

(1978) 07 CAL CK 0055
In the Calcutta High Court
Case No : A.F.A.D. No. 1665 of 1968

Hrishikesh Barik

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-07-1978

Acts Referred:

Bengal Tenancy Act, 1885 — Section 5(1)
Civil Procedure Code, 1908 (CPC) — Section 9
Evidence Act, 1872 — Section 35
West Bengal Estates Acquisition Act, 1953 — Section 2, 42, 42(1), 42A(2)

Citation : AIR 1978 Cal 556

Hon'ble Judges : B.N. Maitra, J

Bench : Single Bench

Advocate : S.C. Mitter and S.P. Roy Chowdhury, for the Appellant; B. Malkhandy and S. Mustafi, for the Respondent

Final Decision : Allowed

Judgement

B.N. Maitra, J.—The plaintiff's case is that the disputed property was khas mahal land appertaining to a jama of Rs. 10-1-2 ps. Nibaran and Brojomoyee used to occupy 2 cents of land of sub-khatian No. 96 and 59 cents of plot No. 156 appertaining to Khatian No. 95. The plaintiff is Nibaran's only heir. Subsequently that jama was divided among the co-sharers and thereby the plaintiff used to pay Rs. 4-8-5 ps. as proportionate rent in his share. In the R.S. Khatian the plaintiff's share was recorded in Khatian No. 781 and Brojomoyee's share in Khatian No. 780. Further in those khatians the rental was recorded as Rs. 40-5-0 and Rs. 25-12-0 respectively. Those properties cannot be arbitrarily assessed to such high rent. Such assessment is entirely illegal and unfair and the rental would be Rs. 2-12-2 and Re. 1-12-3 ps. respectively. After service of notice u/s 80 of the Civil P. C. the plaintiff has asked for a declaration that such assessment of rent is illegal and for an injunction.

2. The State, defendant No. 1 alone contested the suit denying the plaintiff's allegations. It has been stated that the suit is not maintainable. The assessment

made is a valid one.

3. The learned Munsif stated that the plaintiff could not prove his case. The suit was, therefore, dismissed. The plaintiff preferred an appeal. The appellate court stated that the plaintiff was an intermediary within the meaning of Section 42 of the West Bengal Act 1 of 1954 and the property consisted of both agricultural and non-agricultural land. The appeal was, therefore, dismissed. Being aggrieved by that decision, the present appeal has been filed.

4. It has been contended on behalf of the appellant that in the R.S. Khatian Exts. 5 (a) and 5 (b) in respect of the bastu appertaining to Khatian No. 156 the plaintiff is a non-agricultural tenant (vernacular). The original plot No. 156 of the C. S. Khatian has been recorded in 2 khatians during the R. S. operations. The rental has been enhanced from Rs. 10-00 odd to Rs. 65.00 odd. In any view of the matter, in view of the provisions of Section 42 of the West Bengal Estates Acquisition Act or of Section 11 of the West Bengal Non-Agricultural Act, 1949, such illegal enhancement is not permissible. The cases of Umrao Bibi v. Md. Rajabi (1900) ILR 27 Cal 205 and of Shyam Rangini in ILR (1949) Cal 165 have been cited to show that the mere fact that a lessee is empowered to collect rent would not make him a tenure holder, The user of the land determines the character of the tenancy and so it can never be tenure unless these are agricultural lands. A non-agricultural property does not vest in the State. In the plaint it was loosely stated that it was recorded as tenure in the C.S. Khatian. The court should not strictly construe the loose statements made in mofussil pleadings. Hence the appeal should be allowed.

5. The learned Advocate appearing on behalf of the State respondent has contended that in view of the principles laid down by Maxwell in his Interpretation of Statutes, when there is special law in this respect, the general law of the land will not apply. Moreover, Section 3 of the Act I of 1954 will clinch the issue because according to that section the provisions of the Act will override all other laws on the subject. At best it can be stated that there is a conflict between the provisions of Section 42 of the West Bengal Estates Acquisition Act and of Section 11 of the West Bengal Non-Agricultural Act, 1949. In case of such conflict the provisions of the later Act will apply. The Act of 1954 is the later Act. and so it will apply. The case in AIR 1978 NOC 42 (Cal) has been cited to substantiate this contention. Moreover, the Civil Court has no jurisdiction to try the suit and the provisions of Section 57-B of the Act are clear on the point. It has also been stated that the plaintiff did not exhaust all these remedies provided for in the Act. Section 42-A(2) of the Act says that any person aggrieved by an order of the Revenue Officer determining the rent after draft or final publication of the record of rights, may appeal to such authority and within such time as may be prescribed. No such appeal was filed. Hence The suit is not maintainable. It has been lastly contended that in any event the property consists of agricultural and non-agricultural land, vide entry in the R.S. Khatians Ext. 5 series, which show that one of plots is danga. It is non-agricultural land

and hence the plaintiff cannot take advantage of the provisions of Section 42 (1) (ii) proviso (a).

6. The question of want of jurisdiction of the civil court was not pleaded or argued in any of the courts below. Reference may be made to the well known case of AIR 1940 105 (Privy Council) where Lord Thankerton has observed that the exclusion of the jurisdiction of Civil Courts must either be explicitly expressed or clearly implied and is not to be readily inferred. Even if jurisdiction be so excluded, the Civil Courts have jurisdiction to examine into cases whether the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. The cases of Laxman Purshottam Pimputkar Vs. State of Bombay and Others, and Musamia Imam Haider Bax Razvi Vs. Rabari Govindbhai Ratnabhai and Others, might be cited. It has been rightly pointed out on behalf of the appellant that in view of the provisions of Section 42-A (2) of the Act the aggrieved person has a remedy to appeal to such authority as may be prescribed. But no such rule (sic) (authority ?) has yet been prescribed. Further the copy of the judgment Ext. 6 (b) shows that the plaintiff preferred a petition before the tribunal and it was observed by the tribunal that the appeal was not maintainable. Hence Section 42-A (2) is not a bar to the suit. Further that Sub-section says that an appeal may be preferred before such authority. The use of the word "may" shows that it is not obligatory on the part of the aggrieved person to prefer an appeal. Further that section relates to determination of rent in respect of a tenure. It will be subsequently discussed whether the disputed property is a tenure.

7. The case of Mishri Shaw v. Nikunjamoyee (1978) 1 Cal LJ 532 shows that the provisions of the West Bengal Act of 1954 have brought about a material change in the legal position and agricultural and non-agricultural land defined in Section 2, Clauses (b) and (j) solely with reference to the user of the particular land and it is immaterial whether the predecessor in interest of the party was raiyat or under-raiyat or non-agricultural tenant before the vesting. That case shows that the test is the user of the property on the date of the vesting and the entry in the R.S. Khatian is relevant.

8. Of course, there is a statement in the plaint that the property was recorded as a tenure in the C.S. Khatian. The case of Madan Gopal Kanodia Vs. Mamraj Maniram and Others, has been cited for the appellant to show that it is well settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds. The C.S. Khatian and the R.S. Khatian Ext. 5 series have been filed. It appears that there is a conflict between the entries therein because in the C.S. Khatian the property was recorded as a tenure, whereas in the R.S. Khatian it was recorded as non-agricultural land (vernacular) vide Exts. 5 (a) and 5 (b). The latest Supreme Court decision of Shri Raja Durga Singh of Solan Vs. Tholu, may be cited to show that where there is a conflict between the old and new record of right, the recent one is presumed to

be correct. It has not been stated even at present that the entry in the R. S. Khatian is wrong. Hence in view of the entry in the R.S. Khatian Exts. 5 (a) and 5 (b), which will be presumed to be correct, it must be held that the disputed property is a non-agricultural land and not an agricultural one.

9. It will appear from Shyam Rangini's case in ILR (1949) Cal 165, cited on behalf of the appellant, that there is well marked demarcation between the tenancies created under the T. P. Act and those under the Bengal Tenancy Act, and, unless the lands are agricultural or horticultural or the tenants are of the same description, the mere fact that a lessee is empowered to collect rents from the tenants would not make him a tenure holder within the meaning of Section 5(1) of the Bengal Tenancy Act.

10. Of course the word "Tenure" has not been defined in the present Act 1 of 1954. But Section 2, Clause (p) shows that expressions used in the West Bengal Estates Acquisition Act and not otherwise defined therein have in relation to areas to which the Bengal Tenancy Act applies, the same meaning as in that Act. It has been stated on behalf of the appellant that the disputed property is situated at Sinthi, where the Bengal Tenancy Act applied. So, the provisions of the Bengal Tenancy Act, namely. Section 5 (1) of the Act, may be looked into for the purpose of gathering the meaning of the word "Tenure". It may not be out of place to state here that Section 42 (1) (ii) contains a lacuna because it speaks of tenure comprising exclusively of non-agricultural lands. The definition of the word "Tenure" will be found in Section 5 (1) of the Bengal Tenancy Act, as stated previously, by no stretch of imagination a tenure can consist of non-agricultural land. So this provision is meaningless for that is merely a contradiction in terms. At all events it is not necessary to dilate any more on the subject because it has already been indicated that the disputed property is a non-agricultural one and not a tenure. Hence, the provisions of Section 42 of the Act will not govern the matter. Moreover as happened in *Mishri v. Nikunja*'s case ((1978) 1 Cal LJ 532) (supra), here also the plot No. 156 was recorded in 2 R.S. Khatians.

11. Here we can usefully refer to the provisions of Section 11 of the West Bengal Non-agricultural Land Act, 1949. Before dealing with this aspect of the case we may point out that the case in AIR 1978 NOC 42 (Cal) cited on behalf of the respondent, has no application to the facts of the present case because that case shows if there is a prior enactment and a subsequent special enactment, the court will see whether the later enactment expressly repeals the earlier enactment or any part of it. If there is no express repeal, the court will see whether there is repeal by implication. But in this case the West Bengal Act 1 of 1954 and Act 2 of 1949 are both special laws. Hence no question of repeal of earlier general Act by the West Bengal Special Act 1 of 1954 does arise.

12. Now about the provisions of Section 11 of the earlier West Bengal Act 2 of 1949. That section deals with enhancement of rent in respect of a non-agricultural land, as in the present case. Sub-section (2) says that rent payable by the tenant may be enhanced up to such limit as the court thinks fair and

equitable. The proviso is very important because the mandatory provisions thereof show that the rent shall not be enhanced so as to exceed the rent previously paid by the tenant by more than 12 1/2%. It has already been stated that the disputed property is a non-agricultural land and the enhancement made by the Revenue Officer is much more than 12 1/2%, within the meaning of the proviso to Section 11 (2) of the Act. Hence accepting the appellant's contention 1 hold that the assessment made by the Revenue Officer is in violation of the mandatory provisions of the proviso to Section 11 (2) of the West Bengal Act 2 of 1949 and the same is illegal and without jurisdiction.

13. The appeal be, therefore, allowed with costs. The judgment and decree appealed against are set aside and the suit is decreed with costs. It is hereby declared that the assessment made in regard to the disputed property appertaining to Khatian Nos. 780 and 781 of mouza Nainapur is illegal and not binding on the plaintiff. The defendant No. 1 is hereby restrained from realising rent at Rs. 40-5-0 and Rs. 25-12-0 for the land appertaining to the said khatians.