

(1913) 06 CAL CK 0007
In the Calcutta High Court

Jagabandhu Saha

APPELLANT

Vs

Magnamoy Dassi
 Magnamoy Dassi Vs Jagabandhu Saha

RESPONDENT

Date of Decision : 23-06-1913

Acts Referred:

Bengal Tenancy Act, 1885 — Section 18

Citation : 36 Ind. Cas. 884

Hon'ble Judges : Cuming, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. The subject-matter or the litigation, which has culminated in these appeals, comprises the lands of three tenancies held by one Kaliprasanna Pal under the plaintiff. The plaintiff asserts that the tenancies were nontransferable, and, yet on the 22nd June 1939, the tenant transferred the lands to the defendant who entered into wrongful possession. He consequently instituted this suit on the 20th September 1911 for recovery of possession on declaration of title. His claim was resisted substantially on the ground that the tenancies were transferable. As regards the first two tenancies, each of which consisted of 25 bighas of land, the defendant alleged that they were ryoti holdings held at a fixed rent and were consequently transferable in the same way as a permanent tenure u/s 18 of the Bengal Tenancy Act. As regards the third tenancy, which comprises an area of 63 bighas, she pleaded that it constituted a transferable tenure. The Court of first instance came to the conclusion that the first two tenancies constituted non-transferable occupancy-holdings and that the third was a transferable tenure. In this view the Subordinate Judge made a decree in favour of the plaintiff for the lands comprised in the first two tenancies and dismissed his claim in respect of the lands included in the third tenure. Appeals were thereupon preferred against the decision of the Subordinate Judge as well by the plaintiff as by the defendant. The District Judge has dismissed both the appeals and affirmed the decision of the Trial Court. In this Court, the decree of the District Judge has been assailed by each of the parties in so far as that decision is ad verse to his

interests.

2. The question for determination in the appeal preferred by the plaintiff is whether the lands comprised in the third tenancy constitute a transferable tenure. It has been found by both the Courts below that the 63 bighas, now in suit, formed part of a tenure of 126 bighas, which was divided into two tenancies of 63 bighas each, at some date anterior to the commencement of the Bengal Tenancy Act. They have held in substance that the statutory presumption embodied in Clause 5 of Section 5 of the Bengal Tenancy Act is applicable to the circumstances of this case, that, till the contrary is proved, the tenancy of the 126 bighas must be presumed to have been a tenure, and that, consequently the lands now in suit, which comprise one-half of the lands included in that tenure, also constitute a tenure. This view is assailed by the appellant, who assigns three reasons in support of the contention that Clause (5) of Section 5 has no application to the present litigation, namely, first, that the clause, like Section 50, is limited in its application to suits or proceedings between landlords and tenants under the Bengal Tenancy Act; secondly, that the clause is applicable only to lands which constitute a tenancy of more than 100 standard bighas at the date of the institution of the suit wherein the character of that tenancy requires determination; and thirdly, that the clause is, in any view, limited in its application to tenancies which existed as tenancies of more than 100 standard bighas at the date of the commencement of the Bengal Tenancy Act,

3. The first branch of this contention is sought to be supported by reference to Section 50. In our opinion, the terms of Clause 5 of Section 5, when contrasted with the language used by the Legislature in Section 50, show conclusively that there is no foundation for the argument. Sub-Section 2 of Section 50 spates explicitly that the presumption mentioned therein applies only to suits or proceedings under the Act. *Mohabir Prasad v. Charles Fox* 1 Ind. Cas. 112 : 9 C.L.J. 467; *Buzlul Karim v. Satish Chandra Giri* 10 Ind. Cas. 325 : 13 C.L.J. 418 : 15 C.W.N. 752; *Nityananda Pal v. Nanda Kumar Chowdhuri* 10 Ind. Cas. 163 : 13 C.L.J. 415. J. If the Legislature had desired that Clause 5 of Section 5 should have a similarly restricted application, appropriate words might have been used to indicate that intention; and it would be clearly wrong to read into the section words not to be found there. There is thus no substance in the first branch of the contention of the appellant.

2. The second branch of the contention is equally groundless. The argument is that Clause 5 is limited to cases of tenancies of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination. The answer obviously is that the language used by the Legislature in Clause 5 is perfectly general and does not support this narrow construction. As is clear from the decisions in *Bengal Indigo Co. v. Roghobur Das* 24 C. 272 : 23 I.A. 158 : 1 C.W.n. 83 : 7 SAr. P.C.J. 94 : 12 Ind. Dec. (N.S.) 848 and *Khatajan Bewa v. Aswini mohan Ghose* 2 Ind. Cas. 72 : 9 C.L.J 82 (notes), the presumption applies to cases of tenancies

created before the Act came into force.

3. The third branch of the contention of the appellant has been sought to be supported by an appeal to the principle that a Statute is deemed to be, *prima facie*, not retrospective in its operation. The rule on this subject is well settled and is accurately stated by Lopes, L.J., in the case of *Bourke v. Nutt School Board Election for the Parish of Pulborough*; *In re* (1891) 1 Q.B. 725 : 63 L.J. Q.B. 497 : 9 B. 395 : 70 L.T. 639 : 42 W.R. 388 : 1 Manson 172 : 58 J.P. 572,; Every Statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect". As Wright, J., observed in *In re Athlumney (Lord)* (1891) 2 Q.B. 547 : 67 L.J. Q.B. 935: 79 L.T. 303 : 47 W.R. 144., a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure", or, in the words of Lord Selborne, in *Main v. Stark* 15 App. Gas. 384 : 59 L.J. P.C. 68 : 63.L.T. 10. quoted by Lord Morris in *Reynolds v. Attorney-General for Nova Scotia* (1896 A.C. 240 : 05 L.J.P.C. 16 : 74 L.T. 108., words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed". What, then, is the true position, when we test the scope of Clause 5 of Section 5 in the light of these principles? We cannot, by any stretch of language, hold that it creates any new rights, or purports to affect any rights created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant, the Legislature lays down that the tenancy is to be presumed to be that of a tenure-holder; but, be it noted, that the presumption thus raised is rebuttable. The clause is, consequently, a provision not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. Whereas in the absence of the presumption, the party who affirmed that the tenancy was of a particular description would have to give evidence in support of his contention, the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance. If in respect of a tenancy, the area whereof exceeds 100 bighas, it is contended that the tenant is a raiyat and not a tenure-holder, the burden of proof lies upon the party who makes the assertion, that is, he has to rebut the presumption. In substance, here, as in other cases, the effect of the presumption is to shift the burden of evidence or the burden of proof, as it is sometimes inaccurately called. The establishment of the presumption of law by proof of facts from which it arises, sustains the burden of evidence, and so far as it extends, shifts it to the opposing side. This is implied by the fact that it creates a *prima facie* case, for the burden of evidence rests always on him who has to create or meet such a case, according as he has or has not the burden of proof properly so called; consequently, the theoretical effect of a presumption is that it is a legal ruling which affects the duty of producing evidence. This may have important

practical consequences; but that does not alter the quality of a presumption and make it a rule of substantive law rather than a rule of mode of proof. We can see no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act; one might as well contend that the provisions of the Indian Evidence Act are inapplicable to events and circumstances which took place before the commencement of the Act. Reliance, however, has been placed upon a passage from the judgment of the Judicial Committee in the case of *Bengal Indigo Company v. Roghobur Das* 24 C. 272 : 23 I.A. 158 : 1 C.W.N. 83 : 7 Sar. P.C.J. 94 : 12 Ind. Dec. (N.S.) 848 where Lord Watson observed that it was not necessary to notice the reasoning which prevailed in either of the Courts below, because it entirely ignored statutory definition of the word raiyat contained in Section 5, subSection 5, which was in the following terms: where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown". Possibly Lord Watson intended to refer to the definition of the term raiyat as given in Section 5, sub-Section 2, for sub-Section 5 does not at all define the term raiyat, it lays down, as we have explained, a statutory presumption in respect of a tenancy which exceeds ICO standard bighas in area, a presumption which is expressly made operative, only till the contrary is established. We may further point out that the presumption embodied in Rule 5, Clause (5), does not incorporate a novel principle into our law, but merely qualifies what had been recognised doctrine under the old law. The cases of *Baboo Bhunpat Singh v. Baboo Gooman Singh* W.R. Gap. x Rulings 64; *Gopee Mohan Roy v. Sibchunder Sen* 1 W.R. 68 and *Sarat Chandra Boy Chowdhury v. Ratubuddin Mandal* 17 Ind. Cas 227 : 6 C.L.J. 71 , show that the area of the land held by the tenant was taken into consideration along with other circumstances in the determination of the question of status. The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystallized mode of proof, for as Walker, J., puts it in *Cogdel v. By. Co.* (1903) 132 N.C 852, an inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and can. not be disregarded". We do not think it would be right to put a narrow construction upon the presumption, so as to defeat the object which the Legislature had in view, namely, to import certainty into the land and thereby to shorten, if not to prevent, litigation. We are consequently of opinion that Sub section 5 of section (5) may be properly applied to determine the character of the tenancy of 126 bights, although that tenancy had been sub-divided into two tenancies before the Bengal Tenancy Act came into operation. The tenure was divisible, the fact of sub-division clearly did not create a breach of its continuity; and each fragment, carved out of the original tenure, retained its incidents *Adit Singha v. Sukhrai Rai* 21 Ind. Cas 385 : 17 C.L.J 435; *Chandra Kanta Chakrabarty v. Bam Krishna Mahalnabis* 36 Ind. Cas. 707 : 20 C.W.N. 1002 : 24 C.L.J. 275. The tenancy of 63 bighas now in suit has thus been rightly held to be a transferable tenure. Though it was open to the plaintiff-landlord to establish the contrary, he has failed in the attempt. The only circumstance whereon reliance has been placed on his behalf is that some

tenants of the land themselves carried on cultivation and did not collect rent from under-tenants. That fact, however, is not by any means decisive as to the true character of the tenancy *Bibhudendra Mansingh Bhramarbar Rai v. Debendra Nath Das* 27 Ind. Cas. 432 : 20 C.L.J. 140. The real nature of the tenancy would be determined by proof of the purpose of the original grant *Durga Prosunno Ghose v. Kalidas Dut* 9 C.L.R. 449.; *Pramatho Nath Kumar v. Nilmoni Kumar* 10 Ind. Cas. 431 : 14 C.L.J. 38 : 15 C.W.N. 902; *Promodo Nath Roy v. Asir-ud-din Mandal* 11 Ind. Cas. 262 : 15 C.W.N. 896.; *Bamnpada Bay v. Midnapur Zemindary* 16 Ind. Cas. 376 : 10 C.L.J. 322, but it has not been shown that the tenancy, though in respect of 126 bighas, was created for the purpose of cultivation by the grantees. The presumption thus stands unrebutted and we must hold that there is no substance in the contention of the appellant. The appeal is consequently dismissed with costs.

4. We have next to deal with the appeal of the defendant, which involves the determination of the question of the true character of the first two tenancies. These tenancies are admittedly agricultural holdings; the only point of difference is that while the plaintiff-landlord alleges that the tenancies were non-transferable occupancy-holdings, the defendant purchaser asserts that they constituted holdings at fixed rates of rent. The burden clearly lies upon the defendant to establish the truth of her allegation. It is plain that the tenancies were not transferable by local usage or custom. It is equally plain that sub-Section 2 of section for has no application, because this is a suit, not under the Bengal Tenancy Act, but under the general law, for ejectment of an alleged trespasser. The defendant is, consequently, driven to rely upon the conduct of the parties, in the absence of direct evidence as to the terms of the original contract between them. No document is produced nor is oral evidence forthcoming to show that at the time when the grants were made, the rent was fixed in perpetuity. But the defendant has proved that the rate of rent has not been changed during the last 40 years; she also asserts that the origin of the tenancies is unknown, although the Courts below have concurrently held that the tenancies were created 40 years prior to the institution of the suit; this, however, it is said, is not based on any evidence on the record. We shall assume in favour of the defendant that the time of the origin of the tenancies is unknown, and that there is no direct evidence of the terms of the initial contract between the parties. The question, consequently, arises, whether from these circumstances, it follows as a matter of law that the contract of tenancy in its inception must have been a tenancy at a fixed rate of rent. In support of the affirmative of this proposition, reference has been made on behalf of the defendant-appellant to the decision of this Court in *Moharom, sheikh Choprasi v, Tellamuddin Khan* 13 Ind. Cas. 606 : 15 C.L.J. 220 : 16 C.W.N. 567. That was a case of a non-agricultural tenancy let out for residential purposes. It was established that the origin of the tenancy was unknown, that the land had been held at a small and uniform rate of rent for at least 60 years and that the holding had been treated as transferable and heritable. The Court below declined to infer from these circumstances that the

tenancy was permanent, because there was no permanent substantial structure erected by the tenant on the land. This Court reversed that decision, held that the question was of mixed law and fact, and concluded, on the authority of a long line of decisions of the Judicial Committee, that from the facts proved, the only inference deducible was that the tenancy in its inception was permanent. The case before us is of a very different character. Here, we have two plots of agricultural land held by tenants who have been unquestionably occupancy raiyats; their rent has not been altered for a term of 40 years; and the origin of the tenancies is unknown. Can we hold as a matter of law that the only inference legitimately deducible from these facts is that at the inception of the tenancies the rent was, by agreement of parties, fixed in perpetuity? It is plain that the inference as to the terms of the original contract is drawn from the conduct of the parties. The only conduct of the plaintiff or his predecessor whereupon reliance is placed by the defendant, is his omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception was for payment of rent fixed in perpetuity? The answer must obviously be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because in view of the amount of rent already fixed, as well as the character of the land comprised in the tenancies, no further rent could be legitimately claimed. We have no information about the history of the holding, or the condition of the land included therein. We do not know what would be fair rent at the present time or would have been the fair rent during years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate for ever. If we were to accede to the contention of the defendant-appellant, we should be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding, does so at his peril, and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity. From whatever standpoint we examine the case, it thus transpires that this appeal also is groundless and must be dismissed with costs.