

(1945) 08 CAL CK 0018
In the Calcutta High Court
Case No : Appeals Nos. 834 to 839 of 1941

Kaliprosad Saha and others	Vs	APPELLANT
Naihati Jute Mills Co., Ltd.		RESPONDENT

Date of Decision : 27-08-1945

Acts Referred:

Citation : (1945) 08 CAL CK 0018

Final Decision : Dismissed

Judgement

Chakravartti, J.—These six appeals arise out of as many suits for ejectment brought by the same plaintiff against different defendants. They involve a common question of law and were heard together. On the facts, the suits fall into two groups, one composed of Suits Nos. 96, 97, 100 and 101 out of which arise second Appeals numbered 836, 837, 838 and 839 respectively and the other composed of Suits Nos. 93 and 99 out of which arise respectively Appeals numbered 834 and 835.

2. The plaintiff is a joint stock company which in the years 1919 and 1920 obtained permanent leases of certain areas of land for the expansion of its mills. In two of the three documents, there is a casual reference to settlement of tenants as one of the acts to be within the rights of the lessee, but it is perfectly clear that the immediate and governing purpose was a manufacturing one and this character of the plaintiff's leases was not questioned either in the Courts below or before me. On portions of the land so settled with the company, the defendants, who had been inducted by the company's lessors, had already their homesteads but the leases stated that they were liable to eviction and might be evicted. The lessors of the company appear in each case to have been zamindars. The tenancies of the defendants in suits Nos. 98 and 99 have been found by the Courts below to have been created 25 or 30 years ago. In the remaining four cases, the tenancies have branched out of an original settlement with a single tenant which, according to the version of the defendants apparently accepted by the Courts below, was made about 20 years ago. The defendant in

Suits Nos. 96 and 97 who is the same person is an heir of the original tenant and the defendant in suits Nos. 100 and 101, who again, is the same person, is a purchaser from an heir. When his purchase or purchases were made does not appear from the record.

3. The Record of Rights was published in the year 1933 and there with respect to these tenancies, all the defendants have been recorded as dakhalkar basat tenants. But they are otherwise settled raiyats, the defendants in the first group of suits, of the same village and the contiguous village of Balibhara and those in the other group, of the contiguous village of Garifa. The lower appellate Court has stated that the defendants are occupancy raiyats of the villages above mentioned but that, it appears, is an under-statement, as a reference to the Record of Rights would show. There is a further statement in the judgments under appeal that the tenancies of both the plaintiff and the defendants have been expressly recorded as governed by the Transfer of Property Act, but for that statement there is no foundation except that both have been described as dakhalkars. The company alleged in the plaints that the defendants were tenants-at-will and although their tenancies had been terminated by notices to quit, they had not quitted the lands. Accordingly the company prayed for ejectment of the defendants, mesne profits and injunctions restraining them from erecting further structures.

4. The special defence of the defendants in the first group of suits was that their tenancies were agricultural in character and could not be terminated by notices to quit under the Transfer of Property Act. The defendants in the other group of suits pleaded permanent tenancies. All the defendants, however, set up two common defences which were that no notices to quit had in fact been served, at least no valid notices, and that in any event they were protected from eviction by S. 182, Ben. Ten. Act. None of the defences other than the one taken under S. 182, Ben. Ten. Act, need be considered in these appeals. They were repelled by the Courts below and no attempt was made before me to pursue them further. The sole question, therefore, is whether the defendants are entitled to the benefit of S. 182, Ben. Ten. Act.

5. As regards whether the last question arises in all the appeals in the same form, it is necessary that I should dispose of one matter which is peculiar to the appeals of the second group. With respect to the tenancies to which those appeals relate, it has been found by the trial Court that although the land was undoubtedly used at one time for residential purposes, the house constructed thereon fell down shortly after its construction and the land has since been "lying jungly and fallow." The lower appellate Court appears to accept this finding and further finds that the tenants of these tenancies are now living at Bhowanipore and Hooghly respectively. In the circumstances a question might well arise whether there was in these cases any homestead at all to attract the provisions of S. 182, Bengal Tenancy Act. That section, by its terms, applies only to the homestead of a raiyat or under-raiyat which he may hold otherwise than as part

of his raiyati or under-raiyati holding and the language, to my mind, requires that the land should actually be used as a homestead or at least still be possessed of its homestead character when the section is sought to be invoked for its protection. No objection on this ground was, however, taken in the Courts below and none was taken before me. I must, therefore, proceed on the basis that the lands to which the second group of appeals relate are also homestead lands and they are not excluded from the operation of S. 182, Bengal Tenancy Act, by any special fact.

6. The suits have been decreed in part by the Courts below. Decrees for ejectment have been passed but no mesne profits have been allowed, nor any injunctions granted. Both the Courts have held that S. 182, Bengal Tenancy Act, has no application to these tenancies and have given the same reason for their decision. They have referred to the amended section and held that under the section, as it now stands, the status of a tenant of homestead land is dependent on the status of the landlord and where the landlord himself has no status under the Bengal Tenancy Act, holding, as here, under a lease governed by the Transfer of Property Act, the tenant cannot possibly be a raiyat or under-raiyat under him and therefore the section is plainly inapplicable. The tenants question this decision and have appealed.

7. Before the appeals came for hearing, they were mentioned to me on behalf of the appellants who contended that they could not be heard but must be stayed under the provisions of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act. It might seem curious that persons seeking relief by an appeal should themselves insist that the appeal should not be proceeded with, but the explanation for such seemingly strange conduct is to be found in the present case in the order which the lower appellate Court appended to its decrees. By that order, execution of the decrees was stayed till 1st June 1942, that is to say, till one day after the date then fixed for the expiry of the special Act. I doubt whether the lower appellate Court had any jurisdiction to make this order when dealing with the appeals, but the order was made and the plaintiff had not appealed. Meanwhile, the life of the special Act had been extended and the appellants may have thought - though mistakenly, since the respite granted to them by the lower appellate Court was only up to a named date - that as long as the special Act remained in operation it would be to their interest not to seek a reversal of the lower appellate Court's decrees. It seemed to me, however, that the appeals could not be stayed in any event in limine. Since the appellants were contending that they were to be treated, even as respects their homesteads, as agricultural tenants the appeals had to be heard at least on the question of their status, and if it was decided that they were non-agricultural tenants, the question of stay might then arise. But it had already been held by this Court in a number of cases that a tenant's appeal could not be regarded in any sense to be a suit or proceeding for ejectment and was not liable to be stayed under the provisions of S. 3, Bengal Non-Agricultural Tenancy (Temporary Provisions) Act. I accordingly ruled that the hearing of the appeals could not be stayed or

adjourned. Thereafter they were in due course heard.

8. The argument addressed to me was, in the case of both the parties, solely by reference to S. 182, Bengal Tenancy Act, as amended in 1928. On behalf of the appellants, Mr. Hiralal Chakravarty did not dispute that the plaintiff company held under leases to which the Bengal Tenancy Act did not apply and consequently it did not, as a tenant, come within any of the classes known to and dealt with by that Act. But he did not concede that a tenant could not claim the benefit of the present S. 182 unless the Act applied to the landlord of his homestead and the latter had a status thereunder. The main effect of the section, he contended, was to direct that in the circumstances mentioned in its opening clause, the Bengal Tenancy Act would apply to the homestead tenancy of a raiyat or under-raiyat and the reference to the status of the landlord was no more than an ancillary provision which would apply only when there was a landlord, having a status under the Bengal Tenancy Act. In any event, he contended further, the relevant landlord under the section was the landlord who had inducted the tenant into the homestead or at least the person who was the landlord at the time when the two circumstances of the tenant holding a homestead and also a raiyati or under-raiyati holding outside it came first to co-exist. At one stage of his argument Mr. Chakravarty also contended that the facts to be considered were those existing at the time when the dispute as to the incidents of the homestead tenancy arose, as indeed had been held in certain cases decided under the old section, but when it was pointed out to him that this would destroy his second argument he abandoned the contention.

9. On behalf of the plaintiff-respondent, the learned Advocate-General insisted, quite rightly that I must confine myself to the terms of the section and construe it according to the natural meaning of the language used. That language, he contended, did not warrant either of the interpretations suggested by Mr. Chakravarty. The section did not say that on the conditions laid down in its opening clause being satisfied, the Bengal Tenancy Act would apply to the homestead tenancy of a tenant in all circumstances, but required that in order that the Act might apply, the landlord must himself have a status under the Act. Again, the section had no reference to past history but only present circumstances, for the language used was simply "holds" and not "holds or held." Accordingly, the learned Advocate-General contended that under S. 182, as it now stood, if at the time a question arose as to the status of a tenant with respect to his homestead, the landlord of the homestead happened to be one to whom no status under the Bengal Tenancy Act could be assigned, the section, under its own language, could not apply at all. He expressed some surprise that the old section should have been applied as reported decisions showed it was, even in cases decided long after 1928.

10. The question is undoubtedly one of some difficulty, but before taking it up for examination on my own account, it is proper that I should deal with two decisions on which the Courts below have relied as supporting the view taken by

them. Each is a decision of a Judge sitting singly, but if they have decided the point and decided it in the same sense, my duty would be the simple one of following them, unless I had strong reasons to differ. Unfortunately, I am unable to regard either decision as having determined the question which has arisen for consideration in this case.

11. The first decision relied on is that of Panckridge J. in 36 C. W. N. 788 Raj Kumar Mandal v. Shib Chandra Mandal ("32) 19 A. I. R. 1932 Cal. 857 : 139 I. C. 765: 36 C. W. N. 788. There, as would appear from the statement of facts, a raiyat held a homestead otherwise than as a part of his occupancy holding but it was under the same landlord. He transferred the homestead and thereupon the landlord sought to pre-empt it under the provisions of the then S. 26F, Ben. Ten. Act. That section, it will be remembered, applied only to occupancy holdings of a raiyat and the landlord's contention was that by virtue of S. 182, all the incidents of the transferor's occupancy holding were attached to his homestead. The transferee resisted the landlord's claim and his contention was that although the holding of the transferor was an occupancy holding and he was a raiyat in respect thereof the position was not necessarily the same as regards the homestead but would depend, under the terms of S. 182, on the nature of the superior interest held by the landlord in the homestead. Panckridge J. accepted this contention and held that S. 182

makes the position of the raiyat or the under-raiyat with regard to the homestead dependent not upon his position with regard to his holding but upon the status of the landlord of the homestead.

As the landlord had not adduced any evidence as to what his status with regard to the homestead was and therefore had not proved that with respect to it the transferor was an occupancy raiyat, it was held that he had not proved his right to pre-emption.

12. No question was decided by Panckridge J. as to the applicability of S. 182 in a case where the landlord of the homestead had no status under the Bengal Tenancy Act. All that he decided was, given the landlord had such status, given S. 182 applied, given there was a raiyati holding also under him, the status of the tenant with respect to the homestead would not be that of a raiyat simply because that was his status with respect to the occupancy holding, but would be a status in accordance with the status of the landlord with respect to the homestead, whatever such status might be. It was, so to say, a decision on an internal question within S. 182, not a decision on a question which involved the applicability of the section itself. The other decision relied on was that of S. K. Ghose J. in 41 C. W. N. 1327 Panchanan Choudhury Vs. Samatul Chandra Saha and Others, . There the question was directly raised, but it is not at all clear to me what the learned Judge actually held. As far as I can understand the judgment, he appears rather to have been inclined to the view that in order that S. 182 might apply, it was not necessary that the landlord of the homestead should have a status under the Bengal Tenancy Act. First the learned Judge

refers to the fact that the landlord had described himself in the plaint as holding the property in niskar right and observes that that might mean he was the holder of a revenue-free estate or a rent-free tenure. Next he proceeds to discuss a number of cases decided under the old section and points out that in those cases it was held that the section only required that the tenant should be a raiyat and that he should hold his homestead otherwise than as a part of his holding. The learned Judge points out particularly that in neither of those cases was it contended that the landlord of the homestead should have a status under the Bengal Tenancy Act. In the end he concludes that the section would apply in spite of the fact that the homestead did not constitute an agricultural tenancy. If I may say so with respect, the learned Judge does not appear to have had present in his mind the very different language of the amended section and, in any event, he did not answer the question which he took up for discussion at page 1328 of the report. The question, was not whether the tenant's tenancy with respect to the homestead was required to be an agricultural one, but whether the landlord's interest in the homestead was required to be one governed by the Bengal Tenancy Act. The question is thus not covered by authority and must be decided on the language of the statute. It will be convenient to set out the section first. Before the amendment, the section stood in the following form :

When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat.

The amended section stands thus :

When a raiyat or under-raiyat holds his homestead otherwise than as part of his holding within the same village or any village contiguous to that village, his status in respect of his homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord of the homestead, and the incidents of his tenancy of such homestead shall be governed by the provisions of this Act applicable to raiyats or under- raiyats, as the case may be.

The opening clause of the section remains in the same form except that to raiyats originally entitled to its benefit, under-raiyats are now added and the village in which the raiyati or the under-raiyati holding must be situated is required to be the same village or a contiguous one. It will be noticed, however, that whereas the old section provided that on the condition laid down in the opening clause being fulfilled, the homestead tenancy would be regulated, subject to local custom or usage, by the Bengal Tenancy Act, the amended section contains no such provision of a general character. It only says that on the condition laid down in the opening clause being fulfilled, the status of the tenant with respect to the homestead will be that of a raiyat or a under-raiyat according to the status of the landlord and the appropriate provisions of the Bengal Tenancy Act will then apply. In other words, it provides for the application of the

Act only indirectly and that in special circumstances; or to put it in another way, the section requires that before the Act can apply, the tenant must be found to be a raiyat or an under-raiyat independently by reference to the status of the landlord. The provision for the applicability of the Act is thus not an absolute, but a relative and contingent one; and if the object of the Legislature was to provide generally that the homestead tenancy of a raiyat or an under-raiyat of the same or a contiguous village would be governed by the provisions of the Act, that object has not been achieved by the language used. It would have been, I imagine, achieved only if the second and third clauses of the section had been placed in the reverse order and the section stated that on the condition laid down in the opening clause being fulfilled, the homestead tenancy would be governed by the provisions of the Bengal Tenancy Act and the status of the tenant would be that of a raiyat or an under-raiyat according to the status of the landlord.

13. The real operative clause in the section being that the status of the tenant with respect to the homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord, it has to be seen in what circumstances this provision can possibly have effect. The terms "raiyat" and "under-raiyat" are peculiar to the Bengal Tenancy Act and each is a relative term as regards the status it signifies. An under-raiyat is a tenant, holding immediately or mediately under a raiyat (S. 4 (3)); and no person can be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder. It follows that the tenant of a homestead cannot be an under-raiyat unless the landlord is a raiyat or an under-raiyat, as defined in the Bengal Tenancy Act; and he cannot be a raiyat unless the landlord is a proprietor or tenure-holder; where the landlord is none of these, the tenant cannot be either a raiyat or an under-raiyat, and his being one or the other with respect to the homestead being a condition precedent to the Bengal Tenancy Act applying to the tenancy, the section does not attract the Act at all where the tenant, for the above reason, possesses neither status. The status conferred by the section on the tenant is not the status of a raiyat or an under-raiyat simpliciter : it is only a status "according to the status of the landlord;" and the Act applies if and only if the tenant can be said to possess one or the other status, this condition being prefixed to the clause drawing in the Act by the conjunction "and" which in the context means thereupon or "on his so being a raiyat or an under-raiyat." Where the landlord's interest is not governed by the Bengal Tenancy Act at all and he is not either a proprietor or a tenure-holder or a raiyat or an under-raiyat thereunder, a raiyati or under-raiyati status of the tenancy cannot possibly accord with the landlord's status and possession of such a status by the tenant being wanting, there can be no room, under the words of the section, for the application of the Act to the homestead tenancy. I do not find it possible to hold, as Mr. Chakravarty invited me to do, that the clause linking the tenant's status with the landlord's is no part of the principal enactment but a supplementary provision which would only come into play when the landlord happened to be one, having a status under the Bengal Tenancy Act. In my view, the words of the

section cannot bear that construction. Sufficient has been said above to show that unless the landlord has such a status that the tenant can be a raiyat or an under-raiyat vis a vis him, the section does not make the Act applicable to the homestead tenancy at all.

14. Nor am I able to hold that the landlord contemplated by the section is the landlord who originally inducted the tenant into the homestead or was the landlord of the homestead at the time when the tenant first came to possess both homestead and a holding. In fairness to Mr. Chakravarty, I must not represent him as wholly responsible for this contention, for he developed it only from a suggestion thrown out by me. On consideration, however, I think that this view is not tenable. It may be that the use of the present tense in the verb "holds" occurring in the opening clause, does not signify that the state of things existing at the time when a controversy arises is to be regarded. In my opinion, although I am aware that a contrary view has been taken the words "when a raiyat or an under-raiyat holds" etc. constitute not a verbal but an adjectival phrase, having no reference to time, but only describing the class or kind of tenant which is contemplated, still the tenor of the amended, section seems to me to be that in cases where it would apply, the position must be judged by reference to the landlord for the time being, except perhaps in cases where there has been a change in the landlord since the section became applicable and some such consideration as, that a status once acquired by a tenant cannot be lost, intervenes. In the result my opinion is that the view taken by the Courts below of S. 182, Ben. Ten. Act, as amended is correct. The section requires that in order that the Bengal Tenancy Act may apply to a homestead held by a raiyat or an under-raiyat otherwise than as a part of his holding, the landlord of the homestead must have a status under the Act and such a one that the tenant may be a raiyat or under-raiyat under him. Where the same is not possible, the section does not attract the Act to the homestead at all.

15. I am sensible that this interpretation of the section may lead to strange and anomalous results which could hardly have been in the contemplation of the Legislature. If the superior interest in the homestead changes hands, the tenant's status, varying therewith, may prove to be a fluctuating one, coming once to be governed by the Bengal Tenancy Act and again by the Transfer of Property Act and once again by the former. There may be means of avoiding this result or there may not be. But on the words in which the section is expressed, the interpretation, adopted above, seems inescapable. The real object of the Legislature in amending the section may have been simply to widen its scope so as to embrace under-raiyats and without affecting the general applicability of the Act to separate homestead tenancies, to define its results in a more precise way. The clause specifying the status of the tenant may have been added only for the purpose of adjusting the introduction of the under-raiyat. But if so, the Legislature has failed to use appropriate language to express that intention effectively and has on the other hand used language which has produced a curious result.

16. But although I agree with the Courts below in the view taken by them of the amended S. 182, it does not follow that I must at once uphold the decrees passed by them. The decrees are in accordance with the amended section, but the question whether in the special facts that section applies at all remains to be considered. I put that question to the learned Advocate-General and he replied by referring me to the language of the section and one reported case to which I myself drew his attention. He contended that the amended section would apply. It is true that it was the defendants who pleaded the section in bar and the only question put in issue by them and tried by the Courts below was a question under the amended section. Nevertheless, all the necessary facts have been found and if it appears from those facts that the rights of the parties must be governed not by the new section but by the old, I do not think I am debarred from saying so in second appeal.

17. Let me recall the facts. The record of rights, published in the year 1933, shows the defendants to be settled raiyats of the same or a contiguous village. It takes twelve years' occupation as a raiyat to become a settled raiyat and therefore the defendants must have been occupying their other holdings as raiyats before the amended section came into operation and when the old section was still in force. If at the same time they were also holding the homesteads, then by virtue of the old section the homestead tenancies came to be governed by the provisions of the Bengal Tenancy Act applicable to raiyats, whether or not the landlord had a status under that Act. It was not contended before me that there was any special local custom or usage. In other words, the defendants acquired an immunity from ejectment except as raiyats might be subject to such process. That clearly was the position in four out of the six cases, for the defendants in Suits Nos. 96, 97, 98 and 93 are heirs of the original tenant of the homestead and the homestead tenancy in all the six cases was created over twenty years ago. In the four cases above referred to the defendants or their predecessors whose rights they have inherited were, on the facts found, in possession of both the homestead and a raiyati holding during the currency of the old section. The position is not clear with regard to the defendant in suits Nos. 100 and 101 for he acquired the homestead by purchase and it does not appear when his purchase took place. In his case, therefore, it is not possible to say with definiteness that he held the homestead as well as his raiyati holding at any time when the old section was in force and thus acquired any rights under the old section.

18. But in the case of the defendants who acquired, in respect of the homestead, the rights conferred by the old section, is there anything in the amendment to take those rights away? I can find nothing at all. The moment these defendants came to hold a homestead as well as a raiyati holding outside it, which they certainly did during the currency of the old section, they acquired the rights of a raiyat in respect of the homestead. At the time the amendment came into force, these rights were vested rights. The amended section contains no words of divestiture or of any positive enactment which might be said to take away those

rights, either expressly or by necessary implication. The result is that the rights remain.

19. Indeed, strictly speaking, the question is not one of the amended section operating retrospectively with the effect of destroying vested rights. On the very words of the section, it does not apply to cases where the rights of a raiyat have already been acquired in respect of a homestead tenancy by virtue of the old section. Leaving aside under-raiyats, the amended section applies when the only fact is that a raiyat holds his homestead otherwise than as a part of his raiyati holding. The case where another fact is present, viz., the homestead has already acquired the incident of being governed by the provisions applicable to land held as a raiyat, is, as I read the amended section, not within its purview at all.

20. Thus, from whatever point of view the matter may be looked at, whether that of retrospective operation so as to take away vested rights or the presence of sufficient words, the amended section does not affect or apply to cases where a raiyat, during the currency of the old section, held his homestead otherwise than as a part of his holding and acquired, as respects the homestead, the rights conferred thereby, although the landlord of the homestead may not have or have had any status under the Bengal Tenancy Act. The section, before its amendment, contained no reference to the status of the landlord and it was not necessary, in order that the benefit of the section might be available, that he should have any particular status. Although it has not been specifically decided in any case that in such circumstances the old section would apply, it has in fact been always applied, a circumstance to which the learned Advocate-General referred.

21. The reported case relied on by the learned Advocate-General which is the decision of Edgley J. in 41 C. W. N. 405 Kalikumar Deb and Others Vs. Secy. of State, may be easily disposed of. All that the learned Judge held was that the amended section would apply in a case where a tenant holding a homestead in a village subsequently acquired an under-raiyati holding in the same village, although he had done so before the amended section came into force. The decision is easily explicable and clearly right, because under-raiyats had no place at all in the old section and in their case the amendment is wholly in their favour. Since they had no rights under the old section, the application of the amended section in their case affects no vested rights; the field is unoccupied and clear. And since the amended section is expressed in general terms, without any reference to the time when the homestead or the holding was acquired, there is no reason why it should not apply to under-raiyats in all circumstances. The decision does not touch the case of raiyats who came on under the operation of the amended section with certain rights already acquired under the old. My conclusion on this part of the case therefore is that in the case of a raiyat who held his homestead otherwise than as a part of his holding when the old S. 182 was in force and thus acquired the rights of a raiyat in respect of his homestead tenancy there being no question of any local custom or usage, his homestead will

continue to be governed by the old section even after the amendment, if he is still holding it as before. The amended section would not apply and the fact that the landlord of the homestead has no status under the Bengal Tenancy Act would make no difference, inasmuch as the existence of such a status was not a requirement under the old section and the rights accrued without it.

22. The position, I conceive, would be the same if the raiyati holding is situated not in the same village as the homestead or a contiguous village but in some other village, since the limitation as to the village is also an addition made by the new section. For the reasons above given, Appeals Nos. 834, S35, 836 and 837 must be allowed. The judgments and decrees in these cases of both the Courts below are accordingly set aside and the plaintiff's suits dismissed with costs throughout. Appeals Nos. 838 and 839 must also be allowed but in these cases no final decree can be passed. It is not clear whether the defendant acquired the homestead during the currency of the old section or thereafter, but I consider it right that this matter should be further investigated. The judgments and decrees of both the Courts are, in these cases too, set aside and the cases remanded to the Court of appeal below for a further hearing of the appeals and a determination of the date of the acquisition of the homesteads on the evidence already on the record and such further evidence as the parties may adduce. If it be found that the homesteads were acquired by the defendant before the amended section came into force, the appeals will be allowed and the plaintiff's suits dismissed. If, on the other hand, it be found when the homesteads were acquired, the amended section had already come into force, the appeals will be dismissed. Costs of these two appeals in this Court will abide the result. Leave to appeal under cl. 15 of the Letters Patent has been asked for. It is granted.