

(1933) 03 CAL CK 0049
In the Calcutta High Court

Kinu Gazi and Others

APPELLANT

Vs

Kiranbala Debi and Others

RESPONDENT

Date of Decision : 03-03-1933

Acts Referred:

Bengal Tenancy Act, 1885 — Section 46

Citation : AIR 1933 Cal 653 : 145 Ind. Cas. 885

Hon'ble Judges : Rankin, C.J; Mukerji, J; Jack, J

Bench : Full Bench

Judgement

Jack, J.—These appeals have arisen out of suits u/s 46, Ben. Ten. Act, for determination of fair and equitable rent and for ejectment if the defendants do not agree to pay the rent so determined. In the trial Court the suits were dismissed as it was held that the defendants being occupancy raiyats, Section 46, Ben. Ten. Act, could not be applied. In the Court of appeal below the appeals have been decreed and it was held that the defendants were non-occupancy raiyats and the suits were remanded for a fresh trial on the footing that the defendants were non-occupancy raiyats. The lands in dispute appertain to Sundarban lots which were gradually re-claimed; it has been found that the area in which the lands lie was declared a "village" on 14th February 1912. The defendants accordingly became occupancy raiyats since they occupied lands in a village continuously for 12 years from that date. The suits were instituted in January and February 1924. By Act 1 of 1925 there was an amendment of Section 20, Ben. Ten. Act, by insertion of Sub-section (1-a) which runs as follows:

A person shall be deemed for the purpose of this section to have continuously held land in a village notwithstanding that such village was defined, surveyed or recorded as or declared to constitute, a village at a date subsequent to the commencement of the said period of 12 years.

2. The trial Court held that this amendment had a retrospective effect and that therefore as regards two of the suits the raiyats had acquired occupancy rights before the institution of suits. As regards the other suits the Court found that

occupancy rights were acquired during the pendency of the suits and therefore the Munsif held that in all these cases the raiyats could not be ejected. The appellate Court decreed the suits on the ground that (1) the position must be taken as at the time of the institution of the suits and what occurred subsequently cannot affect the position of parties with regard to each other, and (2) Act 1 of 1925 could have no retrospective effect. In this I think he was right. There is nothing in the Act to indicate that it is to have such effect as regards the rights of the parties and unless there is anything to show that its provisions are retrospective, they cannot be taken to have such effect.

3. Then as regards acquisition of occupancy rights subsequent to the institution of the suits, the learned Munsif has referred to various cases which are apparently exceptions to the rule that a decision is to be based on the cause of action as it existed at the time of the suit, and no doubt in the cases he referred to, for special reasons, subsequent events have been allowed to affect the decision of the Court. He finds that the original relief asked for by plaintiffs has by reason of acquisition of occupancy right by the defendants become impossible for the Court to grant. The cases have been referred to at a considerable length and it is not necessary to refer to them again, and it is sufficient to say that in all these cases there are special reasons for holding that subsequent events should be allowed to influence the decision of the Court. But in the present case there is no reason to suppose that, as the learned Munsif thinks, in order to do complete justice between the parties and to shorten litigation, the decision of the Court must be based on the altered circumstances. Acquisition of occupancy right by tenant after 12 years is very similar to the acquisition of right by adverse possession by holding the land for a certain period adversely; and in that case a decree can be passed against a defendant though his period of adverse possession is completed during the suit. This is exactly a similar case. Here the period of 12 years required for acquisition of occupancy rights was not complete before the institution of the suits but became so during the pendency of the suits. It would be unreasonable that the suits should be barred as against the defendants simply because subsequent to the institution of the suits they have acquired occupancy rights, perhaps owing to delay in disposal of the suits. The appellate Court is quite right in these circumstances in setting aside the order of the trial Court. A reference has been made on behalf of the appellant to Clause 7, Section 46, Ben. Ten. Act, under which the tenant is not liable to ejectment, if he has acquired a right of occupancy before the expiry of the period of 5 years for which a fair and equitable rent has been fixed. This does not help the appellant but may indicate that if the acquisition of a right of occupancy before a fair and equitable rent was fixed nullified the proceedings, this would have been noted in the section. The result is that these appeals are dismissed with costs.

4. (On Letters Patent appeals their Lordships delivered the following judgments).

Rankin, C.J.

5. We have before us four Letters Patent appeals from the decision of my learned

brother Jack, J., sitting in second appeal. The suits out of which these appeals arise were brought u/s 46, Ben. Ten. Act, which deals on its face with suits for ejectment on the ground of refusal to agree to enhancement of rent. The particular history of the land in question need not detain us because the position with which we have to deal and which is admitted on both sides appears to be this: In all the cases the suits were brought in 1924. The judgment of the trial Court was given on 4th February 1929. An appeal being taken the lower appellate Court gave judgment on 9th November 1929. The Munsif dismissed the suits and on the following ground, namely that at some period between the institution of the suits in January and February 1924 and the date of his judgment in February 1929, the defendants had become occupancy raiyats. They had acquired occupancy right subsequent to the institution of the suit. Now, before us it has been contended that if occupancy right is acquired before the decree in the suit in the Court of first instance, the proper course is for the suit to be dismissed. It is said that it is impossible and wrong to grant a decree of the character described in Section 46 against a person who at the time of the decree is an occupancy raiyat. The contention, on the other hand, is that if on the date of the suit the landlord is entitled to bring a suit for ejectment, nothing that can happen in the way of the acquisition of occupancy right should be entertained by the Court or acted upon by the Court and no answer to the right of ejectment can accrue to the defendant after the institution of the suit and before it is decreed. The matter was at one stage complicated by the circumstance that a question arose as to whether retrospective effect could be given to Bengal Act 1 of 1925 which came into force on 14th March 1925. No argument on that point has however been addressed to us in this case.

6. The contention on behalf of the appellant is that although it is quite true as a general rule that a circumstance arising after the institution of the suit will not be looked at by the Court or regarded as affording a defence or as taking away the right which the plaintiff had at the date of the institution of the suit, nevertheless that principle is subject to certain exceptions. In the case of pre-emption suit, for example, the plaintiff has to be in a position to preempt at the time of the decree. In the case of specific performance, the plaintiff has to be ready and willing to carry out his part of the contract right up to the time of the decree. It is said that there is no absolute or rigid rule that matters arising after the institution of the suit and before decree cannot be regarded by the Court at the time of the making of the decree. Now, for the purpose of deciding the question before us it is necessary to examine carefully the provisions of Section 44 and 46, Ben. Ten. Act, so as to be certain that one has an accurate appreciation of what the cause of action is. If any argument from convenience is in point, it may be noticed that the present case affords a very strong illustration of the inconvenience that may, in some cases, attach to the view of the appellants being accepted. In this case it appears that though the suits were filed in 1924, the first thing that happened was that the suits were stayed till the final publication of the Record of Rights, the fact being that cadastral survey

operations were in progress and it being pleaded that Section 111, Ben. Ten. Act. was a bar to the trial of the suits. This is the circumstance which accounts for the five years between the institution of the suits in 1924 and the judgment of the trial Court in February 1929.

7. Leaving aside however the mere question of convenience, we may look at the matter more closely upon the face of the section. Sections 46 and 44 are not expressed absolutely in the same way, the language of Section 44 being more favourable to the appellant and the language of Section 46 being, in my judgment, more favourable to the respondent. Section 46 however is the section which deals substantively with the suits before us. They are suits u/s 46 and one sees from Sub-section (1) of that section and also sub-S, (6) that in certain circumstances the landlord is entitled to institute a suit for ejectment. If he tenders to the raiyat an agreement to pay enhanced rent the raiyat has a month after the service of the draft agreement upon him to execute it and give notice of his agreement. If he does not agree the landlord has a limited time, namely three months, within which he may institute a suit of the character dealt with in the section. It is a suit, curiously enough, for ejectment on the ground of refusal to agree to an enhancement of rent. It occurs to one that the landlord's proposed enhancement may be arbitrary and unfair and that it is perhaps somewhat curious that the mere refusal to agree to whatever agreement the landlord shall tender should be treated by the statute as a ground for a suit in ejectment. That however is the undoubted language of sub Section (1) and of Sub-section (6). It is contemplated that the landlord shall bring a suit for ejectment.

8. It is however true that apart from the exact language of Section 46 the law does not allow a non-occupancy raiyat to be ejected merely because he does not comply with his landlord's demand for enhancement of rent. The section provides that though the landlord's suit is a suit for ejectment the Court shall first fix a fair and equitable rent, that the tenant shall be given an opportunity to agree to pay that fair and equitable, and only in case he does not agree shall he be evicted; if he does agree he shall remain in occupation of his holding at the new rent for a term of five years. He shall be liable to ejectment prima facie at the end of the five years. Section 44 which is a section dealing with all the grounds upon which a non-occupancy raiyat is subject to ejectment, mentions in Clause (d) as the last ground:

On the ground that he has refused to agree to pay a fair and equitable rent determined u/s 46 * * *.

9. We have therefore to consider in the present case whether we are to treat the landlord at the time of filing the suit as a person who is given by the law a right to bring a suit for ejectment; and the provisions for settling a fair and equitable rent and for giving the tenant an opportunity to agree to pay as provisions modifying the right which existed in the landlord at the date of the institution of the suit; or whether on the other hand we are to put aside all technicalities and

hold that the landlord's right at the date of the suit is not a right to ejectment, but only a right given to have the Court fix a fair and equitable rent, and to have the tenant put to his option whether he will agree to pay that rent or be evicted. There is much to be said on both sides of this controversy. But it appears to me that the language of Section 46 is inconsistent with the view that the landlord has not got the right to eject at the time the suit is brought. I think, on the whole, though the question is a difficult one that the provisions, whereby a fair and equitable rent is to be settled and the tenant is to be allowed to come to an agreement to pay, should be regarded as modifications of the right which the landlord had at the date he brought his suit. They are defences to the tenant. The landlord's right is not to be exercised until the tenant has had a chance to make such an agreement as will prevent the Court in its discretion from permitting the landlord, merely on the ground of refusal to agree to his proposal, to have the tenant evicted from the land. The phrase "cause of action" is very difficult to apply in connexion with a suit of this character. Ordinarily, cause of action means every allegation which it is necessary to make in order to show that the plaintiff is entitled to the relief claimed. In this case it is clear enough that the plaintiff will never get relief by the way of an order for ejectment merely on the ground that the tenant has refused to agree to the plaintiff's proposals. But it is on that footing that the plaintiff has a right to bring a suit and the circumstance that the Court will refuse to allow ejectment so long as the tenant is willing to pay a fair and equitable rent and will give the tenant five years but no more is I think statutory defence to the prima facie cause of action upon which the plaintiff takes his stand. I think therefore that this suit must be regarded as an ejectment suit at the date of its institution and not as a suit to settle a fair and equitable rent to be followed by proceedings equivalent to a new ejectment suit in case the tenant refuses to agree to pay the fair and equitable rent settled by the Court. That being so, I am not prepared to accept the view that the acquisition of occupancy right prior to decree means that the suit becomes infructuous and must be dismissed.

10. It is necessary to refer to the language of Sub-section (7), Section 46. That does not deal with the case of acquisition of occupancy right prior to the decree but deals with occupancy right prior to the expiry of the five years further tenancy that ensues when the tenant agrees to pay a settled rent. I do not think that any argument the other way can be founded upon this clause. I do not regard it as justifying the conclusion that if prior to the decree occupancy right is acquired the suits come to an end. I think the better view is that notwithstanding the acquisition of occupancy right subsequent to the institution of the suit the tenant who refuses to agree to pay the rent settled by the Court is still subject to the landlord's right which he had at the date of the institution of the suit, namely is subject to a decree for ejectment. The matter is a difficult one. But in my judgment the conclusion at which the learned Judge in second appeal arrived is, in the end, correct and these appeals, should be dismissed with costs.

Mukerji, J.

11. I agree.