

(1968) 06 CAL CK 0008

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 2190 of 1961

Mrityunjay Chattopadhyay

APPELLANT

Vs

Biseswar Koer

RESPONDENT

Date of Decision : 26-06-1968

Acts Referred:

Bengal Tenancy Act, 1885 — Section 182

Citation : 72 CWN 796

Hon'ble Judges : Bijayesh Mukherjee, J

Bench : Single Bench

Advocate : Ranjit Banerji and Rameswar Saha, for the Appellant; Ganga Narayan Chandra, for the Respondent

Final Decision : Dismissed

Judgement

Bijayesh Mukherjee, J.—This is an appeal by the plaintiff, Mrityunjay Chattopadhyay, whose suit for declaration of his title to plot No. 1121, a homestead land, admeasuring.04 acre, under khatian No. 386, exhibit 5, of mouza Saonta, police station Mangalkote, within the subdivision of Katwa, and for recovery of khas possession thereof, after eviction of the defendant Bisheswar Koer, has failed in the Court of first instance and also in the court of appeal below. One Nutbehari Bagdi was the owner of the aforesaid plot. His wife, as also his two sons, Satya and Fakir, and Satya's wife too, predeceased him. So, when he died on December 13, 1945, Fakir's widow, that is, Nutbehari's widowed daughter-in-law Soroshibala, was, it is said, his only heir.

2. Leaving aside points concluded by findings of fact and no longer insisted upon, all that need be stated now is that on November 5, 1957, Soroshibala sold the disputed plot to the appellant.

3. Upon such sale, the question arises : did Soroshibala, the widow of a predeceased son, acquire title to this homestead plot so that she, in turn, could have conveyed title to the appellant by her conveyance dated November 5, 1957,

exhibit 1 ?

4. The learned munsiff, and on appeal, the learned subordinate judge find:

One, Nutbehari Bagdi was an occupancy riyat, holding plot No. 848 of mouja Saonta under khatian No. 118, exhibit F.

Two, the disputed land, Nutbehari's only homestead, was, therefore, agricultural land by operation of section 182 of the Bengal Tenancy Act, 8 of 1885.

Three, the Hindu Women's Rights to Property Act, 18 of 1937, a Central Act, does not apply to agricultural land, a matter within the legislative competence of the Provincial Legislature only, in view of entry No. 21 in the Provincial Legislative List: List II: of the Government of India Act, 1935, 25 & 26 Geo. 5, Ch. 42.

Four, ergo, devolution of the disputed land, upon Nutbihari's death on December 13, 1945, was governed by Hindu Law, not by Act 18 of 1937, with the result that Soroshibala, a pre-deceased son's widow, acquired no title and could have, therefore, conveyed no title either, to the appellant.

5. The point for decision, therefore, boils down to that and that only: what is this land, plot No. 1121, like ? Agricultural or non-agricultural ? The plain meaning of agriculture is the art or practice of cultivating the land. A homestead land, as the disputed plot is, can never fit such meaning. Cultivating a homestead, a "bhita", as it is called in the countryside ? Cacophony apart, it means negation of a homestead. Or take the etymological meaning. Derived from the Latin "agricultura", it is really a compound of two words-"ager" meaning a field, and "cultura" meaning cultivation. Now, a homestead, a "bhita", as the disputed land is, does not happen to be either-"ager", a field, meaning a piece of ground enclosed for tillage or pasture, or "cultura" connoting cultivation.

6. Test it in another way too. Two elements must be there in order to make a certain land agricultural, as held by the Privy Council in (1) Raja Mustafa Ali Khan v. Commissioner of income tax, (1948) LR 75 IA 268, and reiterated by the Supreme Court in (2) Commissioner of income tax v. Raja Benoy Kumar Sahas Roy, 1957 SCJ 740. The two elements are: (i) some measure of cultivation of the land and (ii) some expenditure of skill and labour for the purpose. The first element necessarily connotes the basic operations of tilling, cultivating, or dressing up the land for growing the thing sought. The second element similarly connotes the subsequent operations of tending, by skill and labour, the work started by the basic operations. When both these elements are there, the land becomes agricultural; otherwise not. Miss one element and you miss agriculture. Such then is the law laid down by the highest court of the land. Translate this law to the homestead land in controversy here. And it does not answer either to the description or to the contents of an agricultural land.

7. More, the relevant khatian, khatian No. 386, exhibit 5, the entries in which are presumed to be correct until the contrary is proved, records Nutbihari as

dakhalkar basat -praja : a residential tenant in occupation, the word "dakhalkar" having a significance all its own- a tenancy governed by the Transfer of Property Act, not the Bengal Tenancy Act. (More of which in paragraph 11 infra.)

8. Thus, whichever way you look at it, the disputed land does not appear to be agricultural, either in fact or at law, to start with. But does section 182 of the Bengal Tenancy Act, very much a live law on December 13, 1945, when Nutbihari died, make any difference ? It does, contends the respondent, and hold the two learned judges below. The appellant contends, however, it does not.

9. Let the matter be examined. Section 182 bears : "when a raiyat or an under-raiyat holds his homestead otherwise than as a 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."

This section, therefore, provides for two things : (i) the status in respect of the homestead and (ii) the incidents of such tenancy. Let it. But does it convert land, nothing to do with agriculture, into agricultural land ? Does it prescribe : no matter that it is a homestead land, it shall be reckoned as agricultural land, for all purposes including the purposes of devolution ? Clear words are needed for a big conclusion as this. Such words are not simply there in section 182.

10. Still, the implication of section 182 be worked out, so far as the disputed land is concerned. What was the status of Nutbehari as respects this land? Khatian No. 386 answers : his was the status of dakhalkar basat praja, meaning, he was a tenant in residence governed by the Transfer of Property Act. The Bengal Tenancy Act knows not a dakhalkar, a word which has a technical meaning all its own. The Bengal Tenancy Act knows a raiyat or an under-raiyat, which a dakhalkar is not, a tenant in residence (a Basat praja) though he may be. Indeed, in settlement operations and recordings, the word "dakhalkar" is used in contradistinction to a raiyat or an under-raiyat. The afore-said khatian then goes so far. But that is not far enough. Because another khatian, c.s. khatian No. 188, exhibit F, of the same village does record Nutbehari as an occupancy raiyat of c.s. plot No. 848. Here it is that section 182 goes into action, and says : "Because Nutbehari is a raiyat holding a homestead in the same village Saonta, and because the landlords of his homestead are tenure-holders, his status in respect of the homestead, not part of his holding, shall be that of a raiyat." The action of section 182 is not over yet. Only its first part, providing for the status of the raiyat as respects his homestead, is covered so far. Now, the second part of section 182 goes into action, and says : "The incidents of Nutbehari's tenancy of the homestead shall be governed by the Bengal Tenancy Act, not by the Transfer of Property Act, rebutting thereby the presumption of the record of rights, khaitan No. 386, recording Nutbehari as a dakhalkar instead of a raiyat".

11. This is then all section 182 se-cures. It does not convert the homestead, a non-agricultural land, into an agricultural land. Nor does it necessarily provide for devolution of Nutbehari's occupancy right in the homestead as an agricultural land. But by the conjoint operation of sections 182 and 26 of the Bengal Tenancy Act, his right of occupancy in the homestead shall descend in the same manner as "other immoveable property" of Nutbehari, he dying intestate, as indeed he does.

12. Now, in what manner does "other immovable property" of Nutbehari descend ? The answer is in section 26 of the Bengal Tenancy Act, but it is an incomplete answer. Other immovable property descends in accordance with the law of inheritance prescribed by the Hindu Law and the Hindu Women's Rights to Property Act, 18 of 1937, as amended in 1938. So, Nutbehari's right of occupancy will descend in the same manner as his other immovable property will. Thus, the complete answer lies here, in the conjoint operation, of section 26 of the Bengal Tenancy Act, the Hindu Law, and the Married Women's Rights to Property Act. And such complete answer is :

A. If the immovable property Nutbehari has left behind him is agricultural land, the manner in which it will descend is the manner laid down in old Hindu Law : that it shall not descend on a predeceased son's widow, as Soroshibala is.

B. The first proviso to section 3, sub-section (1), of the Hindu Women's Rights to Property Act, 1937, as amended in 1938, no doubt, provides for the widow of a predeceased son who, it is prescribed, shall inherit in like manner as a son. But it has been rendered idle. As held by the Federal Court, this Act does not operate to regulate succession to agricultural lands in the Governors' Provinces, if the land in dispute, certainly inside of the then Governor's Province of Bengal, is that, that is, agricultural land : In the matter of the Hindu Women's Rights to Property Act, AIR 1941 72 (Federal Court) .

C. But if, however, the immovable property Nutbehari has left behind is non-agricultural land, the Hindu Women's Rights to Property Act receives full effect. Because here is a Hindu, Nutbehari Bagdi, governed by the Dayabhaga School of Hindu Law. Such a one dies intestate, leaving the property (non-agricultural land as the homestead is). So the widow of a predeceased son of Nutbehari - Soroshibala is just that - inherits in like manner as a son, there being no other heir surviving.

13. I, therefore, come full-circle back to the starting point of discussion in this judgment : whether the land in controversy, a homestead, a bhita, is agricultural or not. If I am right in my finding that it is not agricultural, section 182 of the Bengal Tenancy Act notwithstanding, Nutbehari's right of occupancy therein descends in the same manner as "other immovable property" of his. And his "other immovable property" does descend upon his predeceased son's widow, Soroshibala, if it is non-agricultural, and does not descend so, if it is agricultural.

14. But, with a view to pointing out the other side of the shield, I have been

proceeding so long in a manner as if the matter - whether a homestead land as this is agricultural land or not - were res integra. In reality, it is not. Nearly a quarter of a century ago, R. C. Mitter, J., sitting with Sharpe, J., laid down the law in (3) Khantamayee v. Rukmini, (1944) 48 CWN 759 :

"Lands actually used for raising by cultivation food crops for men and beasts, as also other crops like jute, hemp, cotton and flax - marketable commodities raised by the labour of man - are no doubt agricultural lands. Lands which are used for purposes accessory to cultivation would in our judgment also be considered as agricultural lands - the threshing floor, irrigation tanks, land containing cattle sheds for plough, cattle, etc. We would also hold that the site of the hut, where the cultivator lives, is to be considered as agricultural land for the purpose of item No. 21 of List II."

Again,

"Dwelling houses other than those used for residence of cultivators or farmers should be regarded as non-agricultural property."

Now, to the conclusion of a discussion as this:

"Till the Provincial Legislature legislates on the lines of Act XVIII of 1937 and the amending Act of 1938, there would arise anomalies and difficulties in the matter of succession, but the adoption of the wider import for the term "agriculture" would reduce the anomalies to a great extent, and that is one of the main reasons why we adopt the wider meaning."

It thus becomes plain to be seen that the way I have proceeded right from paragraph 6 ante, in my attempt to examine the matter as if it were a point of first impression, adopts the narrower meaning of agriculture and necessarily makes for anomalies in the realm of succession; whereas the law laid down by their Lordships adopts the wider meaning and does reduce the anomalies to a great extent. On top of that, the decision of a division of this court, it is binding on me.

15. The contention, on behalf of the appellant, however, is that it is an obiter dictum by which I am not bound. I am unable to agree. The claim of the plaintiff Rukmini was grounded on section 3, sub-section (2) of the Hindu Women's Rights to Property Act, 18 of 1937, proceeding as it did on the basis that her husband was at the time of his death a member of the joint Mitakshara family of which the defendants were the other coparceners. So, the point that fell for consideration and decision was whether the properties claimed by Rukmini were agricultural lands or not. If agricultural lands, section 3, sub-section 2 of Act 8 of 1937, was not for her. And it was found as a fact that out of various properties claimed, many were agricultural lands, inclusive of homesteads of under-tenants, with the result that Rukmini's claim failed pro tanto. Her claim succeeded on the dwelling-house, etc, non-agricultural properties all, such dwelling-house being not the dwelling-house of cultivators or farmers, but of tenure-holders. Thus, the

finding that the homesteads of under-tenants were agricultural lands was so necessary for the decision, and indeed the ratio of their Lordship's judgment. It cannot, therefore, be reckoned as an obiter dictum.

16. There are other contentions too, on behalf of the appellant, with a view to persuading me to hold that the homestead of Nutbehari. cannot be regarded as agricultural land. I proceed to notice them one by one.

(i) Relying on the following passage from the judgment of Earl Lore-burn, L.C. in (4) Attorney-General for Ontario v. Attorney-General for Canada, (1912) AC 571, a Privy Council decision :

"* * * if the text is explicit the text is conclusive, alike in what it directs and what it forbids" - a passage which Gwyer, C.J. quotes In re The Central Provinces and Berar Act, 14 of 1938, (1939) FCR 18, it is contended that there can be no enlargement of the meaning of agricultural land in entry 21 of List II, of the Government of India Act, 1935. I would not call the wider meaning an enlargement in the true sense of the term. It is a meaning which is inherent in the expression. On the threshing-floor, for example, nothing grows. But, without it, agriculture "dies". Thus, it is an essential accessory to agricultural land and forms part thereof. That apart, the answer to such a contention is, in a manner, in the following passage, the very one relied upon, on behalf of the appellant, from the judgment of Lord Wright, M.R., in (5) James v. Commonwealth of Australia, (1936) AC 578, another Privy Council decision:

"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

The Government of India Act, 1935, a written organic instrument, was our Constitution then. A division of this court has not construed an entry there-in in any narrow and pedantic sense. The meaning of agricultural land has not changed. But the homestead of a raiyat, living by and on agriculture, which he could not have lived but for a roof like this over his head, illustrates and illuminates the full import of the meaning.

(ii) When, in a written Constitution, as here, there are two complementary powers, each, expressed in precise and definite terms, there can be no reason for giving a broader interpretation to one power rather than to the other. Such is the proposition laid down by Kania, C.J., speaking for the court in (6) Firm Ram Krishna Ramnath Agarwal v. The Secretary, Municipal Committee, Kamptee, AIR 1950 SC II, but for refusing to extend the meaning or the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods. Once that is borne in mind, and is borne in mind too the difference in language between entry 45 (duties of excise on tobacco and other goods manufactured)

under List I and entry 49 (cesses on the entry of goods) under List II, it becomes difficult to translate, as I am asked to do, the ratio of this decision to the facts here. The language here is the same : devolution of agricultural land in entry 21 under List II, and succession save as regards agricultural land in entry 7 under List III. The expression "agricultural land" is common to both. More, in (7) *Megh Raj v. Alla Rakhia*, (1942) CWN 1942 FR 61, affirmed in appeal by the Privy Council in (8) *Megh Raj v. Alla Rakhia*, (1947) LR 74 IA 12, Varadachariar, J., speaking for the court, refrains from defining the precise scope of the expression "agricultural land," but not without observing as under :

"It is difficult to impute to parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to laws framed under list II, but that when the same parcel of land is used to produce something else (as often happens in this country), it should be governed by and descend according to laws framed under List III."

The case I am seized of appears to be so much the stronger. The use of the homestead land does not change. It remains what it was, affording residence to the cultivator who cultivates agricultural land, which he could not have done but for such residence. Ergo, it forms part of his agricultural land too.

(iii) Then I am taken to two passages from the opinion of the court delivered by Mr. Justice Brewer of the United States Supreme Court in (9) *South Carolina v. United States*, (1905) U.S. SCR 50 LE 437 : 199 U.S. 261 -

"It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they under-stood them; putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take.....

Looking therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers, in granting full power over licence taxes to the national government meant that that power should be complete, and never "thought that the states, by extending their functions, could practically destroy it." To say the least of it, by treating land which is a necessary accessory to agricultural land, by regarding land an agriculturist cannot simply do without, as agricultural land, the Provinces are not certainly destroying the Centre's power to make laws touching devolution of non-agricultural land.

(iv) By parity of reasoning, the same approach holds good *mutatis mutandis* about what Das Gupta, J., quotes, in (10) *Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another*, , from the same opinion of Mr. Justice Brewer: that "we must place our-selves in the position of the men who framed and adopted the Constitution and inquire what they must have understood to be the meaning and scope of those grants." Sure enough, the makers of the Government of India Act could not have understood the homestead of a raiyat, a poor specimen of a shanty, from which he tilled and

toiled, and without which. he could not, to be anything but standing on a land, very much part of, and deriving its colour from, his agricultural land. So considered, no different conclusion can be reached, on the homestead land of a raiyat being part of his agricultural land, on the strength of what "Mr. Chief Justice Marshall" said in (11) *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L.ed. 23, 68, as quoted by Mr. Justice Brewer, in the South Carolina case, (supra):

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The Constitution, the like of which the passage just quoted contemplates, is the Constitution "We, the people of India", "In our Constituent Assembly", on the twenty-sixth day of November 1949 did adopt, enact and give to ourselves. The Government of India Act, 1935 cannot be put on that high pedestal. Even so, it is impossible to impute to the makers of the Act such oddity and unnaturalness that a raiyat's homestead land or, say, threshing-floor will not be regarded as agricultural land because nothing grows on it, though without either a raiyat cannot function as a raiyat, tilling his land, and cannot, therefore, grow anything.

(v) The revisional record of rights, khatian No. 118, exhibit 5/a, no doubt, records Balaram and Saraswatibala for plot No. 848 which Nutbehari held as an occupancy raiyat, as is manifest from the earlier CS. khatian, exhibit F: paragraph 5 ante. So, ordinarily, the latter khatian will prevail over the earlier one, as rightly urged on behalf of the appellant, relying upon (12) *Shri Raja Durga Singh of Solan Vs. Tholu*, . But the difficulty is that both the courts of facts have found, on the basis of evidence, oral and documentary, that the latter khatian is no good. Now, whether the presumption raised by the record of rights has been rebutted or not is a question of fact: (13) AIR 1930 91 (Privy Council) , the entries therein being not the foundation of title, but mere items of evidence. I cannot, therefore, even enter into such question-a prohibited area for me.

(vi) True it is, as urged on behalf of the appellant, that in order to attract section 182 of the Bengal Tenancy Act, two elements are needed. First, one must be a raiyat at the time, that is, must have arable lands. Second, he must be using the other land as his residence. These two elements co-existing, section 182 will come into play; other-wise not: (14) *Naihati Jute Mills Co. Ltd. v. Kali Prosad Saha*, 1949, 53 CWN 82, and (15) *Kiriti Bhusan v. Tarubala*, (1956) 61 CWN 572. But here also the facts found by the two courts of facts are that the two elements did exist at the time the succession opened on December 13, 1945, when Nutbihari died. So, that is the end of the matter.

(vii) The Bengal Tenancy Act does not purport to be a complete Code even in respect of the law of landlord and tenant, as Mookerjee, J. points out in (16) *Kripa Sindhu Mukherji v. Annada Sundari Debi*, (1907) 6 CLJ 273 (FB). That, no

doubt, is true. But it cannot tilt the scales one way or the other, the nature of a raiyat's homestead land being a necessary accessory to his agricultural land and therefore part thereof.

17. Thus, all the contentions addressed to me, in support of the appeal, fail, and the appeal fails too, Soroshibala, a widow of Nutbehari's predeceased son, and, therefore, not an heir of Nutbehari, having acquired no title to the disputed land, regarded as agricultural land, and having necessarily failed to convey any title to the appellant.

18. In the result, the appeal be dismissed. But, in all circumstances here, each party do bear its costs throughout. Leave to appeal under clause 15 of the Letters Patent has been asked for. The importance of the matter demands that there should be a far more authoritative decision than is possible in the hands of a single judge.

Leave prayed for is allowed.