

(1911) 12 CAL CK 0030
In the Calcutta High Court

Raja Sir Sourindra Mohan Tagore and Others

APPELLANT

Vs

Rahim Bakhsh and Others

RESPONDENT

Date of Decision : 19-12-1911

Acts Referred:

Bengal Tenancy Act, 1885 — Section 23, 25(a), 76

Citation : 15 Ind. Cas. 497

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the plaintiffs in an action in ejectment. The plaintiffs commenced this action under Clause (a) of Section 25 of the Bengal Tenancy Act to eject the defendants on the ground that they, as occupancy-raiyats, had used the land comprised in their holding in a manner which rendered it unfit for the purposes of the tenancy, because they had excavated a tank on the land in suit. The Courts below have concurrently dismissed the suit on two grounds, namely, first, that the plaintiffs had waived their right to eject the defendants, as, subsequent to the excavation of the tank which is alleged to have caused a forfeiture of the tenancy, they received rent from the defendants, and secondly, that the excavation of the tank had improved the holding and was not shown to have impaired its value. This decision has been assailed before us on behalf of the plaintiffs on two grounds; namely, first, that the question of waiver ought not to have been decided because it was not expressly raised either in the pleadings or in the issues, and that in any view, upon the admitted facts, no question of waiver arises; and secondly, that the facts found are not sufficient to show that the excavation of the tank constitutes an improvement within the meaning of Section 76 of the Bengal Tenancy Act. In our opinion, the first contention is well founded, but the second must be overruled.

2. In support of the first ground, it is pointed out that the tank was excavated in April 1908 and that the notices required by Section 155 of the Bengal Tenancy Act as a necessary preliminary to the commencement of an action under Clause

(a) of Section 25 were served on the 20th April 1907. The present suit was instituted on the 31st March 1908. A suit for rent was subsequently commenced on the 13th July 1908. Consequently, although, as explained by this Court in the cases of *Kali Krishna Tagore v. Fuzle Ali Chowdhry* 9 C. 843 : 12 C.L.R. 592; *Jogeshuri v. Mahomed Ebrahim* 14 C. 33; *Sita Nath v. Basudeb* 2 C.L.J. 640, a landlord may, by acceptance of rent from his tenant subsequent to the date of forfeiture of the tenancy, be deemed to have waived his right to eject him, there was no waiver at the date of the commencement of the suit Cf. *Mansar Alt v. Abdul Karim* 1 Ind. Cas. 753 : 10 C.L.J. 187. Possibly, the claim for rent might have been successfully defeated by the plea that as the plaintiffs had already sued the defendants as trespassers, it was not competent to them to hold them liable for rent. We are, however, not concerned with the decision in the rent suit. The conclusion at which we arrive is that the claim for ejectment cannot be defeated on the ground of waiver.

3. In support of the second ground, it has been contended, upon the authority of the decision in *Govinda Chandra Basu v. Kamijuddi Soyal* 9 C.W.N. ccxvi, that in order to constitute an improvement, it is necessary to show that the tank in question was excavated for the storage, supply or distribution of water for the purpose of agriculture or for the use of men and cattle employed in agriculture. It may be conceded that this position is well founded and that the finding of the District Judge is defective from this point of view, but it is obvious that it is unnecessary for the defendants to establish that the tank in question was an improvement within the meaning of Section 76 to enable them to defeat the claim for ejectment. Section 23 of the Bengal Tenancy Act provides that when a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy. Section 25, Clause (a), then provides that an occupancy-raiyat shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy. Consequently, before a landlord can succeed in an action u/s 25, Clause (a), of the Bengal Tenancy Act, it is obligatory upon him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy. It is obvious that what has to be considered is the effect of the act upon the entire land comprised in the tenancy. In the case before us, the holding comprises sixty-six bighas, The tenants sublet four bighas to an under-lessee who excavated a tank on two bighas. The Courts below have concurrently found that the excavation of the tank had not rendered the land of the tenancy unfit for the purposes thereof. The District Judge has also found that the tank was a practical necessity." The inference follows that the landlords have not established that the land comprised in the holding has been used in a manner which renders it unfit for the purposes of the tenancy. Their claim for ejectment, therefore, cannot be sustained. The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.