

(1969) 10 CAL CK 0001

In the Calcutta High Court

Case No : L.P.A. 11 of 1964 in S.A. 1286 of 1959

Ramesh Chandra Das

APPELLANT

Vs

Satish Chandra Chakravarty

RESPONDENT

Date of Decision : 10-10-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103
West Bengal Estates Acquisition Act, 1953 — Section 39, 39(1), 46
West Bengal Estates Acquisition Rules, 1954 — Rule 26

Citation : (1971) 1 ILR (Cal) 169

Hon'ble Judges : D. Basu, J;A.C. Sen, J

Bench : Division Bench

Advocate : Manindra Nath Ghosh, for the Appellant;Jnanendra Nath Baksi, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Sen, J.—The present Letters Patent Appeal once came up for hearing before B.N. Banerjee J. and one of us D. Basu J. The principal point that was urged before their Lordships was the applicability of Section 46 of the West Bengal Estates, Acquisition Act, 1953, to the facts of the case. B.N. Banerjee J. came to the conclusion that Section 46 of the West Bengal Estates Acquisition Act was not attracted to the facts and circumstances of the case. In coming to this conclusion B.N. Banerjee J. mainly relied on three Bench decisions of this Court, namely, (i) Lala Gangaram v. Krishna Gopal Jhunjhunwalla (1955) 59 C.W.N. 1006, (ii) Panchanan Pramanik v. Kishori Mohan Banerjee (1959) 64 C.W.N. 83 and (iii) Manmotha Nath Kayal v. H.S. Khyer A.U (1961) 66 C.W.N. 121.

2. Mr. Manindra Nath Ghosh appearing on behalf of the Defendant Appellant before that Bench drew the attention of their Lordships to another Bench decision in the case of Dharendra Nath Bose v. Sushil Kumar Safui (1958) 63 C.W.N. 521, in support of his contention that Section 46 of the West Bengal Estates Acquisition Act did apply to the facts and circumstances of the case. In Dharendra

Nath Bose v. Sushil Kumar Safui a suit for the declaration of the Plaintiff's tenancy right was stayed by the Division Bench. In the suit, out of which the instant Letters Patent Appeal arises the primary question for determination was whether the Defendants Appellants had any jamai right under the Plaintiffs Respondents. Mr. Ghose, therefore, argued that according to the principle laid down in Dhirendra Nath's case it should have been held that the suit fall within the ambit of s 46 of the West Bengal Estates Acquisition Act and in that view the suit should have been stayed.

3. B.N. Banerjee J. rejected the contention of Mr. Ghosh, because his Lordship was clearly of opinion on an analysis of Section 46 of the West Bengal Estates Acquisition Act that a dispute as to (the existence or non-existence of a tenancy is outside the scope of Section 46, West Bengal Estates Acquisition Act. In the cases of Lala Gangaram (1), Panchanan Pramanik (2) and Manmotha Nath Kayal (3) it has been held that a suit in which the dispute is as to whether or not a person is a tenant in respect of a particular land does not come within the preview of Section 46 of the West Bengal Estates Acquisition Act. It is for this reason that his Lordship referred to these three cases to fortify die conclusion he arrived at on an analysis of Section 46. His Lordship also considered at great length whether there was any conflict between the case of Dhirendra Nath Bose (Supra) on the one hand and the cases of Lata Gangaram (Supra), Panchanan Pramanik (Supra) and Manmotha Nath Kayal (Supra) on the other. His Lordship started the discussion on this point by saying this, viz.:

The decision in the case of Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, did not in terms lay down that; the expression "determination of status of any tenant or incidents of any tenancy" would include the question of existence or non-existence of the tenancy itself, although the suit was one in which there was a prayer made for declaration of the tenancy right in the disputed property itself.

His Lordship then quoted the following observation of P.N. Mookerjee J. in Manmotha Nath Kayal's case regarding the decision in Dhirendra Nath Bose's case (Supra):

In the above case...on the construction of the plaint?and upon the construction of the statute as made by their Lordships...the actual decision is open to no objection.

4. His Lordship concluded the discussion on this point with the following remarks?

With very great respect I am constrained to observe that the attempted reconciliation by P. N Mookerjee J. does not fully cause a reconciliation regard being had to the factual background of the two decisions, namely, the Division Bench decision in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, and his own decision in 64 C.W.N. 83. But nevertheless, I need not ignore the reconciliation, because the law as laid down in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, did not directly militate against

the principle of law in 64 C.W.N. 83.

His Lordship then offered three reasons for following the decision in Panchanan Pramanik's case. His third reason was as follows: Dhirendra Nath Bose and Others Vs. Sushil Kumar Safui and Others, has been interpreted in Manmotha Nath Koyal Vs. Hazi Sheikh Khayer Ali and Others, , and it has been found that the decision in Dhirendra Nath Bose and Others Vs. Sushil Kumar Safui and Others, was on the construction of the plaint in that suit correctly decided, meaning thereby that; the decision was a correct decision in the context of the case itself, but did not; lay down any general proposition? of law contrary to the law as laid down either in Lata Gangaram's case or Panchanan Pramanik's case.

5. D. Basu J., however, thought that the Division Bench decisions in Dhirendra Nath Bose's case (4) and Panchanan Pramanik":

Case (2) were patently irreconcilable. His Lordship was further of opinion that B.N. Banerjee J. did not agree with the explanatory observation of P.N. Mookerjee J. who tried to avoid the conclusion that the two Division Benches had laid down different proposition of law, but that B.N. Banerjee J. accepted the view taken in the case of Panchanan Pramanik on the ground that that view was consonant with the general principles as to the exclusion of the jurisdiction of a Civil Court.

6. D. Basu J. concluded his judgment with the following remarks:

As I see, there is a direct conflict as between the decision in the two Division Bench cases referred to and it is not possible to say that the decisions relate to different circumstances. If so, according to the Supreme Court, only a Full Bench can reconcile the difference.

His Lordship, therefore, suggested that the question as to whether the decision in Dhirendra Nath Bose's case (Supra) or that in Panchanan Pramanik's case (Supra) was correct as to the interpretation of Section 46 of the West Bengal Estates Acquisition Act, 1953, should be referred to a larger Bench and that the question on the merits should be decided a somewhat embarrassing and difficult position.

7. To resolve the difference of opinion between B.N. Banerjee J. and D. Basu J. the matter was referred to P.N. Mookerjee J. under Clause 36 of the Letters Patent. P.N. Mookerjee J. started by saying that B.N. Banerjee J. and D. Basu J. had not been pleased to state the point of difference. This, said his Lordship, put him in a somewhat embarrassing and difficult position.

8. P.N. Mookerjee J. pointed out that D. Basu J. had suggested reference to a Full Bench for two reasons (i) that, in his opinion, the two decisions [Dhirendra Nath Bose's case (Supra) and Panchanan Pramanik's case (Supra)] are irreconcilable and (ii) that, in his opinion, Banerjee J. was also of the same view. His Lordship, however, was not prepared to accept the second reason given by D. Basu J. In other words, P.N. Mookerjee J. thought that in the opinion of B.N. Banerjee J., as

far as it could be gathered from his judgment, the two decisions in the cases of Dhirendra Nath Bose" and Panchanan Pramanik are reconcilable. The relevant portion from the judgment of P.N. Mookerjee J., under Clause 36 of the Letters Patent runs thus:

Banerjee J., however, as I read his judgment, however critical he may be of my reasoning in Manmotha Nath Koyal Vs. Hazi Sheikh Khayer Ali and Others, , "for reconciliation of the above two decisions in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, , holds in effect, that they are reconcilable....

His Lordship thought that the reference had to be answered from two different points of view, that is, on two different hypothesis. The reference was answered as follows:

(1) If Banerjee J. be of the same opinion as Basu J. on the interpretation of his (Banerjee J.) judgment, or, in other words, if he was of the opinion that, the two decisions in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, are conflicting and cannot, be reconciled and my view or ultimate conclusion and not only the reasoning for the same?on the said two decisions in Manmotha Nath Koyal Vs. Hazi Sheikh Khayer Ali and Others, was wrong the instant case is clearly one for reference to the Full Bench for resolving the aforesaid conflict between the above two decisions in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, , and also for testing the correctness or otherwise of the view, taken of the said two decisions in Manmotha Nath Koyal Vs. Hazi Sheikh Khayer Ali and Others, as against their Lordships" above contrary opinion, and

(2) if, on the other hand, Banerjee J. be of the view that I have interpreted his present judgment correctly so that the two decisions in Dhirendra Nath Boss and Others Vs. Sushil Kumar Safui and Others, are and were, according to him also, reconcilable and not in real conflict and my similar conclusion on the same in Manmotha Nath Koyal Vs. Hazi Sheikh Khayer Ali and Others, was correct?no matter my reasoning for the same was not so?no question of any reference to a Full Bench will arise in the instant case and it has to be decided on the view of Section 46 of the West Bengal Estates Acquisition Act in the light of or as deducible from the above decisions which, as stated above, according to Banerjee J. and myself, present no conflict as between themselves?for which decision the matter has to go back to the learned Judges, as Basu J. has not expressed his view or final opinion on the said point, or, upon the aforesaid statutory provision, in relation to the instant case, upon that footing.

With this expression of opinion P.N. Mookerjee J. returned the record to the learned Chief Justice for further and necessary action in the matter, one thing may be pointed out, Basu J. was definitely of opinion that the two decisions in Dhirendra Nath Bose's (Supra) and Panchnan Pramanik's (Supra) cases were irreconcilable. Assuming that, according to Banerjee J., they were reconcilable, what would be the position ? Will it or will it) not be necessary to refer the

matter to a Full Bench ? This aspect of the question was not considered by P.N. Mookerjee J.

9. This matter has now been placed before this Bench as per order passed by the learned Chief Justice on January 28, 1969 Having regard to the chequered history of this appeal we propose to dispose of the appeal on merits as if we are hearing it for the first time.

10. The Defendants are the Appellants before us. The suit out of which the present, appeal arises was instituted by the Respondent ; before us for declaration of his title and recovery of possession, in the alternative, for confirmation of his possession in the disputed land. In the plaint, the Plaintiff's claim is confined to an area of about 15 cottahs out of a bigger area of about 1 1/2 bighas. His case is that 48 acres in Mourn Palla was khas land containing various fruit bearing trees, that an area of 15 cottahs in the middle was bare land, and that the Defendants took settlement of the said 15 cottahs for the purpose of making a betel-leave grove (panbaroj) thereupon. It was stated in the plaint that the Defendants had taken settlement, of the said land measuring 15 cottahs for a period of five or six years agreeing to pay Rs. 9 per annum as compensation for use and occupation. As to why he felt the necessity of filing the present suit for recovery of possession he stated that as the Defendants Appellants were trying to have their names entered in the settlement record of rights under preparation under the West Bengal Estates Acquisition Act, he became very much annoyed with them and asked them to vacate the disputed land and that as they refused to vacate he had to institute the present suit.

10.1 The suit was contested by the Defendants Appellants. Their case was that they had a right, of tenancy under the Plaintiff on payment of Rs. 9 per annum as rent, that they had a betel-leave grove on the land, that they were in occupation of the entire area of 48 acre including the disputed land on payment of rent, and that the Plaintiff had no right to evict them from the disputed land.

11. On the pleadings the trial Court framed the following issues:

- (1) Have the Defendants any jamat right under the Plaintiffs ?
- (2) Is the suit maintainable in its present form ?
- (3) Is the suit barred under the principles of estoppel and acquiescence ?
- (4) Is the Plaintiff entitled to get khas possession as prayed for ?

12. Of the four issues, issues Nos. 2 and 3 "were not pressed at the time -of the hearing before the trial Court. On the first issue, the trial Court found that the Defendants succeeded in proving their tenancy under the Plaintiff and that they were in possession of the disputed land as tenants. On that finding the learned Munsif held that the Plaintiff was not entitled to evict the Defendants on the plea that they were licensees and not tenants.

13. The Plaintiff preferred an appeal against the judgment and decree passed by

the learned Munsif. Before the lower appellate Court, the Plaintiff sought, to enlarge the scope of the suit by claiming recovery of possession of the entire area of -48 acres on the allegation that they had been dispossessed by the Defendants from the remaining portion subsequent to the filing of the suit. Before the first appellate Court, the only point urged was that the trial Court was wrong in finding that the Defendants had tenancy right under the Plaintiff. The first appellate Court, on a survey of the evidence on record, both oral and documentary arrived at the following finding:

I hold that the Defendants were permitted to possess 15 cottas of land in the middle of the dag in suit for the purpose of growing panboroj for a temporary period of 5 or 6 years on payment of damages at the rate of Rs. 9 per year and that there is no convincing reliable evidence on record to prove that the entire dag in suit was settled with the Defendants at an annual rental of Rs. 9 per year.

14. The first appellate Court passed a decree for recovery of possession not only in respect of 15 cottas as originally claimed by the Plaintiff but in respect of the entire dag measuring -48 acre. The relevant portion of the judgment justifying decree for khas possession of the entire dag is quoted below:

On perusal of the entire evidence on record I have been left with the impression that the Plaintiff has been dispossessed from the entire dag in suit after the filing of the suit before us. It appears from the plaint that the Plaintiff has prayed for recovery of khas possession of 15 cottas of land in the middle of the dag in suit and that he has prayed for confirmation of possession in respect of the rest of the dag in suit. Now when from the evidence on record it has transpired that the Plaintiff has been dispossessed from the entire dag in suit, this Court has inherent jurisdiction to pass a decree for khas possession in favour of the Plaintiff in respect of the entire dag in suit when this relief is not inconsistent with the case made out in the plaint. I desire to point out here that ad valorem court-fee has been paid on the plaint in the suit before us on the basis of the market price of the entire dag in suit. Hence, there can be no objection to the Plaintiff's getting a decree for khas possession in respect of the entire dag in suit.

15. Aggrieved by the judgment of the first appellate Court the Defendants preferred a second appeal to this Court. The second appeal came up for hearing before Chatterjee J., before whom three points were urged by Mr. Manindra Nath Ghosh, learned Advocate for the Defendants Appellants, namely, (i) that the first appellate Court should have held that the Defendants obtained a lease and not a licence from the Plaintiff, (ii) that the first appellate Court should have stayed, the hearing of the suit u/s 46 of the West Bengal Estates Acquisition Act and (iii) that the first appellate Court had no jurisdiction to grant a decree with regard to a claim for which there was no cause of action at the date of the institution of the suit and for which the cause of action arose admittedly at a date subsequent to the institution of the suit.

16. The second point relating to stay u/s 46 of the West Bengal Estates

Acquisition Act, was urged by Mr. Ghosh, the learned Advocate for the Defendants Appellants, for the first time in second appeal before this Court. The point being one of law, Mr. Ghosh was allowed to urge that point by Chatterjee J.

17. On this second point his Lordship held that the words "determination of status" used in Section 46 of the West Bengal Estates Acquisition Act were wide enough to include a dispute as to whether there existed relationship of landlord and tenant between the Plaintiff and the Defendants.

18. His Lordship did not accept the argument on behalf of the Plaintiff Respondent that Section 46 contemplates only those cases where there is an admitted tenancy and then there is a dispute as regards the status of a tenant. Whether there is a permanent tenancy, whether a tenant has the right of an occupancy raiyat and similar other matters, in the opinion of his Lordship, came not under the heading "status" but under the heading "incidence of a tenancy". His Lordship, therefore, concluded that the question of "determination of status" would include the question whether a person is a tenant at all or not.

19. One of the questions in issue was whether the Defendants were tenants. In the opinion of his Lordship, that certainly meant whether the Defendants had the status of a tenant at all and, (therefore, the learned Munsif should have stayed the proceedings after the amendment of the West Bengal Estates Acquisition Act by Bengal Act XX of 1957. Unfortunately, the attention of his Lordship was not drawn to the Division Bench decisions in *Lain Gangaram v. Krishna Gopai* (Supra) and in *Panchanan v. Kishori Mohan* (Supra), in both of which it has been laid down that a suit where the question is whether one party is the tenant of the other is outside the purview of Section 46. Both the decisions were reported prior to the hearing of the second appeal by Chatterjee J.

20. It was brought to the notice of his Lordship by Mr. Ghosh appealing on behalf of the Defendants Appellants that the record of rights had been finally published and Mr. Ghosh filed an application for the admission of the finally published record of rights showing the Defendants as tenants under the Plaintiff as an additional evidence. Chatterjee J. thought that the issue regarding the determination of the status abated and it was replaced by the question whether the presumption of the record of rights had been rebutted by the evidence on record. His Lordship summarised the position by saying that the Courts below should have stayed the hearing of the suit and then considered the presumption raised by the finally published record of rights and how far the presumption was rebutted by the evidence on record.

21. Chatterjee J. thought that Section 46 of the West Bengal Estates Acquisition Act enabled the High Court to admit as additional evidence the finally published record of rights in second appeal. The record of rights filed on behalf of the Defendants Appellants was, therefore, marked as Ex. (H.C.)A. The result of the admission, said his Lordship, would be that the issue regarding the determination of the status would abate and a fresh issue would arise as to whether the record

of rights had been rebutted.

22. Exercising power u/s 103 of the Code of Civil Procedure, Chatterjee J. came to the conclusion that the presumption raised by the entry in the record of rights that the Defendants were raiyat sthitiban with effect from 1357 B.S. had been rebutted by the evidence on record. In other words, his Lordship held that the Defendants failed to establish their tenancy under the Plaintiff.

23. His Lordship, however, accepted the third contention of Mr. Ghosh that the first appellate Court acted without jurisdiction in granting a decree for recovery of possession not only in respect of 15 cottahs as originally claimed but also in respect of the remaining portion of the entire dag measuring -48 acre or about 1½ bighas. His Lordship, therefore, allowed the appeal with regard to the portion beyond 15 cottahs and dismissed the appeal so far as the 15 cottahs portion was concerned.

24. The Defendants Appellants have challenged the propriety of the order passed by Chatterjee J. Mr. Ghosh appearing on behalf of the Appellants contended that after having held that the issue as to the relationship of landlord and tenant between the parties had abated, Chatterjee J. should not have entered into the question as to whether the presumption raised by the entry in the record of rights in favour of the Defendants had been rebutted. His argument is that if a suit abates u/s 46 of the West Bengal Estates Acquisition Act, it cannot be decided on merits.

25. Mr. Bakshi, appearing on behalf of the Plaintiff Respondent, on the other hand, submits that Chatterjee J. erred in holding that the present suit was within the purview of Section 46 of the West Bengal Estates Acquisition Act.

26. Before entering into the merits of the case we propose to consider whether the present suit is one of the suits contemplated by Section 46 of the West Bengal Estates Acquisition Act.

27. The present suit bears a close resemblance to the suit considered by a Division Bench in *Lala Gangaram v. Krishna Gopal* (Supra) referred to above. There the primary question for consideration was whether the option to renew given in the original lease had been exercised on behalf of the original lessee. This question was raised on behalf of the original lessee and an application u/s 46 was filed by the original lessee for the stay of the suit. Mr. Atul Chandra Gupta contended on behalf of the lessee that a suit in which the question as to whether or not a person is a tenant is raised in a suit to which Section 46 of the West Bengal Estates Acquisition Act, 1953, (before its amendment by Bengal Act XX of 1957) applies. In support of the said contention Mr. Gupta relied upon the provisions of the Bengal Tenancy Act wherein the items to be included in a record of rights had been stated. He also referred to Rule 26 of the Rules prepared under the West Bengal Estates Acquisition Act, 1953. Mr. Gupta contended that the name of each person, who is a tenant or occupant of land, has to be recorded in the record of rights under Rule 26 of the said Rules. It therefore,

according to him, followed that a suit in which the question arose as to whether or not a particular person was a tenant was a suit which came within the purview of Section 46 of the Estates Acquisition Act and had to be stayed. Mr. Gupta, in effect, submitted that if a suit was instituted respecting any matter which was mentioned in Rule 26, that suit had to be stayed. Their Lordships did not accept the contention of Mr. Gupta. The reason for rejection will appear from the following extract of the judgment: In our opinion this contention of Mr. Gupta cannot be accepted as sound. It is true that in Rule 26 a number of particulars have been mentioned which may be set out in an oracle made under Clause (a) or Clause (b) of Sub-section (1) of Section 39 of the preparation or revision of a record of rights, but that does not mean that any suit relating to any of the matters mentioned in the said rule would be a suit which has to be stayed u/s 46 of the West Bengal Estates Acquisition Act, 1953. In our opinion, the correct position is that although various particulars have to be given in a record of rights to be prepared under the new Act, the suit which has to be stayed u/s 46 would be only those suits in which the determination of rent or the determination of the status of any tenant or the incidents of any tenancy to which the record of rights relates are raised; ...we cannot accept the view that any suit which may be filed relating to any matter to be included in a record of rights must be stayed u/s 46 of the Act, nor can we accept the view that the question as to whether or not a person is a tenant comes within the words "status of any tenant" or within the words "incidents of any tenancy". The question as to the status of a tenant or the incidents of any tenancy in our opinion presupposes the existence of a tenancy. In other words, the question of the status of a tenant or the incidents of any tenancy can arise only on the admitted fact of a tenancy.

28. Their Lordships concluded their judgment as follows:

The suit in which the title has to be determined, namely, whether or not X is a tenant in respect of a particular land or Y is the landlord thereof does not in my opinion come within the purview of Section 46 of the said Act.

29. In *Panchanan v. Kishori* (Supra) P.N. Mookerjee and Niyogi JJ. also took the same view as to the scope of Section 46. The judgment was delivered by P.N. Mookerjee J. His Lordship referred to *Lala Gangaram's* case (Supra) and observed as follows:

Whatever might be said about some of the observations in the said reported decision, there can be little doubt that the actual decision in that case was correct and that has been followed in subsequent decisions of this Court. It appears to us clear also that what Section 46 contemplates is stay of further proceedings in suits where the "question of rent" or the "question of status" of the tenant or "incidents" of the tenancy were or, at least, were also matters for determination as distinct from the question of existence or non-existence of the particular tenancy. That distinction should always be borne in mind in applying the said section....

In Panchanan's case (Supra) the suit was one for partition. The Defendants Nos. 1, 2, 3 and 4, admittedly co-sharers having 7 as. interest, claimed tenancy right under the other co-sharers in respect of the remaining 8 as. They applied for the stay of the suit u/s 46 of the West Bengal Estates Acquisition Act. It is in this context that P.N. Mookerjee J. made the above observations and affirmed the decision of the learned Subordinate Judge dismissing the application u/s 46.

30. In the instant case, the Defendants have been described in the plaint as licensees whose licence has been revoked. The Defendants, on the other hand, claim tenancy under the Plaintiff. So, in the instant suit, the only question involved is the existence or nonexistence of a tenancy. As has been pointed out by S.R. Das Gupta J. in Lala Gangaram's case (Supra) the question as to whether or not a person is a tenant does not come within the words "status of a tenant" or within the words "incidents of any tenancy". Therefore, on the authority of the two cases cited above it may safely be concluded that the present suit is not within the purview of Section 46.

31. Mr. Ghose appearing on behalf of the Defendants Appellants has drawn our attention to the case of Dharendra Nath Bose v. Sushil Kumar Safui (Supra) where, according to him, a suit almost on all fours with the instant suit, was stayed u/s 46 of the West Bengal Estates Acquisition Act, 1953. Dharendra's case was decided by a Division Bench consisting of Das Gupta and Guha JJ., and the judgment was delivered by the former. Let us see how far the suit in Dharendra's case can be regarded as of the same nature as the suit in the instant case. In the plaint in Dharendra's case the Plaintiff averred that he had been in possession of the suit land as a tenant under the Defendant since the year 1356 B.S. that a new settlement was proposed in 1359 B.S., whereby it was agreed that the Defendant would grant a permanent lease, but no permanent lease had actually been granted, that the Defendant had been trying to oust the Plaintiff forcibly though he had valuable fish cultivation, golaghar, tube well etc. in the property, that the Defendant wrote several letters to (the Plaintiff asking him to vacate the property and that the Plaintiff gave replies of those letters. In the prayer portion the relief prayed was in these words:

Plaintiff prays:

(a) That Plaintiff's tenancy right upon the property described in the schedule below may be declared and the Defendants may be restrained by a decree for permanent injunction from interfering with the Plaintiff's possession therein either by ousting him or in any other way.

(b) That a decree for costs of this suit may be passed against the Defendants.

(c) That during the pendency of this suit the Defendants may be temporarily restrained by an order of temporary injunction from interfering with the Plaintiff's possession of suit property.

(d) That the Court may be pleased to pass such other order or any order as may

be deemed fit.

32. The main defence taken in the written statement was that the¹ property in suit was wholly a Jalkar and was settled by the landlords first with one Khagendra Nath Singh, and then with the Plaintiff's father Dhirendra Nath Safui for 1356 B.S. and again for 1357 B.S. as a Jalkar., that on the death of the Plaintiff's father k was settled with the Plaintiff for 1358, 1359, 1360 and 1361 B.S. each time for one year only after the expiration of the settlement of the preceding year, for the purpose of rearing and catching fish without any right to soil or sub-soil, that the Defendants had served on the Plaintiff a notice asking him to vacate and leave the property in suit in complete khas possession of the Defendants on the expiry of the settlement ending in Magh, 1361 B.S. There was also a denial of an agreement to grant permanent lease of the disputed Jalkar to the Plaintiff.

33. The Plaintiff referred in his plaint to certain letters which indicated that there was a dispute as regards the incidents of his tenancy- The Plaintiff's case was that it was a bemeadi settlement whereas the Defendant's case was that the settlement used to be given from year to year and that the settlement given for the year 1361 B.S. had already expired. K. C. Das Gupta J., as he then was, expressed the following opinion as to the real issue involved in the suit:

I find it difficult to see how this case can be properly decided without a decision of the question on which the real dispute was based. To say that without saying anything about the tenancy, the Court might merely decree that there is a tenancy would be to shirk the issue. To try such a suit as a suit not for the determination of any incidents of the tenancy is to mistake the form for the substance.

As his Lordship thought that the suit before him was one for the determination of the incidents of the tenancy claimed by the Plaintiff he held that the suit was within the purview of Section 46. As the suit was instituted after the publication of the order under Sub-sections (1) of Section 39 of the West Bengal Estates Acquisition Act, 1953, for the preparation of record of rights, his Lordship passed an order rejecting the plaint.

34. Whether a suit is for the determination of any rent or determination of the status of any tenant or the incidents of any tenancy to which the record of rights relates is to be ascertained" on a conspectus of the entire plaint and not from the prayer portion only. Das Gupta J. in his judgment quoted Section 46, as it stood before its amendment in 1957 by the Amending Act XXV of 1957. Evidently, his Lordship decided the matter on the language of Section 46 as it stood before its amendment in 1957. Under that section the Court was not competent to entertain any suit for the determination of lithe matters mentioned therein after the publication of the order under Sub-sections (1) of Section 39. His Lordship was considering the question of jurisdiction as the order under Sub-section (1) of Section 39 had been made before the institution of the suit. It, therefore,

became necessary to construe the plaint and on such construction his Lordship thought that the suit was, in substance, one for the determination of the incidents of the tenancy claimed by the Plaintiff. If his Lordship was of opinion that the only question raised in the plaint was whether or not a person was a tenant, his Lordship would have held that the suit was outside the purview of Section 46. As a matter of fact his Lordship observed:

There are at least two Bench decisions of this Court which are binding on us.

One of those two decisions is the case of *Lala Gangaram v. Krishna Gopal Jhunjhunwalla* (Supra) wherein it has been held, inter alia, that a suit in which the title has to be determined, namely, whether or not X is a tenant does not come within the purview of Section 46 of the West Bengal Estates Acquisition Act.

35. We cannot agree with Mr. Ghosh that the instant suit is of the same nature as the suit in *Dhirendra's* case (Supra). The instant suit has been instituted by the owner. On the plaint the suit cannot be said (to be one for the determination of rent or the determination of the status of a tenant or the determination of the incident[^] of any tenancy. The Plaintiff's "case is that a licence for reward was granted to the Defendants and that the licence has been revoked. The other suit was instituted by the tenant and on the plaint it was a suit for the determination of the incidents of a tenancy. Therefore, on the plaint, the two suits are entirely different in nature. The plaint was rejected in that suit because on the plaint it was the suit for determination of the incidents of a tenancy, and for the purpose of deciding whether the suit could be entertained it was not necessary to consider anything except the plaint. If the instant case had been instituted after the order u/s 39(1) had been made, it could not be said that the Civil Court was not competent to entertain the suit, because on the plaint the suit is not one for the determination either of rent or of the status of a tenant or of the incidents of any tenancy. Therefore, the ruling in *Dhirendra's* case (Supra) can have no application to the facts of the present case.

36. In the instant case, the question to be considered is the question of stay and abatement. Before the amendment of Section 46 in 1957, for the purpose of stay too the only thing to be considered was the plaint. The section was amended retrospectively in 1957. The present position, therefore, is that for the purpose of stay, not only the plaint but the written statement too is to be considered because a suit has got to be stayed if any of the matters mentioned in the first part of Section 46 is in issue. This must always be deemed to have been the law. Even on this view of the law regarding stay, it cannot be said that; any of the matters mentioned in the section, viz., rent, status and incidents is in issue in the present suit. Issue No. 1 raises the question whether the Defendants have any jamai right under the Plaintiff. This issue, too, does not relate to any of the matters mentioned in Section 46 because, as laid down in *Lala Gangaram's* case (Supra), the words "status of any tenant" or the words "incident of any tenant" or the words "incident of any tenancy" do not include the question as to whether or not a person is a tenant.

37. The question may be considered from another point of view, when a suit on the plaint is not one for the determination of rent, for determination of the status of any tenant or determination of the incidents of any tenancy, such matters cannot be said to be in issue by reasons of any averments in the written statement. For instance, |the present suit on the plaint is not one for the determination of any of the matters enumerated in Section 46, because the Plaintiff's definite case is that the Defendants obtained settlement as licensees and that the licence has been revoked. Simply because the Defendants claim tenancy under the Plaintiff, it will not be necessary to decide either the question of rent or the question of the statute of the Defendants as tenants or the question of the incidents of their tenancy. If there is a finding that the Defendants are tenants, that will be sufficient for the purpose of defeating the suit. It will not be necessary to determine their rent or their status as tenants or the incidents of their tenancy. It is for this reason that in a suit like this the question as to whether the Defendant is a tenant or not does not come within the words "the status of any tenant" or the words "the incidents of any tenancy".

38. If a Plaintiff wants a bare declaration that he is a tenant under the Defendant and for giving that declaration it is not at all necessary to determine any of the matters mentioned in Section 46, such a suit too will be outside the purview of Section 46. But, a suit of this nature is rarely to be met with. In most cases, when a suit of this nature is instituted, it becomes necessary to determine that some or all of the matters mentioned in Section 46 before the Plaintiff can be declared to a tenant. In Dhirendra's case (Supra) Das Gupta J. was definitely of opinion that the Plaintiff's prayer for the declaration of tenancy could not be given without determining the incidents of the earlier settlements set up by him in the plaint. It was for this reason that the plaint was rejected in that suit. The suits in Lala Gangaram's case (Supra) and Panchanan's case (Supra) were not on the plaint suits either for declaration of tenancy or for the determination of any of the matters mentioned in Section 46 as in the present case. Therefore, the present case is to be decided on the principles laid down in Lala Gangaram's case and Panchanan's case and not on the principles laid down in Dhirendra's case (Supra). Again, there cannot be any question of conflict, either apparent or real, between the law laid down in Dhirendra's case and Panchanan's case, because the nature of the suit in Lala Gangaram's case and Panchanan's case was entirely different from the nature of the suit in Dhirendra's case.

39. We, therefore, cannot accept the contention of Mr. Ghosh, the learned Advocate for the Appellants, that on the principles laid down in Dhirendra's case the present suit should have been stayed by the trial Court or that on the final publication of the record of rights the suit has abated.

40. The second appeal preferred by the Defendants to this Court was allowed in part, because this Court held that the Plaintiff was not entitled to get any decree for khas possession for more than 15 cottahs out of the total area of 48 acres comprised in the dag. No cross-appeal under Clause 15 of the Letters Patent has

been filed by the Plaintiff. Hence, it is not necessary to consider whether Chatterjee J. in deciding the second appeal was justified in refusing a decree for khas possession for any land beyond 15 cottahs as originally claimed in the plaint.

41. In the result, the appeal fails and the appeal is hereby dismissed. There will be no order for costs.

D. Basu, J.

42. I agree.