

(1940) 11 AHC CK 0009
In the Allahabad High Court

Shanti Sarup Das

APPELLANT

Vs

Asharfi Singh

RESPONDENT

Date of Decision : 26-11-1940

Acts Referred:

Citation : AIR 1941 All 61 : (1941) 11 AWR 34

Hon'ble Judges : Collister, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Collister, J.—This is a defendant's second appeal arising out of a suit for the demolition of a building and for a permanent injunction to restrain the defendant from making any construction in future upon the plot in suit. There was a fixed-rate holding of 16 bighas belonging to one Jangi within the municipal limits of Benares. After Jangi's death the holding passed to his widow, Mt. Phulani. On 15th June 1936 Mt. Phu-lani sold 2 biswas of this holding to the defendant. We shall have occasion later on to particularise the main allegations in the plaint, but for the present it will suffice to say that in brief the plaintiff's case was that the defendant was unlawfully constructing a building on this plot of 2 biswas. He accordingly instituted this suit for a mandatory and for a prohibitory injunction. The defence, so far as it is necessary to state it for the purpose of this appeal, was that the defendant had committed no act which was detrimental to cultivation, that he had not in any way altered the nature of the land, as alleged by the plaintiff, that in any event the plaintiff was not entitled to have the construction demolished and that the civil Court had no jurisdiction to try the suit. The trial Court found against the defendant and decreed the suit, and that decree has been affirmed in appeal by the District Judge. The first plea taken before us on behalf of the defendant-appellant is that it was the revenue Court and not the civil Court which had jurisdiction. In this connexion learned Counsel for the defendant-appellant relies upon Section 230, Agra Tenancy Act (3 of 1926), which reads as follows:

Subject to the provisions of Section 271, all suits and applications of the nature specified in Schedule 4 shall be heard and determined by the revenue Courts, and no Courts other than a revenue Court shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application or of any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application.

2. There is also an explanation to the section, which we shall have occasion to refer to at a later stage of this judgment. Learned Counsel's first contention is that the suit out of which this appeal has arisen lay to the revenue Court u/s 85 of the aforesaid Act : vide Group A, Serial No. 3, Schedule 4. Now in the previous Act, that is to say, Act 2 of 1901, a fixed-rate tenant, in common with other tenants except permanent tenure-holders, was liable to ejectment u/s 57; and Section 65 provided that, in addition to or in lieu of suing for ejectment, the landholder might sue for compensation or for an injunction with or without compensation if his cause of action rested upon any of the grounds set out in Clause (b) or (c) of Section 57. In Act 3 of 1926, the law was altered and a fixed-rate tenant became exempt from ejectment. In order to understand Section 85 of Act 8 of 1926, we must first look at Section 84. The last-named section provides for the ejectment of a tenant for an act detrimental to the land which he holds or inconsistent with the purpose for which it was let or for breach of a condition of the contract between him and his landholder; but the section specifically excludes fixed-rate tenants, as well as permanent tenure-holders from its operation. Section 85, which learned Counsel for the defendant-appellant claims to be applicable reads as follows:

85. (1) A decree for ejectment u/s 84 may direct the ejectment of the tenant either from the holding or from such portion thereof as the Court having regard to all the circumstances of the case, may direct.

(2) Such decree may further direct that if the tenant repairs the damage, or pays such compensation as the Court thinks fit within one month from the date of the decree, or such further time as the Court may, for reason to be recorded, allow, the decree shall not be executed except in respect of costs.

(3) Notwithstanding anything contained in this section a landholder may, in addition to, or in lieu of suing for ejectment, sue : (a) for compensation, or (b) for an injunction with or without compensation, or (e) for the repair of the damage or waste, with or without compensation.

3. Learned Counsel for the defendant-appellant concedes - as in fact he must concede - that Clause (1) and (2) of this section refer only to decrees passed u/s 84, from the operation of which fixed-rate tenants are excluded. But he pleads that Clause (3) of Section 85 applies to all tenants, including fixed-rate tenants, and therefore the suit lay in the revenue Court under Sub-clause (b) of Clause (3) of this section. In our opinion there is no force whatsoever in this plea. The words "notwithstanding anything contained in this section...." leave no doubt in

our mind that what was meant by the Legislature was that while the landlord was at liberty u/s 84 to sue for a decree for ejectment such as is referred to in Clauses (1) and (2) of Section 85, he might also add a prayer in his suit u/s 84 for one of the reliefs mentioned in Clause (3) or he might sue exclusively u/s 84 for one of such reliefs or for a combination of them. The words "in this section" show clearly that Clause (3) of Section 85 is referable to Section 84 equally with Clause (1) and (2). A fixed-rate tenant having been specifically exempted from ejectment by Section 84, it is obvious that the provision in Section 85 which allows a landholder to sue for injunction etc., in lieu of or in addition to suing for ejectment can have no application whatsoever to a fixed-rate tenant. It is thus clear that a suit under Schedule 85 of Act 3 of 1926 was not competent.

4. Learned Counsel for the defendant-appellant next contends that a proceeding in the revenue Court was competent u/s 120(1)(b) of Act 3 of 1926 : vide Group D, serial No. 6 of Schedule 4. Section 120 provides as follows:

If a question arises between a tenant and his landholder : (a) as to the right to make an improvement or (b) as to whether a particular work is an improvement, or (c) as to the amount of compensation or abatement of rent due under Sub-section (3) or Sub-section (4) of Section 115, the Assistant Collector in charge of the sub-division shall, on the application of either party, decide the question.

5. In para. 4 of the plaint it was alleged that by the construction of a building the defendant had altered the nature of the land in breach of a condition of his tenure and had thereby committed a wrongful act. In para. 3 of the additional pleas of the written statement, the defendant pleaded that he had not altered the nature of the land, that he had done no act such as was detrimental to agriculture and that in any case the plaintiff had no right to have the construction demolished. The word "improvement" finds no place anywhere in the pleadings by the parties and it is clear that there was no specific plea as to whether the building in suit did or did not constitute an improvement, and therefore there was no issue on the subject. The question was, however, agitated both in the trial Court and before the lower appellate Court and both Courts have held that the building was not an improvement as defined in the Act. Learned Counsel for the defendant-appellant rests his contention upon Section 230 of Act 3 of 1926 and its Explanation. We have already quoted the section in an earlier portion of this judgment and it is unnecessary to repeat it. The explanation reads as follows:

If the cause of action is one in respect of which adequate relief might be granted by the revenue Court, it is immaterial that the relief asked from the civil Court may not be identical with that which the revenue Court could have granted.

6. Learned Counsel pleads that in lieu of instituting a suit in the civil Court the plaintiff ought to have applied to the revenue Court u/s 120(1)(b) of the Act. It seems to us that there are several answers to this contention. As we have already seen, Section 230 opens with the words "subject to the provisions of Section 271, all suits and applications of the nature specified in the Schedule

4...."

7. Now it cannot possibly be said that a suit for a mandatory and for a prohibitory injunction is of the same nature as an application u/s 120(1)(b) for a decision as to whether a work is or is not an improvement as defined in the Act. Moreover, all that the Assistant Collector is competent to do under that section is to give a declaration in the affirmative or in the negative, and this would certainly not amount to "adequate relief" to the plaintiff in respect to his cause of action within the meaning of Section 230 and its Explanation. It would, on the contrary, be totally inadequate inasmuch as the plaintiff would still have to sue for demolition and for a permanent injunction if the revenue Court's decision were in his favour. Then again there was no obligation on the plaintiff to claim that the building was not an improvement within the meaning of the Act. As we have seen, in para. 4 of his plaint he pleaded that the defendant had acted unlawfully and in contravention of the conditions of his tenure, and we cannot see that the plaintiff was under any necessity of alleging that the building which had been put up was not an improvement as recognised by the Act. It was open to the defendant, if he so desired, to apply to the revenue Court u/s 120 for a decision as to whether the building was an improvement as defined in the Act and to pray for a stay of proceedings meanwhile in the civil Court; but this he did not do. Moreover, there is nothing in the language of Sections 120 and 230 of the Act which can be construed as precluding the civil Court from determining a plea advanced before it as to whether a work is or is not an "improvement". What Section 230 provides (so far as we are concerned in this appeal) is that if an application is preferred u/s 120(1)(b), it shall be heard by the Assistant Collector in charge of the sub-division; it nowhere lays down that the civil Court is incompetent to decide a plea taken in a suit of which it has cognizance as to whether a work does or does not qualify as an improvement under the Act.

8. From what we have said above it is, we think, clear that the suit out of which this appeal has arisen did not lie to the revenue Court u/s 85, Agra Tenancy Act (3 of 1926) and that its hearing by the civil Court was not barred by the provisions of Section 230 read with Section 120 of the Act. The learned Counsel for the defendant concedes that, apart from Section 85 and Section 120, Agra Tenancy Act, the revenue Court would not be competent to hear this suit. What we now have to consider therefore is whether the suit lay in the civil Court. *Ubi jus ibi remedium*, and we have no doubt whatever that, upon the allegation that the defendant had committed an act which amounts to an invasion of the rights of his landholder, the suit lay in the civil Court under the provisions of Section 9, Civil P.C. which provides:

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

9. In this connection we may usefully refer to Illus. (k) of Section 54, Specific Relief Act, which says:

A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

10. It is thus clear that the suit lay in the civil Court. In fact learned Counsel for the defendant-appellant does not contest the point that, if the suit did not lie in the revenue Court, the civil Court had jurisdiction to try it. A Bench of this Court in *Kashi Kahar Vs. B. Asharfi Singh*, , held that a suit of this nature was triable in the revenue Court; but that view was subsequently dissented from by another Bench of this Court, of which one of us was a member, in *Asharfi Singh Vs. Chandrika Prasad Kuari*, . It was on account of this conflict of view that the appeal with which we are dealing has been referred to a Full Bench. In the last mentioned case at P. 264, the Court observes:

In the present case it has been found by both the Courts below that the plot in dispute was originally let for agricultural purposes. The defendant-respondent now proposes to build a temple on the plot and is thus proposing to do an act which is inconsistent with the purpose for which the plot was let. This act of the defendant is in contravention of the original contract by which the plot was let out and the land-holder must, therefore, have the right to have the original contract respected and acted upon unless there is some law disentitling him to do so.

11. At page 266, there is the following pronouncement:

It may straightway be conceded that Section 85(3) has no application to fixed-rate tenants. It must further be admitted that the remedy by way of ejectment is not available to a land-holder as against a fixed-rate tenant who does any act inconsistent with the purpose for which the holding was let. This is by virtue of Section 84 read with Section 77 of the Act. Section 77 lays down that "no tenant shall be ejected otherwise than in accordance with the provisions of this Act," It follows from this section that the provisions in the Act as regards ejectment are exhaustive and a suit for ejectment against a tenant can lie only if permitted by the Act. There is, however, no provision corresponding to Section 77 barring suits for injunction or for compensation against a fixed-rate tenant. In other words it has not been provided by the Act that no suit for compensation or for injunction shall be brought against tenant otherwise than in accordance with the provisions of the Act. The provisions of the Act as regards such suits are not, therefore, exhaustive and cannot override the general law which entitles a person to remedy for the wrong done to him. The conclusion is, therefore, irresistible that a landholder can sue a fixed-rate "tenant for compensation or for an injunction if the latter does some act inconsistent with the purpose for which the holding was let. Such a suit is not barred by any provision of the Tenancy Act, nor is by the Act made cognizable by the revenue Court. A suit for compensation or for an

injunction as against a fixed-rate tenant must, therefore, in view of the provisions of Section 9, Civil P.C. lie in the civil Court.

12. With these observations we are in complete accord. As regards the wisdom of the Legislature, it must be borne in mind that fixed-rate tenants are a privileged class in common with permanent tenure-holders. Apart from other privileges, they are exempt from ejectment and there is no occasion for surprise if the Legislature decided that suits against them of the nature of the suit out of which this appeal arises should not be heard by the revenue Court, but that these special tenants should have the advantage of a trial by a civil Court. For the reasons which we have given we are of opinion that the civil Court had jurisdiction to hear and determine this suit.

13. The next plea taken by learned Counsel for the defendant-appellant is that, assuming that the construction in question is not an improvement as defined in the Act, there has been no invasion of the plaintiff's right. He contends that the defendant was under no obligation to use the land for agricultural purposes; he was perfectly at liberty to alter its nature by constructing anything he liked upon it, providing always that the regular payment of rent to the landholder was duly safeguarded. Learned Counsel has attempted to base this contention on (1) a supposed inference to be drawn from Section 11 relating to permanent tenure-holders, who do not "hold" land, but "hold an interest" in land, and (2) the provisions of Section 117, T.P. Act, (4 of 1882) in which a distinction between leases for agricultural purposes and leases for other purposes was recognised by the Legislature. We have had difficulty in appreciating this argument. Learned Counsel admits that originally, by which he means at the date, prior to the permanent settlement, when the land was let to his predecessor-in-interest, it was let to him for agricultural purposes and that there was a restrictive covenant against its use for purposes other than agricultural, but he contends, upon grounds which we are totally unable to appreciate, that after, and somehow or other by virtue of the permanent settlement and notwithstanding the original covenant the defendant's predecessor acquired rights which were equal to and parallel with the rights of a non-agricultural lessee and were not subject to the restriction which is imposed by Act 3 of 1926, and he pleads that he was not divested of these rights by Act 4 of 1882 which had no retrospective effect. Section 12, Agra Tenancy Act, (3 of 1926) provides as follows:

12. (1) When any land in a district or portion of a district which is permanently settled has been held by a tenant from the time of the permanent settlement at the same rate of rent, such tenant shall have a right of occupancy at that rate.

(2) Such tenant shall be called a fixed-rate tenant.

14. Section 22 of that Act provides that "the interest...of a fixed-rate tenant is both heritable and transferable." Thus a fixed-rate tenant is in a privileged position. He has rights approximating to the rights of an owner; but his rights are not absolute inasmuch as the landholder retains the right of proprietary

reversion. In other words, notwithstanding such dominion as a fixed-rate tenant has over his holding, the landholder remains the proprietor. Three words which are defined in the Act occur in Section 12. These are "land", "tenant" and "rent". "Land" was not defined in any tenancy enactment prior to 1901. Section 23(4) of Act 10 of 1859 provided that suits for arrears of rent on account of land should be cognizable by the Collector; and in *E.J. Rooke v. Bengal Coal Co.* (01) 28 Cal. 485, it was held that the word "land" in that section referred to land granted for agricultural or horticultural purposes. In Act 18 of 1873 under which fixed-rate tenants for the first time came into existence it was enacted in Section 1 that

...nothing herein contained applies to land for the time being occupied by dwelling houses or manufactories or appurtenant thereto.

15. In Section 1 of Act 12 of 1881 the same words occur, but they terminate with the reservation "...so long as such land is not let to agricultural tenants". In Act 2 of 1901 land was for the first time positively defined, it was defined as "land let or held for agricultural purposes." We now come to Act 3 of 1926. Section 3(2) defines land in the following terms : "'land" means land which is let or held for agricultural purposes, or as grove-land or for pasturage." The definition then goes on to say:

It includes land covered by water used for the purpose of growing singhara or other similar produce, but does not include land for the time being occupied by dwelling houses or manufactories or appurtenant thereto.

16. It will be observed that the words "so long as such land is not let to agricultural tenants", which appeared in Act 12 of 1881, have not been reproduced in subsequent legislation. Clause (3) of Section 3 of Act 3 of 1926 defines rent as "whatever is, in cash or kind, to be paid or delivered by a tenant for land held by him...." Clause (6) defines a tenant as "the person by whom rent is, or but for a contract, express or implied, would be payable." Thus the keyword, so to speak, is "land." Now the defendant is admittedly a fixed-rate tenant and such tenants are defined in Section 12 of the Act. Thus he pays "rent" for "land" and the land for which he pays rent is land as defined in Section 3(2) of the Act. Thus it must be held that, when Act 3 of 1926 was enacted, the holding of the defendant's predecessor-in-interest was land which was "let or held for agricultural purposes," that is to say he was a person holding land, as defined in the Act, from the time of the permanent settlement at the same rate of rent." Improvement" is defined in Section 3(11) and Section 109, enacts that "...a fixed-rate tenant may make any improvement." This means any improvement as defined in Section 3(11) and by necessary implication it excludes any work which does not satisfy these conditions.

17. As we have already said, learned Counsel for the defendant-appellant admits that originally the land was let to his predecessor for purposes of husbandry, and it appears to us that Section 109 of Act 3 of 1926, read with the definition of "land" in Section 3(2), was a recognition by the Legislature of a limitation of the

fixed-rate tenant's beneficial user, such limitation arising out of the restrictive covenant-whether such covenant may have been express or implied which was originally entered into by the fixed-rate tenant's predecessor and his landlord prior to the permanent settlement. The defendant's position must rest upon the provisions of Act 3 of 1926; it is in no way affected either by the Transfer of Property Act of 1882 or by any other Act of the Legislature intermediate between the permanent settlement and 1926 or in any other manner or by any other circumstance. Since the defendant is a fixed-rate tenant as defined in the Act which was in force when the building was constructed and when the suit was brought, it follows that the plot which he holds is "land" as defined in Section 3(2) of the Act and that he is not entitled to make any construction upon it which does not qualify as an "improvement" within the meaning of Section 3(11). Our finding therefore is that, unless the building in question is an improvement as defined in Section 3(11) of Act 3 of 1926, its construction was an actionable invasion of the landholder's rights.

18. Finally, learned Counsel for the defendant-appellant contends that the building is in fact an improvement as recognized by the Act. Section 3(11) enacts as follows:

"Improvement" means with reference to a tenant's holding, any work which adds materially to the letting value of the building which is suitable to the holding and consistent with the purpose for which it was let, and which, if not executed on the holding, is either executed directly for its benefit, or is after execution made directly beneficial to it : and subject to the foregoing provisions, includes : (a)...(b)...(c)....(d) the erection of buildings on holding or in its immediate vicinity elsewhere than on the village Site, required for the convenient or profitable use or occupation of the holding and (e)....

19. In the lower Appellate Court it was contended that the building in suit was for the purpose of keeping seeds etc., but learned Counsel who appears for the defendant in this Court admits that the building is a masonry dwelling house; and it has been found by the Courts below that it covers one-half of the plot held by the defendant and that the costs of its construction was Rs. 2500. Now, if the defendant's plot of 2 biswas is to be treated as a holding within the meaning of Section 3(8) of the Act, it is obvious that the building, which covers one-half of the plot, is not "suitable to the holding and consistent with the purpose for which it was let." But learned Counsel pleads that it qualifies as an improvement in respect to the larger holding as constituted by the plots retained by Mt. Phulani plus these 2 biswas. It appears that the 2 biswas though sold to the defendant, were for the benefit of the panchayati akhara, and we are unable to see how the dwelling house which has been built by the defendant for the akhara on these 2 biswas is a work which "is suitable to the holding and consistent with the purpose for which it was let, and which...is either executed directly for its benefit or is after execution made directly beneficial to it." The best person to speak on this subject would have been Mt. Phulani herself; but she was not called as a witness,

the obvious reason being that she had divested herself of all interest in the 2 biswas which she had sold and was no longer concerned with it. It is, we think, manifest that the defendant has failed to show that the building in question is an "improvement" as defined in Section 3(11) of the Act. As a result of our findings this appeal fails and is dismissed with costs.