
(1965) 08 CAL CK 0013
In the Calcutta High Court

Tara Prasad Mukherjee and Others

APPELLANT

Vs

Ganesh Chandra Mondal and Others

RESPONDENT

Date of Decision : 10-08-1965

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 106, 111, 111(g), 117

Citation : 70 CWN 652

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Bankim Chandra Roy and Binoy Krishna Mukherjee, for the Appellant; Sachindra Chandra Das Gupta and Murari Mohan Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This is a second appeal by the plaintiffs who filed a suit for khas possession against the defendants. The plaintiffs were the patnidars in respect of two mohuls, mouza Kharia and Mangrajpur which were part of the mohuls of the Maharaja of Burdwan. They appointed Nandiram Mondal and Ganesh Chandra Mondal as paiks who were allowed to possess a few bighas of land in lieu of wages, during the continuance of their service as paiks. Nandiram died leaving defendants Nos.2 and 3 as the heirs. In Baisak, 1362 B.S. the plaintiffs asked the defendants to give up the lands in suit and they were also dismissed from service on that date. It is the plaintiff's case that the defendants agreed to quit. But on the 2nd Pous, 1363 B.S. the defendants refused to vacate. It was then that the plaintiffs instituted the suit on the 23rd March, 1957.

2. Defendants Nos. 1 to 3 filed a written statement and the main defence is as follows :-

They were working as paiks for generations. The defendants' predecessor got it by grant, burdened with service. The claim that the defendants are now tenants under the Government and that from 1362 B.S. the plaintiffs have no right, title

and interest in the lands in suit.

3. The trial Court decreed the suit. On appeal the lower appellate Court allowed the appeal and set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiffs. In this second appeal the plaintiffs, therefore, are the appellants.

4. Important questions of chakran land and their incidents arise in this appeal. The settlement record-of-rights, exhibit 2 series described the possession of Nandiram and Ganesh as that of chakrans. They also described that their possession was in lieu of service as paiks. No question, therefore, of payment of any rent arises in this case and it is common case that the defendants do not pay any rent at all and they possessed the lands in lieu of wages. There is concurrent finding of fact by both the Courts below that it is a case of a grant of an office remunerated by the use of land and that it is not a case of grant of land burdened with service. That concurrent finding of fact must, therefore, be accepted as correct in this second appeal. The importance of this finding of fact bears on the general theory that where there is a grant of office, land used as a consequence thereof is prima facie resumable when the service is no longer required but not so where the grant is of the land itself burdened with service.

5. Two reasons on which the lower appellate Court dismissed the plaintiffs' suit may now be stated. The first reason is that the plaintiffs could not re-enter on the lands without service of notice on the defendants terminating their service and the lower appellate Court came to the finding that their service had not been terminated by any valid notice. The second reason is that the lower appellate Court came to the finding that the interest of the plaintiffs vested in the State of West Bengal in 1362 B.S. and that the plaintiffs had failed to prove that they retained the disputed lands u/s 6(1)(d) of the Estates Acquisition Act.

6. In this appeal those two points have been urged before me by the appellants. According to the appellant's contention, the lower appellate Court was wrong in holding that no notice was given and as such there could be no decree for eviction and they further contended that, in fact, no notice was necessary in law. The next contention of the appellants was that the lower appellate Court was wrong in coming to the conclusion that the appellants had failed to prove that they retained or applied for retention order of the land u/s 6(1)(d) of the Estates Acquisition Act. Both these points require consideration specially in the light of the incidents of chakran lands.

7. A significant point in this appeal is whether the Bengal Tenancy Act applies to this case having regard to the provisions of Section 181 thereof or whether Section 105 of the Transfer of Property Act applies. On the decision of that question will depend how far notice, if at all, is necessary in the case of eviction from chakran lands.

8. The essential character of chakran land usually described as service tenure or service tenancy has been the subject of many decisions and controversy. The

words, "service tenure" or "service tenancy" do not really imply any tenure as distinguished from a holding. The words, "service tenure" occur in Section 181 of the Bengal Tenancy Act. The relevant part of Section 181 of the Bengal Tenancy Act on this point is "Nothing in this Act shall affect any incident of a service-tenure, or in particular, shall confer a right to transfer or bequeath a service-tenure which, before the passing of this Act, was not capable of being transferred or bequeathed." The words "service-tenure" were not defined by the Bengal Tenancy Act. Service to the lessor by the lessee as a consideration for a lease or a tenancy appears to be excluded by the definition of rent on Section 3(13) of the Bengal Tenancy Act which speaks of rent only in money or in kind. Service does not come within the expression "money" or "kind". The definition of a tenant, however, in Section 3(17) of the Bengal Tenancy Act meaning a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person might have included chakrans as tenants but for the limited definition of rent as pointed out above and for the proviso u/s 3(17) which appear to exclude a person who occupies land in lieu of wages for service from being a tenant under the Bengal Tenancy Act. But then expressly service to the lessor can be consideration for the lease under the definition of a lease in Section 105 of the Transfer of Property Act.

9. The origin and persistence of this service-tenure are a part of the economic and social history of the country. The land marks for this service-tenure can be seen from such institution as (1) thanadari lands, (2) chowkidari chakran lands and (3) Chakran or service lands. The thanadari lands were appropriate to the maintenance of thanadars appointed by the Zamindars, who had to retain police forces under the control of thanadars. Chowkidari chakran lands were appropriate to the remuneration of village watchmen, etc. The chakran or service lands or ordinary chakran lands were held for purposes other than military or police, e.g., land were held in the so-called village communities by watchmen and others, or else lands were held under private individuals and families for the performance of services, generally relating to religious worship. It will not be necessary, for the purpose of this appeal to refer to the evolution of the chakran lands under the Decennial settlement and the Chowkidari Act (VI, B.C. of 1870), or to the right of Government to resume such lands.

10. This much is clear that the incidents of the service-tenure are nowhere defined in the Bengal Tenancy Act. The first incident appears to be inalienability and impartibility of this service-tenure. The second incident is that it is not liable to sale in execution of a decree, but is liable to forfeiture. The third incident is no right of occupancy can be acquired in a land held under a service-tenure. These are authorities to show that occupancy right cannot be acquired in chowkidari chakran lands and at the same time it has been held that there is nothing to prevent a raiyat of a chowkidari chakran land from acquiring a right of occupancy under Act X of 1859. If occupancy rights were acquired in chakran lands before 1885, they were protected by Section 19 of the Bengal Tenancy Act, 1885 and in this respect there is no difference in principle between chakran lands of a private

nature and those of a public nature. The fourth incident is related to the question of the right of a grantor to resume a service grant.

11. Now in determining whether land which is the subject matter of a service grant is resumable at the will of the grantor or not, the classic distinction has been laid down between the grant of an office to be remunerated by the use of the land and the grant of land burdened with service. On that distinction hinges the law of resumption of chakran lands as explained in the observations of the Privy Council in (1) *Lakhangouda Basavarabhu Sardesai v. Rao Saheb baswant Rao alias Annasaheb Subedar*, 35 CWN 721. In the former case the land will prima facie be resumable when the service is no longer required and in the latter case prima facie it will not be so.

12. On the facts here in the 2nd appeal as concluded by the concurrent findings of facts by both the Courts it has been established that the grant in this case was the grant of an office to be remunerated by the use of land and it was not a grant of land burdened with service. It is an incident of a service-tenure that the holder thereof is liable to be ejected upon refusal to perform the service incidental to the holding. It has been held that a chakran land is resumable by the land owner without notice on refusal of senior Counsel or denial of the landlord's title by the grantee. Where the grant comes into existence before the Transfer of Property Act no notice is necessary for eviction of the service-tenant but the tenancy ipso facto ceases on refusal to perform the service or on the renunciation of his character as service tenant. When the grant came into existence after the Transfer of Property Act the possession of the parties was determined with reference to either clause (b) or clause (g) of Section 111 of the Transfer of Property Act. For the purpose of this appeal it will not be necessary to refer to any further feature of chakran lands.

13. The service tenures originally arose from service which was partly military in character and partly relating to the work of local police force. Chowkidars and Paiks were in every village and they did the work of watchmen for the protection of the person and property of the villagers. It is this work of watchmen that was remunerated by the appropriation of land as Mr. Justice Saradacharan Mitra in his Tagore Law Lectures on The Land Law of Bengal published in 1921 said at page 272, "it would seem that this practice had continued from time immemorial." Here in the present appeal the fact is that the defendants were paiks. They supervised collection of rents for the zamindars. In Justice Mitra's Tagore Law Lecture at page 277 it has been said :-

The village functionaries, including the chowkidars, became, to a certain extent, the servants of the zamindars; and, though the services of the other village functionaries ceased in course of time, those of the chowkidars could not be dispensed with. The two classes of chowkidars, those appointed by the zamindar himself and to whom he granted chakran lands for service, and those who held lands for generations as village watchmen, became almost undistinguishable in character. They agreed in this, that they had lands known as chakran lands, that

they acted under the orders of the same class of masters, and that they were performing the same sort of duties, but they differed material in origin.

14. The celebrated case of (2) Joykrishna Mukherji v. The Collector of Burdwan raised for the first time this question in 1855, how far land held by chowkidars was for performance of services personal to the zamindar and how far the chowkidar was removable at his pleasure? The case ultimately went up to the Privy Council and is reported in 10 Moore's Indian Appeals, 16. The lands in suit there were not held as thanadari lands, in the strict sense of the term, but as chowkidari lands appropriated to the maintenance of an officer whose duty it was to act as village watchman. It was held in that case that the chowkidars in the district of Burdwan had always been accustomed to perform services personal to the zamindars as well as to the police. Their Lordships of the Judicial Committee held there that the lands in question were at the time of Decennial Settlement appropriated, and still liable, to the maintenance of such an officer, and that the taluqdar had no right to take possession of them for his own purposes, and held them, discharged of the obligation to which they were subject. The decree which the Privy Council made in that case was significant and its nature will appear from the following quotation :-

That the lands in question were to be considered as appropriated to the maintenance of a chowkidar or village watchman, and that the right of appointing such an officer belonged to the taluqdar and that such officer was liable to the performance of such services to the taluqdar as, by usage in the zamindari of Burdwan, chowkidars have been accustomed to render to the zamindar.

15. This Privy Council decision set at rest the doubts that were growing about the legal nature and incidents regarding the difference between the ancient chowkidar chakran lands and the lands granted by the zemindars for the performance of private duties. It is now as a result of this decision a question of fact to be decided from the evidence of usage. Reference may also be made in this connection to the observation of the Privy Council in (3) Raja Ranjit Singh v. Kali Dasi Debi, 44, IA 117.

16. Having cleared the ground it will now be appropriate to look more closely to the facts in this second appeal. No doubt, here the outstanding fact is that the defendants have denied the title of the plaintiffs. It is a notice to quit in such facts and circumstances necessary? Reliance has been placed for the appellant on the decision in (4) Raja Sati Prasad Bahadur v. Mahesh Bhunia, reported in 31 CWN 552, a decision of the Division Bench of this Court where it has been observed that when a service tenant refuses service or denies the title of the landlord to resume the land, the lease to him determines and no notice is necessary to evict him. This decision followed an earlier decision of a Division Bench of this Court in (5) Ramnath Seal v. Siba Sundari, reported in 25, CLJ 332 where it has been laid down that if a service tenant renounces his character as a service tenant and denies title of the landlord to resume the land, the lease to him determines and no notice is necessary to eject him. Sir Ashutosh Mukherjee,

J. delivering the judgment in that case at page 334 observed :-

A service tenant holds the land on condition that if he refuses to render service the lease shall determine and thereupon the landlord shall be entitled to re-enter. There can thus be no doubt that if a service tenant renounces his character as a service tenant by claiming to hold the land as money or produce and denies the title of the landlord to resume the land the lease to him determines and no notice is necessary to eject him.

17. Now these two decisions bind me. The facts in this case are that the tenants have denied title of the plaintiffs to resume the land and even have pleaded that they had become tenants of the State and claiming to pay rent to the State. That certainly is denial of title. It also is a renunciation by the defendants of their character to render service as paiks to the plaintiffs. When both these tests are satisfied, on the authority of the two decisions mentioned above, no notice to quit is necessary. The lower appellate Court's decision, therefore, is wrong and cannot be sustained on this point.

18. For the respondents Mr. Das Gupta, however, has relied on some other decisions and it will be necessary to refer to them. Reference in that connection has been made to (6) Jyotish Chandra Mukherjee v. Ramanath Bhadra, reported in LLR 32, Cal 243. In that case A, the owner of a house, by an agreement allowed B to occupy the house in consideration of his rendering services, as a medical practitioner, to A and his family in lieu of rent. Three learned Judges of this Court including the Chief Justice held that such an agreement amounted to a "lease" as defined in Section 105 of the Transfer of Property Act and was terminable at the option of either party by fifteen days' notice expiring with the end of a month of the tenancy. The point there, however, was that by plaintiffs' own pleading in the plaint the agreement between the parties amounted to a lease u/s 105 of the Transfer of Property Act. No further question arose in that case. Secondly, this had nothing to do with the system of service tenure by which paiks were required to render service to the zemindar in lieu of rent. There in that case the plaintiffs were the sebaits of certain deities who agreed with the defendant who was a medical practitioner to allow him to occupy a house and premises belonging to them in consideration of his rendering services as a medical practitioner to the plaintiffs and their families. The decision, therefore, is of little help to the facts and incidents of the present case.

19. Mr. Das Gupta also relied on the decision of (7) Radha Prosad Singh v. Budhu Dushad, reported in ILR 22 Cal 938. That was a Division Bench decision. It laid down that a service tenure created for the performance of service, private or personal to the zemindar may be resumed by the zemindar when the services were no longer required or when the grantee of the tenure refuses to perform the service. I do not see how this case at all helps the respondents. On the contrary, it appears to go against them on the principles laid down there. The point, however, for such Mr. Das Gupta invokes this decision is the necessity of a notice but even then that does not help him because of the facts there. In that

case the suit was for resumption of jagir lands granted by the zemindar to a gorait (village watchman), the lower Courts found that the grant was made in favour of defendant's ancestor more than twelve years before suit and descended from father to son who was allowed to retain possession without rendering services to the zemindar, and that the zemindar could not prove the terms of the land. On those facts it was held that although these facts did not legitimately lead to the inference drawn therefrom by the lower Courts that the tenure was of a permanent character but that the defendant could not be ejected without notice. But then the facts here are very different. There is no question of the owner here allowing the service tenant to continue without rendering services; nor is it a fact that the owner could not prove the terms of the grant before me.

20. For the respondents reliance was also placed on the decision of (8) Nirmal Kumar v. Surjan Dusadh, ILR 9, Pat 425. There it is held that a suit cannot proceed in the absence of a notice on the defendant to quit the land before the suit was commenced because resumption will not as a rule be ordered unless and until it is clearly shown that the defendant was unwilling or incapable of doing the service required. On the facts before me that question is admitted.

21. It is essential to emphasise at this stage the fact that the defendants cannot in fact and law any more render service as paiks to collect rents for the plaintiffs in this case by reason of the passing of the West Bengal Estates Acquisition Act. The whole substratum of this chakran land is gone. Service by the defendants to the plaintiffs cannot in law be rendered now. Therefore, the defendants' character and their liability to render service to the plaintiffs have disappeared for good. That being so, on the principles I have discussed above I hold that no notice to quit is necessary.

22. Finally Mr. Das Gupta for the respondents relies on the Division Bench decision in (9) Panvhu Chakar Behera v. Nagendra Nath Pal Chowdhury, 12 CLJ 480. That decision lays down that a service rendered by a tenant to his landlord is in the nature of rent, and a suit for damages for non-performance of such service is not cognizable in the Court of Small Causes under Article 8, Schedule II of the Provincial Small Causes Courts Act. I am not concerned here with a suit for damages for non-performance of service, nor is it a case for non-performance of service by the tenant. The case before me is a case of legal impossibility of such service being rendered by the tenant to the landlord by reason of the Estates Acquisition Act. In that case defendant holds certain lands under the plaintiffs and agreed to render service as a servant during four months in the year and also to procure two other persons to render similar service for the same period. Mr. Das Gupta relied on the observation of Mr. Justice Mookherjee at page 481-82 of the report to the following effect :-

It was argued with reference to this definition that the services which the defendant undertook to render could not be treated as anything payable or deliverable in money or in kind by him to the plaintiffs, and that consequently it

was not in the nature of rent. In our opinion, the conclusion does not follow from the premises. No doubt, it is possible to maintain the view that service is not "rent" as defined in the Bengal Tenancy Act : and we may in this connection refer to Section 181 of the Bengal Tenancy Act which provides that nothing in the Act shall affect the incidents of service tenures. It may be assumed, therefore, that the intention of the Legislature was that service tenures should not be governed by the provisions of the Bengal Tenancy Act; and that may be the reason why the definition of rent was so framed as to exclude service tenures. But this does not prove that service performed by a tenant is not in the nature of rent; Section 105 of the Transfer of Property Act conclusively shows that the contrary view is well founded.

These observations were made only with a view to determine the question of the jurisdiction of the Provincial Small Causes Court and must be read in that context.

23. It will be necessary now to proceed to the consideration of the question how far Section 105 of the Transfer of Property Act applies to chakran lands. For the respondents it is argued that it applies so that u/s 106 of the Transfer of Property Act a notice in writing will be necessary to terminate the tenancy. Section 105 of the Transfer of Property Act reads as follows in its material portions bearing upon the question to be decided in this appeal:

A lease of immoveable property is a transfer of a right to enjoy such property..... in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically, or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

24. On the strength of that definition it has been argued for the respondents that here service is the consideration and, therefore, service is the rent. Hence it is a lease and, therefore, a notice u/s 106 of the Transfer of Property Act should have been given and as that has not been given the suit must fail.

25. This problem for the purpose of this second appeal can be examined from 2 points of view, first on the basis that the Transfer of Property Act applies and secondly, on the basis that it does not apply.

26. Let us assume that the Transfer of Property Act does apply and that Section 105 of the Transfer of Property Act is attracted. Does it then follow that a notice u/s 106 of the Transfer of Property Act must be given? No doubt Section 106 of the Transfer of Property Act expressly says that the lease is to be terminable by a notice in writing mentioned there. Termination of the lease on notice is, however, not the only provision in this connection. The determination of a lease is also provided for in Section 111 of the Transfer of Property Act. If Section 105 of the Transfer of Property Act applies then ipso facto Section 111 would also apply. If that is so, then Section 111 (g) provides that a lease of immovable property

determines by forfeiture, in case the lessee renounces his character as such by setting up a title in a third person or claiming title by himself. Now the plaintiffs' whole case is on the facts here that defendants have renounced their character by setting up title in the State and for themselves claiming the title of being tenants under the State. These are the admitted facts in this case. Therefore, it is a case of forfeiture. No doubt, even u/s 111(g) of the Transfer of Property Act the lessor has to give notice in writing to the lessee of his intention to determine the lease. But what are the facts in this case? The fact pleaded in the plaint is that the plaintiffs asked the defendants to quit and vacate and that the defendants to quit and vacate and that the defendants in fact agreed to do so but thereupon backed out. No doubt, there was a denial of this pleading of the plaint in the written statement. But then the crucial point is that no issue was raised either about a notice u/s 106 of the Transfer of Property Act or u/s 111(g) of the Transfer of Property Act.

27. This is a crucial stage of the facts in this appeal. Many issues were framed before the trial Court but no issue was raised alleging that no notice u/s 106 of 111(g) was given in this case. Therefore, the trial Court after having found that the plaintiffs' interest had not vested in the State and that it was the khas land of the plaintiffs and they could retain the same u/s 6(1)(d) of the Estates Acquisition Act came to the conclusion that notice was given. In fact, the trial Court says that "they have proved that notice was given to the defendants to quit the land". No argument was at all made that such a notice had not been given or such a notice was illegal or insufficient. The lower appellate Court set aside this finding of the trial Court on no material. The plaintiffs led evidence to the effect that they had asked the defendants to vacate the disputed land and also dismissed them from service. The lower appellate Court goes on then to find reasons to disbelieve that evidence. First the lower appellate Court says that there is no documentary evidence to show that the plaintiffs dismissed the defendants from service or that they asked them to vacate the disputed land and secondly, although the evidence of P.W. 1 is corroborated by P.W. 2 their evidence is not accepted on the ground that they are not disinterested witnesses specially P.W. 2 was an ex-gomosta of the plaintiffs. Therefore, the lower appellate Court came to the conclusion "thus it has not been proved that the plaintiffs dismissed the defendants from service or that they asked them to vacate the disputed land." Now I am reluctant to examine conclusions of fact in a second appeal. But I am satisfied in this case that this conclusion of the lower appellate Court is absolutely without any evidence and is not based on any material whatever. A notice to quit naturally is given by parties and only persons interested either a gomosta or an employee is the proper person to prove it. In the nature of things one cannot have independent strangers and disinterested witness to prove a notice to quit. There is, therefore, no justification whatever for not accepting the evidence of P.W. 1 and P.W. 2 what is worse, the lower appellate Court forgot that there was no cross-examination even of these witnesses challenging this notice to quit. Lastly the lower appellate Court's conclusion that there is no

documentary evidence to show that the plaintiffs had dismissed the defendants from service. No documentary evidence was called for in cross-examination, nor even suggested that there was none. Dismissal of service is consistent with the state of things. After the West Bengal Estates Acquisition Act it could not be that the defendants would still continue to render the service to the plaintiffs and the plaintiffs would demand such service. There would be no occasion for it. The plaintiffs cannot collect any rent after this Act and no paik would be necessary for collection of any rent. I am afraid, on this ground I find no evidence or material for the lower appellate Court to come to the conclusion that the plaintiffs did not dismiss the defendants from service or that they did not ask them to vacate the disputed land. The conclusion is not only unsupported by any evidence or material, but is also entirely belied by the circumstances of this case. I, therefore, set aside that finding and uphold the finding of the trial Court on this point.

28. Then comes the question, does Section 105 of the Transfer of Property Act at all apply to the chakran lands? That section can only apply if there has been a transfer of a right to enjoy property. The test of a lease is transfer of interest in immoveable property. It is not, therefore, a mere contract but is a transfer of interest in immoveable property. The important question is, is the defendant in this case a transferee of such an interest? Is the person holding chakran land a transferee of an interest in land? Or is he a servant? It is argued for the appellants that these holders of service tenures are only tenants by misnomer and essentially they are servants or labourers, under a contract. The contract is that they render service and in lieu of the wages for the service they are allowed to occupy the land. It is at best a contract or a licence and not a lease.

29. The next question follows. Is the servant's occupation then the master's occupation? A servant allowed by the master to live in the premises during the period of service is not normally a tenant of the master. With determination of the service he goes and cannot claim any tenancy in the premises.

30. In (10) Governor-General of India in Council Vs. Corporation of Calcutta, a Division Bench of this Court had occasion to discuss this point in an assessment case in rating appeal under the Calcutta Municipal Act. The ratio of that decision appears to be that if it is a requirement of the contract of service that a servant should live in a house owned by the master whether it is suitable to him or not or if the occupation is necessary and subservient to the service it should be deemed to be the occupation of the servant and not of a tenant. It is clearly pointed out there that it is settled, however, that to constitute the occupation of a servant it is not necessary to prove that the service could not be performed at all the other hand, the mere fact that it is convenient to both parties that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant. His possession is that of a tenant unless he is required to occupy the possession for the better performance of his duty though his residence is not necessary for the purpose or unless his

residence there be necessary for the performance of his duties, though not specifically required. The principles there discussed, however, were not in connection with the chakran lands.

31. The admitted fact here is that the defendants were Paiks. They were to render their services as paiks as collectors of rent for the plaintiffs. Their occupation of the land was directly related to their services. With the abolition of the zemindary and the abolition of the Intermediary interests under the West Bengal Estates Acquisition Act the plaintiffs no longer required to collect rents. It is the state now in which the properties and right have vested. The defendants were occupying the lands as a price of their services. Service having ceased can chakran land or chakran tenure or such a service tenure continue or is it frustrated? That is the question. Service is the *raison d'être* of this relationship. When such service is not required the servant's occupation of the land under that relationship cannot continue. The occupation ceases with the termination of the service. The termination of the service here is not only alleged by the plaintiffs by stating that they have dismissed them from service but also by reason of the fact implicit in the situation that no occasion for service is any longer existing after the West Bengal Estates Acquisition Act. On behalf of the appellants it has been argued before me that if a Darwan or a rent collector (who will be akin to a "Paik" in this case) is kept at the premises to watch his house, collect the rents from tenants and he is given a room in the tenanted premises to perform that service, then can he claim tenancy of the room even when his work as a Darwan or a rent collector ceases. The answer of course to this illustration is in the negative.

32. But is a Paik in chakran in the same position as a Darwan or a rent collector? The point is not free from difficulty. A chakran appears to be a hybrid legal speeches. He has neither the character of a tenant, nor the character of an ordinary servant even though service is the very soul of his existence or occupation on the land. As a Paik his presence certainly was necessary in the estate for collection of rent and in that view of the matter according to the test laid down in the decision just quoted above his occupation is integrally and inseparably connected with his service. Therefore, it may very well be said that he is a servant and is not tenant. Again because chakran is not heritable, therefore, he could not be a tenant, and because it is inalienable therefore, he could not be tenant. Taking an overall view I have come to the conclusion that the chakran is more a servant than a tenant. From that point of view I am inclined to take the view that there is no transfer of interest in immovable property within the meaning of s. 105 of the Transfer of Property Act.

33. In the argument it has been loosely said that Section 181 of the Bengal Tenancy Act makes that Act inapplicable to chakrans. The Section as quoted above does not say so. All that it says is that nothing in that Act shall effect the incidents of the service tenure. It has therefore been said that that does not affect the "essential" "agricultural purpose" in this relationship between the

chakran and the owner. The idea of suggesting this line of argument is to bring it within Section 117 of the Transfer of Property Act which says that the provisions in Chapter V on leases of immovable properties under the Transfer of Property Act do not apply to leases for agricultural purposes except in so far as the State Government by Notification may declare. So far as the defendants are concerned they have given evidence that they cultivated the lands. It has been argued that the expressions "agricultural purposes" in Section 117 would include the chakran lands. The argument in brief is this. The paiks are there for collection of rents. Collection of rents in the estate is an agricultural purpose. Besides, the lands are in fact cultivated by the chakrans. But then it has been held by the Privy Council that the creation of a tenancy for the purpose of the tenant realizing rent from the cultivators is not a tenancy exempted from the provisions of this Chapter - See (11) *Satya Niranjan v. Sarajubala Debi*, 33 CWN 865. But then it must be noted here that there was no creation of tenancy for the purpose of the tenant realizing the rents in this case. It was the paik who realised the rents for the owner. So the actual limits of that Privy Council decision do not cover the present case. Again it has also been held that a lease mainly executed with the object of making arrangement for collecting rents and not with the object of cultivating is not a lease for agricultural purposes as in (12) *Shiam Sundar v. Chotteylal*, reported in ILR 12 Luck 514. But then here again the distinction is clear so far as the paik is concerned in this case. Here in the instant appeal, it was not an object of making arrangement for collecting rent and it was not a part of the arrangement that it was not to be with the object of cultivating as in that Lucknow case. It has been held in some cases that it is not the actual use of the land but the original purpose of the tenancy which determines the question of applicability or otherwise of the Transfer of Property Act as in (13) *Raj Kumari Baishnabi Vs. Mirja Samsuddin and Others*, . Here again the question before me is what is the original purpose of chakran land. The paiks were given lands to occupy and cultivate and in return they rendered service to the owner. In (14) *Ballav Das v. Murat Narain Singh*, ILR 48 All 385 it has been held that a puttni lease is not one for agricultural purpose merely because the lessee sublets to cultivate land for he could use for other purposes also. These decisions are not intended to lay down an exhaustive definition of the expressions "agricultural purposes" within the meaning of Section 117 of the Transfer of Property Act. In my opinion, the expressions have got to be applied and used according to the facts of each case. There is no hard and fast rule to define what is agricultural purpose and what is not. Having regard to the origin, evolution and incident of chakran land and specially of the system of paiks and chakrandars. I have come to the conclusion that the land used in such case is essentially stamped with agricultural purpose. In that view of the matter, I am also of the opinion that Section 117 excludes the operation of Section 105 of the Transfer of Property Act in this case. To enforce the fact here of agricultural purpose I need only record that in the settlement record-of-rights the land has consistently been described as "sali" land which means paddy land and that is land for cultivation.

34. For these reasons I hold that Section 105 of the Transfer of Property Act does not apply to the chakran lands in the facts of this case.

35. Then remains the question of vesting. The date of vesting under the West Bengal Estates Acquisition Act is the 14th April, 1955. It was also then that the plaintiffs terminated service of the defendants and asked them to quit. The case of the plaintiffs is that the defendants had at first agreed but then they refused. Finally the refusal to vacate was on the 2nd Pous, 1363 B.S. corresponding to the 16th December, 1956.

36. At the trial Court it was contended on behalf of the defendants appellants that the interest of the plaintiffs vested in the State of West Bengal and, therefore, the State was a necessary party. The issue was only on the ground of non-joinder and mis-joinder of parties. The trial Court found against the defendants. The trial Court also found that it was the khas land of the plaintiffs and they could retain the same u/s 6(1)(d) of the Estates Acquisition Act and also relied on the evidence of P.W. 1 saying that he had submitted a return in "B" form. The lower appellate Court did not accept that finding on the ground that the "B" form has not been produced before him. That again, in my opinion, was unwarranted conclusion unsupported by any evidence. In fact the conclusion is directly against the evidence P.W. 1 definitely said that he had submitted a form. There was no cross-examination and no challenge. The defendant who later came to the box could have easily produced evidence if he would have thought that that was a wrong statement. It is not necessary to produce the original "B" form return in order to prove the assertion that one has submitted it. If there is any doubt then the original or the certified copy of it will be appropriate evidence but then at the trial Court there was no cross-examination and no challenge of the fact that P.W. 1 submitting the "B" form. But then the lower appellate Court perhaps realised that his conclusion was not justified because he said "however as the suit fails on the ground of notice the question whether the interest of the plaintiffs has vested in the State of West Bengal or not is left open."

37. Mr. Das Gupta for the respondents realised the difficulty of his client on this aspect of the case. He, therefore, developed a new attack on the appellants' case by saying that even if it be assumed that the plaintiffs have submitted the "B" form for retention of the land u/s 6(1)(d) of the Estates Acquisition Act, this was a land which could not be retained under the law. This raises a very interesting question.

38. The retention in this case is intended to be made u/s 6(1)(d) of the West Bengal Estates Acquisition Act. Now that statutory provision mentions agricultural land in his khas possession", not exceeding twenty-five acres in area, as may be chosen by him. Now so far as this land is concerned it is the common case and it is also the entry in the record of rights that the actual physical possession of this land was not with the plaintiffs but with the defendants chakrans as paiks. Therefore, it is said that only such agricultural lands as are in the khas possession of the person can be retained u/s 6(1)(d) of the Act. This

land not being in khas possession of the plaintiffs they cannot retain these lands u/s 6(1)(d) of the Act.

39. The material words for the purpose of this appeal in Section 6(1)(d) are that "intermediary shall be entitled to retain with effect from the date of vesting agricultural land in his khas possession." The question is, has the intermediary to be in khas possession at the time of the vesting before he is allowed to retain or is the expression "in his khas possession" to be taken with the word "to retain"? In other words, the question is, has the intermediary to be in khas possession on the date of vesting in the State or is it a qualification to suggest that an intermediary can only retain if he retains it in his khas possession? I am not unmindful of the decisions and authorities including my own on a cognate point such as (15) Sankar Prosad Mukherjin v. State of West Bengal, 63 CWN 620 at page 625, (16) Mahindra Nath Bose Vs. State of West Bengal, , (17) The Reliance Development and Engineering Limited v. The Corporation of Calcutta, 61 CWN 533 at page 538 and (18) Lalji Agarwala Jain v. Jhingu Goala, 61 CWN 607 at page 609. But I do not think that any of these decisions goes against the view that I propose to take in this case.

40. My conclusion is that the words "in khas possession" in Section 6(1)(d) of the West Bengal Estates Acquisition Act qualify the word "retention". In other words, that expression means that the intermediary can only retain in his khas possession but cannot otherwise retain through tenant or intermediary. It does not mean that the intermediary must actually be in khas possession or in actual physical possession at the date of vesting of the estate in the Government. It is only after the estate had vested in the Government that the right of retention really arises. Before the Act it was legally permissible and not punishable in any way to have all the lands let out by an intermediary and to earn the rent thereon. After the Act no doubt the effect is that all such estates vested in the Government. The intermediaries as rentiers lost their character. But then this Act itself gives a right to retain certain lands. It is that right to retain which is contained in Section 6 of the statute. I do not find any warrant in the statute that this right to retain the minimum land was intended to be confiscated by the State if at the date of vesting the agricultural land was not in khas possession or in actual physical possession of the intermediary. The intermediary in such a case should in my view be left free with the right to retain which the statute has given him and claim to keep in his khas possession the minimum land permitted by the statute. To deny such intermediaries this minimum right would be to create inequality among two classes of intermediaries, namely, one who had not parted with their khas possession at the date of vesting and the other who had parted with khas possession before the date of vesting. I cannot find any express or implicit intention in the statute to deprive any class of intermediary of their right to retain the minimum land permissible under the statute on that ground. It is open to the intermediary to say that now that the Act has come into force and all the estates have vested in the Government I shall retain the minimum land in my khas possession and if there be tenants or other occupiers of those lands I shall

make them khas in order to be able to retain it under the right which the Statute now gives. The word is "entitled." That means a right to make it khas.

41. In (19) Gour Gopal Mitra and Another Vs. State of West Bengal and Others, , I had the occasion to consider Section 6(5) of the West Bengal Estates Acquisition Act. There in that case I took the view that under that section an intermediary has a right and an opportunity even after the prescribed time limit had passed to make a claim for retention of land u/s 6(1) (c) (d) and (j) thereof, so long as he had not parted with the possession of his lands and the prima facie authority to which the intermediary could make such claim was the Revenue Officer. It was therefore contended by Mr. Das Gupta that once the possession is not there no claim for retention u/s 6(1)(d) could be made on the strength of that decision. I am afraid, Mr. Das Gupta has misread my decision because the possession mentioned there in the headnote of the report was not the intermediary's possession, vis-a-vis the chakran or the tenant but when the possession had been handed over to the Government by the intermediary. I have made that clear at page 16 of that report in the following terms:

In other words it will mean this that so long as the intermediary has not delivered possession to the Col u/s 10(2) of the Act he has the right to claim retention. Once however the intermediary has lost possession to the Government no question of his any more "retaining" possession arises, for such a claim will be to "repossess" and not to "retain".

Here in the case admittedly the plaintiffs have not delivered possession to the Collector of the Government within the meaning of that decision. Indeed in that event there would be no point in the evidence of P.W. 1 saying that he had submitted the "B" form for retention. On this point Mr. Das Gupta drew my attention to the fact that Government had given notice to the chakrans for setting rent and that his clients are supposed to have been paying rents to the Government. But then such receipts are expressly stated to be "without prejudice to the other rights" and, therefore, they cannot defeat the plaintiffs' right, if any.

42. Here again, of course, the question will arise that if the chakran is a servant then his possession is the possession of the master and were it necessary I would hold that possession, in the facts and circumstances of this case, is the possession of the plaintiffs.

43. It is submitted for the respondents that u/s 41 of the West Bengal Estates Acquisition Act it is provided that in preparing or revising any record of rights under this Chapter, the Revenue Officer shall fix in respect of any land held free of rent by a person who holds such land free of rent in consideration of some service to be rendered, a rent determined on the basis of the rent paid by raiyats or non-agricultural tenants for lands of similar description and with similar advantages in the vicinity. On the strength of this section Mr. Das Gupta argues that the chakran becomes tenant of the estate after the vesting. No doubt a

chakran can become tenant of the estate if the land in question is not retained by the intermediary or the owner. Naturally in such cases Section 41 provides how a land for which rent is not available is to be fixed by comparison with rents of similar description and with similar advantages in the vicinity. Section 41 does nothing more. It does not in my view say that even where the land in question is retained by the intermediary or the owner the chakran may continue to be a tenant of the estate.

44. For these reasons the appeal is allowed. The lower appellate Court's judgment and decree are set aside and the judgment and decree of the trial Court are restored and affirmed.

45. There will be no order as to costs in this appeal.

46. I must record my high sense of appreciation of the very able arguments which Mr. Das Gupta for the respondents had advanced in this case.