PRIVY COUNCIL

Anup Mahto

Vs.

Mita Dusadh

P.C.A.No.113 of 1929
(Lords Blanesburgh, CJ. Thankerton, Rusell Of Killowen, J. Sir John Wallis and Sir Lancelot Sanderson JJ.)

07.12.1933

JUDGMENT

SIR JOHN WALLIS J.

1. This case comes here on appeal by the defendant from a judgment in second appeal of the High Court at Patna reversing the judgment and decree of the lower appellate Court and giving to the plaintiffs a decree for ejectment. The plaintiffs' case was that they were raiyats within the definition in the Bengal Tenancy Act, 1885, that is to say, that the suit lands had been acquired by the original grantee for the purpose of cultivating them himself and that therefore their tenant the defendant was an under-raiyat and so liable to ejectment on the statutory notice under Section 49 of the Act. The defendant's case was that the suit lands had been acquired by the original grantee for the purpose of collecting rents, and that therefore the plaintiffs were tenure holders and he himself was a raiyat holding under them and was not liable to ejectment as he had acquired occupancy rights under the Act.

2. In that case the further question arises whether the defendant is precluded by Section 181 of the Act from acquiring occupancy rights in the lands by reason of the fact that they are held on service tenure, as has been ruled in some Calcutta decisions which have been followed by the High Court in this case. This is a question of general importance, as the effect of these decisions is largely to exclude this class of raiyats from the benefits of the Act, and now comes before Board for the first time. The plaintiffs are jagirdars holding the suit lands and other lands in neighbouring villages as a revenue free jagir for watching certain roads. The grant probably dates back to the days before the cession to the Company. It is stated in the introduction to Mr. Field's

Regulations, p. 53, that a large number of jagirs were created in Behar in the time of Shah Alam and his immediate predecessor during the anarchy and decline of the Mogul Empire. This may account for the great number of small jagirs of this kind in the immediate neighborhood as mentioned in the judgment of the High Court. According to the same authority such grants when made by the Emperor were assignments not of the lands but of the revenue. As the lands being revenue free were not included in the Permanent Settlement with the local zamindar they have been recorded as the property of the Crown. The first question therefore already stated is whether the original grantee of the lands on service tenure was a tenure-holder or a raiyat within the meaning of the Act?

3. The Record of Rights was against the plaintiffs as they were recorded as tenure-holders, and Section 103-B of the Act provides that every entry therein is presumed to be correct until the contrary is proved. Ordinarily therefore all the Courts have to do with the record is to apply this presumption as directed by the section. Unfortunately in this case the certified copies of extracts from the Record obtained in 1922 for use at the trial were not wholly in English as they should have been in what purports to be the English version of the Record which was completed in 1910. The printed forms are in English, but some of the entries contain vernacular terms taken apparently from the vernacular version of the Record which is necessarily the version in common use. Whatever be the explanation, the use of these vernacular terms has enabled the plaintiffs to set up successfully in the two first Courts that the Record was self contradictory and that it was Impossible to raise the presumption that the plaintiffs were tenure-holders, while the High Court has gone further and held that the presumption arising on the Record was that the plaintiffs were raiyats. Prima facie nothing can well be less likely than that the Record of Rights, if properly understood, should be self-contradictory prepared as it is in accordance with rules framed by the Local Government under the Act by a revenue officer familiar with its provisions and on printed forms supplied for the purpose.

4. Under the Rules the part of the Record known as the Khatian is to show how all the lands in the village are held; and, every tenant, from the tenure holder down to the under-raiyats if there are any, has to be given an extract relating to his tenancy. The khatian is framed in such a way as to enable this to be done, and the material extracts in the case are the extracts relating to the tenancies of the plaintiffs and of the defendant respectively. The plaintiffs in the extract relating to their tenancy are not shown as raiyats, nor is there any entry under Col. 10 recording whether or not they

had occupancy rights, as there must have been if it had been intended to record them as raiyats. They are recorded as tenants of the proprietor, the Crown, holding revenue-free lands on service tenure, as a jagir for watching roads. That the plaintiffs were here regarded as tenure-holders appears from the fact that in the extract relating to the defendant's tenancy which is set out below, they are entered as tenure-holders "as in khata No. 463," where the word "khata" is an obvious misprint for khatian, 463 being the serial number of the plaintiffs' khatian. The defendant is entered in the plaintiffs' khatian as the tenant holding under them with the word "shikmi" appended to his name, but the exact nature of his tenancy is to be ascertained from his own khatian, in which he is shown as the tenant of tenure-holders. The material parts of the defendant Anup Mahto's khatian on which the case turns are as follows:

> A.-Khatian of Mauza Kujra, Name of proprietor and number in khewat- Crown (?), entered in khewat No. 1. Name of tenure-holder, if any, and number in khewat Ramlal Dusadh and others, as in Khata (sic No. 463).

5. Under the definitions in Section 5 of the Act a raiyat is a cultivating tenant either of a proprietor of a tenure-holder, and an under-raiyat a tenant of a raiyat, and therefore the fact that the defendant is a raiyat and not an under-raiyat sufficiently appears from his being recorded in Col. 2 as a tenant holding not under-raiyats but under tenure-holders. Under the rules every tenant has to be asked if he claims occupancy rights, and the object of the entry as to occupancy rights in Col. 10 is to show whether or not he is to be presumed to have them. The defendant being incapable according to the decisions already mentioned of acquiring occupancy rights, the entry if made in English must have been "non-occupancy twelve years," whereas the actual entry is "shikmi twelve years." This is where the alleged contradiction arises, as it is said shikmi necessarily means under-raiyat, a meaning which would appear to be excluded by the context. If on the other hand, it is used here as the vernacular equivalent for non-occupancy, it should have been used in the same sense in Col. 10 of the vernacular version of the khatians of all under-raiyats except the very few who have occupancy rights by custom, which may possibly account for its being supposed to mean under-raiyat. The word shikmi as used in the word "shikmitaluk" which has been considered by this Board in *Bageswari Charan Singh v. Kamakhya Narain Singh* denotes some degree of dependence on the zamindari, and some vernacular equivalent having to be found for non-occupancy, it would not be inapt to describe tenants who are so much less independent of their landlords than tenants who possess occupancy rights.

6. No such case was however put forward before the Munsif or before the Subordinate Judge on appeal. The consistency of the Record seems to have had no defenders. It was apparently accepted that shikmi must mean under-raiyat, and was so assumed in the judgments without considering whether this meaning was not excluded by the context. As however both Courts found on the evidence without the aid of any presumption that the plaintiffs were tenure-holders the defendant was not prejudiced; and on this finding both Courts held that the defendant had occupancy rights and dismissed the plaintiffs' suit. The High Court however reversed this finding and gave to plaintiffs a decree for ejectment on the ground that the lower appellate Court had misdirected itself, because the Subordinate Judge had not raised a presumption that the plaintiffs were raiyats. As to this ruling which appears to proceed on a misunderstanding as to the nature of the khatian, it is sufficient to say that, even if it had been open to the lower appellate Court to raise such a presumption, the fact that the Subordinate Judge did not raise it would not, in their Lordships opinion, amount to a misdirection. The question would necessarily depend on inferences to be drawn from statements in the khatian, and it is well settled that such inferences are inferences of fact with which a High Court cannot interfere in second appeal. The finding of the lower Court that the plaintiffs are tenure-holders must therefore stand.

7. Their Lordships will now proceed to consider the serious question whether, as held in the Calcutta decisions, the defendant is disabled from acquiring occupancy rights : and even non-occupancy rights, under the Act by reason of the fact that his landlords are tenure-holders whose tenure is a service tenure and so liable to resumption. Whether the proprietary rights in the suit lands are vested in the Crown, as recorded in the Record of Rights, or are revenue-free lands owned by the plaintiffs, in either case they constitute an estate as defined in the opening definition in Section 3(1), and therefore the respective rights of the defendant and his landlords, whether proprietors or tenure holders, are governed by the Act. Much the most important-as they were the most controverted-provisions of the Act are these relating to occupancy rights, and very clear words would, in their Lordships' opinion, be necessary to show an intention on the part of the legislature to exclude any particular class of raiyats from the enjoyment of such rights and the protection they afford. Under the Act occupancy rights are conferred, by Section 21, upon the settled raiyat, who is defined in Section 20 as a person who for a period of 12 years has continuously held land in the village as a raiyat. During the intervening period he is a non-occupancy raiyat, but is not left altogether without statutory protection against arbitrary eviction, as Section 44 provides that he can only be ejected on one of the four grounds specified in the

section.

8. The importance attached by the legislature to the rights conferred upon raiyats by this part of the Act further appears from the fact that they are prohibited by Section 178 from contracting themselves out of them. It is therefore scarcely likely that the legislature should by a subsequent section have deprived a large class of raiyats of these very rights, and thereby created a new class of raiyats without any statutory protection against their landlords, but nevertheless subject to the other provisions of the Act which were intended to facilitate the collection of the landlord's rents. The section which is said to have this effect is section 181, which is as follows.

> "Nothing in this Act shall affect any incident of a ghatwali or other 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."

9. In their Lordships' opinion this is merely a saving clause which does not affect the rights of occupancy expressly conferred by the Act upon raiyats against this class of tenure-holders, but leaves the incidents, of service-tenure unaffected. With regard to the Calcutta decisions which have been cited for the respondents, it will be sufficient to refer to the two earliest decisions which have since been followed in that Court and were followed by the Patna High Court in this case. In *Mohesh Majhi v. Pran Krishan Mandal* which was decided in 1904, Mitra, J., sitting alone, held that neither occupancy nor non-occupancy rights under the Act could be acquired by raiyats against ghatwali holding their lands on service tenure having regard to the provisions of Section 181 of the Act. This case was followed three years later in *Upendra Nath v. Ram Nath (1906) 33 Cal 630*, in which Maclean, C. J., delivering the judgment of the Court referred with approval to the case just mentioned, and observed:

> "I think upon principle, having regard to the nature of ghatwali lands, the acquisition of occupancy rights in these lands is inconsistent with the incidents of such tenures, and this view gains support from section 181, Ban. Ten. Act, which seems to me to be inconsistent with the view of the acquisition of such rights in ghatwali lands."

10. Their Lordships with great respect are unable to agree with this construction of the Act. It is a tenancy Act, and what it does is to enable this class of raiyats to acquire occupancy rights against their landlord, the tenure-holder, so long as the tenancy subsists-that is to say, until the landlord's tenure is determined by resumption, leaving the rights arising on resumption to be determined in accordance with the pre-existing

law, and in *Secy. of State v. Girjabai* this Board recently refrained from expressing any opinion on the question whether rights of occupancy created, by a jagirdar would be binding on the Crown after the resumption of the jagir. The effect of the other view might be so deprive, raiyats of this class in some cases for generations of the statutory protection given by the Act because of a possible right to dispossess them on a resumption of the tenure, which might not exist or might never be exercised. Further, it has been held by the Calcutta High Court in *Ram Kumar v. Ram Newaj (*and other cases that, as the Bengal Rent Act 10 of 1859 and Act 8 of 1869, which replaced it and was repealed by the present Act, did not contain any provision, corresponding to Section 181 of the present Act, there was nothing to prevent the acquisition of occupancy right by raiyats against tenure-holders holding a service tenure while those Acts were in force, and that occupancy rights so acquired were not affected by the present Act. This is an additional reason for not so construing Section 181 as to attribute to the legislature an intention to deprive this class of raiyats by Section 181 of rights which they had enjoyed under the previous Acts, and which were again expressly conferred upon them in the present Act as being in accordance with the ancient law and custom of the country.

11. In their Lordships' opinion there is a great distinction between the grant of lands on service tenure revenue or rent free to a raiyat to cultivate himself in lieu of wages and a grant to a tenure-holder whose emoluments are to be derived from the collection of rents from tenants holding under him as raiyats. In the former case the raiyat's grant may well be said to be inconsistent with the acquisition of full occupancy rights because the lands are only granted to him so long as he holds the office. On the other hand, the grant to the tenure holder is in the nature of an assignment of the landlord's rights for the duration of the tenure and would not necessarily involve any interference with the raiyats' customary rights. For these reasons, their Lordships are of opinion that the defendant has established his rights of occupancy against the plaintiffs and that the appeal should be allowed, the decree of the High Court reversed and the decree of the lower appellate Court restored, and they will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs both here and in the High Court.

Appeal allowed.

Cases Referred.

AIR 1931 PC 30=131 IC 325=58 IA 9=10 Pat 296 (PC),

(1904) 1 C LJ 138,

AIR 1927 PC 238=106 IC 1=54 IA 359= 61 Bom. 957 (PC)

1904) 31 Cal 1021=8 CWN 860