

# CALCUTTA HIGH COURT

Jiban Krishna Chakrabarty

Vs

Abdul Kader Chowdhury

(Mitter, J.)

13.03.1933

## JUDGMENT

### **Mitter, J.**

1. This is an appeal against an order of the Additional District Judge of Chittagong remanding a suit to the Court of the Subordinate Judge of that district for retrial in accordance with law. The suit in which this appeal arises was brought by the plaintiff, now appellant, for a declaration of plaintiff's raiyati right to the lands mentioned in the plaint and for eviction of the defendant from the same. There is also a prayer for recovery of the rent in kind with damages and mesne profits. Plaintiff alleged that there was a service of notice upon the defendant under Section 49, Ben. Ten. Act, but as the defendant refused to vacate, the present suit has been brought. The defence to the suit is that no notice was served on him and that the defendant had acquired permanent rights in the under-tenancy. Several issues were framed in the suit and the Court of first instance found that as the pottah granted by the plaintiff creating a kaimi dar raiyati right in the defendant offended against the provisions of Section 85, Ben. Ten. Act, as it stood before the amendment by Act 4 of 1928(B.C.), it must be treated as nonexistent and the under-raiyati must be regarded as one without a written lease. He held further that there has been proper service of notice under Section 49 and the tenancy was thereby determined. He accordingly decreed plaintiff's suit in part declaring his raiyati title to the disputed lands and directing recovery of khas possession; plaintiff's claim for price of bhag paddy was also decreed.

2. On appeal the lower appellate Court was of opinion that the suit should have been decided under Section 48-C of the amended Bengal Tenancy Act and not under old Section 49(b) of the Act as it stood before the amendment. He held that the learned Subordinate Judge having based his decision on an absolute section of law there was no proper trial of the appeal before him and the suit should be remitted to the Subordinate Judge for retrial. Against this order of remand the plaintiff has preferred the present appeal and it is contended that the notice under Section 49(b)

having been given on 13th April 1928 before the new amended Section 48-C came into force the tenancy was determined on 13th April 1929 although by that time the Bengal Tenancy Amendment Act had come into operation. It is argued that no retrospective operation can be given to a Statute unless retrospective operation is either expressly given or is to be inferred by necessary implication. I am of opinion that this contention must prevail. Section 49(b) runs as follows: An under-raiyat shall not be liable to be ejected by his landlord except when holding otherwise than under a written lease for a term at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord.

3. The notice given under this section expired at the end of the agricultural year, i.e., on 13th April 1929. The right to evict accrued in the plaintiff as soon as a proper notice to quit was given although the right could not take effect in possession till 13th April 1929 when the new Act came into operation. Once a notice is given the tenancy will inevitably be determined upon its expiration and Courts have gone so far as to hold that when the notice to quit is given by the landlord or tenant the party to whom it is given is entitled to insist upon it and it cannot be withdrawn without consent of both: see *Taylor v. Wildin* (1868) 3 Ex 303. As Baron Bramwell has put it in the same case: A tenant from year to year has an interest in the land for so long as neither party gives a six months' notice to quit, when that is done the estate is determined.

4. These observations of Bramwell, B., have been approved of in *Freeman v. Evans*<sup>1</sup> Warrington, L.J., said; Bramwell, B. put the point in the neatest and most precise terms that could be used. He said if the notice to quit is given the tenancy is at an end.

5. On the expiration of the agricultural year plaintiff's right would take effect in possession but he had vested right to evict the moment the notice was given i.e., 13th April 1928. The great jurist, Austin, in his lectures on Jurisprudence has drawn prominent attention to two classes of vested rights and it is instructive to reproduce here what the learned jurist says on this topic, for it is pertinent to the matter under consideration in this appeal: Before I proceed to contingent rights, or to chances or possibilities of rights, I must remark that vested rights or rights properly so called, are divisible into two classes: first present or vested rights which are coupled with a present right to enjoyment or exercises; secondly present or vested rights which are not coupled with a right to present enjoyment or exercise: For example: If I am absolute owner of land or a moveable not subject to a right in another of limited duration, I have not only a present right to or in the subject, but also a right to the present possession of it, that is to say, a present right to enjoy or exercise my present right of ownership. But if the subject be left to another, I have a present right of ownership without a present right to exercise my right of ownership. I have merely a reversion, expectant on the determination of the lease, and which till the lease determine, cannot take effect in possession: see Austin's Jurisprudence, Vol. 2, p. 857.

6. The right of the landlord in the present case falls within the second class of vested rights. The plaintiff has a right to the reversion expectant on the determination of the under-tenancy. The under-tenancy is determined on the expiration of the period of the notice which is one year from the date of service. The legal effect of the notice to quit under Section 49-B, Ben. Ten. Act, is to determine the tenancy on the expiration of the agricultural year. The landlord has a vested right to require the tenant to abandon possession at the end of the agricultural year following the year in which notice is given and the legislature cannot interfere so as to impair this vested right unless the legislature intended the amending Act to be retrospective in its operation either by express enactment or necessary intendment. A vested right is one in respect of which all the events necessary to bring it into existence and vest it in a party has happened. Notice to quit has been duly given under the old Act and the right to evict the under-tenant on the expiration of the notice has vested in the landlord from the moment of the notice, and cannot be affected by change of legislation before the expiration of the period of notice.

7. It was not a mere contingent right as on the expiration of the agricultural year the tenancy will inevitably be determined. So also *Foa on Landlord and Tenant*, Edn. 6, 683. The coming into operation therefore of the amended Bengal Tenancy Act, 1928 could not take away from the right of the plaintiff landlord to evict on expiration of the notice. The next provisions of Section 48-C, Ben. Ten. Act, cannot touch the right of the landlord to evict the tenant at the expiration of the agricultural year, a right which was in existence at the passing of Act 4 of 1928 as it is not in accordance with sound principles of interpreting Statutes to give them a retrospective effect: see the observations of Lord Lindley in *Mohammad Abussamad v. Kurban Husein*<sup>2</sup> No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In a recent decision of *Delhi Cloth and General Mills Co. v. Income-tax Commissioner*, their Lordships of the Judicial Committee approved of this rule of construction and observed as follows:

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co. v. Irving*<sup>3</sup> where it is in effect laid down that while provisions of a Statute dealing merely with matters of procedure may properly unless that construction be textually inadmissible have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment: see also *Cadar Ali v. Doliluddin*, *Napra v. Sajar Pramanik*.

8. I have examined the provisions of Section 48-C and I can find nothing in this section to justify the conclusion that it was intended to touch existing rights. A reference has been made to Clause (d) and Prov. 2, Clause (2), Section 48-C by the learned advocate for the respondent as justifying an inference that the provisions were retrospective. I cannot agree with his contention. It has further been argued by him that the landlord acquired no rights till after the expiration of notice. I have already answered this contention in an earlier part of my judgment. The learned advocate for the respondent has relied on *B. v. Magwan A & E 496*. That was no doubt the former view. As is pointed out by Maxwell in his *Interpretation of Statutes* that where an Act expired or was repealed it was formerly regarded in the absence of provision to the contrary, as having never existed except as to matters land transactions past and closed. Where therefore a penal law was broken the offender could not be punished under it if it expired before he was convicted although the prosecution was begun while the Act was still in force, and *R. v. Magwan<sup>4</sup>* is cited in support: Maxwell 728, Edn. 6. But the learned author points out that since then under the provisions of 38(2), Interpretation Act of 1889 and repeal by that Act or any subsequent Act, unless the contrary intention appears does not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, and these are precisely the words of Section 6, Clause (b) or Clause (c), General Clauses Act of 1897, by which the present case is governed. *R. v. Magwan A & E 496* is therefore not good law now either in England or India as Maxwell points out that was the former view.

9. Under Section 6(b), General Clauses Act of 1897, the operation of the notice duly given under the previous enactment cannot be affected by any new enactment under Section 6, Clause (c), nor can it affect any right to determine the tenancy acquired under the Tenancy Act before its amendment by Act 4 of 1928(B.C.). For the above reasons this appeal should be allowed and the case should be sent back to the Additional District Judge in order that he may rehear the other questions raised by the appeal before him and proceed to determine the same in accordance with law. The appellant is entitled to costs of this appeal. We assess the hearing-fee at one gold mohur. I regret very much I have to differ from my learned brother, but after the best consideration that I have been able to give to the case I can come to no other conclusion than that reached by me.

10. M.G. Ghose, J.-This appeal arises out of a suit by the plaintiff landlord to recover khas possession by evicting the defendant under-raiyat after a notice under 8. 49(b), Ben. Ten. Act, as it was in 1928. The notice was served on 13th April 1928, the cause of action arose on 13th April 1929 and the suit was brought on 15th April 1930. The primary Court decreed the suit. The lower appellate Court has set aside the decree of the primary Court and remanded the case for retrial in accordance with the amended Bengal Tenancy Act. The relevant words of Section 49(b)

are these:

An under-raiyat shall not be liable to be ejected by his landlord except at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord.

11. This section was repealed on 21st February 1929. The question is what the effect of the repeal is in the circumstances of this case. The learned advocate for the plaintiff has argued that the right to evict the tenant accrued to the plaintiff as soon as he served the notice and although Section 49(b) was repealed before the notice ran its course the notice having been given would inevitably upon its expiration determine the tenancy. The case of *Tayluer v. Wildin*<sup>5</sup> was quoted in support of the argument. I am of opinion that the facts of that case are different from the facts of this case. There one Morgan was a yearly tenant of the plaintiff and in consideration of the plaintiff continuing Morgan's tenancy of the farm, the defendant gave the plaintiff a guarantee for the rent of the farm in the occupation of Morgan. Afterwards Morgan fell into arrears and the plaintiff gave him notice to quit the farm on the expiration of the current year's tenancy. But before the expiration of the notice the arrears were paid by Morgan and the plaintiff withdrew the notice. The following year Morgan was again in arrear of rent. The plaintiff sued the defendant on the above guarantee. Their Lordships held that the old tenancy was determined by the notice to quit, that the guarantee applied only to the tenancy which existed at the time when it was given, that tenancy having expired by the notice the defendant was not liable on the guarantee. In that case the law remained the same during the period of the notice. In this case however the enactment upon which the notice was based was itself changed before the expiration of the notice. It is urged for the respondent that the operating point of time was not the date when the notice was given but the date when the notice was due to expire and as the enactment was changed before the date of expiration the notice was of no effect. The learned advocate for the respondent has quoted Craies on Statute Law, Edn. 3, p. 345, where, it is stated:

In order to decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was complete or incomplete at the time the Act was repealed. Thus, if an Act gives right to do anything, the thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left in statu quo. If by virtue of some statute a right becomes vested upon the completion of some certain transaction, but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is complete: *Mac Millan v. Dent*<sup>6</sup>

12. It was urged by the learned advocate for the plaintiff-appellant that the amendment should not be allowed to have retrospective effect, and that no amendment should be allowed to touch a

vested right. I am of opinion that a vested right means a right which a person has acquired or which has accrued to him. The question here is on what date did the plaintiff acquire the right to evict the tenant. Section 49(b) is quite clear that the right to evict does not arise except at the end of a year after service of notice. Therefore no right had accrued to the plaintiff on the date when Section 49(b) was repealed. Section 6, General Clauses Act, provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect of such right. In this case the right to evict the tenant was not due to be acquired until after the repeal of the enactment. On these grounds I am of opinion that the judgment of the lower appellate Court is correct. I would dismiss the appeal with costs.

13. On this difference of opinion, the following question was referred to a Bench of three Judges. A notice was given by the landlord to an under-tenant under Section 49(b), Ben. Ten. Act, before its amendment by Act 4 of 1928(B.C.) to quit at the end of the agricultural year following the year in which notice is given and before the period of the notice expires. Section 49(b) is substantially altered by Act 4 of 1928. The question is whether the new Act which is not retrospective in its operation can affect the effect or operation of the notice. One of us thinks that the right to evict the under-tenant vests in the landlord from the date of the notice although the right does not take effect in possession till after the expiration of the period of the notice, and that this right is not affected in view of 6 (b) and (c) of the General Clauses Act, 1897; the other of us thinks that the right to evict the under-tenant vests in the landlord not on the date of the notice but on the expiration of the notice. If the former view is right then the amending Act 4 of 1928 does not apply; if the latter, then the amending Act applies. The question is which view is right?

## **JUDGMENT**

### **Rankin, C.J.**

14. In this case the learned Judges of a Division Bench hearing the appeal have differed in opinion upon a question of law which has been stated and referred to us under Clause 36, Letters Patent. The suit was a suit for ejectment and for certain other reliefs with which we are not now concerned. It was found by the trial Court that the plaintiff was a raiyat and that though he had purported to grant a permanent interest to the defendant by a registered patta this instrument was, at the date of its execution, invalid by reason that it offended against the provision of Section 85, Ben. Ten. Act, so that for purposes of ejectment the position of the defendant was that he was an under-raiyat without any written lease; and that accordingly, under Section 49, he was liable to be ejected at the end of the agricultural year, provided that in the previous agricultural year the plaintiff had served upon him a notice to quit. The facts alleged by the plaintiff and found by the trial Court to have been proved are that before the end of the agricultural year 1927-28, namely,

on 12th April 1928, the defendant was duly served with a notice to quit, so that he became liable under Section 49 to be ejected on 13th April 1929, that is to say, on the expiry of the agricultural year 1928-29.

15. The foregoing references to the Bengal Tenancy Act refer to that Act as it stood before it was amended by Bengal Act 4 of 1928 which came into operation on 21st February 1929, about two months before the date on which the plaintiff became entitled to evict the defendant under the previous law. By the amending Act, Section 49, together with certain other provisions governing the ejection of under-raiyats, was repealed and was replaced by a new section, viz., Section 48-C. In lieu of the provision that an under-raiyat shall not be liable to be ejected by his landlord, when holding otherwise than under a written lease except at the end of the agricultural year next following the year in which notice to quit is served upon him by his landlord, the provision under the amending Act is that an under-raiyat shall, subject to the provisions of this Act, be liable to ejection on the ground that the tenancy has been terminated by his landlord by one year's notice expiring at the end of the agricultural year when he holds the land otherwise than under a written lease, provided that an under-raiyat shall not be liable to be ejected on this ground if he has been admitted in a document by the landlord to have a permanent and heritable right to his land, or been in possession of his land for a continuous period of 12 years or has a homestead thereon. Moreover, under the new Act, he cannot be ejected, even if he does not come within the terms of this proviso, unless the landlord satisfies the Court that he requires the land for his own homestead or for cultivation by himself or by members of his family, or by hired servants, or with the aid of partners. The amending Act does not contain any provision giving it retrospective effect.

16. In the trial Court the case was treated as arising under the old law and on the assumption that the new Act did not affect it. The lower appellate Court held that the case must be governed by the provisions of the new Act and remanded it to the trial Court to be dealt with thereunder. In this Court Mitter, J., has taken the view that the new Act does not apply to the case. M.C. Ghose, J., is of opinion that the new Act does apply to the case. This is the question for our opinion. Now it will be noticed that Clause (d) of the new Section 48-C is expressed somewhat differently from Clause (b) of the old Section 49. Section 49 did not prescribe that the notice should be a notice for any given period; as long as it was a notice to quit, and whether it specified any period or not, the landlord would be entitled at the end of the following agricultural year to eject the tenant, but in no circumstances could the tenant be ejected before that time. A complete failure to specify the period within which the under-raiyat was required to quit did not make the notice bad: *Mohendra v. Biswanath*<sup>7</sup> *Naharullah v. Madan Gazi*<sup>8</sup>, *Dwarka Nath v. Rani Dassi*<sup>9</sup> *Harifullah v. Binode*<sup>10</sup> *Purna v. Ali Mohammad*<sup>11</sup> and *Chandi Charan v. Somla Bibi*<sup>12</sup> It seems to me that the

new Act cannot safely be interpreted in the same way. What the landlord has now to give is one year's notice expiring at the end of the agricultural year. It is more than probable that many notices were given in the course of 1928 which would not be held to be good notice under the new law. The clause having been re-drafted, I do not think that in the absence of express provision, we can hold that after February 1929 no under-raiyat is to be ejected on the ground of notice to quit unless he has had the notice which the new Act requires. If the new provision as to notice had been exactly the same as the old, it may well be that a different view could be taken; it may well be also that the case of a written lease for a definite term expiring after the commencement of the new Act, that is, the case contemplated by the old Section 49, Clause (a) and new Section 48, Clause (c) will require to be decided upon other lines. On this point I desire to say that when that question comes up for decision, I am not, as at present advised, prepared to say that the reasoning of Mitter, J., in the present case will conclude the matter. I am of opinion however that in the case before us, whatever be the form of the notice which was actually given by the plaintiff to the defendant, the amending Act does not affect the rights of the parties and I would therefore agree with Mitter, J., in his conclusion and in the order which he proposes to make. I propose that the costs of the hearing before us be made costs in the appeal. Hearing fee three gold mohurs.

Pearson, J.

17. I agree.

Mukerji, J.

18. I agree.

Cases Referred.

1(1922) 1 Ch 36(at p. 46)

2(1904) 26 All 119

3(1905) AC 369

4A & E 496

5(1868) 3 Ex 303

6(1907) 1 Ch 107

7(1902) 29 Cal 231

8(1897) 1 CWN 133

9(1901) 28 Cal 308

10(1913) 19 IC 557

11AIR 1921 Cal 520

12AIR 1918 Cal 917