

## CALCUTTA HIGH COURT

Arun Kumar Sinha

Vs

Durga Charan Basu

(B.K. Mukherjea, J.)

30.04.1941

### JUDGMENT

#### **B.K. Mukherjea, J**

1. These three appeals arise out of three analogous actions in ejectment commenced by the same plaintiffs against different sets of defendants. The material facts are not in controversy and may be shortly stated as follows : The lands in dispute which are situated within the Comilla Municipality admittedly appertained to a raiyati holding which belonged to one Jinnat Ali Sardar and was held by him under the Maharaja of Tippera at a rental of Rs. 36 a year. The raiyati holding of Jinnat Ali comprised both agricultural and homestead lands having a total area of more than one drone. Babu Gurudayal Sinha, the grandfather of the plaintiffs, purchased the lands of these suits from Jinnat Ali by a registered kabala dated 17th Pous 1802 B.S. These lands are all homestead lands and after his purchase Gurudayal Babu settled the same in separate parcels with the defendants in the three suits who took these lands for purposes of residence and promised to vacate them on receipt of 15 days notice. Gurudayal, who purchased only a portion of Jinnat Ali's holding, had not got his name registered in the sherista of the landlord and in the year 1924 the latter instituted a rent suit against the heirs of Jinnat Ali and obtained a decree. In execution of this decree the entire holding of Jinnat Ali was put up to sale and it was purchased by the plaintiffs, through their guardian mother Urmila Sinha, and certain other persons who had also acquired portions of the jote from the original raiyat.

By amicable arrangement among the purchasers the disputed lands fell exclusively to the share of the plaintiffs. The defendants, who were temporary lessees, having refused to vacate the lands in their possession, although they were served with notice to quit under Section 106, Transfer of Property Act, the present suits were instituted by the plaintiffs.

2. The defence of the three sets of defendants was practically the same, and in substance was that the tenancies were governed by the Bengal Tenancy Act and not by the Transfer of Property Act, and consequently they could not be ejected by fifteen days notice under Section 106, Transfer of Property Act. This contention was accepted by both the Courts below and the suits were dismissed. It is against this decision that the plaintiffs have come up on appeal to this Court. It is admitted that the lands in suit are homestead lands situated within the Comilla Municipality and the defendants took them for purposes of residence. It is said however that as the lands formed part of a raiyati holding which belonged to Jinnat Ali, the defendants as sub-lessees under

the transferees from Jinnat Ali would be under-raiyats as defined in Section 4, Bengal Tenancy Act and hence they could not be ejected except under the circumstances specified in Section 48 (c), Ben. Ten. Act. This view is supported by a series of decisions of this Court commencing from that in *Babu Ram Roy v. Mahendra Nath Samanta* ('04) 8 CWN 454. It was held in that case by Mitra J., and the decision was affirmed by the Letters Patent Bench, that where the lands included in the holding of an agricultural raiyat consisted partly of agricultural and partly of homestead lands, and the portion which could be used as homestead was let out for residential purposes, the under tenant would be an under raiyat within the meaning of Ben. Ten. Act, and the provisions of the Transfer of Property Act would not be applicable. In course of his judgment the learned Judge observed as follows: Act 8 of 1885 was passed for the protection of raiyats as well as under-raiyats; and if a raiyat holds land partly agricultural and partly homestead, the incidents of the holding would regulate the incidents of the sub-lease created by the raiyat. The Transfer of Property Act is not applicable to lands used for agricultural purposes, and in considering whether the one Act or the other would apply, we have to look to the nature of the original tenancy, and not the nature of the tenancy with reference to a particular piece of land within the landlord's holding. Otherwise the result would be anomalous.

3. This decision was followed in *Abdul Karim Patwari v. Abdul Rahaman* <sup>1</sup>*Krishna Kanta v. Jadu Kasya* <sup>2</sup>*Rampada Sirkar v. Atore Dome and Pankajini Devi v. Satish Behara* <sup>3</sup> It is true that in some of these cases reference was made to Section 182, Ben. Ten. Act, and protection was given to the tenant not merely because he was an under raiyat with regard to the homestead lands which he held as a sub-lessee under the raiyat but also because he held other lands as raiyat in the same or adjacent village and, consequently, could invoke the provisions of Section 182 in his favour. But the principle was never dissented from, that in a case of this description, the question whether the tenancy is governed by the Bengal Tenancy Act or the Transfer of Property Act, would depend on the nature of the original tenancy, and not on the character of the parcel included in the sub-tenancy. The learned advocate who appears for the appellants has subjected these decisions to a good deal of criticism. Had the matter been *res integra*, we might have some hesitation in accepting the view enunciated in them. In the Bengal Tenancy Act, the raiyat is defined to be a person who acquires land primarily for purposes of cultivation; unless the letting was for purposes of agriculture the tenancy would not be governed by the Bengal Tenancy Act even if the superior interest was vested in the holding of the tenure to which the Bengal Tenancy Act was applicable. We do not think also that any real anomaly would arise if as between a raiyat and his sublessee the rights were governed by the Transfer of Property Act.

4. Mr. Das, who appears for the respondents, has contended that difficulties would arise in enforcing the provisions of Ch. 14, Ben. Ten. Act. What he says is, that the purchaser of a raiyati holding has the right to annul all sub-tenancies which are incumbrances under Section 161, Ben. Ten. Act; but if the raiyat has created a non-agricultural tenancy in respect of a portion of his lands for a fixed period which is governed by the Transfer of Property Act, to allow a purchaser to annul such sub-tenancies would be to entitle him to go against the provisions of the Transfer of Property Act. We do not think that there is any substance in this contention. It is not necessary that the incumbrances which can be annulled under Section 167, Ben. Ten. Act, must be incumbrances created under that Act. A mortgage is certainly an incumbrance which is created under the Transfer of Property Act but it can never be suggested that because it is governed by the Transfer of Property Act it cannot be annulled by a purchaser who purchased the holding at a sale in execution of a rent decree under Chap. 14, Ben. Ten. Act.

5. The difficulty however is created by the way in which the expression "under-raiyat" has been defined in Section 4, Ben. Ten. Act. An under-raiyat has been defined to be a tenant who holds immediately or immediately under a raiyat. It is not stated here, as in the case of a raiyat, that he must hold also for purposes of cultivation. It may be argued that this must be the implication, for the provisions relating to under raiyats which are contained in chap. 7, Ben. Ten. Act, are appropriate only to this character as an agricultural tenant. It cannot be denied however that the wording of Section 4, clause (3), Ben. Ten. Act, is very wide, and when the word has been interpreted in one way for a period of nearly 40 years without any dissension whatever, we think that we should not be justified in upsetting the long series of decisions. It is significant to note that considerable changes have been introduced in the Bengal Tenancy Act in recent years but the Legislature which must be presumed to be aware of the law as laid down in the above mentioned decisions did not consider it necessary to make any changes in this respect. Our attention was drawn to the decision in *Alauddin Ahamed v. Tomizuddin Ahammed* , but in that case this particular point was neither raised nor decided. The result therefore is that . these appeals fail, but in the circumstances of the case we direct that each party will bear his own costs in all the three Courts.

#### Cases Referred.

1('12) 15 CLJ 672

2('16) 3 AIR 1916 Cal 32

3('35) 40 CWN 86