Nolin Behari Bosu Vs Hari Pada Bhuia and Others

Court: Calcutta High Court

Date of Decision: July 13, 1933

Acts Referred: Bengal Tenancy Act, 1885 â€" Section 153

Citation: AIR 1934 Cal 452

Judgement

1. We have listened to a very interesting and in some portions very illuminating argument in this group of cases from Dr. Bijan Kumar Mukherji;

but, after giving to his submissions our very best attention, we are of opinion that these appeals must be dismissed. A preliminary objection has

been taken by Mr. Bankim Chunder Roy, learned Advocate for the respondents in 58 out of these 89 appeals. His case is that, leaving aside six

appeals which are above Rs. 100 in value, in the remaining 52 appeals the value of the suits was under Rs. 100 and that having regard to the

language of Section 153, Ben. Ten. Act, these second appeals are incompetent. Dr. Mukherji has pointed out that; in all these oases questions

relating to enhancement of rent and of the amount of rent were in issue and those questions were determined by the trial Court. We are satisfied

that those questions did come within the ambit of the matters in controversy between the parties in these 52 cases and that there is no substance

whatsoever in the preliminary point sought to be raised on behalf of the respondents in these 52 appeals. The preliminary point is therefore

negatived.

2. We now turn to decide the real questions in controversy in these 89 appeals. These appeals are by the plaintiff and they arise out of a group of

suits for recovery of arrears of rent. The tenants allege that by reason of the operation of a custom of ""Hajabad"" in the four mouzahs in suit and

there having been inundation in 1333 and 1335 there were no crops in the years 1334 and 1336 and that therefore the tenants should not be made

liable to pay rents during those years. The question of the existence of this custom of ""Hajabad"" has been gone into by the Courts below and the

finding of fact by the lower appellate Court is that the tenants have been able to prove the existence of this custom from time immemorial and that

there is no evidence on the plaintiff''s side to rebut this. In essence this is a mixed question of law and fact and no doubt the finding of the lower

appellate Court bends itself easily to a very plausible argument on behalf of the plaintiff-landlord. But it is impossible to shut one''s eyes to the fact

that the lower appellate Court on full consideration of the evidence has come to the conclusion that the tenants have shown that this custom has

always existed; in other words, that this custom has been in existence from time immemorial. What is the exact meaning of the term ""time

immemorial"" in this country has been the subject of debate in many cases.

3. In England the matter is not full of difficulties because of the recognition that the period of the commencement of time immemorial has by statute

and also by common law been definitely fixed for centuries past. The time immemorial would for all practical purposes, and has indeed in several

instances for all practical purposes, been taken to be something which was in existence at the time of Pitt''s India Act, ordinarily called the

Regulating Act of 1773. If it be taken that time immemorial would carry one back to 1773 or if it be taken that time immemorial would carry one

back to 1793, when the Permanent Settlement of Bengal was made, it would from a practical point of view amount to the same thing, namely that

for all these long series of years the custom has been recognized and has been in existence. If that is so, then there is nothing to wonder that in the

record-of-rights mention of the existence of this custom finds a place. It is undeniable that the existence of this custom in the localities concerned

forms one of the incidents of tenancy and the fact that this custom is recognized and given effect to is easily provable by the production of the

entries in the record of rights. Therefore we start with this, that the custom in question has been proved by the tenants; it has been proved to have

been in existence for a long series of years compendiously described as time immemorial and the only question that need detain us is whether or

not this custom is a reasonable one. Dr. Mukherji has addressed us a vigorous argument combating the proposition that it is a reasonable custom;

but we are unable to hold that having regard to the character of the lands let out, having regard to the fact that the true source of the real wealth of

the tenants is often sapped because of the inundation which the lands are subject to and the tenants are left without their wherewithal to pay the

rent due to their landlord, that the custom is in any sense of the word an unreasonable one.

4. The character of the land mainly is agricultural. This is not the case of a town with manufacturing industries in it. Agriculture, is the source of the

living of the tenants, though we are not unmindful of the fact that homestead lands in some parts of these mouzahs are also to be found. But having

regard to the character of the occupation of the tenants and the character of the lands on the tilling of which the occupation of the tenants can be

made profitable it would require a very strong set of circumstances to induce us to hold that the custom referred to above would be considered to

be unreasonable. Therefore, our conclusion is that the custom in question has been proved to have been in existence for a long time, in other words

the custom is an ancient one and it is a reasonable one and we are unable further to say that the custom is in any way a variable one. That being so,

on the question of the custom raised by the tenants our conclusion must be in favour of the tenants.

5. The next question that has been argued is that it is an encumbrance within the meaning of Section 37 of Act 11 of 1859 and that the landlord

who is a recent purchaser at a revenue sale is entitled to treat the custom as an encumbrance and to disregard the existence thereof. The answer to

this question depends upon the fact as to whether or not this custom in question is at all an encumbrance. It is argued that the undoubted right of

the landlord is to receive rent from the tenants in respect of the lands let out and if between the tenants and the landlord a custom like this

intervenes and a portion of the landlord"s rent is cut off because of the existence of this custom, then it is something which is in derogation of the

landlord"s rights and it is something which the tenants are allowed to appropriate to themselves to the prejudice of the landlord. But if however the

position be that the landlord has let out lands out of which, owing to the circumstances referred to above, namely the loss of crops owing to

inundation the tenants are unable to make anything, in other words, to put it shortly, if the lands do not yield anything, from a practical point of view

can it be said that the landlord is still entitled to his rent although he has not provided the tenants either with lands capable of yielding or has not

taken care to prevent inundation by erection of suitable works as have been adopted in various European countries. If the position be what we

have tried to sketch however imperfectly we may have doneÃ¯Â¿Â½then it is in consonance with notions of natural justice that a custom like this should

not be held to be an encumbrance. We are aware that on this question of encumbrance there has been spent much learning and much has been

written in various text books; but each case has gob to depend on its own facts, and on the facts of these cases we have come to the conclusion

that the custom in question cannot be treated as an encumbrance.

6. If these are our true conclusions on the two questions raised above, there is not much to discuss any further in this group of cases. The result

therefore is that this group of appeals must in our view be dismissed with costs, i.e., one set of costs in the 58 appeals in which the learned

Advocate Mr. Roy appears. There will be no order as to costs as regards the other appeals.