

(1918) 03 CAL CK 0029**Calcutta High Court****Case No:** None

Gopal Mandal

APPELLANT

Vs

Tapai Sankhari and Another

RESPONDENT

Date of Decision: March 15, 1918**Citation:** AIR 1919 Cal 691 : 45 Ind. Cas. 545**Hon'ble Judges:** Shamsul Huda, J; Fletcher, J**Bench:** Division Bench**Judgement**

Fletcher, J.

This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Faridpore, dated the 23rd December 1915, reversing the decision of the Munsif at Bhanga. Mr. Sen who appears in support of the appeal considers that the case is one of importance and difficulty. Of course, in a matter dealing with a question coming under the Bengal Tenancy Act, on account of Mr. Sen's great knowledge in this matter, one always pays great attention to what he says. But having listened to his arguments, it seems to me that the case is one of great simplicity. The question is, "can an under-riayat by usage or custom obtain a right of occupancy?" Mr. Sen says he cannot. The Legislature of the country have said that he can. Therefore, one has got to decide, whether the Indian Legislature, when they gave the second illustration of Section 183 of the Bengal Tenancy Act which expressly shows that an under-riayat may by usage or custom obtain a right of occupancy, gave an illustration opposed to the provisions of the Act. Section 183 is a saving clause and it says that nothing in the Bengal Tenancy Act shall affect any custom, usage or customary right not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions. The second illustration is one showing that an under-riayat may acquire by custom or usage a right of occupancy. The saving, section means this: that the provisions of the Act shall not affect any right, amongst other things, that an under-riayat has by usage or custom and, therefore, if by usage or custom it is duly proved that an under-riayat has acquired a right of occupancy, Section 183 says that that shall not

be affected unless it is inconsistent with the provisions of the Act. The section that it is said it is inconsistent with is Section 4, which defines the classes of tenants under the provisions of the Bengal Tenancy Act; and, amongst those tenants, there are raiyats and under-raiyats. A person may be an under-raiyat to whom a special usage or custom applies, out he still remains an under-raiyat. It seems to me that it is quite impossible to say on reading Section 183 and the provisions of the Act that an under-raiyat cannot by usage or custom obtain a right of occupancy.

2. There is another matter, and that is that Section 113 expressly makes mention of an under-raiyat having occupancy rights. The criticism that Mr. Sen makes on that is that that was not in the original draft as passed by the Indian Legislature but is only an amendment by the Bengal Legislature. Still the Bengal Legislature were within their powers in making the amendment and there does not seem to be any reason for supposing that when they made that amendment they did not recognise that an under-raiyat could have no occupancy right.

3. The next point that is raised is that, even if an under-raiyat has a right of occupancy, still he is liable to be ejected after notice to quit u/s 49 of the Bengal Tenancy Act. That is clearly not so. That would mean that Section 49 would affect a custom, usage or customary right not inconsistent with the provisions of the Act by which an under raiyat may have a right of occupancy. I think that Section 49 cannot apply to an under-raiyat who has got a right of occupancy.

4. Then it was finally said that in this case the presumption applied by reason of the entry in the Record of Rights was rebutted. That is a question of fact and it was clearly within the competence of the learned Judge of the Court below.

5. I may mention that Mr. Justice Mooker-jee in the case of Akhil Chandra Biswas v. Hasan Ali Sadagar 20 Ind. Cas 698 : 19 C.W.N. 246 : 18 C.L.J. 362 expressly stated that by a special usage or custom an under-raiyat might under certain circumstances have a right of occupancy. That seems to me to be in accordance with the provisions of the Bengal Tenancy Act.

6. The present appeal, therefore, fails and is dismissed with costs.

7. Shamsul Huda, J.--I agree.