## ORIGINAL CIVIL.

*Before Rankin J.*

1921

*June 24.*

BITHALDAS CHANDAK

*v.*

LALBEHARI DUTT & SONS.*

*Landlord and Tenant—Calcutta Rent Act (Beng. III of 1920), ss. 2 (g), II (5), 12—Monthly tenant—Notice to quit before the Act—Landlord's right to eject—Tenants' fixity of tenure—Regular payment of rent.*

Under the Calcutta Rent Act though a monthly tenant received a notice to quit before the Act came into force, he was nevertheless a "tenant" under the Act. The landlord is entitled to an order for ejectment, if the tenant does not pay regularly the rent chargeable under the Act and the tenant is not entitled to the benefits of the Act under which the latter gets a certain fixity of tenure.

*Per* CURIAM. The Rent Act puts a tenant who complies with its conditions into much the same position as a tenant who is entitled to a term. At all events it gives him some fixity of tenure so long as the Rent Act is in force; but that privilege is given to a tenant who pays his rent and performs the conditions and to no one else.

The Legislature has seen fit to forbid all the benefits of the Rent Act to any tenant who has not within three months from 6th May 1920 paid all arrears of rent due by him in respect of the said premises.

THE plaintiff who was a lessee under an assignment of a lease of premises No. 13, Clive Street, in the town of Calcutta sued the defendants who were occupying a shop room and a godown on the ground floor in the said premises, as trespassers from 1st day of January 1920, for ejectment and vacant possession, for arrears of rent and for damages. He stated that

* Original Civil Suit No. 222 of 1920.

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he desired to repair the said premises thoroughly and that he had given notice to the defendants who were monthly tenants on the 29th November 1919 to quit the said premises by the 31st December 1919. Unpaid rent for October, November and December 1919 at the rate of Rs. 175 per month was claimed, as also damages for trespass. The defendants stated that for over 30 years they had occupied two shop rooms on the ground floor of No. 13, Clive Street, at Rs. 130 per month, and were agreeable to pay rent at that rate. It was not necessary to vacate the shop-premises for purposes of repair. The assignment and the notice to quit were admitted. It was denied that they were trespassers or liable to eviction and in any event they were entitled to reasonable time before vacating the shop premises which had been held for such a long time.

The plaint had been filed on the 3rd day of February 1920 before the Calcutta Rent Act had come into operation. No steps had been taken to alter the pleadings. The main points considered were, (i) whether the defendants were tenants or trespassers, and (ii) whether the defendants who were monthly tenants were entitled to the benefit of the Rent Act, having regard to s. 11(5) and to their not paying the rent regularly though they subsequently deposited the sum with the Controller. It appeared the defendants had paid the enhanced rent for two months.

It was decided that the defendants came within the meaning of "tenant" and were not trespassers though the notice to quit was before the Act but that they were not entitled to the benefits of the Rent Act inasmuch as though the Rent Act gave a monthly tenant a certain fixity of tenure that privilege was given to a tenant who paid his rent and performed his conditions and to no one else.

The provisions of the Calcutta Rent Act, 1920, which are material for this report are as follows :—

"11. (*1*) Notwithstanding anything contained in the Transfer of "Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the "Indian Contract Act, 1872, no order or decree for the recovery of posses- "sion of any premises shall be made so long as the tenant pays rent to "the full extent allowable by this Act, and performs the conditions of "the tenancy :

"Provided that nothing in this sub-section shall apply where the tenant "has done any Act contrary to the provisions of clause (*m*), clause (*o*), or "clause (*p*) of section 108 of the Transfer of Property Act, 1882, or has "been guilty of conduct which is a nuisance or an annoyance to adjoining "or neighbouring occupiers, or where the premises are *bonâ fide* required by "the landlord either for purposes of building or re-building, or for his own "occupation, or for the occupation of any person for whose benefit the "premises are held, or where the landlord can show any cause which may "be deemed satisfactory by the Court.

"(*2*) Where the landlord recovers possession on the ground that the "premises are required for his own occupation, or for the occupation of any "person of whose benefit the premises are held, the tenant shall have a right "of re-entry, if the premises are let to another tenant within six months "from the date of recovery of possession.

"(*3*) The fact that the period of the lease has expired, or that the "interest of the landlord in the premises has been transferred, shall not of "itself be deemed to be a satisfactory cause within the meaning of the "proviso to sub-section (*1*), provided that the tenant is ready and willing "to pay rent to the full extent allowable by this Act.

"(*4*) Where a landlord refuses to accept the rent referred to in sub- "section (*1*) offered by a tenant, the tenant may deposit it with the "Controller within a fortnight of its becoming due.

"(*5*) No tenant shall be entitled to the benefit of this section in respect "of any premises, unless within three months of the date of the commence- "ment of this Act he has paid all arrears of rent due by him in respect "of the said premises, and also unless he pays the rent due by him to the "full extent allowable by this Act within the time fixed in the contract "with his landlord, or, in the absence of any such contract, by the "fifteenth day of the month next following that for which the rent is "payable.

"12. Where any order or decree of the kind mentioned in section 11, "sub-section (*1*), has been made on or after the thirtieth day of September "1919, but not executed before the date of the commencement of this Act,

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"the Court by which the order was made may, if it is of opinion that the "order or decree would not have been made if this Act had been in "operation at the date of the making of the order, rescind or vary the "order in such manner as the Court may think fit, for the purpose of giving "effect to this Act."

*Mr. S. N. Banerjee*, for the plaintiff, contended that the defendants were trespassers and not "tenants" within the meaning of the Calcutta Rent Act. They were liable in damages for wrongful occupation.

*Mr. M. N Kanjilal*, for the defendants, argued that the defendants were "tenants" within the definition of "tenant" in the Calcutta Rent Act. It was stated that rent had not been paid as it had not been demanded and it was submitted that the defendant was entitled to relief having deposited all the rent with the Controller.

RANKIN J. In this case there must be a decree for ejectment. The suit was brought for ejectment on the 3rd February 1920, and it appears and indeed it is admitted that the plaintiff on the 12th August 1919 took an assignment from Luchminarain Sadani for a term granted by an Indenture bearing date the 20th September 1918 and made between the Archbishop of Calcutta and Luchminarain Sadani. The defendants' firm Messrs. Lalbehari Dutt & Sons had been in occupation of two rooms in the premises for some time before Luchminarain Sadani was granted his lease. Luchminarain Sadani raised the rent to Rs. 175 per month. After the plaintiff took an assignment of the term the defendants paid that rent to the plaintiff and took two receipts for the month of August and the month of September 1919. They began to fall into arrears from the month of October 1919, and in point of fact they paid no rent at all until the time when in June of this year 1921, the ypaid into the hands of the Rent Controller under the Rent

Act a sum of over Rs. 3,000 being the rent from October 1919 until May of this year. In the meantime on the 3rd February this suit was instituted. On the 26th April 1920 the written statement was filed. On or about the 5th May the Rent Act came into force in Calcutta. What has happened is, that notwithstanding the Rent Act no amendment of pleadings has taken place and the suit in some way, which I do not quite understand, comes on now in June 1921 before me as a short cause. Prior to the Rent Act the position was shortly this. The defendants, as they quite admit, were monthly tenants. In November they got more than a month's notice determining their tenancy at the end of December, and at the end of December, therefore, the landlord, in this case the plaintiff, was entitled to re-entry. That position is the position pleaded in the plaint with this exception that the plaint contains some irrelevant matters purporting to explain why the plaintiff desired to have his premises back again. Before the Rent Act came into force, it was so far as I know, entirely irrelevant for the landlord, whose tenancy had been properly determined by a notice to quit, to explain why he wanted to have his rights. The written statement, however, deals with certain matters by way of showing that the purpose of repairs which the landlord had alleged was not one which made it necessary for the landlord to be allowed to re-enter. When the Rent Act came into force the matter took a different complexion. Nothing was done to put the pleadings into order, and before me at the opening of the case the landlord desired to maintain that he came within the proviso to section 11 of the Rent Act, as being a landlord who required the premises for the purpose of building or rebuilding. That matter has not been inquired into by me for the

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reason that it did not appear to me probable that this course would be necessary. If it had been necessary I should certainly have on some terms allowed the defendants an opportunity of investigating into that question. However Mr. Kanjilal, who has very ably conducted the case for the defendants, has offered me on the question of the Rent Act the issue as to whether the defendants have fulfilled the conditions of section 11. Undoubtedly as I am giving him leave to raise the Rent Act, he has to show that he has fulfilled those conditions. So far as they are concerned the first question is, whether the defendants here are within the meaning of the words "so long as the tenant pays rent to the full extent allowable by this Act." Mr. Banerjee for the plaintiff takes the point that in this case the tenancy had been determined at the end of 1919, so that in May 1920 he says the defendants were mere trespassers. When one comes to consider the meaning to be attached to the word "tenant," one has the definition under section 2 to guide one. That states "any person by whom or on whose account rent is payable for any premises." In answer to that Mr. Banerjee naturally says that mesne profits are not rents. What a trespasser has to pay for his trespass, is not rent. Therefore he puts the problem before me whether the defendants come within the meaning of section 11 at all. I think the defendants are within the meaning of "tenant" in section 11 and are tenants in the special sense in which that word is used. It seems to me that this is shown by section 12 which contemplates the case of a person who has had an order made against him for recovery of possession of property before the operation of the Rent Act, and it goes on to say that if the Court is of opinion that the order or decree would not have been made if this Act

had been in operation, the Court can even yet give relief. In strictness of language decree for the recovery of possession of property is never made against a tenant. If there has been a tenancy and the decree is upon a forfeiture, it is on the footing that the term was forfeited either before suit or at the latest by the issue of the writ. In the same way against a tenant-at-will or a tenant-in-sufferance, the issue of the writ would determine the tenancy. So far as I know it is never correct that a decree for recovery of possession should go against a person who is in strict sense a tenant. Mr. Kanjilal has drawn my attention to the fact that in the English Rent Act the word "tenant" has been given a very special and specially wide meaning. I think that persons in the position of the defendants are not outside the scope of s. 11 on the mere ground that they are not tenants.

I now come to the question whether the defendants here have not been shown to be hit by sub-section (5) of s. 11. The position was that when the Rent Act came into force they were in arrear with their rent since October 1919, and until June of 1921, when they paid money to the Rent Controller, they did nothing in the way of paying rent at all.

Sub-section (5) is intended, as I think, to give persons who are tenants three months within which they may pay up and put themselves in the position of being entitled to claim the benefits of the Rent Act. If a person is in arrear in May 1920 with his rent, he still has three months in which he can pay up those arrears under the first part of that sub-section. Three months in this case would take us to August 1920, as a matter of fact the 5th or 4th. By that time this defendant had done nothing to pay up any of the arrears that were standing over since

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October 1919. He says with regard to that two things. First of all he says it was for the plaintiff by the custom to send and collect rent, that the *durwan* never came, that the plaintiffs never came although the defendants were asking them to come and collect their own rent. The plaintiff's story is that he went for the rent on some three occasions and could not get the rent. Of these two stories I have no hesitation at all in believing the plaintiff and rejecting the story of the defendants.

Then it is said that in June 1920, a letter was received from a firm of Hustamull Chunilal claiming that the plaintiff was not the proper person to be paid the rent. As a matter of fact Luchminarain, the previous landlord, had told the defendants himself that he was assigning to the plaintiff. The defendants had paid rent in respect of two months at least to the plaintiff and accepted his receipt. Further, it appears now that somebody had a quarrel with Luchminarain, namely, Luchmichand, a partner in the firm of Hustamull Chunilal. Because this gentleman in June sent from Bikaneer this letter to the defendants, the defendant says that he did not pay his rent at all to anybody until June of 1921. No proof has been adduced before me of any letter written by or on behalf of the defendants in June of 1920 to the plaintiff asking about this matter, or seeking to pay the money into Court or into the hands of any neutral party.

I regret to say that as the Legislature has seen fit to forbid all the benefits of the Rent Act to any tenant who has not within three months from 6th May 1920 paid all arrears of rent due by him in respect of the said premises, it is not possible for me to hold, that the defendants are entitled to them. It may be said that on the plaintiff's view after the beginning

of 1920 what was due was not strictly rent but more strictly mesne profits; but as I have pointed out the defendants cannot claim the benefits of this section at all except by saying that he is in the position of a tenant within the meaning of the section, and of course he cannot have it both ways. He cannot claim, as he does claim and all along claimed, to be in possession not as trespasser but as a tenant, and also claim to be under the words "so long as the tenant pays rent in s. 11", and also for the purpose of sub-section (5) say that it is not rent at all. The second half of sub-section (5) is this "and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or in the absence of any such contract by the 15th day of the month next following that for which rent is allowable." In the same way also the defendants here can make no pretence that they have done anything of the sort.

Under sub-section (4) where a landlord refuses to accept the rent, the tenant may deposit it with the Controller within a fortnight of its becoming due. It is said that he is not bound to deposit it with the Controller. That is perfectly true. He is not bound to bring himself within sub-section (5) at all; but if he wants to come under sub-section (5) so as not to lose the benefits of the Rent Act, then where the landlord refuses to accept it as rent, he may pay to the Controller and thus preserve his rights.

In these circumstances it seems to me that it is entirely unnecessary to go into the question of whether these premises are *bonâ fide* required for the purpose of building or re-building.

Mr. Kanjilal has argued that the question under sub-section (5) is a mere question of non-payment of rent and that equity can relieve against any forfeiture

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for non-payment of rent. I must say at once that that contention is entirely unfounded. If the defendant apart from the Rent Act had had a term say 2, 3 or 5 years and the landlord was proposing to forfeit that term by reason of non-payment of rent, equity could relieve against that forfeiture. But apart from the Rent Act if he had not a term but was only a monthly tenant and had his month's notice, there would have been no equity on the part of the defendant to insist upon the Court giving him any larger interest in the property than he had agreed to with his landlord.

That being the position apart from the Rent Act, the defendants would have no defence here at all. The Rent Act puts the tenant who complies with its conditions into much the same position as a tenant who is entitled to a term. At all events it gives him some fixity of tenure so long as the Rent Act is in force; but that privilege is given to a tenant who pays his rent and performs his conditions and to no one else.

The result is that not being within s. 11 by reason of the non-payment of rent, the defendants have got no equity at all to ask the Court to give him the special relief provided by the Rent Act in the teeth of the section which says that such relief should go only to the tenant who has paid.

As regards the question of ejectment this is now towards the end of June, and I do not propose that the defendants should be ejected until the end of July. This is reasonable. The defendants must pay the rent for July as a condition. They will, in any case, have till the 15th July. If by that time they pay Rs. 175 for July rent they will get till the end of July.

As regards the amount of mesne profits, there does not seem to be dispute.

As regards the money that has been paid to the Rent Controller, there must be some sensible arrangement for withdrawing that.

The plaintiff will get costs on scale No. 2.

S. K. R.

Attorneys for the plaintiff: *Hazra & Roy.*
Attorney for the defendant: *J. N. Dutt.*

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## CIVIL APPELLATE.

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*Before Chatterjea and Panton, JJ.*

PROBHAT CHANDRA BISWAS

*v.*

GOPAL CHANDRA MUKHERJI AND OTHERS.*

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*June* 28.

*Partition Suit—Partition suits whether within the purview of O. XLI, r. 33 of the Civil Procedure Code (Act V of 1908).*

The Appellate Court is competent to exercise the powers conferred upon it by O. XLI, r. 33, in partition suits. There is no restriction of the powers as to any class of suits under that rule.

SECOND APPEAL by Probhat Chandra Biswas, the defendant No. 1.

In this partition suit, the plaintiffs' share was one-third and the defendant's share two-thirds in respect of the disputed properties. With regard to the homestead lands it was held that the plaintiff was entitled to get from the defendants the price of his share of the lands, under section 4 of the Partition

* Appeal from Appellate Decree No. 1100 of 1919, against the decree of M. Smither, District Judge of Dacca, dated Feb. 19, 1919, affirming the decree of Dhirendra Kumar Mukherji, Munsif of Munshiganj, dated Feb. 11, 1918.