GOPI KANTA SEN A

v.

ABDUL GAFFUR & ORS.

August 11, 1967

[K. N. WANCHOO, C. J., V. BHARGAVA AND G. K. MITTER, JJ.] B

Calcutta Thika Tenancy Act, 1949, as amended by Calcutta Thika Tenancy Act 1953—S. 3 of the Act whether applicable to pre-Act suits—Deletion of ss. 28 and 29 of original Act by 1953 amendment—Effect of deletion on jurisdiction of civil courts.

In June 1948 the appellant instituted a suit against the first respondent and others for their ejectment from the property in suit. On February 28, 1949 the Calcutta *Thika* Tenancy Act came into force. The first respondent was not a *thika* tenant within the definition thereof given in the Act. The suit was decreed by the Munsif in March 1949. In November 1949 the appeal filed by the first respondent was dismissed by the first appellate court. He then filed a second appeal in the High Court which was heard in 1954. Before that the Calcutta *Thika* Tenancy (Amendment) Act, 1953 was passed. Under this Act the first respondent came within the definition of *thika* tenant. The High Court remanded the case to the Subordinate Judge for trying the case in the light of the amended Act. The Subordinate Judge held that the first respondent was a *thika* tenant and could not be ejected as none of the grounds mentioned in s. 3 of the Act had been established by the appellant. The latter appealed to the High Court and urged that with the omission of s. 29 in the 1953 Act Civil Courts became unable to remit ejectment suits to the Rent Controller with the result that the Act as amended could not apply to pre-Act suits. The High Court however took the view that after the omission of ss. 28 and 29 from the Act suits for eviction before civil courts became infructuous and, accordingly, dismissed the appeal. The appellant with certificate came to this Court. The questions that fell for consideration were: (i) whether the tenant could take the benefit of s. 3 in a pre-Act suit, (ii) whether in view of the omission of ss. 28 and 29 from the Act the civil courts had jurisdiction to try such a suit.

HELD: *Per* Wanchoo C.J. & Mitter J. (i) While it is a general principle of law that statutes are not to operate retrospectively so as to defeat vested interests; such operation may be given by express enactment or by necessary implication from the language employed. The language of s. 3 leaves no room for doubt that it is retrospective since it expressly states that notwithstanding anything contained in any other law for the time being in force or in any contract, a *thika* tenant will be liable to ejectment on grounds specified therein and not otherwise. [179 D-E; 180 F-G].

Knight v. *Lee*, [1893] 1 Q.B. 41 and *Beadling* v. *Goll*, 39 Times Law Reporter 31, referred to.

Section 3 does not purport to lay down that the grounds mentioned therein have got to be stated in the notice of ejectment. All that the section lays down is that ejectment could not be had unless the existence of one of the grounds was proved. Such proof could have been adduced at the trial even if no mention of the grounds had been made before. The appellant not having given such proof the case was rightly decided against him. [183 C-D].

A (ii) However in a pre-Act suit no notice under s. 4 could be insisted on as that section was clearly prospective. Section 5 which required proceedings to be filed before the Controller was also clearly prospective. [180 H; 181 A; B—H].

(iii) The High Court was wrong in holding that suits for the eviction of *thika* tenants became infructuous before civil courts after the omission of ss. 28 and 29. There being no longer any provision for B transfer of pending suits and appeals, the court hearing the appeal would have to pass a decree for ejectment even if the defendant was a *thika* tenant after taking into account s. 3. [183 D—F].

Per Bhargava, J.—This appeal must be dismissed because the respondent was entitled to the benefit of s. 3. It was not necessary to express any opinion whether compliance with s. 4 was also required or whether it being prospecitve only no such compliance by the appellant was needed.- [184 B].

C

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 787 of 1964.

Appeal from the judgment and decree dated January 5, 1961 of the Calcutta High Court in Appeal from Appellate Decree No. 1012 of 1955.

D *A. K. Sen* and *D. N. Mukherjee*, for the appellant.

Sukumar Ghose, for respondent No. 1.

The Judgment of WANCHOO, C. J. and MITTER, J. was delivered by MITTER, J. BHARGAVA, J. delivered a separate Opinion.

Mitter, J.—This is an appeal by a certificate granted by the E High Court at Calcutta from a judgment and decree in Second Appeal passed by that court in January, 1961. The question before us is, whether the respondent No. 1 was entitled to the benefit of the Calcutta *Thika* Tenancy Act, 1949, as amended finally by an Act of 1953.

The facts necessary for the disposal of this appeal are as F follows. On the 18th June 1948, the plaintiff, the appellant before us, instituted Suit No. 292 of 1948 for ejectment of three persons, namely, Abdul Rahim, Abdul Hamid and Abdul Gaffur, from the property in suit (a parcel of land about 1 cottah 8 chittaks being part of premises No. 6/1, Shibtola Lane, Entally, Calcutta). In the notice to quit served on the 7th May, 1948 the first two persons were described as tenants under the plaintiff and the third G as a person who had purported to purchase the structures on the land and the tenancy right therein. In the plaint itself, the first two defendants were described as *thika* tenants. No claim was made for rents or taxes although it was alleged that the same were in arrears. The suit was contested only by the third defendant who filed a written statement in September 1948 contending that the H suit was bad for non-joinder of parties. The suit was decreed by a Munsif of Sealdah court, 24-Parganas on March 18, 1949 after the Calcutta *Thika* Tenancy Act of 1949 had come into force on February 28, 1949. The appeal filed therefrom by the third defendant was dismissed by the Subordinate Judge. Fifth Additional

Court, Alipore on November 23, 1949. The decree-holder put the decree in execution and recovered possession of the land on December 18, 1949. The Calcutta *Thika* Tenancy (Amendment Ordinance), 1952 was passed on October 21, 1952 introducing various changes in the Act and substituting a new definition of a *thika* tenant. On March 14, 1953 the Calcutta *Thika* Tenancy (Amendment Act), 1953 was passed amending the definition of *thika* tenant still further and introducing important changes in the Act of 1949. The effect of these provisions will be considered later on.

Before the Subordinate Judge, a point was taken that after the coming into force of the Act of 1949, the Rent Controller alone had jurisdiction in respect of ejectment suits as the defendant-appellant was a *thika* tenant. The Subordinate Judge dismissed the plea on the ground that the defendant-appellant had not erected the structures on the land and was not a successor-in-interest of the tenant but only a transferee. Abdul Gaffur preferred a Second Appeal to the High Court and this was heard and disposed of by a single Judge of that court on July 21, 1954, long after the *Thika* Tenancy Ordinance of 1952 and the Amending Act of 1953 had come into force. The learned Judge held that at the time when the appeal of the defendant was disposed of by the Subordinate Judge, the rights of the parties were governed by the *Thika* Tenancy Act of 1949 and the definition of a *thika* tenant in that Act was not such as to afford any protection to the appellant. In view of the amendment of the Act in 1953 however, the learned Judge felt that the question whether the appellant was entitled to the benefit of that Act had to be re-examined and consequently he remanded the matter to the lower appellate court with a direction that there should be a fresh decision of the case after considering the law applicable and taking further evidence if necessary. On remand, the Subordinate Judge, Seventh Court, Alipore rejected the plea of the landlord that the appellant Gaffur could not be regarded as a *thika* tenant *inter alia* on the ground that he had sold his interest by a registered sale deed dated April 12, 1949 to one Subasini. On a consideration of the provisions of the Act and the Ordinance, the Subordinate Judge held that t e appellant, Gaffur, was not liable to ejectment in the absence of any grounds therefor in the notice to quit in accordance with s. 3 of the Act as he was a *thika* tenant within the meaning of the Act as it was finally amended. He also observed that s. 4 of the Act would be applicable. The landlord went up in appeal once more to the High Court. On this occasion, the main plank of the argument on behalf of the landlord was that with the omission of s. 29 civil courts became unable to remit ejectment suits to the controller with the result that the Act as finally amended could not apply to pre-Act suits and *thika* tenants could get no relief under the Act. The learned Judges of the Division Bench of the High Court found themselves unable to accept this argument and held that the only power vested in civil courts in respect of ejectment suits against

A *thika* tenants like the present one was to be found in ss. 28 and 29 of the original Act and by their omission from the statute "suits for eviction became infructuous before civil courts". In the result, they dismissed the appeal. We have now to trace the relevant changes in the law made from time to time and see whether the landlord was entitled to eject Abdul Gaffur notwithstanding the Act as amended from time to time.
B

The first attempt to give relief to persons described as *thika* tenants was made by West Bengal Ordinance No. XI of 1948 promulgated on October 26, 1948. The Ordinance had only six sections. Section 2 defined a '*thika* tenant' as meaning any person who under the system commonly known as "*thika*" "*thika masik*
C *utbandi*", "*thika masik*", "*thika bastu*", or under and other like system held land under another person whether under a written lease or otherwise and was, or but for a special contract would be, liable to pay rent at a monthly or any other periodical rate, for that land to such other person and had erected any structure on such land and was entitled to use it for residential purposes or for manufacturing or business purposes and included the suc-
D cessors in interest of such person. Section 3 provided that notwithstanding anything contained in any other law for the time being in force, no decree or order for the ejectment of a *thika* tenant shall be executed during the continuance in operation of the Ordinance. We need not consider the proviso to the section as we are not concerned with the condition mentioned therein. It is
E to be noted that by the definition of *thika* tenant, a person could only get the protection of the Ordinance if he could establish that he was holding land under any of the systems expressly mentioned or any other like system.

A comprehensive Act was later passeed *i.e.*, West Bengal Act II of 1949 which, as already noted, came into force on Feb-
F ruary 28, 1949. The definition of a *thika* tenant was modified slightly but the change affected thereby need not be taken account of because the respondent Gaffur's position was not improved thereby. The incidents of *thika* tenancy were mentioned in various sections from s. 3 to s. 11 contained in Chapter II of the Act. S. 3 provided that notwithstanding anything contained in any
G other law for the time being in force or in any contract, a *thika* tenant shall, subject to the provisions of the Act, be liable to ejectment from his holding on one or more of the specified grounds and not otherwise. The six grounds mentioned are: (i) failure to pay an arrear of rent due to the landlord in respect of the holding; (ii) user of the land comprised in the holding in a manner when rendered it unfit for any of the purposes mentioned in cl.
H (5) of s. 2 (the definition of a *thika* tenant) or violation of a condition consistent with the Act by a breach of which he was, under the terms of a contract between himself and his landlord, liable to be ejected; (iii) refusal to agree to pay rent at such enhanced rate as might be determined under s. 25; (iv) requirement

of the land by the landlord for his own occupation or for the purpose of building on the land or otherwise developing the land except during any period limited by a registered lease under which the tenant might be holding; (v) failure on the part of the tenant to use or occupy a major part of the holding for his own residential, manufacturing or business purpose for more than six consecutive months (omitting the proviso); and (vi) on the expiry of a registered lease in favour of the tenant. S. 4 provided:

> "It shall not be competent for a landlord to eject any *thika* tenant from his holding unless the landlord has given the *thika* tenant notice in the manner provided in section 106 of the Transfer of Property Act, 1882:—
>
> (a) in the case where he wishes to eject the *thika* tenant on any of the grounds specified in clauses (i), (ii), (iii) and (iv) of section 3 at least one month's notice in writing expiring with the end of a month of the tenancy; and
>
> (b) in the case where he wishes to eject the *thika* tenant on the ground specified in clause (iv) of section 3 at least three months' notice in writing expiring with the end of a month of the tenancy"

The section has two provisos one of which laid down that no *thika* tenant shall be ejected from his holding on any of the grounds specified in cls. (iv) and (v) of s. 3 except on payment to him or on deposit with the Controller for payment to him such compensation as might be agreed upon or might be determined in the manner prescribed by the Controller.

S. 5 enacted that:—

> "(1) Notwithstanding anything contained in any other law for the time being in force, a landlord wishing to eject a *thika* tenant on one or more of the grounds specified in section 3 shall apply in the prescribed manner to the Controller for an order in that behalf and, on receipt of such application, the Controller shall, after giving the *thika* tenant a notice to show cause within thirty days from the date of service of the notice why the application shall not be allowed and after making an inquiry in the prescribed manner either allow the application or reject it after recording the reasons for making such order.....".

The section further provided that no order allowing an application was to be made unless compensation payable to the tenant was either deposited with the Controller or paid to the tenant. Chapter IV of the Act, by several sections, provided for appeals, reviews etc. Under s. 27 any person aggrieved by an order of the Controller might present an appeal in writing either to the Chief Judge of the Court of Small Causes in the Presidency town or to

A the District Judge of a district in which the holding was situate. Sub-s. (5) of the section provided for reviews. Section 28 enacted that:

> "Where any decree or order for the recovery of possession of any holding from a *thika* tenant has been made before the date of commencement of this Act but the possession
B of such holding has not been recovered from the *thika* tenant by the execution of such decree or order, the Court by which the decree or order was made may, if it is of opinion that the decree or order is not in conformity with any provision of this Act other than sub-section (1) of section 5 or section 27, rescind or vary the decree or order in such manner as the Court may think fit for the purpose
C of giving effect to such provision and a decree or order so varied by any Court shall be transferred by such Court to the Controller for execution under this Act as if it were an order made under and in accordance with the provisions of this Act".

D Section 29 ran as follows:—

> "The provisions of this Act shall apply to all suits and proceedings, including proceedings in execution, for ejectment of a *thika* tenant which are pending at the date of commencement of this Act, and if any such suit or proceeding relates to any matter in respect of which the
E Controller is competent after the date of such commencement to pass orders under this Act, such suit or proceeding shall be transferred to the Controller who shall on such transfer deal with it in accordance with the provisions of this Act as if this Act had been in operation on the date of institution of the suit or proceeding:
>
> F Provided that in applying the provisions of this Act to any suit or proceeding instituted for the ejectment of a *thika* tenant so transferred, the provisions regarding notice in section 4 of this Act shall not apply".

Section 33 provided that on the expiry of the Calcutta *Thika* Tenancy Ordinance, 1948, the provisions of s. 8 of the Bengal General
G Clauses Act, 1899 would apply as if it were an enactment then repealed by a West Bengal Act. It will be noted from the provisions of the Act that it was intended to benefit all *thika* tenants expressly covered thereby. Unfortunately, the Act did not afford any real protection to persons for whom it was meant because of the peculiar definition of *thika* tenant in it. A series of decisions of the Calcutta High Court shows that the tenants failed to get
H any relief because they could not prove any system either of the kind specifically mentioned in s. 2 sub-s. (5) or any other like system. It is however clear that the benefit of s. 28 was available only if the decree or order for the recovery of possession had been made before the date of the commencement of the Act but

possession of such holding had not been recovered from him. Section 29 on the other hand was made applicable to all poceedings including proceedings in execution which were pending at the date of the commencement of the Act. No exception was made under s. 29 to cases where possession of the holding had been recovered from the *thika* tenant. The consequence was that even if the tenant had lost possession but any proceeding even arising from an execution proceeding was pending, the provisions of the Act would be attracted. If any such pending suit or proceeding related to any matter in respect of which the Controller was competent to pass orders, the suit or proceeding would be transferred to the Controller who would deal with it in accordance with the provisions of the Act just as if the Act had been in operation on the date of the commencement of the suit or proceeding. The only qualification was that even if the suit had been filed before the Act but was not disposed of by that date, the landlord had to establish that he was entitled to possession because of the existence of any of the grounds mentioned in s. 3. He was however not to be bound by the provision as to giving a notice under s. 4 which obviously he could not have done because of the passing of the Act after the filing of his suit. As already stated, the Act failed to achieve its object—see *Murari* v. *Prokash*(1) and *Mohammad Mateen* v. *Baijnath Bajoria*.(2) To get over this difficulty, an Ordinance, namely, the Calcutta *Thika* Tenancy (Amendment) Ordinance, XV of 1952 was promulgated on October 21, 1952. By s. 2 of this Ordinance, the definition of *thika* tenant in the Calcutta *Thika* Tenancy Act, 1949 was substituted by a new one, namely:

> "(5) '*thika* tenant' means any person who holds, whether under a written lease or otherwise, land under another person, and is but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate, for that land to that another person and has erected any structure on such land for a residential, manufacturing or business purpose and includes the successor in interest of such person, but does not include a person:—
>
> (a) who holds such land under that another person in perpetuity; or
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> (b) who holds such land under that another person under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; or
>
> (c) who holds such land under that another person and uses or occupies such land as a *khattal*".

(1) A.I.R. 1950 Calcutta 230. (2) A.I.R. 1951 Calcutta 358.

A Other amendments were made in different sections of the Act. The most important one was however that contained in s. 5 sub-s. (1) of this section which enatced that—

> "Save as provided in sub-section (2), the provisions of the said Act as amended by this Ordinance, shall apply to all cases pending before a Court or Controller on the date
B of the commencement of this Ordinance".

Sub-s. (2) of s. 5 provided as follows:—

> "If, at any time between the commencement of the said Act and of this Ordinance, a decree or order has been passed for the recovery of possession of any land and for other relief, if any, and delivery of possession has not
C been given, then on application made in this behalf by the person against whom the decree or order was passed, within three months of the commencement of this Ordinance, the Court which or the Controller who passed the decree or the order shall decide (after hearing the parties and after taking fresh evidence if necessary) whether the
D person is a *thika* tenant within the meaning of the said Act as amended by this Ordinance. If the Court or Controller holds that the person is not such a *thika* tenant. it or he shall dismiss the application. If the Court or Controller holds that the person is such a *thika* tenant. it or he shall set aside the decree or the order and annul the execution proceedings, if any, and
E
> (ii) where the proceedings are before a Court—it shall remit the case to the Controller to be dealt with by him according to law.
>
> (iii) where the proceedings are before the Controller,— he shall reopen the case and pass a new order".

F Sub-s. (4) provided that the provisions of this section would have effect notwithstanding anything to the contrary in any other law or elsewhere in the said Act as amended by the Ordinance. The second Explanation to the section provided that the expression "court" would include a court exercising appellate or revisional jurisdiction and the expression 'controller' meant the controller
G referred to in sub-s. (2) of s. 2 of the Calcutta *Thika* Tenancy Act, 1949 for the time being in force or the person deciding an appeal under s. 27 of the Calcutta *Thika* Tenancy Act, 1949 for the time being in force as the case may be.

The effect of this was that a person who before the Ordinace would not come within the pale of the Act because he could not
I prove a system came within its protection because of the amendment of the definition of a *thika* tenant. Sub-s. (1) of s. 5 made the Act, as amended by the Ordinance, applicable to all cases pending before a court or a controller. This was irrespective of the question whether the suit had been filed before the Act or

after the Act, or whether a decree had been passed before the Act or thereafter. Sub-s. (2) of s. 5 made a special provision for cases where a decree or order for possession had been made between the commencement of the Act and of the Ordinance and delivery of possession had not been given to the decree-holder. In such a case it became open to a person covered by the new definition of a *thika* tenant to make an application within three months of the commencement of the Ordinance either to the court or to the Controller as the case may be for relief on the basis that the applicant was a *thika* tenant. Such an application could be made even if the decree for ejectment had become final and order for recovery of possession made but actual delivery of possession had not been given. In such a case, if it was found that the person applying was a *thika* tenant, the court before whom the proceedings were pending had to remit the case to the controller and if the authority before whom the application was made was a controller, he had to re-open the case and pass a new order. If the matter was in appeal, the appellate court had to exercise jurisdiction under this sub-section, determine whether the tenant was a *thika* tenant and send the matter to the controller 'if it was found that the tenant was entitled to the benefit of the Act'. Even if no proceedings were pending in any court, it was open to the *thika* tenant to apply for relief provided delivery of possession had not been given.

Finally came the *Thika* Tenancy (Amendment) Act (VI of 1953). It made important changes in the Act itself. It came into force on March 14, 1953 on which date the Calcutta *Thika* Tenancy (Amendment) Ordinance, 1952 ceased to operate. Sub-s. (2) of s. 1 provided that the Act was to come into force immediately on the Calcutta *Thika* Tenancy (Amendment) Ordinance, 1952 ceasing to operate: provided that the provisions of the Calcutta *Thika* Tenancy Act, 1949 as amended by this Act were subject to the provisions of s. 9 to apply and be deemed to have always applied to all suits, appeals and proceedings—(a) before any court, or (b) before the Controller, or (c) before a person deciding an appeal under s. 27 of the said Act, on the date of the commencement of the Calcutta *Thika* Tenancy (Amendment) Ordinance, 1952 *i.e.*, 21st October, 1952. Section 2 of the Act amended the definition of '*thika* tenant' still further by giving the benefit of the Act to persons who had erected or acquired by purchase or gift any structure on the land for a residential, manufacturing or business purpose and was to include the successors in interest of such person.

The word 'successor-in-interest' had not been defined in the Act or in the Ordinance but as words in the Act were under s. 2 sub-s. (6) to have the same meaning as those used in the Transfer of Property Act, 1882 and the Bengal Tenancy Act, 1885 it would, but for the amendment of the definition of a *thika* tenant, have meant only those persons who inherited from tenants and

A not those who acquired by purchase. Sections 3, 4 and 5 introduced changes with which we are not concerned. Section 8 laid down that ss. 28 and 29 of the Act of 1949 shall be omitted. Under s. 9 any proceedings commenced under sub-s. (2) of s. 5 of the Calcutta *Thika* Tenancy (Amendment) Ordinance were to be continued as if such sub-ss. (2), (3) and (4) of that section and the
B Explanation to that section were in force.

The net result seems to be that after the Amendment Act of 1953 came into force, the position of a tenant had to be examined in the light of the Act as it finally emerged. Sub-s. (2) of s. 1 made the provisions of the Calcutta *Thika* Tenancy Act, 1949 as amended by the Act of 1953, applicable to all suits,
C appeals and proceedings pending on 21st October before any court or before the controller or before a person deciding an appeal under s. 27 of the Act. No reference is made in this subsection to the date when the suit was instituted. Only suits which were pending on 21st October 1952 were to be decided in terms of the Act as finally amended. The question therefore arises, whether a tenant could claim the benefit of the Act in a pre-Act
D suit. It is a general principle of law that statutes are not to operate retrospectively so as to defeat vested rights, but such operation may be given by express enactment or by necessary implication from the language employed. According to Craies on Statute Law (Sixth Edition) at p. 391:

E "If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation".

The learned author points out at p. 397:

F "It is a well recognised rule that statutes should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction..... For it is not to be presumed that interference with existing rights is intended by the legislature, and if a statute be ambiguous the court should lean to the interpreta-
G tion which would support existing rights."

Again at page 398, the learned author states:

"In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable
H to a slaim in litigation at the time when the Act is passed, ...Where, however, the necessary intendment of an Act is to affect pending causes of action, the Court will give effect to the intention of the legislature even though there is no express reference to pending actions".

Reference may be made to the case of *Knight* v. *Lee*(1) where Parke B. in his judgment, said:— A

> "It seems a strong thing to hold that the legislature could have meant that a party who under a contract made prior to the Act had as perfect title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation". B

This was decided in terms of the Gaming Act, 1845, section 18 of which enacted that—

> "no suit shall be brought or maintained for recovering any such sum of money"

and the question was whether that enactment was retrospective C so as to defeat an action already commenced. The Gaming Act, 1922 enacted that "no action for the recovery of money under the said section (s. 2 of the Gaming Act, 1835) shall be entertained by any court". In *Beadling* v. *Goll*(2) it was held that the section was not retrospective and that the Act did not operate to put an end to pending actions. D

According to Halsbury's Laws of England, third edition, Vol. 36, page 413, Art. 627:—

> "Unless it is clearly and unambiguously intended to do so, a statute should not be construed so as to interfere with or prejudice established private rights under contracts or the title to property or so as to deprive a man of his property without his having an opportunity of being heard". E

The provisions of the Act of 1949 as finally amended by the Act of 1953 have to be examined to show how far they disturb the rights of landlord to recover possession of the property from F a person who would be a *thika* tenant on 28th February, 1949. Section 3 of the Act which cuts down the right of the landlord to recover possession except on the grounds therein specified must be held to apply to all suits even though filed before 28th February 1949. The language of the section leaves no room for doubt as to this. It expressly states that notwithstanding anything G contained in any other law for the time being in force or in any contract, a *thika* tenant shall be liable to ejectment on grounds specified and not otherwise. Consequently, a landlord who had filed a suit before the 28th October 1949 but was unable to establish any of the grounds mentioned in s. 3 could not claim to eject his tenant. But the provisions of ss. 4 and 5 of the Act are not couched in the same kind of language as s. 3. The legis- H lature clearly meant s. 4 to be prospective because according to its language "the landlord who wishes to eject the *thika* tenant

(1) [1893] 1 Q.B. 41. (2) 39 Times Law Reporter 31.

must give at least one month's notice in writing" or three months' notice as the case may be. A landlord who had already filed the suit before the Act had evinced his intention and the question of his wishing to eject the *thika* tenant afresh after the Act or giving a notice for the purpose did not arise.

Again s. 5 lays down in clear terms that a "landlord wishing to eject a *thika* tenant" on one or more of the grounds specified in s. 3 "shall apply in the prescribed manner to the controller". This is only consistent with the wish of a landlord after the Act has come into force. Before the Act had come into force, the landlord could not possibly know that his suit would be liable to be defeated unless he applied to the controller because there was no such authority functioning then. The section shows clearly that when a landlord wished to eject a *thika* tenant after the Act had come into force, he had to consider whether any of the grounds in s. 3 was available to him, and if so, he did not have to file a suit but apply to the controller for an order in that behalf.

The language of ss. 4 and 5 leave no room for doubt that after the coming into force of the Act it was not open to the landlord to file a suit. He could only make an application under s. 5 after giving notice under s. 4. Sections 28 and 29 of the Act which were omitted as a result of the enactment of the Act of 1953 bring this out in clear terms. Section 28 was meant to give relief to a *thika* tenant in a case where a decree or order for recovery of possession of any holding from a *thika* tenant had been made before the date of commencement of the Act. It could not apply to the facts of a case like the present where the decree was made after the Act had come into force. Section 29, on the other hand, shows that it was to be applicable to all suits and proceedings which were pending at the date of the commencement of the Act of 1949. In other words, it was to apply to any suit or appeal or any proceeding in execution which was pending on 28th February, 1949. In any such case, the suit or proceeding wherever it was pending had to be transferred to the controller. The controller in his turn had to deal with the matter in accordance with the provisions of the Act of 1949 as if it had been in operation on the date of the institution of the suit or proceeding which might be before the commencement of the Act; but he was to deal with all pre-Act suits on the basis that no notice under s. 4 was necessary. If the legislature did not want to impose the bar of s. 4 to pre-Act suits in 1949 it does not stand to reason that the legislature should seek to impose it in the year 1953 to be operative in all suits pending not on February 28, 1949 but on 21st October, 1952. The logical conclusion is that the legislature always proceeded on the basis that s. 4 was prospective. The language of s. 5 being closely similar to that used in s. 4 that section should also be held to be prospective only.

We cannot speculate as to why the legislature thought fit to omit ss. 28 and 29 from the Act of 1949. The effect of omission of s. 28 has been considered by this Court in *Mahadeolal Kanodia* v. *Administrator-General of West Bengal*(1) where it was held that a *thika* tenant against whom proceedings for execution of the decree for eviction were pending and who had applied for relief under s. 28 lost the protection of that section as a result of the Amending Act of 1953.

The effect of omission of s. 29 is that we must measure the rights of the parties in the appeal before us on the basis that the section had never been on the statute book. The situation which arises as a result thereof is that we must deal with the rights of the parties to a suit filed before the Act of 1949 was enacted in terms of such provisions as were clearly applicable thereto. As Abdul Gaffur came under the definition of a *thika* tenant by the Amending Act of 1953 we have to proceed on the basis that he was such a tenant in 1949 with the result that he could claim the benefit of s. 4 of the Act. As already noted, ss. 4 and 5 could not be made to apply to such a suit which in the view expressed, were prospective and not retrospective. Consequently, the absence of a notice under s. 4 would not stand in the way of the landlord nor could his suit be rejected on the ground that he had not applied to the controller. There being no provision for transfer of the proceedings of the suit to the controller, the court had to apply the Act as it found applicable to the facts of the case. It is open to the legislature to impose a bar or a qualification to the rights of the parties by the use of suitable words such as "notwithstanding any law to the contrary or in any agreement between the parties". In such a case, a litigant desiring to have relief in a suit must show that the bar does not affect his case. For instance, it is open to the legislature to enact that notwithstanding the rights which a landlord may have against a tenant under the ordinary law of the land, he shall not be entitled to eject the tenant unless he makes out a special ground for eviction, as has been done by s. 3 in this case. Most of the Rent Control Acts all over India contain similar provisions and courts have always held such provisions applicable to pending proceedings. Whereas before the enactment of the Calcutta *Thika* Tenancy Act, 1949 it was not necessary for the landlord either to allege any of the grounds specified in s. 3 or to prove the existence thereof at the hearing of the suit, he had to establish the existence of such a ground when the suit was heard. The ground need not be specified in the plaint, but nevertheless it had to be established in the suit. In this case, the learned Subordinate Judge, Seventh Court, Alipore who was directed by the remand order of the Calcutta High Court to take fresh evidence, if necessary, was not called upon by any of the parties to hear or record fresh evidence. He however directed his attention to the

(1) [1960] 3 S.C.R. 578.

A question as to whether the tenant-appellant was entitled to press into service the provisions of ss. 3 and 4 of the Act. According to him both these sections would apply to the facts of this case. The learned Subordinate Judge seems to have been of the opinion that it was necessary to state some ground under s. 3 on the basis of which the landlord wanted to eject the tenant. Referring to the B notice of ejectment served in this case, he said:

> "Not any one of the grounds as enumerated in section 3 was called in aid or could be called in aid".

He was not right in his view that the grounds specified in s. 3 could not be called in aid. Section 3 does not purport to lay down C that the grounds mentioned therein had got to be stated in the notice of ejectment. All that the section lays down is that ejectment could not be had unless the existence of one of the grounds was proved. Such proof could have been adduced at the trial even if no mention of the grounds had been made before. As section 4 of the Act was prospective only, it could not apply to this case. The decision of the Subordinate Judge is however right inasmuch D as the landlord made no attempt to establish any of the grounds for eviction mentioned in s. 3. The decision of the High Court, when the matter was heard for the second time must be upheld on that ground. However, the view expressed by the Calcutta High Court finally hearing the appeal that suits for eviction of *thika* tenants became infructuous before civil courts after the omission E of s. 29 is not correct. The correct view is that ss. 4 and 5 being prospective and as such inapplicable to pre-Act suits, the landlord had to establish the existence of one of the grounds specified in s. 3 in order to succeed. There being no provision for transfer of pending suits and appeals, the court hearing the appeal would have to pass a decree for ejectment even if the defendant was a *thika* tenant after taking into acount s. 3. The tenant could not F however ask for any compensation for the structures but could only remove them in terms of s. 108(h) of the Transfer of Property Act. For reasons we cannot speculate upon, the legislature limited the applicability of the Act only to suits and appeals pending on 21st October 1952 and not in February, 1949 *i.e.* the date of the commencement of the Act of 1949. It may be because G before the Ordinance of 1952 no one could establish his rights as a *thika* tenant in view of the vague definition of "*thika* tenant" in the Act of 1949 which led to the decisions of the Calcutta High Court against persons who sought to establish their rights as such. The legislature cannot be taken to have imposed a ban on all pre-Act suits by the circuitous process of ss. 4 and 5 of the Act. It could then have said in clear terms that all pre-Act suits shall be H stayed. Clearly that never was the intention of the legislature as section 29 of the Act of 1949 amply demonstrates.

In the result, as the landlord has not established any of the grounds specified in s. 3 entitling him to ejectment, the appeal

must be dismissed. On the special facts of the case, we make no order as to costs. A

Bhargava, J.—I agree with the judgment of my brother, Mitter. J. with the exception that I would like to reserve my opinion on the question whether section 4 of the Calcutta *Thika* Tenancy Act, 1949, as amended up to 1953, is prospective or not. On the view that this appeal must be dismissed because the respondent was entitled to the benefit of section 3, it does not appear to me to be necessary to express any opinion on whether compliance with section 4 was also required, or whether it being prospective only no such compliance by the appellant was needed. B

Appeal dismissed.

G.C.