MANU/BH/0143/1954

Equivalent Citation: AIR1954Pat408, 1954(2)BLJR313

IN THE HIGH COURT OF PATNA
FULL BENCH

Letters Patent Appeal No. 14 of 1951

Decided On: 28.04.1954

Appellants: **Bhagwat Sharma and Ors.**
Vs.
Respondent: **Baijnath Sharma and Ors.**

Hon'ble Judges/Coram:
Syed Jafar Imam, C.J., Das, Vaidynathier Ramaswami, Jugal Kishore Narayan and Jamuar, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: K.K. Sinha, U.C. Sharma and Madhusudan Singh, Advs.

For Respondents/Defendant: N.L. Untwalia, Tribeni Prasad Sinha, Salil Kumar Ghose and Shanker Kumar, Advs. and Govt. Adv.

JUDGMENT

Das, J.

1. This appeal under the Letters Patent raises a problem of some complexity as to the transfer of homestead land governed by Section 182, Bihar Tenancy Act. The problem, in some of its aspects, has been the subject of consideration in several decisions of this Court and the Calcutta High Court. The latest decision of this Court was that of a Special Bench of three Judges in -- 'Hari Narain' Singh v. Babui Mohari' MANU/BH/0062/1949 : AIR 1949 Pat 413 (A), which practically overruled the earlier decision in --'Mahadeoashram Prasad Sahi v. Parikha Choudhri' MANU/BH/0015/1945 : AIR 1945 Pat 428 (B). Under orders of my Lord the Chief Justice the appeal has now been placed before a Full Bench of five Judges.

2. The facts so far as they are relevant to this appeal, may be briefly stated. The plaintiffs are the appellants. They brought a suit for a declaration of title and confirmation of possession, or, in the alternative, recovery of possession in respect of about .08 acres of land comprised in plot No. 1050 of holding No. 176 situate in village Lauria, in the district of Monghyr within tauzi No. 445 of the proprietor, popularly known as the Banaili Raj. The holding was recorded in the record of rights (finally published in 1908) as 'gairmaarua-malik', the total area of the holding being 13 acres. The holding consisted of this plot, namely, plot No. 1050 on which stood a house and 'sahan'. In the remarks column of the record of rights was recorded the possession of one Musammat Darsano Kuari, widow of Tale Rai. On the death of Musammat Darsano Kuari, one Musammat Chaurabati came in possession of the plot. She was the widow of a brother of Tale Rai.

On the 11th of July, 1939, Musammat Chaurabati conveyed the plot, along with her raiyati lands, about 1.46 acres in area appertaining to holding No. 66 in village

Siloutha and about 1.08 acres of holding No. 25 of village Tevai, to the defendant second party, namely, one Jagrup Mawar. Musammat Chaurabati died sometime in 1941. The case of the plaintiffs was that they took possession of the plot on the death of Musammat Chaurabati, in spite of the sale deed executed by her on 11-7-1939. Then, on 27-6-1946, Bhagwat Sharma, one of the plaintiffs, took settlement of the plot from the landlord, Banaili Raj, under a registered Kabuliat of that date. The house standing on the plot having become dilapidated by that time, the plaintiffs repaired the house and began to grow vegetables on the rest of the land and amalgamated it with survey plot No. 1051.

3. The defendants first party, Baijnath Sharma and others, claimed .08 acres out of the plot on the strength of an oral purchase from Musammat Chaurabati for a consideration of Rs. 75/- only, made some 15 or 16 years before the institution of the suit. There was a proceeding under Section 144, Criminal P. C., between the plaintiffs on one side and the defendants first party on the other. This proceeding terminated in favour of the defendants first party by the order of the Sub-divisional Magistrate, Monghyr, dated 6-1-1948, which order was upheld by the District Magistrate on 20-1-1948. The plaintiffs then brought their suit on 29-1-1948, against the defendants first party.

4. Jagrup Mawar intervened, and was added as the defendant second party. His claim, I have already stated, was that he had purchased the disputed land along with her raiyati lands from Musammat Chaurabati by a registered sale deed dated 11-7-1939. Jagrup Mawar's defence was that Musammat Chaurabati left the house after the sale, and though she returned sometime after and lived with him till her death in 1941, he came in possession of the disputed land and house after his purchase. The contention of Jagrup Mawar was that he acquired a good title to the homestead by reason of the sale-deed in his favour.

5. In the Courts below as also before us the case proceeded on the footing that (a) the disputed land and house were a homestead, (b) Musammat Chaurabati was the tenant of the homestead, and (c) Musammat Chaurabati had no other raiyati land in village Lauria, though she had raiyati lands in village Siloutha and Tevai. It was also admitted that the disputed homestead was held by Musammat Chaurabati otherwise than as part of her raiyati holdings in the aforesaid two villages. Several questions of fact and law fell for decision in the Courts below.

6. I had better state first the findings of the learned Munsif who dealt with the suit in the first instance. He found that the story of oral purchase set up by the defendants first party was not worthy of credence. Secondly, he found that no local custom or usage having been pleaded by any of the parties, Musammat Chaurabati had a transferable interest in the homestead. The learned Munsif relied on my decision in -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B)' for this finding, and held that Jagrup Mawar had acquired a good title to the homestead on the strength of his sale deed dated 11-7-1939. Thirdly, he held that Jagrup Mawar having acquired a good title in 1939, the landlord could not make a valid settlement in favour of the plaintiffs in 1946.

Fourthly, the learned Munsif disbelieved that Musammat Chaurabati had abandoned the holding, or that the landlord came in possession after her death. On the question of possession, he held that though the defendant second party had acquired title to the land in 1939, he never came in possession; and after the death of Musammat Chaurabati, the defendants first party took possession of the disputed portion of .08

acres as trespassers, and the plaintiffs took possession of the undisputed portion of plot No. 1050. On these findings, the learned Munsif dismissed the suit, primarily on the ground that the plaintiffs had failed to make out any title to the disputed portion of plot 1050.

7. On appeal, the learned Subordinate Judge held that the question of possession was of little importance in the case, as admittedly Musammat Chaurabati died in 1941, and the defendants first party who came in possession thereafter, were not in possession for more than 12 years. He thereupon discussed the question of title, and affirmed the finding of the learned Munsif that Musammat Chaurabati had a transferable interest in the homestead, which had been validly transferred to Jagrup Mawar; in arriving- at this finding, the learned Subordinate Judge corrected an apparent error of the learned Munsif in treating the disputed land in Lauria as a raiyati holding.

The learned Subordinate Judge rightly pointed out that the land was homestead land, held otherwise than as part of a raiyati holding. The learned Subordinate Judge found, however, that Siloutha and Lauria were adjoining villages under the same landlord, and relying on the decision in -- 'Krishna Kanta Ghosh v. Jadu Kasya' AIR 1916 Cal 32 (C) and other Calcutta decisions, he held that the incidents of the homestead land, in the absence of any local custom or usage, would be governed by the provisions of the Bihar Tenancy Act applicable to the raiyati land of Musammat Chaurabati; in that view of the matter, the learned Subordinate Judge held that Musammat Chaura- bati could validly transfer her interest in the homestead land.

8. A second appeal was then preferred to this Court which was heard by Sarjoo Prosad J. (as be then was). The case was first remanded for a definite finding if the defendant second party had acquired both the raiyati and homestead lands of Musammat Chaurabati by the sale deed dated 11-7-1939. The learned Subordinate Judge gave a finding that the defendant second party had acquired both the homestead and raiyati lands by the aforesaid sale deed. Sarjoo Prosad, J. then heard the second appeal, and distinguishing the Full Bench decision of this Court in -- 'MANU/BH/0062/1949 : AIR 1949 Pat 413(A)' held that inasmuch as the raiyati holding had also been transferred along with the homestead land, the transfer was a valid transfer. He expressed himself as follows :

> "The homestead land taken apart from his raiyati holding is devoid of all incidents except under local custom or usage, and, as such, there may be no right to transfer under Section 26A of the Act of such a land; but along with the raiyati holding itself the incidents whereof continue to regulate the incidents of the homestead land, I see no reason why such a homestead land cannot be transferred. There the raiyat i s not transferring merely his homestead which loses its incidents as soon as it is sought to be severed from the raiyati holding to which it is linked by virtue of the common incidents which regulate the two. So long therefore, as this link of common incidents continues t o operate upon the homestead land as the raiyati holding of the tenant, and the two are transferred together the incident of the right to transfer, in my opinion, still operates with equal efficiency upon the homestead land as well.
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> In the present case, the finding being that both the raiyati lands and the homestead have been transferred, I see no reason to hold that the right of transfer which could be validly exercised in respect of the raiyati holding with

the incidents of which the homestead land continues to be regulated could not be validly exercised in respect of the homestead. This distinction, therefore, in my opinion, is essential, and the decision of the Full Bench does not in any manner conflict with the view which I am adopting in regard to the validity of the transfer of the homestead land in the present case."

9. An appeal was then filed under the Letters Patent, which has now been heard by this Full Bench.

10. The principal question for decision in the appeal is what is the true scope and effect of Section 182, Bihar Tenancy Act; and if under the provisions of that section read with Section 26A of the said Act, Musammat Chaurabati had the right to transfer her interest in the homestead land?

11. Before I deal with that question, it is advisable to dispose of two other points which were argued before us at an initial stage of the hearing. The learned Munsif found that there was no abandonment of the homestead by Musammat Chaurabati during her lifetime; nor did the landlord come in possession after the death of Musammat Chaurabati. A question arose, if, in these circumstances, the landlord could make a valid settlement in favour of the plaintiffs, irrespective of any question as to the right of Musammat Chaurabati to transfer the homestead. On this question, Mr. K. K. Sinha who has argued the case on behalf of the plaintiffs-appellants, has relied on the decisions in -- 'Lal Mamud Mandal v. Arbullah Sheikh' MANU/WB/0196/1896 : 1 CWN 198 (D) and --'Abdul Majid Bhuiya v. Ali Mia MANU/WB/0336/1930 : AIR 1931 Cal 657 (E).

He has argued that the right of the landlord to recover possession of a tenancy relinquished by the tenant or his heirs does not depend exclusively upon Section 87, Bihar Tenancy Act; the landlord has the right to re-enter when the land remains unoccupied or is in the occupation of a trespasser, and if the landlord has the right to re-enter, he can as well make a valid settlement in favour of the plaintiffs-appellants, unless the transfer of her interest by Musammat Chaurabati in favour of Jagrup Mawar in 1939 stands in the way as a valid transfer in law. M.r. N. L. Untwalia appearing on behalf of the contesting respondent, has not challenged the correctness of the aforesaid contention of Mr. K. K. Sinha. It may, therefore, be taken as correct that the plaintiffs-appellants would be entitled to succeed, unless the sale-deed in favour of Jagrup Mawar stands in their way.

12. Mr. N. L. Untwalia has also conceded with commendable fairness, that he is not in a position to submit that the distinction made by Sarjoo Prosad J. makes any real difference in the legal position with regard to the interpretation of Section 182, Bihar Tenancy Act. He has submitted that if a raiyat holding his homestead otherwise than as a part of his holding as a raiyat, has the right to transfer his homestead, it makes no difference whether he transfers the homestead along with the raiyati lands, or he transfers the homestead first and then the raiyati lands, though he accepts that the position may be different if at the time of the sale of the homestead, the vendor has no raiyati land at all; in that event Section 182, Bihar Tenancy Act, will not be attracted at all. If, on the contrary, a raiyat holding his homestead land otherwise than as part of his holding has no right to transfer the homestead, it makes no difference whether the transfer of the homestead is made along with the raiyati lands or not. Mr. K. K. Sinha, appearing for the plaintiffs-appellants, has also challenged the correctness of the distinction drawn, by Sarjoo Prosad J.

13. I agree with learned Counsel for the parties : that the distinction drawn by Sarjoo Prosad J. (as he then was) is not decisive of the question which falls for determination in the present appeal. I do not think that it can be laid down as a general proposition of law, that when the homestead is transferred along with, raiyati lands, the transfer is valid; but when the homestead is transferred separately, the transfer is invalid. The, incident of the right of transfer with regard to such homestead land as is governed by Section 182, Bihar Tenancy Act, has to be determined with reference to the provisions of that section and such other sections of the Bihar Tenancy Act as may be applicable by reason of the words used in Section 182, Bihar Tenancy Act.

14. I proceed now to a consideration of the main question in this appeal. I must first read Section 182, Bihar Tenancy Act :

> "When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

I think that it is a little easier to understand the section if it is divided into its component parts. The first part is expressed in the form of a condition, namely, "when a raiyat holds his home- stead otherwise than as part of his holding as a raiyat." This condition includes two elements, and both the elements must be present at the time when the protection of the section is sought to be invoked by the tenant. The tenant must be a raiyat at the time, that is to say, have arable lands and must be using the other land for his residence. As has been observed in -- 'Naihati Jute Mills Co. Ltd. v. Kali Prosad Saha' AIR 1949 Cal 259 (P) it is the co-existence of these two elements that brings in the section (see also --'Sukh Lal v, Prosanna Kumar' AIR 1923 Cal 1193 (G) and --- 'Pulin Cliandra Daw v. Abu Bakar Naskar' MANU/WB/0235/1936 : AIR 1936 Cal 565 (H)). The tenant may have acquired the homestead before, but the moment he acquired later on a raiyati holding, he comes within Section 182.

It follows that if the aforesaid two elements become dissociated later on, Section 182 will cease to be applicable, from the moment when either of these two elements disappears in relation to the tenant concerned. When, however, the two elements coexist, the second part or the third part of the section, as the case may be, comes into operation. The second part says that "the incidents of his tenancy of the 'homestead shall be regulated by local custom or usage." The third part says that

> "subject to local custom or usage, the incidents of his tenancy of the homestead shall be regulated by the provisions of this Act applicable to land held by a raiyat."

Where local custom or usage is pleaded or proved, there is no difficulty of interpreting Section 182, Bihar Tenancy Act; either the case will be decided on such proof of custom or usage as is given, or the case will be decided on the doctrine of onus, and the person who has to prove the custom must prove it or fail. The difficulty arises in a case where no local custom or usage is at all pleaded, or where the parties proceed on the footing that there is no local custom or usage governing the incidents of the homestead tenancy. What will happen in such a case? That is the crucial question in this appeal. In my opinion, the third part of Section 192, Bihar Tenancy Act, will then come into operation, and the incidents of the homestead tenancy shall be regulated by the provisions of the Bihar Tenancy Act applicable to "land held by a

raiyat."

There has been some discussion before us as to what is meant by the expression "land held by a raiyat" in the third part of the section. It seems to me that the expression refers to the same raiyat who holds his homestead otherwise than as part of his holding as a raiyat, mentioned in the first part of the section; in other words, if that raiyat is an occupancy raiyat in respect of his other land, the incidents of his homestead shall be regulated by the provisions of the Act applicable to occupancy holdings; if, on the contrary, that raiyat is a non-occupancy raiyat, the incidents of his homestead shall be regulated by the provisions of the Act applicable to non-occupancy holdings.

This seems to me to be the plain meaning of Section 182 of the Bihar Tenancy Act. If that be the correct meaning of Section 182, Bihar Tenancy Act, then Section 26A of the Bihar Tenancy Act, which was substituted for the former section by the Bihar Tenancy (Amendment) Act, 1938, will apply to the homestead tenancy in a case where the same raiyat has other land capable of being transferred under s'. 26A, Bihar Tenancy Act. This is the view which I elaborated in some detail in my judgment in -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B)'. I do not wish to repeat what I said then.

15. Mr. K. K. Sinha has argued that a too literal adherence to the words of Section 182, Bihar Tenancy Act, will produce injustice and absurdity, and it should be the duty of the Court. to consider the state of the law at the time Sections 182 and 26A were enacted with a view to ascertaining whether the language of Section 182 is capable of any other fair interpretation, or whether it may not be desirable to put upon the language a more restricted meaning or, perhaps, to adopt a construction not quite strictly grammatical. The first point which Mr. K. K. Sinha has pressed is that the right or protection given to a tenant in respect of his homestead under Section 182, Bihar Tenancy Act, is of the nature of a personal right in the sense that it is not! transferable; the protection is available to the tenant as long as he holds the homestead land. Mr. Sinha has relied on the observations made by Sinha J. (as he then was) in the decision in -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B)'. He has also relied on similar observations made by Mookerjee, J. in -- 'Indra Chand Dutt v. Tinkari Chose' MANU/WB/0058/1950 : AIR 1950 Cal 170 (I), where Mookerjee J. said :

> "The effect of the provisions is not to create a transferable occupancy right in that homestead. The right is a personal one dependent on the proof of the existence of certain facts. Such personal rights continue to be available only so long as the conditions are satisfied."

Mookerjee J. was, however, dealing with a case of ejectment and not of transfer, and based his decision on the earlier case of -- 'AIR 1949 Cal 259 (F)', with particular reference to Section 182, Bengal Tenancy Act, as it stood in Bengal after the amendment in 1928. The main ground of the decision was, as the learned Judge himself pub it, that the homestead itself did not become a raiyati holding, and, therefore, the effect of Section 182 was not to create a transferable occupancy right In the homestead; it was in this sense that the expression "personal right" was used by Mooker-jee J. If the right or protection given under Section 182, Bihar Tenancy Act, is a mere personal right, the right cannot be heritable. The right should then disappear with the death of the person enjoying the right. There are, however, many decisions where the right has been held to be heritable. It would be so under Section

26 of the Bihar Tenancy Act, if the raiyat has a right of occupancy in the other arable land held by him,

In the Special Bench decision of three Judges MANU/BH/0062/1949 : AIR 1949 Pat 413 (A), Shearer J. dealt with this question and did not subscribe to the view that the right was a personal right. Section 182 by itself does not define the status or right of the raiyat in homestead land held otherwise than as part of his holding as a raiyat; it merely states that the incidents of the tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage, by the provisions of the Act applicable to land held by a raiyat. Where there is no local custom or usage, the incidents of the other land held by the raiyat regulate the homestead by a sort of legal fiction; that seems to me to be the meaning of Section 182, Bihar Tenancy Act, and if I may say so with great respect, the question of a personal right, a right which disappears with the death of the tenant, does not really arise out of Section 182, Bihar Tenancy Act.

16. Mr. K, K. Sinha then referred to the absurdity or anomaly, which in his opinion, will arise if Section 182, Bihar Tenancy Act, is given its plain meaning. He has referred particularly to the decision in -- 'AIR 1916 Cal 32 (C)', where it was held that the provisions of the Act applicable to a raiyat would regulate the incidents of the tenancy of the homestead, even though the tenant had only the interest of an under-raiyat with respect to the homestead. That was also a case of ejectment, and it was held that even though the tenant of the homestead had only an under-raiyati interest with respect to it, he could not be evicted. Their Lordships observed :

> "It may lead to some anomalous results, but so would the application of Section 182 to the cases cited above, and the present case cannot be distinguished on principles from the said cases."

Mr. K. K. Sinha's argument is that on the interpretation of Section 182, as given in -- 'AIR 1916 Cal 32 (C)' an under-raiyat in respect of the homestead land, if he is a raiyat in respect of other land, will have the right of transferring the homestead under Section 26A, though this Court has held, on an interpretation of Section 49A, Bihar Tenancy Act, that an under-raiyat, who has acquired a right of occupancy, cannot transfer his interest under Section 26A, Bihar Tenancy Act; therefore, Mr. K. K. Sinha contends that such an interpretation would bring Section 182 into conflict with Section 49A, Bihar Tenancy Act, a conflict which should be avoided by giving a somewhat narrower interpretation to Section 182. Section 182, as amended in Bengal, has resolved the conflict; because the amended section states that

> "the incidents of his tenancy of such homestead shall be governed by the provisions of this Act applicable to raiyats or under-raiyats, as the case may be,"

Unfortunately, Section 182, Bihar Tenancy Act, was not amended in Bihar when Sections 26A and 49A were incorporated for the first time in 1938. We are not concerned, in the present case, with the rights of an under-raiyat in respect of the homestead . We are concerned with the rights of a raiyat who holds his homestead otherwise than as part of his holding as a raiyat. So far as the rights of such a raiyat are concerned, the meaning of Section 182, Bihar Tenancy Act, seems to me to be quite clear, and I do not see how the plain meaning of the section can be cut down by reason of some anomaly which may arise in the case of an under-raiyat.

17. The third and most important point which Mr. K. K. Sinha has urged arises out of

the Special Bench decision in -- 'MANU/BH/0062/1949 : AIR 1949 Pat 413 (A)'. Mr. Sinha has placed reliance on that decision; firstly, on the point that in every case where there is no custom or usage of transferability of the homestead, there would be a legal presumption of a custom or usage to the contrary; and, secondly, on the point that Section 182, Bihar Tenancy Act, merely provided that subject to local custom or usage prescribing a shorter period, a raiyat would acquire a right of occupancy in his homestead when he had been in possession of it for 12 years, and that until he had been in possession for 12 years, his rights in it should be those of a raiyat who did not have a right of occupancy. It is necessary to examine these two points with some care. It must be stated at this stage that Meredith, J. who was a party to the Special Bench decision, confined his judgment to the question of custom only as it arose out of the pleadings of the parties in the case under consideration before their Lordships. Meredith, J. said :

> "Under Section 182, where a custom exists, the matter is regulated by that custom. I agree that when the tenant has failed to prove a custom of transferability the finding should be that there is a custom of non-transferability. For these reasons I concur in the view that the appeal should be allowed."

Meredith, J. did not say anything about the true meaning and effect of the other two parts of S. 182, Bihar Tenancy Act. Shearer, J. referred to the pleadings of the parties in the case, and pointed out that the conclusion at which the lower appellate court had arrived was that while the defendants had failed to prove the existence of a local custom or usage which they set up, the plaintiffs also failed to prove affirmatively that it did not exist. Shearer, J. then said :

> "This, in my opinion, must, in second appeal, be taken as a finding that the defendants failed to discharge the onus which lay on them to prove the existence of the local custom or usage, in the absence of which, the conveyance which they had taken was voidable at the instance of the landlord."

Later on, in another part of his judgment, his Lordship said :

> "In my opinion, the Courts below have misdirected themselves in placing the onus on the plaintiff to show the non-existence of any local custom or usage of transferability instead of placing the onus on the defendants to show its existence."

If I may say so with great respect, the decision of his Lordship, in so far as it rested on the pleadings of the parties and onus of proof in that case, was correct. I have already stated that in a case where custom is pleaded or sought to be proved, the decision must depend on such proof of custom as is given. If, however, the decision goes further and lays down, as a matter of law, that in every case where no local custom or usage is pleaded, there is a presumption of a custom of non-transferability, then I must demur to the decision. Ordinarily, custom is a mixed question of law and fact; first, certain facts have to be proved, and from those facts an inference of the existence of a valid custom is drawn. The inference Is a legal inference.

I do not see any reason why in a case where none of the parties plead custom, there should be a presumption in law of a custom of non-transferability. I speak with humility, but I fail to see how such a legal presumption can be drawn in every case.

In my opinion, there may be local areas where no custom, either way, has grown up. Our attention has been drawn to Section 183, Bihar Tenancy Act, which saves custom. The illustrations to that section have now become otiose by reason of the amendments made in 1933. It is true that the position in law was different, before a raiyat was given the right to transfer his occupancy holding. The position then was that an usage under which a raiyat was entitled to sell his holding without the consent oi : his landlord was not inconsistent with the provisions of the Act; therefore, a raiyat who relied on that usage had to prove it.

That does not, however, mean that there was a prevailing local custom or usage with regard to every bit of homestead land, and unless the contrary was proved, the presumption was of a custom of non-transferability. When by law a raiyat has been given the right to transfer his raiyati holding, that incident of his raiyati land will regulate his homestead, subject to local custom or usage. It may well be that the draftsman thought it unnecessary to make any change in Section 182, when new rights were given to a raiyat in 1938; because the draftsman proceeded on the footing that those rights will regulate the homestead as well, in the absence of any local custom or usage. Where, however, there is local custom, or usage, the incidents of the homestead shall be regulated by such local custom or usage.

I do not see any compelling circumstance existing at the time when the amendments of 1938 were made, which would lead to a presumption that every bit of homestead land was either transferable or non-transferable by custom. If such a legal presumption of universal application is to be made with regard to transfer ability, I see no reason why it was not made with regard to heritability or eviction; yet we have many cases where on the points of heritability and eviction, the incidents of the homestead were regulated by the provisions of the Act irrespective of custom, on the footing that there was no local custom or usage. If a legal presumption of universal application arises in every case, the third part of Section 182 can never come into operation.

18. With regard to the second point arising out of the Special Bench decision --'MANU/BH/0062/1949 : AIR 1949 Pat 413 (A)', I have the greatest respect for the view of Shearer, ,J. but I am unable to concur in it. Shearer, J. has expressed the view that the intention of Section 182, Bihar Tenancy Act, is that subject to local custom or usage prescribing a. shorter period, a raiyat acquires a right of occupancy in his homestead when he has been in possession of it for 12 years. This view is in direct conflict with a long line of decisions of the Calcutta High Court and of this Court in --'Bishnath Singh v. Mt, Bibi Ayesha' MANU/BH/0071/1929 : AIR 1930 Pat 224 (J). The meaning of the expression "raiyat" is given in Section 5(2) of the Bihar Tenancy Act; the expression means

> "primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such a right."

There are three classes of raiyats as described in Section 4 of the Bihar Tenancy Act, namely, raiyats holding at fixed rates, occupancy raiyats and non-occupancy raiyats. When the homestead is part of a raiyati holding, there is no difficulty. As was pointed out in the Full Bench decision of --'Tilakdhari Singh v. Kuman Das' MANU/BH/0013/1930 : AIR 1930 Pat 201 (FB) (K), the homestead land recorded as included in the holding of a raiyat must be deemed to have been held by the raiyat

for the purpose of cultivating the lands in that holding, such as, for the purpose of storing the produce of the land, keeping cattle and implements of cultivation and residence. In respect of such homestead land which is part of the holding of the raiyat, the tenant is a raiyat even within the meaning of Section 5(2) of the Bihar Tenancy Act.

We are, however, dealing with homestead which is not part of the raiyati holding. In respect of such homestead, the tenant is not a raiyat within the meaning of Section 5(2) o.f the Bihar Tenancy Act. The contention that the tenant of a homestead Requires a right of occupancy in the homestead by 12 years' possession though he has no other raiyati land, was repelled in the Letters Patent Appeal -- 'MANU/BH/0071/1929 : AIR 1930 Pat 224(J)'. Jwala Prasad, J. expressed himself as follows on this point :

> "The fallacy lies in the assumption that whatever homestead land the defendant had was held by him as a raiyat. There never was any contract between the landlord and the defendant constituting his homestead land as a raiyati holding governed by the Bengal Tenancy Act. This homestead was in no case governed by the provisions of the Bengal Tenancy Act contained in Chapter V, except that by reason of the defendant having at one time held some agricultural land as a raiyat the incident at that time might have attached to the homestead land. But when the appellant ceased to be a raiyat in respect of cultivable land Section 182 had no application. Similarly, the incident of occupancy right, if any, that attached to the homestead land came to an end; it was never revived either in respect of the homestead land or in respect of the raiyati land which the defendant held under the kabuliyat in question."

Dhavle, J. said as follows :

> "Section 182 of the Bengal Tenancy Act itself makes a distinction between a homestead held by a raiyat otherwise than as part of his holding as a raiyat and '!and held by a raiyat . Under Sub-section (5) of Section 20 it is necessary that a man should hold some land as a raiyat in a village if he is to be a settled raiyat; and the status of a settled raiyat, so acquired, will disappear one year after he ceases to hold any land as a raiyat in that village.
>
> Reading the two sections together it is difficult to see how homestead held otherwise than as part of a holding could be regarded for the purposes of Section 20(5) as land held by the raiyat. Section 182 merely provides that the incidents of a raiyat's tenancy of his homestead (held otherwise than as part of his holding as a raiyat) shall be regulated .....by the provisions of the Bengal Tenancy Act applicable to land held by a raiyat. This does not define the status of the person holding the homestead but merely deals with the incidents of his tenancy of the homestead."

I respectfully agree with the aforesaid observations. There is a long line of Calcutta decisions which have taken the same view, and unless it can be shown that the decisions are manifestly or plainly wrong, this Court should not depart from the authority of long established decided cases. In one part of his judgment Shearer, J. himself said that a raiyat does not hold his homestead as a raiyat as he takes the land not for the purpose of cultivation but for building and residential purposes. He said :

> "Also, the incidents of the tenancy of his homestead are to be regulated

primarily by local custom or usage and not by statutory provisions which regulate the incidents of occupancy rights";

yet in another part of his judgment he said that the intention of Section 182, Bihar Tenancy Act, was to allow a raiyat to acquire the right of occupancy in the homestead when he had been in possession of it for 12 years. I say this with great respect, but it appears to me that his Lordship's' view with regard to the intention of Section 182, Bihar Tenancy Act, is not quite consistent with his earlier observation that a raiyat who holds his homestead otherwise than as part of his holding, does not hold it as a raiyat,

19. Mr. Lalnarain Sinha, appearing for the State of Bihar, has supported the view of Shearer, J. He has contended that under Section 182, Bihar Tenancy Act, a raiyat may acquire a right of occupancy in the homestead itself, and that right will remain intact even if the raiyat loses his other raiyati land. Mr. Lalnarain Sinha has argued that if a raiyat has acquired an occupancy right in the homestead, he can transfer it; if, however, he has not acquired a right of occupancy in the homestead, he cannot transfer it. Mr. Lalnarain Sinha does not quite accept the position that as long as raiyat has some other occupancy land, he can transfer his homestead by reason of Section 182 read with Section 26A, Bihar Tenancy Act. His argument is that a raiyat can transfer his homestead only when he has acquired an occupancy right therein by 12 years' possession or otherwise.

He has placed reliance on the Full Bench decision in -- 'MANU/BH/0013/1930 : AIR 1930 Pat 201 (K)', referred to earlier, and has contended that Section 5 (2), Bihar Tenancy Act, does not define a raiyat and the word "primarily" occurring therein should be given a liberal meaning. According to him, if the homestead is held for the purpose of cultivating some other agricultural land, the tenant in possession of the homestead is a raiyat in respect of it within the meaning of Section 5(2) of the Act, and he acquires occupancy right therein by 12 years' possession -- which right remains even after the tenant loses the agricultural land. In his opinion that is the meaning of Section 182, Bihar Tenancy Act.

My answer to this argument is contained in the observations in -- 'MANU/BH/0071/1929 : AIR 1930 Pat 224 (J)', which I have earlier quoted in this judgment. Even if Mr. Lalnarain Sinha's argument is correct, Musam-mat Chaurabati must have acquired occupancy right in the homestead and could transfer it. Musammat Darsano was recorded in respect of it in 1908 and Musammat Chaurabati died in 1941; the tenant must have been in possession for more than 12 years.

20. Mr. Lalnarain Sinha has also argued that when a transfer is made, the transferee must get the whole bundle of rights which the transferor had. He has submitted that if Section 182, Bihar Tenancy Act, is given the meaning which I am giving to it, then the position of the transferee would be an anomalous position dependent on whether he has some other raiyati land or not. I can only give the same reply as was given in -- 'AIR 1916 Cal 32 (C)', and what Dhavle, J. said in -- 'MANU/BH/0071/1929 : AIR 1930 Pat 224 (J)'; Section 182 does not define the status of a person holding the homestead but merely deals with the incidents of his tenancy of the homestead. The position of the transferee will also depend on whether he can get the protection of Section 182 or not; in other words, it will depend on whether both the elements mentioned in the first part of the section co-exist or not.

21. Therefore, the conclusion at which I have arrived is that in a case where no local

custom or usage is pleaded, the third part of Section 182 comes into operation, and the incidents of the homestead shall be regulated by the provisions of the Bihar Tenancy Act applicable to the other arable land held by the raiyat. If the other arable land is transferable, the homestead will also be transferable provided both the elements mentioned in the first part of Section 182 co-exist at the time when the protection or right under Section 182, Bihar Tenancy Act, is claimed.

22. There is one other question for consideration. The other arable lands which Musammat Chaurabati had along with the homestead lay not in the same village but in another village which had been found by the final court of fact to be an adjoining village. The question is if in this circumstance Musammat Chaurabati could claim the right to transfer her homestead under Section 182 read with Section 26A of the Bihar Tenancy Act. So far as the Calcutta High Court is concerned, the position seems to be well settled. Mitter, J. summarised the Calcutta decisions with reference to old Section 182, Bengal Tenancy Act, in the following manner in -- 'AIR 1949 Cal 259 (F)'. His Lordship said :

> "When the old section was in force it was held uniformly that in order to attract the section
>
> > (1) the agricultural holding may be anywhere. --need not be in the same village where the homestead was situated or in an adjoining or even in a nearby village; (2) that the agricultural holding and the homestead need riot be under the same landlord; (3) that the word "homestead" occurring in that section is not 'generic' term descriptive of a particular kind of land but it denotes land on which a raiyat has a house where he lives, -- 'Dina Nath v. Sasht Mohan' AIR 1916 Cal 730 (L); (4) that it is not necessary that the agricultural holding should have been acquired either before or simultaneously with the homestead land. It would attract the section to the homestead even if the agricultural holding had been acquired after he had acquired the homestead in which he is living : -- 'MANU/WB/0427/1926 : AIR 1926 Cal 1199 (G)'; -- 'MANU/WB/0235/1936 : AIR 1936 Cal 565 (H)'."

So far as this Court is concerned, there are two decisions, -- 'Ganga Singh v. Chairman, District. Board, Patna' AIR 1919 Pat 108 (Ml and -- 'Achhaibar v. Sohan' MANU/BH/0162/1950 : AIR 1951 Pat 215 (N). In --'AIR 1919 Pat 108 ', it was pointed out that the High Court of Calcutta had gone so far as to lay down that if a raiyat was a settled raiyat of one village under one landlord, and he acquired lands for the purpose of a homestead under a different landlord in a different village, that nevertheless by the operation of Sections 21 and 182, Bengal Tenancy Act, he had occupancy rights in the lands so acquired by him for the purposes of a homestead. Their Lordships said that the decision was very far reaching and might under suitable conditions require further judicial consideration.

In -- 'MANU/BH/0162/1950 : AIR 1951 Pat 215 (N)', a decision to which my Lord the Chief Justice was a party, the earlier decisions on the subject were reviewed, and it was held that the raiyat of a village who holds his homestead in a neighbouring or contiguous village would have the same protection in respect to his homestead as he enjoyed in respect to his raiyati land in the other village. The facts found in that case were that the defendants were settled raiyats of village Nirmal Bigha, which was contiguous to village Tendua. The question was whether the defendants could be

evicted from the land in village Tendua. It was held that Section 182 gave the defendants a protection against eviction, even though the raiyati land was in a contiguous village. The question of the right of transfer was not raised, nor discussed in the decision. But I think the same principle will apply.

Section 132, Bihar Tenancy Act, does not say whether the other land which the raiyat holds is in the same village or not. It has been contended before us that if Section 182 is carried to its logical extreme, it will lead to the anomaly that if a person is a settled raiyat in Patna and holds the homestead in a distant district like Monghyr, he will claim a right in respect of the homestead which has practically no or very little connection with the other arable land of the raiyat. Sarjoo Prosad, J. (as he then was) suggested a solution of the difficulty. He said that the word "homestead" must mean the homestead of the tenant in the neighbourhood of the raiyati land, or, in other words, in the vicinity of the raiyati land from where the raiyat carries on his agricultural operations in respect of the raiyati land. That may be the solution of the difficulty pointed out. It is interesting that in a very early case governed by the Rent Act of 1859 -- 'Pogose v. Rajoo Dhopee' 22 W R 511 (O) bastoo land or homestead land was described as

> "lands upon which houses stand, inhabited by persons engaged in agriculture; and "they are adjacent to the lands which the raiyats who inhabit those houses cultivate"."

I have underlined (here in " ") the words which I consider to, be important. Though Section 182 does not say in express terms whether the other raiyati land must be in the same village or not, the idea of vicinage may well be derived from the use of the expression 'homestead'. It may, therefore, be said that the section postulates some connection between the homestead and the raiyati land, even if the - tenant of the homestead may not be a cultivating raiyat himself or be actually carrying ion agricultural operations from the homestead in question (see in this connection the observations made in -- 'Dulichand Mahesri v. Prohlad Chan-dra' MANU/WB/0013/1943 : AIR 1945 Cal 50 (P)).

23. It is not quite necessary in the present case to decide finally if Section 182, Bihar Tenancy Act, should be given such a wide meaning as to include a homestead which is far away from the other arable land or which is not used for any purpose ancillary to the cultivation of the raiyati land. In the case before us, the finding is that the two villages are neighbouring villages, though lying in different districts. The villages are under the same landlord, and it is obvious that the home-stead had connection with the other arable lands held by Musammat Chaurabati. I would, there-fore, hold that Musammat Chaurabati had a right of transfer under Section 182, Bihar Tenancy Act. I may note that both parties in this case proceeded on the footing that no custom, either way, had been pleaded or proved. The Courts below gave their decision on the footing that there was no custom either way about this homestead land. My judgment also proceeds on the same footing.

24. As Musammat Chaurabati had the right to transfer her homestead and she transferred it along with her other raiyati lands to the same person, the plaintiffs-appellants acquired no title by reason of the settlement in their favour by the landlord, in spite of whether the transferee came in possession or not. In order to succeed, the appellants had to prove their title, and having failed to prove their title, their appeal was rightly dismissed.

25. I would accordingly dismiss this appeal with costs, though the reasons of dismissal are different from those given by Sarjoo Prosad J. fas he then was) when he dismissed the second appeal of these appellants.

Syed Jafar Imam, C.J.

26. I have read the judgments of my brethren Das and Narayan JJ. I agree with my brother Das.

Vaidynathier Ramaswami, J.

27. I agree with the reasoning and the conclusion reached by my learned brother Das J. I agree that ,the appeal should be dismissed with costs.

Jugal Kishore Narayan, J.

28. I am in the unfortunate position of not being able to agree with my learned brother Das J., though after the agreement expressed by my Lord the Chief Justice and by my learned brother Ramaswami J. with his views, my judgment will only be a minority judgment.

29. Though a Special Bench of five Judges was constituted for hearing this Letters Patent Appeal, no points had been formulated, and our main purpose will be to decide this appeal, though in doing so we will have to consider the previous Full Bench decision of this Court in -- 'MANU/BH/0062/1949 (A)'.

30. The facts have been very clearly set out in the judgment of my learned brother, and I need not re-state them. The subject-matter of the litigation is .08 acres of land comprised' in plot No. 1050 of holding No. 176 situate in village Lauria in the district of Monghyr. Plot No. 1050 has got an area of .13 acres, and it is recorded in khata No. 176, this khata having been described in the Survey record-of-rights as "Ghairmazrua malik wo thiccadar". In the "Remarks" column of the khatian the possession of Musammat Darsano Kuari, widow of Tale Rai, has been recorded with regard to the entire plot. The description of the land as given in the khatian is "Makan mai sahan--4".

On the death of Musammat Darsano Kuari, one Musammat Chaurabati, the widow of a brother of Tale Rai, came in possession of the plot, and on 11-7-1939 Chaurabati sold this plot along with certain other raiyati lands lying in two other villages to the defendant second party Jagrup Mawar. Chaurabati died sometime in the year 1941, and on 27-S-1946 Bhagwat Sharma, one of the plaintiffs, took settlement of the plot from the landlord under a registered kabuliat. The defendants first party in this suit had claimed .08 acres, the disputed portion, on the strength of an oral purchase from Musammat Chaurabati. The story of oral purchase set up by the defendants first party has not been accepted, and the question which ultimately fell to be determined was a pure question of title.

The question was whether Chaurabati had a saleable interest in the disputed land so as to be able to convey to the defendant second party a valid title to the property. If the said lady could not validly transfer the property to the defendant second party, then the plaintiffs who claim to be settlement holders from the landlord would be deemed to have acquired a valid title to it. The sale-deed had been executed in 1939, Chaurabati died in 1941 and the present suit was instituted on 29-1-1948. Undoubtedly, the question of possession is immaterial, inasmuch as if the sale by

Chaurabati to the defendant second party is not a valid sale, the landlord had the right to settle the land, and the settlee from the landlord would acquire a valid title to the property.

31. It was never alleged by any party that Musammat Darsano, whose possession had been recorded in the "Remarks" column of the record-of-rights, had any other raiyati holding in village Lauria where the disputed land lies, and it cannot be disputed that when after the death of Musammat Darsano, Musammat Chaurabati came in possession of the property that was not under any right or title. The landlord had the right to re-enter when Darsano died, but that right was not exercised and Chaurabati was allowed to take possession of the plot and remain in possession of it. If Chaurabati had no permanent interest in the, property, then the landlord had the right to eject her any time he liked and he could certainly make a settlement of the land in 1946 ignoring the sale which took place in 1939.

32. The question of law arising for determination in this case is as to whether under Section 182, Bihar Tenancy Act, read with Section 26A of the said Act, Musammat Chaurabati had the right to transfer her interest in this plot to the defendant second party. Nobody has asserted that when Chaurabati executed this sale-deed she had any raiyati land in village Lauria, and we have to proceed on the assumption that the only immovable property over which Chaurabati had her possession at the time of the execution of the sale-deed was this disputed plot. It is also now clear that along with this land Chaurabati sold about 1.46 acres of holding No. 66 in village Siloutha and about 1.08 acres ox holding No. 25 in village Tevai to the defendant second party.

The raiyati lands that were sold along with the disputed plot admittedly lie in two other villages which were in the district of Bhagalpur and not in the district of Monghyr where the disputed property is situate. One of the points which require very careful consideration in this case is as to whether, even if the legal position after the insertion of the new Section 26-A in the Bihar Tenancy Act is that the raiyat of the village who holds the homestead, though not as a part of his raiyati holding, has the same sort of transferable interest in the homestead as in the raiyati holding, this principle can be applied to a case in which the raiyat holds his homestead in one village and his raiyati land in another village.

There are no doubt Calcutta decisions to the effect that Section 182 will be applicable even in the case of a raiyat who has got homestead land in one village and agricultural lands in another village and in -- 'MANU/BH/0162/1950 : AIR 1951 Pat 215 (N), a Bench of this Court presided over by my Lord the present Chief Justice followed the Calcutta decisions, and laid down that the provisions of Section 182 will be applicable in the case of a raiyat who holds his homestead in one village and his agricultural land in another village, provided the lands in the two villages are either adjacent or in close proximity. I have read the judgment of my Lord the Chief Justice with very great care, and what I find is that he has followed the Calcutta decisions on the point, it being generally the practice of this Court to follow the Calcutta decision, on points on which this Court has not definitely expressed any clear opinion.

But Sarjoo Prosad J. (as he then was), though he expressed his entire agreement with the views of my Lord the Chief Justice, made an observation to the effect that the word "homestead" must mean the homestead land of the tenant in the neighbourhood of the raiyati land, or, in other words, in the vicinity of the raiyati land from which the raiyat carries on his agricultural operations in respect of the raiyati land. And he pointed out that because of the finding that the cultivation of the

raiyati lands in village Nirmal Bigha was being carried on from village Tandua, where the homestead lands were situate, Section 182 of the Bihar Tenancy Act would protect the interest of the tenant even in those homestead lands. My learned brother Das J. has observed that what Sarjoo Prosad J. has suggested may be a solution of the difficulty which arises, and he has also referred to a very old decision on the point, namely, -- '22 WR 511 (O)'.

I have read the judgment of Markby J. and from the facts as I gather from his judgment it does not appear to me that that was really a case in which the bastoo land lay in one village and the agricultural land in another. His Lordship says that the lands to which the suit relates and in which the defendant claims a right of occupancy are what are called bastoo lands; that is to say, they are lands upon which houses stand inhabited by persons engaged in agriculture; and they are adjacent to the lands which the raiyats who inhabit those houses cultivate. It no doubt appears that the two lands were Held under the same landlord. Then his Lordship observes that a distinction has frequently been drawn between the houses in the town and what are called homestead lands of a raiyat engaged in agriculture.

The lower appellate Court had found in that case that the tenure of the bastoo lands was a ryotwaree tenure, and Markby J. says that the only question will be that whether as a matter of law that distinction in the mode of paying the rent excludes the bastoo lands entirely from the operation of Act X of 1859. In my humble opinion, this decision is of little assistance to us in deciding the question raised, though I must admit that the cursus curiae of the Calcutta High Court seems to be in favour of the view that where the homestead of the tenant lies in one village and his raiyati lands in another, and even when these two kinds of holdings are held under different landlords, Section 182 of the Bengal Tenancy Act will apply to protect the interest of the tenant. The Calcutta High Court is distinctly of the view that in such circumstances the incidents of the raiyati land will regulate the incidents of the homestead.

I would in this case first address myself to the question as to whether this view of the Calcutta High Court can be upheld by us, especially, when on account of the complexity of the problem a Special Bench of five Judges has been constituted for reviewing all the earlier decisions including some of our own High Court. When the Calcutta decisions were brought to the notice of the learned Judges of this Court who decided the case of -- 'AIR 1919 Pat 108 (M)', their Lordships observed that those decisions were far-reaching and might under suitable conditions require further judicial consideration in this province. After having given my most anxious consideration to the question I find that the view taken by the Calcutta High Court cannot be supported and is quite contrary to the statute as it stands. Section 182 is only in these terms :

> "When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

The words "raiyat" and "holding" are to be found in this section, and both these words have been defined in the Bihar Tenancy Act. "Holding" means a parcel or parcels of land held by a raiyat and forming the subject of separate tenancy. And "Raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants,

or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right. If we read in this section a provision indicating that the Incidents of the tenancy in the homestead shall be regulated by the provisions of the Act applicable to land held by a raiyat 'in the neighbourhood', then we will be certainly importing something in the section which it does not contain.

The section does not also contain anything to indicate that the homestead lands should be such from which the agricultural operations might be carried on. We have in the first instance to examine the language of the statute and to ask what is its natural meaning, and if that does not afford a clear solution, then we may be guided by the intention of the legislature, real or supposed, and we will have to see whether the intention behind the statute is that incidents of the tenancy of the homestead would be the same as the incidents regulating the tenancy of the raiyat's lands situate not only in one village but in different villages lying in different districts to which the Bihar Tenancy Act applies. There may be a big cultivator owning- lands in different villages of different districts, and according to certain Calcutta decisions, it is not necessary that he must have a single homestead or that he must carry on agricultural operations from such homestead, Biswas J. in -- 'MANU/WB/0013/1943 : AIR 1945 Cal 50 (P)', observed as follows :

> "The tenant may be a raiyat in respect of a number of agricultural holdings, and it is as likely as not that he may have a number of homesteads in the village or villages where these holdings are situated. It would be wrong to say that, although he could claim the benefit of Section 132, if he had only one homestead, he would necessarily be deprived of such benefit, if he happened to have more than one homestead."

It is possible that a raiyat may have a homestead land in one village and raiyati lands in deferent villages in some of which he may not have right of occupancy at all. Undoubtedly, according to the Calcutta view, the incidents of the tenancy of the homestead will be regulated by the provisions of the Act applicable to lands held by him in different villages either as an occupancy raiyat or as a non-occupancy raiyat. While this question was being discussed at the Bar, I did point out that as soon as we accept the principle that a tenant holding homestead in a particular village can claim that the incidents of his tenancy in the homestead would be the same as the incidents of his tenancy in the raiyati lands held by him in different villages, with regard to some of which he may be an occupancy raiyat and with regard to others a non-occupancy raiyat, the result would be not only anomalous but highly complex, and the problem would be rendered insoluble.

My learned brother Das J. has observed that though Section 132 does not say in express terms whether the other raiyati land must be in the same village or not, the idea of vicinage may well be derived from the use of the expression "homestead". All the Calcutta decisions on the point have not taken this view, and I find it difficult to understand how the idea of vicinage can be derived from the use of the expression "homestead". If really the idea ol vicinage is there, then we cannot in this context ignore the position which the scheme of the Bihar Tenancy Act has given to a village. The expressions "vicinity" and "neighbourhood" are relative expressions, and a particular village may be a very big one, so much so that the homestead of a raiyat may be in one corner of it and his raiyati lands in another corner, even 2000 yards apart.

We also know of small villages or hamlets, each having only a few houses and only a

few acres of land within its ambit as contemplated by Section 115A of the Bihar Tenancy Act. To find out the 'vicinage' or the 'neighbourhood' in such cases would be a difficult problem, and it appears to me that as soon as it is conceded that the incidents of the tenancy of a homestead held by a raiyat in a particular village can be regulated by the incidents of his raiyati lands held in a different village, we would be driven to an impossible position which cannot be brought under the purview of Section 182 and which would actually do violence to the provisions ol this section.

33. It is Chapter V of the Bihar Tenancy Act, which deals with occupancy raiyats, and if we carefully examine the provisions of this Chapter along with the general scheme of the Act, it would be manifest that for defining and explaining the rights of an occupancy raiyat a village has beeD taken to be the sole entity. In Section 20 we find the definition of a "settled raiyat", and the sub-sections, of this section require a very careful examination. Sub-section (1) lays down that every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat 'land situate in any village', whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, settled raiyat 'of that village'.

One, who therefore possesses for a period of twelve years a land situate in any particular village becomes a settled raiyat of that village and not a settled raiyat of any contiguous village, though it is possible that his agricultural operations might extend to a contiguous village or to several contiguous or neighbouring villages. According to Sub-section (2) a person can become a settled raiyat of a village even if he has held in that village different lands at different times. Sub-section (5) is very important, because it lays down that a person shall continue to be a settled raiyat of a village as long as he holds any land, as a raiyat 'in that village' and for one year thereafter. And it is Sub-section (1) of Section 21 which says that every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village.

Section 23 lays down the rights of the raiyats in respect of the use of the land, and Section 24 says that an occupancy raiyat shall pay rent for his holding at fair and equitable rates. Section 25 protects him from eviction and lays down the conditions under which an occupancy raiyat can be evicted. Section 26 deals with the devolution of the occupancy right on death, and Section 26A which as a result of the amendments comes after Section 26 has altered the old law so far as the transfer and the bequest of occupancy holdings are concerned and ii is because of this provision that an occupancy holding has now become transferable.

The rights of a settled raiyat of a particular village do not extend beyond the ambit of the village, and the legislature has therefore taken care to explain what is meant by a village. The definition of "village" is to be found in Section 3 (10) of the Bihar Tenancy Act. and "village" according to this section means the area defined, surveyed and recorded 'as a distinct and separate village' either in the general land revenue survey or in the survey made by the Government. If there has been no survey, the Collector has got the power to declare, with the sanction of the Board of Revenue, as to what would constitute a village. Section 115A is the provision laying down the rules for the demarcation of boundaries, and it is in these terms :

> "In the demarcation of village boundaries for the purpose of making a survey and preparing a record-of-rights under this Chapter, a Revenue Officer shall,

so far as is possible, and subject to the provisions of the Bengal Survey Act, 1875, preserve, as the unit of survey and record, the area contained within the exterior boundaries of the village maps of the revenue survey, if any;

and, where village maps prepared at a previous revenue survey exist, he shall not, without the sanction of the Board of Revenue, adopt any other area as such unit."

The scheme of the Act, therefore, shows that a village has been taken to be the sole entity and the provisions in Chapter V relating to settled raiyats and occupancy raiyats leave no room for doubt that whatever rights the settled raiyat has got are confined to the particular village of which he is the settled raiyat. I say in all humility that it is inconceivable that by virtue 01 Section 182 the rights of the raiyats possessing homestead lands were in any way extended beyond the ambit of the village. If the view taken by the Calcutta High Court is correct, then a raiyat holding his homestead land in a village different from the village of which he is a settled raiyat should acquire a right equivalent to occupancy right in that homestead land, even though the legislature never meant to lay down that by virtue of being a settled raiyat of a particular village the raiyat : who is the settled raiyat of that village becomes entitled to lands outside that village because ol" the connection which he maintains with that village.

If a settled raiyat of one village cannot by virtue of his position as the settled raiyat of that village acquire any interest in the lands held by him in another village, I do not understand how any additional rights would be created for him with regard to his homestead lands in the other village. The natural consequence of the extension of such rights, never within the contemplation of the statute, will be the creation of anomalies. Biswas J. went to the length of observing in --MANU/WB/0013/1943 : AIR 1945 Cal 50 (P)' that the Act nowhere requires that a raiyat must be an actual cultivator and that if a raiyat need not be an actual cultivator, much less need he hold the homestead for the purpose of cultivation. This is how the principle has been stretched in Bengal, and we cannot anticipate how many anomalous results will follow from the decision that the incidents of the raiyati lands held by a tenant in several or different villages will regulate the incident of his homestead situate in a particular village different from the one in which the raiyati lands are held.

His Lordship has further observed that the requirements of Section 182 would be satisfied if the homestead be one from which the raiyat might, if necessary, carry on agricultural operations in his raiyati holdings, if and when the occasion arises. In other words, according to the Calcutta view, if a raiyat has got homestead lands in village A from which he can carry on agricultural operations in a number of villages. B, C and D, though he is not actually carrying on agricultural operations in those villages, he will be deemed to be an occupancy raiyat with regard to the homestead land in village A. These are anomalies which could not be within the contemplation or sanction of the statute, and if we examine the plain meaning of Section 182 along with the provisions contained in Chapter V, it will be clear that it could not be the intention of the legislature to extend the rights of a settled raiyat of any particular village in this fashion.

Section 182 is to be found in Chapter XIV which deals only with contract and custom. By virtue of the provisions contained in this Chapter the rights sanctioned by Chapter V can neither be cut down nor enlarged. Sinha, J. (as he then was) did not make a meaningless observation in --'MANU/BH/0015/1945 (B)' when he said that by making

the following observation in -- 'Golam Mowla v. Abdool So\ver Mondul', 13 Cal LJ 255 (Q), Rampini J. seems to have stated the result of the application of Section 182 a little too broadly :

> "Even though the defendant is not a raiyat in respect of this piece of bastu land in dispute between the parties, still under Section 182, the provisions of this Act applicable to land held by a raiyat are applicable to this particular piece of land; in other words, he has, under Section 21, a right of occupancy in this piece of bastu land as well in the agricultural land in the village of which he is a settled raiyat."

Certainly, B. 182 does not say in so many words that a raiyat holding his homestead otherwise than as a part of his holding as a raiyat shall acquire in the homestead all the rights, and be subject to all the liabilities, that he has as a raiyat in his holding and if it had said that, then the homestead would have constituted a separate raiyati holding with all the incidents of such a holding. I am in respectful agreement with his following observation :

> "What Section 182 lays down, in my opinion, inter alia is that a raiyat shall not be ejected from his homestead, so long as he continues to be a raiyat of some land in the village; for example, Section 182 does not have the effect of making the raiyat liable for payment of rent for the homestead portion on the same terms as he holds his raiyati holding though in this case, as in other case, the land is belagan. Furthermore, the provisions of Section 182 continue to apply to the homestead only so long as the raiyat continues to hold other lands as such. As soon as a raiyat's holding as a raiyat passes out of the hands of the raiyat, leaving in his possession the homestead portion only, it cannot be said that the tenant still has any rights of occupancy in the homestead. This is the effect of the decision of the Letters Patent Bench of this Court in the case of -- 'MANU/BH/0071/1929 : AIR 1930 Pat 224 (J)'."

I shall have occasion to refer to the decision of this Court in -- 'MANU/BH/0071/1929 : AIR 1930 Pat 224 (J)' which has been discussed by Sinha J., and for the present I have to point out that the observations of Jwala Prasad J. and Dhavle J. in that case should not give us the impression that their Lordships meant to hold that a settled raiyat of one village can by virtue of being a settled raiyat of that village acquire occupancy right or a right equivalent to occupancy right in the homestead land possessed by him in another village contiguous or distant. I may quote the following passage from the judgment of Jwala Prasad J. in this connection :

> "Under Section 20 (5) of the Bengal Tenancy Act he also ceased to be a settled raiyat of the village inasmuch as he could continue to be a settled raiyat only so long as he held the land as a raiyat in that village, and for one year thereafter. Therefore, in September 1913 when he executed the kabuliyat in question he had no raiyati land in the village and the provisions of the Bengal Tenancy Act applicable to land held by a raiyat ceased to apply to the homestead land."

His Lordship says that as a protection to cultivating tenants the section is enacted, so that so long as the tenant holds his raiyati land he may not be turned out of his homestead. If the section has been enacted only as a protection to cultivating tenants, can it be asserted after examining what is contained in Chapter V that the legislature meant to create facilities for the cultivation of lands held in different

villages even though both Sections 20 and 21 speak of one village and one village alone? In my opinion, there is no justification for the view that even according to the legal fiction created by Section 182, a settled raiyat of one village can acquire occupancy rights in his homestead lands lying in other villages so much so that he will have the right to transfer the homestead lands in those other villages according to the provisions of Section 26A.

Even in the Calcutta High Court, there have been two recent decisions in which Section 182 has been considered, and I respectfully agree with the view of R. P. Mookerjee J. in -- 'AIR 1050 Cal 170 (I) that the word "holds" in Section 182 indicates the point of time when the necessary ingredients are satisfied. The question is whether the word "holds" means holding in the village in which he is a raiyat or in other villages as well. If the word "holds" is to be given a wide interpretation, then he can hold the homestead anywhere in the State of Bihar where the Bihar Tenancy Act applies. R. P. Mookerjee, J. further observed as follows :

> "It is further not correct to state that the raiyat or an under-raiyat acquires a right of occupancy in the homestead on his proving that he is a settled raiyat or the holder of a raiyat, in the same village or in a contiguous one. It is not that the homestead itself becomes a raiyati holding. The effect of the provisions is not to create a transferable occupancy right in that homestead. The right is a personal one dependent on the proof of the existence of certain facts. Such personal rights continue to be available only so long as the conditions are satisfied."

Sinha J. in our own Court said in -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B) that it is a personal right created in favour of the raiyat which cannot be transferred either by act of parties or by operation of law. If some of us do not like the expression "personal right" as used in this context, we may call it a . right to property, which cannot be transferred, and therefore I am inclined to the view put forward before us by the learned Government Advocate that it is merely a right to property which by means of any legal fiction has not become transferable. At any rate, even if the force of the legal fiction is such as to create a transferable right in the homestead land possessed by the raiyat in the village of which he is a settled raiyat, this right cannot be extended in favour of a homestead possessed by the raiyat in a village of which he is not the settled raiyat.

The Calcutta case in -- 'AIR 1949 Cal 259 (P)' is a Bench decision of that Court, and their Lordships pointed out in this case that the use of the present tense "holds" cannot be overlooked and that it indicates that both the elements must be present at the time when the protection of the section is sought to be invoked by the tenant and that he must be a raiyat at that time, that is to say, he must have the arable lands and must be using the other land for his residence. Undoubtedly, it is the co-existence of these two elements that would bring in the operation of Section 182, but can it be asserted that Section 182 will be attracted even if these two elements are not present in one village but in two or more different villages? Naturally, if these two elements become dissociated, Section 132 will cease to be applicable from the moment when either of these elements disappears, and Bengal having probably realised the difficulty has now amended Section 182 by inserting the words "in the same village where the homestead is situate or in any village contiguous thereto."

Unfortunately, there has been no such amendment in Bihar, and the Bihar legislature in its wisdom did not think of amending Section 182 even after the insertion of the

new Section 26A in the Bihar Tenancy Act. But the principle laid down in this Calcutta decision is a principle fully applicable here, and nobody can take the view that if after the two elements become dissociated, Section 182 can be applied. I will respectfully frame the question : Is there any association of the two elements if one element is found in village A and the other element is found in village B?

The answer to my mind on a consideration of what is contained in Chapter V and Chapter XIV where 3. 182 occurs must be in the negative, and, according to the scheme of the Act, we would be applying a legal fiction of our own creation, if we were to say that even if the two elements are found present in two different villages, Section 182 will be attracted. I should like to quote here a passags from Mr. S. C. Mitra's Tagore Law Lectures. The passage runs as follows :

> "No right of occupancy can be acquired in land used for building purposes. Neither can the right be acquired in land used for the erection of a school or a church, and no suit for enhancement of rent or even for the recovery of arrears of rent of such lands could be maintained in the Collector's Court under the Rent Act of 1859. Similarly, land used for arhats, ghats, bazars, indigo-factories or manufactories cannot come within the purview of the Bent Acts. But if a piece of land has been used by a cultivator for his own habitation, and it is a part of an entire agricultural holding, he acquired a right of occupancy in it with the rest of the land in the holding.
>
> If a raiyat holds his homestead land otherwise than as a part of his agricultural holding, the incidents of his tenancy of the homestead land are regulated by local custom or usage and subject to such local custom or usage the raiyat may, under the provisions of the Bengal Tenancy Act. acquire a right of occupancy in it. It seems that if a raiyat holding land for agricultural purposes holds his homestead land as a different holding in the same village, and not as a part of his agricultural holding, he has ordinarily the same sort of right in the homestead land as in the agricultural holding."

It is noteworthy that the learned author has definitely stated that if a raiyat holding land for agricultural purposes holds his homestead land as a different holding 'in the same village', he has ordinarily the same sort of right in the homestead land as in the agricultural holding. I feel that I am supported in my view by a lawyer of repute. Before I conclude my discussion on this particular topic I think I ought to state that whatever observation has been made by me in this connection has been made for the purpose of expressing my disagreement with the Calcutta view, and I should not be understood to criticise in any way the judgment of my learned brother Das J. with which my Lord the Chief Justice and my learned brother Ramaswami J. have expressed their full agreement and which is now going to be the judgment of this Court.

34. It is possible that sitting in a Division Bench I might have followed the cursus curiae of the Calcutta High Court as was done by my Lord the Chief Justice in -- 'MANU/BH/0162/1950 (N)', but our responsibility is much greater nowbecause we are called upon to review not only the old decisions of the Calcutta High Court but also several important decisions of our own High Court including the Full Bench decision in -- 'MANU/BH/0062/1949 : AIR 1949 Pat 413 (A)' to which three very eminent Judges of this Court are parties.

I do not think it can be pressed upon us that we should adhere to the rule enunciated

in the Calcutta case even if we find it to be erroneous in principle and contrary to the terms of the statute, but if we are asked to follow the Calcutta decisions on the ground that that Court has for long held this view, I can do no better than reproduce the quotations which are to be found in the judgment of Mookerjee, A. C. J. in-- 'Chandra Binode Kundu v. Ala Bux Dewan' MANU/WB/0042/1920 : AIR 1921 Cal 15 (R). Lord Cranworth observed in -- 'Young v. Robertson' (1862) 4 Macq. H, L. 314 (S) :

> "There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon, induce them to alter it so as to endanger the security of property and titles."

Lord Chelmsford observed in -- 'Mersey Docks v Cameron' (1861) 11 H.L.C. 443 (T) :

> "The Courts rightly abstain from overruling cases which have been long established, because it they did so, they would only disturb, without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of 'stare decisis', refuse to examine the foundation upon which they rest."

And Lord Loreburn said in -- 'West Ham Union v. Edmonton Union' 1908 A. C. 1 (U) :

> "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent course of judicial decisions had disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of the House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them."

Undoubtedly, the subsequent course of judicial decisions in this Court has disclosed weakness in the reasoning on which the decisions of the Calcutta High Court are founded, and I need not repeat that in my humble opinion the decisions of the Calcutta High Court go beyond the provisions of the statute.

35. For the purpose of this case therefore, I hold that even if by virtue of Section 26A a raiyat can acquire a transferable interest in his homestead land, this principle can by no moans be applied in the case of a homestead which lies in a village different from the one in which the raiyat has got his occupancy holding or of which he is a settled raiyat. I have already said that the lands which the raiyat Musarnmat Chaurabati had transferred to the defendant second party were lands situate not only in two different villages but in another district altogether.

The landlord may be the same, and in Bihar up till very recently we had several Rajas and Maharajas who were proprietors of big estates situate in several districts. The fact that the landlord was the same is of no consequence and the fact that this homestead was transferred along with the raiyati lands of the two other villages will not by itself make the transfer valid. Mr. Untwalia could not support the view of

Sarjoo Prosad J. that because both the raiyati lands and the homestead had been transferred together the transfer would be valid. That is how Sarjoo Prosad J. has distinguished the Full Bench decision which had been pressed upon him.

36. Having taken the above view, the next question which arises for determination is what sort of right Musammat Chaurabati had in this homestead land. This question, I think, is very easy to decide. If Section 182 has no application in this case, then there can be no doubt that the tenancy is of a precarious nature. Mosammat Chaurabati when she came in possession of this land did not do so under any right, she being no heir to Musammat Darsano Kuari, and my learned brother also says in his judgment that it may be taken as correct that the plaintiffs-appellants would be entitled to succeed unless the sale-deed in favour of Jagrup Mawar (defendant second party) stands in their way. I have already referred to the entry in the khatian which shows that the land is recorded as ghainnazrua malik in the record-of-rights. The possession of Darsano is recorded in the 'Remarks' column, and nobody has ever disputed the correctness of this khatian entry.

In Second Appeal No. 631 of 1940 which was one of the cases decided in -- 'Ram Ranbijeya : Prasad Singh v. Ramjivari Ram' MANU/BH/0131/1942 : AIR 1942 Pat 397 (V) there was a similar entry, and the discussion in the judgment shows that the defendants Nos. 1 and 2 who were claiming the land recorded in the ghairmazrua malik khata No. 249 had also another khata No. 248 in the village which indicated that their father was a settled raiyat of the mauza. Their Lordships did not agree with the view that Jumrabi whose possession had been recorded with regard to the ghairmazrua plot had any permanent right in the land and relied on an earlier decision of this Court in -- 'Ramkishun Pande v. Bibi Sohaila' MANU/BH/0303/1933 : AIR 1933 Pat 561 (W). This decision is also an important decision for our present purpose, inasmuch as Agarwala J. (as he then was) had quoted in his judgment extracts from the rules of the Settlement Department. The following rules are important, and I should like to reproduce them in this judgment :

> "Rule 125 (a) (corresponding to Rule 295 of the Survey Manual) directs that
>
> > 'in the case of uncultivated lands in direct possession of the landlord the entry in column 4 (of the khatian) will be 'gair mazrua khas' or some other corresponding phrase'.
>
> Rule 128 (corresponding to Rule 297 of the Survey Manual) directs that
>
> > 'When lands covered by houses are not included in any agricultural holding, they may be entered separately in a continuous khatian slip for the whole village site, if this be convenient, but details of occupancy must always be entered against each plot number.'
>
> Finally, Rule 278 directs that
>
> > 'It' the tenant of homestead land is not a raiyat, the plots will be entered in the gair mazrua malik khatian without any specification of rent'."

These two decisions of this Court appear to me to have a very great bearing on the question which has to be decided by us, and the position of the person possessing this land is no better than that of a tenant-at-will. The question whether the tenancy is permanent or precarious is of little importance in this case though it had been

considered very seriously in -- 'MANU/BH/0131/1942 : AIR 1942 Pat 397 (V)' and also in -- 'Muhammad Zeya-uddin v. Shaikh Bargahan' MANU/BH/0225/1939 : AIR 1939 Pat 448 (X). Darsano Kuari who had the houses on this land (it being nobody's case that they are permanent structures) died several years ago, and Musammat Chaurabati could not come in possession of this land except with the sufferance or the permission of the landlord.

A person who lives in a house rent-free, by the sufferance of the owner is a tenant-at-will, and a mere permission to occupy land constitutes a tenancy-at-will only. A tenancy-at-will may be created by express words or impliedly or even from the fact of the occupation, without more, of premises by permission of the owner. Lord Watson in -- 'Secy, of state v. Nellakutti Siva Subra-mania' 18 I.A. 149 (Y) observed as follows :

> "Beyond what may be implied in the acts themselves there is nothing to shew that aught done by these stranger ryots was in the assertion of right; and, assuming the statements of the Appellant's witnesses to be absolutely true, the acts of user to which they speak are neither in amount nor quality sufficient to displace the proprietary title of the zemindar. Whether the evidence would per se be sufficient to raise rights of easement, and if so in whose favour, are issues which do not arise in the present case."

And in the well-known case of -- 'Jagdeo Narain Singh v. Baldeo Singh' MANU/PR/0025/1922 : AIR 1922 PC 272 (Z), their Lordships have discussed the powers and rights of the proprietors of the estates. I need not pursue this point further when my learned brother is also of the opinion that the plaintiffs would be entitled to a decree if the sale-deed in favour of the defendant second party is found to convey no title to him. There can also be no question of any title having been acquired by adverse possession. In view of the clear decisions of this Court in -- 'AIR 1842 Pat. 397 (V)' and -- 'MANU/BH/0303/1933 : AIR 1933 Pat 561 (W)', the landlord is at liberty to eject the person in possession of this land and the houses standing on it, and the settlee from the landlord will have the same right. In this view, I am of the opinion that the plaintiffs are entitled to a decree in this suit.

37. The entire appeal has been placed before this Bench and, as I have already said, no points of law were formulated for being answered by this Special Bench. I have found that even if under Section 182 read with Section 26A, Bihar Tenancy Act, a right to transfer the homestead laud has accrued to the raiyat, this right is confined to the homestead land situate in the same village of which he is the raiyat, and consequently Section 182 affords no protection to the defendant second party in this case. I have further found that the position of the defendant second party is no better than that of a tenant-at-will, and therefore he is liable to be ejected, and in this view I am strongly supported by well-established principles and two Bench decisions of this Court.

38. The question, therefore, whether a settled raiyat can transfer his interest in the homestead land lying in the village of which he is a settled raiyat is a question of only academic interest for me in this case. But, as the question has been discussed very seriously and as this Special Bench was constituted for reconsidering the decision by the previous Special Bench, I think I ought to express my opinion on this point as well. I have already referred to the provisions of Sections 20 and 21 of the Bihar Tenancy Act, and I have pointed out that while Chapter V deals with occupancy raiyats, Chapter XIV which contains Section 132 deals only with contract and custom.

Whatever rights an occupancy raiyat can have are really indicated in Chapter V and it is in this Chapter that we find the new Section 26A, according to which an occupancy holding or a portion thereof can now be transferred without the landlord's permission. Before the enactment of Section 26-A occupancy holdings could not be transferred unless there was a custom to that effect. For the last few years there has been a tendency to strengthen the position of raiyats and to give them as many rights as possible, and the enactment of Section 26-A is one of the results of this policy. Atone time, the tendency was to strengthen the zamindar's position, and therefore Sir Edward Colebrocke writing in 1870 observed thus while considering the defects of Regulation I of 1193 :

> "The errors of the Permanent Settlement in Bengal were two-fold : first in the sacrifice of what may be denominated the yeomanry by merging all village rights, whether of property or occupancy, in the all-devouring recognition of the zerninder's permanent property in the soil; and, secondly, in the sacrifice of the peasantry by one sweeping enactment, which left the zemindar to make his settlement with them on such terms as he might choose to require. Government, indeed, reserved to itself the power of legislating in favour of the tenants; but no such legislation has ever taken place; and, on the contrary, every subsequent enactment has been founded on the declared object of strengthening the zamindar's hands."

The important question which falls for determination is whether even though there is no express provision in the amended Bihar Tenancy Act sanctioning the transfer of homestead lands, this sort of right can be deemed to have been granted to the raiyat by virtue of Section 26A of the Act. I shall again advert to the important dictum very clearly laid down in one of the Calcutta decisions referred to by me, -- 'AIR 1919 Cal 259 (P)', that it is co-existence of the two elements that would attract The operation of Section 182. If the principle is that both the elements must be present at the time when the protection of the section is sought to be invoked by the tenant, and if there is and can be no possible bar to the dissociation of the two elements, would it be sound to hold that by-virtue of Section 182 and Section 182 alone (because Section 26-A does not in terms sanction the transfer of homestead lands), even after the two elements get dissociated, the transferor is able to convey to the transferee the homestead land with right of occupancy therein and the transferee acquires the homestead land with the right of occupancy therein?

It has been conceded that anomalies are bound to occur in applying Section 182, but I do not think it will be correct to ignore these anomalies altogether while testing the proposition that Section 26-A, though in terms it does not permit the transfer of homestead lands, should be deemed to apply to homestead lands as well by virtue of Section 182 which says only this much that when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incident of his tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat. Because of Section 26A no question of local custom or usage arises so far as the right to transfer the occupancy holding is concerned, but Section 182 still retains the words "shall be regulated by local custom or usage." It merely says that the incidents of the tenancy of the homestead shall, in absence of local custom or usage, be regulated by the provisions of this Act applicable to land held by a raiyat.

> "A thing is 'incident to another when it appertains to, or follows on, that other which is more worthy or principal, e.g., a Court Baron is incident to a

> manor, rent to a reversion, distress to rent, timber trees to the freehold, title deeds to an estate, etc.' and of incidents, some be separable, and some inseparable'; 'separable, as rents incident to reversions, &c., which may be severed; inseparable, as fealty to a reversion or tenure1, or, possession or usage and time to a custom or prescription." (Stroud's Judicial Dictionary, page 1412).

Even Rampini J. had said in -- '13 Cal LJ 255 (Q)' that the defendant was not a raiyat in respect of the piece of bastu land, but he was of opinion that he had under Section 21 a right of occupancy in this piece of bastu land as well. With the highest respect for his Lordship's view I should say that Section 21 in terms cannot apply to the homestead land (because of the definition of "raiyat"), and if Sections 20 and 21 can have no application to a homestead land, then the only alternative is to agree with Sinha J.'s view that Section 182 lays down inter alia that a raiyat shall not be ejected from his homestead so long as he continues to be a raiyat of some land in the village. Section 26-A refers only to occupancy holdings, and the legal fiction cannot be carried so far as to lay down that it applies to homestead lands as well.

The observation regarding association or dissociation in the Calcutta case is, I say with respect, a very sound observation, and it will be illogical to deduce therefrom that even if the two elements are dissociated the same rights shall be available to the holder of the homestead as to the holder of the raiyati land. This is a sure test of the proposition that Section 26-A applies with, equal force to homestead lands as well. Almost in all the relevant decisions the principle has been accepted that if the two elements are dissociated, the incidents of the tenancy of the homestead would not be regulated by the provisions of the Act applicable to land held by a raiyat.

The decision in -- 'MANU/BH/0071/1929 : AIR 1930 Pat224 (J), proceeded upon this principle and must be regarded as an authority to support the proposition that when the homestead land is dissociated from the raiyati holding, the Bihar Tenancy Act does not apply to it. I should like to quote the following passage from the judgment of Jwala Prasad J. :

> "The fallacy lies in the assumption that whatever homestead land the defendant had was held by him as a raiyat. There never was any contract between the landlord and the defendant constituting his homestead land as a raiyati holding governed by the Bengal Tenancy Act. This homestead was in no case governed by the provisions of the Bengal Tenancy Act, contained in Chap. V except that by reason of the deft, having at one time held some agricultural land as a raiyat the incident at that time might have attached to the homestead land. But when the appellant ceased to be a raiyat in respect of cultivable land Section 182 has no application. Similarly, the incident of occupancy right, if any, that attached to the homestead land came to an end; it was never revived either in respect of the homestead land or in respect of the raiyati land which the defendant held under the kabuliyat in question."

The ratio decidendi of -- 'AIR 1919 Pat. 108 (M)' is that if a settled raiyat in a village acquires other land as a raiyat, apart from the lands of which he is a settled raiyat, for the purpose of creating a homestead thereon, then he acquires occupancy rights in such land, even if the land be not held under the same landlord as the lands in respect of which such tenant is a settled raiyat. T can point out with the greatest respect that it is not quite correct to say that he acquires occupancy rights in such lands, the correct statement in my humble opinion being that so long as he is a

settled raiyat, the incidents of his tenancy in the homestead would be the same as the incidents of his tenancy in the arable land.

Even this case, however, is no authority for the proposition that even if the two elements are dissociated, the incidents of the tenancy of the homestead shall be regulated by the provisions of the Act applicable to cultivable land held by the raiyat. And there is no association of the two elements if the homestead is in one village and the raiyati land in another. The case of -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B)' was decided in the year 1945 by Sinha J. (as he then was! and by my learned brother Das J. Sinha J., though he was of the view that the provisions of Section 26A cannot be attracted to the homestead, did not differ from the conclusion arrived at by my learned brother Das J. who took the view which he has now reaffirmed in the present decision.

In addition to what had been held by Das J. in -- 'MANU/BH/0015/1945 : AIR 1945 Pat 428 (B)' he has now accepted the Calcutta view that even if the homestead is situate in a village different from the one in which the holder of the homestead is a raiyat, he will have transferable interest in the homestead. In 1949, we had the previous Full Bench decision -- 'MANU/BH/0062/1949 : AIR 1949 Pat 413 (A)' in which Shearer J. has pointed out that a raiyat does not hold his homestead as a raiyat, as he takes the land, not for purposes of cultivation, but for building and residential purposes and that the incidents of his tenancy of his homestead are to be regulated primarily by local custom or usage and not by the statutory provisions which regulate the incidents of occupancy right.

I have said above that the provision to the effect that the incidents of the tenancy of the homestead shall be regulated primarily by local custom or usage clearly indicates that at least to some extent Section 26-A which had done away with custom altogether was not intended to apply to homestead lands. Here it will be interesting to note that it is now the settled view oi" this Court that an under-raiyat acquiring an occupancy right cannot transfer his interest under Section 26-A. Section 48A is the provision under which an under-raiyat can acquire occupancy right in certain circumstances, but still he cannot have the benefit of Section 26-A. Of course, I should say with respect that I do not agree with all the observations made by Shearer J. and I have made an humble attempt to construe the provisions of Chapter V and Section 182 with a view to determining how far the rights conferred on the raiyat by Section 26-A can be available with regard to the homestead land. At any rate, this point, according to the view which I have taken, is only of academic interest.

39. In the result, therefore, I would allow this appeal and decree the suit of the plaintiffs with costs throughout. According to my judgment, the plaintiffs' title to the land in suit should be declared, and they should be allowed to recover possession of the same.

Jamuar, J.

40. I have had the advantage of reading The judgments prepared by my learned brethren Das and Narayan JJ.

41. On the facts of the case, two main points arise in this appeal. Both of them have been very elaborately dealt with in the two judgments. It would only be a repetition were I to restate and examine them in detail.

42. The first question for determination is regarding the true meaning and scope and

effect of Section 182 of the Bihar Tenancy Act after the amendment of the Act by the insertion of Section 26A.

43. Section 182, Bihar Tenancy Act, reads as follows :

> "When a raiyat holds his homestead otherwise than as a part of Ms holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

I would construe this section upon its plain and grammatical meaning, and I would net place upon its language a narrow or a restricted meaning.

44. The section means that, in order to attract its provisions, a raiyat must hold (1) homestead land, that is, land for purposes of residence, fcnd (2) land for purposes of agriculture. These two elements must co-exist; and when they co-exist, then the incidents of his tenancy of the homestead shall be regulated, firstly, by local custom or usage; and, secondly, in the absence of any local custom or usage, by the provisions of the Tenancy Act applicable to the land held by the raiyat. Thus, where local custom or usage is pleaded, the decision regarding the incidents will depend upon its proof or otherwise; and, where no local custom or usage is alleged or pleaded, then upon the provisions of the Act applicable to the land held by the raiyat.

In the latter case, it does not necessarily mean that there must be a presumption that no such local custom or usage exists, otherwise the last part of Section 182 will become wholly redundant. This, in my opinion, is the plain meaning of the section, and I would not modify or restrict that meaning. Then there will come into play the provisions of Section 26-A, that is to say, the homestead land of the raiyat becomes transferable under the law to the same extent as his raiyati holding has been made transferable.

45. The second question which assumed importance was whether a raiyat can take advantage of Section 122, Bihar Tenancy Act, if his homestead land and his raiyati land -- though held by him simultaneously -- are situated in two different villages or whether they both must be situated in the same village. Section 182, Bihar Tenancy Act, does not in express terms say whether the two kinds of land must be in the same village or that they may be in two different villages. The 'cursus curiae' of the Calcutta High Court is that it makes no difference if the homestead and the raiyati lands are situated in different villages provided the villages are contiguous or nearby.

I think the basis of these decisions is that the two villages should be so close to each other as to enable the tenant to carry on his agricultural operations from his place of residence. That long line of Calcutta decisions has been followed by this Court, and I do not think that I could not dissent from the view which has prevailed so long. In the present case, however, it has been found that the two villages are adjacent and under the same landlord.

46. For these reasons, I find myself in agreement with the judgment of my brother Das J.