

(1921) 07 CAL CK 0004
In the Calcutta High Court

Abdul Hossain and Others

APPELLANT

Vs

Afsaruddin and Others

RESPONDENT

Date of Decision : 19-07-1921

Acts Referred:

Citation : AIR 1921 Cal 83 : 67 Ind. Cas. 639

Hon'ble Judges : Panton, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for ejectment. The disputed land is claimed both by the plaintiffs and the defendants as tenants under the same landlord, On, the 10th October 1912, the defendants executed a kabuliyat in favour of the landlord in respect of a defined area. On the 12th January 1914 the plaintiffs executed a kabuliyat in favour of the same landlord, also in respect of a defined area. The case for the plaintiffs was that the land in dispute was comprised within the boundaries of their tenancy and that the defendants had unlawfully kept them out of possession thereof. The defendants resisted the claim on the ground that the land was comprised within the ambit of their tenancy and that as their tenancy was earlier in point of time the plaintiffs had required no valid title thereto. The Court of first instance came to the conclusion that the land was comprised within the tenancy of the defendants and dismissed the suit. Upon appeal the District Judge came to the conclusion that the land was comprised not within the tenancy of the defendants but within the tenancy of the plaintiffs and accordingly decreed the suit. On second appeal to this Court it was contended that by virtues of the terms of the Kabuliyat of the defendants they had acquired a good title to the disputed land as tenants even though it was situated beyond the ambit of them tenancy. In support of this position reliance was placed upon the following clause in the kabuliyat; If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that Survey, whether lying inside or outside

the boundaries mentioned in the kabuliyat and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the kabuliyat have been enjoyed secretly." The contention of the defendants-respondents is that the effect of this clause is to entitle them to encroach upon the adjoining waste of the landlords and thereby to create a tenancy in their own favour in respect of such lands, even against the wish of the landlord. In our opinion, this contention cannot possibly be sustained. It was pointed out by this Court in the case of *Ishan Chandra Mitter v. Raja Ramranjan* 2 C.L.J. 125, that if a tenant encroaches upon the adjoining waste of his landlord, the landlord is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser, the landlord is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. If the landlord treats him as a tenant, then he becomes liable to pay additional rent. The object of the clause in question was to make the tenant liable to pay additional rent for additional area, should it be discovered upon measurement that he had secretly taken possession of such land as was not comprised within the ambit of his tenancy. The clause did not entitle him to annex the adjoining land and retain possession thereof against the wishes of the landlord. We are unable to hold that anything had happened between the 10th October 1912 and 12th January 1914 which made it impossible for the landlord to grant a tenancy in respect of the disputed land to the plaintiffs.

2. The result is that this appeal is allowed, the judgment and decree of Mr. Justice Walmsley set aside and those of the District Judge restored. This order will carry costs both here and before Mr. Justice Walmsley.