
(1925) 12 CAL CK 0020
In the Calcutta High Court

Bahadur Ahmed Moulvi

APPELLANT

Vs

Hemanta Kumar Roy and Others

RESPONDENT

Date of Decision : 03-12-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 178

Citation : 94 Ind. Cas. 338

Hon'ble Judges : Cuming, J; B.B. Ghose, J

Bench : Division Bench

Judgement

B.B. Ghose, J.—This appeal arises out of a suit for recovery of khas possession of certain land. The Trial Court dismissed the suit which was decreed on appeal by the Subordinate Judge.

2. Defendant No. 1 has appealed to this Court. The facts found by the Subordinate Judge are that certain lands belonged jointly to two persons Baidya Nath and Golok in equal shares. There was a partition between the two co-sharers and the lands belonging to Golok's share were inherited by one Nityamoyi. She died sometime in 1916. Before her death she executed a kabuliyat in favour of the plaintiff dated the 11th of April 1907. It was stated in that kabuliyat that the lands of which she had been in possession was found on measurement to be in excess of the original jama and, therefore, the was altered and certain terms were arranged between the landlord and the Nityamoyi with regard to her leasehold property. The defendants came into possession by right of purchase from one Pitambari who was the widow of the daughter's son of Golok.

3. The plaintiff claimed possession of these lands on two grounds. First, that the transfer to the defendants was made in contravention of the terms of the kabuliyat executed by Nityamoyi and secondly, that the tenancy being that of an occupancy raiyat the purchasers had acquired no title as against the landlord as the occupancy right was not transferable by custom.

4. The Trial Court found that the leasehold was a permanent tenure that the sale was of a portion of the tenancy which was saleable and that, therefore, the plaintiff was not entitled to succeed in ejectment. On appeal by the plaintiff the Subordinate Judge held that if the leasehold interest of Nityamoyi be held to be a permanent tenancy then the sale having been effected in breach of the covenant contained in the kabuliyat executed by her the landlord was entitled to re-enter. He, however, held that the interest of Nityamoyi in the lands was that of a raiyat. He found that the leasehold did not form a holding as defined by the Bengal Tenancy Act, because it did not consist entirely of parcels of land but some undivided shares of land under the occupancy of tenants were included within the leasehold. He came to the conclusion that the Bengal Tenancy Act made no provisions for a tenancy of this character and the incidents of such a tenancy were rather uncertain, but that, at any rate, such a tenancy would not be transferable. In that view he made a decree in favour of the plaintiff.

5. Defendant No. 1 by his appeal contends that the leasehold having been found not to consist of a holding as defined by the Bengal Tenancy Act the sale to the defendants cannot be considered to be an abandonment of the holding by an occupancy raiyat which would entitle the landlord to take khas possession as on an abandonment under the Bengal Tenancy Act. It is contended by the learned Vakil on behalf of the plaintiff-respondent that the leasehold really consisted of a holding find he placed the kabuliyat before us. On reading the descriptions of the lands in the schedule there cannot be any doubt that undivided portions of lands have been included within the leasehold and,, therefore, according to the decision in the case of Hari Charan Bose v. Runjit Singh 25 C. 917 : 1 C.W.N. 521 : 13 Ind. Dec. 598 the tenancy cannot be said to comprise holding as defined in the Bengal Tenancy Act. The sale, therefore, cannot be construed into an abandonment of a holding by an occupancy raiyat and the landlord is not, therefore, entitled to recover possession on that ground. But it is contended on behalf of the respondent that the plaintiff is entitled to take advantage of the provision with regard to the restriction as to alienation contained in the kabuliyat of Nityamoyi and that he is entitled to re-enter on account of the breach of that covenant. Clause 9 of the kabuliyat runs thus: "With respect to this jama or any portion thereof, I shall not be entitled to make a gift or sell or give settlement of or create any lien or incumbrance in favour of anybody or otherwise transfer the same in any way. In case I do so, you shall be entitled to take khas possession of the entire mehal either of your own motion or through the Court and I shall not be able to object to the same." This is a clear provision restricting alienation and reserving the right of re-entry by the landlord in case of breach of the covenant. According to the plaintiff's case there has been a transfer which is a breach of the covenant. It is, however, argued on behalf of the appellant that this covenant is not valid under the Bengal Tenancy Act, I cannot find any provision in Section 178 of the Bengal Tenancy Act which prevents any such agreement being entered into, An attempt was made on behalf of the appellant to bring this covenant within the provisions of Clause (d), Sub-section (3) of Section 178 of

the Bengal Tenancy Act which enacts that nothing in any contract made between a landlord and a tenant shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. But the answer is that this leasehold is not a holding and the defendants have not been able to prove that there was any local usage authorising them to transfer their tenancy. There is no provision in the Act which the clause in the kabuliyat mentioned above offends against. In my opinion, therefore, the plaintiff is entitled to re enter for the breach of the covenant above referred to.

6. The appeal must, therefore, be dismissed with costs.

Cuming, J.

7. I agree.