

(1929) 03 CAL CK 0029
In the Calcutta High Court

Baikuntha Chandra Nag and Others

APPELLANT

Vs

Chandra Nath Bandopadhyaya and Others

RESPONDENT

Date of Decision : 12-03-1929

Acts Referred:

Bengal Tenancy Act, 1885 — Section 87

Citation : AIR 1930 Cal 190

Judgement

1. The suit which has given rise to this appeal was instituted so far back as the year 1920. When originally instituted it was a simple suit in which the plaintiffs asked for khas possession of an 8 auuas share of some lands on the ground that the plaintiffs were 8 annas patnidars and one Ram Charan Mandal who held the lands under them in non-transferable occupancy right at an annual jama of Rs. 3 made an unauthorized sale thereof in favour of the defendants and abandoned possession in their favour. The lands were described in the plaint as survey plots 1320 and 1348 and a half of survey plot 1321. The defendants pleaded that Ram Charan had permanent and transferable rights to the lands and that they themselves had acquired rights of occupancy having been recognized by the plaintiffs' predecessors and also by the plaintiffs themselves.

2. The trial Court held that Ram Charan had no permanent or transferable rights and that the defendants had not been recognized by the plaintiffs or their predecessors. There was a contention raised that the disputed, lands did not constitute an entire holding but were part of a holding which belonged jointly to two brothers Ram Charan and Guru Charan. This contention was not definitely disposed of by the trial Court but it observed that there was evidence to show that the mudafat of Ram Charan was separate from the mudafat of Guru Charan, and held that in any case there was abandonment of the lands by Ram Charan and his family after the transfer. The trial Court decreed the suit.

3. There was an appeal by the defendants. From the judgment of the Additional District Judge who dealt with the appeal it appears that the position that the defendants, as appellants, took up before him, was that the homestead of Guru

Charan, and a share of a certain tank and the disputed lands formed one holding, and that the defendants after their purchase of Guru Charan's share in 1314 and Ram Charan's share in 1315 had been recognized by the landlords and so were protected from eviction. The Additional District Judge held against the defendants so far as transferability and recognition were concerned. On the other questions that arose he observed:

So from the materials on the record which are not consistent I can only say that the plaintiffs have failed to prove that the dispute lands appertained to one jama of Rs. 3 in the name of Ram Charan Mandal; and the defendants have also failed to establish satisfactorily that Guru Charan's lands and Rim Charan's lands formed one holding, and none proves what was the jumma payable for the same.

4. One should have thought that after these conclusions, if they are to be treated as findings, nothing more was left to be found for the dismissal of the plaintiffs' case. But the Additional District Judge proceeded to order a remand which was made in these words:

Now the question is, whether the plaintiff has satisfied the requirements of law, which would entitle him to get khas possession, in this case. No doubt, Ram Charan had a nontransferable occupancy holding. The question of transferability has not been pressed before me. But the plaintiffs have purchased a part of Ram Charan's land, though its legal effect has not been considered. Moreover, as I have found, there is nothing to show what quantity of land was included in Ram Charan's holding and what was the jumma for it. There was no material on the record to show whether all the lands of Ram Charan's holding have been sold away or not. Therein nothing to show, whether the heirs of Ram Charan have abandoned their holding altogether or not. These points are necessary to be decided, before an order for khas possession in favour of the plaintiffs can be passed. The case therefore should go back to the original Court for consideration of these points, and then deciding according to law.

Hence ordered:

That the appeal be allowed in part, and the case remanded to the original Court for decision after considering the points noted above. Costs to abide the final result. It is now to be decided, what was the quantity of land in Ram Charan's holding and what was the jumma for it; whether all the lands of Ram Charan's holding have been sold away; whether the heirs of Ram Charan have abandoned the holding altogether and what is the legal effect of plaintiffs having purchased a portion of Ram Charan's land. The case is to be decided according to law, after that.

5. The whole judgment of the learned Additional District Judge, however, is to be read together and the very terms of the order of remand make it plain that the learned Additional Judge was not confident about the correctness of what he recorded as his conclusions and intended to leave the points that were mentioned in his order to be dealt with afresh by the trial Court. In any event no

appeal was taken from the decision and the parties went to trial again before the Court of first instance.

6. A fresh stage of the litigation commenced from this point. The question now raised was a somewhat different one. It was now found that at one time the jama of Ram Charan's holding was Rs. 5. By the purchase of a plot called Kondur Kola plot the jama of the holding became Rs. 5-8. By two sales, portions of the holding were transferred to two persons named Salimuddi and Abuali. These persons got their names registered in the landlord's sherista and Ram Charan's holding came to be divided into two separate holdings one belonging to Salimaddi and Abuali at a rental of Rs. 2-8-0, and the other to Ram Charan himself, the latter bearing a rental of Rs. 3. The question that was now raised was whether the whole of what was left to Ram Charan, as a holding with a jama of Rs. 3 was sold by him to the defendants, and whether after such sale Ram Charan and his family abandoned that holding. The defendants' contention at this stage was as the learned Subordinate Judge put it.

The dolendants do not dispute the plain-tiff's case that after the sale of the lands to Salimuddi and Abuaii, the jama of Ram Charan became Rs. 3, but the main plank on which they take their stand is that plot 13-22 (bhiti in the northern bank) was never sold to Abuali and Salimuddi as alleged by the plaintiffs. It is stated by them that that plot is still possession of Ram Gharan's sons

7. The Subordinate Judge found that plot 1322 was sold to Abuali and Salimuddi. He held also that the story of Earn Gharan's sons being in possession of that plot after the transfers was not true. On the aforesaid findings the Subordinate Judge again decreed the suit.

8. The defendants again preferred an appeal. Two contentions were put forward in the appeal; one was that there was no valid recognition of the transfers in favour of Abuali and Salimuddi and the other was that Ram Charan's sons were still in possession of plot 1322, as a plot which had not been included in the sale of 1315. These two contentions were overruled, it being held that Abuali and Salimuddi got recognition of their purchase, a separate holding being formed of their tenancy out of the original one with a rental of Rs. 2-8-0, and also that plot 1322 was included in the purchase of Abuali and Salimuddi who, however, sold the said plot subsequently to the plaintiffs in 1318 and Ram Charan's sons then came to possess the plot under the plaintiffs under a separate agreement. A further contention was now raised, and now for the first time, that Ram Charan's tenancy was not a holding within the meaning of the Bengal Tenancy Act, and so there could be no abandonment of it within the meaning of Section 87 of the Act and the plaintiffs were not entitled to re-enter. The contention was overruled and the decree of the Court of first instance was upheld.

9. The defendants have then appealed to this Court. It has been urged on behalf of the appellants first that Ram Churn's tenancy was not a "holding;" second : that in any case what was left of Ram Charan's holding after the sale to Abuali

and Salimuddi was not a "holding"; third that the rent receipts granted to Abuali and Salimuddi do not show that there was a sub-division within the meaning of Section 88; and fourth : that apart from Section 87, Ben. Ten. Act, there could be no abandonment. On all these grounds it is said that the plaintiffs were not-entitled to khas possession.

10. As regards the first of these contentions we find that there is no indication in the record that any time till now was the contention ever raised. The judgments of the several Courts satisfy us on this point. We do not think we should allow this contention to be raised at this stage.

11. As regards the second contention, it was first put forward in 1926, when the case came on before the lower appellate Court on the second occasion, and there is no indication anywhere that the de-fondants at any time before that took their stand on this contention. The sale by Ram Charan to Abuali and Salimuddi was by two kabalas. By the kabala of 1306 he sold one plot of land and by the kabala of 1308 he sold three plots and 8 annas share of each of two other plots. The holding of Ram Charan since then consisted of two plots and a half of another plot. It has been argued that the holding consisted of an undivided share of the plots. It was not a holding within the meaning of the Bengal Tenancy Act and so Section 87 has no application to the case. This question, as we have said, was never raised at any time during the first six years of the suit, and as it is not a pure question of law but depends on an investigation into facts as to whether the shares of the two plots were in fact, divided or undivided, it should not have been allowed to be raised by the lower appellate Court. The kabala Ex. H by which the defendants purchased from Ram Charan militates against the appellant's contention inasmuch as it describes the tenancy as lying within specified boundaries and divided off from the surrounding lands. In one of the boundaries of plot 2 in that document is mentioned the purchase of lands of Abuali Sircar. On the materials before us we are not able to say that the defendant has made out a case that the lands of the tenancy of Rs. 3 that was left to Ram Charan did not comprise a holding as understood in the Tenancy Act.

12. As regards ground 3, we have examined the dakhilas and the evidence relating to the alleged recognition of the purchase of Abuali and Salimuddi and we see no reason to differ from the view which the Courts below have taken namely that two new tenancies were created on division of the earlier one of Rs. 5-8-0. Whatever irregularity there may have been in this subdivision it is clear that it has been fully acted upon. Moreover the plaintiffs having executed the agreement of 1318 under which they were holding plot 1322 are not competent to urge that the old tenancy of Rs. 3-8-0 still subsists.

13. As regards the fourth contention, the authority cited on behalf of the appellants is the case of Romesh Chandra Mitra Vs. Daiba Charan Das, . That case, however, did not actually decide that there may not be abandonment apart from the terms of Section 87, Ben. Ten. Act. That the provisions of the section are not exhaustive have been laid down in a large body of decisions amongst

which may be mentioned; Samujan v. Munshi Mahaton 4 C.W.N. 1319; Matukdhari v. Jugdip Singh 19 C.W.N. 1319; Pran Krishna v. Mukta Sundari [1913] 18 C.L.J. 193 and Priya Nath v. Anath [1917] 37 I.C. 942. The question, however, does not arise in view of the opinion we have expressed on the other contentions.

14. The land which forms the subject matter of the suit is not the homestead of the defendants, which we are told is at a distance from the place, and it is used only for the purpose of keeping cattle. On the findings of fact arrived at by the two Courts below it is impossible for the defendants to resist a decree for khas possession to the extent of the plaintiff's 8-annas share. The appeal, therefore, is dismissed with costs.