

(1924) 07 CAL CK 0071
In the Calcutta High Court

Bishnu Chandra Sen and Others

APPELLANT

Vs

Behari Lal Pradhan

RESPONDENT

Date of Decision : 17-07-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : AIR 1928 Cal 279

Judgement

1. This appeal arises out of an ejectment suit which was brought by six plaintiffs against the defendant after service of notice to quit. The defendant was holding the land under a kabulyat dated Aswin 1312, which was one for a lease from year to year. He took lease of the tank for the purpose of rearing fish therein undertaking not to cut trees standing on the banks or to do any act prejudicial to the tank. The plaintiff's case was that the defendant had cut down and appropriated some trees on the bank, and had allowed weeds and mars to grow on the water rendering it unfit for human consumption. The plaintiffs thereupon served a notice to quit upon the defendant putting an end to the tenancy which the defendant had by his conduct forfeited. The trial Court dismissed the suit on the ground that the plaintiffs had failed to prove that as a matter of fact the defendant was guilty of any act injurious to the tank. The plaintiffs appealed against the decree of the Munsif, and the appeal was heard by Mr. A.H. Carter on 20th April 1921. The appeal was allowed and the plaintiff's suit decreed. On 29th April 1921, an application was filed before the Judge by two persons Aputtam Sen and Mohan Krishna Sen to be substituted in place of plaintiff 5 (Bodhi Satta Sen) who, it was alleged, had died on 31st January 1921. Notice was ordered to be served of this application and it came on for hearing before Mr. J.A. Ross who had succeeded Mr. Carter as District Judge of Murshidabad. It was heard on 20th August 1921, when the following order was passed:

It is ordered that the legal representative of the deceased appellant will be brought on the record and the appeal will be reheard. Fix 28th September 1921 for hearing.

2. The effect of this order was to vacate the judgment of Mr. Carter delivered on 20th April 1921. The appeal was reheard by Mr. Ross, on 1st February 1922 and dismissed with costs.

3. The plaintiffs appeal to this Court and two grounds have been urged on their behalf : first, that the order passed by Mr. Ross on 20th August 1921, vacating the entire judgment of Mr. Carter and ordering a rehearing of the whole appeal was passed without jurisdiction and was erroneous in law. On this point reference has been made to Order 41, Rule 4, and we are asked to hold that on the date on which Mr. Carter delivered his judgment the appeal was not incompetent nor was the order passed by the Judge liable to be set aside, the grounds of appeal being common to all the appellants. The appellants are joint landlords. They served the tenant with notice to quit and on the expiration of the time provided in the notice brought the suit for ejectment. The fact that one of the landlords died since the institution of the appeal would not affect the right of the others to get a decree in ejectment and in support of this reference has been made to the case of Dwarka Nath Roy v. Kali Sankar Roy [1886] 13 Cal. 75. We think that there is great force in this argument. But it is not necessary for the purposes of this case to consider this matter more minutely for on the second ground that the appellants have taken, we are of opinion that they are entitled to succeed. That ground is that on the findings of the Courts below the defendant was a tenant-at-will and his tenancy has been determined by a notice to quit presumably u/s 106, T.P. Act irrespective of the fact that he did or did not do any act in contravention of the terms of the contract determining the tenancy and so he was liable to be ejected. The second issue framed by the learned Munsif was as follows:

Is the defendant a tenant-at-will under the plaintiff?

4. In disposing of that issue the learned Munsif observed that this issue was raised owing to the defendant claiming a right of occupancy in respect of the tank and he held that the parties were bound by the Transfer of Property Act, and that the provisions of the Bengal Tenancy Act did not apply. Mr. Ross in appeal has considered this finding of the Munsif as a finding that the defendant was a tenant-at-will. He observed:

The respondent raised the issue whether he was a tenant-at-will, whether a notice to quit, was served on him and whether he injured the tank by any act contrary to the terms of the kabuliyat. The Munsif found for the plaintiffs, on the two first issues and I think rightly.

5. We have, therefore, the finding of the learned Judge of the Court of first appeal: that the defendant was a tenant-at-will. It has been found by the learned Munsif and that finding has not been displaced by the Judge, that the notice to quit was duly served upon the defendant. The only objection, therefore, that may be urged in defence is that there is a contract between the parties to take the case out of the operation of Section 106, T.P. Act. The learned vakil for the

respondent contends that as the defendant reared fish in the tank and did not commit any act likely to injure the tank or pollute the water of the tank, it should be presumed that the contract between the parties was that so long as the respondent carried out the terms of the contract he would not be liable to be ejected. If this contention prevails, the defendant must be taken to have acquired a permanent tenancy in the tank so long as he does not commit any act contrary to the contract. We do not think that that was the intention of the parties. There is no other term in the kabuliyat which will stand in the way of the plaintiff landlords determining the tenancy by a proper notice. We think that on this-finding the plaintiffs are entitled to succeed.

6. The result is that the decree of the Court below is set aside and the plaintiff's suit, in so far as it claims recovery of possession from the defendant by ejecting him from the tank, is decreed. Since we have held that the plaintiffs are entitled to succeed in ejectment by virtue of the determination of the tenancy of the defendant u/s 106, T.P. Act., they are not entitled to any compensation in the suit. That part of the claim is dismissed. The plaintiffs will be entitled to get proportionate costs in all the Courts.