
(1954) 01 CAL CK 0016
In the Calcutta High Court
Case No : A.F.O.D. No. 82 of 1949

Bishnupuriya Choudhurany	Vs	APPELLANT
Panchkari Das and Others		RESPONDENT

Date of Decision : 28-01-1954

Acts Referred:

Transfer of Property Act, 1882 — Section 10, 108, 111

Citation : AIR 1954 Cal 541 : (1956) 2 ILR (Cal) 107

Hon'ble Judges : K.C. Das Gupta, J;Debabrata Mookerjee, J

Bench : Division Bench

Advocate : Prafulla Kumar Roy and Satya Charan Pain, for the Appellant;Sarat Chandra Jana and Arun Kumar Jana, (for Nos. 1 and 2) and Hemanta Kumar and Sudhir Kumar Dutt, (for Nos. 4 and 5), for the Respondent

Final Decision : Dismissed

Judgement

K.C. Das Gupta, J.—The subject-matter of this litigation. is holding No. 8 Rajballav Saha Lane within the Howrah Municipality. Admittedly defendants 2 to 5 held this land as tenants under the plaintiff. The tenancy was created in favour of predecessor-in-interest of defendants 2 to 5 by the plaintiff's predecessor-in-interest on 26-3-1865. The plaintiff has brought the present suit for khas possession of the property and mesne profits and in the alternative for damages on the allegation that none of the defendants 2 to 5 have any right and title whatsoever to sell the said property contrary to the terms of the Patta and Kabuliyat and that according to the terms of the Patta and Kabuliyat they were bound to sell the property to the plaintiff and that defendants 2 to 5 having sold the property contrary to the terms of the said Patta and Kabuliyat the plaintiff was entitled to get possession of the property in suit. The Kabuliyat is in these words:

"This Kabuliyat is executed by (Sree Lakshimoni Khanki of Ramkrishnapur, Pargana Boro, District Howrah, to the effect following: "You grant unto me a Maurasi Patta in respect of 2 1/2 Cottahs (two and half Cottahs) more or less and

land lying with the boundaries given below and comprised within the residential house purchased by you on fixing the annual rent therefore at Rs. 10/- and on receiving from me a Selami of Rs. 57. I shall go on possession and enjoying the aforesaid land down to my heirs in succession by erecting houses and brick built structures etc. thereon. I shall pay the amount of the rent year after year as per instalments stated below. If I make default in payment of the instalments, I shall pay interest according to the custom. The rent of this land shall never be enhanced or reduced. If I ever transfer my Maurasi interest I shall duly execute (in your favour) a Kobala in respect of the buildings and of the Jotedari (tenancy) interest along with the Mourashi Patta granted by you on accepting from you the amount of the consideration that would be fixed by some respectable persons assembled together as arbitrators, I shall not be competent to execute the same in favour of any one else except your Sircar (estate?). If I or my heirs do so, the same shall be void and be rejected. To the above effect, I execute this deed of Mokorari Kabuliyat on accepting a Patta of Mourashi Jama. Dated the 14th Chaitra, 1271, (Twelve Hundred and Seventy-one B. S.: 26 March 1865)."

2. The learned Subordinate Judge was of opinion that as the lease simply provides that the transfer made by the lessee would be void and there was no right of re-entry reserved, the clause of bar to the alienation of the property was void. He also held that the stipulation to transfer only to the lessor and its successors was hit by the Rule against perpetuity. Accordingly he dismissed the suit.

3. The main dispute in this Court has been on a point which was curiously enough not raised in the Court below. Before the Subordinate Judge both the parties appeared to have proceeded on the basis that except in so far as prevented by the terms of the contract the tenancy was transferable. If it was transferable, the bar against alienation would be void, as infringing the rule against perpetuities.

4. The rule that there would be no ejectment of the transferee of the lessee, in the absence of a provision of a right of re-entry, or equivalent provision, has also been held to be applicable to leases before the Transfer of Property Act, as a rule of justice, equity and good conscience. These questions can arise, however, only if the tenancy was, except for the provision against restraint, transferable. If the tenancy is not transferable, the fact, that a provision has been made that transfer can be made only to the lessor or his successor would not make it transferable to others and the transferee would obtain no right thereunder. The transferee in that case would be a trespasser and the landlord would be entitled to khas possession.

5. Strangely enough the question whether the land was transferable or not does not appear to have been raised in the Court below. The plain tiff did not state in so many words that the tenancy was non-transferable quite apart from the terms of the contract. All that is said on this point was contained in para. 6 of the plaint in these words:

"None of the defendants 2 to 5 have any right and title whatsoever to sell the said property contrary to the terms of the said Patta and Kabuliyat. According to the terms of the said Batta and Kabuliyat, the defendants 2 to 5 are bound to sell the said property to the plaintiff."

The defendant No. 1 took the definite plea in para. 3 of his written statement that the land in suit was held in Mokorari Mourashi right with right of transfer and that it having been transferable according to law the plaintiff in succession of her predecessor-in-interest recognised that under plea or objection. It is difficult to understand why no issue was framed on this question. The fact that the lawyers of the parties argued at length on the applicability of the principle of Section 10, Transfer of Property Act suggests that both the parties proceeded in the Court below on the assumption that the tenancy was transferable, apart from the special term of the contract.

6. The question for decision is whether without any evidence being adduced on this point it is possible to come to any conclusion as regards the transferability. It has been contended by Mr. Jana on behalf of the respondents that the Ex. 3 itself shows that the lease was given for the purpose of erecting pucca structures for the purpose of residence and that on the authority of the decision in -- "Banee Madhub Banerjee v. Joy Kissen Mookerjee" 12 WR 495 (A), such a tenancy should be held to be transferable even before the Transfer of Property Act. There is obviously no question of the provisions of Section 108, Transfer of Property Act being applicable to this case. Whether a tenancy created prior to the Transfer of Property Act was transferable or not has to be decided quite apart from the provisions of Section 108, Transfer of Property Act; for these certainly are not applicable to such a tenancy. In -- "Banes Madhub Banerjee's case (A)" Sir Barnes Peacock, C. J., observed that

"if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved."

In that case all the three learned Judges held that the tenancy in question was transferable. Macpherson J. based his decision only on the fact that there was evidence to show that the tenure was according to the custom of the district, transferable. Jackson J. also said that there was certainly evidence of existence of such a custom but he further observed:

"The parties in occupation of this land, which, confessedly was let for building purposes had been allowed gradually to pull down the temporary buildings first erected and substitute in their place more permanent ones. I think where this is sanctioned, there must be implied a right on the part of the tenant to convey his interest to other persons."

Sir Barnes Peacock himself in a previous part of his judgment stated this:

"If he (the plaintiff) allowed the defendants to erect pukka buildings upon the land without objecting, it appears to me that he was bound in the same way in equity as if he had granted them a pottah with the privilege of building pukka houses on the land."

It appears clear from the judgments that while all the three learned Judges were agreed as regards the existence of a custom of transferability, both Sir Barnes Peacock, C. J., and Jackson J. were of the opinion that if pukka buildings are allowed to be constructed, a right to the tenant to convey his interest must be implied. Sir Barnes Peacock himself went further and said that where the tenancy was granted for the purpose of building for living then the right will be assignable.

7. In recent years in -- *Sulin Mohon Banerjee and Others Vs. Raj Krishna Ghosh and Another*, (B), Sir Ashutosh Mookerjee, Ag. C. J., had to consider the question of transferability of a tenancy. After pointing out the tenancies which are heritable are not necessarily transferable, his Lordship observed:

"Now it has been laid down by this Court in the cases of -- "*Harinath v. Raj Chandra*" 2 Cal WN 122 (C); -- "*Madhab Chandra v. Bejoy Chand*" 4 Cal WN 574 (D); -- "*Madhu Sudan Sen v. Kamini Kanta Sen*" 32 Cal 1023 (E); -- "*Ram Charan Naskar v. Hari Charan Guha*" 7 Cal LJ 107 (P) that under the law as it stood before the Transfer of Property Act tenancies, whether of homestead lands or of agricultural lands were not transferable in the absence of a custom to the contrary or of an express contract to that effect. The only recognised exception to this Rule is that stated in the case of -- *Banee Madhub v. Joy Kishen and Ors.* (A)". In that case Sir Barnes Peacock, Chief Justice, observed that if one man grants a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary is assignable. The same view was subsequently taken in the case of --- "*Durga Per-shad v. Brindaban Sookul*" 7 Beng LR 159 (G). In the case before us the tenancy have not been created for the purpose of residence. Subsequently we must hold that the tenancy was not transferable."

8. Speaking about this decision in -- *Sarada Kanta Sen Gupta and Another Vs. Nabin Chandra Sen Gupta and Others*, , where also the question was whether a lease of homestead land created before the Transfer of Property Act was transferable by law or not, Page J. expressed his view that in -- "*Sulin Mohan's case* (B)", Sir Asutosh Mookerjee, when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above. With great respect to the learned Judge I am of opinion that Sir Ashutosh's observation in -- "*Sulin Mohan's case* (B)" cannot but be read as an approval of what had been laid down as to the law by Sir Barnes Peacock. Referring to the observations of Peacock C. J. in -- "*Bahee Madhub Banerjee's case* (A)", Page J. expressed his view in these words: "In our opinion, these observations of Peacock C. J. are opposed to the settled view of this Court, and cannot now be regarded as correctly stating the law."

9. Prior to this in the case of -- "Madhu Sudan Sen v. Kamini Kanta Sen (E)", Maclean C. J. and Mitra J. had expressed doubt as regards the correctness of these observations of Sir Barnes Peacock. They, however, did not state clearly in their view that Sir Barnes Peacock's observations did not state the law correctly. It will be helpful at this stage to consider some of the previous decisions of this Court by which Page J. seemed to think that the law had been settled in a way different from what Chief Justice Peacock had stated. As has been stated above the same view as Sir Barnes Peacock took in -- "Banee Madhub Banerjee's case (A)" was taken by a Bench of this Court in the case -- "15 WR 274 (G)".

The next case in point of time in which the question of transferability appears to have been considered was -- "2 Cal WN 122 (C)". Rampini J. sitting singly in that case held that it could not be inferred from the mere fact that a non-agricultural holding was used for residential purpose that it was transferable. Referring to the decision in -- "Banee Madhub Banerjee's case (A)" Rampini J. says that previous to the passing of the Transfer of Property Act, non-agricultural land might or might not have been assignable and that being so it was incumbent upon the learned Subordinate Judge to come to a finding upon this question. The learned Judge remanded the case to the lower appellate Court for an express finding as to whether the interest of the plaintiff's vendor was transferable.

In the following year Rampini J. had again to deal with a case in which the landlord sought to eject the defendants, one of whom was his admitted tenant and the other the purchaser from the tenant, on the ground that the tenant's right was not transferable. The learned Judge referred the matter to a Full Bench expressing his own view that if land is let for building pukka house upon it and it the tenant with the knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with long continued enjoyment of the property by the tenant or his predecessor-in-title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. It is necessary to mention that it is clear from the referring judgment in the case of -- "Nabu Mondal v. Cholim Mullik" 25 Cal 896 (FB) (I) that the learned Judge meant the word "permanent" to include the attribute of transferability. The Pull Bench held that the reference was irregular, it not being competent for a Judge sitting alone to make a reference to a Pull Bench. When the case went back to Rampini J. he decided the case in these words:

"The cases I have cited in my judgment of reference may lay down no hard and fast rule on the subject, but the rule which I think should be deduced from them is, as I have already pointed out, that mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and that before such a presumption can be made there must be something more viz., either (1) the land having been let for the erection of pukka buildings, or (2) a standing by on the part of the landlord while the tenant without objection erects permanent buildings or effects substantial improvements on the land.....Taking this view of

the matter, I must hold that the Court below was not justified in presuming that defendant 2 had a permanent and transferable interest in the land and therefore that the suit should have been decreed."

10. In the year 1900 a similar question arose again before Rampini and Wilkins JJ. in the case reported in -- "4 Cal WN 574 (D)". That was a case of an agricultural holding. In deciding that the holding was not transferable, their Lordships observed:

"The pleader for the appellant says that under the law existing before the Transfer of Property Act, tenancies of this nature were transferable against the will of the landlord and could also be sub-divided. He has, however, not been able to call our attention to any ruling to this effect and we are not aware that such is the law. On the contrary, we think that before the Transfer of Property Act was passed there was no distinction drawn between agricultural and non-agricultural tenancies. But however that may be, we are unable to see that there is any law under which before the passing of the Transfer of Property Act agricultural holdings could be transferred against the will of the landlord or subdivided without his consent."

11. Shortly after this came a quick succession of cases in which the question of transferability of a tenancy of homestead land from year to year came up for consideration. First in -- "32 Cal 1023 (E)", it was held that "the incident of non-transferability was common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary." This was followed by Rampini and Mookerjee JJ. in -- "7 Cal LJ 107 (F)", by Chatterjee and Mullick JJ. in "Ananda Mohan v. Gobinda Chandra" AIR 191G Cal 827 (J) and by Chatterjee and Greaves JJ. in -- "Mon-motha Nath v. Anath Bandhu Pal" AIR 1919 Cal 482 (K). It is important to remember that in none of these cases the tenants made out a case that the original letting was for building purpose. All that we find from the reports are that the tenancy was of homestead land. It will not, in my judgment, be reasonable to hold that the Court proceeded on the assumption that the tenancy was for the purpose of building. What is however, absolutely clear is that in none of these cases was the letting for building pukka structures.

12. The result of these decided cases, in my opinion, is that where the lease was given before the Transfer of Property Act, and

(1) all that appears is that the tenancy was of homestead land, it was not transferable; I

(2) if the original letting was for the purpose of building cutcha structure, it was transferable, according to some authorities, and not transferable according to some;

(3) if the original letting was for building, pukka structures, it was transferable.

13. There can be no doubt that in the present case the tenancy was created with

the ex-press purpose of construction of pucca building for the purpose of residence. That alone in my judgment is sufficient for a conclusion that the tenancy was ordinarily transferable.

14. My conclusion therefore is that the suit was rightly dismissed. This appeal is, therefore, dismissed with one set of costs to be divided equally between the two sets of respondents.

Debabrata Mookerjee, J.

15. I agree.