

(1925) 06 CAL CK 0029
In the Calcutta High Court

Brojo Dhabal and Others

APPELLANT

Vs

Prem Chand Kundu

RESPONDENT

Date of Decision : 11-06-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 72
Evidence Act, 1872 — Section 116

Citation : 91 Ind. Cas. 726

Hon'ble Judges : Graham, J; Babington Newbould, J

Bench : Division Bench

Judgement

1. This is an appeal by the defendants against a decree of the Subordinate Judge of Bankura by which they were held liable to pay rent for the Bengali year 1327 to the plaintiff.

2. The main contest between the parties was as to the plaintiff's title. Somewhat complicated evidence bearing on this dispute has been discussed in the judgment of the lower Appellate Court. But sitting in second appeal we must accept the finding of facts and need only state the more important points. The plaintiff claimed as a transferee from one Ram Kamal, The defendants main allegation on the question of title was that Ram Kamal was a benamdar for his three brothers Brojo, Surendra and Jugol. Brojo is now dead and his interest is now represented by his daughter Kishori who is wife of Ram Kamal. On the question of title the lower Appellate Court held that Ram Kamal was not a benamdar for Brojo, Surendra and Jugol. It further found that as the defendants had executed a kabuliyat in favour of Ram Kamal they were estopped from denying Ram Kamals right in the land. In our opinion, the finding of fact is conclusive on the plaintiff's title. It is argued that there was an error in law in the decision of the question of estoppel since there was evidence that one of the defendants was in possession of the land before the execution of the kabuliyat. The most that could be said was that defendant No. 3 Mahindi Majhi was admittedly in wrongful possession of some land but it is held by the Final Court of fact that there were no materials for finding that Mahindi was holding this particular land at that time. Further, even if

he was in possession of the land of this tenancy as a trespasser he would still be stopped from denying the plaintiff's title on the finding that the holding was created by the kabuliyat. The leading case on estoppel of a tenant which was cited in support of this contention is *Lal Mohamed v. Kullunns* 11 C. 519 : 5 Ind. Dec. 1104. In that case the ryot was in possession of the holding before he executed the kabuliyat regarding his holding and he was not a trespasser on the land of the holding. That ruling decides that the words "at the beginning of the tenancy" in Section 116 of the Evidence Act only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. Here there was no tenancy before the execution of the kabuliyat and the tenants were put into possession of that tenancy by Ram Kamal.

3. The main contention urged in this appeal was that Section 72 of the Bengal Tenancy Act is a bar to the plaintiff recovering rent from the defendants. That section runs thus. "A tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which, became due after the transfer and was paid to the landlord whose interest was so transferred, unless the transferee has before the payment given notice of the transfer to the tenant". Before the tenant can be excused from payment to the transferee, under this section two conditions are necessary. The first is that he must pay rent to the landlord whose interest has been transferred and secondly, he must have done so without notice of the transfer. The lower Appellate Court held that this section was inapplicable because one of the three defendants had knowledge of the transfer and his knowledge must be taken as the knowledge of all the joint tenants. In our opinion, it is not necessary to decide whether the knowledge of one joint tenant can be imputed to his co-tenants since the other condition of Section 72 has not been fulfilled. It is not the defendants' case that they had paid rent to Ram Kamal who was their landlord and whose interest had been transferred to the plaintiff. It is contended that the payment to Jugol, Surendra and Brojo's daughter is equivalent to payment to Ram Kamal since Ram Kamal had executed a deed of release in favour of Brojo. But on the finding that Ram Kamal was a purchaser of the property and was not a benamdar for these persons the execution of a mere deed of release would not transfer his interest to Jugol, Surendra and Brojo. There having been no payment of rent to the landlord whose interest was transferred to the plaintiff Section 72 is of no benefit to the appellants.

4. We accordingly dismiss this appeal with costs.