

(1924) 05 CAL CK 0065
In the Calcutta High Court

Eshaque Sheikh and Others

APPELLANT

Vs

Motilal Malo and Others

RESPONDENT

Date of Decision : 28-05-1924

Acts Referred:

Bengal Tenancy Act, 1885 — Section 49, 85

Citation : AIR 1925 Cal 294

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Full Bench

Judgement

Suhrawardy, J.—This appeal arises out of a suit for rent. The defendant No. 1 who is the appellant, gave a permanent lease to the plaintiff and the plaintiff granted a barga lease for one year of the land to the defendant No. 1. The defendant No. 1 held over and the present suit is for rent for the years 1322 to 1325. The defence was that the defendant No. 1 was a raiyat and that the lease granted by him was in contravention of Section 85, Bengal Tenancy Act. The plaintiffs, therefore, had no interest in the land and were not entitled to receive any rent. The Munsiff gave effect to these pleas and finding that notice u/s 49, Bengal Tenancy Act, was proved to have been served upon the plaintiff dismissed the suit. On appeal the learned Additional District Judge has decreed the plaintiff's suit. The learned Judge first raised two principal points: (1) "Is the patta granted by the defendant to the plaintiff and pro forma defendant No. 2 void u/s 85, Bengal Tenancy Act, (2) was any notice u/s 49 of the said Act served on the plaintiff and the defendant No. 2, and if so, did it operate to extinguish the title of the plaintiff?" He proceeds to examine the first point elaborately and has come to the conclusion that the document, Exhibit B, under which the defendant No. 1 obtained this property from the superior landlord created a raiyati at a fixed rent. The lease to the plaintiff, therefore, was not governed by Section 85, Bengal Tenancy Act. The learned Judge further found that defendant No. 1 was estopped from questioning the plaintiff's permanent interest in the land; and thirdly, on the question of notice, he has found that on the state of the evidence on the record it cannot be said that any notice was served upon the

plaintiff, He discusses the evidence with regard to the service of notice and comes to the following finding: "The upshot of all this clearly is that it has not been established that there was really any service of any notice u/s 49, Bengal Tenancy Act, or that the alleged notice was a notice contemplated by that section." In my judgment the learned Judge has approached the case from a wrong standpoint. The view that he has expressed with regard to the service of notice was sufficient to decree the appeal and the suit of the plaintiff.

2. The real question, so far as the plaintiff's claim for rent was concerned depended upon the document of the plaintiff's tenancy, what the nature of that tenancy was is not so important as the question of the right of the plaintiff to recover rent from the defendant. On the finding on the question of notice arrived at by the lower Appellate Court this appeal must fail. We have expressed our view that this appeal ought to be dismissed. But it is represented to us that the effect of the dismissal of the appeal on that question would leave the other findings arrived at by the lower appellate Court binding on the parties. As I have observed, the case was not properly dealt with by the learned Judge who has spent a great deal of time and energy over questions which were not necessary to decide. The question of the construction of the document, Exhibit B, is not free from difficulty. The learned Judge has relied upon two passages which he quotes from the document in one of which the tenancy is stated to be a heritable one—descending from father to son; and in the second it is stated that in future if land is measured and any increased area is found to be in the possession of the tenant, it would be assessed with rent at the rate mentioned in the kabuliyat. These two points alone may not be sufficient to establish that the document; created a raiyati. These with other circumstances may, no doubt, go a great way to establish the permanent nature of the tenancy. In the case of Golam Rahman Mistri and Others Vs. Gurdas Kundu Choudhri and Others, this condition, namely, that the excess area is to be assessed with rent at the rate mentioned in the contract was present but there were other circumstances relying on which it was held that the tenancy was a tenancy at a fixed rent. This stipulation alone apart from other circumstances of each particular case would not establish that a tenancy is a tenancy at a fixed rent. The cases of Bhairab Chandra Das and Others Vs. The Midnapur Zemindari Co., Ltd. and Others, and Surja Prasad Sukul v. Midnapore Zemindary Co., Ltd. (1908) 38 C.L.J. 369 establish the view that this stipulation does not prove by itself that the rent is fixed in perpetuity. This question, therefore, is not free from difficulty and upon the view we have taken we do not wish to discuss this matter. The learned Judge has again relied on the doctrine of estoppel. His view seems to be that because this contract is complete and the plaintiff took possession of the property under the contract, whether it creates a tenancy at fixed rate or not, the defendant was estopped from questioning the right of the plaintiff under the Full Bench decision of this Court in case of Chandra Kanta Nath and Others Vs. Amjad Ali Hazi, ; with regard to this point, it is sufficient to observe that if in law a document does not create a tenancy at a fixed rent, the expression in the kabuliyat that it did, would not

estop the defendant in law. But considering the finding on the question of notice it is not necessary to discuss this point.

3. The result is that this appeal fails on the ground that the defendant has failed to prove that the plaintiff's tenancy under him was determined by means of notice u/s 49, Bengal Tenancy Act. The appeal is accordingly dismissed with costs.

Duval, J.

4. I agree. It seems to me that the learned Additional District Judge should have contended himself with his findings of fact that as a matter of fact the plaintiff was in possession that the defendant No. 1 was in possession, of the land as tenant of the plaintiffs under a lease for one year, that he held over beyond that period and that the tenancy of the plaintiff had not been brought to an end by service of notice. As to the finding of the learned Judge on the question of the nature of the tenancy held by the defendant originally and the tenancy which he created in his turn in favour of the plaintiff I would only remark that besides the fact that the decision on this point was unnecessary for the determination of the case, it can be of little value because the superior landlord is not a party to this litigation and the decision will also be outside the ordinary scope of a rent suit. I, therefore, agree that the appeal should be dismissed with costs.