
(1913) 03 CAL CK 0013
In the Calcutta High Court

Ganga Chandra Choudhury and Others

APPELLANT

Vs

Alak Chand Saha

RESPONDENT

Date of Decision : 10-03-1913

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26

Citation : 18 Ind. Cas. 996

Hon'ble Judges : Stephen, J;Holmwood, J

Bench : Division Bench

Judgement

1. This second appeal arises out of a suit brought by the plaintiffs, as proprietors of the lands mentioned in the plaint, for recovery of khas possession thereof on the allegation that the lands have been transferred in usufructuary mortgage by the pro forma defendant contrary to the usage and custom of the locality, and that such transfer operated as a forfeiture. The second ground for claiming khas possession was that the tenant had surrendered a portion of the holding; or as the plaintiffs contended the entire holding in suit, and that by such surrender the rights of the contesting defendants were altogether defeated and that they are entitled to khas possession without further notice. Both the Courts have held that the entire holding of the pro forma defendant not having been transferred, it cannot be said that there has been a forfeiture of the tenancy. Against this, a ruling of the Full Bench in the case of Narendro Narayan Roy v. Ishan Chundra Sen 22 W.R. 22; 13 B.L.R. (F.B.) 274 has been cited before us and a ruling in the case of Krishna Chandra Dutta Chowdhury v. Khiran Bajania 10 C.W.N. 499; 3 C.L.J. 222. Both these cases are distinguishable, as has been pointed out by Mr. Justice Mookerjee in the case of Rai Kamaleswari Persad Singh Bahadur v. Maharaja Harbullabh Narain Singh Bahadur 2 C.L.J. 369 by reason of the fact that only a portion of the holding was transferred and not the entire holding.

2. It is argued that from certain remarks of Couch, C.J., and Phear, J., it might be inferred that they held that it would not matter whether the whole of the holding was transferred or only a portion of it, the right of occupancy being of the nature

of a personal privilege and not a substantive proprietary right; and in this case Section 26 of the Bengal Tenancy Act has been cited to us to show the difference or alleged difference in the law. But we do not think that any such distinction was present in the minds of the learned Judges who decided the Full Bench case, at any rate nothing appears from their judgments and as far as the law goes, the wording of Section 26 of the Bengal Tenancy Act is not so strong in favour of the doctrine of proprietary right as that of Act VIII of 1869 B.C.; for the Bengal Tenancy Act says that the right of occupancy descends in the same manner as other Immovable property, whereas Act VIII of 1869 says that "the holding of the father or other person from whom a raiyat inherits shall be deemed to be the holding of the raiyat," so that whatever view may be taken of the question, which, we understand, is, now under reference for consideration of the Full Bench of this Court, there is nothing, in our opinion, to distinguish this case from that reported in *Rai Kamleswari Persad Singh Bahadur v. Maharaja Harbullabh Singh Bahadur* 2 C.L.J. 369 to which we have just referred.

3. But as regards the second point on which the Subordinate Judge has differed from the Munsif and reversal his decision, we think that the learned Subordinate Judge is wrong and the Munsif is right. There is ample authority for holding that when a raiyat surrenders a portion of his holding to the landlord, the landlord is entitled to re-enter that portion notwithstanding any subordinate rights which the raiyat may have created upon that particular portion. If any authority is needed for this proposition, we may refer to the case of *Badan Chandra Das v. Rajeswari Debya* 2 C.L.J. 570 and to the case of *Rajendra Kishore Adhikari v. Chandra Nath Butt* 12 C.W.N. 878 at p. 884. We also agree in the finding of the Munsif that "the execution of the Istapanama having been proved, the mere fact that the plaintiffs were aware of the incumbrances created by the pro forma defendant cannot take away their right to re-entry. Whatever remedy the principal defendants may have against the pro forma defendant, they cannot claim to retain possession of the lands as against the plaintiffs after the determination of the pro forma defendant's rights." The pro forma defendant having relinquished this portion of the holding to the landlord, the landlord is entitled to khas possession.

4. The result is that this appeal must be allowed, the judgment and decree of the Subordinate Judge are set aside and those of the Munsif restored with costs.