

(1924) 01 CAL CK 0041
In the Calcutta High Court

Jagabandhu kundu and Others

APPELLANT

Vs

Rajmohan Pal and Others

RESPONDENT

Date of Decision : 25-01-1924

Acts Referred:

Citation : AIR 1925 Cal 538a

Hon'ble Judges : Rankin, J; Mukerji, J

Bench : Full Bench

Judgement

Rankin, J.—This is an appeal from a decision of the 5th Subordinate Judge of Dacca whereby he modified a decision of the Munsif of Munshiganj. The plaintiff is a co-sharer in the maliki interest of a small piece of land in area about one-third of an acre and he has a 3 annas 4 gundas share. So far as this particular land now in question is concerned, it appears that it was the subject-matter of a non-transferable occupancy right in defendant No. 11. The original raiyat transferred it or purported so to do to the first defendant and the case has been argued on the footing that the first defendant is merely a benamidar transferree for a co-sharer of the plaintiff, by name Hari Binode. It appears that the transfer was in November 1918, and that, in May of 1919, Hari Binode settled the land with the present appellants, defendants Nos. 2 and 3. It appears, further, so far as we can gather, that in or about January of 1919, Hari Binode excavated a tank and dug certain ditches on the property and that, in May 1919, defendants 2 and 3 erected certain structures for use as jute godowns, the intention being to use this plot of land not for agricultural purposes but for the purposes in connexion with the storage of jute. In these circumstances, about a month after defendants Nos. 2 and 3 had taken settlement the plaintiff brought this suit in June 1919, claiming to the extent of his share the right to eject the defendants from the land, that is to say, claiming a decree for joint possession with the defendants to the extent of his share.

2. The first point urged by the appellants was successful before the trial Judge. That point is this: that in respect of other lands wherein the plaintiff and Hari

Binode were co-sharers, these two were settled in non-transferable right, and that of these the plaintiff has taken a transfer from the tenants and is now in possession. Accordingly, it is said that this gives rise in the present suit to an equitable defence on the part of the defendants Nos. 2 and 3; that is to say, that they are entitled to object that, in consideration that the plaintiff is in actual possession of more lands than are referable to his share, he cannot, as regards this land, get a decree for joint possession, but may be limited to his mere rights to bring a suit for partition of all the common properties.

3. With regard to this matter, one has to observe that the principle that, when one co-sharer landlord takes a transfer of a non-transferable holding from a tenant, he may be treated by the other co-sharer landlords as a trespasser, has been laid down in this Court more than once, and the principle itself is not disputed by the learned Vakil who appears for the appellants. The case of *Dilbar Sardar v. Hosein Ali Bepari* (1899) 26 Cal. 353 and the case of *Lakhi Kant v. Balabhadra Prosad* (1914) 19 C.L.J. 400 are sufficient authorities.

4. It has been contended, however, that the case of *Basanta Kumari Dasya v. Mohesh Chandra Shaha* (1914) 18 C.W.N. 328 affords some authority, in certain circumstances, for an equitable defence—such as that now put forward. But an examination of the case in 18 Calcutta Weekly Notes 328 shows that the aspect of this case, namely, that the defendants have taken transfer of a non-transferable right was not the basis of the decision and the case had not really been looked at from that particular point of view. In any case, it seems to me that the fact that the plaintiff has been for a long period in possession of other lands purporting to hold an occupancy right therein is no equitable defence when afterwards Hari Binode seeks to do the same thing as regards a different piece of land altogether and the plaintiff takes objection. Whether Hari Binode could have taken objection successfully to the plaintiff's occupation of other lands, what his motives were in not claiming ejectment in good time, whether he would now be barred from proceeding in ejectment—all these are matters which seem to me foreign to the present case. Under *Dayamoyi v. Amanda Mohan* (1915) 42 Cal. 172 it appears to me that the transfer out and out of a non-transferable occupancy jote gives to the landlord a right to re-enter; if the landlord does not re-enter but does not recognize, it may be that his right to re-enter continues for a substantial time. But, in this case, so far as the other lands are concerned no co-sharer of the plaintiff has ever purported or attempted to re-enter, and the plaintiff, as the matter stands, is standing, in fact, in the shoes of the previous tenant against whom his right is quite unimpeachable.

5. Accordingly, there seems to be a fallacy in treating the plaintiff, as regards those lands, as a person who is merely exercising a right given to him by his maliki interest. For these reasons, I think that the equitable defence set up by the appellants fails and that the correct view on this point was taken by the Court of appeal below.

6. We then come to a matter of considerable practical importance. There can be

no doubt that, with regard to this land, defendants Nos. 2 and 3 have been engaged in changing its character from agricultural land to land suitable to some form of business connected with jute. As regards the future, the learned Judge has given an injunction restraining the defendants from further digging the land and from raising any other huts thereon. So long as that decree is corrected by confining it to the defendants 2 and 3, I can see no objection to that decree for an injunction standing.

7. The learned Judge has, however, also granted against the defendant without distinction a mandatory injunction that they do fill up the ditches, remove the earth and the huts from the land within a fortnight at their own costs failing which the plaintiff may do that, recovering costs from the defendants. Now, on that question, it may be desirable to be a little precise. Hari Binode, who is said to have done the excavation of the tank, is not a party to this suit. His excavation was not objected to at the time and the plaintiff, as regards that, seems to have taken no action until it was completed. I do not say that his delay had been such as would disentitle him to an ordinary injunction but that the delay disentitles him to a mandatory injunction may very easily be inferred in the present case.

8. However that may be, Hari Binode is not a party to this suit and the plaintiff took no action until Hari Binode had parted with his possession of the land to the defendants Nos. 2 and 3. I fail to see, therefore, that there can be any possible question of granting in this suit a mandatory injunction to re-instate the tank or the ditches against any one. That being so, the next question is this: The plaintiff is not willing, and certainly cannot be asked now to express his willingness, to make any arrangement for restoring the land so as to make it suitable for such modest agricultural purposes as it would seem to be capable of. The buildings on the land, that is to say, the huts-whatever they be (we are informed that there is now only an office) are certainly things which the defendants may remove as the defendants put them up so very shortly before the suit; and I am inclined to think that the defendants Nos. 2 and 3 may be ordered to remove them. At the same time, having regard to condition of the land as it now is and the other circumstances of the case which rather point to probability of this property being comprised within a suit for partition at the instance of some party or another, it would seem reasonable, if this mandatory injunction is granted at all to stay the operation of the order for a period of two months from this date with a view to see whether a partition suit is in fact instituted; and in that event, to let the stay continue until such partition suit is determined or until further order of this Court. If in fact, Hari Binode has a strong claim in the partition suit, in the circumstances, to have this land allotted to him as part of his share, it would be mere useless injustice to require the defendants Nos. 2 and 3 in the meantime to take away the huts, though the tank and the ditches have to be left standing. It requires a strong case for a Court to refuse an injunction restraining a further alteration of the character of the property; but, in the case of mandatory injunction to restore to its original condition, I am of opinion that that is always a

most exceptional remedy and one never to be applied except with the greatest safeguard for the prevention of waste as well as injustice.

9. In the present case, the order for removing the huts will be made but it is not to take effect until two months have elapsed from this date and, in the event of a partition suit being instituted and, of course, properly prosecuted, the intention is that the injunction shall not operate until the question of allotment in the partition suit has been decided.

10. As regards the costs of this appeal, I think there should be no order.

Mukerji, J.

11. I agree.