

(1928) 06 CAL CK 0020
In the Calcutta High Court

Jharu Mondal and Others

APPELLANT

Vs

Mahatabuddin Mondal and Others

RESPONDENT

Date of Decision : 15-06-1928

Acts Referred:

Citation : AIR 1928 Cal 713 : 113 Ind. Cas. 561

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—This is an appeal by the defendants against a decision of the Subordinate Judge of Jessore, dated 3rd May 1927, which affirmed a decision of the Munsif of Bongaon, dated 14th September 1925. The suit in which this appeal arises was brought by the plaintiff for recovery of possession of two plots on the allegation that the plaintiff brought a suit for recovery of rent with respect to plot No. 1 in the year 1921 against defendant 1 who according to the plaintiff's case was holding the disputed lands as the utbondi tenant from the time when plaintiff's vendor was in possession. Defendant 1 denied the title of the plaintiff in that rent suit with the result that that suit was dismissed on 28th March 1923. It is said that the present suit had to be instituted due to the denial of plaintiff's title in the previous suit there has been a forfeiture and the plaintiff is entitled to get khas possession of the lands of plot 1. With regard to plot 2 the case of the plaintiff is that these are lands which are possessed by all the three defendants 1, 2 and 3 as utbondi tenants and that there has been a denial of the title of the plaintiff by defendant 1 alone and that as defendants 2 and 3 did not admit the title of the plaintiff, plaintiff is entitled to a decree for ejectment as against all. The Munsif found "that the plaintiff has a niskar title to the property in suit, i.e., both in plots 1 and 2. He further found that as defendants 1 and 2 did not claim any right in tenancy under the plaintiff, whatever title they had as tenants had been extinguished by the denial of the title of the plaintiff in the rent suit or by the execution of the deed of surrender in 1327. The Munsif further held that there was a denial of the title of the plaintiff in respect of both the plots in the rent suit and further that by the istifanama the tenancy was repudiated in

respect of both the plots. The Munsif accordingly decreed the plaintiff's suit declaring his niskar title to both the plots and held that the plaintiff was entitled to recover possession by evicting defendants 1-3 from both the plots. There was also a decree for mesne profits. Against this decision an appeal was taken to the Court of the Subordinate Judge of Jessore with the result that the decision of the Munsif was affirmed.

2. A second appeal has been taken to this Court and on behalf of the appellant it has been argued that the decree in so far as it grants khas possession to the plaintiff in respect of plot 2 cannot be sustained. It is to be observed that the learned vakil for the appellant does not challenge the findings of both the Courts that the plaintiff has established his niskar title to the disputed property. So far as plot 1 is concerned it appears that defendant 1 was the utbondi tenant and as he denied the title of the plaintiff in the rent suit the decree granting the -relief with regard to khas possession in respect of plot 1 seems to be correct. So far as plot 2 is concerned it appears that the denial was by defendant 1 alone and in such circumstances as the denial cannot be held to bind the other two defendants 2 and 3 such denial cannot work as a forfeiture. The disclaimer by defendant 1 of the title of the plaintiff cannot operate as a forfeiture of the tenancy in so far as defendants 2 and 3 are concerned and as there cannot be a forfeiture of the tenancy in part the result is that the tenancy still subsists and the suit for ejectment, so far as plot 2 is concerned, must fail. But there must be no reason why the plaintiff should not realize rent from all the defendants on the footing that the tenancy still continues. If any authority is needed, reference may be made to the case of *Birendra Kishore Manikya v. Bhubaneswari*. The plaintiff prayed in the alternative for rent as will appear from para. 8 of the plaint. It remains to notice the argument of the respondents that as there has been a denial in this suit of the title of the plaintiff and defendants 1-3 did not claim to be his tenants, a decree in ejectment should follow with regard to plot 2. It is to be observed with regard to this argument that in order to work as a forfeiture a denial must precede the institution of the suit. Consequently the denial in the present suit cannot entitle the plaintiff to a relief for ejectment.

3. The result is that the decrees of the Courts below are affirmed in so far as they award khas possession with regard to plot 1. The decrees of the Courts below are set aside in so far as they award khas possession to the plaintiff in respect of plot 2. The case will, therefore, be remitted to the Court of first instance in order that it may determine what is the fair and equitable rent payable to the plaintiff in respect of plot 2 including the arrears of rent which have not been realized. There will be no order as to costs.