

(1935) 05 CAL CK 0017
In the Calcutta High Court

Jogesh Chandra Das and Another

APPELLANT

Vs

Hem Chandra Ghose and Others

RESPONDENT

Date of Decision : 21-05-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 76(2), 77(f)

Citation : AIR 1936 Cal 243

Hon'ble Judges : Lodge, J

Bench : Division Bench

Judgement

Lodge, J.—This appeal arises out of a suit for declaration of plaintiff's title to and recovery of Khas possession of the land of a holding which originally stood in the name of one Hosanaddin. Hosan addin died 20 years ago leaving 2 sons, 3 daughters and a widow. The sons are defendants 3 and 4 in the suit. After the death of Hosanaddin the lands of the holding were in the actual occupation of defendants 3 and 4, the sons of Hosanaddin. These two defendants have transferred their interest in the holding to defendants 1 and 2 by two Kobalas dated Falgun 1329 and Pous 1332. The transferees are in actual occupation of the holding. The plaintiffs in the suit are the landlords. They seek khas possession on the ground that the holding has been abandoned by the original tenants. They made a second prayer for permanent injunction restraining the defendants from erecting permanent structures on the land. The Munsiff who tried the suit came to the conclusion that the holding had not been abandoned and he rejected the prayer for khas possession. He held further that the transferees had the same right as the tenants to erect permanent structures on the lands and he refused the prayer for permanent injunction. The findings of the Munsiff were upheld on appeal. I have been asked to hold first that the holding has been abandoned by the tenants and secondly that the plaintiffs appellants are entitled to the permanent injunction prayed for. The finding of the trial Court and the lower appellate Court is to the effect that the sisters and the mother of defendants 3 and 4 had an interest in the holding and that that interest was still subsisting, that they were in possession with defendants 3 and 4 and that they

were co-tenants with defendants 3 and 4 in the disputed jote.

2. The Advocate for the appellants had pointed out that defendants 1 and 2 are in occupation of the holding and that there is no evidence that the sisters and the mother of defendants 3 and 4 had made any arrangement whatsoever for the payment of the rent, and he argues that these facts are sufficient to establish the abandonment of the holding by the tenants. Abandonment implies a change of conduct or, at all events, of attitude on the part of the tenants. The sisters and the mother of defendants 3 and 4 were not in actual occupation of the holding before the sale to defendants 1 and 2. Defendants 3 and 4, occupied and possessed it on their behalf. The sisters and the mother did not pay the rent and there is nothing on the record to show that there has been any change in their conduct or in their attitude. Defendants 1 and 2 alleged that two of the sisters had transferred their interest to them by oral sale and that the third sister had granted a korfa settlement to these defendants. But this case was disbelieved in the lower Courts. Apparently there is no change in the conduct of the sisters and the mother of defendants 3 and 4 since the transfer by defendants 3 and 4. Whether the holding has been abandoned or not is largely a question of fact and in these circumstances I am not prepared to differ from the finding of the lower Courts. On this issue I hold that the tenancy has not been abandoned and that the prayer for khas possession was rightly rejected. The plaintiffs appellants prayed for a permanent injunction to restrain defendants 1 and 2 from erecting permanent structures on the holding. The Munsiff came to the conclusion that defendants 1 and 2 are co-sharers of the other tenants and that as the tenancy has not terminated the landlord cannot restrain the purchaser from building any pucca structures on the land which is not objected to by the other co-tenants and which was within the competence of other co-sharers to build. This finding was affirmed with some hesitation by the lower appellate Court.

3. u/s 76, Clause 2, Sub-section (f) and Section 77, Ben. Ten. Act, a landlord is not entitled to prevent his tenant from erecting a permanent dwelling house whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices. The right to erect a dwelling house is a right belonging to the tenant and to no other. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant. In my opinion therefore there is no justification for holding that the transferee has the same right as the tenant. u/s 76, Clause 2, Sub-section (f), it is the tenant and the tenant only who is entitled to erect such a dwelling house, and even the tenant is entitled to do so only for the benefit of himself and his family. I hold therefore that the plaintiffs were entitled to the permanent injunction prayed for. It remains to be decided however whether the permanent structures since erected by defendants 1 and 2 stand upon the lands of the holding or, as they allege, upon the lands covered by the mirash lease granted by the plaintiffs-appellants to them. A Commissioner was appointed in the trial Court to re-lay the

settlement daga. The Commissioner re-laid the settlement map from two different points and arrived at two different conclusions. The learned Munsiff adopted one of these conclusions, a conclusion which indicates that the structure in question stands partly upon the holding transferred. The respondents denied that the structures stand upon the holding. The matter was not considered in the lower appellate Court and there was no finding on this point. As the building has since been erected the respondents are entitled to have this matter decided by the lower appellate Court whether in fact the structures stand wholly upon the lands of the mirash lease or partly on the lands of the holding transferred to them by defendants 3 and 4. I therefore order that the appeal be allowed in part. The prayer for khas possession is rejected. The appeal in so far as it concerns the plaintiff's prayer for permanent injunction be remanded to the lower appellate Court for determining whether the structures stand wholly within the mirash land or partly within the lands of the holding transferred by defendants 3 and 4, and not covered by the mirash lease. In the latter event the suit should be decreed. Costs of this Court as also of the lower appellate Court to abide the result.