

(1928) 05 CAL CK 0045
In the Calcutta High Court

Jogesh Chandra Kundu and Others

APPELLANT

Vs

Radha Gobinda Rai and Others

RESPONDENT

Date of Decision : 03-05-1928

Acts Referred:

Bengal Tenancy Act, 1885 — Section 87

Citation : AIR 1928 Cal 848

Hon'ble Judges : Rankin, C.J.;Mukherji, J.;Mukerji, J

Bench : Full Bench

Judgement

Rankin, C.J.—This is a suit by a zemindar against certain defendants who are now the appellants before us. But about the lands in Schedule 2 for which the lower appellate Court has given the plaintiff a decree, no question arises here. The question that arises is with regard to the lands of Schedule 1 to the plaint, and it appears that those lands were originally covered by a non-transferable occupancy holding of which the tenant was one Beng Mandal. It further appears that this tenant Beng Mandal in 1907 granted a mortgage over this holding to the defendants. It also appears that the defendants sued and-obtained a foreclosure decree and that in 1914 and later on in 1921 they obtained symbolical delivery of possession through Court. Some question has been raised as to the delivery of possession in 1921. But there was delivery of possession in 1921 as appears from the document which the learned lower appellate Court relied on. In these circumstances the question arises whether or not there was an abandonment of the tenancy by Beng Mandal some time prior to January 1922 when the plaintiff instituted his suit. On that question it appears to me that our first resort should be to what is laid down by the Full Bench in the case of Dayamoyi v. Annoda Mohan Roy [1915] 42 Cal. 172, and the principle that is there laid down is this that where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; and the first question is whether there is any difference in the case between a sale of the whole holding and the case of a person who has granted a mortgage where the mortgagee has subsequently foreclosed and been given possession by the Court.

In my opinion there can be no distinction between those two cases. The present is not mere case of mortgage any longer. Accordingly it seems to me that we must apply the principle that ordinarily in these circumstances the Court will directly infer that there has been an abandonment such as entitles the landlord to re-enter. It appears from the statement of the principle given by the Full Bench that this inference of law - while it is an inference of law on the same lines as those laid down by Section 87, Ben. Ten. Act - is not of itself a direct application of that section. The statement goes on to say that where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to "recover possession of the holding unless there has been (inter alia) an abandonment within the meaning of the section.

2. Applying those principles what appears in the present case is this: Taking the matter as in 1921 when for the second time delivery of possession obtained from the Court, it appears that for about a year after that Beng Mandal himself was allowed to remain in the house or homestead. He appears to have died in about a year's time. Secondly, the question arises as regards certain of the lands of the holding that had been sublet by Beng Mandal to tenants. As regards them, the delivery of possession would immediately put those tenants in the position of having attorned to the defendants. Thirdly, the question arises as to whether or not any of the lands which Beng Mandal used to cultivate continued to be cultivated either by him or by his sons or heirs. On that point the Courts have differed. The learned Subordinate Judge has taken the view that it is not proved to his satisfaction that after the delivery of possession in 1921 Bang Mandal was in possession of any other land of the jote at all. It appears also from the Munsif's judgment that what seems to have happened was that Bang Mandal hung on in the house until he died and that his sons and heirs removed here and there at other places, and in these circumstances we must take that finding of fact to be that it is not proved that Beng Mandal was in possession of any of the other lands.

3. It remains, therefore, as a special matter for consideration in this case to take note of the fact that the tenant was allowed to go on till he died in a space of about a year in the house. One has to ask oneself whether that is a circumstance that would remove this case as a matter of law from the ordinary category. In my judgment that would not be sufficient in itself to show that Beng Mandal who had mortgaged, who had been foreclosed, who had allowed symbolical possession to be obtained against him was still professing or intending to discharge his responsibility to the zemindar treating himself as responsible for the rent. I see no reason because of that fact which is readily explained by the permission of the defendants to say that the ordinary inference of abandonment should not be drawn. In that view of the case the learned Subordinate Judge is right in putting the burden upon the defendants. Once it is shown that they are mortgagees who have foreclosed and taken possession I think that the burden of proof is on the defendants to show why the inference of abandonment should not

be drawn; and as they have not managed to show that there was any occupation of the lands it seems to me that the learned Subordinate Judge's judgment should be upheld.

4. Mr. Dwarka Nath Chakravarti as part of his argument endeavoured to maintain, if I rightly understood him, that in this case the plaintiff could succeed against the defendants short of showing that the interest of the original tenant Beng Mandal had come to an end. I see no reason to alter my opinion or to change what I have said in the case of Romesh Chandra Mitra Vs. Daiba Charan Das, . It was contended that under Dayamayi's case (1) because a transfer was valid between the transferrer and the transferee therefore when the landlord came to sue the transferee on the ground that he was a mere trespasser and had no title, the trespasser was in this position that he could not assert any title and still could not deny that the whole of the tenant's title had vested in himself and therefore had left the transferrer. It is said that in these circumstances the transferee could not set up juiterti of the transferrer.

5. With the greatest possible respect I dissent from that principle. It seems to me to be a perversion of the true principle. If the landlord can say to the transferee "you have got no title" the transferee can retort to the landlord upon that basis; and it is for the landlord to show that he has an immediate right to possession; hence I am wholly unable to see that short of showing abandonment a suit of that character can succeed at all.

6. In this case, therefore, I think that under Dayamayi's case (1) the zemindar succeeds in showing abandonment, and I think, therefore, that this appeal should be dismissed.

7. I do not think that it would be reasonable at all to send the matter back for any further investigation. It seems to me reasonably clear that the Subordinate Judge took a view upon which the principles of law which I have endeavoured to state are applicable.

8. This appeal is dismissed with costs.

Mukherji, J.

9. I agree.