

(1910) 02 CAL CK 0009
In the Calcutta High Court

Kishori Lal Roy Chowdhury

APPELLANT

Vs

Srimati Krishna Kamini Chowdhurani

RESPONDENT

Date of Decision : 02-02-1910

Acts Referred:

Contract Act, 1872 — Section 37

Transfer of Property Act, 1882 — Section 108(j)

Citation : 5 Ind. Cas. 500

Hon'ble Judges : Teunon, J;Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the first defendant in an action for recovery of possession of land. The plaintiff and the first, third and fourth defendants are owners of the taluh in which the disputed land is situated. The land has been tised according to one of the witnesses for the plaintiff as homestead land for about half a century, and it has been in the occupation of tenants from time to time. About 1889, the land was let out to one Rajani Kumar Dey who raised structures thereon and occupied them till his death in or about the year 1897. He left a widow Susila Sundari and three infant sons who remained in occupation of the land and buildings after his death. On the 25th February 1901, Susila Sundari, as the guardian of her infant sons, conveyed the premises to one Ghanesyam Pandey, who on the 1st June 1901, sold the property to the first defendant, one of the superior landlords in the name of his officer, the second defendant. Shortly after the plaintiff commenced an action against her co-sharer for recovery of joint possession on the ground that the defendant had acquired no valid title by his purchase. This suit was withdrawn and liberty was reserved to the plaintiff to bring a fresh suit on the same cause of action. On the 8th August, 1905, the plaintiff commenced the present action for joint possession of the land substantially on the ground that the tenancy was nontransferable, that the defendant had acquired no valid title to the land and that the plaintiff as co-owner to the extent of a half share was entitled to joint possession. No suggestion appears to have been made in the plaint, that the Jease-hold interest

was not heritable by custom or otherwise. The defendant resisted the claim substantially on the ground that the lease-hold interest was transferable, that he had acquired a valid title to the land, and that even if it was assumed that his purchase was not valid, he was entitled as joint owner to continue in sole occupation of the land which he had improved at considerable expense. The Court of first instance held that as the tenancy had been created after the Transfer of Property Act, it was prima facie transferable, that the plaintiff had not proved any custom or contract to the contrary, but that it was not heritable as Section 108 of the Transfer of Property Act did not make tenancies heritable. In this view the Court held that the defendant had not acquired any title by his purchase. The Court, however, declined to make any decree for ejectment on the ground that the defendant had improved the land, and erected structures on it, and as the plaintiff had acquiesced in the acts of the defendant, she was entitled to get only fair and equitable rent. The plaintiff then appealed against this decision, and the defendant preferred a cross-appeal. The District Judge held that the tenancy was not heritable and did not express any opinion upon the question, whether the plaintiff had proved that the tenancy was not transferable by custom or contract. He then went on to hold that the doctrine of acquiescence had no application, and that there were no equitable grounds to justify the sole occupation of the land by the defendant as co-owner. In this view, he allowed the appeal of the plaintiff, dismissed the cross-appeal, and made a decree for ejectment. The first defendant has now appealed to this Court, and on his behalf the decree of the District Judge has been assailed on three grounds namely, first, that the holding was heritable, secondly, that it was transferable, and, thirdly, that there was no ouster of the plaintiff, and the defendant was entitled to continue in occupation.

2. In support of the first ground, reliance has been placed upon the case of *Tej Chund v. Sree Kanth Ghose* 3 M.I.A. 261 : 6 W.R. 48 (P.C.) and it has been broadly Contended that a lease-hold interest is an interest in land and is consequently heritable. In reply it has been contended that a lease-hold interest in this country is not necessarily heritable and in illustration of this statement reference has been made to the cases of *Vaman Shripad v. Maki* 4 B. 424, *Rajaram v. Narasinga* 15 M. 199 and *Narsingh Dyal v. Ram Narain* 30 C. 883. In our opinion the proposition that a lease-hold interest must be heritable because it is an interest in land, is too broad and requires to be qualified. In the case of *Tej Chund v. Sree Kanth* 3 M.I.A. 261 : 6 W.R. 48 (P.C.) it was ruled by the Judicial Committee that a lease for a fixed term is not terminated by the death of the lessee. To the same effect is the decision in *Burda Kanth Roy v. Aluk Munjooree Bassiah* 4 M.I.A. 321. The cases as pointed out in *Badrinath v. Bhajan Lal* 5 A. 191 are authorities for the principle that in the absence of words to the contrary, a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either the lessor or the lessee. The same view was expressly recognised by the Judicial Committee in *Gobind Lal v. Hemendra Narain Roy Chowdhry* 17 C. 686, on the other hand the

terms of the grant or the nature of the interest created may plainly indicate that the tenancy is not intended to continue beyond the life-time of the grantee. To this class belong the three decisions upon which reliance is placed by the respondents. The true test to apply is, as stated by Mr. Justice Woods in *Alsup v. Banks* 68 Miss 664 : 9 South. 895 to determine from the terms of the grant or from the nature of the tenancy whether the parties intended that the execution of the contract was to be contingent upon the continued existence of both or either of them. In the case before us, the lease was clearly for building and residential purposes. It cannot be supposed to have occurred to the parties that such a lease would terminate upon the death of the lessee who would have to, spend considerable sums for the improvement of the land and for the erection of a suitable residence thereon. The lease, therefore, in such a case cannot reasonably be assumed to fall within the small class of purely personal contracts contemplated by Section 37 of the Indian Contract Act. As observed by Mr. Justice Willes in *Farrow v. Wilson* L.R. 4 C.P. 744 : 20 L.T. 810 : 18 W.R. 43 : 38 L.J. C.P. 326 generally speaking contracts bind the executor or administrator though not named; where, however, personal considerations are of the foundation of the contract as in cases of principal and agent and master and servant, the death of either party puts an end to the relation, and in respect of service after the death, the contract is dissolved unless there be a stipulation, express or implied to the contrary. It is not necessary for us to consider how far the covenant in a lease, when there is a devolution by the death of the original lessee, is binding upon the representative of the latter *Woodfall on Landlord and Tenant*, Chapter VII, Section 13(b). It is sufficient for us to hold that in the case of a tenancy of the description now before us, the lease-hold interest is heritable and we are fortified in this view by the circumstance that in the plaint, no suggestion was made that the tenancy terminated upon the death of the original tenant. Relief was asked on the ground that the tenancy was not transferable and it was not till the case came on for trial in the Court of first instance, that the suggestion was made that the tenancy was not heritable. This view was founded on the ground that Section 108 of the Transfer of Property Act does not make lease-hold interests heritable. This reasoning is manifestly fallacious. The Transfer of Property Act merely defines and amends certain parts of the law relating to the transfer of property by act of parties and even in these respects it does not purport to be a complete Code, much less does it deal with cases of succession. The inference, therefore, follows that the tenancy in this case was heritable and we may add that this view is supported by the rule of English Law that a tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Thus in *Parker v. Constable* 3 Wills. 25 which was treated in *Wilkinson v. Calvert* 3 C.P.D. 360 : 47 L.J.C.P. 679 as a case of great authority, it was ruled that half an year's notice must be given to a tenant-at-will or his executor to quit or ejectment does not lie. To the same effect are the decisions in *Mackay v. Mackreth* 4 Dong. 213 : 2 Chil. 461; *Doe v. Porter* (1789) 3 T.R. 13 : 1 R.R. 626; *Doe v. Wood* (1845) 14 M. and W. 682 : 68 R.R. 781 : 15 L.J. Ex. 41 : 9 Jur 1060

which were all cases of tenants from year to year See also the observations of Lord Eldon L.C. in *James v. Bean* (1804) 15 Ves. 241 : 8 R.R. 178. We need hardly add that we are not in this case concerned with agricultural tenancies which in this country stand on an entirely different footing, *Lakhan Narain Das v. Jai Nath Panday* 34 C. 516 : 5 C.L.J. 457 (F.B.) : 11 C.W.N. 626 : 2 M.L.T. 219, The first ground urged on behalf of the appellant must, therefore, prevail.

3. The second ground urged on behalf of the appellant, raises the question of transferability. As the tenancy is non-agricultural, and was created after the Transfer of Propert by Act, it is governed by the provisions of that Act and is consequently prima facie transferable u/s 108, Clause (j). The sole question is whether the plaintiff has established any custom or contract to the contrary. The Court of first instance found upon this question against the plaintiff. The appellate Court has not come to any determination thereon. It is open to this Court, however, u/s 103 of the Code of 1908, to determine this issue of fact upon the evidence or the record. We have accordingly examined the evidence and we are satisfied that the conclusion of the Court of first instance is correct. It follows, therefore, that upon the death of Rajani Kumar, the tenancy devolved upon his infant sons, and upon transfer by their guardian on their behalf the defendant became the holder of the tenancy on the 25th February 1901. He cannot obviously be treated as a trespasser. It is needless to determine precisely the incidents of the tenancy, for whether it is permanent or terminable, there is no suggestion that it has been terminated. In this view, the second ground must be answered in favour of the appellant and the third ground does not, therefore, require consideration.

4. The result is, that this appeal is allowed, the decrees of both the Courts below discharged and the suit dismissed with costs in all the Courts.