

(1909) 06 CAL CK 0007
In the Calcutta High Court

Lal Mahomed Sarkar

APPELLANT

Vs

Jagir Sheikh Mallik and Nehal Sheikh

RESPONDENT

Date of Decision : 11-06-1909

Acts Referred:

Citation : (1909) 06 CAL CK 0007

Judgement

1. This appeal arises out of a suit for the recovery of land. It was dismissed by both the lower Courts but on appeal Mr. Justice Brett passed a decree in the plaintiff's favour. From this decree the present appeal has been preferred under the Letters Patent.

2. The facts found are that Ambica Churn Dutt held the suit land as a raiyat under Ambica Moyi Dasi, the proprietor; that the plaintiffs held the land as under-raiyat under Ambica Churn Dutt, that on the 27th of February 190], Ambica Churn Dutt's raiyati interest was expressed to be transferred to Satya Bhama who was benamidar for Ambica Moyi Dasi; that Ambica Moyi Dasi made the land khas and let it to defendant No. 1; and that thus the plaintiffs have been dispossessed.

3. Before us it has been contended that the plaintiffs are not entitled to possession as u/s 85 (1) of the Bengal Tenancy Act the oral sub-lease to them is not valid against defendant No. 1 who for this purpose, it is argued, stands in the position of landlord.

4. Assuming for the sake of the argument that defendant No. 1 is entitled to the same rights against the plaintiffs as Ambica Moyi, can it be said that the plaintiffs' interest in the land has come to an end? If not, the plaintiffs are manifestly entitled to a decree for possession.

5. The defendant-appellant argues that this must be answered in the affirmative on the strength of the transfer of the raiyat's interest and Section 85 (1) of the Bengal Tenancy Act.

6. It is conceded that Section 85 (1) without this transfer would not suffice, for

the existence of the intermediate holding would have been an answer to the landlord's claim.

7. But can this protection be destroyed by the Voluntary Act of the raiyat who created the under-raiyat's holding? It would certainly be contrary to justice, equity and good conscience that it should, but this, I recognize would, be no answer to the words of the statute.

8. The right of the landlord u/s 85 (1) is a right vested in him by virtue of his landlord's interest and not by virtue of any other interest he might acquire; and to entitle the landlord to act by virtue of that interest there must be no obstacle in the shape of an intervening interest, and so the appellant is forced to contend that the raiyat's transferred interest has been extinguished.

9. For this view reliance has been placed on the doctrine of merger and on the terms of Section 22 (1) of the Act.

10. But it is at least doubtful whether the doctrine of merger applies to lands in the mofussil see per Sir Barnes Peacock, C.J. in *Woomesh Chander Gopto v. Raj Narain Roy* 10 W.R. 15 ; *Jibanti Nath Khan v. Gokal Chunder* 19 C. 760; *Prosunno Nath Roy v. Jogut Chunder Pundit* 3 C.L.R. 159. And even if it be assumed that it does, it cannot be that it would be more oppressive in its operation on the undertenant than the English Common Law doctrine. Mergers were never favoured in Courts of law and still less in Courts of Equity and so we find it said in C. Lit 338b that having regard to strangers who were not parties or privies there unto lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender the estate surrendered both in consideration of law and continuance."

11. So clearly the doctrine of merger would not help the appellant. Then is there anything in the Act which assists him? Our attention has been drawn to Section 22 (1) and there no doubt it is provided that where the entire interests of the landlord and the raiyat in the holding became united in the same person by transfer succession or otherwise the occupancy right shall cease to exist; but nothing in this section shall prejudicially affect the rights of any third person."

12. It may be a question whether it can be said on the facts of this case that entire interest of the raiyat has united with that of the landlords. But be that as it may what is it that has ceased to exist? The occupancy right, not the entire interest of the raiyat, so that on the words of the section there would be no extinguishment of the holding, and I see no reason for adopting a construction beyond what the language imports see *Jawadul Huq v. Ram Das Saha* 24 C. 143 at p. 148 and *Ram Mohan Pal v. Sheikh Kachu* 32 C. 386. And if as I have shown the holding continues in favour of the under-tenant. then there is, a continuing intermediate interest between that of the landlord and the undertenant which still furnishes an answer to any claim u/s 85 (1). To hold otherwise would involve the view that if the position were reversed and the raiyat acquired the holding of his landlord he could call Section 85 (1) in aid against his own under-tenant; for

this the learned appellant's pleader admitted he could not contend.

13. The conclusion at which I have arrived is in substantial accord with decisions in Amirullah Mahomed v. Nazir Mahomed 31 C. 932 and Amirullah Mahomed v. Nazir Mahomed 34 C. 104 and is distinguishable from Peary Mohan Mookerjee v. Badul Chandra Bhagdi 28 C. 205 in that there the tenant's interest did not pass to the landlord by the voluntary act of the tenant.

14. The result is that, in my opinion, the conclusion at which Brett, J. arrived, is correct and this appeal must be dismissed with costs. Exception has been taken to the expression by Brett, J., of the opinion that it would be open to the present plaintiffs in any subsequent suit or proceeding taken against them to raise the question whether the plaintiffs by custom or usage had acquired an occupancy right. This objection is, I think, well founded; whether the question can be raised in a future suit or proceeding must be determined in that suit or proceeding and its determination cannot be anticipated in this suit.

15. This judgment, it is conceded, will govern the other appeal (No. 49) which is, accordingly, dismissed with costs.