

(1940) 12 CAL CK 0024
In the Calcutta High Court

Munshi Serajul Huq Mia and Others

APPELLANT

Vs

Abjal Mia and Another

RESPONDENT

Date of Decision : 16-12-1940

Acts Referred:

Bengal Tenancy Act, 1885 — Section 4, 48(c)

Citation : AIR 1941 Cal 351

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This is an appeal on behalf of the plaintiffs and it arises out of an action in ejectment. The material facts lie within a brief compass and may be stated as follows : The plaintiffs admittedly hold as raiyats certain lands which are recorded in C. S. Khatian No. 96 of mouza Betua. Under them there was an under-raiyati held by two persons, Tajamaddin and Roushan Ali which was recorded in Khatian No. 96. The plaintiffs instituted a suit for ejectment against Tajamaddin and Roushan Ali in the year 1928, and, having obtained a decree, executed the same and took delivery of possession of the property through Court on 11th November 1931. They succeeded in obtaining actual possession of the lands comprised in the under-raiyati holding with the exception of two plots, namely plots Nos. 594 and 594/748 in respect of which the present suit has been instituted. The defendants who are in occupation of these plots resisted the attempt of the plaintiffs to take possession of the same on the allegation that they were dar kol raiyats or under-raiyats of the second degree under Tajamaddin and Roushan Ali in respect of these two plots and being in possession since the time of their ancestors, they had acquired occupancy rights in the same. Both the Courts below have accepted the story of the defendants and have dismissed the plaintiffs' suit, and it is against this decree of dismissal that the present second appeal has been preferred. The learned advocate for the appellants has raised three points in support of the appeal. The first, point taken is that the defendants being on their own admission sub-lessees under Tajamaddin and Roushan Ali, are bound by the decree for ejectment that was

passed against the latter and, as such, they have no subsisting interest in the property. The second ground urged is that an under-raiyat has no right to create a sub-tenancy under him, at any rate, without the consent of landlord and the defendants are trespassers in the eye of the law. In the last place, it is said that the Courts below erred in holding that the defendants have acquired the limited interest of a tenant by adverse possession.

2. As regards the first point, it may be taken to be established by authorities that a decree for eviction against a lessee is binding on the sub-lessee even though the latter [has not been made a party to the suit and "he can be ejected in execution of the decree without any proceeding under Order 21, Rule 97, Civil P. C: vide *Ramkissan Das v. Binraj Chowdhury* AIR 1923 Cal 691 and *Sheikh Yusuf Vs. Jyotish Chandra Banerjee and Others*, . Assuming that the principle is applicable to the case of a tenancy under the Bengal Tenancy Act, I do not think it is of any assistance to the plaintiffs in the present case. According to this view, the only remedy of the landlord would be to execute the decree which he obtained against the lessee, against the sub-tenant also. But this remedy is no longer open to the present plaintiffs, as more than three years have already passed since the decree was executed against Tajamaddin and Roushan Ali and a suit is barred u/s 17, Civil P.C. I am of the opinion however that this principle cannot have any application to a tenancy created under the Bengal Tenancy Act. If the defendants are under-raiyats within the meaning of Section 4, Ben. Ten. Act, they can be ejected only under the provisions of Section 48 (c) of the Act and not otherwise. If, on the other hand, they are not under-raiyats, they must be deemed to be trespassers and can be turned out irrespective of any decree for ejectment having been obtained against their alleged lessors.

3. The material fact for consideration therefore is as to whether as sub-lessees under an under-raiyat, the defendants have acquired the status of an under-raiyat under the Bengal Tenancy Act. An under-raiyat, as defined in Section 4, Ben. Ten. Act, means a tenant who holds immediately or immediately under a raiyat. A sub-lessee therefore of an under-raiyat is not a trespasser but a tenant. This was held both under the old law as well as under the new : vide *Paruchulla Sheikh v. Sital Chandra Das* AIR 1916 Cal 546 and *Dwarik Mandal Vs. Nalini Kanta Mitra and Others*, . It was observed in the last mentioned case by Nasim Ali J., that although there is no privity of contract between a raiyat, on one hand, and an under raiyat of the second degree, on the other, he could not, nevertheless be a trespasser with regard to the former and a tenant only with regard to his own lessor, as under the Bengal Tenancy Act, a tenancy can be created apart from any contract. It is argued on behalf of the appellants that u/s 48 F, Ben. Ten. Act, an under-raiyat cannot sublet his land except with the consent of the landlords, and, as there is no evidence of any consent being expressed on behalf of the plaintiffs at the time when the defendants' sub-tenancy was created, the latter cannot acquire any valid rights as under-raiyat under the Bengal Tenancy Act. The learned advocate for the respondents, on the other hand, argues that Section 48F, Ben. Ten. Act, does not refer to assignment

by way of sub-lease but is only applicable when there is a transfer out and out, and even if it includes a sub-lease it is controlled by Section 4 of the Act which impliedly authorises an under-raiyat. to create a subordinate tenancy under him. I must say that I am not inclined to accept this view as correct. The wording of Section 48P is quite comprehensive and the word "transfer" is sufficiently wide to include a sub-lease as well. Section 4 of the Act cannot, in my opinion, control Section 48F. Bather it pre-supposes that a sublease is validly created.

4. I think however that the discussion is not material to the present case. In the first place, there is a finding though not very satisfactory, that there was consent on the part of the plaintiffs to the creation of the sub-tenancy held by the defendants. In the second place, Section 48 F, in my opinion, does not apply where an under-raiyati holding of the second degree was created before 1928. Section 48F was introduced for the first time by the amending Act of 1928. As the law stood before that, an under-raiyati holding was neither heritable nor transferable but there was an exception in the case of a sub-lease, as a power to sub-let was implied in the definition of an under- raiyat as given in Section 4 of the Act: vide *Dwarik Mandal Vs. Nalini Kanta Mitra and Others*, . The learned advocate for the appellant has drawn my attention to a number of cases decided under the old law, where it was held that the interest of an under-raiyat could not be transferred at all. But with the single exception of the decision in *AIR Gopal Molla v. Mafidannessa AIR 1920 Cal 842* in all the rest the transfers were by way of sale out and out and not by way of sub-lease. In *AIR 1920 Cal Gopal Molla v. Mafidannessa ("20) 7 AIR 1920 Cal 842* the learned Judge did not advert to Section 4, Ben. Ten. Act, at all but based his decision entirely on an earlier pronouncement of this Court which related to a case of sale and not of sub-lease."

5. I do not think that we would be justified in saying with regard to tenancies created under the Bengal Tenancy Act, that where sales are prohibited, a sub-lease must be deemed to be forbidden also. An occupancy ryot could not transfer his holding except by custom before the amended Act of 1928 came into force but it could never be disputed that he could create a subordinate tenancy under him. I hold therefore that "the defendants are under-raiyats within the meaning of Section 4, Ben. Ten. Act, and cannot : therefore be ejected except under the provisions of Section 48 (c), Ben. Ten. Act. In the view I am taking, it is unnecessary to say anything with regard to the third point that has been raised on behalf of the appellants. But I may observe here that even if it is conceded that the defendants were trespassers from the very beginning vis a vis the plaintiffs, the right of the plaintiffs to recover khas possession of these lands could not accrue till the under-raiyati held by Tajamaddin and Roushan Ali was determined and as admittedly 12 years have not elapsed from that time the defendants could not acquire a tenancy by adverse possession. My conclusion, therefore, is that this appeal fails and is dismissed. I make no order as to costs.