

**(2003) 02 CAL CK 0031**

**In the Calcutta High Court**

**Case No :** Appeal from Original Decree No. 254 of 2001

Musammat Afroz Begum and Others

APPELLANT

Vs

Abdul Quddus and Others

RESPONDENT

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**Date of Decision :** 18-02-2003

**Acts Referred:**

Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 — Section 6(3), 7, 7(1)

**Citation :** (2003) 2 CALLT 384

**Hon'ble Judges :** Hrishikesh Banerji, J;Ajoy Nath Ray, J

**Bench :** Division Bench

**Advocate :** Jyotirmoy Bhattacharjee, Suman Dutta and Aniruddha Chatterjee, for the Appellant; Durga Sankar Mallick and Supratik Syamal, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

A.N. Ray, J.—In this appeal a point of first Impression arises, amongst others, whether thika tenancy is partible amongst joint tenants who have inherited the original thika tenant's rights.

2. The point arises in the appeal before us which was preferred from a decree passed in 1992 in a suit instituted in 1978 allowing partition, and passing a decree in preliminary form, declaring 12 annas share as owned by the plaintiff No. 1 and the balance 4 annas by the defendants.

3. There have been substitutions in this matter. The plaintiff No. 1 was substituted by her three successors after she died after passing the preliminary decree.

4. It appears that, one Abdul Ghani was the original owner of the thika tenancy and he died in 1945. Since he died without leaving any issue, according to Mohammedan Law his widow, Abeda, got 4 annas share and balance 12 annas share went to the daughter of his pre-deceased brother, Sk. Kallu, namely, Rabea. Rabea was the first plaintiff. The plaintiff No. 2 was the Asgar, who was brought up by the defendant and also given in her marriage by her.

5. It appears that about two month before her death on 3rd April, 1975, Abeda gave her share to the defendants stating in the deed that she was 16 annas shareholder. Also in a Small Cause Court Suit bearing No. 2857 of 1977, the defendants obtained a decree for eviction against the plaintiff No. 2 claiming that his licence had been revoked.

6. The learned Judge in the Court below has found that the shares 12 annas and 4 annas cannot be disputed. Indeed, on the above facts, the shareholding as above being in perfect in accordance with the Mohammedan Law, could not be disputed even by the appellants. They raised, however, several other points which have to be dealt with. The first point was that thika tenancy is not partible. The original Thika Tenancy Act of our State is dated in 1949 and thereafter there were large scale amendments in 1964. The Act intended to- protect not very well off tenants who erect kuchha structure on the land. Although that was the original idea, the idea has not undergone several modifications and changes. After the amendments of thika tenancy laws, lands got vested in the State of West Bengal and every thika tenant is now a tenant under the State.

7. Mr. Bhattacharjee, appearing for the appellants showed us, that as the said Thika Tenancy Act now stands, the most current Act being of 1981, u/s 6(3) the interests of thika tenants are not transferable except inter se amongst heirs. The said sub-section is set out below:

"6(3) The interest of thika tenants and tenants of other lands holding directly under the State under Sub-section (1) shall be heritable and shall not be transferable except inter se amongst the heirs and existing co-shares Interest or to the prospective heirs, subject to the provisions of Sub-section (1) of Section 7."

8. Relying on the case V.N. Sarin Vs. Ajit Kumar Poplai, , which proceeds on the basis of the decision given in Sadashiv Dhundiraj, 43 Indian Appeal 151, he said that partition does not involve transfer amongst co-sharers. The decision of the Judicial Committee clearly mentions that partition does not give or create title in a co-share; in our opinion what it does is, that it gives the co-sharer exactly what the co-sharer already had, no more and no less, but changes, as the Judicial Committee pointed out, the shareholding in the property which was undefined, into something specified and which is wholly his own.

9. Mr. Bhattacharjee's argument was that although transfer amongst co-sharers is permitted it does not mean that partition is automatically permitted thereby.

10. He also showed us Rule 3(h) of the Calcutta Thika Tenancy Rules, 1981 which is as follows:

"The boundaries of the land shall be kept intact and well defined."

11. The argument was that as per this Rule the boundary of the land cannot be changed by an Act of partition amongst co-sharers.

12. As against this argument the respondent's case was that thika tenancy right is now both heritable and transferable at least as amongst co-sharers. If these property ownership incidents are now made applicable to thika tenancy, then partition should also be equally made applicable,

13. In our opinion, as per the present law, inherited thika tenancy rights give the co-sharers a right to obtain a partition amongst themselves. If there is a joint ownership, ordinarily speaking every joint owner should be entitled after observance of the due process of law to claim something which is his own and thereafter to enjoy it privately all by himself. The policy of the law is not to keep parties in joint ownership whether they like it or not. Another principle is that every citizen is, generally speaking, free to do what he pleases with his property, unless there is some law, rule or usage prohibiting him from acting in such manner. We find from the Thika Tenancy Act and the Rules, that no provisions either clearly or by express implication prohibits the partition of thika tenancy as amongst co-sharers. Rule 3(h) states that the land boundaries shall be kept intact and well defined but gives no indication that within such boundaries no new boundaries will be created either, indicating separation amongst co-sharers. Accordingly the first point of the appellant fails.

14. It was secondly argued that a partition is not possible excepting in the presence of the State of West Bengal which is the land owner. The argument was made on the basis of the first principle only. Again we do not find any reason why the State of West Bengal should be unnecessarily impleaded in a suit which concerns the co-sharers alone. The interest of the State is not the land itself, which it owns upon vesting, and also in the rent to be paid by the thika tenants. Once the partition is effected properly and the rent is also apportioned as per the partition decree, there should be no difficulty about the State continuing to own its land and continuing to receive the rent which is entitled to receive. If any co-sharer fails to pay his portion of the rent later on, he might be evicted from his portion like any other thika tenant, be he an original tenant or a tenant who has inherited the tenancy.

15. It was thirdly argued that the second plaintiff has been improperly joined in the suit. He was joined only to stop the process of execution of the decree which was obtained against him by the defendant in the Small Causes Suit. Whether that was the motive of joining second plaintiff or not we need not pronounce upon, but we find from the decree under appeal, that no share had been declared in favour of the second plaintiff. We also find that the First Court has passed an order of injunction restraining the operation of the Small Cause Court decree against the first set of plaintiffs only, and not the second plaintiff. We do not find any infirmity in the decree in this regard either.

16. Points of limitation and prescription were also taken. Since the suit was filed in 1973. i.e., within three years of the defendant acquiring interest from Abeda the point of limitation hardly arises. The suit is also a partition suit, which is without such a period. As regards prescription, the learned Judge has not found

this to be proved by the defendants. Assertion of hostile title by one co-sharer against another is the essence of prescription. Such assertion for long 12 years could not be proved in this case. It was said by the Rabea's husband that before her death she had not given up her rights to the property and she had never been threatened by the defendants in any manner by show of any hostility or otherwise setting up a hostile title.

17. In sitting in appeal over facts of this nature the Court of appeal does not usually upset the First Court's findings which has a chance of doing the first practical work by hearing the witnesses and assessing them. We are not minded to upset the First Court's findings in this regard either, as it appears to us that the learned Judge was quite careful and correct in analysing the evidence. Also, it was correctly said, that even if Abeda had purported property to convey 16 annas share in the thika tenancy, she could not convey more than 4 annas, because 4 annas is all that she had ever had.

The appeal is, therefore, dismissed without any order as to costs.

We make it clear that the Small Causes Court decree can be executed against the plaintiff No. 2 by or on behalf of the defendants, provided, and only provided, the plaintiffs 1(a) and 1(b) and 1(c) join with the defendants and show their support in evicting the plaintiff No. 2.

H. Banerji, J.

I agree.