

(1903) 12 CAL CK 0004
In the Calcutta High Court
Case No : Appeal No. 2159 of 1901

Nadhu Mandal and others

APPELLANT

Vs

Kartick Mandal and others

RESPONDENT

Date of Decision : 09-12-1903

Acts Referred:

Citation : (1903) 12 CAL CK 0004

Final Decision : Dismissed

Judgement

Banerjee, J.—This appeal arises out of a suit brought by the Plaintiffs-Respondents to recover possession of certain lands upon establishment of their title to the same, on the allegation that the Plaintiffs and their predecessor in interest had been holding the lands for upwards of 12 years as tenants under Defendant No. 1; that the Plaintiffs mortgaged their holding to certain persons who may be shortly described as the Kapurias, and to satisfy the decree obtained by the Kapurias upon the mortgage, they in Bysak 1305 sold the holding to the Kapurias, but continued in possession under a lease for a year taken from the Kapurias; that upon the expiry of the term of the lease the Plaintiffs went on holding possession of the land with the consent of the Kapurias and in accordance with the terms of the lease until they were ousted by the Defendant in Falgoon 1306; and that the Plaintiffs are therefore obliged to bring this suit for establishment of their right in the lands as stated above, for possession of the same and for any other relief which under the circumstances of the case the Court may think they are entitled to. The defense of Defendant No. 1 so far as it is necessary to be considered for the purposes of this appeal is that the suit was barred by limitation, general and special, as the Plaintiffs never had possession within 12 years before suit, that the suit was bad for defect of parties, the Kapurias not having been joined as Defendants, and that the Plaintiffs never had any title to, or possession of, the lands in suit.

2. Upon these pleadings several issues were framed of which it is necessary to refer only to the following, namely, (4) is the suit barred by limitation ? (6) have

the Plaintiffs or their present landlords any right to the land in suit ? (7) what relief if any are the Plaintiffs entitled to?

3. The first Court held that the Plaintiffs were in possession of the lands even in 1306 and so limitation could not apply to their claim. Then upon the 6th issue, that is the issue on the question of title, the first Court held that as the holding of the Plaintiffs was a nontransferable one their transfer of it to the Kapurias could not convey any valid title to the latter, and that they had lost their original right by their transfer and they could not acquire any right under the lease from the Kapurias who themselves had none; and it accordingly dismissed the Plaintiffs' suit.

4. On appeal by the Plaintiffs, the lower Appellate Court has reversed the first Court's decision and given the Plaintiffs a decree, holding that although the transfer by the Plaintiffs to the Kapurias could not convey to the latter any valid title, as the Plaintiffs were still in possession of the lands until their dispossession by the Defendant; and as the Defendant No. 1 recognized them as his tenants up to the end of 1305 by receiving rent from them, the Plaintiffs were entitled to a decree.

5. Against this decree of the lower Appellate Court the Defendant No. 1 has preferred the second appeal now before me, and it is contended on his behalf, first, that the lower Appellate Court is wrong in holding that the Plaintiffs were entitled to a decree and in relying upon the case of *Sristeedhar Biswas v. Mudan Sirdar* ILR 9 Cal. 648 (1883), when the title upon which the Plaintiffs seek to recover, namely, their title as under-tenants under the Kapurias had been found to be invalid, and when the rule laid down in the case relied upon is inapplicable to the present by reason of its being a suit brought by the transfers of a non-transferable holding to recover possession as undertenants of their transferee and not being a case of the landlords' seeking to eject the original tenants who were still in possession; and, secondly, that the lower Appellate Court is wrong in holding that the rent receipts show any recognition of the Plaintiffs by the Defendant No. 1, as his tenants.

6. A third point was sought to be raised at the hearing of the appeal, namely, that the lower Appellate Court ought to have held that the suit was barred by limitation, it having been brought admittedly, as appearing on the face of the plaint, more than six months after the alleged date of dispossession. I shall deal with this last point first and then with the other two in the order they have been stated above.

7. This second appeal was filed on the 18th November 1901 and it is not until this day that this point has been sought to be raised in the appeal; and no previous notice has been given to the other side that this ground is intended to be raised. The suit was instituted on the 10th January 1901. The plea of limitation was raised but not in the form in which it is now taken. The first Court overruled that plea; and no further notice was taken of the point either by the

parties or by the Court at the hearing of the first appeal. Under these circumstances it would not be right in my opinion to allow the point to be raised now. Then I am asked to dismiss the suit notwithstanding that the point was not raised, as the limitation law, sec. 4 of Act XV of 1877, requires that the Court should give effect to the rules of limitation even though limitation may not be set up as a defense. But then the point must appear on the face of the record and must not stand in need of being developed by evidence. Now is that the case here ? The learned vakil for the Appellant relies upon the case of Bhagabati Charan Roy v. Luton Mondal 7 C.W.N. 218 (1902) in support of his contention that a suit by a non-occupancy raiyat for recovery of possession is governed by the rule of limitation contained in sec. 9 of the Specific Relief Act and that such a suit must be held to be barred if it is brought more than six months after the date of dispossession. There is apparently some conflict between that case and the case of Ramdhan Bhadra v. Ram Koomar Dey ILR 17 Cal. 926 (1890); and if the point had properly arisen in this case it would have been necessary to refer it to a Full Bench for determination. But in my opinion, even if the contention had been allowed to be raised, it could not have succeeded; and the case cited is not applicable to the present case, because on the face of the plaint the Plaintiff seeks to recover possession upon establishment of his title; and the suit contemplated in sec. 9 of the Specific Relief Act is a suit to recover possession after dispossession otherwise than in due course of law, merely upon the ground of previous possession and without any reference to title. It cannot therefore be said that the suit was barred on the face of the plaint even if the rule laid down in the case cited were followed. Then, again, it could not be said upon a bare perusal of the plaint that the Plaintiffs were seeking to establish their right as non-occupancy raiyats. They were seeking to establish their title according to the facts stated in their plaint. They asked also for such relief as in the circumstances of the case the Court might consider them entitled to; and if, as the last Court that had to deal with the facts has found, the Plaintiffs have been recognized by the Defendant No. 1 as his tenants notwithstanding the unauthorized transfer by them of their holding to the Kapurias; and if they are entitled to recover possession accordingly, the suit could not be regarded as a suit within the scope of sec. 9 of the Specific Relief Act. The plea of limitation now set up in the contention sought to be raised can therefore have no application to the case.

8. I come now to the consideration of the first point raised in the appeal. It is true, the Plaintiffs have stated in their plaint that they transferred their holding to the Kapurias and took a lease from them for one year; but that lease had expired before the institution of the suit, and the Plaintiffs were still in possession of the lands. They alleged no doubt that they held such possession with the consent of the transferee and in accordance with the terms of the lease taken by them; but if the transfer by them to the Kapurias is invalid and did not convey any valid title to the Kapurias, and if the Plaintiffs themselves continued in possession of the lands and continued also to be treated by the Defendant No. 1, their original landlord, as his tenants, could it be said that the mere fact of that transfer

having taken place deprived the Plaintiffs of their right?

9. Having regard to the authorities I must say that the question ought to be answered in the negative. The case of *Sristeedhar Biswas v. Mudan Sirdar* ILR 9 Cal. 648 (1883) lays down the rule that a raiyat having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right to the land and sold that right to a stranger without giving up possession of the land. It is true that in that case it was the landlord who sought to recover possession by ejectment of the tenant; but if the principle upon which the decision is based is correct, it must be held that the tenant does not lose his right by an unauthorized alienation if he is still on the land; and the landlord will not be entitled in such a case to enter upon the land merely by reason of the unauthorized transfer by the tenant who still continues in possession, unless there is a clause for forfeiture and re-entry in the contract by which the tenancy was created. And it is not shown that there was any such clause in the contract of tenancy in this case. The learned vakil for the Appellant relies upon the case of *Dwarka Nath Misser v. Hurrish Chunder* (4) in support of his contention that upon an unauthorized transfer by a tenant it must be held that there has been an abandonment by the tenant of his right. But the observations of the Court which are relied upon have been considered and explained in the case of *Sristeedhar Biswas v. Mudan Sirdar* ILR 9 Cal. 648 (1883), as having no application to the case then before the Court; and I think they have no application to the case before me. In the case in *Dwarka Nath Misser v. Hurrish Chunder* ILR 4 Cal. 925 (1879) the original tenants did not appeal against the decree that had been given to the Plaintiff for ejectment, and the only party who appealed to this Court was the transferee from the original tenant. That distinguishes that case from the present case. The first contention of the Appellant must therefore fail.

10. As to the second contention, there is nothing to satisfy me that the lower Appellate Court is wrong in the view it has taken, that the rent receipts show that the Defendant No. 1 recognized the Plaintiffs as his tenants even in 1305. The second contention must therefore fail.

11. It was urged on behalf of Defendant No. 1 that the decree of the lower Appellate Court, even if it should stand, does require amendment in one respect, that is to say, that it should clearly state that the Plaintiffs do recover possession upon their right as tenants of Defendant No. 1. Now the decree of the lower Appellate Court does not clearly state this in so many words; but reading the decree by the light of the judgment of the lower Appellate Court it seems clear that that is the meaning of the Court of Appeal below, because the lower Appellate Court holds that the Plaintiffs are entitled to a decree by reason of their having been recognized by Defendant No. 1 as his tenants. However to avoid any future difficulty the decree may be amended in the manner suggested in the argument, the learned vakil for the Plaintiffs-Respondents not objecting to it. The result then is that with the slight modification in the decree of the lower Appellate Court as indicated above that decree will be affirmed and this appeal

dismissed with costs.