

(1910) 01 CAL CK 0052
In the Calcutta High Court

Radha Nath Karmokar and Others

APPELLANT

Vs

Aditya Prosad Dass and Others

RESPONDENT

Date of Decision : 07-01-1910

Acts Referred:

Bengal Tenancy Act, 1885 — Section 49, 85

Citation : 5 Ind. Cas. 264

Hon'ble Judges : Chatterji, J

Bench : Single Bench

Judgement

Chatterji, J.—An occupancy holding in the zamindary of the plaintiffs belonged to one Biswanath Dass. Biswanath sublet a portion of the same to defendants Nos. 1 and 2 and then sold the holding to a third party, who again sold the same to defendant No. 1, one of the under-tenants. The plaintiffs brought the suit on the allegation that the occupancy holding¹ was not saleable by the custom of the locality and that they were entitled to possession.

2. The first Court dismissed the suit holding that the property was transferable and secondly that there had been no notice u/s 49 of the Bengal Tenancy Act.

3. The lower appellate Court has decreed the suit holding that the property was not transferable according to local custom and that no notice, u/s 49 of the Bengal Tenancy Act was necessary.

4. On appeal, before me, three points have been raised. First, that the under-raiyati holding of defendants Nos. 1 and 2 still subsists and must be got rid of by a separate suit in due course of law. Secondly, that the holding should have been held to be transferable and, thirdly, that in consequence of certain conduct on the part of some of the plaintiffs, there is an estoppel against the present suit being-maintained. With regard, to the second and third points I think they cannot prevail against the findings of fact arrived at by the lower appellate Court.

5. As regards the first point there is, however, something to be said. It is contended that the effect of the transfer of a non-transferable holding with a

right of occupancy has been held in a series of cases to be that of abandonment of the land by the tenant conveying the right and this abandonment should be considered to be a transfer in favour of the landlord and therefore, on the principle of the case of Gobinda Nath Shaha Chowdhry v. Surja Kanta Lahiri 26 C. 460 and in the case of Ammirullah Mahomed v. Nazir Mahomed 34 C. 104 : 3 C.L.J. 155 the plaintiffs should be considered transferees from the tenants so that they are bound to sue for the same again for the purpose of evicting the defendants as the original tenant would have been bound to do. There is no doubt upon the principles of the said cases that if the raiyats had sold the property by a private sale to the plaintiffs, the plaintiffs could not evict the defendants without taking proceedings under Chapter VII of the Bengal Tenancy Act. The question, however, is whether what has taken place is tantamount to a sale by the tenants in favour of the landlords or at all events is to be clothed with the same legal effect. In the case of a sale by a tenant in favour of the landlord, the landlord consents to the sale in his own favour and, therefore, any question as to transferability of the holding does not arise. He also claims under his vendor and cannot claim any higher rights than what his vendor possessed. In the case of a surrender and abandonment by a tenant, without making any provisions for payment of rent as it falls, due, special, provision, is made in. the Bengal Tenancy Act for the procedure to be adopted by the landlord for working but his rights for khas possession. There is no such provision, however, for the circumstances that have transpired in this case and we have to work out the legal rights of the parties upon general principles. The general principles holding in the case of a private sale by a tenant do not appear to be applicable to a case where a tenant makes a sale in favour of a third person without the consent of his landlord; the vendee in these circumstances has been in a series of cases held to be a trespasser and all connection between the landlord and tenant has been held to have ceased from the fact of the conveyance of a property which is not transferable under the law. The result, therefore, is that the land is theirs, the right has gone away, the vendee is a trespasser and may be considered as nobody and, therefore, there is nothing between the land and the landlord. The question is whether any person deriving title from the tenant who has sold away his rights is entitled to stand between the land and the landlord. Section 85 of the Bengal Tenancy Act, provides that if a raiyat sublets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent."

6. In this case the lower appellate Court has held that the transfer was without the landlord's consent and as regards one of the sub-leases, it was a registered document, but it was for an indefinite period. This sub-lease which is a registered instrument; was executed after the passing of the Bengal Tenancy Act and as it is not in accordance with the provisions of Section 85, it is, I think, not a valid document, and in this opinion I am supported by the case of Sirkant Mondul v. Saroda Kant Mondul 26 C. 46. Apart from these considerations, however, Section 49 of the Bengal Tenancy Act, under which, it is contended, the plaintiffs ought

to have proceeded, provides that "an under-raiyat shall not be liable to be ejected by his landlord except--(a) on the expiration of the term of a written lease, (b) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord." The plaintiffs are not the immediate landlords of the under-tenants and, therefore, Section 49 has no application.

7. It has further been contended that u/s 22 of the Bengal Tenancy Act there is a provision that when the landlord acquires by transfer, succession or otherwise the interests of an occupancy raiyat, the rights of any third person shall not be prejudicially affected. In the first place this section has been held to apply to occupancy holdings which are transferable see the case of Girish Chandra Chowdhry v. Kedar Chandra Roy 27 C. 473 : 4 C.W.N. 569. The holding in this case has been held to be non-transferable and, therefore, that section has no application. In the second place, in the view that I take of the case and the result of what has taken place it is not a transfer to the landlord. But it is contended that the word "otherwise" used in the section is comprehensive enough to connote what has taken place in the present case. I should think that the word "otherwise" is used in respect of a transaction, which is ejusdem generis with the co-ordinate words, used in the section, "by transfer or succession" and cannot be held to apply to the circumstances obtaining in this case.

8. In this view of the case I dismiss the appeal with costs.