

(1918) 03 CAL CK 0047
In the Calcutta High Court

Rani Mina Kumari Saheba

APPELLANT

Vs

Ichamoyee Chowdhurani and Others

RESPONDENT

Date of Decision : 13-03-1918

Acts Referred:

Citation : 45 Ind. Cas. 747

Hon'ble Judges : Walmsley, J;Richardson, J

Bench : Division Bench

Judgement

1. The appellant is the plaintiff in a suit brought to recover actual possession of an occupancy holding in the village of Basanta of which he is the proprietor. His case is that the holding is non-transferable and that the defendants, who are in possession as purchasers from the original tenant, are mere trespassers. Of the defences raised we are now concerned only with the defence that occupancy holdings in the village are transferable by custom without the landlord's consent. The written statement says nothing about the payment of nazar, customary or otherwise. There is no plea that nazar has in fact been paid. Nor is there any reference to nazar in the issue framed upon this question. The issue is merely: "Are the disputed holdings transferable by local custom or usage?" At the trial, however, evidence relating to the payment of nazar has been given and both the Courts below have found in favour of a custom of transferability involving in some way, which is not clearly defined, the payment of nazar. The question is whether the finding can be supported in law.

2. The cases on the subject of customary nazar will be found collected in Mr. Sen's work on the Bengal Tenancy Act (3rd Edition, pages 136, 137). The principle of the cases is clearly this, that in order to establish a custom of transferability subject to the payment of a customary nazar the evidence must show that the landlord is bound to recognize the transfer when nazar of the amount or at the rate determined by custom is tendered to him. There is all the difference between a fixed nazar, which the landlord is obliged to accept whether he likes it or not, and a nazar which is bargained for and paid as the price of a

consent which he may give or withhold as he pleases. A practice or course of business in a Zemindary office, according to which a transferee is recognized provided that the amount of the nazar is satisfactory to the landlord, is not sufficient.

3. Tried by this standard the finding of the learned Munsif is not a good finding of a custom. It is not enough to say "that there are constant transfers and the transferees pay nazar to the landlord to be recognized." The two statements that "occupancy jotes are transferable" and that "landlords recognize snoh on payment of nazar" are as they stand inconsistent. The payment of nazar without more is an indication that the jotes are not transferable without the landlord's consent, given on receipt of the nazar.

4. The finding of the learned District Judge is more artificial, but as it rests on the same materials it is perhaps not surprising to find that it is also open to objection. He holds "that a custom or usage existed in the plaintiffs' estate at Basanta by which occupancy holdings are transferred with the knowledge but without the consent of the landlord and are recognized by the landlord upon payment of a nazar fixed by custom." It may be presumed that the Judge means that the transfers are or must be recognized by the landlord. Apart, however, from any question of grammar, the substantial objection to the finding is that it does not state the amount of the customary nazar. As to that there is no definite conclusion arrived at in the judgment. The Judge says that "the landlords recognize all transfers of occupancy holdings, provided a fixed nazar, generally four annas in the rupee on the purchase of the property, is paid." But though he adds that "the nazar varies in different estates" he does not determine the rate payable in Basanta.

5. Now obviously a custom which leaves the amount or rate of nazar indefinite must be void for uncertainty. The position is no whit better than when the nazar is determined by agreement. No one knows what he has to pay and the landlord can demand what he pleases and refuse his consent unless he is satisfied.

6. Further there is another vice in the judgment. It is not found that the defendants paid or tendered any nazar. As I have said the written statement contains no such plea, and even if it be assumed that there is a customary rate of nazar which the landlord is obliged to accept, the defendants have no title under the custom until they have paid or tendered nazar at that rate. [Maharaja Radha Kishore Manikya v. Srimutty Ananda Pria 8 C.W.N. 235; Sreemutty Siboo Sundari Ghose v. Raj Mohun Guho 8 C.W.N. 214.]

7. For these reasons the judgments and decrees of the Courts below should, in my opinion, be set aside and a decree made in favour of the plaintiff awarding her khas possession in accordance with the first prayer of the plaint with costs throughout. There will be a remand of the suit to the Court of first instance in order that the claim for mesne profits may be tried.

8. This judgment governs the consolidated appeals other than Appeals Nos.

2892, 2893, 2894, 2895 and 2896, which fail on other grounds and are dismissed with costs.

9. I may add that we allowed the parties, at their request, time to settle the matter, but they have not found it possible to arrive at an agreement.