

(1926) 04 CAL CK 0022
In the Calcutta High Court

Sarada Kanta Sen Gupta and Another	APPELLANT
Vs	
Nabin Chandra Sen Gupta and Others	RESPONDENT

Date of Decision : 23-04-1926

Acts Referred:

Citation : AIR 1927 Cal 39

Hon'ble Judges : Page, J;Cuming, J

Bench : Full Bench

Judgement

Page, J.—The suit out of which this appeal arises was brought to recover khas possession of certain homestead land. The land in question for many years had been in the possession of one Tilak Das under a howla of which the plaintiffs possessed twelve annas and the pro forma defendant a four annas share. The defence to the suit was that the appellants-defendants in the suit had purchased the interest of Tilak Das in the land which was set out in, and controlled by, a kabuliyat executed by Tilak Das on the 24th Falgoon 1308, that is in the year 1901.

2. The lower Court has found as a fact that the kabuliyat of 1901 was a document merely confirmatory of a pre-existing tenancy, and did not create a fresh tenancy. The learned advocate for the appellants has urged that this finding of fact cannot stand because there was no evidence on the record upon which the Judge could have based the conclusion that the kabuliyat merely confirmed a prior tenancy. This point, however, has not been raised in the grounds of appeal, and it is not open to the appellants to urge it before the High Court in second appeal. It must be taken, therefore, that the kabuliyat of 1901 merely confirmed an earlier tenancy. Now the kabuliyat was executed in 1901, and the learned Subordinate Judge in the course of his judgment stated that

Admittedly Tilak Das Bairagi's tenancy with respect to the land in suit commenced about 50 years ago, that is, before the passing of the Transfer of Property Act.

3. It is necessary, therefore, for us to consider whether before the passing of the Transfer of Property Act in 1882 a lease of homestead land was transferable by law. The only authority which lays down that a lease of homestead land was transferable apart from custom or contract is the decision in *Beni Madhab Banerjee v. Jai Krishna Mookerjee* 7 B.L.R. 152 in which case Peacock, C.J., expressed the opinion that

speaking for myself, I should say that, if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable.

4. It is to be observed that in that case the tenure was created for building purposes, and as such was both assignable and inheritable according to the custom of the country. A further ground upon which the decision in that case was based was that the landlord having stood by while pucca buildings were erected upon the land in such circumstances the tenant reasonably might imagine that if the landlord's rights were thereby being infringed he acquiesced in such a violation of his rights and the landlord was not entitled to treat the tenant as a person without a legal interest in the land in question. The observations of Peacock, C.J., in that case were cited apparently with approval, by Jackson and Ainslie JJ., in *Durga Prasad Misser v. Brindaban Sookal* 7 B.L.R. 159. But that case was decided upon another ground. The view expressed by Peacock, C.J., since 1871 has never been cited with approval. On the contrary where, upon the facts of a case, the learned Judges were unable to distinguish *Beni Madhab Banerji's* case 7 B.L.R. 152 they usually expressed their doubt as to the accuracy of Peacock, C.J.'s observation as a correct statement of the law prior to the Transfer of Property Act.

5. In *Madhu Sudan Sen v. Kamini Kanta Sen* [1905] 32 Cal. 1023 Maclean, C.J., stated that:

there are, no doubt, certain observations of Chief Justice Peacock in that case, which give support to the appellant's contention. They were, however, unnecessary for the decision of the case, and we doubt whether they accurately state the law as now understood in Bengal.

6. See also *Hari Nath Karmakar v. Raj Chandra Karmakar* [1897] 2 C.W.N. 122, *Nabu Mondal v. Cholim Mullik* [1898] 25 Cal. 896 (F.B.), *Madhab Chandra Pal v. Bejoy Chand Mahatab* [1899] 4 C.W.N. 122, *Ram Charan Naskar v. Hari Charan Guha* [1908] 7 C.L.J. 107, *Ananda Mohan Saha v. Gobinda Chandra Roy* [1916] 20 C.W.N. 322, *Manmatha Nath Mitter v. Anath Bandhu Pal* [1919] 23 C.W.N. 201 and *Sulin Mohan Banerjee v. Raj Krishna Ghosh* [1921] 33 C.L.J. 193. In the last case at page 197 Acting Chief Justice Mookerji observed that:

under the law as it stood before the Transfer of Property Act, tenancies whether "of homestead lands or of agricultural lands were not transferable, in the absence of a, custom to the contrary or of an express contract to that effect,

7. In our opinion that must be taken to be the settled view of the Calcutta High Court. His Lordship in that case proceeded to add that the only recognized exception to this rule is that stated in the case of Beni Madhab Banerji v. Jai Krishna Mookerjee [1885] 10 Bom. 227. In that case Sir Barnes Peacock, C.J., observed that if one man grants a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary is assignable. The same view was subsequently taken in the case of Durga Prasad Misser v. Brindaban Sookul 7 B.L.R. 159.

8. The learned advocate for the appellants has contended, having regard to those observations of Acting Chief Justice Mookerjee, that it must be taken that where land was let for the purpose of residence before the Transfer of Property Act, 1882, the tenancy was assignable. We cannot accede to that contention. Acting Chief Justice Mookerji was also a party to Ram Charan Naskar v. Hari Charan Guha [1908] 7 C.L.J. 107 in which Rampini and Mookerji, JJ., held that we think that this plea cannot be sustained in the face of the rule laid down in Madhab Chandra Pal v. Bejoy Chand Mahtab [1899] 4 C.W.N. 574 and Madhu Sudan Sen v. Kamini Kanta Sen [1905] 32 Cal. 1023 in which it has been held that: the incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands created before the passing of the Transfer of Property Act in the absence of a custom to the contrary and we are of opinion that the Acting Chief Justice in Sulin Mohan's case [1921] 33 C.L.J. 193 when referring to the case decided by Chief Justice Peacock did not do so for the purpose of expressing approval of the observations in that judgment which have been cited above.

9. In our opinion these observations of Peacock, C.J., are opposed to the settled view of this Court and cannot now be regarded as correctly stating the law. It follows, therefore, that by purchasing Tilak Das's interest in this land the defendants obtained no title or interest therein, and they have no defence to the claim of the plaintiff's to khas possession of this plot of land.

10. For these reasons, in our opinion, the appeal fails and must be dismissed with costs.

Cuming, J.

11. I agree.