

(1938) 03 CAL CK 0011
In the Calcutta High Court

Sreedhar Chandra Roy and Others

APPELLANT

Vs

Sm. Kusum Kumari Roy and Another

RESPONDENT

Date of Decision : 18-03-1938

Acts Referred:

Citation : AIR 1938 Cal 478

Hon'ble Judges : Panckridge, J;Costello, J

Bench : Full Bench

Judgement

Panckridge, J.—This is an appeal under the provisions of Clause 15 of the Letters Patent from a judgment of Biswas J., affirming the decree in second appeal of the learned Additional Subordinate Judge of Alipur who allowed the plaintiff's appeal from the-decree of the third Munsif at Alipur dismissing the plaintiff's suit. The plaintiff sued for declaration of her title to and for possession of a certain Jalkar tenancy, the defendants being the purchasers of that tenure at an auction sale. The sale was inexecution of a rent decree obtained by the landlord, the owner of the Jalkar. The plaintiff's husband was impleaded in the rent suit and it was suggested that that being so, the plaintiff could not institute the present suit as she was a mere benamidar of her husband. The learned Subordinate Judge found as a fact that the plaintiff was not her husband's benamidar and that finding cannot be questioned in second appeal. The plaintiff bases her title on a transfer in the year 1918 made by one who held the tenancy in virtue of a maurashi makarari patta dated 3rd January 1892, granted by the landlord. The defendants, that is to say, the appellants before us, contend that the grant to the plaintiff was invalid by reason of a certain clause in the patta. The clause translated into English is as follows:

If at any time you (grantees) transfer by sale any land (comprised in the tenure), then the transferee shall be bound to pay us (grantors) a chauth or one-fourth of the consideration money as khariji (mutation) fee; in default of such payment, his transfer shall not be valid.

2. The learned Subordinate Judge was off opinion that this stipulation in the

patta did not render the grantee's transfer to the plaintiff inoperative and he accordingly made a decree in favour of the plaintiff. Biswas J. was of the same opinion and affirmed the decree of the Subordinate Judge. The sole question to be determined is the construction and the effect of the clause which I have just set out. The learned advocate for the respondents has not been able to point to any statutory provision which would invalidate such a clause,; if otherwise on a proper construction it has the effect for which the appellant contends. The learned Judge has referred to several cases, and in our opinion has rightly taken the view that clauses of this sort should not be dealt with on the basis that they are covenants running with the land, for it is clear from the language of the clause that there is no covenant on the part of anyone to perform any obligation. He has however upheld the judgment of the learned Subordinate Judge, apparently basing his opinion upon the authority of a case which has been cited to us by the advocate for the respondents. That is the case in *Basarat Ali Khan v. Manirulla* (1909) 36 Cal 745. The lease in that case included a condition in the following terms:

You (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect.

3. There was no right of re-entry reserved and in those circumstances, the Court held that an assignment by the lessee was operative, in spite of the condition forbidding a transfer without the permission of the landlord. It is clear from the judgment of Sir Lawrence Jenkins and Mookerjee JJ. that they took the view that this clause in the lease was in the nature of a covenant. That being so, it follows on the principles enunciated in *Williams v. Earle* (1868) 3 QB 739, that though there was a covenant not to assign, the assignment was nevertheless operative and the landlord's only remedy in default of a clause giving him a right of re-entry was a suit for damages. In our opinion, the language of the clause with which we are dealing is not appropriate to a covenant. It provides that in the case of a transfer, the transferee shall pay one-fourth of the consideration money to the landlord and also provides that in default of such payment, the transfer shall not be valid. In our opinion, this clause is, in effect, a restrictive condition which limits the power of alienation to [which the grantee under the *maurashi Imakarari patta* would, in default of special conditions, be entitled. The matter is really a simple one, and the principles which govern it are not peculiar to the law of landlord and tenant and are part of the ordinary rules as to the construction of contracts. The result of the authorities is very conveniently summarized in *Redman's Law of Landlord and Tenant*, Edn. 8 p. 389. It is there stated as follows:

If a term is granted subject to a condition against assignment, an assignment by the lessee will be void; but if the restraint is by covenant only, the lessee, by assigning, commits a breach of covenant but the assignment itself is not void, though the landlord can put an end to it as soon as the assignment comes to his knowledge if the lease contains a power of re-entry.

4. If, as is not disputed, a grantor can by a stipulation withhold from the grantee, the power to assign absolutely, it follows that he can make the power to assign subject to conditions, and can stipulate that any purported assignment which does not fulfil those conditions shall not be valid. This appears to us to be the position in this appeal. It follows that the appeal must be allowed and the decree of the learned Munsif must be restored. The appellants are-entitled to their costs in all the Courts.

Costello, J.

5. I am of the same opinion.