

(1909) 11 CAL CK 0013
In the Calcutta High Court

Tamizuddin Khan and Others

APPELLANT

Vs

Khoda Nawaz Khan and Others

RESPONDENT

Date of Decision : 19-11-1909

Acts Referred:

Citation : (1909) 11 CAL CK 0013

Judgement

1. The facts giving rise to this second appeal may be shortly stated thus.
2. The defendant No. 7 was the tenant of a certain non-transferable holding. He sold If kauris out of his holding to the defendants Nos. 1 to 4. The landlord declined to recognise that transfer but accepted a surrender of the If kauris from the defendant No. 7, and then settled the same, by means of a registered qabuliat, with the plaintiffs who, however, failing to obtain possess from the defendants Nos. 1 to 4, brought the suit to recover khas possession of that area or adjudication of their title thereto.
3. The first Court decreed the suit in full. On appeal to the Subordinate Judge, the decision of the first Court has been reversed the sale by the defendant No. 7 to the defendants Nos. 1 to 4 has been held to be an incumbrance within the meaning of Section 86 Sub-Section ((5) and (7) of the Bengal Tenancy Act. The Subordinate Judge has further declared that rent for If 1? kauris must be paid by the defendants Nos. 1 to 4 to the superior landlord and that these defendants have a right of occupancy in their purchased land. In second appeal by the plaintiffs, who, as we have already mentioned, are the new tenants under the superior landlord after acceptance of the surrender by the defendant No. 7, the contentions are, substantially, these: that the sale by the defendant No. 7 to the defendants Nos. 1 to 4 is not an incumbrance within the meaning of the Section (86), that the surrender of the If kauris was valid even without the consent of the defendants Nos. 1 to 4, and that the further reliefs granted by the Subordinate Judge, as to the liability for payment of rent and the declaration of the occupancy right of the defendants Nos. 1 to 4, cannot be sustained.
4. The Subordinate Judge has accepted the definition of "incumbrance" in Section

161 of the Rent Law. That definition was imposed by the Legislature for the purposes of Chapter XIV and runs thus: "The term incumbrance, used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein."

5. There is no other definition of "incumbrance" available to us; but we may mention that in the Transfer of Property Act where also there is no definition of the words the meaning attached to it in the Conveyancing Act of 1881 has been accepted, namely, a mortgage-in-fee, or for a less estate, and a trust for securing money and a lien and a charge of a portion, annuity or other capital or annual sum."

6. Now, can it be said that the "incumbrance" in Section 86 of the Bengal Tenancy Act includes a sale of a portion of a non-transferable holding. In *Jogeshwar Mozumdar v. Abed Mohammad Sircar* 3 C.W.N. 13, there is an observation by the learned Judges that "a lease just as much as a sale, gift or mortgage, must come within the meaning of the word "incumbrance." An incumbrance would seem to mean anything that restricts or limits the rights of the patnidar, and interferes with his enjoyment of the subject of the putni." This observation, however, is not conclusive in the present circumstances. The attention of the Court in that case was primarily directed to the question whether a lease amounted to an "incumbrance." We entertain no doubt that if the defendant No. 7 had created a sub-lease of his own interest, that, would have amounted to an "incumbrance" within the meaning of the Sub-section (6) of Section 86; but we are here dealing with the case of sale. To enable the defendants Nos. 1 to 4 to fall on Sub-section (6), it must be shown that the sale to them was a valid sale; and further, the discussion as to the validity of that sale and the resultant interests arising therefrom, must be limited to the position of the transferor and transferees, and not to the position of the superior landlord, still less to that of the plaintiffs in the present suit. Now, the holding of defendant No. 7, was non-transferable and the limitation of the interest of the transferor, so far as the If kauris transferred is concerned, amounted to an absolute extinction of his right in that land as between himself and the defendants Nos. 1 to 4. The transferees may, in confineable circumstances, have a right to recover the purchase-money if the transaction of sale be held to be invalid. But as regards the If kauris with which we are now dealing the interest in the same passed completely to the transferees. That transfer therefore was not a limitation of the tenant's interest, so far as the defendant No. 7 was affected but a complete extinction of his interest restricted to the If kauris. There is no reported case exactly in point; and although we have been referred to certain authorities in the course of the argument, in view of the observations we have made, we think that the judgment of the Subordinate Judge cannot stand. It is accordingly set aside; the plaintiff's suit is decreed and the judgment of the first Court will be restored with costs in all the Courts.