
(1909) 06 CAL CK 0070
In the Calcutta High Court

Uday Chandra Das Bairagi

APPELLANT

Vs

Hari Das Bairagi

RESPONDENT

Date of Decision : 07-06-1909

Acts Referred:

Bengal Tenancy Act, 1885 — Section 22

Citation : 3 Ind. Cas. 417

Hon'ble Judges : Lawrence Jenkins, C.J.; Mookerjee, J

Bench : Division Bench

Judgement

1. The plaintiffs,, one of whom is the appellant before us from the judgment of Mr. Justice Doss in second appeal, brought this suit to recover possession of a piece of land which they alleged belonged to their maternal grandfather Ram Das Bairagi. The claim was contested by the defendants who pleaded, first, that the plaintiffs were not the heirs of Ram Das Bairagi, and, secondly, that even if they were the heirs, they, the defendants, had a better title by virtue of a devise to them of the property in dispute. The interest of Ram Das Bairagi in this property was that of a raiyat who had an occupancy right, and an argument of considerable interest has been addressed to us both on behalf of the appellant and the respondent, as to whether an interest of that kind could be bequeathed. Had it been necessary for us to determine that point, then we should have had to refer to a Full Bench two points. The first point would have been whether a holding in respect of which there was a non-occupancy right, was heritable or not. The state of the authorities on that point cannot be regarded as satisfactory; for while on the one hand there is the decision of a Division Bench of this Court in *Karim Chowkidar v. Sundar Bewa* 21 C. 207 : 1 C.W.N. 88 to the effect that it is not heritable, on the other hand in *Lakhan Narain Das v. Jainath Panday* 34 G. 516 : 11 C.W.N. 626 : 5 C.L.J. 457 : 2 M.L.T. 219 (F.B.) the point though apparently referred was left undecided inasmuch as two members of the Full Bench were of opinion that the holding was heritable, one was of opinion that it was not, and two other members did not express any opinion except so far as the Bengal Tenancy Act was concerned.

2. The second point would have been whether an occupancy right may be severed from the tenancy right or whether as decided in *Girish Chandra Chowdhry v. Kedar Chandra Boy* 4 C.W.N. 569 : 27 C. 473 such separation is, under no circumstances, possible except to the extent and in the manner indicated in Section 22 of the Bengal Tenancy Act.

3. But while we should have been glad to refer these two points to a Full Bench, it would not be right for us to do so in the circumstances of this case, because there is another and, in our opinion, a complete, answer to the claim of the plaintiffs, and that is that the title by *Leirship* is not made out. The first Court appears to have thought that the contention of the defendants that there was a superior heir could not succeed, because the plaintiff's only rival was a daughter who, in the opinion of the learned Munsif, had no prospect of getting a son. This point was not touched. by the lower appellate Court. We, in second appeal, under the extended power given to this Court, are entitled to deal with this matter, and, on the facts found, we are clear that the conclusion of the learned Munsif is one that cannot be supported. In fact it is apparent from his judgment that he did not attribute much importance to this conclusion as there was another ground on which his judgment was based. We think that the plea advanced by the defendants that the plaintiffs are not the heirs is established; and on that ground we think that the conclusion of Mr. Justice Doss is correct.

4. We, therefore, dismiss this appeal with costs.