

(1917) 08 CAL CK 0012
In the Calcutta High Court

Umesh Chandra Dutta by his Father and Next Friend Jugal
Kishore Dutta

APPELLANT

Vs

Joy Nath Das and Others

RESPONDENT

Date of Decision : 24-08-1917

Acts Referred:

Citation : 43 Ind. Cas. 779

Hon'ble Judges : N.R. Chatterjea, J;Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—The only question arising for decision in this case is whether a portion of a non-transferable occupancy holding can be devised by Will.

2. The facts are extremely simple. The holding in question belonged to three brothers, Ram Jiban Das. Jugal Kishore Das and Lob Narain Das. Lob Narain died on the 23rd Baisakh 1314, having by his Will, dated the 30th Baisakh 1928 (which was duly admitted to probate), bequeathed his share to his widow, Jugat Tara.

3. The widow subsequently made a gift of the property sued for to the plaintiff. The defendants claim through the other brothers. So the claimants to the property are on the one hand a person claiming through the Will of Lob Narain and on the other hand persons claiming through his heirs. Now it was decided in this Court in the case of Arnulya Ratan Sarkar v. Tanimi Nath Dey 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254pc that a non-transferable occupancy holding is not capable of being devised by Will. This case was followed in the case of Kunja Lal Roy v. Umesh Chandra Roy 27 Ind. Cas. 352 : 18 C.W.N. 1294. These cases are clearly binding on us and govern this case, unless a different rule applies with reference to a portion of a non-transferable occupancy holding.

4. Reliance in the present case has been placed by the appellant on the decision of a Full Bench of this Court. But as Mookerjee, J., points out, the validity as

against the raiyat of transfers by him of his holding for value depends on the doctrine of estoppel and in cases of involuntary transfer by sale in execution where the ryot does not apply to have the sale set aside, on the doctrine of acquiescence or waiver. It is suggested that the decision of the Full Bench above referred to has modified considerably the remarks of the learned Judge, but I am unable to agree to this view.

5. The learned Judges in *Arnulya Ratan Sarkar v. Tarini Nath Dey* 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254 lay down definitely that a raiyat has no right of testation with regard to a non-transferable occupancy holding and the principles enunciated by the learned Judges apply equally to the whole or a portion of occupancy holding. The principles laid down by the Full Bench on which transfers inter vivos for value of a holding are supported do not apply to the case of a bequest by Will.

6. The present case does not in any way involve the consideration of the rights of the landlord. The only question is one of competition between a person claiming under a Will of an occupancy raiyat and a person claiming under his heir.

7. I am of opinion that the present case is governed by the principles laid down in *Arnulya Uatan Sarkar v. Tarini Nath Dey* 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254pc.

8. That being so, in my opinion, the present appeal fails.

9. It is conceded that the plaintiff-appellant is entitled to a declaration that he is entitled to the share in the *khanabiri* which belonged to Lob Narain and as transferred to the plaintiff by the deed of gift executed by Lob Narain's widow but that his claim for possession of the *khantbari* lands should be disallowed. It is also agreed that the *mesne* profits, instead of being ascertained in the execution proceedings as directed by the lower Appellate Court, should be ascertained in this suit. Subject to these slight variations the decree appealed from is confirmed and the present appeal stands dismissed with costs.

Chatterjea, J.

10. The question involved in this appeal relates to the validity of testamentary disposition of a part of an occupancy holding, not transferable by custom. It appears that a certain occupancy holding belonged to three brothers one of whom Lob Narain by his Will bequeathed his share in the holding to his wife Jagat Tara absolutely, and the latter made a gift of the share of the *jote* to her brother's son the plaintiff. The defendants, the sons of the other two brothers of Lob Narain (who are the heirs of the latter on the death of Jagat-Tara), dispossessed the plaintiff and hence the suit.

11. The only reference in the Bengal Tenancy Act to the testamentary power of an occupancy raiyat over his holding is contained in Section 178. Sub-Section 3, Clause (i), of that section provides that nothing in any contract between a landlord and a tenant, after the passing of the Act, shall take away the right of a

raiyat to transfer or bequeath his holding in accordance with local usage. It is not suggested in the present case that there is any local usage under which a raiyat can bequeath his holding. Section 26 of the Act deals with the devolution of occupancy rights on the death of a raiyat dying intestate in respect of an occupancy holding, but no implication arises from the section in favour of testamentary disposition generally, because a raiyat has the power to bequeath his holding in accordance with local usage.

12. In two recent cases in this Court, it has been held that a raiyat is not competent to make a testamentary disposition of a nontransferable occupancy holding. See *Amulya Ratan Sarkar v. Tarini Nath* 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254pc and *Kunja Lal Roy v. Umesh Chandra Roy* 27 Ind. Cas. 352 : 18 C.W.N. 1294. In these cases the entire holding appears to have been devised.

13. In the first case it was pointed out that in the case of a transfer inter vivos for value, there is an estoppel in favour of the transferee as against the transferor or persons claiming under the latter and that even assuming for the sake of argument that the same principle applies to the case of a gift, the principle can have no operation in the case of a testamentary devise and the contrary view taken in the case of *Hari Das v. Udoy Chandra* 12 C.W.N. 1086 : 8 C.L.J. 261, by Doss, J., was dissented from. As observed in *Amulya Ratan's* case 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254 it is open to the testator to change his mind up to the last moment of his life and revoke his Will, and the right of the heir to the holding under the law comes into operation immediately on the death of the testator. That being so, the grounds upon which a testamentary disposition of an entire holding is invalid would apply equally to such a disposition of a part of the holding.

14. It is contended, however, on behalf of the appellant that the case of *Amulya Ratan Sarkar v. Tarini Nath Dey* 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254 pc was decided before the Full Bench decision in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* 27 Ind. Cas 61 : 18 C.W.N. 971 : 20 C.L.J. 52 : 42 C. 172, and that the Full Bench has held that the occupancy raiyat has a property in his holding which can be transferred. One of the questions (in the third case) referred to the Full Bench no doubt was whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all, and the answer was in the affirmative. But the Full Bench did not lay down that an occupancy raiyat has an absolute power of disposal over his holding. If it were intended to hold that he had such a right, it would have been wholly unnecessary to consider or lay down in what cases a transfer is operative against the raiyat. The answer must be read with the question referred, viz., whether it can be transferred at all, and subject to what was said in the earlier part of the judgment where the Full Bench laid down that in certain cases a transfer by an occupancy raiyat of his holding is operative against him. A transfer for value of the whole or a part of an occupancy holding apart from custom or

local usage is, according to the Full Bench, operative against the raiyat (a) where it is made voluntarily, (6) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, and the transfer of the whole or part is operative against all persons (other than the landlord) where it is operative against the raiyat. The Full Bench did not deal with the power of an occupancy raiyat to bequeath his holding nor lay down any principle contrary to that upon which the case of *Amulya Ratan Sarkar v. Tarini Nath Dey* 27 Ind. Cas. 235 : 18 C.W.N. 1290 : 21 C.L.J. 187 : 42 C. 254pc proceeded.

15. The validity of a transfer of the whole or part of an occupancy holding made voluntarily appears to depend upon the principle of estoppel, and that of a transfer made involuntarily upon the principle of acquiescence and waiver. No such principles are applicable to the case of a testamentary disposition.

16. That being so, the grounds upon which a testamentary disposition of an entire holding is invalid, would apply equally to such a disposition of a part of the holding.

17. It is true the Full Bench laid down that in the case of a transfer of a part of a holding, the landlord is not ordinarily entitled to reenter. But the considerations upon which the right of the landlord as against a transferee of a part of a holding have to be determined have no bearing upon the question of the validity of a bequest of a part of the holding as between the devisee and the heir-at-law.

18. I am accordingly of opinion that a portion of an occupancy holding, apart from custom or local usage, cannot be devised by Will, and the appeal must, therefore, be dismissed with costs subject to the slight variation agreed to between the parties as mentioned in the judgment of my learned brother, Mr. Justice Fletcher.