

(1896) 11 CAL CK 0003
In the Calcutta High Court

Upendra Chunder Chowdhry and Others	APPELLANT
Vs	
Kallinath Chakravarti and Others	RESPONDENT

Date of Decision : 30-11-1896

Acts Referred:

Citation : (1897) ILR (Cal) 212

Hon'ble Judges : Rampini, J;Banerjee, J

Bench : Division Bench

Judgement

Banerjee and Rampini, JJ.—This appeal arises out of a suit brought by the plaintiff, respondent, to recover khas possession of his share in certain lands on the allegation that the principal defendants, who alleged that they were in possession of the same as purchasers of the jote rights of the former tenants thereof, had no right to remain on the land, the alleged jotes not being transferable, and that as the plaintiff's co-sharers have not joined with them in the suit, they are made defendants.

2. The co-sharer defendants did not enter appearance, but the principal defendants defended the action on various allegations of which it is necessary now to notice only one, namely, that the plaintiff was not entitled to recover khas possession, as the original tenants were still in possession. This objection led to an issue being raised in the first Court, which was the seventh issue in the case. Both the Courts below have found for the plaintiff upon that issue, and they have accordingly given him a decree for so much of the land as was found to be in the possession of the principal defendants.

3. In second appeal two objections have been raised against the judgment of the lower Appellate Court, first, that it was wrong in giving the plaintiff any decree at all when he was only a fractional co-sharer in the zemindari and the other co-sharers did not join as plaintiffs; and, second, that upon the facts found, the lower Appellate Court was wrong in giving the plaintiff any decree for khas possession when it ought to have held that the original tenants, being still in possession of the holdings though as sub-tenants under the defendants, a suit

for khas possession was not maintainable.

4. The first objection was never raised in either of the Courts below, and we do not think it right and proper to allow it to be raised at this last stage of the case. It is an objection which, if raised in time, might have been met. Moreover, upon the facts found by the lower Appellate Court, the defendants are mere trespassers upon the land, and as against them there could be no objection to a fractional co-sharer in the zemindari maintaining a suit for khas possession.

5. In support of the second contention, two cases have been relied upon. One of these, the case of Kabil Sardar v Chunder Nath Nag Chowdhry ILR 20 Cal. 590, has been considered by the Courts below, and they have both found that the facts of this case are very different from those of the case cited. In our opinion the Courts below are quite right in holding that that case has no application to the present. There a share of the holding was sold by the original tenants to certain members of their family and, after the sale, the entire holding remained jointly in the possession of the original tenants and the transferees, and the rent of the holding continued to be paid in its entirety in the names of the original tenants and the transferees. In that state of things, the lower Appellate Court having given the plaintiff, the landlord, a decree for khas possession, all the defendants in the suit, that is, the original tenants and the transferees, appealed to this Court, and this Court reversed the decree appealed against and dismissed the suit of the plaintiff, holding that, as there had been no abandonment of the holding by the original tenants, the landlord had acquired no right to re-enter. In the present case on the contrary the facts found are, that the rights of the original tenants have been entirely transferred to other persons, that some of these transferees are in possession of portions of the tenures upon payment of rent to the landlord or his ijaradars, that in regard to the remaining lands of the tenures, though the original tenants may be still in possession, they are in possession as sub-tenants of the transferees and have paid no rent to the landlord for the last ten or eleven years. The original tenants were not made parties to the suit nor was any objection taken to the suit proceeding in their absence, and the present appeal is only on behalf of the purchasers. Upon a review of these facts, the lower Appellate Court has distinctly come to the conclusion that the former owners of the tenures which the defendants have purchased have abandoned their holdings under the plaintiff. That being so, we think that the facts of this case are so essentially different from those of the case of Kabil Sardar v. Chunder Nath Nag Chowdhry ILR 20 Cal. 590 that the principle of that decision can have no application to the present case.

6. The other case relied upon is that of Srishteedhur Biswas v. Madan Sirdar I . L. R. 9 Cal. 648. There also the whole of the tenure after the transfer Continued in the possession of the original tenants under a sub-lease from the transferees, and the party who before the lower Appellate Court contested the correctness of the decree for ejectment given by the first Court, was one of the original tenants; the lower Appellate Court held that as there had not been any

abandonment of the holding of the original tenants, the suit for ejectment was not maintainable; and that decision was affirmed on second appeal by the plaintiff to this Court. That considerable importance was attached to the fact of the original tenant having been the party who contested the decree for ejectment, would appear from the observations contained in the last but one paragraph of the judgment of Mr. Justice Wilson, in which he distinguished that case from the case of Dwarkanath Misser v. Hurrish Chunder ILR 4 Cal. 925.

7. We are of opinion, therefore, that the two cases relied upon are both distinguishable from the one now before us; and that we must here follow the general rule laid down by the Full Bench in the case of Narendra Narain Roy v. Ishan Chunder Sen 13 B. L. R. 274: 22 W. R. 22 and hold upon the facts found by the lower Appellate Court that the landlord was entitled to the decree for ejectment that has been made in his favour. The appeal, therefore, fails and must be dismissed with costs.