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**(1917) 01 CAL CK 0044**  
**In the Calcutta High Court**

Zamir Munshi

APPELLANT

Vs

Bisseswari Debya Chowdhurain and Others

RESPONDENT

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**Date of Decision :** 30-01-1917

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 86, 86(6)

**Citation :** 40 Ind. Cas. 544

**Hon'ble Judges :** Newbould, J;D. Chatterjee, J

**Bench :** Division Bench

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## Judgement

D. Chatterjee, J.—In this case certain tenants sold portions of their occupancy holdings to the principal defendant and surrendered those portions only to the landlord and took from him leases at an enhanced rent in respect of the residue of their holdings. The landlord by virtue of the surrender wants to eject the principal defendant. The first Court disallowed the prayer for khas possession and the lower Appellate Court has allowed it. The question before us is whether the decree for khas possession is right. The judgment of the lower Appellate Court finds support in the cases of Tamizuddin Khan v. Khoda Nawaz Khan 5 Ind. Cas. 116 : 14 C.W.N. 229 : 11 C.L.J. 16 and Ramoni Mohan Roy v. Kalimuddi 17 Ind. Cas. 682 : 17 C.W.N. 1101. It is contended, however, that these cases were wrongly decided and in any case are no longer binding authorities, as they are inconsistent with the later Full Bench ruling in Dayamoyi v. Ananda Mohan Roy 27 Ind. cas. 61 : 18 C.W.N 971 20 C.L.J 52 : 2 C. 172 and have been questioned in the case of Asgar Ali v. Gouri Mohan Roy 21 Ind. Cas. 564 : 19 C.W.N 601 : 18 C.L.J. 257. I think these contentions are right and that the judgment of the lower Appellate Court is wrong. It was held in Dayamoyi's case 27 Ind. Cas. 61 : 18 C.W.N 971 20 C.L.J 52 : 2 C. 172 that the sale of a portion of an occupancy holding is valid and the landlord has no right to khas possession of the land. Now what more has taken place in this case? The tenants sold portions of their occupancy holdings and had no right or interest left in the same. Then they made a show of a surrender of the self-same lands to the landlord. They had nothing to surrender and the landlord had no right to eject the purchaser. Then there is an

amalgamation of these two nothings and at once the landlord is competent to eject the purchaser. It is true the landlord was not bound by the sale and could, u/s 85(7), Bengal Tenancy Act, accept a partial surrender; but this means a surrender of something which the tenant had to surrender. Apart from the meaning of the word "surrender" in English Law, the word has a meaning as a word in the English language, to give up or resign or yield to the possession of another; but the tenant has no right to give up or resign or yield what he has already sold. In this view of the case surrender is a misnomer for the act of the tenant and Section 86(5), even if it could apply to part-surrender (for the clause speaks of surrender of his holding), would not entitle the landlord to take khas possession. Nor in this view of the case is it necessary to consider whether the word incumbrance in Section 86(6) includes the sale of a portion of a holding.

2. Having regard to the fact that I differ from the decision of the Court in the cases of *Tamieuddin Khan v. Khoda Nawaz Khan* 5 Ind. Cas. 116 : 14 C.W.N. 229 : 11 C.L.J. 16 and *Ramoni Mohan Ray v. Kalimuddi* 17 Ind Cas. 682 : 17 C.W.N. 1101 the better course would perhaps have been to refer the matter to the Full Bench, but as I cannot do so alone and as the second branch of the argument, namely, the effect of *Dayamoyi's* case 27 Ind. Cas. 61 : 18 C.W.N. 971: 20 C.L.J 52 : 2 C. 172 may be sufficient to dispose of the case I would allow the appeal.

3. As we differ on a point of law, the case must go to the Chief Justice for reference to a third Judge. The point of law in respect of which we differ is-- whether a raiyat, having sold a part of his occupancy holding, can surrender the self-same part to his landlord so as to entitle the latter to take khas possession of the said part by ejecting the purchaser?

Newbould, J.

4. The facts as found in this appeal are as follows:--The tenants of these holdings with occupancy rights under the plaintiff sold the plots of land in suit, which form portions of the lauds of these holdings, to the principal defendant who is the appellant in this appeal. Subsequently these tenants orally relinquished the lands in suit in favour of the plaintiff and took fresh settlements at enhanced rates by executing *kabuliyats* in respect of the remaining lands of their holdings, The appellant alleged that he had obtained a settlement of the disputed land from the plaintiff but this was found against him by the lower Appellate Court,, who granted the plaintiff a decree for khas possession.

5. On behalf of the appellant it is contended that the tenants after their: sale to the appellant-defendant were divested of all their interests in the land in suit and had nothing left to surrender to their landlord and consequently there was no valid surrender. It is also contended that the appellant-defendant, as a transferee of a portion of an occupancy holding, as not liable to ejectment and further that he is protected by the provisions of Section 86(6) of the Bengal Tenancy Act, which provides that, when a holding is subject to an incumbrance secured by a

registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.

6. In support of the first contention a passage from Foa's Landlord and Tenant (5th edition, page 624) was read to us. But the general principles of English Law that are relied on have no application to the present case. No English case could be cited to support the contention that the landlord would be bound by a transfer made by a tenant who had covenanted not to transfer. The position of a tenant of a holding not transferable without the landlord's consent is similar to that of an English tenant who has made such a covenant.

7. In my opinion the facts of the present case cannot be distinguished from the facts of the cases of *Tamizuddin Khan v. Khoda Nawaz Khan* 5 Ind. Cas. 116 : 14 C.W.N. 229 : 11 C.L.J. 16 and *Ramoni Mohan Roy v. Kalimuddi* 17 Ind Cas. 682 : 17 C.W.N. 1101. In both these cases it was held that the sale of a portion of a non-transferable holding did not create an "incumbrance" on the tenancy within the meaning of Section 86(6) of the Bengal Tenancy Act. In the former of these cases the tenant sold a portion of his holding without the landlord's consent and then surrendered that portion. The landlord then settled this surrendered portion with the plaintiff and it was held that the plaintiff could eject the transferee. In the latter case the facts still more closely resemble the facts of the present case. The tenant after selling a portion of his holding surrendered that portion and executed a *kabuliyat* in respect of the remaining portion of the holding. It was held that upon such surrender the landlord was entitled to eject the transferee as a trespasser.

8. The learned Vakil for the appellant did not deny that these cases were in point but contended, firstly, that the decisions were erroneous and secondly, that they were opposed to the later decision of the Full Bench of this Court in *Dayamayi*'s case 27 Ind. cas. 61 : 18 C.W.N 971 20 C.L.J 52 : 2 C. 172. In support of the first of these contentions he relies on the decision of a Bench of this Court in *Asghar Ali v. Gouri Mohan Roy* 21 Ind. Cas.564 : 19 C.W.N 601 : 18 C.L.J. 257. There the accuracy of the decision in *Tamizuddin Khan v. Khoda Nawaz Khan* 5 Ind. Cas. 116 : 14 C.W.N. 229 : 11 C.L.J. 16 was doubted and Mookerjee, J., in his judgment pointed out that at least four points required consideration before that case could be held to furnish a correct exposition of the law. I will, therefore, consider these points seriatim. The first point is that "the learned Judges adopted for the purposes of the interpretation of Section 86, which finds a place in Chapter IX of the Bengal Tenancy Act, the definition of the term incumbrance given for the purpose of Chapter XIV alone." This statement appears to be incorrect. The learned Judges remarked that the Subordinate Judge had accepted the definition of incumbrance in Section 161 of the Rent Law. But though they quoted this definition and stated that the word was nowhere else defined in Indian Acts, they appear to have accepted the meaning attached to this word in the English Conveyancing Act of 1881 [44, & 45 Viet. c. 41, Section 2(vii)]

9. The second point noticed is that "the decision of this Court in the case of Chundra Sakai v. Kalli Prosanno Chuckerbutty 23 C. 254 : 12 Ind. Dec. (N.S) 170 shows that an exchange is an incumbrance within the meaning of Section 161 of the Bengal Tenancy Act," and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale." The answer to this objection is that in the case cited the meaning of incumbrance as defined in Section 161, Bengal Tenancy Act, was being considered and as pointed out above the definition in that section is not applicable to the word as used in Section 86(6).

10. The third point is that "the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under Sub-section (6) of Section 86." The result may seem anomalous, but that does not make the decision bad law. It is similar to the effect of the Full Bench decision in Dayamoyi's case 27 Ind. Cas. 61 : 18 C.W.N 971: 20 C.L.J 52 2 C. 172 which puts the purchaser of the whole of a non-transferable holding in a worse position than the purchaser of a part. The last point is that, "it may be a question whether there can be a surrender effective for the purposes of Section 86 when the conditions mentioned in Sub-section (5) cannot be fulfilled." Sub-section (5) of Section 80 is as follows:-- "When a raiyat has surrendered his holding, the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself." I cannot see that this clause is any bar to the landlord making a fresh settlement with the original tenant after his surrender. Even if the agreement to make a re-settlement was entered into before the surrender, this, in the absence of collusion, would not make the surrender invalid. There is nothing in the law to prevent a surrender being made subject to conditions. In the case of Asgar Ail v. Gouri Mohan Roy 21 Ind. Cas.564 : 19 C.W.N 601 : 18 C.L.J. 257 the question of the correctness of the decision in Tamieuddin Khan v. Khoda Nawaz Khan 5 Ind. Cas. 116 : 14 C.W.N. 229 : 11 C.L.J. 16 was expressly reserved. After considering the objections throwing doubt on its correctness, I see no sufficient reason for refusing to follow it, on the point that a sale of a portion of a holding is not an incumbrance within the meaning of Section 86(6), Bengal Tenancy Act. If it is not an incumbrance, Clause (7) of that section clearly provides for the valid surrender of a part of the holding.

11. The learned Vakil for the appellant relied on the unreported case of Haswni Bibi v. Sadir Mamttd Sarkar 21 Ind. Cas. 252 which was followed in Ram Udar Singh v. William Cox 27 Ind. Cas. 19 C.W.N. 268. Both these cases are distinguishable on the ground that the transfers made by the raiyat were by way of mortgage and were, therefore, obviously incumbrances within the meaning of Section 86(6). The recent case of Naba Kishore Saha v. Dhananjoy Saha 33 Ind. Cas. 611 : 20 C.W.N. 610 is not in point, as there the pretended surrender of the whole holding was held to be a collusive surrender and not a real surrender, Here there is no finding that the surrender was collusive and I see no reason for thinking that the landlord had any fraudulent intention in acting as he did.

12. Finally, the effect of the decision of the Foil Bench in Dayamoyi's case 27 Ind. Cas. 61 : 18 C.W.N 971 : 20 C.L.J 52 : 2 C. 172 has to be considered. It was there decided that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of Section 87 of the Bengal Tenancy Act, or (b) "a relinquishment of the holding, or (c) a repudiation of the tenancy. This does not help the appellant, as in the present case there has been a relinquishment of the holding. It may be conceded that relinquishment of the holding means a re-linqnishment of the whole holding but the whole holding has been surrendered. The part sold to the defendant appellant was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as an implied surrender of the remaining portion. Clause (3)(a) of Section 86 of the Bengal Tenancy Act shows that there can be implied surrender under that Act as well as u/s 111 of the Transfer of Pro-party Acts which is not applicable to leases, for agricultural purposes. It is contended that it was not the plaintiff's case as set forth in the plaint that there was a surrender of the whole holding. The facts that the tenants made estifa of some of the land of their holdings and executed separate registered kabuliyats in favour of the plaintiff in respect of the remaining lands are set out in the plaints It was open to the plaintiff at the trial to agree that these facts amountel to a surrender in law of the whole holding.

13. I consider, therefore, the lower Appellate Court was right in. granting the plaintiff's decree of khas possession and would dismiss this appeal with costs.

14. As their Lordships differed the case was referred to a third Judge, Chitty, J., who, however, did not decide the case as he thought that the judgment of the two Judges proceeded upon different views of the facts. The case was then sent back to the learned Judges, who dismissed the appeal with costs under Sub-section 2 of Section 98 of the Civil Procedure Code. We understand an appeal u/s 15 of the Le ters Patent has been preferred by the appellant and is pending.