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 MATHURA
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 DASI
 v.
 HARAN
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 SAHA.

Corporation (1), and to another in England, *Burgoine v. Taylor* (2). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

Appeal allowed.

Attorney for the appellant: *N. C. Bose.*

Attorneys for the respondents: *K. K. De, B. P. Chunder, B. L. Mookerjee, S. C. Ghosh* and *P. N. Banerjee.*

J. C.

(1) (1866) 2 Bom. H. C. 282.

(2) (1878) L. R. 9 Ch. D. 1.

APPELLATE CIVIL.

Before Richardson and Imam JJ.

KUNJA KISHORE PAL CHOWDHURY

v.

BAMA SUNDARI DASEE.*

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 Dec. 17.

Landlord and Tenant—Non-transferable occupancy holding—Occupancy holder transferring part of his holding without the knowledge or consent of the landlord—Transfer, validity of—Non-payment of rent by tenant—Disclaimer—Suit by landlord for khas possession of the transferred portion.

The holder of a non-transferable occupancy holding has no power to create by transfer a title good against his landlord.

Where a tenant transferred by a deed of sale a portion of his non-transferable occupancy holding without his landlords' knowledge or consent and subsequently refused to pay the rent of the transferred portion to the landlords on the ground that it was sold and relinquished in favour of the purchaser, paying rent only for the portion of the holding which remained

*Appeal from Appellate Decree, No. 3882 of 1913, against the decree of Sarat Chandra Sen, Subordinate Judge of Dacca, dated Aug. 12, 1913, reversing the decree of Amulya Gopal Roy, Munsif of Naraingunge, dated April 25, 1912.

in his possession, and where such apportionment of the rent was accepted by the landlords :—

Held, that such an act on the part of the tenant amounted to a disclaimer to all right, title and interest to the transferred part, and that the part transferred was at the disposal of the landlords, unless any third person could make out a good title to possession as against them.

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SECOND APPEAL by Kunja Kishore Pal Chowdhury and others, the plaintiffs.

By a nominal deed of gift one Kali Prasanna Dhar transferred to his wife his entire non-transferable occupancy holding and subsequently sold a portion of it to one Krishna Mohan Dutt in the name of the latter's mother. Both these transactions were effected without the knowledge or consent of the landlords. After the sale, Kali Prasanna and his wife refused to pay rent for the transferred portion of the land on the ground that it was sold and relinquished in favour of the purchasers, and paid rent only for the portion of the holding which remained in his possession. The landlords accepted the apportionment of the rent for the portion occupied by the tenant, but declined to recognise the purchaser of the portion sold as his tenant. In a suit brought by the landlords against the purchasers and their vendors for the recovery of *khas* possession of the portion of the lands sold, the Court of first instance decreed the suit in favour of the 6 annas 7½ gundas co-sharer landlords and dismissed it against the others. On appeal by the defendants this suit was dismissed. The plaintiffs, thereupon, appealed to the High Court.

Dr. Sarat Chandra Basak (with him *Babu Harihar Prosad Sinha*), for the appellant. The Full Bench case of *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (1) was distinguishable. In the present case the

(1) (1914) I. L. R. 42 Calc. 172.

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tenant's refusal to pay rent to the landlords, for the portion of the holding sold by him on the ground that he had no interest in it, amounted to a disclaimer of all his interest in that portion of the holding. The landlords might have brought a suit for recovery of *lhas* possession of the entire holding. This was not their sole remedy. They also had the additional right of recognising the division of the holding and the apportionment and acceptance of the rent for the portion occupied by the tenant. With respect to the divided portion of the holding transferred by the tenant, there existed no relationship of landlord and tenant between them and the transferee. The landlords, therefore, were entitled to re-enter upon the latter portion of the holding.

Babu Gobinda Chandra Dey Roy, for the respondent. The refusal of the tenant to pay rent for the portion of the tenancy transferred by him to the purchaser thereof, did not operate as a forfeiture. He was liable to the landlords for the rent of the entire holding. The landlords' remedy did not lie in a suit for *lhas* possession of the transferred portion. Unless there was an abandonment of the entire holding by the tenant, the landlords could not re-enter upon a portion of it: see *Kabil Sardar v. Chunder Nath Nag Chowdhry* (1) where the very same question as in the present case arose. The principle of this decision was upheld in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (2).

The appellants were not called upon to reply.

RICHARDSON AND IMAM JJ. The holding in question in this suit originally belonged in its entirety to the defendant No. 3. He sold a portion of it to the defendant No. 2 in the name of the latter's mother, the

(1) (1892) I. L. R. 20 Calc. 590. (2) (1914) I. L. R. 42 Calc. 172.

defendant No. 1. The holding is found to be a non-transferable occupancy holding and, as we read the judgment of the learned Subordinate Judge in the lower Appellate Court, he has also found that, subsequently to the transfer of the portion of the holding, the defendant No. 3 refused to pay rent for that portion and tendered to the landlords the proportionate rent due in respect of the remainder of the holding, which the landlords accepted. The learned Subordinate Judge, in one part of his judgment, says this:—"The plaintiff's first witness Kamini, who is the Naib of the plaintiffs owning 6 annas and 7½ gundas share, deposes that the defendants Nos. 3 and 4 refused to pay rent for the land in suit as it was sold and that the defendant No. 3 paid rent for the lands other than the land in suit. The refusal to pay rent was due to the fact that the land had been sold." Then further on, the Subordinate Judge says:—"The refusal to pay rent was due to the fact that there was a sale and the alleged relinquishment was in favour of the purchaser." From these passages, we gather, as we have said, that the learned Subordinate Judge accepted the evidence of the plaintiff's Naib that, after the transfer in question, the defendant No. 3 refused to pay rent for the land he had transferred. In that state of things, it was, of course, open to the landlords to decline to accept an apportionment of the rent and to decline to recognise any division of the holding. On the defendant No. 3 refusing to pay the entire rent of the whole holding, the landlords might have instituted a rent suit and so brought the holding to sale in execution of any decree they might have obtained. But, in our opinion, this was not the only course open to the landlords. We can see no reason why the landlords should not be at liberty, if they so chose, to accept from the defendant No. 3 the amount of rent tendered

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by him for the land he still held without prejudice to any right which they might have as proprietors in respect of the transferred portion. The learned Subordinate Judge in the Court of appeal below has found on these facts that there was no surrender of the transferred portion in favour of the landlords. It seems to us, however, that only one conclusion is possible from the transfer coupled with the subsequent refusal to pay the rent of the transferred portion; clearly, that amounted on the part of the defendant No. 3 to a disclaimer of all right, title and interest in the transferred portion. He had transferred his interest as tenant to the defendant No. 2 and, as between him and the defendant No. 2, his interest as tenant was extinguished. As to the landlords, he put an end to the relationship of landlord and tenant by refusing to pay rent for this land. In our opinion the tenant, the defendant No. 3, by his own acts and conduct, made it as clear as possible that he had no further interest in the land. The land is, therefore, at the disposal of the landlords, unless any third person can make out a good title to possession as against them. The present case is easily distinguishable from those cases where, after transferring a portion of the holding, the tenant continues in possession of the remainder and continues to pay, or, at any rate, does not deny his liability to pay, the rent due in respect of the whole holding. In cases of that kind, it is familiar law that there is no abandonment or surrender of the holding either as a whole or in part. But the present case is very different; and the conclusion arrived at by the learned Subordinate Judge appears to us to be entirely inconsistent with the facts which he has found. On the materials before us the only conclusion possible is, as we have said, that the defendant No. 3 has ceased to have any interest in the transferred land. If that

be so, what are the rights to the land as between the transferee and the landlords? *Primâ facie*, the landlords are entitled to the land. The transferee shows no title from the landlords; his title is derived from the defendant No. 3 who had no power to create a title good against the landlords. In the circumstances, we are of opinion that there is no answer to the landlord's suit. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored. The plaintiffs, the appellants before us, who are co-sharers in the land to the extent of 6 annas $7\frac{1}{2}$ gundas, are entitled under the latter decree to joint possession to the extent of their share. The other co-sharers were made party defendants, and no question is raised as to their share.

The appellants are entitled to their costs throughout from the contesting defendants.

O. M.

Appeal allowed.

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