

APPELLATE CIVIL.

Before Suhrawardy and Jack J.J.

ABDUL MAJID BHUIYA

v.

ALI MIA.*

1930

Nov. 12.

Landlord and Tenant—Landlord's right to recover land from transferee of a non-transferable tenancy, whether restricted by the Bengal Tenancy Act (VIII of 1885).

The right of the landlord to recover possession of land, the tenancy of which is relinquished by the tenant, is conferred upon him under the general law and does not depend exclusively upon section 87 of the Bengal Tenancy Act.

The fact that a tenancy is not a holding under section 87 of the Bengal Tenancy Act does not affect the landlord's right to re-enter his land on relinquishment by the tenant by transfer of a non-transferable tenancy to a third party, as the matter comes more within the domain of the law of contract than the tenancy law.

Bahadur Ahmed Moulavi v. Hemanta Kumar Roy (1) discussed and distinguished.

Matookdhari Shukul v. Jugdip Narain Singh (2), *Frosonna Kumar De v. Ananda Chandra Bhattacharjee* (3), *Lal Mamud Mandal v. Arbullah Sheikh* (4) and *Samujan Roy v. Mahaton* (5) referred to.

The facts appear sufficiently from the judgment.

Jitendrakumar Sen Gupta for the appellants.

Gunadacharan Sen and *Gopalchandra Narayan Chaudhuri* for the respondents.

SUHWARWADY J. This appeal arises out of a suit for recovery of *khás* possession of the land in suit, on the allegation that the tenant who held the land had no transferable occupancy right, but he had transferred the entire tenancy to the defendant. The plaintiffs claim to be the sixteen anna landlords in respect of the tenancy in suit. Their suit was

*Appeal from Appellate Decree, No. 1845 of 1929, against the decree of Rashbehari Mukherji, Subordinate Judge of Noakhali, dated Feb. 11, 1929, affirming the decree of Bhabeshchandra Sen Gupta, Munsif of Sudharam, dated Feb. 18, 1926.

(1) (1925) 30 C. W. N. 613.

(3) (1925) 30 C. W. N. 231.

(2) (1914) 19 C. W. N. 1319.

(4) (1896) 1 C. W. N. 198.

(5) (1900) 4 C. W. N. 493.

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dismissed by the trial court on the ground that they were not sixteen anna *mâlîks*, but were eight anna co-sharer landlords and the other co-sharer was not made a party. The lower appellate court was of opinion that the suit by the plaintiff was maintainable to the extent of their share, but, relying on the case of *Bahadur Ahmed Moulavi v. Hemanta Kumar Roy* (1), he dismissed the suit, on the ground that the holding in suit was composed of some entire plots and undivided shares in some other plots and was, therefore, not a holding under section 87, Bengal Tenancy Act. The learned Subordinate Judge was of opinion that the plaintiffs were entitled to succeed but for the decision mentioned above.

The question raised in this appeal on behalf of the plaintiffs is not free from difficulty. The suit is brought by the plaintiffs for recovery of possession on the ground that the tenant had no right to transfer his interest to the defendant and accordingly the defendant had no right to retain possession of the land in suit. It is not a suit restricted by the limited provisions of section 87 of the Bengal Tenancy Act. It is a suit brought by a party, who is entitled to possession, to recover possession from a party, who is not entitled to possession. In *Bahadur Ahmed's* case (1), it was a suit for recovery of possession by the landlord on the ground of abandonment of the tenancy and breach of contract under which the tenant had agreed that he would not transfer the lands. The suit was decreed by the courts below and the appeal to this Court was dismissed. The defendant raised the contention that his tenancy, comprising undivided shares of several plots, was not a holding as defined by the Bengal Tenancy Act and therefore the sale to defendant could not be considered to be an abandonment of the holding by an occupancy *râiyat*, which would entitle the landlord under section 87, Bengal Tenancy Act, to get *khâs* possession as upon abandonment. The learned Judge of this Court who delivered the judgment was inclined to accept this

(1) (1925) 30 C. W. N. 613.

contention, but he did not give effect to it, as he was of opinion that, under the contract, the tenant had no right to transfer the tenancy and the plaintiff, therefore, was entitled to re-enter for the breach of the covenant. The learned advocate for the appellants before us has argued that the opinion expressed in that case was an *obiter dictum*. The appeal was really decided against the appellant on a quite different ground. Apart from that, what the learned Judges held was that the tenancy could not be said to be a holding as defined in the Bengal Tenancy Act, because it included undivided portions of some plots and, therefore, the sale thereof could not be construed to be an abandonment of a holding. So far as this opinion is based upon the observations made in their Lordships' judgment, it cannot be questioned. But the right of the landlord to recover possession of a tenancy relinquished by his tenant does not depend exclusively upon section 87 of the Bengal Tenancy Act: *Lal Mamud Mandal v. Arbullah Sheikh* (1), *Samujan Roy v. Munshi Mahaton* (2) and *Matookdhari Shukul v. Jugdip Narain Singh* (3). The right of the landlord to re-enter, when his land remains unoccupied or is in the occupation of a trespasser, is a right which is conferred upon him under the general law—the right of reversion. In the present case, the tenancy which is admittedly a non-transferable one, was transferred by the tenant to the defendant, thus putting an end to the tenancy or the relationship of landlord and tenant. The landlord is, therefore, entitled to assert his reversionary right as owner of the land and lessor and has the right to enter into possession and to exclude any one who may be found upon the land. The landlord may not bring a suit under section 87 of the Bengal Tenancy Act, in virtue of the fact that the tenancy is not a holding; but his right to recover possession of the land on relinquishment (I do not purposely use the word 'abandonment') by the tenant is in no way restricted

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(1) (1896) 1 C. W. N. 198.

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(3) (1914) 19 C. W. N. 1319.

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by the provisions of the Bengal Tenancy Act. In my judgment, the matter seems to come more within the domain of the law of contract than the tenancy law. When the tenancy was created, the original holder agreed with the landlord that he would not transfer it and his successors are bound by the terms on which the tenancy was created. When the tenant was holding the land in suit he was holding under an agreement that he would not transfer it without the consent of the landlord. Though there was no *kabuliyat* in this case, as was in the case of *Bahadur Ahmed*; but there was a contract that the tenant would not part with the possession of the land. In my judgment, the opinion expressed in the case of *Bahadur Ahmed*, on the basis of the decision in that case, does not touch the matter before us; if it does, it is not conclusive of the matter. It is not the defendant's case that the tenants have now any concern with the land. The plaintiffs, accordingly, are entitled to a decree in their suit for recovery of *khâs* possession. To hold otherwise will be to turn a non-transferable holding into a transferable one and to deprive the landlord the right of ever recovering possession of his property. See in this connection *Prosonna Kumar De v. Ananda Chandra Bhattacharjee* (1).

The next point urged by Mr. Sen Gupta is that it ought to have been held by the courts below that the plaintiffs are entitled to the sixteen annas of the land in suit. The courts below have found that the plaintiffs and some other persons called Sens are co-sharers in respect of this tenancy and another tenancy. By arrangement, the plaintiffs were in possession of this tenancy and the Sens used to realize the entire rent from the tenants holding the other tenancy. This has been the arrangement for convenience of possession but there was no division of the land or partition of the landlords' interest. That being the finding of fact, we are not entitled to interfere with

it in Second Appeal. Mr. Sen Gupta argues that no deed is necessary for partition between the co-sharers and the arrangement by which they realize the entire rent from two sets of tenants is a sufficient indication that there was a partition. We cannot give effect to this contention on the face of the clear finding of the courts below.

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The result is that this appeal is allowed in part. The plaintiffs are entitled to recover *khâs* possession of the eight annas share of the land in suit with mesne profits from the defendant. Their claim for the remaining eight annas share of the land must stand dismissed. As both parties have partially succeeded in this litigation we direct that each party will bear his costs throughout.

JACK J. I agree.

Appeal allowed in part.

A. A.