APPELLATE CIVIL.

Before Nasim Ali J.

GOLAM MUSTAPHA

1934

May 4, 7

v.

HANUMANDAS MUNDRA.*

Witness—Credibility—Trial court's opinion—Abandonment—Question of fact or law—Ground for ejecting râiyat*—Abandonment apart from s. 87—Bengal Tenancy Act (VIII of 1885), ss. 25, 37.*

When a court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from the manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the appellate court in differing from the trial court even on a question of fact turning on the question of credibility of witnesses, whom the appellate court has not seen.

Coghlan v. *Cumberland* (1) referred to.

Though the question of abandonment is a question of fact, the inference from the facts found, as to whether there was abandonment or not, is a question of law.

Aswini Kumar Dhupi v. *Har Kumar Ghosh* (2) followed.

In the absence of any clear indication in the judgment of the Full Bench in *Dayamayi's* case (3), the view, which was taken by this Court prior to that Full Bench decision, *viz.*, that there might be abandonment apart from section 87 of the Bengal Tenancy Act, cannot be taken now as wrong.

Baikuntha Chandra Nag v. *Chandra Nath Bandopadhya* (4) and *Abdul Majid Bhuiya* v. *Ali Mia* (5) referred to.

It is, however, open to doubt whether, in view of the express provisions laid down in section 25 of the Bengal Tenancy Act, the breach of an implied condition would be a ground for ejecting an occupancy *râiyat*.

Even if there be no abandonment within the meaning of section 87, an inference of abandonment would be legitimate, if it be proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding.

*Appeal from Appellate Decree, No. 1829 of 1931, against the decree of Praphullakrishna Ghosh, Second Subordinate Judge of Midnapore, dated Feb. 24, 1931, reversing the decree of Subodhchandra Sarkar, Third Munsif of Midnapore, dated Feb. 24, 1930.

(1) [1898] 1 Ch. 704.
(2) (1928) 32 C. W. N. 1111.
(3) (1914) I. L. R. 42 Calc. 172.
(4) (1929) 33 C. W. N. 1023.
(5) (1930) I. L. R. 58 Calc. 869.

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This view can be supported on the principle that, after the entire holding has been transferred and the transferee has been put into possession, it becomes the *khâs* land of the *zemindâr* and the *zemindâr* is, therefore, entitled to re-enter.

Pran Krishna Saha v. *Mukta Sundari Dassya* (1) referred to.

SECOND APPEAL by the defendant.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Ramaprasad Mukherji for the appellant.

Kshiteendranath Basu for the respondents.

Cur. adv. vult.

NASIM ALI J. This is an appeal by the defendant in a suit for recovery of possession of an occupancy holding on the allegation that it has been abandoned by the recorded tenant. The case for the plaintiff as alleged in the plaint is that defendant No. 3 was the original occupancy *râiyat* in respect of the land in suit, that defendants Nos. 1 and 2 are now in possession of this entire holding on the basis of purchase, and that defendant No. 3 is not in possession of any portion of the holding. It is on these allegations that the plaintiff wanted *khâs* possession of the land. Defendant No. 1, who contested the suit, resisted the plaintiff's claim on the ground that the original tenant, that is defendant No. 3, was still in possession of a portion of the land, that there was not a transfer of the entire holding, inasmuch as the purchase of defendant No. 2 was only a *benâmi* purchase and was for the benefit of defendant No. 3. The second and third defendants did not appear and contest the plaintiff's claim. The trial court held that defendant No. 3 was in possession of a portion of the holding and that defendant No. 3 never repudiated his liability to pay rent. The trial court was further of opinion that the sale, at which defendant No. 2 purchased, was a collusive affair. In this view of the matter, the trial court dismissed the

(1) (1913) 18 C. L. J. 193.

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plaintiff's claim for *khâs* possession. On appeal, the lower appellate court has held that the entire holding has been transferred and that defendant No. 3 is not in possession of any portion of the holding. On these findings, the lower appellate court came to the conclusion that the entire holding had been abandoned by the original tenant. In the result, the lower appellate court has decreed the plaintiff's suit. Hence the present appeal by defendant No. 1.

The first contention of Mr. Mukherji, appearing on behalf of the appellant, is that the finding of the lower appellate court about the defendant No. 3's possession is not a proper finding, inasmuch as, in reversing the finding of the trial court, the learned judge has overlooked the principle, that when the question arises as to whether one witness should be believed rather than another and that question turns on the demeanour of witnesses in the witness-box, it requires circumstances of exceptional character to justify a court of appeal in coming to a different conclusion. It is urged by the learned advocate that the trial court, in view of the demeanour of the plaintiff's *gomastâ* in the witness box, disbelieved him and believed the evidence of the defendant No. 1, as the latter appeared to him to have deposed in a very straight-forward manner. It is contended that the lower appellate court, however, in believing the plaintiff's *gomastâ* and in disbelieving defendant No. 1 has not at all taken into consideration the impression, which these witnesses made on the trial court by their demeanour in the witness-box. There can be no doubt that, when a court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the appellate court in differing from the trial court even on a question of fact turning

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on the question of credibility of witnesses whom the appellate court has not seen. See *Coghlan* v. *Cumberland* (1). It appears that the lower appellate court disbelieved the evidence of defendant No. 1 about the residence of defendant No. 3 on a portion of the holding, mainly relying upon the record-of-rights, which shows that there is no homestead land in the holding. The lower appellate court also relied upon another circumstance, namely, that, in the written statement, the story about the residence of defendant No. 3 on a portion of the holding was not specifically mentioned. There is, therefore, no substance in this contention.

It is next urged by the learned advocate in support of the appeal that the facts found by the lower appellate court do not amount to abandonment and consequently the plaintiff is not entitled to *khâs* possession. It may be pointed out, at the outset, that there is no finding in this case that there has been repudiation by defendant No. 3. It has not been found also that there has been any abandonment within the meaning of section 87 of the Bengal Tenancy Act. The lower appellate court has decreed the suit only on the ground that the holding has been abandoned by the original *râiyat*. Now the question is whether this finding can be challenged in Second Appeal. There can be no doubt that the question, as to whether there has been abandonment of the land by the *râiyat*, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case. See *Monohar Pal* v. *Ananta Moyee Dassee* (2) and *Moharamdi* v. *Asmat* (3). It is no doubt true that Mitter J. observed in the case of *Aminaddin Sheikh* v. *Chandranath Sen* (4) that the question of abandonment is a question of fact and that the finding about abandonment is binding in

(1) [1898] 1 Ch. 704.
(2) (1913) 17 C. W. N. 802.
(3) (1925) [1926] A. I. R. (Calc.) 751; 91 Ind. Cas. 493.
(4) (1928) 48 C. L. J. 390.

Second Appeal. But, in the case of *Aswini Kumar Dhupi* v. *Har Kumar Ghosh* (1), a Division Bench of this Court has observed that the inference from the facts found, as to whether there was abandonment or not, is a question of law. In view of the decision of this Court, I am not prepared to dismiss this appeal on the ground that it is concluded by finding of fact.

The next question for determination then is whether the facts found by the lower appellate court amount to an abandonment in law. In the case of *Dayamayi* v. *Ananda Mohan Roy Chowdhury* (2), the proposition laid down by the Full Bench are in these terms :—

> Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding ; but where the transfer is of a part only of the holding, or not by way of sale, 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.

It has been found that, in this case, there has been a transfer of the entire holding. Consequently, the landlord is ordinarily entitled to enter on the land. Mr. Mukherji, on the authority of the decision in the case of *Ramesh Chandra Mitra* v. *Daiba Charan Das* (3), however, contends that the use of the word "ordinarily" in the proposition laid down by the Full Bench indicates that "the circumstances mentioned in "each branch are being regarded as evidence of, or as "importing reference to, some higher, more precise or "more ultimate test." His further contention is that this ultimate test must be the same in both the branches of the proposition. It is clear from the second part of the proposition that the ultimate test is (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. But the question as to whether that is also the ultimate test in the first branch of the proposition is

(1) (1928) 32 C. W. N. 1111. (2) (1914) I. L. R. 42 Calc. 172, 223.
(3) (1924) 28 C. W. N. 602.

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not free from difficulty. The first branch of the proposition laid down by the Full Bench does not expressly state what the ultimate test is. Prior to *Dayamayi's* case (1) it was settled, on good authority, that section 87 of the Bengal Tenancy Act did not prescribe the only mode in which the holding could be abandoned. It is not very clear whether the decision in *Dayamayi's* case (1) affects these decisions prior to the decision of that case. In the absence of any clear indication in the judgment of the Full Bench, I am not prepared to say that the view, which was taken by this Court prior to the decision of the Full Bench, namely, that there might be abandonment apart from section 87 of the Bengal Tenancy Act, must be taken now as wrong. I am fortified in this view of the matter by two recent decisions of this Court, *viz.*, *Baikuntha Chandra Nag* v. *Chandra Nath Bandopadhya* (2) and *Abdul Majid Bhuiya* v. *Ali Mia* (3). In the last mentioned case, Suhrawardy J. refrained from using the word "abandonment" and used the word "relinquishment". In that case, the holding in question contained some undivided parcels of land and, therefore, could not be considered as a holding as contemplated by the Bengal Tenancy Act before the amendment of 1928. Consequently the question was whether the landlord is entitled to re-enter when the whole of this tenancy was transferred, though it was not a holding within the meaning of section 87 of the Bengal Tenancy Act. The learned Judges held that the landlord was entitled to re-enter. It was observed in that case that section 87 of the Bengal Tenancy Act was not exhaustive and that there might be abandonment apart from the provisions of that section. The decision was based on two grounds, namely, (1) that the right of the landlord to re-enter, when his land remained unoccupied or is in the occupation of a trespasser (the transferee of a non-transferable tenancy is a trespasser), is a right which is conferred upon the landlord under the general law,

(1) (1914) I. L. R. 42 Calc. 172. (2) (1929) 33 C. W. N. 1023.
(3) (1930) I. L. R. 58 Calc. 869.

and (2) that the transfer of a non-transferable occupancy holding is the breach of an implied condition of a tenancy, namely, that the tenant would have no right to transfer and consequently on account of this breach of the implied condition the landlord is entitled to eject. It is, however, open to doubt whether, in view of the express provisions laid down in section 25 of the Bengal Tenancy Act, the breach of an implied condition would be a ground for ejecting an occupancy *râiyat*. Ejectment for breach of an implied condition has always been limited to cases where there had been estoppel by record or where there had been an attempt by the tenant to assert a title paramount to the landlord either in himself or in a third person. [See *Ramesh Chandra Mitra* v. *Daiba Charan Das* (1)]. In fact, if that was the intention of the legislature that, apart from the provisions of section 25 of the Bengal Tenancy Act, the landlord would have the right to eject an occupancy *râiyat* for breach of an implied condition, the legislature would have said so expressly.

As pointed out above, in view of the above decisions of the Division Bench of this Court, I am not prepared to say that the ultimate test in the first branch of the proposition laid down by the Full Bench is restricted only to an abandonment within the meaning of section 87 of the Bengal Tenancy Act. It is no doubt arguable that, in view of the ultimate test indicated in the second branch of the proposition laid down by the Full Bench, it is no longer open to contend that the ultimate test would be different, so far as the first branch of the proposition is concerned. But, as already observed, in view of the recent decisions of this Court, I am not prepared to hold that there cannot be an abandonment apart from the provisions of section 87 of the Bengal Tenancy Act. What then are the facts, which must be proved to show that there had been an abandonment apart from the

(1) (1924) 28 C. W. N. 602, 608.

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provisions of section 87? In the case of *Ram Lal Mandar* v. *Kuldip Narayan Tewari* (1), Dawson Miller C. J. observed as follows :—

> I agree that, apart from section 87 of the Bengal Tenancy Act, there may be an abandonment of a holding but I consider that in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein as for example by a sale of the whole property or that he has abandoned the right to retake possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi.*

Again in the case of *Prosonna Kumar De* v. *Ananda Chandra Bhattacherjee* (2), a Division Bench of this Court has made the following observation :—

> It is not necessary to prove as a fact that the holding has been abandoned but it is a direct inference from the fact that the entire holding was sold and possession given to the predecessor.

In other words, even if there be no abandonment within the meaning of section 87, an inference of abandonment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding. This view can be supported on the principle that, after the entire holding has been transferred and the transferee has been put into possession, it becomes the *khâs* land of the *zemindâr* and the *zemindâr* is, therefore, entitled to re-enter. See *Pran Krishna Saha* v. *Mukta Sundari Dassya* (3).

Now, from the facts found by the lower appellate court, it is clear that the original defendant No. 3 is no longer in possession of any portion of the holding and that the entire holding has been transferred. In these circumstances, the lower appellate court was right in holding that the holding had been abandoned by the original *râiyat* before the institution of the suit.

The result, therefore, is that the appeal is dismissed with costs.

Appeal dismissed.

G. S.

(1) (1923) I. L. R. 3 Pat. 126, 132. (2) (1925) 30 C. W. N. 231, 232.
(3) (1913) 18 C. L. J. 193, 198.