

## APPELLATE CIVIL.

Before Edgley J.

ANNADA PROSAD TALUKDAR

v.

RAM JAN SARKAR.\*

1939

July 4.

**Landlord and Tenant**—*Abandonment—Transfer of portion of holding before and of portion after 1928—Ejectment of former transferee—Bengal Tenancy Act (VIII of 1885), as amended in 1928, ss. 26B, 26F, 27.*

Where an occupancy *rāiyat* transfers, without the consent of the landlord, a portion of his holding before the amendment of 1928 of the Bengal Tenancy Act and the remaining portion after that amendment comes into force, and the landlord pre-empted the latter portion from the transferee under s. 26F of the Act, the landlord is entitled to take *khās* possession of the land by ejecting the earlier transferee from the portion purchased by him on the ground of abandonment of the holding.

*Sorojini Roy v. Romesh Chandra Biswas* (1) and *Syed Mohsenuddin v. Bhagaban Chandra Sutradhar* (2) distinguished.

*Ruhini Kumar Das v. Aminuddin Kaviraj* (3); *Sheoraji Kuer v. Dhani Mian* (4) and *Prosonna Kumar De v. Ananda Chandra Bhattacharjee* (5) referred to.

The new provision under s. 26B of the amended Bengal Tenancy Act, 1928, is not retrospective and cannot operate to compel the landlord to recognise as his tenant a person to whom a portion of a holding had been transferred before the amendment of the Act came into operation.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

The facts of the case are sufficiently stated in the judgment.

*Bireswar Bagchi* and *Jyotirindra Nath Das* for the appellants. The Courts below have placed reliance on *Sorojini Roy v. Romesh Chandra Biswas* (1) in holding that the landlords are not entitled to

\*Appeal from Appellate Decree, No. 935 of 1937, against the decree of H. C. Mitra, First Subordinate Judge of Pabna, dated Feb. 20, 1937, affirming the decree of Renu Pada Mukherji, First Munsif of Serajganj, dated July 28, 1936.

(1) (1935) 40 C. W. N. 269.

(3) (1930) 35 C. W. N. 648.

(2) (1920) I. L. R. 48 Cal. 605.

(4) (1923) I. L. R. 3 Pat. 1.

(5) (1925) 30 C. W. N. 231.

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treat the holding as having been abandoned by the tenant. But that case is distinguishable, as in that case the landlord sought to take advantage of her own auction-purchase of the holding in order to eject the earlier transferee of a portion of the lands; whereas in this case the holding was abandoned by the tenant's own action in transferring the remaining portion to Kali Pada Bhattacharjya, and the landlords do not rely upon their subsequent pre-emption from the transferee. If the entire holding is sold in parts at different times it would amount to abandonment as soon as the last transfer is made. [Cases cited.]

*Krishna Kamal Moitra* and *Amares Chandra Roy* for the respondent. The distinction sought to be drawn between *Sorojini's* case (1) and the present case is a distinction without real difference. The sale to Kali Pada was in accordance with the right conferred on the tenant by the amended Act and the landlord was bound to recognise the transfer. This transfer, therefore, did not make any difference between the rights of the parties so far as the law is concerned. It is only by his own action by exercising the right of pre-emption that the landlord seeks to make it out as a case of abandonment or relinquishment, and he cannot be allowed to succeed.

EDGLEY J. In the suit, with reference to which this appeal arises, the plaintiffs sought to eject the defendant, Ram Jan Sarkar, from certain land. Their case was that a man named Manir Uddin was their tenant in respect of a holding with an area of 1.76 acres and that on Aswin 17, 1335 B.S., corresponding to October 3, 1928, *i.e.*, before the passing of the Bengal Tenancy (Amendment) Act of 1928, he transferred one acre of this holding to the defendant, Ram Jan Sarkar. Subsequently, after the passing of the Act of 1928, Manir Uddin transferred the remainder of the holding to Kali Pada Bhattacharjya. The transfer took place on

February 28, 1934. The plaintiffs then applied for pre-emption of the portion of the holding, which had been transferred to Kali Pada Bhattacharjya and an order for pre-emption was duly made in their favour. Subsequently, on January 10, 1936, the plaintiffs instituted the suit, out of which this appeal arises, for the purpose of ejecting Ram Jan Sarkar from that portion of the holding which had been transferred to him in 1928.

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The main defence put forward by Ram Jan Sarkar was to the effect that, under the law as it stood after the passing of the Bengal Tenancy (Amendment) Act of 1928, he was not liable to ejectment.

The first Court dismissed the plaintiffs' suit on two grounds. The first was to the effect that, under the present law, a subsequent transferee steps into the shoes of the former tenant. Therefore, in the event of such a transfer, there can be no abandonment of a holding within the meaning of s. 87 of the Bengal Tenancy Act and the previous purchaser obtains protection under the shield of the purchase by the subsequent transferee.

The second ground on which the learned Munsif decided the case in favour of the defendant was that the plaintiffs could not take advantage of their own purchase for the purpose of treating the entire holding as having been abandoned.

The lower appellate Court upheld the decision of the first Court on the second of the two grounds mentioned above, but the learned Subordinate Judge did not consider it necessary to discuss the first ground upon which the case had been decided in the defendant's favour by the first Court.

The first point urged in favour of the appellants is to the effect that both the Courts below were wrong in dismissing the plaintiffs' suit on the ground that they cannot take advantage of their own purchase for the purpose of treating the entire holding as

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having been abandoned. In support of the view which has been adopted by both the Courts below reliance was placed upon a decision of this Court in the case of *Sorojini Roy v. Romesh Chandra Biswas* (1). In that case the plaintiff was the landlord of a non-transferable occupancy holding, a portion of which had been previously transferred by the tenant, who, however, retained the homestead portion of the holding. The plaintiff subsequently obtained a decree for arrears of rent, purchased the homestead and took possession of the same. On the basis of her purchase, she then sought to treat the entire holding as having been abandoned and she sued to recover that portion of the holding which had been previously transferred by the tenant. Mitter J. held :—

It is now well settled that, for the purpose of abandonment, a sale *in invitum* stands on the same footing as a transfer by the act of the occupancy *rdiyat*, and for the purpose of constituting abandonment, the transfer of the entire holding need not be effected all at once. If the entire holding is sold, but in parts at different times, it will amount to abandonment as soon as the last transfer is made.

The learned Judge held, however, that, as the plaintiff by her purchase stepped into the shoes of the tenant, on the principle adopted in the case of *Syed Mohsenuddin v. Bhagaban Chandra Sutradhar* (2), she could not put forward her right as a landlord to re-enter the abandoned holding. The learned Judge, therefore, held :—

The retention of her character as assignee of the tenant, *i.e.*, of her character as representative of the tenant, is inconsistent with her insisting on her claim to recover possession on the ground of abandonment in her character as landlord.

In the present case, however, the plaintiffs' contention is that the holding was abandoned by reason of the sale by Manir Uddin to Kali Pada Bhattacharjya on February 28, 1934. They are not relying upon their pre-emption of a portion of the holding as enabling them to treat the whole of the holding as having been abandoned, but they maintain

(1) (1935) 40 C. W. N. 269, 270-1.

(2) (1920) I. L. R. 48 Cal. 605.

that their right to re-enter accrued as soon as the last portion of the holding, which had been retained by their original tenant, was transferred to Kali Pada Bhattacharjya on February 28, 1934. They are, therefore, not relying upon their own purchase as giving them the right to re-enter, but upon the fact of the abandonment of the entire holding by the original tenant by reason of the sale to Kali Pada Bhattacharjya. From this point of view, therefore, the fact that they subsequently pre-empted the holding under s. 26F of the Bengal Tenancy Act is immaterial.

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Had this been a case, in which the plaintiffs were in fact seeking to take advantage of their own purchase for the purpose of treating the whole holding as having been abandoned, the question would have required serious consideration whether the principles laid down by a Full Bench of this Court in the case of *Syed Mohsenuddin v. Bhagaban Chandra Sutradhar* (*supra*) had not been applied somewhat too harshly against the landlord in the case of *Ruhini Kumar Das v. Aminuddin Kaviraj* (1) and that of *Sorojini Roy v. Romesh Chandra Biswas* (*supra*) and it is even possible that the principles laid down in *Syed Mohsenuddin's* case might have required reconsideration in the light of the views expressed in connection with this matter by a Full Bench of the Patna High Court in the case of *Sheoraji Kuer v. Dhani Mian* (2).

As matters stand, the only remaining question which require determination is whether or not it can be said that the holding had been abandoned by reason of the transfer to Kali Pada and, if so, whether this abandonment gave the landlords the right to re-enter. With reference to this matter the learned advocate for the respondent places considerable reliance upon the first ground mentioned above upon which the trial Court dismissed the plaintiffs' suit.

(1) (1930) 35 C. W. N. 648.

(2) (1923) I. L. R. 3 Pat. 1.

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Under the law, as it stood before 1928, the two successive transfers of portions of the holding to Ram Jan Sarkar and Kali Pada Bhattacharjya would admittedly have constituted a complete abandonment on the part of the tenant which would have entitled the landlords to re-enter under s. 87 of the Bengal Tenancy Act, sub-s. (1) of which is in the following terms:—

If a *râiyat* or under-*râiyat* voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due, and ceases to cultivate his holding either by himself or by some other person, the landlord may, at any time after the expiration of the agricultural year in which the *râiyat* or under-*râiyat* so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself.

In this connection it was held by this Court in the case of *Prosonna Kumar De v. Ananda Chandra Bhattacharjee* (1) that for a landlord seeking to re-enter it would not be necessary to prove as a fact that the holding had been abandoned, but the abandonment would be a direct inference from the fact that the entire holding had been sold and possession had been given to the purchaser. It must, however, be considered whether the landlord's right of re-entry on abandonment of a holding has been curtailed by the law as it stood after the amendment of the Bengal Tenancy Act in 1928.

One of the most important provisions of the Bengal Tenancy (Amendment) Act (IV of 1928) was to enable an occupancy *râiyat* to transfer his holding or a share or a portion thereof. Provision to this effect was made in s. 26B of the Bengal Tenancy Act, as it stood after amendment, which is in the following terms:—

The holding of an occupancy-*râiyat* of a share or a portion thereof, together with the right of occupancy therein, shall, *subject to the provisions of this Act*, be capable of being transferred in the same manner and to the same extent as other immoveable property.

The main effect of the above provision was to compel the landlord to recognise as his tenant the transferee of his former tenant's holding or of a

portion thereof provided the transfer was made in accordance with the material sections of the Bengal Tenancy Act. This new provision, however, was not retrospective in its purpose and could not, therefore, operate to compel the landlord to recognise as his tenant a person to whom a portion of a holding had been transferred before the Amendment Act of 1928 came into operation. Further, as the right conferred by s. 26B was subject to the provisions of the Act, the new section did not affect the right of the landlord to re-enter under s. 87 of the Act if the tenant vacated his holding without arranging for the payment of his rent as it fell due.

In the case, with which we are now dealing, there is no doubt that the original tenant Manir Uddin had completely severed his connection with the holding and any proceedings, which might have been instituted by the landlord to recover the rent of the holding from him, would have been infructuous. It is true that, as long as Kali Pada Bhattacharjya remained in possession of the transferred share, it might be argued that he would have been liable under s. 146A of the Bengal Tenancy Act as a co-sharer tenant in respect of the rent of the entire holding, but there can be no doubt that his liability would have ceased as soon as his share was pre-empted under s. 26F of the Act. Further, even if the landlord had decided not to avail himself of his right to pre-empt, the transferee tenant might have applied for a division of the tenancy under the second proviso to s. 88 of the Bengal Tenancy Act. If such division had been ordered by the Court, the landlord would have been entitled merely to recover from the transferee the rent due in respect of the transferred portion only and not the rent for the entire holding. It cannot, therefore, be said that the transferee of a portion of a holding steps into the position of the former tenant except as regards that portion of the holding which has been transferred to him. As long as the original tenant retains the holding or a portion thereof the landlord has some security for the

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payment of his rent. If, on the other hand, the original tenant severs his connection with the holding, in a case such as that with which we are now dealing, the only method by which the landlord can safeguard his interest is by pre-empting the portion transferred or by attempting to recover rent from the transferee in respect of the entire holding. As already pointed out, such a course will afford the landlord no guarantee that he will be able to recover rent for any portion of the holding that may have been transferred previously by the original tenant, unless that tenant has made proper arrangements for the payment of the rent as it falls due. The utmost that can be said in the present case is that Manir Uddin, on severing his connection with the holding on February 28, 1934, had made arrangements, which would safeguard the position of the landlord as regards the recovery of rent for that portion of the holding which was transferred to Kali Pada Bhattacharjya on February 28, 1934, but he had made no such arrangement with regard to that portion of the tenancy which had been transferred to Ram Jan Sarkar in September 1928, before the passing of the Bengal Tenancy (Amendment) Act. In this view of the case, Manir Uddin must be treated as having abandoned his holding within the meaning of s. 87 of the Bengal Tenancy Act. The landlords are, therefore, entitled to re-enter and may evict Ram Jan Sarkar from that portion of the holding which was transferred to him in September, 1928.

Having regard to the considerations mentioned above, the decision of the lower appellate Court cannot be supported and this appeal is accordingly allowed with costs throughout. The plaintiffs will, therefore, be entitled to have the suit decreed.

Leave to appeal under s. 15 of the Letters Patent is refused.

*Appeal allowed; suit decreed.*

A. A.