

1883  
 March 7.

*Before Mr. Justice Wilson and Mr. Justice Maclean.*

SRISHTEEDHUR BISWAS (PLAINTIFF) *v.* MUDAN SIRDAR  
 AND OTHERS (DEFENDANTS).\*

*Right of occupancy—Ejectment—Transfer—Effect of asserting a right to transfer land, by a ryot having a right of occupancy, who remains in possession.*

A ryot having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the lands, and sold that right to a stranger without giving up possession of the land.

*Narendra Narain Roy Chowdhry v. Ishan Chandra Sen* (1); and *Ram Chandra Roy Chowdhry v. Bholanath Lushkhar* (2) distinguished.

*Dwarkanath Misser v. Hurriah Chundra* (3) referred to.

IN this case the principal defendants, Nos. 2, 3, and 4, held a jama under the plaintiff, which they had transferred to the first defendant. The plaintiff sued to eject the defendants, alleging that the jama was not transferable. The only defendant who appeared to the suit was defendant No. 3, and he pleaded that his jama was kaemi, and transferable according to the custom of the country, and that as no notice to quit had been served upon him the suit could not be maintained. The following issues were accordingly framed:—

*First.*—Whether the suit could proceed, unless notice to quit was served upon the defendants?

*Second.*—Whether the jama of defendants Nos. 2 to 4 was transferable or not; and whether the sale of the jama by those defendants to defendant No. 1 was void; and whether the plaintiff was entitled to the khas possession of the land by evicting the defendants?

The Court of first instance held with regard to the first issue, on the allegation of the plaintiff, that the defendants Nos. 2 to 4

\* Appeal from Appellate Decree No. 1379 of 1881, against the decree of H. Beverley, Esq., Additional Judge of the 24-Pergunnahs, dated the 13th May 1881, modifying the decree of Baboo Rama Nath Seal, First Munsiff of Satkheera, dated the 13th September 1880.

(1) 13 B. L. R., 274; S. C., 22 W. R., 22.

(2) 22 W. R., 200.

(3) I. L. R., 4 Calc., 925.

were no longer his tenants, but trespassers along with the first defendant, that no notice to quit was necessary.

With regard to the second issue the Court held, as regards the transferable character of the holding, that the defendants having failed to adduce any evidence, the sale of the jama to the first defendant was void, and that the plaintiff was entitled to khas possession.

The suit was accordingly decreed with costs.

The third defendant then appealed.

The lower Appellate Court, however, found as a fact that the appellant, with others, being tenants with certain occupancy rights under the plaintiff, had transferred their rights to the first defendant, from whom they again took a sub-lease, and so remained throughout in possession, and that consequently the only question at issue, and the only one that was urged in appeal, was whether the transfer having been set aside as invalid, the plaintiff could eject his former tenants.

In the plaint there was also an allegation that the tenants had denied the plaintiff's title, but this allegation was traversed, and no evidence was given in support of it, and in the lower Appellate Court the plaintiff's right to eject was based solely on the attempt, on the part of the tenants, to transfer their rights.

The lower Appellate Court held that this was not a sufficient ground to entitle the plaintiff to eject them and obtain khas possession, and accordingly varied the decree of the Court below by declaring that the tenure in question was not transferable, and disallowing the prayer of the plaintiff for ejectment of the defendants Nos. 2 to 4.

Against this decree the plaintiff now preferred a special appeal to the High Court, on the ground that the lower Court was wrong in holding that the defendants Nos. 2 to 4 could occupy the land after they had sold their right of occupancy to the defendant No. 1: that the third defendant having admitted, in his written statement and also in his deposition, that the tenants had sold their occupancy right and made over possession to defendant No. 1, and that they were not holding possession under the plaintiff on their occupancy right, but had completely severed their con-

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nection with the landlord, the lower Appellate Court should not have disturbed the decree of the first Court for ejectment. It was contended, in support of this view, that the case was within the ruling in the case of *Narendra Narain Roy Chowdhry v. Ishan Chundra Sen* (1).

Baboo *Umbica Churn Bose* appeared on behalf of the appellant.

Baboo *Boydo Nath Dutt* for the respondents.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—The question for decision here is, shortly, whether occupant cultivators who have asserted a transferable right in their lands and sold that right to a stranger without giving up their occupation, are liable to ejectment by the superior landlord, whom they may have repudiated in a suit brought against them for arrears of rent, and set themselves up as tenants of the purchaser.

Fortunately this question has been considered on several occasions by this Court.

In *Narendra Narain Roy Chowdhry v. Ishan Chandra Sen* (1), it was ruled that the transferee of occupant rights, illegally sold, could be ejected if he had entered into actual possession of the land. The principle involved in that case was the abandonment by the tenant of his connection with the land, and the landlord's consequent right to re-enter. This principle is re-asserted in *Ram Chunder Roy Chowdhry v. Bholanath Lushkur* (2), and is also referred to in a recent judgment delivered on 17th January 1883 (appeal from Appellate Decree No. 1655 of 1881, Mitter and O'Kinealy, JJ.)

In *Dwarka Nath Misser v. Hurrish Chandra* (3) there is a remark which seems to indicate that occupant ryots who after sale remain upon the land by permission of the transferee, as his tenants, do so under circumstances amounting to an abandonment of their right of occupancy, and the result of that case shows that neither they nor the transferee can resist an

(1) 13 B. L. R., 274; S. C., 22 W. R., 22.

(2) 22 W. R., 200.

(3) I. L. R., 4 Cal., 925.

action to eject them; but it must be remarked that in that case the ryots did not question the decree for their ejection by appeal to this Court, and therefore we need not consider the judgment as deciding anything contrary to the other cases quoted above.

We accordingly follow those decisions and dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Wilson and Mr. Justice Maclean.*

CALLY NATH BUNDOPADHYA (PLAINTIFF) *v.* KOONJO BEHARY SHAHA AND OTHERS (DEFENDANTS).\*

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*Mortgage—Money Decree on Mortgage Bond—Mortgagee's lien—Registration Act (XX of 1866,) s. 53—Frame of Suit—Parties.*

*A* and *B*, co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C* and *D* in March 1869. *C* and *D* having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874.

*A* not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against *C* and *D*, and the representatives of *B* (*B* having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of *C* and *D*, and to recover the share of the mortgage debt still due to himself alone.

*Held*, that *A* did not acquire a better right to proceed against the property by reason of its having come into the hands of *C* and *D*, nor did *C* and *D* take subject to a greater burden than the mortgagor himself, and that as *A* had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties.

*Quære*.—Whether the suit being one for only a portion of the debt due on the mortgage (*B*'s representatives not having joined and claimed the share due to them) was not properly framed, assuming it would lie.

\* Appeal from Appellate Decree No. 1484 of 1881, against the decree of F. McLaughlin, Esq., Judge of Backergunge, dated the 28th May 1881, affirming the decree of Baboo Bani Madhub Mitter, First Subordinate Judge of that district, dated the 24th April 1880.