APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

1903
November 10.

TAMIJUDDI
v.
ASGAR HOWLADAR.

Superior landlord—Sub-tenant—Bengal Tenancy Act (VIII of 1885), s. 85.

As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject the sub-lessee, who is not his raiyat, and the sub-lessee can maintain a suit for possession of the land, from which he is dispossessed by the superior landlord and a tenant of his, who is not the lessor of the plaintiff.

Section 85 of the Bengal Tenancy Act interpreted.

Gopal Mondal v. *Eshan Chunder Baneriee* (1) and *Madan Chandra Kapali* v. *Jaki Karikar* (2) explained and followed.

Srikant Mondul v. *Saroda Kant Mondul* (3), *Fazel Sheikh* v. *Keramuddi* (4), *Ramgati Mandul* v. *Shyama Charan Dutt* (5) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (6) held inapplicable.

SECOND APPEAL by the plaintiff.

Asgar Howladar, the *pro forma* defendant No. 2 in the suit and one of the respondents in this appeal was one of the *maliks* of the *howla* named after him. Within the said *howla* there is a *jote* in the name of Arman Howladar. The plaintiff, who is the appellant in this appeal, claims the land in suit under Arman. The *jote* is made up of two plots and he is in possession of only one plot, being dispossessed of the other in Magh 1304 B. S. by the defendant No. 1, who acted in collusion with Asgar Howladar, the superior landlord. Hence the suit for establishment of title and recovery of possession thereon.

* Appeal from Appellate Decree, No. 2106 of 1907, against the decree of F. J. Graham, Officiating District Judge of Faridpur, dated 13th June 1907, reversing the decree of Srish Chandra Roy, officiating Munsiff at Bhanga, dated 2nd March 1907.

(1) (1901) I. L. R. 29 Calc. 148.
(2) (1902) 6 C. W. N. 377.
(3) (1898) I. L. R. 26 Calc. 46.
(4) (1902) 6 C. W. N. 916.
(5) (1902) 6 C. W. N. 919.
(6) (1906) 11 C. W. N. 190.

The defendants filed a joint written statement and pleaded *inter alia* that the lease granted by Arman to the plaintiff was void under section 85 of the Bengal Tenancy Act, since it was for an indefinite period, and that, even if the view were adopted that the lease was valid for nine years, that period having come to an end about a month after the dispossession, the plaintiff could have no title whatever at the date of the institution of the suit.

The Munsiff decreed the suit holding that the plaintiff had an existing under-raiyati right in the land in suit. The District Judge reversed the decision of the Munsiff, upholding the contention of the defendants.

Dr. Priyanath Sen for the appellant. So long as the tenancy of Arman Howladar subsists, the question whether the plaintiff's sub-lease is or is not binding against the superior landlord cannot arise. The tenancy of Arman Howladar serves as a shield to protect the sub-lease from being attached by the superior landlord, and the plaintiff is entitled to succeed on the basis of the sub-lease to recover possession from the defendants. Section 85 of the Bengal Tenancy Act does not help the defendants. Firstly, there is no sub-lease executed by the *raiyat*, but there is a *kabuliyat* executed by the under-raiyat. Hence sub-section (2) does not stand in the way of its registration. Secondly, assuming that a *kabuliyat* stands on the same footing as a lease, the lease in this case is not for a term exceeding nine years, but is really a lease from year to year. *Thirdly*, sub-section (2) only prohibits registration, and the effect of that would be to make the registration ineffectual, if it took place in contravention of that sub-section, and the further result would be that the case would come under sub-section (1). The raiyat himself cannot avoid the sub-lease, and, so long as the raiyat's interest subsists, the under-raiyat is safe. See *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) and *Madan Chandra Kapali* v. *Jaki Karikar* (2). In *Srikant Mondul* v. *Saroda Kant Mondal* (3) the precise point raised by me

(1) (1901) I. L. R. 29 Calc. 148. (2) (1902) 6 C. W. N. 377.
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does not seem to have been argued. If necessary, I would submit the case was wrongly decided.

Maulvi Wahed Hossein for the respondent. The sub-lease was void: *Fazel* v. *Keramuddi* (1), *Basaratulla Mundul* v. *Kasirunnessa Bibi* (2). Plaintiff, having no title, cannot succeed.

MITRA AND CHITTY JJ. There is no dispute as to the facts of this case. The defendant No. 2 is the superior landlord. The defendant No. 1 holds a plot of land under him. This plot is a portion of a holding held at one time by a raiyat Arman Howladar under the defendant No. 2. In 1889 Arman Howladar granted a lease of it along with other plots of land to the plaintiff. The lease was one from year to year; it was not permanent or for a term of years. The defendant No. 2 dispossessed the plaintiff, but the plaintiff is still in possession of other plots, which he holds under Arman. The present suit was instituted by the plaintiff for recovery of possession of this plot, on the ground that he was at least a tenant from year to year under Arman and that the defendants had no right to dispossess him.

On these facts the Munsiff held that the plaintiff was entitled to succeed and gave him a decree for possession. The lower Appellate Court had come to the conclusion that under section 85 of the Bengal Tenancy Act, the lease granted by Arman to the plaintiff was void. The lower Court has also held that the plaintiff had no title to rely on in a suit for recovery of possession.

It has, however, been found that the interest of Arman, as that of a raiyat, has not been put an end to. The plaintiff was paying to Arman the rent, which he was bound to pay under the lease of 1889, and Arman himself was paying rent to the second defendant. We do not see how we can come to the conclusion that the plaintiff had no title to sue for possession of the plot in dispute. He was, under the terms of the

(1) (1902) 6 C. W. N. 916. (2) (1906) 11 C. W. N. 190.

lease to him, a tenant from year to year, and, even if the lease was void for certain purposes, it could not be held to be void against his own landlord Arman; and, as long as Arman's interest is not put an end to, the defendant No. 2 has no right to eject the plaintiff, who is not his raiyat.

The words of section 85 of the Bengal Tenancy Act appear to us to be clear, at least, in one respect, namely, that a sub-lease granted by a raiyat is void only under the circumstances specified therein as against the landlord, but is not necessarily void so far as the raiyat and the under-raiyat themselves are concerned. It does not appear to bar the creation of a right in the under-raiyat to the extent of the right of the raiyat himself. Sub-section (1) expressly says that a sub-lease shall not be valid against the landlord. Sub-section (3) also refers to the right of a landlord if a sub-lease was granted before the passing of the Bengal Tenancy Act. Sub-section (2) was put in between sub-section (1) and sub-section (3) evidently for the benefit of the landlord only to prevent the registration of a document, if it creates a tenancy of more than nine years or in perpetuity.

The lease in the present case is not one for more than nine years and is not also permanent, and there was therefore no bar to the registration of the lease, even if it be considered that the kabulyat had the same effect as a lease. Thus there is nothing in section 85 to make the lease to the plaintiff void for all purposes.

The lower Appellate Court has relied on certain cases decided by this Court, but none of them appear to us to be applicable to the facts of the present case. *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) may be used in favour of the contention of the plaintiff and supports our view of the law as laid down in section 85. It lays down that a sub-lease granted by a raiyat in contravention of the provisions of section 85 of the Bengal Tenancy Act is void against the landlord only and not against the raiyat or any person claiming through the raiyat. To the same effect is the decision of this Court in *Madan Chandra*

(1) (1901) I. L. R. 29 Calc. 189.

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Kapali v. *Jaki Karikar* (1). The learned judges say in the last cited case that, when an under-raiyat holds under a written lease for an indefinite time (and in the present case, the lease is also for an indefinite time), the raiyat is not entitled to eject him by giving him a notice under section 49 (6), and that the words "the sub-lease shall not be valid" in section 85 (3) mean that the sub-lease shall not be valid against the landlord.

The decision in *Srikant Mondul* v. *Saroda Kant Mondul* (2) might at first sight appear to be against the view taken by us, but the question which has been raised before us was not distinctly raised before the learned Judges, who decided it, and it was not necessary for them to decide this question. The same observations would apply to *Fazel Sheikh* v. *Keramuddi* (3), *Ramgati Mandul* v. *Shyama Charan Dutt* (4) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (5).

We are, therefore, of opinion that the decision of the lower Appellate Court is erroneous. We accordingly set it aside and restore the judgment and decree of the Court of first instance with costs in all the Courts.

(1) (1902) 6 C. W. N. 377.
(2) (1898) I. L. R. 26 Calc. 46.
(3) (1902) 6 C. W. N. 916.
(4) (1902) 6 C. W. N. 919.
(5) (1906) 11 C. W. N. 190.

S. M.