APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

RAJANI KANTA BISWAS
v.
EKKOWRI DAS.*

1907
May 21.

Landlord and Tenant—Transfer by a tenant without consent of the landlord—Non-transferable right—Right of occupancy—Abandonment.

Where a person, having a non-transferable right of occupancy, transferred such right to a third party, and obtaining a sub-lease from the purchaser remained in possession of the land, but repudiated his relation as tenant to the landlord, and sought to re-occupy the land not as his landlord's tenant, but as the under-tenant of a person who was not a tenant and had no legal connection with the land:—

Held, that such a person is not entitled to hold the land as against the landlord.

Madar Mondal v. Mahima Chandra Mazumdar(1) distinguished.

SECOND APPEAL by the defendants, Rajani Kanta Biswas and others.

The plaintiff, Ekkowri Das, held a jama of 2 bighas under the principal defendants; he transferred his holding to one Bipin Krishna Ray, and took a sub-lease of the land from him, and remained in possession thereof. Bipin Krishna Ray, after his purchase, sent by money order the rent of the holding to the landlord, defendant No. 1, who refused to accept it; subsequently, the landlord demanded rent from the plaintiff who told him to realise the rent from the said purchaser. Then the landlord defendant dispossessed the plaintiff from the holding, and hence this suit was brought for recovery of possession of the disputed land, and declaration of title thereto.

The defendant landlord contended that the land appertained to jama standing in the name of one Bhairab Bagdi. Bipin Krishna Ray, who was added as a defendant, supported the

* Appeal from Appellate Decree, No. 1214 of 1905, against the decree of F. Roe, District Judge of Burdwan, dated March 10, 1905, affirming the decree of Babu Lal Singh, Munsif of Burdwan, dated Sept. 30, 1904.

(1) (1906) I. L. R. 33 Calc. 531.

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plaintiff's case, maintaining that the *jote* in question was a transferable one.

The Court of first instance, having held that the *jote* was the plaintiff's *jote* but was of a non-transferable character, and that the plaintiff did not abandon the holding, decreed the plaintiff's suit.

On appeal, the learned District Judge affirmed the decision of the first Court. Against this decision the defendants appealed to the High Court.

Babu Pramatha Nath Sen, for the appellants, contended that the plaintiff was not entitled to a decree inasmuch as he abandoned the holding by transferring a non-transferable occupancy holding to a third party; although he took a sub-lease from the transferee, he maintained that the transfer was a valid transfer, and repudiated his relation as of a tenant to the landlord; and under those circumstances the plaintiff was not entitled to get a decree to hold the land against the landlord. The cases of *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry*(1), *Nurendro Narain Roy* v. *Ishan Chunder Sen*(2), *Dwarka Nath Misser* v. *Hurrish Chunder*(3), and *Samujan Roy* v. *Munshi Mahaton*(4) support my contention.

Babu Shib Chandra Palit (*Babu Nil Madhab Bose*, *Babu Khettra Mohan Sen* for *Babu Nalini Ranjan Chatterjee*, and *Babu Lalit Mohon Ghose* with him), for the respondents, contended that the cases of *Srishteedhur Biswas* v. *Mudan Sirdar*(5), *Robert Wilson* v. *Radha Dulari Koer*(6), *Dina Nath Roy* v. *Krishna Bejoy Saha*(7), *Mathur Mundal* v. *Ganga Charan Gope*(8), and *Madar Mondal* v. *Mahima Chandra Mazumdar*(9) supported his contention, that where a tenant transfers his holding but remains in possession by taking a sub-lease from the transferee, he is entitled to hold it as against his landlord.

Babu Pramatha Nath Sen, in reply. The cases cited by the other side are quite distinguishable. In all these cases the tenant

(1) (1896) I. L. R. 24 Calc. 212.
(2) (1874) 22 W. R. 22.
(3) (1879) I. L. R. 4 Calc. 925
(4) (1900) 4 C. W. N. 493.
(5) (1883) I. L. R. 9 Calc. 648.
(6) (1897) 2 C. W. N. 63.
(7) (1904) 9 C. W. N. 379.
(8) (1906) 10 C. W. N. 1033.
(9) (1906) I. L. R. 33 Calc. 531.

did not repudiate the relationship of landlord and tenant; but in the present case he not only repudiated the relationslip, but maintained that the transfer was a valid one, and that the landlord should look for his rent to the transferee.

Cur. adv. vult.

RAMPINI AND SHARFUDDIN, JJ. The facts of this case are as follows: The plaintiff, Ekkowri Das, alleged that he had a jama of 2 bighas, which he held under the principal defendant. He was in want of money to meet the expenses of a marriage, and accordingly sold this jama to the defendant, Bipin Krishna Ray, on the 23rd Baisakh 1306. The following day, *i.e.* the 24th Baisakh 1306, he took a settlement of the jama under Bipin Krishna Ray at a rental of Rs. 20, and has remained in possession of the land ever since. It is to be noted that this Bipin Krishna Ray was not originally made a defendant. The suit was instituted on the 15th September 1903, and Bipin Krishna Ray was not made a party to the suit till the 23rd June 1904.

The plaintiff goes on in his plaint to say that after the sale by him of the land to Bipin Krishna Ray the latter sent the rent for 1308 and 1309 by money order to the landlord, the defendant No. 1, but the defendant No. 1 refused to receive it. "Subsequently, the defendant No. 1 demanded rent from the plaintiff, but the plaintiff told him to realize rent from the said purchaser on the allegation of the sale of the land." Then the landlord defendant "detained the paddy on the land." But the plaintiff, notwithstanding the detention, cut the paddy, upon which the landlord removed the paddy. The plaintiff sued him for the value of the paddy in the Small Cause Court, but lost his case. The defendant No. 1 then dispossessed him from the land.

The plaintiff accordingly brought this suit (i) for a declaration that the 2 bighas appertain to his father's jama, (ii) for a declaration that he has a right to it and for possession of it, and (iii) for a declaration that he held the land under a *jamai* right under the defendant, Bipin Krishna Ray, that the crop for 1309 was raised by him and for a decree for Rs. 40 for the value of the

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crop of that year. The landlord defendant pleaded that the land appertained to a jama standing in the name of Bhairab Bagdi. The added defendant, Bipin Krishna Ray, *i.e.* the person to whom the plaintiff has sold the land, supported the plaintiff's case, maintaining that the *jote* in question was a transferable one, and that he not only sent the rent to the talukdar defendant, but also the mutation fees. The Munsif found that the jote was the plaintiff's jote, but was of a non-transferable character and that the plaintiff did not abandon the holding by selling the land to Bipin Krishna Ray and taking a lease under him. "The plaintiff was all along in possession," the Munsif says, "and therefore not liable to be ousted." "It is clear, I find from the evidence and circumstances of this case, that Bipin Krishna Ray tried to injure the *maliks* by a *kobala*, and the *maliks* took the land into their own hands, and ousted plaintiff from his lands, so both parties are to be blamed, and I do not allow costs to either. The ill-doing of the plaintiff in creating a new landlord is made up by the illegal acts of the *malik* defendant; so to avoid multiplicity of suits, I think, I may allow a relief to the plaintiff in this very suit. But I decide issues 4 and 5 against the plaintiff, and issue No. 6 in his favour."

Issues 4, 5 and 6, as framed by the Munsif, it may be mentioned, are as follows:—

"*Fourth*—Has the plaintiff acquired any title to the disputed land by his alleged *bandobust* from Bipin Krishna Ray?

"*Fifth*—Has Bipin Krishna acquired any right by his purchase from the plaintiff? Had plaintiff any transferable interests in the land?

"*Sixth*—Is the plaintiff entitled to get khas possession of the disputed land?"

On appeal, the District Judge affirmed the Munsif's findings. He held that the case was on all fours with that of *Srishteedhur Biswas* v. *Mudan Sirdar* (1), and that the plaintiff was entitled to be restored to possession.

The defendants 1 and 10 to 20 now appeal. On their behalf it has been urged (*i*) that on the facts found the plaintiff is not entitled to khas possession; (*ii*) That the lower Courts have given

(1) (1883) I. L. R. 9 Calc. 648.

the plaintiff khas possession without even ordering him to pay rent to the landlord-defendant, and (*iii*) that the plaintiff prayed for khas possession as an under-raiyat of Bipin Krishna Ray and that the lower Courts have given him a decree for khas possession of the land under a title which he did not set up, *viz.*, as the raiyat of the land.

It may be mentioned here that the defendant Bipin Krishna Ray has appeared before us by pleader, and that on his behalf it has been contended, that the finding of the Courts below that the holding is a non-transferable one, is wrong.

The lower Courts' finding on this point is, however, a finding of fact which concludes us in second appeal.

On the facts found it would seem to us that the plaintiff is not entitled to the relief which the Courts below have given him.

The facts found are that the plaintiff was a raiyat. He had a non-transferable holding. He transferred it to Bipin Krishna Ray, which he had no right to do. It is true that he remained in occupation of the land as an under-raiyat of Bipin Krishna Ray. But he repudiated his position as a tenant under the landlord. When the landlord asked him for rent, he refused to pay him, and told him to take rent from Bipin Krishna Ray to whom he had sold the holding. The landlord would not accept the rent from Bipin Krishna Ray, because he did not recognize him as his tenant, which he was justified in doing, as the holding has been found to be of a non-transferable nature. It would, therefore, seem to us that the plaintiff has abandoned his holding under the landlord. He entirely repudiated his position as a tenant under the defendant No. 1 and in this suit continues to do so, for he seeks to re-enter the land as an under-raiyat of Bipin Krishna Ray. It will be seen that he has made no arrangement for the continuance of the payment of rent in his name through Bipin Krishna Ray. On the contrary, throughout this suit the plaintiff and Bipin Krishna Ray have maintained that the jote is transferable and that the defendant is bound to accept rent from Bipin Krishna Ray and from no one else. Bipin Krishna Ray has even urged this plea through his pleader before us. It would therefore seem that the Courts below have given the plaintiff a decree for what he did not ask, *viz.*, a decree for

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khas possession as a raiyat of the land, instead of a decree for khas possession as an under-tenant of Bipin Krishna Ray.

It has, however, been argued on the other side that nothing that the plaintiff has done has really altered the previous state of things. The plaintiff after selling the land to Bipin Krishna Ray remained in possession, and though he repudiated his landlord's title and did not pay rent to him, this does not, it is said, work a forfeiture of his rights. This is quite true, and if the plaintiff in this suit had recanted and resiled and sued for possession as a raiyat under the landlord defendant No. 1, offering to pay rent to him, he would be entitled to possession and to the relief he has obtained. But he does not do so. He comes to Court saying:—"I have sold my land. I will not pay rent to the landlord. I will pay rent to Bipin Krishna Ray to whom I have sold the land, and to no one else. The landlord must take rent from Bipin Krishna Ray, and I pray for possession as an under-raiyat of Bipin Krishna Ray." But Bipin Krishna Ray has now been found by the Courts below to have no title in himself, and consequently no title which he can convey to the plaintiff.

The plaintiff's pleader himself admits that his client has made "a mistake" in the way he has shaped his suit, and suggests that this be overlooked; but it would seem to us that a plaintiff is entitled to relief, "*secundum allegata et probata*," and not according to what he did not ask for or prove. In short, the case would seem to us to come within the purview of the ruling of this Court in *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry*(1), which has been relied on by the pleader for the appellant. The appellant's pleader has also cited the cases of *Nurendro Narain Roy* v. *Ishan Chunder Sen*(2), *Dwarka Nath Misser* v. *Hurrish Chunder*(3), and *Samujan Roy* v. *Munshi Mahaton*(4).

They are all in his favour no doubt, but are not exactly in point.

On the other hand, the cases of *Srishteedhur Biswas* v. *Mudan Sirdar*(5), *Robert Wilson* v. *Radha Dulari Koer*(6), *Dina Nath Roy*

(1) (1896) I. L. R. 24 Calc. 212.
(2) (1874) 22 W. R. 22.
(3) (1879) I. L. R. 4 Calc. 925.
(4) (1900) 4 C. W. N. 493.
(5) (1883) I. L. R. 9 Calc. 648.
(6) (1897) 2 C. W. N. 63.

v. *Krishna Bejoy Saha*(1), *Mathur Mundal* v. *Ganga Charan Gope*(2), and *Madar Mondal* v. *Mahima Chandra Mazumdar*(3) have been relied on. But none of these, except the last can possibly be said to conflict with the view we take of this case.

In *Srishteedhur Biswas* v. *Mudan Sirdar*(4) it is laid down that a raiyat having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the land and sold that right to a stranger without giving up possession of the land. This is no doubt good law:—but the plaintiff has done more. He has expressly repudiated his relation of tenant to the landlord, and he seeks to recover possession not as his landlord's tenant, but as the under-tenant of a person who has been found to have no title.

In *Robert Wilson* v. *Radha Dulari Koer*(5), it has been decided that where a tenant transfers his holding and abandons possession of it, the landlord is entitled to eject the transferee. This does not help the plaintiff. It is not said in that case that it is only when the plaintiff abandons possession that the landlord can eject the transferee. In the case of *Samujan Roy* v. *Munshi Mahaton*(6), it has been expressly pointed out that the provisions of section 87 of the Bengal Tenancy Act are not exhaustive.

In the case of *Dina Nath Roy* v. *Krishna Bejoy Saha*(1) it was held that the landlord was entitled to a decree for possession against the defendant No. 1, the transferee of a non-transferable holding, but was not entitled to get khas possession against defendants 2 and 3 (the transferors), but only to receive rent from them.

But in that case it will be seen the transferors, the defendants 2 and 3, professed themselves to be quite willing to pay rent to their old landlord. They were therefore entitled to remain in possession of the land. There was no reason why they should be ejected. Nothing they had done had worked a forfeiture. But the facts of the present case are quite different. The present plaintiff is not willing to pay rent to his landlord. On the contrary, he refuses to pay rent to him, alleges that the defendant

(1) (1904) 9 C. W. N. 379
(2) (1906) 10 C. W. N. 1033.
(3) (1906) I. L. R. 33 Calc. 531.
(4) (1883) I. L. R. 9 Calc. 648.
(5) (1897) 2 C. W. N. 63.
(6) (1900) 4 C. W. N. 493.

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is not his landlord, and that his old landlord, the defendant No. 1, must now take rent from his (plaintiff's) transferee.

The case of *Mathur Mundal* v. *Ganga Charan Gope*(1) would seem to have no application. The case was remanded to have it determined whether Nidra Bewa had really abandoned the land. It was held that if the defendant was holding possession on behalf of Nidra Bewa he could not be evicted. But there is no allegation in the present case that Bipin Krishna Ray is holding the land for the plaintiff, or in any other but his own right. The case of *Madar Mondal* v. *Mahima Chandra Mazumdar*(2) would seem at first sight to present some difficulty. In this case it has been laid down that where a tenant having a non-transferable right of occupancy sold such right to a third person, obtained a sub-lease from the purchaser, and remained in possession of the land, and was cultivating the same, the landlord is not entitled to khas possession against him. In order to entitle a landlord to re-enter an abandonment by the tenant, it must be an abandonment in the words of section 87 of the Bengal Tenancy Act, namely, that "the raiyat voluntarily abandons his residence and ceases to cultivate without notice to the landlord and without arranging for the payment of his rent as it falls due." But on examining the judgment it will be seen that it nowhere expressly conflicts with the view we take of this case. In the judgment it is said—"In a case very similar to the present, *Dina Nath Roy* v. *Krishna Bejoy Saha*(3), it was held that the landlord was not entitled to khas possession against the original tenants, who were still on the land and were cultivating the same. A decree was passed against the purchaser defendants. It appears to us that the view taken in that case is correct and we accordingly follow it."

But in the case of *Dina Nath Roy* v. *Krishna Bejoy Saha*(3) as has been pointed out, the original tenants, the transferors, were quite willing to cancel the sale, to resile from their position as transferors and to revert to the old state of things and again pay rent to their landlords. Hence, it was held that their landlord could not eject them. That, as has already been

(1) (1906) 10 C. W. N. 1033. (2) (1906) I. L. R. 33 Calc. 531.
(3) (1904) 9 C. W. N. 379.

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pointed out, is not the case in the present suit. Again, in the judgment in *Madar Mondal* v. *Mahima Chandra Mazumdar*(1) it is said: "there can be no doubt that in order to entitle the landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of section 87, namely, that the raiyat voluntarily abandons his residence without notice to the landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate. In such a case the landlord's entry would be legal, and he may then let out the land to another tenant or take it into cultivation himself." But it has already been decided, that the provisions of section 87 are not exhaustive. The present case is not one of abandonment under section 87 of the Bengal Tenancy Act. It is not a case in which the plaintiff is willing to revert to the former state of things, to re-occupy the land and pay rent to the landlord as before. If this were the case, the decree of the lower Court would be right. But it is a case in which the plaintiff repudiates his relation of tenant, refuses to pay rent to him, maintains his right to transfer a non-transferable holding, and seeks to re-occupy the land not as his landlord's tenant, but as the under-tenant of a person who is not a tenant and has no legal connection with the land. The judgment in the case of *Madar Mondal* v. *Mahima Chandra Mazumdar*(1) does not deal with or apply to such a case as this, and on the plaintiff's pleadings in this suit we do not think he is entitled to the relief he has obtained or to any relief.

We therefore decree this appeal with costs.

Appeal allowed.

S. C. G.

(1) (1906) I. L. R. 33 Calc. 531.