

## APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Doss.

AGARJAN BIBI

v.

PANAULLA.\*

1910  
May 6.

*Landlord and Tenant—Transfer of a portion of a non-transferable jote—Joint possession—Transfer, validity of.*

The purchaser of a portion of a *raiyati jote* which is not transferable without the landlord's consent, and where there is no finding of such consent, is not entitled to have joint possession of the *jote*.

It is open to tenants in occupation of a portion of the *jote* to question the validity of the transfer.

SECOND APPEAL by defendants Nos. 1 to 4.

This appeal arose out of a suit for possession of certain plots of land upon establishment of title therein. The allegations in the plaint were that the disputed lands belonged to the *raiyati jote* of one Ghogan, who died leaving two sons, Kamal (the predecessor of defendants Nos. 1 to 4) and Jamal (the defendant No. 5), and four daughters (defendants Nos. 6 to 9). It was further alleged there that after Ghogan's death all the aforesaid heirs were in joint possession of the lands, that Jamal removed to a neighbouring village, leaving his son Riazuddin in his dwelling-house in possession of his four annas share in those paternal lands, and that subsequently the daughters sold their eight annas share in those lands to their brother, the defendant No. 5, Jamal, who, together with his own four annas share, sold twelve annas share of these lands to the plaintiffs. So the plaintiffs claimed twelve annas share in the disputed lands.

Defendants Nos. 1 to 4 alone contested the suit. They pleaded, *inter alia*, that as the *jotes* were not transferable by custom, the plaintiffs had acquired no right by their purchase.

\*Appeal from Appellate Decree, No. 2265 of 1908, against the decree of Srish Chandra Mukherjee, Subordinate Judge of Tippera, dated June 19, 1908, modifying the decree of Lalit Mohan Bose, Munsif of Comilla, dated May 13, 1907.

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The Court of first instance found that the disputed lands formed a *raiyati jote* of the two brothers in equal moieties, and that Jamal and Kamal being joint tenants of the lands, Kamal could not hold them adversely to Jamal, who had thus eight annas share in these lands to convey, and that the defendants Nos. 1 to 4, the holders of the other eight annas share in these lands, could not be allowed to raise the question of non-transferability of Jamal's share. The Munsif, however, dismissed the suit, holding that the plaintiffs were benami-dars, and that as such were not entitled to sue for possession and declaration of title.

On appeal, the Subordinate Judge held that the plaintiffs purchased the lands for their own use and benefit and that they could maintain the suit. The Subordinate Judge (agreeing with the Munsif that the contending defendants were not entitled to dispute the question of non-transferability of Jamal's share) reversed the judgment and decree of the Munsif, and partially decreed the suit for possession in their purchased eight annas share in the disputed share, with proportionate costs against the defendants Nos. 1 to 4 in both Courts.

The defendants, Nos. 1 to 4, thereupon appealed to the High Court.

*Babu Harendranurayan Mitra*, for the appellants. The right of an occupancy *raiyat* is not a property that is transferable. It is a mere *personal* right to occupy only: *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (1). The fact that it has a marketable value does not confer on the transferee any right whatever. The decision in *Basarat Mandal v. Sabulla Mandal* (2) is not good law: see *Kali Nath Chakravarty v. Kumar Upendra Chandra Chowdhury* (3) and *Bibee Suhodra v. Maxwell Smith* (4). The defendants in this case, *i.e.*, the appellants, are not mere trespassers. They are the co-sharers of the transferor. They could go over all parts of the land, and are responsible for the rent payable to the landlords for the entire holding.

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1898) 2 C. W. N. CCLXXIX.

(3) (1896) 1 C. W. N. XII.

(4) (1873) 20 W. R. 139.

*Babu Shashadhar Roy*, for the respondents. The question of non-transferability can be raised only by the landlord or by the tenant himself when his holding is going to be sold in auction. A trespasser cannot raise the question. The appellants in this case are trespassers, for they cannot resist my suit for possession after partition: *Peary Mohun Mandal v. Radhika Mohun Hazra* (1). All decisions within the last twelve years are in favour of this view. *Basarat Mandal v. Sabulla Mandal* (2), cited for the appellant, is based on equity and ought to guide us in such cases. The defendant is not injured by my purchase: *Ambica Nath Acharjee v. Aditya Nath Moitra* (3), *Ayenuddin Nasya v. Srish Chandra Banerji* (4). These cases have been followed in *Hari Das Bairagi v. Udoy Chandra Das* (5), *Samiruddin Munshi v. Benga Sheikh* (6) and *Haro Chandra Podder v. Umesh Chandra Bhattacharjee* (7). The old cases reported in the Weekly Reporter and cited for the appellants are distinguishable.

*Babu Harendranarayan Mitra*, in reply. The decisions cited by my friend are based on the principle of estoppel and are distinguishable.

*Cur. adv. vult.*

JENKINS C.J. The plaintiff-respondents have brought this suit for the joint possession of land.

It has been found by the lower Appellate Court that this land was the *raiyati jote* of two brothers, Jamal and Kamal, who were entitled to the same in equal moieties. Jamal purported to transfer his 8 annas share to the plaintiffs. Defendants 1 to 4 on Kamal's death succeeded to his eight annas, and they contest the plaintiff's claim to joint possession on the ground that the *raiyati jote* is not transferable. The lower Appellate Court, in reversal of the Court of first instance, has passed a decree in the plaintiff's favour for "possession in their

(1) (1904) 5 C. L. J. 0.

(2) (1898) 2 C. W. N. CCLXXIX.

(3) (1902) 6 C. W. N. 624.

(4) (1906) 11 C. W. N. 76.

(5) (1908) 12 C. W. N. 1086.

(6) (1900) 13 C. W. N. 630.

(7) (1899) 14 C. W. N. 71.

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purchased eight annas share in the disputed land," holding that the defendants 1 to 4 had no right to plead the non-transferability of the holding.

From this decree the defendants 1 to 4 have appealed, and the only point is whether it is open to them to question the validity of the plaintiff's transfer.

It is common ground that the *jote* was not transferable without the landlord's consent, and that there is no finding that such consent was given; but it is argued that the absence of this consent is of no consequence, seeing that it is not the landlord who impugns the transfer. The question involved has been somewhat obscured in more recent times, and it will therefore be convenient to look into its history. As far back as Regulation VII of 1799, mention is made of a "tenant having a right of occupancy only so long as a certain rent. . . . . be paid without any right of property or transferable possession;" (see section 15, clause 7,) while in Harington's Analysis, Volume III, page 450, it is said, "It is generally understood that the *raiyats* by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this right does not authorise them to sell or mortgage it, and it is so far distinct from a right of property.

In *Hyat Bebee v. Sheikh Akbar Alee* (1), a *raiyat's* power of transfer came in question, and it was there said of the purchaser, "He bought as he thought something; the principle *caveat emptor* strictly applies, and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer, he had merely a right of occupancy so long as he had paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845, or in cases where a bonus has been given, thereby creating in the *raiyat* a right of property to that extent, are considered tenures transferable by a *raiyat*." In 1867 it was decided by a Full Bench that

(1) (1855) S. D. A. 20.

there was nothing in section 6 of Act X of 1859 which showed that it was the intention of the Legislature to alter the nature of a *jote* and to convert a non-transferable *jote* into a transferable one, merely because a *raiyat* who held it for twelve years had thereby gained a right of occupancy. *Ajoodhya Pershad v. Imam Bandi Begum* (1).

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In 1874 it was decided by another Full Bench in *Nurendro Narain Roy v. Ishan Chunder Sen* (2) that an occupancy right was not transferable. Sir Richard Couch, in reference to section 6 of Act VIII (B. C.) of 1869, remarked: "The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property that could be transferred." Phear J. considered that the right was "rather of the nature of a personal privilege than a substantive proprietary right." Then there is the authoritative statement of the Privy Council in *Chandrabati Koeri v. Harrington* (3), that a right of occupancy cannot be transferred. This view has since been repeatedly recognized, e.g., *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (4), *Durga Charan Mandal v. Kali Prasanna Sarkar* (5), *Sadagar Sircar v. Krishna Chandra Nath* (6); and its basis is that the right of occupancy is a right personal to the particular *raiyat*. In this connection it is instructive to note the view expressed in *Tara Pershad Roy v. Soorjo Kant Acharjee Chowdhry* (7), that even if the zemindar consented to the transfer, the transferee would thereby merely acquire a new *jote* on the same terms as the original tenancy was held: cf. *Hyder Buksh v. Bhubendro Deb Koonwar* (8). It has, however, been held that a transferor cannot call in question the validity of his own transfer; but this is not because the transfer is valid, but because the doctrine of estoppel stands in his way: *Bhagirath Changa v. Sheikh Hafizuddin* (9).

(1) (1867) 7 W. R. 528.

(2) (1874) 22 W. R. 22.

(3) (1891) L. L. R. 18 Calc. 349.

(4) (1897) L. L. R. 24 Calc. 355.

(5) (1899) L. L. R. 26 Calc. 727.

(6) (1899) L. L. R. 26 Calc. 937.

(7) (1871) 15 W. R. 152.

(8) (1872) 17 W. R. 179.

(9) (1900) 4 C. W. N. 679.

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So far the position is intelligible, though I refrain from expressing any opinion as to the doctrine of estoppel, as it can have no application in this case. But it has been argued that it is only the landlord that can question the validity of what purports to be a non-transferable holding. For this, reliance has been placed on the statement in *Basarat Mandal v. Sabulla Mandal* (1), that the question of transferability was one that might be raised by the landlord, but could not be legitimately raised by trespassers like the defendant in that case. The *ratio decidendi* does not appear from so much of the judgment as has been reported, but an examination of the record shows that the plaintiff in that case alleged dispossession. This implies that the plaintiff had been in possession, and his suit in fact was to recover possession. This explains the decision, and it thus becomes apparent that it was not the intention of the learned Judges to disregard the decision in *Bhiram Ali's case* (2) which was cited to them.

*Ambica Nath Acharjee v. Aditya Nath Moitra* (3) obviously turns on its own peculiar circumstances. The contest was as to which of two persons had the better claim to a sum of money representing the balance of the proceeds of the sale of a holding after the landlord's claim had been satisfied. Ordinarily this balance would be payable to the judgment-debtor, but as he had parted with his interest he made no claim, and in fact the only claimants were the plaintiff and defendant, each of whom claimed to be a transferee of the judgment-debtor's interest. In these circumstances, it was held that the question of transferability did not arise, and the balance was awarded to the prior transferee. Obviously this case can have no bearing on the question now before us. When the facts in *Ayenuddin Nasya v. Srish Chandra Banerji* (4) are examined, it will be seen that the decision turned on the doctrine of estoppel as applied to a transferor and those who claim under him.

Much has been made of *Samiruddin Munshi v. Benga Sheikh* (5). But in this case dispossession was alleged, and as the

(1) (1898) 2 C. W. N. cccxxix.

(3) (1902) 6 C. W. N. 624.

(2) (1897) I. L. R. 24 Calc. 355.

(4) (1906) 11 C. W. N. 70

(5) (1909) 13 C. W. N. 630.

resumed till twenty-five years afterwards! It seems to us perfectly clear that, at the time the lease was granted, it was well known that the nominal rents did not represent the actual profits of the putnidars, and this, indeed, is supported by the evidence given by the plaintiffs to prove that no less than Rs. 1,360 has been realized by the putnidars as *salami* for settling a portion only of the resumed lands since their resumption.

The lower Court, in fixing a fair and equitable rent which the zemindars are entitled to demand from the putnidars, has accepted the rent as determined by the Collector at the time of resumption. We have already noticed that that sum exceeds by Rs. 15 only the rental arrived at on the basis of the principle suggested in the case of *Hari Narain Mozumdar v. Mukund Lal Mundal* (1), and, in the circumstances of the case, we see no reason to differ from the lower Court that Rs. 404-8 is a fair and equitable rent which the zemindars, the plaintiffs, are entitled to receive from the defendants for the 201 bighas 14 cottas of resumed chaukidari chakran lands.

We, therefore, confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

*Appeal dismissed.*

s. c. g.

(1) (1900) 4 C. W. N. 814.

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