

## APPELLATE CIVIL.

Before Richardson and Newbould JJ.

BHUPENDRA NATH BOSE

v.

BANSI TANTI.\*

1913

A pril 25.

*Landlord and Tenant—Transfer of holding—Usufructuary mortgage of holding, effect of—Bengal Tenancy Act (VIII of 1885), s. 25—Abandonment—Forfeiture.*

An unauthorized transfer of a holding or the parting with possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. Transfer by way of usufructuary mortgage stands on the same footing as other partial transfers.

*Kabil Sardar v. Chandra Nath Nag Choudhry* (1); *Mathura Mandal v. Ganga Charan Gope* (2); referred to.

*Baroda Charan Dutt v. Hemlata Dassi* (3), commented on.

*Rasik Lal Datta v. Bidhumukhi Dasi* (4); *Rajendra Kishore Adhikari v. Chandra Nath Dutt* (5); *Krishna Chandra Datta Chowdhury v. Khiran Bajania* (6) distinguished.

SECOND APPEAL by Bhupendra Nath Bose and others, the plaintiffs.

This appeal arises out of a suit brought by the landlords for khas possession of a holding on the allegation that the tenants had abandoned it by executing a usufructuary mortgage, giving up possession of the land and ceasing to pay rent. The learned Munsif dismissed the suit finding that the tenants had continued to pay the rent of the holdings. The plaintiffs

\* Appeal from Appellate Decree, No. 2715 of 1911, against the decree of A. Mellor, District Judge of Darbhanga, dated June 5, 1911, confirming the decree of Shyam Narain, Munsif of Samastipur, dated Sep. 12, 1910.

(1) (1892) I. L. R. 20 Calc. 590.

(4) (1906) I. L. R. 33 Calc. 1094.

(2) (1906) I. L. R. 33 Calc. 1219.

(5) (1507) 12 C. W. N. 878.

(3) (1908) 13 C. W. N. 242.

(6) (1903) 10 C. W. N. 499.

then appealed to the District Judge of Darbhanga, who dismissed their appeal with costs. Against that decision the plaintiffs preferred this second appeal to the High Court.

*Babu Shorashi Charan Mitra*, for the appellants.  
No one appeared for the respondent.

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RICHARDSON AND NEWBOULD JJ. This second appeal, preferred by the plaintiffs, is rested on the ground that the mere fact that the tenants defendants mortgaged their holding by way of usufructuary mortgage and put the mortgagee in possession, the holding not being transferable by custom, entitles the plaintiffs, who are the landlords, to re-enter. The decision in the case of *Baroda Charan Dutt v. Hemlata Dassi* (1), to which reference has been made, is not inconsistent with the earlier decisions of this Court. In the course of the judgment at page 244 of the report the learned Judge observed that the usufructuary mortgagee had been in possession for several years, and that during that period the tenants had had no connection with the land. The current of authorities shows that the unauthorised transfer of a holding, or the parting with the possession of it, in whole or in part, does not *per se* work a forfeiture under the Bengal Tenancy Act. There must be something more, something in the nature of an abandonment by the tenant or something of that kind. Reference may be made to the cases of *Kabil Sardar v. Chandra Nath Nag Chowdhry* (2) and *Mathura Mandal v. Ganga Charan Gope* (3). In the case of *Baroda Charan Dutt v. Hemlata Dassi* (1), Mr. Justice Doss cited two cases, *Krishna Chandra Datta Chowdhry v. Khiran Baiania* (4) and *Rasik Lal Datta*

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v. *Bidhumukhi Dasi* (1). In the latter case there was an abandonment by the tenant. The former case arose in the district of Sylhet. and was decided not under the provisions of the Bengal Tenancy Act, but under the provisions of Act VIII (B.C.) of 1869, which is the Act in force in that district. In the case of *Raiendra v. Chandra* (2), there was a relinquishment by the tenant in favour of the landlord. There appears to be no reason why the principle above referred to should not be applied to the case of a transfer by way of usufructuary mortgage in the same way as to other partial transfers. In the case before us there is a clear finding by the lower Appellate Court that there has been no abandonment by the tenant defendants, and with that finding we are unable to interfere in second appeal. We are of opinion that in the view which they took of the facts, the lower Courts were right in holding that the plaintiffs were not entitled to re-enter. The plaintiffs, of course, are not bound by the transfer. They are entitled to demand rent from the tenant defendants and are not obliged to accept rent from the mortgagee. With these observations the appeal is dismissed. No one appearing for the respondents we make no order as to costs.

S. K. B.

*Appeal dismissed.*

(1) (1906) I. L. R. 33 Calc. 1094.

(2) (1907) 12 C. W. N. 878.