

**(1909) 03 CAL CK 0004**

**Calcutta High Court**

**Case No:** None

Samiruddin Munshi

APPELLANT

Vs

Benga Shaikh and Others

RESPONDENT

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**Date of Decision:** March 2, 1909

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### **Judgement**

1. The land in suit in this case is an occupancy holding, which is not shown to be transferable without the landlord's consent by local usage. The plaintiff is a purchaser in execution of a money decree. At the time of his purchase the land was held by one Agar Sheikh under a usufructuary mortgage. When the term of this had expired the plaintiff took possession through Court, and thereafter according to his case obtained settlement from the landlord. He pleads that he was dispossessed by the defendants and sues for recovery of possession.

2. The defence is that the original tenants relinquished the land, which was then settled with the defendants. This alleged settlement, however, was not put in issue, an omission of which no explanation has been given. The issues must doubtless have been accepted and signed by the parties: and the fact that the settlement with the defendants was not entered is not without significance.

3. The Munsiff seems to have disbelieved the story of a settlement with the defendants. He accepted the plaintiffs assertion of a settlement and decreed the suit.

4. On appeal the learned Subordinate Judge wholly disbelieved the story of the settlement with the plaintiff. He did not apparently question the fact of the plaintiff's purchase, which seems to be undisputed. He came to no clear finding with respect to the alleged settlement with the defendants, which indeed could hardly be expected of him in the absence of an issue on the point. But finding that the plaintiff had not proved a settlement from the landlord he dismissed the suit. The plaintiff accordingly appeals.

5. In appeal reliance is placed on the decision in Basarat Mandal v. Sabulla Mandal 2 C.W.N. 279; Ambica Nath Acharjee v. Aditya Nath Moitra 6 C.W.N. 624 and Ayenuddin Nasya v. Srish Chander Banerji 11 C.W.N. 76 and it is argued that in this case, where neither of the parties is either the landlord or the original tenant, the purchase of the plaintiff is a sufficient title to enable him to succeed. It must be admitted that those cases may reasonably be regarded as authority for holding that in cases between rival claimants of holdings, neither of whom is either the landlord or the original tenant, the question of transferability does not arise, and the one who would have the best title if the holding were transferable, is entitled to succeed. On behalf of the respondents the decisions in Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha 24 C. 355; Durga Churn Mandal v. Kali Prosonna Sircar 3 C.W.N. 586 and Sita Nath Chatterjee v. Atmaram Kar 4 C.W.N. 571 are relied on. These cases show that the holding of an occupancy raiyat cannot be sold in execution of a money decree; but in all these cases the sale was attacked by the original tenant himself. This is a clear distinction between these cases and those on which the appellant relies. It may not be a very logical distinction. It certainly seems somewhat anomalous that a sale, to which the landlord can refuse his consent, and to which the tenant can successfully object that nothing passes under it, should create a good title between strangers. This, however, seems to be the inevitable result of the authorities cited above.

6. In the present case the dispute is between persons who are not the original tenants. The learned pleader for the appellant very frankly concedes that if the defendants had proved that the original tenant had abandoned the holding and that it had then been settled with them, he would have no case now that his assertion of a settlement has been disbelieved. But the judgment of the lower appellate Court contains no express finding on this point.

7. It is argued on behalf of the respondents that this question of the rights of the plaintiff under his purchase is a new one, inasmuch as in the Courts below he rested his title on settlement by the landlord. But the wording of the third issue is a complete answer to this contention.

8. We think that the case must go back to the learned Subordinate Judge for a distinct finding on the question whether the defendants have succeeded in proving that the land was settled with them by the whole body of landlords after relinquishment of the holding by the original tenant. Although no issue was raised on this point the parties have clearly adduced evidence on it and, fresh evidence is not required. If the learned Subordinate Judge decides this question in favour of the defendants, this appeal will stand dismissed with costs. If, however, he decides it against them, the plaintiff will be entitled to a decree for recovery of possession with the costs of all Courts.