

(1922) 02 CAL CK 0003

Calcutta High Court

Case No: None

Ambika Debi add Ors.

APPELLANT

Vs

Swarnamayidasi and Another

RESPONDENT

Date of Decision: Feb. 23, 1922

Citation: AIR 1922 Cal 135 : 68 Ind. Cas. 425

Hon'ble Judges: Greaves, J; Ghose, J

Bench: Division Bench

Judgement

1. This is an appeal by the defendants Nos. 1 and 5 against a decision of the subordinate Judge of Midnapore modifying a decision of the 4th Munsif at Tamluk. The plaintiff is the suit was a usufructuary mortgagee. The mortgage was executed in his favour by defendant No. 7. The appellant, defendant No. 6, is the landlord and the first defendant is a new tenant with whom defendant No. 6 purports to have settled the lands. The holding, which is as non-transferable occupancy holding, was sold for nonpayment of rent and was purchased by defendant No. 6, the landlord. The lower Appellate Court has passed a decree for possession of the land in suit in favour of the mortgagee, the plaintiff, on condition of his paying to the landlord, the appellant, defendant No. 6, a sum of Rs. 45, the amount of the arrears of rent for which the holding was brought to sale.

2. Two points have been urged before us in this appeal. First, it is said, that the plaintiff cannot maintain the suit inasmuch as the execution of the usufructuary mortgage by defendant No. 7 gave the landlord a right to obtain possession of the holding, and it is said that, by virtue of the mortgage, the plaintiff acquired no rights in the land. Secondly, it is said that there was no prayer for redemption in the original plaint. So far as the first point is concerned, what has been argued before us is that the mere execution of the usufructuary mortgage by the tenant followed by possession of the mortgagee, even without any definite evidence that, the tenant has abandoned the building, is sufficient of itself to entitle the landlord to possession, and in support of this contention we were referred to several cases, the

one which bears the most upon the point being the case of Krishna Chandra Dutta v. Khiran Bajania (4) where it is held that by treating a usufructuary mortgage an occupancy raiyat not authorised to transfer his holding make? himself liable to ejection by the landlord.

3. As against this on behalf of the respondents it is stated that that decision must be taken to have been impliedly overruled by the decision in the case of Dayamoyi v. Ananda Mohan Boy (7), for it is said that where a transfer is not by way of sale, the landlord, though not contented, not ordinarily entitled to recover possession of the holding unless there has been an abandonment. So far as the abandonment is concerned, there is an express finding in the judgment of the lower Court that there was no abandonment of the holding by defendant No. 7 : consequently, it remains to be said that the argument advocated before us on behalf of the respondent is well-founded said that the mere execution of a usufructuary mortgage followed by possession does not entitle the landlord to re-enter on the holding or recover possession. Reference may be made in support of the conclusion at which we have arrived to the case of Bhujendra Nath v. Bansi Tanti (1) which is a decision that a transfer by way of usufructuary mortgage awards on the same footing as other partial transfers; and in the case of Monohar Lal v. Ananta Moyre 20 Ind. Cas 198 : 17 C. W. N. 802, it is said (at page 806 Page of C. W. N.-[Ed.]) that the mere execution of a usufructuary mortgage might not of itself be sufficient to establish abandonment. So far as the second question is concerned it seems to us that the suit was adequately framed for the purposes of the decree which was obtained.

4. In the result the appeal fails and must be dismissed with costs.

5. The cross of objections are not pressed. They are dismissed without costs.