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**(1874) 03 CAL CK 0002**

**Calcutta High Court**

**Case No:** Special Appeal No. 1519 of 1873

Nidhikrishna Bose

APPELLANT

Vs

Nistarini Dasi and  
Others

RESPONDENT

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**Date of Decision:** March 23, 1874

**Final Decision:** Dismissed

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### **Judgement**

Markby, J.

The question for determination in this case is whether the interest in the tank, which has thus passed to the defendant Nistarini, is a permanent and transferable one, which she can hold against the plaintiff who is the proprietor of the talook in which the tank is situate. The facts as found by the Courts below are, that the tank has been held upon payment of an unvarying rent of Sa. Rs. 2-8 for a very long period; certainly ever since 1213, and long before the grant of the talook which the plaintiff now holds. I also think it has been rightly presumed that the tank has been so held for a considerably longer period, in all probability prior to the permanent settlement. There is no evidence on either side as to the creation of the interest in the tank which is now held by Nistarini, nor has any written document been produced relating thereto. It appears, however, that Gholam Safdar, who purchased the interest of the Palits in the tank, was, with his brothers, the owner of the talook also, and the Munsif considers that this leads to the inference that the holder of the tank had an interest which could not be extinguished at the will of the zemindar, or of the talookdar who represented him.

2. In the first Court the case was evidently treated as governed by Beng. Act VIII of 1869, but as the property in dispute is a tank, it is now admitted that the second Court was right in holding that that Statute is not applicable. Nevertheless, the second Court dismissed the suit to recover possession, holding upon the evidence that the defendant was possessed of a permanent transferable interest in the tank.

3. I think the point for our consideration is, whether upon this evidence the Courts below were at liberty to come to the conclusion that the defendant was possessed of such an

interest.

4. In my opinion the Courts below were at liberty to draw this conclusion. I do not for a moment intend to say that, by occupation upon a holding which was originally terminable at will, permanent interest can be gained, except there be some special circumstances which show that the terminable holding has been subsequently converted by agreement into an interminable one. I have held the contrary, and I still adhere to that opinion. Of course I mean apart from the special provisions of Act X of 1859 as to rights of occupancy, and as to tenures which existed prior to the permanent settlement, which provisions do not apply to this case. But upon a principle in some respects analogous to that expressed in Act X of 1859, but which existed before that Act was passed, which still exists independently of that Act, and which is applicable to all immoveable property alike, whether lands, houses, tanks, or gardens, it may be shown by evidence as to the nature of the enjoyment what the grant in its origin really was. This has frequently been so held in regard to grants of various kinds, and is in fact only an application of the more general maxim, *optimus interpret rerum usus*. The *usus* in this case is the frequent transfer of the interest without any change in the terms of the holding, or in the amount of rent paid, extending over a period of more than sixty years, and in an act done by a person--Gholam Safdar--who may reasonably be supposed to have known the real fact, which act is inconsistent with the interest being terminable at will.

5. The only ground upon which it has been contended that this general maxim cannot be applied to this case is, that the parties stand to each other in the relation of landlord and tenant, Exception has been sometimes taken to the use of these words as applied to the *zemindars*, *talookdars*, and the various persons holding tenures under them in this country, but poverty of language sometimes compels us to resort to them, and I fully admit that here, as elsewhere, a tenant (by which I mean any person holding land derivatively from or as the representative of another) stands in a very different position from a person who holds land as his own, or, as it is commonly said, who holds it adversely. No doubt also, a person who pays rent to another in respect of the land which he holds, generally holds the land derivatively from, or as the representative of, and not adversely to, the person to whom the rent is paid. But I know of no rule of law which prevents a person who pays an annual rent (even if it be inferred therefrom that he holds derivatively or as a representative only) from showing what the true nature of his interest is by evidence as to the nature of his enjoyment. There is indeed one well-known case in England in which it has been held that a person who had made, for a very long period, a small unvarying payment to another in respect of the land which he held, ought to be treated as the owner of the land, the annual payment being treated as a quit-rent only--*Doe d. Whittick v. Johnson Gow*'s Rep., 173, per Holroyd, J. It is not necessary in this case to go to that length, nor do I say that the circumstances of this case would justify us in going to that length. But I refer to the case as a strong illustration of the application of the principle under consideration to the rights of two persons, one of whom paid, and the other was in receipt of rent. The case has been followed in *Reynolds v. Reynolds* 12

6. I do not think that any of the cases cited by Baboo Hem Chunder Banerjee conflict with this view: certainly the case of Ramdhan Khan v. Haradhan Paramanick 9 B.L.R., 107, note does not do so, and as far as I can see, the case of Addaito Charan Dey v. Peter Das Ante, p. 417 was of a similar description. There the tenure was of modern creation, and there was no evidence beyond the bare payment of rent.

7. The Court below seems to think that the rent might be enhanced. Upon that point we express no opinion. We simply dismiss the appeal, and affirm the decree of the Court below which dismisses the suit. The respondent is entitled to his costs.

Birch, J.

8. The plaintiff, as purchaser at a patni sale for arrears of rent, sued to obtain khas possession of a tank held by the defendant at a rent of Sa. Rs. 2-8. The plaint was not clearly drawn, but the issues framed admit of the contention raised before the lower Appellate Court and before this Court. The Munsif dealt with the case as though the plaintiff had relied solely on his rights as auction-purchaser under Regulation VIII of 1819, and held that the plaintiff could not eject the defendant from the tank. Before the Judge in appeal objection was taken to this finding: but a further argument was raised, that even if the plaintiff failed to establish the right he set up as auction-purchaser at a sale under Regulation VIII of 1819, he was entitled to succeed in his suit by virtue of his position as landlord, the defendant having admitted that he held a rent-paying tenure in the shape of a tank within the limit of the plaintiff's patni for which he paid rent to the patnidar. The Judge held that the plaintiff had failed to prove that the defendant's tenure was created by the defaulting patnidar; that he had failed to establish the collusion he alleged between the defendant and the defaulting patnidar; and he further held that the tank was the portion of an old holding paying a jama of Rs. 7-12, and not a separate holding by itself. He was of opinion that the defendant had, by possession for sixty years, acquired a title; and he confirmed the Munsif's order dismissing the suit.

9. In special appeal the argument that the plaintiff has acquired any right to eject the defendant, by virtue of his purchase at a sale under Regulation VIII of 1819, may be said to have been abandoned. It is urged that the Judge is wrong in saying that this tank ever formed part of a ryot's holding,--that there is no evidence to support this. Upon this point, I think, we must hold that there is not sufficient evidence to satisfy us that the tank was part of any holding. The argument most pressed upon us is that the defendant, being admittedly a rent-paying tenant, cannot, by any length of possession, acquire a title against his landlord; that his occupancy, not being protected by Statute or contract, could be determined by his landlord at pleasure, and that the plaintiff was therefore entitled to take khas possession of this tank.

10. In a recent decision of this Court it has been held--in the case of *Sibu Jelya v. Gopal Chandra Chowdhary*<sup>(2)</sup>--that the provisions of Act X of 1859 are not applicable to tanks which are not apportioned to any ryotti holding but held separate.

11. The Rent Law therefore not being applicable to a tenure of this nature, we have to consider whether the defendant is protected from ejectment by the common law of the country. It has frequently been held by the Courts in this country that a tenant cannot plead limitation against his landlord; that possession for sixty years gives a tenant no title to his tenure as against his zemindar, so as to convert his tenant-right into a right of ownership. Long possession may protect his tenancy; but it cannot as a matter of law be said in this country to create a title to the land so held.

12. We have only to consider in this case whether the arbitrary right to eject can be enforced.

13. This tank is proved to have been in existence so far back as 1213 B.C. (1807 A.D.), or within fourteen years of the permanent settlement. It was then sold by Krishna Mohan Hazra to Gopinath Palit, and passed from him to the former talookdar, who again sold it to the present defendant. Possession at an uniform rent is thus traced back for sixty-six years. When the patni was first created does not appear, but it must have been subsequent to the year 1807. It is well known that it was customary for zemindars to grant lands at a quit-rent for the purpose of digging tanks, or for gardens, and reference is made in s. 8, Regulation XLIV of 1793, to such leases. They were excepted from the prohibition then in force against the granting of leases by zemindars for a period exceeding ten years: and the ground for exemption seems to have been that such leases were not improvident diminutions of the culturable area of the estate, but were calculated to benefit the property. No one would be likely to go to the expense of digging a tank unless he secured a transferable interest therein. In the case before us it is true that no grant is produced: but when it is established that this tank was in existence so far back as 1807, was then transferred by its possessor to Gopinath Palit, and after passing from father to son in that family was transferred again by sale, the rent all along remaining the same, I think we may fairly presume that it originated in a grant, and has always been treated as a transferable tenure. That it was so treated by the plaintiff's predecessor is pointed out by the Munsif in his judgment. The purchase of the tank by one of the former talookdars gives the plaintiff no right to determine the tenancy. Rent has all along been paid for the tank. The defendant by purchase acquired only the right to hold the tank on the same terms as his vendor, i.e., by payment of rent. To allow the plaintiff arbitrarily to eject the defendant from this tank would be inequitable and unjust. Both the lower Courts, though for different reasons, have concurred in dismissing the plaintiff's suit, and I think that the special appeal must be dismissed with costs.

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(2) Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.

The 26th February 1873.

Sibu Jelya (one of the Defendants) v. Gopal Chandra Chowdhry and Another (Plaintiffs).\*

Right of Occupancy--Act X of 1859, s. 23, cl. 4--Tank--Landlord and Tenant.

Baboo Nil Madhub Sen for the appellant.

Baboo Hem Chunder Banerjee for the respondent.

The judgment of the Court was delivered by

Couch, C.J.--This suit was brought for the possession of a tank which the plaintiff alleged he had been dispossessed of. His case was that he had purchased the tank at a sale in execution of a decree against Raja Gopal Singh, to whom it belonged as a rent-free tenure.

Sibu Jelya was allowed to come into the suit as a defendant in the suit, and he did not deny that the property in the tank belonged to Raja Gopal Singh, and that it had been purchased by the plaintiff; but he objected that the Raja had no khas possession; that on the 4th of Jaisti 1230 (15th April 1823) he gave a lease of the tank to this defendant's father, and that the property had since been held accordingly, and that under that lease the plaintiffs were not entitled to khas possession.

The issue framed by the Munsif was whether Sibu Jelya entered into possession of the tank as ancestral jamai property, or the judgment-debtor had khas possession of the same; and in his judgment, he says:--"Upon the evidence on the record and the circumstances of the case, it is evident that the defendants have held the tank under a jamai title from before the sale in execution, and therefore the plaintiffs have no right to khas possession." He made a decree to the effect that the plaintiffs were confirmed in possession of their right as owners of the tank; but as the allegation on which they grounded their suit was not proved, while the defendants had made out their case, the plaintiffs were ordered to pay the costs.

From this there was an appeal to the Judge, who, after stating what the nature of the suit was, and the Munsif's decision, and the grounds of appeal, said:--"I am of opinion that defendant's possession under the lease is not proved, and there is no improbability whatever in Sibu Jelya and his father having held possession of the tank from year to year by payment of a share of the produce, namely, fish;" and he decreed the appeal, and reversed the judgment of the Munsif.

It has been objected before us that, although the title which had been set up by the defendant Sibu had not been proved, it appeared upon this judgment that there had been such a possession as gave him a right of occupancy, and therefore the plaintiffs ought not to have a decree for possession.

This tank appears to be used only for the preservation and rearing of fish. It does not appear to have formed part of any grant of land, or that it can in any way be considered as appurtenant to any land held by the defendant.

The only thing occupied appears to be the tank itself; and the question is whether the provisions of Act X of 1859 which would confer a right of occupancy apply to such a tank as this.

No doubt, it may be said that a tank comes under the word land, as land covered with water. But it is to be land cultivated or held; and we think, in considering whether this tank comes within the provisions of Act X of 1859, we must do what was done in *Rani Durga Sundari Dasi v. Bibi Umdatannissa* 9 B.L.R., 101, which was decided by myself, Bayley, and Ainslie, JJ., on an appeal against the decision of Glover, J., the senior Judge sitting with Mitter, J. The question there was whether a suit for enhancement of rent of land covered with buildings would lie in the Revenue Courts under cl. 4, s. 23 of Act X of 1859. I was of opinion--and Bayley and Ainslie, JJ., concurred with me--that in order to see what was meant by land in Act X of 1859, we must look at all the provisions of the Act.

Following that rule in the present case, we think we cannot say that the provisions of Act X of 1859 are applicable to such a tank as this is. For instance, the provision in s. 112 of the Act, which was noticed in that case, respecting the recovery of the rent of the land by distress, is not applicable to such a tank as this. Following that rule, we are of opinion it cannot be said that a right of occupancy was gained under the Act by the parties in possession of this tank, although for more than twelve years.

It is therefore unnecessary to determine the question, whether the defendant (by which we mean the intervening defendant Sibū) not having set up this case (he having set up a title under a lease which he has failed to prove) can be allowed to resist a decree to the plaintiff for possession. We think this is different from where a plaintiff fails to prove the case which he relies upon in bringing his suit, and is not allowed to set up a different case; because here, supposing the defendant has a right of occupancy, the consequence of giving the plaintiff a decree would be that, the plaintiff having got possession under the decree in this suit, the defendant would have to bring another suit to get back the possession by virtue of his right of occupancy, which would be contrary to the rule that circuitry of action is to be avoided. It would not be right to give the plaintiff a possession which he ought immediately to lose by another suit; and the proper course would be finally to decide the rights of the parties in the present suit. Or this injustice would be done, that the defendant, although entitled to a right of occupancy, would be entirely deprived of it by losing possession, and not being able to assert his right in any other suit. It would be not only depriving him of a right which clearly belonged to him, but taking away from him altogether the possession of land which he had a right to keep. However, as we have said, it is not necessary to determine that question. It is in order that it may not be supposed, if this case should arise at some future time, that we assent to the proposition that the defendant could not set up this now, because he did not do so

originally by way of defence, that we have made these remarks.

The appeal will be dismissed with costs.

Special Appeal, No. 712 of 1872, against a decree of the Judge of Zilla West Burdwan, dated the 31st January 1872, reversing a decree of the Munsif of Bishenpore, dated the 5th May 1871.

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(1) Before Mr. Justice L.S. Jackson and Mr. Justice Glover.

The 21st February 1872.

Addaito Charan Dey (Plaintiff) V. Peter Das (Defendant).\*

Landlord & Tenant--Permissive Occupancy--Tank--Ejectment--Act X of 1859, s. 6--Compensation for Improvement by Tenant.

Baboo Hem Chunder Banerjee for the appellant.

Mr. Sandel for the respondent.

The judgment of the Court was delivered by

Jackson, J.--It appears to me that the decision of the lower Appellate Court cannot be supported.

The defendant, it seems, had occupied the land upon which his huts are standing for some thirty years, and about ten or twelve years ago, he put up round the land a wall of bricks, or what is called a kutch-pukka wall. The plaintiff who has lately purchased the ground gave him notice to quit. The defendant refused to leave the land, and the suit was brought to eject him.

The Munsif gave the plaintiff a decree.

On appeal the Subordinate Judge considered that, "when the former proprietor of the land allowed the defendant's father, and afterwards the defendant, to reside on the disputed land by raising houses as described above for two generations, embracing a period of thirty or thirty-two years, the plaintiff, who is the recent proprietor of the disputed land, cannot eject the tenant, defendant, therefrom and obtain its khas possession."

The cases which the Subordinate Judge cites in support of this proposition do not appear really to go to that extent. The case chiefly referred to has been that of Beni Madhab Banerjee v. Jai Krishna Mookerjee 7 B.L.R., 152. In that case, the facts were somewhat similar, though perhaps a little stronger than in the present case. The rights of the tenant had been sold, and the zemindar ignored the purchaser and affected to treat him as a

stranger and a trespasser. In that case, the Court, without actually deciding whether or not the previous tenant could be ejected, held only that the rights, whatever they are, were transferred, and that the zemindar could not summarily eject the purchaser.

S. 6, Act X of 1859, has no bearing upon this case, and the Courts are not competent to extend the provisions of such a rule of law as that, by what they may consider to be an analogy, to a different case. It seems to be quite clear that the permissive occupancy of land under such circumstances as the defendant has held this land will not give him a right to retain possession of it when the landlord desires to put an end to the tenancy.

Then the respondent has pressed us on the subject of compensation. I cannot discover that any thing was proved at the trial which entitles him to compensation. The only circumstance that has been shown is that some ten or twelve years ago he put up a wall round the premises which he says cost somewhere about Rs. 500. I do not know that any evidence of that fact was given, or that there is any thing in that fact which entitles him to compensation at the hands of the plaintiff.

It appears to me that the decision of the lower Appellate Court was wrong, and that it must be set aside, and the plaintiff must have a decree with costs.

\* Special Appeal, No. 1205 of 1871, against a decree of the 1st Subordinate Judge of Zilla 24-Pergunnas, dated the 12th August 1871, reversing a decree of the Munsif of Chauki Alipore, dated the 29th July 1870.