Makhan Lal De Vs Srimati Arun Bala Devi and Others

Court: Calcutta High Court

Date of Decision: July 21, 1922

Citation: 73 Ind. Cas. 2

Hon'ble Judges: Chotzner, J; Asutosh Mukerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the defendant in a suit for ejectment. The plaintiffs brought the action on the allegation that the disputed tenure was the non-

transferable holding of their tenant Saroda Charan Ghose who conveyed it to the defendant on the 3rd May 1914, who is in occupation as a

trespasser without title. The defendant contended that the tenancy was not an agricultural but a maurusi mokarrari holding which was transferable

by law. The Courts below have on these pleadings considered the question whether the lease was under the Transfer of Property Act or under the

Bengal Tenancy Act. They have concurrently come to the conclusion that the lease was under the Benagal Tenancy Act and the interest of the

tenant was not transferable. In this view, the plaintiffs have been awarded a decree for ejectment.

2. In our opinion, it is plain that the Courts below did not consider the real question in controversy in this litigation. It has been found that the origin

of the tenancy is not known, though it is stated that the vendor of the defendant was the fourth member of the family who had by inheritance

succeeded to the holding. It has also been found that the original purpose of the tenancy is riot known. The evidence further established

conclusively that the rent has never changed although there has teen a proportionate reduction by reason of the acquisition of a part of the land for

public purposes. The Courts below have finally held that the land is used and as has used for years past in part, for dwelling purpose sand in part

for horticultural purposes. There is a stray passage in the evidence which may indicate that a part of the land was previously under cultivation. But it

is not clear that the. distinction between agricultural and horticultural purposes was appreciated when this statement was made by the witness. In

view of these facts, it is plain that the question does not arise whether the lease was under the Transfer of Property Act or under the Bengal

Tenancy Act. It is not a lease under either of the two Statutes as neither Statute was in existence when the tenancy originated. The real question is,

whether the tenancy is agricultural or non-agricultural.

3. As already stated, the original purpose of the tenancy is not known. Consequently, the principle enunciated in Ismail Khan Mahomed v. Jaigun

Bibi 27 C. 570 : 4 C. W.N. 210 : 14 Ind Dec. 374 applies; namely, when the origin of the tenancy and the circumstances attending its creation,

are not known, evidence of the mode of dealing with the land demised and the acts and condition of the parties generally constitute the evidence,

and indeed may be the only evidence, available to prove the nature of the tenancy. In the case before us, a part of the land has been used for

dwelling purposes and the remainder as a garden. It is not necessary to consider whether at any previous stage of its history, it was used in part

also for agricultural purposes. For it is well settled that the purpose of a tenancy may be altered by consent of the contracting parties and when

such alteration takes place the incidents of the tenancy may not be identical with those at its inception. As regards the nature of the tenancy at the

present time, there is little doubt in view of the statement made by the landlord himself, on the 3rd July 1905 in an apportionment proceeding under

the Land Acquisition Act. It was then asserted, that the tenant-mother of the transferor of the present defendants held the land for dwelling and

other purposes. It is Impossible for us to hold, in these circumstances, that the tenancy at the present time is agricultural or that the transferor was a

raiyat with a right of occupancy or non-occupancy raiyat. He must be deemed to be a tenant of non-agricultural lands. This leads us to the

question, what are the incidents of such a tenancy? Was the tenancy transferable?

4. The defendant has contended that the facts established justify the inference that the tenancy was of a permanent character and was transferable.

In support of this view reliance has been placed upon the cases of Moharam Sheikh Chaprasi v. Talemuddin Khan 13 Ind. Cas. 606 : 16 C.W.N.

567 : 15 C.L.J. 220 and Shoroshi Charan Chose v. Bhagloo Sah 57 Ind. Cas. 877 : 32 C.L.J. 85. In the case of Moharam Sheikh Chaprasi v.

Talemuddin Khan 13 Ind. Cas. 606 : 16 C.W.N. 567 : 15 C.L.J. 220 the earlier authorities were reviewed and it was laid, down that where the

origin of the tenancy was unknown, but the original tenant and his successor had been in occupation of the land for over 60 years on payment of

rent which was never varied, and the tenancy was treated by the landlord as heritable and the land was let out for residential purposes, the

inference was that the tenancy was in its inception permanent. The presence of a permanent structure on the land was not essential to establish that

the tenancy in its inception was of a permanent character. The proposition last mentioned was questioned in the case of Shoroshi Charan Ghose v.

Bhugloo Sah 57 Ind. Cas. 877 : 32 C.L.J. 85 but was re affirmed and it was specifically laid down that a d veiling house need not be brick-built in

order to indicate that the tenancy was intended in its inception to be of a permanent character. The principle dcdr.ci.tlc from these cases has teen

affirmed by the Judicial Committee in Surendra Nath Roy v. Dwarka Nath Chakravarty 50 Ind. Cas. 856 : 24 C.W.N. 1 :. (1919) M.W.N. 811

(P.C) and Afzall-un-nissa v. Abdul Karim 50 Ind. Cas. 749 : 46 I.A. 131 : 17 A.L.J. 608 : 36 M.L.J. 580 : 26 P.W.R. 1919 : 1 U.P.L R. (P.C.)

47 : 26 M.L.T. 55 : 81 P.R. 1919 23 C.W.N. 966 : (1919) M.W.N. 494 : 30 C.L.J. 152 : 21 Bom. L.R. S91 : 65 P.L.R. 1919 (P.C.) where the

decision of this Court in Caspersz v. Kedar Nath 28 C. 738 : 5 C.W.N. 838 was followed and applied. It cannot be suggested, as was pointed

out in the case of Moharam Sheikh Chaprasi v. Talemuddin Khan 13 Ind. Cas. 606 : 16 C.W.N. 567 : 15 C.L.J. 220 that the question involved is

one of fact. The question is a mixed question of fact and law, and this accords with the decision of the Judicial Committee in Debendra Nath Das

v. Bibudhendhra Mansingh Bhramarbar Roy 45 Ind. Cas. 411 : 45 I.A. 67 : 5 P.L.W. 1 : 27 C.L.J. 543 : 22 C.W.N. 674 : 16 A.L.J. 522 : 23

M.L.T. 384 : (1918) M.W.N. 379 : 20 Bom. L.R. 743 : 35 M.L.J. 214 : 45 C. 805 (P.C.) and Rajani Kanta Ghose v. Secretary of State for

India 51 Ind. Cas. 226 : 45 I.A. 190 : 23 C.W.N. 649 : 46 C. 90 (P.C.). We are clearly of opinion that the facts found by the Courts below,

which are accepted as the basis of our judgment, point to the conclusion that the disputed tenancy was a permanent tenancy of a transferable

character and that the defendant-purchaser is not a trespasser as alleged by the plaintiffs.

5. The result is, that this appeal is allowed and the suit is dismissed with costs in all the Courts.