

**(1914) 08 CAL CK 0019****Calcutta High Court****Case No:** Appeal from Appellate Decree No. 1914 of 1908

Raghunath Singh and Another

APPELLANT

Vs

Mr. William Cox and Others

RESPONDENT

**Date of Decision:** Aug. 17, 1914**Final Decision:** Allowed**Judgement****Chatterjee, J. and Beachcroft, J.**

The Defendant No. 1 had an occupancy holding which was not transferable by local custom or usage. He gave an usufructuary lease of a portion of this holding to the Plaintiff by a registered document and made an express covenant not to surrender his jote to the landlord. In breach of this covenant, however, he surrendered his jote to the landlords who dispossessed the Plaintiff and settled, the remaining portion of the jote with a relation of Defendant No. 1. The Plaintiff sued for recovery of possession with mesne profits. The Court of first instance gave a decree to the Plaintiff holding that the surrender was collusive. The learned District Judge has dismissed the suit holding that no collusion was made out.

2. It is contended in second appeal before us that even if no fraud or collusion is made out, the Plaintiff is entitled to succeed as the surrender made without his consent is not valid and cannot deprive him of his rights. Reliance is placed on sec. 86 (6) of the Bengal Tenancy Act which provides "that, when a holding is subject to an encumbrance secured by a registered instrument the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." The learned Vakil for the Respondents on the other hand contends that this sub-section applies only where the whole holding is under an incumbrance and could not have been intended to apply to a case like the present in which a part only of the holding is incumbered. He further contends that such a construction of sec. 86 (6) would offend against the express provisions of sec. 88 which provides that no division of holding will be binding upon the landlord unless it is made with his consent. He relies on the cases of *Rajendra Kishore v. Chandra Nath* 12 C. W. N.

878 (1907), Gagan Chandra Choudhuri v. Alak Chand Saha 17 C.W. N. 698 (1913), Krishna Chandra Dutt Choudhuri v. Miran Bajania C. L.J. 222 (1903). I think, the contention of the Appellant is sound and ought to be allowed; the incumbrance here is by a registered document and the surrender was without the consent of the Plaintiff. The surrender is therefore invalid.

3. As regards the arguments addressed on behalf of the Respondents, I do not see how an incumbrance upon a part of a holding is not an incumbrance on the whole. A burden upon a part of a holding is a burden upon the holding taken as an undivided whole. Nor do I see how the Appellant's construction of sec. 86 (6) offends against the provisions or the principle of sec. 88. It is true, the landlords have, after the surrender, settled the part not covered by the Plaintiffs' zurpeshgi with a third person and the effect is a division of the holding; this division, however, is one made by the landlords themselves by treating the un-encumbered portion as a separate entirety and assessing a separate rent upon it. The cases relied upon do not help the Respondents. The case of Rajendra Kishore v. Chandranath 12 C. W.N. 878 (1907). was a case in which it was held that there was abandonment by the tenant. The case of Gagan Chandra Choudhuri v. Alak Chand Saha 17 C. W. N. 698 (1913), was one of the surrender of a part of a holding, and sec. 86 (6) was not referred to in that case. In the case of Krishna Chandra Dutt Choudhuri ) 3 C. L.J. 222 (1913), the usufructuary mortgage of the entire holding for an indefinite time was held to be in breach of the conditions on which the tenant held his land. None of these cases decided any question under sec. 86 (6). There is on the other hand an express decision of this Court in the case of Hasani Bibi v. Sadir Mahmud Sarkar 2nd App. No. 2955 of 1911. Unreported in favour of the Appellant. On general principles also, I think, the Respondents have no reason to complain. In the case of Walter v. Yalden [1902] L. R. 2 K. B. 304, Mr. Justice Channel lays down the law on this subject in England thus : "The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. If the lessee has created under-leases the under-leases remain notwithstanding the surrender; the lessee cannot assign his term to any one else so as to put an end to those under-leases. But that, I think, is only an example of what he can and cannot do; the point is that he has no power to effect by surrender anything that he could not do by assignment to a third person : the reason being that he cannot convey to his landlord any more than to any one else anything that he has not got himself." Sec. 86 (6) of the Bengal Tenancy Act embodies the same principle within certain bounds, and is quite consistent with, justice, equity and good conscience. It was intended, no doubt, to prevent fraud and collusion, and no fraud or collusion of the landlord is proved in this case, but the conduct of the tenant was certainly fraudulent and in violation of his express contract not to surrender, and I have no hesitation in decreeing this appeal with costs.