(1926) 12 CAL CK 0024

Calcutta High Court

Case No: Appeals from Appellate Decrees Nos. 1794 and 1997 of 1924

Munshi Safar Ali Master		APPELLANT
	Vs	
Abdul Majid and Another		RESPONDENT

Date of Decision: Dec. 2, 1926

Final Decision: Dismissed

Judgement

Mitter, J.

These two appeals arise out of one suit commenced by the Plaintiff for khas possession of Plots Nos. 1158 and 1159 of the cadastral survey from the Defendants on the allegation that he took settlement of the lands from Waliulla in osat raiyati right of Plot No. 1158 which was in his khas possession and of Plot No. 1159 which was let out to one Arif Meah in meadi osat raiyati right, and that after his death it came into the khas possession of the landlord as it was an under-raiyati right and was neither heritable nor transferable. The defence is that she acquired an interest in the landh suit with reference to both the plots by virtue of her kobala from her husband Arif Meah in consideration of her dower. The first Court held that Plot No. 1158 was outside the kobala and that in Plot No. 1159 Arif had only a meadi right and was holding the land from year to year and that the Defendant was never recognised by the superior landlord. The first Court decreed the suit with regard to both the plots. On appeal by the Defendants the lower Appellate Court dismissed the suit with reference to Plot No. 1159 and confirmed the decree with reference to Plot No. 1158. The Plaintiff has appealed to this Court with reference to Plot No. 1159, his second appeal being numbered 1794 of 1924, while the Defendants have appealed with reference to Plot No. 1158 and his second appeal is numbered 1997. It has been contended before us that the decision of the lower Appellate Court is wrong seeing that the Court finds the kobala in favour of the Defendant who was mistress of Arif was without consideration and that after Arifs death although the Defendant continued to be in possession for 11 years there was no holding over and that Arif''s lease expired after five years which was the time fixed in the lease, and the Court was wrong in holding that from the mere possession one can infer implied

consent of the landlord to the tenants holding over within the meaning of sec. 116 of the Transfer of Property Act. In this connection reference was made on behalf of the Appellant to the case of Ratan Lal Girt v. Farashi Bibi ILR 84 cal s.c.11 C.W.N.826 (1907). It has been argued for the Respondents on the other hand that the case is governed not by the Transfer of Property Act, but by the Bengal Tenancy Act and that the lease being a lease in favour of the Plaintiff and being an under-raiyati lease for a period exceeding 9 years the Plaintiff acquired no interest as such lease is void, and that consequently the Plaintiff has no title to this plot. We are of opinion, however, that the case is governed by the Transfer of Property Act, and that the word raiyati does not necessarily indicate a jote within the meaning of the Bengal Tenancy Act. The record-of-rights shows that both the plots are bagan lands and we find that in 596, the subject-matter of this appeal, there is a house and that the Defendants and Arif enjoyed it for a long time. This land being homestead land within the Municipality the case cannot be governed by the Bengal Tenancy Act. We therefore overrule the contention of the Respondents in this behalf.

2. Now let us proceed to consider the contention of the Appellant that the case being governed by the Transfer of Property Act, and the lease having expired after five years, there has been no holding over simply because the tenant has established his possession for a period of 11 years after the date of the expiry of the lease. Sec. 116 of the Transfer of Property Act says : "If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is in the absence of an agreement to the contrary renewed from year to year or from month to month according to the purpose for which the property is leased." It has been argued on the authority of the case of Ratan Lal Giri v. Farashi Bibi ILR 84 Cal 398 s.c.11 C.W.N, 826(1907).that mere possession is not sufficient to justify the inference that there was holding over. I may point out that in the case of Ratan Lal Giri v. Farashi Bibi (1) the suit was instituted within one year and 7 months of the expiry of the lease, whereas in the present case the tenant continued in possession for some time after the expiry of the lease and after his death his mistress, the present Defendant, continued in possesion under the kobala, the aggregate period being 11 years. In the circumstances the Court was justified in drawing the inference that the tenancy did not determine and that the possession of the Defendants was not that of a trespasser but of a person whose rights were to be determined on notice to quit. In this view we are supported by an unreported decision of this Court in the case of Chaturbhuj Nanda v. Gopal Dolai Decided by Chitty and (sic), JJ.in S.a. No. (sic) of 1910. Unreported.. It is true that there the case was under the Bengal Tenancy Act, but the principle as to what would amount to a holding over is the same whether we are considering the provisions of the Bengal Tenancy Act or those of the Transfer of Property Act. I will quote a passage from that decision to show that this decision supports the view which we take. The learned Judges say : " It is

true that a mere omission by a landlord to sue in ejectment immediately after the tenancy had expired would not be a ground for saying that the tenant was holding over and was not a trespasser." This was decided in the case of Ratan Lal Giri v. Farashi Bibi ILR 84 Cal. 896 (sic) 11 C.W.N. 826 (1907). There the suit was brought a year and 7 months after the period of the lease had expired. Here the case is quite different. The tenant Chandra executed a kobala and held over for five years. He then died and his sons continued to hold the lands. Altogether there was an interval of 8 years between the expiry of the lease and the present suit. We think that it may be reasonably inferred that the tenancy was in the possession of the tenants holding over after the expiry of the lease as the Subordinate Judge has found.

3. In this view we think that the decision of the Subordinate Judge in Appeal No. 1794 was right. The appeal consequently fails and is dismissed with costs.

4. With regard to the other appeal numbered 1997 having regard to the view which we have taken that the case is governed by the Transfer of Property Act, the Plaintiff''s title under the lease is good and as the said plot was outside the kobala of the Defendants the Lower Appellate Court was right in confirming the decree of the first Court.

Duval, J.

5. In the Case No. 1794, which relates only to Plot No. 1159 on which admittedly there was a homestead, the first question appears to me to be as to whether the case is governed by the Transfer of Property Act. The learned Subordinate Judge appears to have thought that the mere fact that the land lay within the Municipality of Noakhali was sufficient to bring the case under that Act. I am not prepared myself to say that that is necessarily so. But in this particular case there is the evidence that the land is homestead land. Neither the original tenant nor the heirs of Khosh Bibi who now appear before us are shown to be cultivators or agriculturists at all; and in this view I agree that the Transfer of Property Act applies. The mere fact that in the record-of-rights the land, which is only a few cottahs in area, was shown as a bagan is not sufficient to show that it was used for horticultural purposes.

6. Coming to the question of whether the lessee held over within the meaning of sec. 116 of the Transfer of Property Act and so cannot be ejected without notice, it appears that Arif held the land under a lease which expired in 1911. Out of affection, apparently, for the lady with whom he lived, he executed a deed of transfer in 1917. It does not seem to me necessary for this purpose to discuss whether it was a hebanama or a gift. He died in 1919 and after that the lady continued to be in possession of the homestead. It was not till 1921 that the Plaintiff got his lease and after his lease he at once instituted this suit. Now, it may be noted that the landlord is no party to this litigation. It is also found that there was no collection of rent from Arif or his successor in occupation after 1911. Sec. 116 says that if a lessee remains in possession after the determination of his lease and the lessor accepts rent from

him or otherwise assents to his continuing possession there is a holding over. The question, therefore, is (as there was no acceptance of rent), has there been consent? It will be noted that for ten years the landlord did nothing and as a presumption of fact from the evidence the learned Subordinate Judge has come to the finding that therefore the-lessee was holding over. Reference was made in the course of argument to the case of Paramahand Sing v. Syjou Sing 24 C.L.J. 80 (1915), where Mr. Justice Ashutosh Mookerjee has discussed at length a large number of reported cases and the conclusion come to is that a notice is not necessary unless the landlord assents to the continuing of possession. In the present case the finding of fact which I do not think increditable in second appeal is that the landlord tacitly did consent to continuance of possession and on that finding of fact the Defendants must have been held to have been holding over. I do not think that there is anything in the contention in view of sec. 108J of the Transfer of Property Act that Arif had not the power so long as he was in possession to make any transfer of whatever interest he had, how small it might have been.

7. Appeal No. 1997 is concerned with another plot of only six cottahs which is described also as a bagan. The Defendant Khosh Banu was impleaded in respect of that plot of land on the ground that there had been a bandabusti taken of it from the landlord. But at the hearing it subsequently transpired that the present Defendants and Khosh Banu before them had no interest at the time of the suit in that land. This is a finding of fact and so the Appelants were not really interested either to defend the suit in respect of that plot or to appeal in the matter. In this view I consider that this appeal also must stand dismissed with costs.