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**(1922) 07 CAL CK 0034**

**Calcutta High Court**

**Case No:** None

Sashi Bhusan Jha

APPELLANT

Vs

Shaikh Ahmadullah Chaudhury

RESPONDENT

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**Date of Decision:** July 19, 1922

**Citation:** 69 Ind. Cas. 1005

**Hon'ble Judges:** Suhrawardy, J; John Woodroffe, J

**Bench:** Division Bench

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### **Judgement**

John Woodroffe, J.

One of the grounds taken in this appeal is that set out in the 8th paragraph of the memorandum of appeal. It is urged that the Court of Appeal below has omitted to come to a finding whether the holding (assuming, though not admitting, it to be an occupancy holding), is or is not transferable by custom as alleged by the defendant and that in the absence of a definite finding upon this point the decree for ejectment is wrong and liable to be set aside. The point was undoubtedly dealt with by the Court of first instance, the judgment of which states (after finding that the plaintiff gave no permission to purchase the holding), that it was for the defendant to prove the alleged custom and usage with regard to transfer. It holds that he has failed to discharge that onus of proof, that his witnesses did not carry conviction and that the defendant's evidence does not establish that the Zemindars are bound to recognize the transferee as a tenant whenever nazrana is paid. The learned Munsif also expresses himself as not being satisfied on the materials placed before him that nazrana is paid by custom. In the judgment of the Subordinate Judge in appeal, it is pointed out that the contention which is set out in the 1st paragraph of his judgment, which is the last point there referred to, was that which had been most strongly pressed before him. Then in the conclusion of his judgment he says that as regards the other objections there is no substance in them. There is an affidavit that the point was argued before the learned Subordinate Judge. Therefore, it has been contended that there should be a remand. It is possible that the points might have been mentioned. But it is quite clear that it was not the chief point pressed before

him and it was in fact disposed of by the learned Subordinate Judge by his finding that there was no substance in the other objections taken in the case. I do not think that under such circumstances as these the appellant is entitled to a remand as regards this matter.

2. The objection taken in the 5th ground of appeal, is, that at any rate the Courts below failed to notice that one of the co-sharer original tenants, not being a party to the mortgage and the suit and other proceedings that followed, there was no transfer of the whole holding by the auction sale and under the circumstances the landlord could not re-enter. This objection was not taken in the lower Courts and involves a question of fact and, therefore, cannot be gone into in appeal.

3. The third ground is that the Court below has erred in not holding that the holding in suit is mokarari. Very clearly this ground has no substance, because it has been found, as a fact upon the evidence that the term "Makara" has a local technical significance which is that given in the evidence. The learned Judge has accepted that evidence and points out that "in some of the dakhilas the word " Makara has been used "but it is explained that this word is used in, order to distinguish the land from halhasili lands in which rent may vary from year to year according to the areas cultivated with bhadoi crops." Both he and the Trial Court have accepted the evidence on this head and this ground fails.

4. There remains to be considered the last ground in this appeal, involving a discussion of the question whether there was a complete transfer and if not, whether there has been" such an abandonment as entitles the plaintiff to re-enter. The last ground is that the minor not being properly represented in mortgage suit his interest did not pass in execution of the mortgage-decree. Therefore, there was no complete transfer and the plaintiff is not entitled to recover, The lower Courts found that the minor's interest did pass. On behalf of the respondent it is urged that even assuming that there was some irregularity as regards representation it makes no difference in the present case, because in fact there was an abandonment of land entitling the plaintiff to re enter. As against this it is contended that there is no finding upon the point. The word abandonment is not used but there are findings which may be taken to show that there was an abandonment in fact. The point is not altogether free from doubt. But, having regard to facts and circumstances of the appeal, I am not disposed to dissent from the view taken by my learned brother that the facts made out a case of abandonment and that this conclusion is involved in the findings of the lower Court.

5. Therefore, the appeal is dismissed with costs.

Suhrawardy, J.

6. The plaintiff seeks in this suit to recover his possession of two holdings in the following circumstances:

The defendant purchased the holdings in execution of a mortgage decree against the original tenants in 1910 and entered into possession of them. In 1918 the plaintiff instituted this suit to eject the defendant on the ground that the jotes were non-transferable occupancy holdings and that the defendant was in wrongful possession of; them. The defendant in his first written statement pleaded in defence that the holdings were mokarrari and transferable and that he was in possession of the same by purchasing them from the tenants thereof. Subsequent to the filing of the written statement one Monmohan, alias, Mohan Lal, brought a suit against the defendant for recovery of possession of 30 bighas out of the holdings in suit on the allegation that as he was a minor at the time of the mortgage suit and as he was not properly represented in that suit his interest did not pass by the execution sale in which the defendant bought the holdings and also that he was not bound by the mortgage-decree and the sale thereunder, and as he was dispossessed by the defendant during his, Mohan Lal's minority he should be put in possession of his share. That suit was shortly after its institution compromised and Mohan Lal was given 5 bighas of land out of his entire claim, Thereafter the defendant filed an additional written statement in this suit averring that as one of the original tenants, Mohan Lal, was in possession of a part of the holdings and as the tenants were not made parties in this suit, the plaintiff had no right to recover possession of the holdings.

7. The parties went to trial on the issue as to whether the holdings were transferable or otherwise, both the Courts have held against the defendant, finding that the holdings were non-transferable. The defendant appeals to this Court and the main ground taken before us is that in the events that have happened subsequent to the institution of the suit, ending in Mohan Lal obtaining possession of a portion of the holdings, the plaintiff is not within his rights to claim re-entry, challenging the transfer done by the defendant as unauthorised or treating the holdings as abandoned. This ground was not taken in the Courts below in the form in which it is pressed before us but the point is not separable from the real points in controversy between the parties and I propose to examine it on the findings of fact arrived at by the Courts below.

8. Now, both the Courts below are decidedly of opinion that Mohan Lal's suit was collusive and brought on purpose to thwart the plaintiff's claim. If by this finding the Courts below meant that the alleged relinquishment of the 5 bighas by the defendant to Mohan Lal was also unreal and fictitious, there is an end of the defendant's contention. But I will proceed on the assumption that there was a show of reality in that suit.

9. As I have stated, the defendant's case is that he was in possession of the entire holdings since his purchase for 9 years till the alleged recovery of a very small portion of it by Mohan Lal. On this point the first Court records its finding thus: "It is abundantly clear that the defendant was in exclusive possession of the entire

holdings by virtue of his purchase during that period." The Court of Appeal below endorses the finding about the exclusive possession of the defendant and is of opinion that at any rate the defendant being in sole possession of the entire holdings from before the institution of the suit the plaintiff has a good cause of action and "the subsequent act of returning a small portion of the land to Monmohan cannot affect the plaintiff's right." In my judgment this view is correct. It is contended that the Court ought to take cognisance of the event that has come to pass since the institution of the suit, namely, the recovery of a portion of the holdings by Mohan Lal, and to hold on the authority of the Full Bench case of *Dayamoyi v. Ananda Mohan Roy* 27 Ind. Cas. 64 : 42 172 : 18 C.W.N. 971 : 20 C.L.J. 52 that there was no transfer of the entire holdings to the defendant giving rise to plaintiff's right of re-entry. If this argument is to prevail, in every such case the landlord's right of re-entry may be defeated by the transferee putting an original tenant in ostensible possession of a portion of the holding or pleading defect in his own title. The position appears more anomalous, as the result of it will be to cast the burden of proving validity of the transfer to the transferee on the landlord. In my opinion the landlord in such a case need only prove that there has been a transfer of the entire interest of the tenant and that the transferee is in possession of the entire holding by virtue and in pursuance of such transfer. In this case both the elements have been found in favour of the landlord and are not disputed by the defendant.

10. The respondent also argues that the holdings should be treated as abandoned entitling the plaintiff to re-enter. It is submitted for the appellant that as there is no finding by the Court below that the holdings were abandoned by the tenants there should be a remand to the Court of Appeal below for such a finding. To my mind such a course is unnecessary. It is true that the Court below have not used the technical expression "abandonment" but the conclusions on the evidence they have recorded leave no room for doubt as to what was actually meant. Their finding put categorically comes to this : There was a transfer of the entire interest of the tenant to the defendant, the defendant got into possession under that transfer and remained in exclusive possession of the holdings for over nine years and was so admittedly in possession at the date of the institution of the suit since the transfer for about nine years the tenants had no concern with the holdings and did not pay rent in respect thereof, nor did they make any arrangement for payment of rent. These findings taken together constitute what in law is considered abandonment. If they do not, I cannot conceive what does. I am of opinion, therefore, that no useful purpose will be served by remitting the case to the Court below requesting it to say what it has already said though not in so many words. I think the plaintiff's suit ought to succeed on both the grounds noticed above.

11. Some other points were urged in appeal which we have already disposed of.

12. In the result this appeal fails and ought to be dismissed with costs.