(1909) 02 CAL CK 0032

Calcutta High Court

Case No: None

Kailash Chandra Pal		APPELLANT
	Vs	
Hari Mohan Das and Others		RESPONDENT

Date of Decision: Feb. 23, 1909

Judgement

1. This was an application u/s 244 of the former Code in which the judgment-debtor pleaded inter alia, that a certain property, which the decree-holders sought to attach in execution of their decree, was not liable to attachment. The Subordinate Judge of Comillah held that the property was subject to attachment and refused the application and the judgment-debtor appeals.

2. The only question that now arises for determination is whether this property, which is a homestead in the Town of Comillah, is saleable property within the meaning of Section 266 of the former Code of Civil Procedure. The learned Subordinate Judge refused the application on two grounds. He held, firstly, that the judgment-debtor was not entitled to deny that the holding was transferable by usage, and secondly that the holding, was transferable under the Transfer of Property Act. As to the first point, the evidence seems to us perfectly clear. The learned Subordinate Judge himself appears to have shrunk from holding in so many words that a usage existed, authorizing the transfer of this holding without the landlord''s consent. In one part of his judgment he says: "There is no custom or usage in existence according to which the Maharaja gives his consent to the transfer of such holdings as a matter of course," and later he says: "There is sufficient indication that usage is growing up for the transfer of such lands without permission and for obtaining the sanction of the landlord after the purchase is made."

3. Now it appears to us that we are not at all concerned with the question whether or not a usage of sale exists in Comillah. It is very likely that such a usage exists and we believe it exists widely throughout these provinces. What we are concerned with is a very different thing, that is to say, whether there is any usage of sale without the

consent of the landlord.

4. For the respondents in this case reliance has been placed on many cases, amongst which we may cite Maharaja Radha Kishore v. Sree-mutty Ananda Pria 8 C.W.N. 235. There is a remark of the learned Judges in that case that the Subordinate Judge might well have found the existence of a usage under which a raiyat was entitled to sell his holding and transfer his occupancy right without reference to the landlord, provided only that the purchaser paid to the landlord a customary fee. This observation, however, was not necessary for the decision of the appeal, and indeed the appeal Was ultimately decided against the party, who pleaded the usage. We do not think, therefore, that this observation, which seems to us an obiter dictum, is necessarily binding upon us. When the landlord receives nazarana as a condition of recognizing a transfer, the acceptance of that Nazarana shows that he consents to that transfer, and to us it seems very difficult to say that any number of instances of sales with the consent of the landlord can possibly prove a usage of sale without consent. In the present case, it is perfectly clear that there is no usage in Comillah at all, either growing or grown, under which tenants are entitled to sell their holdings without the Maharaja''s consent. The respondent''s own witness says that if purchasers do not pay nazarana, the Maharaja is entitled to take khas possession. The second witness says that he cannot say what would happen if no mutation Were obtained by a purchaser on payment of nazarana-. Neither of the witnesses attempted to prove that the Maharaja is bound to recognize a purchaser or is bound to accept nazarana tendered to him. No instance is proved in which the Maharaja was compelled against his will to recognize a transfer, made without his consent.

5. We have read the whole evidence and to us it appears that the lower Court was not justified in accepting the existence of a usage authorizing the sale of these holdings without the landlord''s consent.

6. The learned Subordinate Judge has also held that the judgment-debtor''s interest is transferable u/s 108, Clause (j), of the Transfer of Property Act. It is argued on behalf of the appellant that this enactment does not apply by reason of Section 2 Clause (c), which lays down that the Act shall not affect any right or liability arising out of a legal relation constituted before the act came into force. As regards the question whether the legal relation between the present appellant and the landlord was or was not constituted before 1882, several considerations might arise. It is perfectly clear that this holding has been held by the judgment-debtor and his father before him for more than 40 years. It may be that the holding is not heritable in which case the legal relation between the judgment-debtor and the landlord would have been constituted when the judgment-debtor''s father died. It may be that the original lease was for a term of years and that the tenants thereafter held over from year to year. In that case the principle, laid down in the case of Administrator General Bengal v. Ashraf Ali 28 C. 227, might apply. With all these

various considerations we are unable to deal, as there are no materials in the papers before us to show what was the character of the judgment-debtor''s lease, or when his father died. The parties went to trial on the assumption that the holding had been in existence for upwards of 40 years, and it is on that assumption, that the case in the lower court has been disposed.

7. This appeal must be decided on the same assumption. On that assumption, it is perfectly clear that the Transfer of Property Act does not apply.

8. We have already held that the respondents have wholly failed to show that the holding is by custom transferable without the consent of the landlord. On these two findings it is impossible for us to hold that the bhitti land in question, as described in the petition of execution, is saleable property. That being so the appeal must be decreed with costs and the bhitti land released from attachment.

9. We assess the hearing fee at two gold mohurs.