

(1917) 07 CAL CK 0048**Calcutta High Court****Case No:** None

Moulvi Abdul (Abdur) Rashid
Khan

APPELLANT

Vs

Munshi Safar Ali and Others

RESPONDENT

Date of Decision: July 19, 1917**Acts Referred:**

- Transfer of Property Act, 1882 - Section 112

Citation: 42 Ind. Cas. 614**Hon'ble Judges:** Richardson, J; N. R. Chatterjea, J**Bench:** Division Bench**Judgement**

1. This appeal arises out of a suit for ejectment of the defendants from the disputed land, on the ground that the defendants were liable to be ejected under an express covenant in the kabuliyat executed by their predecessor-in-interest, one Amir-ud-din, on the 16th Falgun 1296.

2. It was stipulated in the kabuliyat that the tenant would be liable to ejectment if, he failed to pay rent "through wickedness". The learned Subordinate Judge says that there is "no allegation of any wickedness" on the part of the defendant in the plaint.

3. We think that this claim for ejectment must fail on the simple ground that the plaintiff bases his cause of action from 1314 and claims rent for the years 1314 to 1319, i. e., for six years. By claiming rent subsequent to the default in payment of rent which, according to the plaintiff, gave him cause of action for ejectment, the plaintiff must be taken to have waived the forfeiture u/s 112 of the Transfer of Property Act.

4. The appeal must accordingly fail and is dismissed.

5. The respondent has preferred a cross-objection.

6. It is contended that the defendant had not purchased the land covered by the kabuliyat which was executed by Amir-ud-din in favour of Shona Miah and that it is not found that the plaintiff was in possession continuously for twelve years by receipt of rent from the defendant. The findings, however, on the point are conclusive and we are of opinion that the Court below was right in holding that the relationship of landlord and tenant between the plaintiff and the defendant was made out.

7. The only other contention on behalf of the respondent relates to the question of interest payable on the arrears of rent. The land was described as homestead land in the judgments of the Courts below and is situated in a Municipal town. The Court below has not found any special circumstances upon which we can hold that the interest at the rate of 6 1/4 per cent, per mensem was penal. Under the circumstances we are unable to interfere with the decision of the Court below on the question of interest.

8. It is contended before us that the land was originally orchard land and that the incidents of the tenancy are covered by the provisions of the Bengal Tenancy Act. This question does not appear to have been raised in the Courts below. We are unable, therefore, to go into it so far as the present case is concerned. The questions as to the character of the land and the nature of the tenancy are, however, left open. The cross-objection is disallowed.

9. We make no order as to costs either in the appeal or in the cross-objection.