

(1922) 07 CAL CK 0064

Calcutta High Court

Case No: S.A. No. 2048 of 1920

Saradakripa Lala

APPELLANT

Vs

Bepin Chandra Pal and others

RESPONDENT

Date of Decision: July 11, 1922

Final Decision: Allowed

Judgement

Mookerjee, J.

This is an appeal by the plaintiff in a suit for rent instituted against two defendants. The Court of first instance decreed the claim against the first defendant alone. Upon appeal the lower Appellate Court has made the second defendant alone liable for arrears. On the present appeal, the plaintiff has contended that the first defendant also is liable for the rent due.

2. The tenancy was created on the 23rd March, 1908, when a kabuliyat was executed by the second defendant in favour of the plaintiff. The tenancy is described as an itmam and consequently on the authority of the decision in Jogesh Chandra Roy v. Makbul Ali [1920] 47 Cal. 979 - 25 C.W.N. 857 - 60 I.C. 984 it may be assumed that the tenancy was a permanent, heritable and transferable tenure. The lease contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as nazar, and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. The provisions of sections 10 and 12 of the Transfer of Property Act make it abundantly clear that restrictive covenant of this description is valid when inserted in a lease between a landlord and his tenant. Reference may in this connection be made to the decision of the Judicial Committee in Abhiram Goswami v. Shyama Charan Nandi [1909] 36 Cal. 1003 - 36 I.A. 148 - 10 C.L.J. 284 - 6 A.L.J. 857 - 11 Bom. L.R. 1234 - 19 M.L.J. 530 - 14 C.W.N. 14 I.C. 449 (P.C.) which shows that a lessor, even when the lease is a permanent one, may, by apt words, prohibit alienation by the lessee and make a breach of this condition a

condition for forfeiture of the lessee's interest. We must consequently proceed on the assumption that this covenant was valid and operative as between the landlord and the tenant.

3. After the grant of the lease, the lessee executed a mortgage in favour of the first defendant. Before the loan had been repaid, the lessee defaulted with the result that the landlord obtained a decree for arrears of rent and brought the tenure to sale. At the execution sale, the first defendant, the mortgagee, became the purchaser. On the 2nd April 1917, the first defendant transferred the property purchased by him to the second defendant. On the 24th April 1918 the plaintiff instituted this suit for recovery of arrears of rent due. The first defendant urged that he was no longer liable for the rent as he had transferred his interest in the tenancy to the second defendant. The plaintiff contended that the transfer was collusive. The Courts below have arrived at divergent conclusions. The trial Court held that the transfer was not genuine while the Court of appeal below has held that the transfer was genuine. We must consequently determine the liabilities of the parties on the assumption that the transaction was genuine.

4. The first question which requires consideration is whether the covenant in the lease was binding between the landlord and the original tenant only, or whether it was a covenant running with the land and binding upon all holders of the tenancy during the entire period of the subsistence of the lease. In our opinion the covenant is a covenant running with the land. As a general principle, a covenant is deemed to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him. It has been ruled that an express covenant not to transfer the land without the consent of the landlord is a covenant which sufficiently attaches, and concerns, the demised premises, and consequently is a covenant running with the land; *Williams v. Earle* [1868] 9 B. & S. 740 - 37 L.J., Q.B. 231 - L.R. 3 Q.B. 739 - 19 L.T. 238 - 16 W.R. 1041; *Mc Eacharn v. Cotton* [1902] A.C. 204, and *West y. Dobb* [1869] 9 B. & S. 755 - 38 L.J., Q.B. 289 - L.R. 4 Q.B. 634 - 20 L.T. 737 - 17 W.R. 879. There is no doubt in this case that the landlord must have intended that the restriction he imposed upon the right of alienation of the tenant, would be operative during the entire period of the subsistence of the lease. The lease was permanent and there is no reason why the landlord should have covenanted for payment of Chouth only in the event of the transfer by the original tenant. It follows accordingly that this covenant was operative not merely between the second defendant and the plaintiff but also between the first defendant and the plaintiff when the former purchased the tenancy at a sale in execution of a rent decree; and if the covenant was operative as against the land in the hands of the first defendant, it would be equally operative when he attempted to transfer the land to the second defendant. The question thus arises, whether in these circumstances the first defendant is liable to pay rent under the terms of the lease. The decision of this Court in *Rup Chand Ghose v. Narendra Krishna Ghose* [1914] 19 C.W.N. 112 - 28 I.C. 683 shows that the answer must be in

the affirmative. We must hold accordingly that the first defendant did not divest himself of his liability to pay rent by the execution of the conveyance in favour of the second defendant. We need not consider whether the conveyance has created a valid title in the second defendant as against the plaintiff. It is sufficient for us to hold for the purposes of this appeal, that the first defendant has not divested himself of the liability to pay rent. Nor do we set aside the decree for rent made by the lower appellate Court against the second defendant, inasmuch as the second defendant has not preferred an appeal.

5. The result is that this appeal is allowed and the decree of the Subordinate Judge modified. There will be a decree for rent against both the defendants. We direct however, that the plaintiff do execute this decree in the first instance against the tenure itself. If by the sale of the tenure, the judgment debt is not satisfied, the plaintiff will be entitled to proceed against either of the defendants at his choice. As the ground on which this appeal has succeeded was not taken in either of the Courts below, each party will pay his own costs throughout the litigation.