

**Harendra Kumar Bose and anr. Vs. Khemada Kinkar Ray and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/851980](http://sooperkanoon.com/851980)

**Court :** Kolkata

**Decided On :** Dec-16-1925

**Reported in :** AIR1927Cal86

**Appellant :** Harendra Kumar Bose and anr.

**Respondent :** Khemada Kinkar Ray and ors.

**Judgement :**

**B.B. Ghose, J.**

1. This appeal by Defendants Nos. 5 and 6 arises out of a suit for recovery of khas possession of 2/3rds share of certain land on the allegation that one Mukta Sundari was an occupancy raiyat and that she had died without leaving any issue. The plaintiff was the owner of 2/3rds share of the land and Defendants Nos. 5 and 6 were the owners with regard to the remaining share. The suit was based on the provisions of Section 26 of the Bengal Tenancy Act on the ground that the occupancy raiyat had died without leaving any heir. The defence of Defendants Nos. 5 and 6 was that they were the heirs of the occupancy raiyat and the plaintiff was not entitled to khas possession. In the course of the trial in the first Court it was contended that Defendants 5 and 6 were not her heirs under the Hindu Law, but there were some distant kinsmen or heirs who were the preferential heirs. The learned Munsiff held that whether the Defendants Nos. 5 and 6 were her heirs or her distant kinsmen need not be decided. He held that so long as there were heirs

of Mukta Sundari existing the plaintiff as landlord had no right of re-entry. In that view he only declared that Mukfca Sundari had no permanent or heritable right to the land in suit, a right which was pleaded by the defendants, but dismissed the plaintiff's suit for khas possession.

2. On appeal by the plaintiff the Subordinate Judge found that Mukta Snndari did not die without leaving any heirs. But he held that this property was clearly an Ayautuk Stridhan of the lady and as such Defendants Nos. 5 and 6 who were said to be her brother's grandsons were not preferential heirs, but the preferential heirs would be her husband's relatives. He further found that these husband's relatives were not in occupation of the land and there was non-payment of rent and that these two facts coupled together amounted to an abandonment of the holding by the legal heirs In that view he passed a decree for khas possession in favour of the plaintiff to the extent of his 2/3rds share.

3. On appeal by Defendants Nos. 5 and 6 it is contended on their behalf that it was not open to the Subordinate Judge on appeal to make a new case for the plaintiff and decree the appeal on the ground of abandonment which was never pleaded nor was any evidence gone into on that question. It is also urged that the defendants are always entitled to plead the right of a third party in order to defeat the plaintiff's claim. It is contended on behalf of the respondents that on the finding that the holding has been abandoned by the real tenants who are the legal heirs of Mukta Sundari, the judgment of the lower appellate Court should be supported.

4. It seems to me that the Subordinate Judge was entirely wrong in deciding the case on the question of abandonment. The Munsiff was quite right in his decision that as soon as it was found that Mukta Sundari had died leaving an heir the suit of the plaintiff should fail and it was not necessary for him to decide who would be the preferential heirs whether Defendants Nos. 5 and 6 or some third persons. The decision of the Subordinate Judge is, therefore, entirely erroneous and must be set aside.

5. The appeal is, therefore, allowed and the decree of the Munsiff restored with costs in this Court and in the lower appellate Court.

**Cuming, J.**

6. I agree.

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