

Jogendra Narayan Dhar Vs. Askarulla

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Court : Kolkata

Decided On : Feb-17-1936

Reported in : AIR1937Cal27

Appellant : Jogendra Narayan Dhar

Respondent : Askarulla

Judgement :

R.C. Mitter, J.

1. This appeal is on behalf of the plaintiff in a suit instituted by him to eject the defendants, who are his tenants, after serving on them on the 22nd Assin 1333 a notice to quit requiring them to vacate the lands with the expiry of the Bengalee year 1333. The defendants took two pleas. They stated that they were occupancy ryots and that the notice to quit had not been served on them. The Court of first instance overruled both these pleas and decreed the plaintiff's suit. The defendant preferred an appeal which was heard by the Subordinate Judge who by his judgment dated the 10th June 1930 dismissed the plaintiff's suit on the finding that the notice to quit had not been served. The plaintiff preferred an appeal to this Court, being Second Appeal No. 619 of 1931. My learned brother Mitter, J. who decided the said appeal, held that the finding of the Subordinate Judge on that point was vitiated by the fact that the principles laid down in Harihar Banerjee v. Ram Soshi Roy AIR 1918 P C 102 and some material circumstances had been

overlooked by the Subordinate Judge. The said Second Appeal was allowed, this Court holding that the notice to quit had been properly served, and the case was remanded to the lower appellate Court for decision on the merits, including the question as to whether the defendants had the right of occupancy. The learned Subordinate Judge after remand has held that they had such rights. He accordingly dismissed the suit. Hence this appeal by the plaintiff. The defendants were inducted on the land in 1324 B.S. On the 21st Bysack 1324 the plaintiff's predecessor-in-interest gave them a Potta, Ex. A. The Potta recites that the defendants held under the grantor a plot of land in occupancy right, but at his request they had executed a deed of surrender in respect of the said plot of land in favour of a person, Rajani Mohan Day, to whom the grantor had transferred the said plot of land. Then follows the grant in respect of the lands in suit in the following terms:

That you the grantees shall have in the demised premises the same rights as you had in the aforesaid surrendered land, and I grant you Jote rights therein.

2. The lands being situated in the District of Sylhet, the rights of the parties are governed by Act 8 of 1869 (B. C). At the time when the suit for ejectment was brought, 10th August 1927, the defendants had not been in occupation for twelve years and hence they had not acquired occupancy rights under the provisions of Section 6 of the said Act. The question which is therefore in controversy in this appeal is whether on the grant Ex. A the defendants can be ejected at the will of the landlord. They cannot be so ejected if the grant has conferred on them a permanent right to remain on the land.

3. The learned advocate appearing for the plaintiff-appellant raised two points: (1) that an occupancy right is a creature of statute and cannot be the subject matter of a grant, and so the defendants have not acquired occupancy rights on the basis of the Potta Ex. A; (2) that Rajani Mohan Dey, not having been able to obtain possession from the defendants of the plot of land surrendered to him, the consideration of the Potta Ex. A has failed and the defendants cannot remain on the lands in suit on the basis of the said Potta.

4. I will deal with the second point first. This point, in my judgment, has no substance. The fact of the surrender is introduced in the pottah as a recital only, but the consideration of the grant is the payment of rent stipulated for. Even if it be held that the surrender was also the consideration for the grant, the fact that Rajani did not succeed in getting possession from the defendants of the surrendered land does not help the plaintiff'. He cannot now take up the position indicated above, for he has treated the defendants as tenants and not as trespassers. The finding is that rents have been received from them for ten years on the basis of the potta and the suit itself is a suit not to recover possession from trespassers but is one to eject tenants on service of a notice to quit. It does not also appear that this point was urged by the plaintiff before the Subordinate Judge after remand. For these reasons I overrule it.

5. In support of the first point the learned advocate for the appellant cites before me the judgment of the Patna High Court in *Maharaja Kesho Prasad Singh v. Parmeswari Prasad Singh* AIR 1923 Pat 276 and a passage from the judgment of Sir John Edge in the appeal preferred to the Judicial Committee in the same case *Bindeswari Prasad Singh v. Kesho Prasad Singh* AIR 1926 P C 79, at p. 167. Although the facts of the said case are different and did not call for a decision on the point which I have before me, the observations to which my attention has been drawn by the learned advocate for the appellant certainly support his contention. The Maharaja of Dumraon sued to eject the two sons of Bahu Kesho Prasad Singh from a plot of agricultural land which his predecessor had settled with the latter for the first time in 1902 for a term of seven years from 1309 to 1315 by a written lease. On the expiry of the said lease, the same land was again settled by another lease for a term of another nine years from 1316 to 1324 with the defendants, whose father, Keshoprasad, had died in the meantime. The defendants and their father, Kesho Prasad, were thus in occupation of the land for a period of more than twelve years and would have acquired occupancy rights if the lands were not zerait. The Maharaja of Dumraon sued them in ejectment on the basis that the lands in suit were his zeraiti lands, and to prove the same relied upon the fact that the land, though not in khas cultivation of the proprietor, had been treated on the footing of zeraiti in transactions beginning from 1843.

6. In 1843 a lease was, granted by the owner of the Dumraon Raj to the Government to raise crops for supplying the needs of a Government stud, and the Government was in possession for thirty years by growing oats. When the Government surrendered the lands in 1873 it was let out for terms of years by successive written leases to Fox up to the year 1892. In each of these leases Fox covenanted that on the expiry of the term of the leases, the Raj would be entitled to the lands as its Sir Zirait; just before the expiry of the last of such leases, i. e. in 1891, the owner of the Dumraon Raj granted by a document occupancy right to Fox in consideration of his special services to the Raj. Fox defaulted in the payment of rent; a rent suit was brought against him and in execution of the decree obtained therein the Maharaja purchased Fox's right in the lands in March in 1896; and thereafter settled the same to Babu Kesho Prasad Singh by the lease mentioned above. The defendants set up a right of occupancy in answer to the plaintiff's claim for ejectment. They did not and could not claim from or through Fox, but on the basis of independent grants from the Maharaja which did not expressly grant to them or their father occupancy rights. The first question involved in the case was whether evidence otherwise relevant under the Evidence Act, for the purpose of proving Zerait was excluded by Section 120, Ben. Ten. Act, namely whether assertions by the proprietor in documents executed after 2nd March 1883, that a particular piece of land was his Zerait, were admissible in evidence.

7. The second question that was raised, as appears from the judgment of Das, J., was whether even if the lands were Zerait before 1891, they had been converted into ryoti lands by the act of the Maharaja in granting occupancy rights to Fox in 1891. Whether occupancy rights could be conferred by grant was not therefore directly in question in that case, and it would have been a material question only if the defendants had claimed through Fox. But for repelling the defendant's contentions on the second of the aforesaid questions Mr. Sen, appearing for the Maharaja raised a larger question. He said the grant of occupancy rights to Fox by the document of 1891 was ineffective in law, as occupancy rights flow from status created by statute, and cannot be the subject-matter of grant. Dass, J. after examining the question from a historical point of view, accepted the said contention of Mr. Sen. At p. 430 of the report he summarised his conclusions thus:

In this view the transaction between the Raj and Mr. Fox did not operate to bring into existence in favour of Mr. Fox a right of occupancy in this land, but conceding that the status could in law and was in fact conferred on Mr. Fox, I do not think that there is any warrant for the view that by such grant the character of the land was changed.

8. The Patna High Court decreed the Maharaja's suit for ejectment and the surviving defendant preferred an appeal to the Privy Council: *Bindeswari Prosad Singh v. Kesho Prasad Singh* AIR 1926 P C 79. The Privy Council affirmed the decree made by the High Court, but in doing so Sir John Edge made the following observations at p. 167 of the report:

It is stated in the plaint that after some time Mr. Fox was granted occupancy rights in the lands by the Maharaja. That statement was not traversed in the written statement, and must be treated as admitted. The grant or gift of such right of occupancy appears to have been, as stated in the judgment of Das, J. in 1891 for valuable services rendered to the Raj by Mr. Fox. A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right and is not conferred by a gift from a proprietor. However that may be, Mr. Fox became in arrears for three years in the payment of the rent of the lands, and in 1895 the then Maharaja brought a suit against him for arrears of rent and obtained in that suit a decree. In execution of that decree Mr. Fox's right and title to the lands were, on 2nd March 1896, sold by auction, and were purchased by the Maharaja of Dumraon and then such rights of occupancy, if any, as Mr. Fox had in the lands, were extinguished.

9. If the matter had rested with an obiter dictum of the Patna High Court, I would have without hesitation held that rights exactly similar to occupancy rights could be conferred by grant. The phrase 'occupancy rights' connotes a bundle of definite and well-ascertained rights, one of them being the right of the ryot to remain on the land in spite of the landlord's will as long as he pays rent; I am speaking here of localities where Act 8 of 1869 is in force, as is the case before me. The right of a landlord in Bengal to grant settlement of his land in any manner and on any terms he pleased was expressly recognized by Regns. 5 and 18 of 1812, and Regn. 8 of 1819, and my own view is that the scope of contract has its normal course in the

domain of letting out of agricultural lands, subject only to specific and well defined qualifications and restrictions intended or devised for the protection of agricultural tenants, but within those restrictions landlords and tenants are free to regulate their rights by contract. Occupancy rights are creatures of statutes, or to be more precise the creatures of custom adopted by statute, which by defining the nature of the evidence, which a person claiming such rights is required to adduce, have extended such rights to a larger class of ryots: see *Thakoorani Dasse v. Bishesher Mokherjee* (1865) 8 WR Act 10 Rule 29, especially the passage in the judgment of Campbell, J. at p. 65. They are creatures of custom or of statute only in the sense that acquisition of such rights by ryots does not depend upon the bounty or gift of the landlord, but they can be acquired against his will.

10. This in my judgment does not imply that the landlord cannot by grant confer on his tenant, rights exactly similar to rights of occupancy. He can in his grant define rights which he is granting to his tenant, by mentioning in detail in the different clauses of the Potta the exact incidents of the rights he is granting. If he does so, the ryot or tenant would get these rights, and I can conceive of no principle of law which would prevent the ryot or tenant from successfully asserting those rights given to him by his Potta against his landlord. To make my meaning clear I will take the following illustration. A landlord brings a person who is absolutely a stranger to the village in Bengal where the Bengal Tenancy Act is in force and immediately thereafter settles on him a piece of agricultural land of the said village. In the Potta he states expressly that the ryot will have (a) the right to remain on the land from generation to generation; (b) that he would be ejected on two grounds only, namely for using the land in a manner which renders it unfit for the purpose of tenancy, or for breaking a condition in the lease which is consistent with the provisions of the Bengal Tenancy Act; (c) that his rent would be enhanced only if it is below the prevailing rates of rent in the locality paid by occupancy ryots: on the grounds of rise of the price of local staple food crops; on the ground that the productive powers of the land have been increased by natural forces or by improvements effected by the landlord; and by written and registered contract but only to the extent of not more than two annas in the rupee and on no other grounds whatsoever and the enhancement can be enforced only at intervals of 15 years; (d) that the ryot shall be entitled to transfer the land by a registered

instrument and if the transfer is not by way of gift to a relation by blood within three degrees of relationship, a fee to be paid to the landlord by the transferee equal to 20 per cent of the consideration money or value of the tenancy; (e) that the ryot shall be entitled to effect improvements; and (f) that arrears of rent will be a first charge and landlord would be entitled to sell the holding for arrears of rent.

11. I do not see why such a ryot cannot insist on these rights from the moment he is inducted on the land and before he has occupied the land for 12 years. I do not see any difference also if the Potta instead of mentioning the rights conferred in such detail had simply stated that the grantee, the ryot, will have all the rights which are enjoyed by occupancy ryots in Bengal. The rights conferred by such a grant would be considered to be defined adequately, and with precision, as the incidents of occupancy rights are well defined. It may be that in one respect only there may be a difficulty, namely about the right of pre-emption of the landlord, by virtue of rule against perpetuities, but I do not see any difficulty so far as the right of occupation of such a person is concerned. On these principles I would decide that the defendants in the case before me cannot be ejected on the notice to quit, served in the present case, as the landlord had by Ex. A conferred on the tenants a right to remain on the land permanently and had contracted himself out of the right to terminate the tenancy by a six months' notice to quit. But the effect of the observations made by Sir John Edge, which I have quoted above, has to be considered. These observations are no doubt obiter dicta, but on that ground alone they cannot be brushed aside, for an obiter dictum of the Judicial Committee of the Privy Council stands on a different footing from an obiter dictum appearing in a judgment of a High Court. In *Mata Prosad v. Nageshwar Prosad* AIR 1925 P C 272 where the Subordinate Judge had disregarded a principle formulated in a judgment of the Judicial Committee on the ground that it was obiter dictum the Judicial Committee made the following observations at p. 417 of the report:

In view of the peculiar course adopted by the Subordinate Judge in dealing with this case, and in order to prevent other Courts in India from falling into the same error, their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle, enunciated by this Board although they have a right in examining the facts of any case before them to see whether and how far

the principle on which stress is laid applies to the facts of the particular case.

12. See Nagarbashi Banik v. Megnath : AIR1931 Cal171 at p. 456 where the said passage is quoted and explained.

13. If therefore Sir John Edge had definitely decided that the principle is that occupancy rights, or rights exactly similar to occupancy rights cannot be conferred by grant from the landlords, I would have been bound to give effect to contention of the appellant, and to decree the appeal. But my reading of the whole of aforesaid passage in Maharaja of Dumraon's case Bindeswari Prasad Singh v. Kesho Prasad Singh AIR 1926 P C 79 which I have quoted above Bindeswari Prasad Singh v. Kesho Prasad Singh AIR 1926 P C 79 at p. 167) is that the Judicial Committee did not definitely decide the point nor did it decide it finally, but reserved to itself further consideration of the principle laid down by Das, J. that 'occupancy rights cannot be conferred by gift or grant from the landlord,' if a case calling for its consideration, were to arise later on. I accordingly hold that I am not bound by the aforesaid observations made in Maharaja of Dumraon's case Bindeswari Prasad Singh v. Kesho Prasad Singh AIR 1926 P C 79 on the ground that it is not the final opinion of the Judicial Committee. I accordingly hold the terms of Ex. A prevent the plaintiff from ejecting the defendants on the basis of the notice to quit served on them. The result is that this appeal is dismissed with costs. The prayer for leave to appeal under Section 15 of the Letters Patent is granted. (L.P.A. No. 8 of 1936 was summarily dismissed-by Guha and Bartley, JJ. on 31st July 1936.)

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