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Court : Kolkata

Decided On : May-14-1925

Reported in : AIR1927Cal174,94Ind.Cas.740,94Ind.Cas.740

Judge : Babington Newbould and ;Pearson, JJ.

Appellant : Santosh Kumar Roy and ors.

Respondent : Rakhal Chandra Hazra and ors.

Judgement :

1. The plaintiffs who are the appellants before us brought a suit for khas possession of what they alleged to be a non-transferable occupancy holding. It is unnecessary to state all the facts of this case since it is conceded that the suit must fail if we hold that the holding was transferable and there was a valid transfer to the principal defendant.

2. It is not disputed that the holding has been held at an unchanged rate of Rs. 9-6 for more than 20 years. It is contended, however, that the lower Court, was wrong in applying the presumption under Clause (2) of Section 50 of the Bengal Tenancy Act in the present case. So far as that argument goes it appears to us to be sound. It seems hardly necessary to {quote authorities in support of the proposition that Sub-section 2 of Section 50 of the Bengal Tenancy Act, has no application in suits. which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser. We may cite, however, the case of Jagabandhu Saha v.

Magnamoyi Dasi [1917] 44 Cal. 555, where this statement of the law is made as an undoubted-proposition. Further also we cannot agree with the learned Subordinate Judge that the fact that the operation and effect of Section 22 Classs (2) of the Bengal Tenancy Act has to be considered makes this suit in ejectment a proceeding under the Act. But although the lower appellate Court was wrong on this point of law he has based his finding that the tenancy in suit is an occupancy holding at fixed rent on other grounds which cannot be assailed in second appeal. Though this special presumption of Clause 2 of Section 50 does not apply, it has been frequently held that in cases not under the Bengal Tenancy Act a presumption may arise apart from the Act that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rates. The learned Subordinate Judge has considered the case from this point of view and he ha? considered that in addition to there being evidence of no change of rent for a fixed period there is also the fact that the pro forma defendants who are also landlords of a considerable share by recognizing the transfer not only admitted the transferability of the holding but also the fixity of the rent as he points out this is something more than a mere forbearance on the part of the landlords to enhance the rent. Sitting as a Court of second appeal we are not prepared to hold that the lower appellate Court was wrong in drawing this presumption.

3. The only other point urged on our expressing our opinion that the tenancy was transferable is that the interest transferred was that of a Hindu widow and expired after her death. We hold that this contention which was not raised in either of the lower Courts cannot be raised in second appeal. It is pointed out that there is some reference to this made in the plaint. But issues were framed in the presence of parties and none of the issues framed raised this question. The result is that the appeal is dismissed with coats.

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