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Court : Kolkata

Decided On : May-06-1910

Reported in : (1910)ILR37Cal687

Judge : Lawrence H. Jenkin and C.J. ;Doss, J.

Appellant : Agarjan Bibi

Respondent : Panaulla

Disposition : Appeal allowed

Judgement :

Lawrence H. Jenkins, C.J.

1. The plaintiff-respondents have brought this suit for the joint possession of land.
2. It has been found by the lower Appellate Court that this land was the raiyati jote of two brothers, Jamal and Kamal, who were entitled to the same in equal moieties. Jamal purported to transfer his 8 annas share to the plaintiffs. Defendants 1 to 4 on Kamal's death succeeded to his eight annas, and they contest the plaintiff's claim to joint possession on the ground that the raiyati jote is not transferable. The lower Appellate Court, in reversal of the Court of first instance, Bas passed a decree in the plaintiff's favour for 'possession m their purchased eight annas share in the disputed land,' holding that the defendants 1 to 4 had no right to plead the non-transfer-ability of the holding.

3. From this decree the defendants 1 to 4 have appealed, and the only point is whether it is open to them to question the validity of the plaintiff's transfer.

4. It is common ground that the jote was not transferable without the landlord's consent, and that there is no finding that such consent was given; but it is argued that the absence of this consent is of no consequence, seeing that it is not the landlord who impugns the transfer. The question involved has been somewhat obscured in more recent times, and it will therefore be convenient to look into its history. As far back as Regulation VII of 1799, mention is made of a 'tenant having a right of occupancy only so long as a certain rent... be paid without any right of property or transferable possession; '(see Section 15, Clause 7,) while in Harington's Analysis, Volume III, page 450, it is said,' It is generally understood that the raiyats by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this right does not authorise them to sell or mortgage it, and it is so far distinct from a right of property.

5. In Hyat Bebee v. Sheikh Ahbar Alee (1855) Section D.A. 20, a raiyat's power of transfer came in question, and it was there said of the purchaser, 'He bought as he thought something; the principle caveat emptor strictly applies, and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer, he had merely a right of occupancy so long as he had paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845, or in cases where a bonus has been given, thereby creating in the raiyat a right of property to that extent, are considered tenures transferable by a raiyat.' In 1867 it was decided by a Full Bench that there was nothing in Section 6 of Act X of 1859 which showed that it was the intention of the Legislature to alter the nature of a jote and to convert a non-transferable jote into a transferable one, merely because a raiyat who held it for twelve years had thereby gained a right of occupancy. Ajoodhya Pershad v. Imam Bandi Begum (1867) 7 W.R. 528.

6. In 1874 it was decided by another Full Bench in *Nurendro Narain Roy v. Iskan Chunder Sen* (1874) 22 W.R. 22 that an occupancy right was not transferable. Sir Richard Couch, in reference to Section 6 of Act VIII (B.C.) of 1869, remarked: The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property that could be transferred.' Phear J. considered that the right was 'rather of the nature of a personal privilege than a substantive proprietary right.' Then there is the authoritative statement of the Privy Council in *Chandrabati Koeri v. Harrington* (1891) I.L.R. 18 Calc. 349, that a right of occupancy cannot be transferred. This view has since been repeatedly recognized, e.g., *Bhiram Ali Shaik Shikdur v. Gopi Kanth Shaha* (1897) I.L.R. 24 Calc. 356 *Durga Charan Mandal v. Kali Prasanna Sarhar* (1890) I.L.R. 26 Calc. 727, *Sadagar Sircar v. Krishna Chandra Nath* (1899) I.L.R. 26 Calc. 937; and its basis is that the right of occupancy is a right personal to the particular raiyat. In this connection it is instructive to note the view expressed in *Tara Pershad Roy v. Hoorjo Kant Acharjee Chowdhry* (1871) 15 W.R. 152, that even if the zemindar consented to the transfer, the transferee would thereby merely acquire a new jote on the same terms as the original tenancy was held: cf. *Hyder Buhsh v. Bhuhendro Deb Koonwar* (1872) 17 W.R. 179. It has, however, been held that a transferor cannot call in question the validity of his own transfer; but this is not because the transfer is valid, but because the doctrine of estoppel stands in his way: *Bhagirath Changa v. Sheikh Hafizuddin* (1900) 4 C.W.N. 679.

7. So far the position is intelligible, though I refrain from expressing any opinion as to the doctrine of estoppel, as it can have no application in this case. But it has been argued that it is only the landlord that can question the validity of what purports to be a non-transferable holding. For this, reliance has been placed on the statement in *Basarat Mandal v. Sabulla Mandal* (1898) 2 C.W.N. ccixxix, that the question of transferability was one that might be raised by the landlord, but could not be legitimately raised by trespassers like the defendant in that case. The ratio decidendi does not appear from so much of the judgment as has been reported, but an examination of the record shows that the plaintiff in that case alleged dispossession. This implies that the plaintiff had been in possession, and his suit in fact was to recover possession. This explains the decision, and it thus

becomes apparent that it was not the intention of the learned Judges to disregard the decision in Bhiram Ali's case (1897) I.L.R. 24 Calc. 355 which was cited to them.

8. *Ambica Nath Acharjee v. Aditya Nath Moitra* (1902) 6 C.W.N. 624 obviously turns on its own peculiar circumstances. The contest was as to which of two persons had the better claim to a sum of money representing the balance of the proceeds of the sale of a holding after the landlord's claim had been satisfied. Ordinarily this balance would be payable to the judgment-debtor, but as he had parted with his interest he made no claim, and in fact the only claimants were the plaintiff and defendant, each of whom claimed to be a transferee of the judgment-debtor's interest. In these circumstances, it was held that the question of transferability did not arise, and the balance was awarded to the prior transferee. Obviously this case can have no bearing on the question now before us. When the facts in *Ayenuddin Nasya v. Srish Chandra Banerji* (1906) 11 C.W.N. 76 are examined, it will be seen that the decision turned on the doctrine of estoppel as applied to a transferor and those who claim under him.

9. Much has been made of *Samiruddin Munshi v. Benga Sheikh* (1909) 13 C.W.N. 630. But in this case dispossession was alleged, and as the learned Judges merely remanded the case for further findings by the lower Court, there was no actual decision of any point material to the determination of the present case. It is, more' over, clear that the learned Judges did not intend to go beyond the case of *Basarat Mandal v. Babulla Mandal* (1898) 2 C.W.N. ccixxix, *Ambica Nath Acharjee v. Aditya Nath Moitra* (1902) 6 C.W.N. 624 and *Ayenuddin Nasya v. Srish Chandra Banerji* (1906) 11 C.W.N. 70, with each of which I have already dealt. *Haro Chandra Podder v. Umesh Chandra Bhattacharjee* (1909) 14 C.W. N 71 merely follows *Ayenuddin Nasya v. Srish Chandra Banerji* (1906) 11 C.W.N. 70.

10. It is no answer to the decision in Bhiram Ali's case (1897) I.L.R. 24 Calc. 355 to say that the sale there called in question was in execution of a decree, for if a sale by private contract would validly pass a right of occupancy, then a sale in execution of a decree would equally pass it and vice versa *Dwarka Nath Misser v. Hurrish Chunder* (1879) I.L.R. 4 Calc. 925 the power of voluntary transfer being

the measure of the power of involuntary alienation.

11. In this case there is no room for the application of the doctrine of estoppel, nor is there any prior possession on which the plaintiff can rely, so that the case falls within the general rule that a right of occupancy cannot be transferred.

12. The decree of the Subordinate Judge should therefore be reversed and that of the Munsiff restored with costs throughout,

Doss J.

13. concurred.

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