

Hemangini Dassi Vs. Asutosh Das

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Court : Kolkata

Decided On : Jul-24-1928

Reported in : AIR1929Cal330,113Ind.Cas.568

Appellant : Hemangini Dassi

Respondent : Asutosh Das

Judgement :

Mukerji, J.

1. This appeal has arisen out of a suit which was instituted by the plaintiff for the recovery of a sum of Rs. 25 as damages for certain trees that has been cut from a plot of land which defendant 1 held under under the plaintiff as tenant and also for an injunction restraining the said defendant from cutting the trees standing on the land, in future. The suit has been dismissed by both the lower Courts and the plaintiff has thereupon preferred this second appeal.

2. The plaintiff's case was that defendant 1 had been holding the land under a kabuliyat dated 1309 B.S. and that, in contravention of the terms of the said kabuliyat, the said defendant in collusion with other persons had cut down and removed five trees standing thereon. The defence of defendant 1 was that the tenancy was not created by the kabuliyat of 1309 B.S. but that it had been in existence for over 80 years and from the time of the father of the said defendant, that the tenancy-consisted of an area of 2 bighas out of which defendant 1 had

sold a quantity of land measuring $13\frac{1}{4}$ bighas to one Kedar Nath Mukherji and had retained for himself the remaining land, namely, 5 cottas in area and further that defendant 1 had not cut any trees from the said land. On this defence being taken, the plaintiff impleaded as one of the defendants in the suit defendant 2 who was the person in whose name the purchase had been made by the said Kedar Nath Mukherjee. She also added as parties defendants to the suit two other persons, namely, defendants 3 and 4 on the allegation that they were servants of the said Kedar Nath Mukherjee.

3. The Munsif held that the tenancy was a very old one and had existed from the time of the father of defendant 1 who himself was about 80 years of age. He held further that the origin of the tenancy was not known, that rent had been uniformly paid for the tenancy at the rate of Rs. 3 ; that the kabuliyat of 1309 B.S. was a document which was not acted upon, that defendant 1 was a tenant holding at a fixed rate of rent and, under the law, therefore, he had the right to cut and appropriate the trees on the land and further that he had a permanent and transferable right and that, therefore, the plaintiff was not entitled to a decree at all. The plaintiff, thereupon, as I have already stated, preferred an appeal. The Subordinate Judge who dealt with the appeal held that, in the absence of Kedar Nath Mukherjee as a defendant in the suit, the suit was not maintainable. The reasons that he gave for this decision were that Kedar Nath Mukherjee was the real purchaser and defendant 2 was his benamidar, that the holding was the ancestral holding of defendant 1, that defendant 1 himself had not cut any of the trees which were the subject of the suit, that if any tree had been cut, it had been cut by Kedar Nath Mukherjee and that therefore the suit was not maintainable in the absence of the said Kedar Nath Mukherji as a defendant therein.

4. Treating the case as one governed by the provisions of the Transfer of Property Act, as it has been contended on behalf of the appellant that it should be I am of opinion that the findings of the learned Subordinate Judge and the reasons that he has given for his decision are not sufficient. Questions might arise under Section 108, T.P. Act, as to whether by the mere fact that defendant 1 had made a transfer of a part of the land in favour of Kedar Nath Mukherjee, the said defendant was absolved from the statutory liabilities which arise under Clauses (m) and (o) of that

section. I think, however, we are relieved of the necessity of considering this matter because the view that should be taken of this tenancy is that it is one to which neither the provisions of the Bengal Tenancy Act nor those of the Transfer of Property Act are applicable. The learned Subordinate Judge has said in his judgment that the holding is the ancestral holding of defendant 1. It does not appear that he has properly considered all the circumstances which should be taken into consideration in arriving at this finding and, therefore, it may well be contended, as it has been, that this finding of the learned Judge is not really a finding which is conclusive on the question. We have, therefore, looked into the evidence in this case and also the findings which have been recorded by the learned Munsif. The view that should be taken with regard to this matter, in my opinion, is that the tenancy is the ancestral holding of defendant 1 having had its origin more than 80 or 85 years ago, that the rent that has been paid for it has been a uniform rental of Rs. 3 only, that it has been used for agricultural purposes and that it has descended from the father of defendant 1 to defendant 1 himself.

5. As regards the kabuliyat of 1309 B.S. I am entirely in agreement with what the learned Munsif has said in his judgment. The kabuliyat came from the custody of defendant 1 himself and the explanation that was offered on behalf of the plaintiff, namely, that it had been taken away from her by defendant 3 has not been accepted as true by the learned Munsif. There are very good reasons why this explanation should not be accepted specially, as it appears that, in a subsequent suit which was instituted by the plaintiff for rent, this kabuliyat was not mentioned and the rent was claimed at the rate of Rs. 10 though the kabuliyat provides for a rent of Rs. 3 only. That suit terminated in a solenama and, although the defendant had to pay at the rate of Rs. 3 no reference whatsoever was made to the kabuliyat in the solenama the defendant's case being that Rs. 3 was the rent which had been paid all along for the holding. There are also other indications in the contents of the kabuliyat which would point to the conclusion that it was a document which was attempted to be created for the purpose of curtailing the right of defendant 1, but that it does not represent a genuine contract between the parties. On the whole I am in agreement with the view which the learned Munsif has taken as regards the validity of this document.

6. Once it is taken that the tenancy had its origin mere than 80 or 85 years ago, the provisions of the Transfer of Property Act or of the Bangal Tenancy Act evidently would not be applicable to this tenancy and upon the facts to which I have referred, namely, that the rent has been the same, that the tenancy was heritable and that it was a tenancy for agricultural purposes, it is evident that defendant 1 should be regarded as a raiyat holding at a fixed rate of rent. It has been held in the case of *Badhika Nath Ray v. Fakir* [1917] 21 C.W.N. 636 that such a tenant has the right to cut and appropriate trees from the land and has a permanent and transferable right in his holding. On these findings, it is not possible for the plaintiff to obtain a decree in the present suit. In that view of the matter, I would dismiss the appeal with costs.

Rankin, C.J.

7. I agree.

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