

# CALCUTTA HIGH COURT

Pramatha Nath Bhattacharjee

Vs

Sashi Bhusan Banerjee

(Costello, J.)

26.01.1937

## JUDGMENT

### **Costello, J.**

1. This is an appeal by defendant 1 arising out of a suit for khas possession of about 15 bighas of land lying in Mouza Damra in the District of Bankura. The late Tara Prosanna Basu, the father of defendant 5 in the suit, held this mouza along with several other mouzas in patni right. He mortgaged by conditional sale the entire patni to Bapin Behari Banerjee and Jagannath Marwari on 2nd May 1912. Defendant 5 was adjudicated an insolvent on 21st February 1914. Bepin and Jagannath instituted a suit for foreclosure on the basis of the mortgage in their favour by Taraprosanna in the year 1915. During the pendency of this suit Taraprosanna died leaving defendant 5 as his only legal representative. The latter was substituted in place of the original mortgagor, but the receiver of the estate of defendant 5, appointed in the insolvency proceeding, was not made a party to the mortgage suit. On 19th September 1919 the mortgagees took possession of the mortgage properties on the basis of the final foreclosure decree obtained by them in the suit on the basis of the mortgage. Thereafter the interest of Jagannath passed by transfer to Bepin. In 1919 the receiver in insolvency brought a suit for redemption of the mortgage properties. This suit was decreed by the first Court on 5th February 1923. An appeal was taken by Bepin against the decree of the trial Court to this Court and this Court ultimately dismissed the redemption suit on 25th February 1924. The receiver applied for leave to appeal to His Majesty in Council on 15th January 1925, and leave was granted by this Court on 16th February of that year. On 4th May 1926 Bepin granted a mckarari raiyati lease of the disputed lands to the defendant-appellant. Their Lordships of the Judicial Committee allowed the receiver's appeal and restored the decree of the First Court on 3rd March 1927. Thereafter the receiver deposited the mortgage money in Court and obtained possession of the mortgage properties on 21st February 1928, and realized rent from the tenants including the defendant-appellant after taking certain directions from the Court. The receiver conducted all these litigations with the fund supplied by the plaintiff. On 30th January 1929 he sold 12 annas share of the patni and granted dar patni settlement lease of the remaining four annas share to the plaintiff. On 21st August 1930 the present suit for ejectment was raised by the plaintiff.

2. The defence of the defendant-appellant, so far as it is relevant for the purposes of the present appeal, are two fold: (1) that he is a settled raiyat of Mouza Damra and consequently he has

acquired occupancy right in the disputed lands and cannot be ejected, and (2) that the receiver from whom the plaintiff has derived his title having recognized him as a raiyat by receipt of rent, the plaintiff is bound to recognize him as a raiyat and cannot eject him. The trial Court dismissed the plaintiff's claim for khas possession. The plaintiff appealed to the lower Appellate Court. The learned District Judge has allowed the appeal and has passed a decree for ejectment against the appellant. Hence this second appeal.

3. The only point for determination in this appeal is whether the defendant-appellant is liable to be ejected from the disputed lands. It is an admitted fact that the appellant is a settled raiyat of Mouza Damra. Under Section 21, Ben. Ten. Act, every person who is a settled raiyat of a village within the meaning of Section 20 has a right of occupancy in all land for the time being held by him as a raiyat of that village. The question then' is whether the appellant was in possession of these lands as a raiyat after obtaining lease of these lands from Bepin in the year 1926. The lease which was granted by Bepin in favour of the appellant was a lease in perpetuity ad a fixed rate. The finding of the lower Appellate Court is that the transaction is not an act of prudent management as the mortgagee in possession received a large amount as selami and reduced the rent which would be ordinarily payable for the lands of this class by cultivating raiyats. Again, this mokerari lease was granted during the pendency of the redemption suit. It is therefore hit by 8. 52, T.P. Act. But this section does not take away the rights of mortgagees in possession under Section 76, C1. (a), T.P. Act, after the redemption suit is instituted. Bepin therefore had the right to lease the lands in ordinary raiyati right for the period of his possession after the suit for redemption was instituted. It is true that he granted a mokerari lease and it cannot be operative as a mokerari lease. But by Section 8, T.P. Act, this transfer conferred upon the defendant such right as the mortgagee in possession was then capable of conferring. The appellant therefore acquired a right to cultivate these lands as a raiyat from Bepin in the year 1926, at least for the period during which the latter would continue in possession as mortgagee. He was in fact in possession as a raiyat till the mortgage was redeemed. He is therefore not liable to be ejected as he has acquired occupancy right in the lands under Section 21, Ben. Ten. Act.

4. This view is supported by the decision of the Allahabad High Court in *Mt. Aziz Fatma v. Mukund Lal*. Much reliance was placed by the learned advocate for the respondents on a decision of this Court in *Madan Mohan Singh v. Rajkishori Kumari*<sup>1</sup> That case is an authority for the proposition that a lessee from the mortgagor pending the mortgage suit is not entitled to resist the claim for possession of the auction-purchaser in execution of the mortgage decree. In that case however the rights of a mortgagee in possession under Section 76, C1. (a), T.P. Act, to execute ordinary raiyati lease on usual terms in the ordinary course of management during the pendency of a redemption suit did not arise for consideration. Further, the question of the effect of the provisions of Section 21, Ben. Ten. Act, was neither raised nor decided in the case. Again it appears that after the receiver obtained possession of the property through Court, and after he received directions from the Court to realize rent from the tenants of the patni mehal, he actually realized rent from the defendant-appellant stating in the rent receipts that the defendant was a tenant in the disputed lands. It is true that in the rent receipt he noted that he was not aware of the real state of affairs so far as the area of the tenancy and the amount of rent payable for the tenancy are concerned. But these remarks do not indicate that he was not receiving the money payable by the defendant as anything but rent for the lands in suit, inasmuch as in the receipt it is clearly indicated that the amount received was rent payable for the jote and the person who was paying the rent was the tenant in respect of that jote. The defendant-appellant is therefore entitled

to remain on the lands as a tenant not only by virtue of Section 21, Ben. Ten. Act, but also on account of the recognition of his tenancy by the receiver after he obtained possession through Court. But the plaintiff will be entitled to get fair and equitable rent settled for these disputed lands in an appropriate proceeding on the footing that the appellant is an ordinary occupancy raiyat in respect of the disputed lands.

5. The result therefore is that this appeal is allowed, and the judgments and decrees of the Courts below are set aside. Plaintiff's title to the disputed lands is declared. His prayer for khas possession is disallowed. The plaintiff will get a decree for rent for the lands in suit at the rate of Rs. 15 per year for two years, namely 1335 and 1336 B.S., but this will not preclude the plaintiff from having fair and equitable rent settled for these disputed lands on the footing that the defendant is an occupancy raiyat in respect of these lands for subsequent periods subject to the law of limitation. The defendant appellant will get his costs in the Courts below but the parties will bear their own costs in this Court.

Cases Referred.

1(1913) 17 C L J 384