

**Keshab Lal Nag Majumdar Vs. Madhu Sudan Pal Kundu and ors.**

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**Court :** Kolkata

**Decided On :** Jun-03-1910

**Reported in :** 6Ind.Cas.685

**Judge :** Brett and ;Richardson, JJ.

**Appellant :** Keshab Lal Nag Majumdar

**Respondent :** Madhu Sudan Pal Kundu and ors.

**Judgement :**

1. In the seven cases out of which these appeals arise the plaintiffs., who are different in each, sued to recover from the defendant No. 1, who is the tenant of them all, possession each of his share of the tenure, held by the defendant under separate leases from each, on the ground that the defendant had broken certain conditions of the leases. The defendant No. 1 is a permanent tenure-holder under the plaintiffs and the condition of the lease, which he is said to have broken, runs as follows: I shall not transfer this jamai land to any body either by gift, sale, ijara, conditional sale, mortgage, or take in any partner, and the land will not be sold for the debt of any one else--also I shall not be able to charge it as security if I stand security for any body--I shall not be able to transfer the same either to any of your co-sharers fraudulently or to anybody else. If I commit breach in respect of any one of the above conditions, then I shall lose all my interest in the jamai land mentioned in the pattah and they will be your khas land to which either myself, my heirs or my representatives will not be able to raise any objection.'

2. On the 9th Magh 1311, the defendant No. 1 executed a registered pattah (Exhibit M), by which he leased out for a term of 999 years the lands covered by his tenure to defendant No. 2 who is a co-sharer of the plaintiffs.

3. The plaintiffs' case in each suit is that by exceeding that lease which amounted to a permanent lease, the defendant No. 1 has broken the conditions of his lease, and that as under the terms of the lease there is a condition for re-entry by the plaintiffs on such breach, they are entitled to obtain possession of the lands covered by the tenure.

4. The plaintiffs served notices on the defendant No. 1 under the provisions of Section 155 of the Bengal Tenancy Act requiring him to pay compensation for the breach of the terms of his contract but he had failed to comply with their demand. The plaintiffs accordingly sued for khas possession of the tenure.

5. The Court of first instance held that the defendant No. 1 was liable to ejection for breach of the conditions of his contract. The Munsif held, however, that the provisions

of Section 155 of the Bengal Tenancy Act would apply and that the plaintiff was in the first instance entitled to compensation for the breach. On failure to pay the compensation within the time fixed, the defendant would be liable to ejection. He fixed the compensation at five times the profit which he calculated to be Rs. 5-5 per bigha as the defendant as tenure-holder merely collected rent from the tenants. The compensation was to be paid within 14 days. A decree in accordance with these findings was given in favour of the plaintiff in each case.

6. On appeal the lower appellate Court has set aside the judgment and decree of the Court of first instance and has dismissed all the suits.

7. The plaintiffs have appealed in all the suits.

8. In disposing of the appeals the lower appellate Court found all the points in favour of the plaintiffs except one. That point is the third as stated in the judgment and runs as follows: 'Are the forfeiture clauses in the qabuliats void ?' This refers to the clause in the qabuliat executed by the defendants in favour of the plaintiffs providing that the defendant would be liable to forfeit the lease for any breach of its conditions. The Judge of the lower appellate Court held that the clauses were void in law for the following reasons: He held that the qabuliats did not create any permanent mokurari tenure and, therefore, that the provision of Section 179, Bengal Tenancy Act, did not apply to them: that the tenure was merely a permanent tenure, and that as such, it was under Section 11 of the Bengal Tenancy Act, capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property. Consequently the provision of Section 11 of the Transfer of Property Act could not govern such leases so as to render valid any condition restraining alienation, and as the leases were for agricultural purposes, the sections of Chapter V of the Transfer of Property Act were rendered inapplicable by the provisions of Section 117 of the same Act. He further held that the clauses in the leases, being repugnant to Section 10 of the Bengal Tenancy Act (see the provis.) to the section), could not be enforced. He accordingly held that the plaintiffs must fail in all the suits.

9. In support of the appeals before us, these findings of the lower appellate Court have been assailed as contrary to law.

10. First it has been pointed out that as it is admitted that there is the condition in the lease restraining the lessee from transferring the holding, then, even if there were no condition for re-entry, nevertheless the lessor, in a case of a breach of such a covenant, would have a remedy by a suit for damages or for injunction, and the cases of *Basarat Ali Khan v. Manirulla* 36 C. 745 : 10 C.L.J. 49 : 2 Ind. Cas. 416 : *Parameshri v. Vitlappa Shanboga* 26 M. 157 : 12 M.L.J. 189 and *Netrapal Singh v. Kalyan Das* 28 A. 400 : A.W.N. (1906) 60 : 3 A.L.J. 196 are relied on.

11. Further it has been argued that the lower Court has erred in law in holding that Sections 10 and 12 of the Transfer of Property Act have been repealed by implication by Sections 10 and 11 of the Bengal Tenancy Act. Admittedly those two sections have not been expressly repealed by the Bengal Tenancy Act and as they must be held to be applicable generally to all transfers of interests in property, they would apply in the present case unless they have been repealed by implication. Before the Court could hold that there had been such a repeal by implication, it must be satisfied that the provisions of the two enactments are so inconsistent or repugnant that they cannot stand together (*Hardcastle on Statutory Law*, 330). But if on a fair and

reasonable construction of the two enactments, it be found that the provisions of the two Acts are not incapable of reconciliation and are capable of standing together, then there can be no repeal by implication. Section 10 of the Transfer of Property Act distinctly saved leases in which the condition restraining alienation for the benefit of the lessors or those claiming under them from the general rule that where property is transferred subject to a condition restraining alienation, the condition is void, and Section 11 of the Bengal Tenancy Act merely formulated the existing law without avoiding the effect of the provisions of Section 11 of the Transfer of Property Act. The two sections of the two Acts are not inconsistent or repugnant as has been held by the Judge of the lower appellate Court.

12. In our opinion this contention is correct and we are of opinion that the Sub-Judge erred in law in holding that Section 10 of the Transfer of Property Act was repealed by implication by Sections 10 and 11 of the Bengal Tenancy Act. The provision in the former Act, saving conditions restraining alienation in leases where the condition is for the benefit of the lessor, is not, in our opinion, inconsistent with or repugnant to the provisions of the latter Act which gives to lessors general powers of alienation, and the two provisions in the two Acts are capable of standing together. If a contrary view were taken, it would follow that the provisions of Sections 10 and 12 of the Transfer of Property Act would, regard being had to Section 179 of the Bengal Tenancy Act, be operative in respect of permanent mokurari leases, but would not be operative in respect of other permanent leases. There would appear to be little reason in making such a distinction.

13. The ground on which the lower appellate Court has dismissed the plaintiffs' suits, therefore, fails.

14. The question which then arises for consideration is what relief are the plaintiffs entitled to. On this point we think that following reasons : He held that the qabuliats did not create any permanent mokurari tenure and, therefore, that the provision of Section 179, Bengal Tenancy Act, did not apply to them: that the tenure was merely a permanent tenure, and that as such, it was under Section 11 of the Bengal Tenancy Act, capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property. Consequently the provision of Section 11 of the Transfer of Property Act could not govern such leases so as to render valid any condition restraining alienation, and as the leases were for agricultural purposes, the sections of Chapter V of the Transfer of Property Act were rendered inapplicable by the provisions of Section 117 of the same Act. He further held that the clauses in the leases, being repugnant to Section 10 of the Bengal Tenancy Act (see the proviso to the section), could not be enforced. He accordingly held that the plaintiffs must fail in all the suits.

15. We accordingly set aside the judgment and decree of the lower appellate Court in all the cases and agreeing with the Court of first instance that the plaintiff in each case is entitled under the provisions of Section 155, Bengal Tenancy Act, to claim from defendant No. 1 reasonable compensation for the breach of the conditions of the lease and on the defendant's default, to a decree for ejectment. We direct that the appeals be sent back to the lower appellate Court with directions to determine what is a reasonable compensation to be paid by the defendant No. 1 to the plaintiff in each case and after fixing under the provisions of Section 155 of the Bengal Tenancy Act the period within which the compensation should be paid, to pass a decree in favour of the plaintiffs for recovery of such sums within the period fixed and on

default of the defendant to pay the sums within that period, for ejection of defendants from the tenure.

16. The plaintiffs are entitled to their costs from defendant No. 1 in this Court, Costs in the lower appellate Court will follow the result of the hearing on remand.

17. The only cross-objection which was mentioned before us was that relating to the validity and service of the notices under Section 155, Bengal Tenancy Act. We agree with the Court of first instance that the notices were sufficient and were duly served according to Law.

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