

*Privy Council Appeal No. 28 of 1934*

*Patna Appeal No. 4 of 1933*

Raja Braja Sundar Deb - - - - - *Appellant*

*v.*

Ram Chandra Paikara and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL DELIVERED THE 19TH NOVEMBER, 1935

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*Present at the Hearing:*

LORD THANKERTON.

SIR JOHN WALLIS.

SIR GEORGE RANKIN.

[*Delivered by SIR JOHN WALLIS.*]

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Raja Braja Sundar Deb, the plaintiff in this case, is the proprietor of Killa Aul, an impartible zemindary in the district of Cuttack. Defendants 1 to 4 are a branch of his family who held the suit lands under grants for maintenance made by his predecessors. The 5th defendant is the Raja of Kanika in the same district. On the 21st of April, 1923, defendants 1 to 4 executed a usufructuary mortgage of the suit lands in favour of the 5th defendant for a consideration of Rs.3,200, to be discharged both as to principal and interest by nine years' possession of the suit lands. In the eighth year, on the 11th June, 1930, the plaintiff instituted this suit in the Court of the Subordinate Judge of Cuttack for possession of the suit lands and mesne profits, on the ground that by this alienation the defendants 1 to 4 had incurred a forfeiture and the plaintiff was entitled to re-enter. He accordingly prayed for declarations (1) that according to the custom of the estate the defendants had no right to alienate the suit properties in any way, (2) that the usufructuary mortgage in favour of the 5th defendant was invalid and inoperative and not binding upon him, and (3) that defendants 1 to 4 having given up possession and forfeited their rights by this alienation, the plaintiff was entitled to resume them and re-enter. Fourthly he prayed for possession and mesne profits. The defendants 1 to 4 pleaded that they held the suit lands under permanent

grants and not as Biradaran Korak-posak grants as alleged in the plaint. The latter generally known as Kharposh grants are made for maintenance of the junior members of the family and are resumable on failure of their male heirs. This question was the subject of the 3rd issue and there are concurrent findings of the Courts below that these were not permanent, but Biradaran Khorak-posak grants.

These defendants also alleged that by the custom of the estate lands held under these grants were transferable, and denied that, by executing this usufructuary mortgage without the knowledge or permission of the plaintiff and putting the 5th defendant in possession, they had forfeited their rights and the plaintiff had become entitled to re-enter and resume possession. They also pleaded that, even if these grants were not transferable, the plaintiff had no cause of action, as the transfer was not absolute, but was subject to a right of redemption which they could exercise at any time.

On these questions the Subordinate Judge decided on the 4th issue that by custom these grants are not transferable, and the defendants had no right to transfer them by sale, gift or mortgage, and that the restriction applied to temporary transfers as well as to permanent transfers. The High Court on appeal concurred in the finding that by custom these grants are not transferable, and that finding has not been questioned in this appeal which is only concerned with the further question whether the plaintiff was entitled to resume the tenures in question by reason of the mortgage executed by defendant 1 to 4 in favour of defendant 5.

As regards this question the Subordinate Judge states that the plaintiff's advocate had submitted that this was a question arising between defendants 1 to 4 and need not be considered for the moment, and that he wanted the decision to be confined to the question whether the transfer was valid or invalid. The Subordinate Judge however considered that the two questions were inextricably mixed. In accordance with his finding that by the custom of the estate the grants were not transferable he held that the mortgage in favour of defendant 5 must be declared to be invalid and inoperative.

On the question of resumption he held on the evidence that the grants were only resumable on the failure of the male heirs of the grantees. The result was that the mortgage was inoperative and the lands must remain in possession in defendants 1 to 4. If, however, they allowed the 5th defendant to remain in possession, the plaintiff would have a right to re-enter. The decree accordingly declared that the mortgage in favour of the 5th defendant was invalid and inoperative, but that the plaintiff would only be entitled to re-enter in case the 5th defendant did not vacate the lands and was allowed by defendants 1 to 4 to remain in possession of them.

As regards the decree Fazl Ali J. who delivered the judgment of the High Court on the appeal observed that it was most unsatisfactory and could not easily be executed, as the 5th defendant might not be willing to give up possession and it would not be easily proveable whether he had continued in possession with the collusion of defendants 1 to 4. No such difficulty however had in fact arisen, as the 5th defendant whose outstanding claims may have been otherwise satisfied and who did not appeal from the decree, appears not to have opposed the application for execution, and the plaintiff was put in possession under Order XXI, Rule 35, of the Civil Procedure Code less than two months after the passing of the decree. The 5th defendant not having appealed, no question as to his rights arises on this appeal.

On the appeal preferred by defendants 1 to 4 the High Court, as already stated, confirmed the findings of the lower Court as to the nature of the tenure and as to the grants being not transferable, and these are concurrent findings with which the Board does not interfere. As regards the question whether by executing the usufructuary mortgage and putting the 5th defendant in possession, defendants 1 to 4 had forfeited their tenure, Fazl Ali J. was disposed to hold that they had not incurred a forfeiture which entitled the plaintiff to re-enter, but did not base the decision of the Court on this ground. He stated that admittedly this issue was not pressed in the Court below, and that at the hearing of the appeal the advocate for the respondent had taken up the same position, and had confined himself to contending that as the plaintiff had been put in possession in execution of the decree, defendants 1 to 4 could not recover possession in this suit but must be referred to a separate suit. As to this contention the learned Judge observed that, as the issue of forfeiture had not been pressed in the Court below, defendants 1 to 4 ought not to be driven to a separate suit. The case of forfeiture in his view had been virtually abandoned in the Court below, and it must consequently be held that defendants 1 to 4 had not incurred forfeiture and that they were entitled to recover possession of the disputed lands from the plaintiff if he had already been put in possession of them, as in fact he had. The Court accordingly allowed the appeal in part, and gave defendants 1 to 4, the first four respondents here, a decree for possession against the plaintiff if possession had been delivered to him.

Their Lordships agree with the learned Judges of the High Court and are of opinion that the issue as to forfeiture having been abandoned by the plaintiff, defendants 1 to 4 are entitled to recover possession in this suit, and will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

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RAJA BRAJA SUNDAR DEB

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RAM CHANDRA PAIKARA AND  
OTHERS

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DELIVERED BY SIR JOHN WALLIS

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