Privy Council Appeal No. 109 *of* 1928.
Bengal Appeal No. 24 *of* 1926.

Jitendra Nath Ghose and others - - - - - *Appellants*

v.

Monmohan Ghose and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH APRIL 1930.

Present at the Hearing:
LORD TOMLIN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The appellants are the owners of a *ganti* tenure known as Dahar Nalbunia in the Khulna District. On the 26th January 1885, shortly before the passing of the Bengal Tenancy Act, VIII of 1885, the predecessor in title of the appellants created a *dar-ganti* or under-tenure in favour of three ladies (hereinafter referred to as the *dar-gantidars*) at an annual rent of Rs. 629–11–0 payable in four *kists* or instalments. By the terms of the kabuliyat then executed by the *dar-gantidars* this tenure was non-transferable, and provision was made for default as follows :—

> "In case of default in payment of any *kist* we shall pay the whole amount of the *kist* together with half of it by way of interest within the period from the date following the date of the *kist*, up to the 30th Chaitra of the same year. Besides the rent, we shall pay along with it all existing and future Government cesses, etc., according to the aforesaid *Kistibundi*, and in case of default of any *kist* we shall without any objection pay interest thereon in the way as stipulated above. If the rent for a year be not paid within the year, then we shall cease to have any right to or concern

with the property on the 1st day of Baisakh of the next year. You will be entitled to take *Khas* possession of the same without instituting any suit and without giving any notice, and the arrears of rent with interest for the year, together with interest on the same at the rate of 1 anna per rupee per month from the 1st day of Baisakh of the following year up to the date of realisation of the same shall be recovered from our other movable and immovable properties and from our persons."

The effect of this was that upon any instalment of the rent being in arrear interest at the rate of 50 per cent. would be payable up to the end of the year, and that if a year's rent was unpaid the landlord would be entitled to re-enter, and the arrears and interest then due would carry further interest at 75 per cent. per annum recoverable from the *dar-gantidars* personally.

These terms however were in effect modified by the operation of the Tenancy Act which came into force in November 1885. The *dar-ganti* which, it is now admitted, was heritable, was a "permanent tenure" within the meaning of the Act, and therefore became under Section 11 transferable; and by Section 65 the *dar-gantidars* ceased to be liable to ejectment for arrears of rent, but their tenure was liable to be sold in execution of a rent decree, and the rent was made a first charge thereon. It was also provided by Section 67 that arrears of rent should bear simple interest at the rate of 12 per cent. per annum which was raised by a later Act to 12½ per cent.

From 1899 onwards the *dar-gantidars* appear to have been in difficulties. They incumbered the tenure: the rent was not paid: rent suits were filed against them and decrees were passed. None of these suits seem to have been defended and the decree in each case included, in addition to the 50 per cent. interest on arrears, interest upon the aggregate sum due at 75 per cent. which was clearly chargeable only in the event of re-entry—an event which had not, and could not under the provisions of the new Act, have taken place.

It is with the last three of these decrees dated respectively the 14th June 1911, the 18th August 1915 and the 7th November 1919, that this appeal is concerned. After 1899 the *dar-gantidars* practically disappear from the scene, though their names, or as one or other of them died, the names of some of their heirs continued to be recorded in the landlord's *sherista*, and they figured as defendants in the regularly recurring suits for the rent In the case of the earlier decrees prior to 1911 the decretal amount was paid, apparently without demur, by one or other of the incumbrancers, and a maze of proceedings resulted which are detailed in the judgments of the Indian Courts, but need not be further referred to here. It is sufficient to state that by 1911 the *dar-gantidars* and their heirs had ceased to have any interest in the tenure which it is now admitted eventually vested in the respondents, subject to a charge in favour of one Hiramati who was not a party to the proceedings out of which this appeal has arisen.

The three decrees now in question were obtained against the one survivor of the *dar-gantidars* and such of the heirs of the other two as were known to the appellants, and included (as stated above) interest upon the arrears at 75 per cent. None of the incumbrancers or execution purchasers to whom the real interest in the tenure had passed were at any time entered in the landlord's *sherista*, nor were they made parties to any of the suits, or recognized in any way by the appellants who contended, relying upon the terms of the *kabuliyat*, that the tenure was not transferable. This contention was maintained by them in the earlier stages of the present proceedings, though in view of the provisions of the Act of 1885 it has not been supported before this Board.

In the case of the later decrees from 1911 onwards no payment was made, and apart from keeping them alive it does not appear that any effective step towards realization was taken by the appellants until April 1921 when they applied for execution by attachment and sale of the tenure. This brought the respondents into action, and in November of the same year they filed the suit out of which this appeal has arisen in the Court of the Subordinate Judge of Khulna. The prayer of their plaint was for a declaration of their title to the tenure, and that the appellants had no right to have it sold in execution of the decrees above referred to, and for an injunction restraining them from selling. The appellants defended the suit, their principal contentions being that the tenure was not transferable, that the decrees were good rent decrees binding on the tenure which could therefore be brought to sale in execution, and that the suit was out of time. The trial judge decided the first two points in the appellants' favour, and holding that the respondents had no title dismissed the suit. He did not think it necessary to come to any conclusion on the question of limitation.

The High Court on appeal reversed his decree, the main ground of the decision being that the decrees were not rent decrees which could be executed by sale of the tenure inasmuch as the 75 per cent. interest which was included in them was not due, and could not be recovered, as rent. The learned Judges held that the respondents had acquired by purchase a right in the tenure though they thought it unnecessary to define its exact nature, and they granted the respondents a declaration to that effect and that the tenure could not be sold in execution, and an injunction as prayed.

Before their Lordships it has not been seriously disputed that the inclusion in the decrees of the 75 per cent. interest, which was payable only on re-entry by the landlord, was wrong, and that this amount could not properly be charged on the tenure. But the argument for the appellants has been that they were entitled to bring their suits against the tenants recorded in their rent rolls, disregarding any transfer of their interests, and that

having obtained decrees against them in rent suits filed under the Act of 1885 they had a statutory right to bring the tenure to sale, which could not be resisted by third parties whatever their interest in the tenure might be, and that no such third party could impugn the propriety of the decrees so passed.

Their Lordships find themselves unable to accede to this argument. Before the Act of 1885 came into force the duty was laid specifically upon the transferee of a tenure to see that his name was recorded in the landlord's *sherista*, and it may well have been that, if he failed without good reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect. Instead of the transferee being bound to go to the landlord to get his name recorded, it was provided that a voluntary transfer must be by a registered instrument, and that before registration a fee was to be paid by the transferee and notice given by the registration office, through the collector, to the landlord, or in the case of an execution sale by the executing court. In this state of the law their Lordships can see no foundation for the contention that a landlord can ignore all transfers of the tenure and rely upon decrees obtained by him against persons whom he chooses for his own purposes still to record as his tenants, though he knows, or must be taken to know, that their interest in the tenure has ceased.

In the present case their Lordships have no doubt that the landlord had notice of the other interests which had come into existence. There is uncontradicted evidence to this effect in the record, and in the case of the earlier decrees the predecessor in title of the appellants accepted payment from persons whom she must have known were incumbrancers. But apart from this their Lordships have no hesitation in presuming, in the absence of evidence to the contrary, that the procedure laid down by Sections 12 and 13 of the Act was duly followed, and that the proper statutory notice was given of the various incumbrances and execution sales from which the respondents' title has evolved. That the appellants did not choose to record the names of the transferees is neither here nor there; the reason for their not doing so was almost obviously that they were unwilling to recognize the transferability of the tenure. If it was, as is now admitted, statutorily transferable, their Lordships know of no principle of law, nor have they been referred to any provision of the Act, which justifies the contention of the appellants. It would indeed appear from the decision of the Board in *Surapati Roy* v. *Ram Narayan Mukerji*, 50 I.A. 155, and other cases decided in India (see, for instance, *Chintamoni Dutt* v. *Rash Behari Mondul*, I.L.R. 19 Calc. 17), that the original tenure-holders would no longer be liable for the rent, and that an effective decree, therefore, could only be obtained against the transferees.

But, in the present case, it being clear to their Lordships that the decrees which the appellants claim to execute by the sale of the tenure were not, for the reasons assigned by the High Court, proper rent decrees, they think it is impossible to hold that the respondents are bound by them.

Reliance has been placed by Counsel for the appellants upon Section 170 (1) of the Tenancy Act, which made Sections 278 to 283 of the Civil Procedure Code of 1882 (now Order xxi, Rules 58 to 63 of the Code of 1908) inapplicable to a tenure attached in execution of a decree for arrears of rent. The effect of this provision is that there can be no investigation in execution proceedings held under Ch. XIV of the Tenancy Act, of claims by third parties to an interest in the tenure, but it does not, in their Lordships' opinion, bar a substantive suit such as that filed by the respondents. In their Lordships' view it is only arrears of rent that are charged by Section 65 upon the tenure, and it is only such arrears that can be realised in execution by the sale of the tenure. Ch. XIV of the Act does not purport to enlarge or restrict the exercise of this right, but only provides the machinery for working it out. If a landlord seeks to use this machinery for the recovery of something that is not rent, to the prejudice of a third party on whom the decree is not binding, it would be a manifest injustice to deny him the right to object, and it would require very clear words in the Act to induce their Lordships to impose this penalty upon him.

It only remains to deal with the question of limitation. The contention of the appellants is that the suit, not having been brought within six years of the passing of the first two of the three decrees in question, is barred in respect of them by Art. 120 of the First Schedule to the Limitation Act, IX of 1908. The respondents admit that this article governs the suit, but say that their "right to sue," which defines the starting point of the period, only accrued in April, 1921, when the appellants first applied for the sale of the tenure, and their suit was brought in November of that year. The trial Judge (as already stated) made no pronouncement upon this issue. The learned Judges of the High Court agreed with the respondents' contention, and their Lordships have no doubt that they were right for the reasons given in their judgment.

Their Lordships think that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

JITENDRA NATH GHOSE AND OTHERS

v.

MONMOHAN GHOSE AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

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