
(1888) 04 CAL CK 0005
In the Calcutta High Court

Bhupendro Narayan Dutt and Others

APPELLANT

Vs

Nemye Ghand Mondul

RESPONDENT

Date of Decision : 17-04-1888

Acts Referred:

Bengal Tenancy Act, 1885 — Section 158
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1888) ILR (Cal) 627

Hon'ble Judges : Norris, J;Beverley, J

Bench : Division Bench

Judgement

Norris, J.—The Suudorbun lot No. 44 was the mourasi tenure of one Mohendro Narain Dutt. He died leaving a will, whereby he demised his properties, ancestral and self-acquired, to his four sons, Jogendro, Bbupendro, Ganendro and Norendro, in equal shares.

2. After reciting that Jogendro, his son by his first wife, had come of age, and that the other three sons by his second wife were minors, the will proceeds as follows : "I do hereby constitute and appoint Srimati Bhava Sundari Dasi, my wife and their mother, executrix on behalf of the minor sons. Until the attainment of majority by the said minor sons the said executrix shall remain in possession of all the property in their share, both moveable and Immovable ; shall collect and realize the rents, as also the monies that may be due to me on my account; shall preserve and take care of all the property ; shall educate and support the minors ; and shall administer the household expenditure, and celebtate the religious rites and ceremonies on a reasonable scale. God forbid it, but if the said executrix should in the meantime feel that it is likely that she will die (soon), then she shall be competent to appoint in her lifetime my mother, Srimati Sukamoyee Dasi, and my adult son, Jogendro, or, failing them, any one whom her judgment approves, being a relative of hers and a trustworthy person, as executor or executrix on behalf of the minor sons, and such executor or executrix shall do everything under the authority that shall be vested in them by her. It shall be incumbent upon my wife and my adult son aforesaid, whatever they

undertake to do, to do it according to the advice of my nephew, Badha Nath Bose, and Shambhu Ohunder Bose, my trustworthy friend. If it should be necessary to grant to anybody a jungle-abadi, mourasi and mokurari pottah of any jungle land in my Immovable property, then, fixing a fair rent on it, my wife aforementioned, in unity with my adult son aforementioned, shall be competent to take a kabuliat and grant such pottah, and the said pottah shall never be liable to cancellation. According to the provisions I have laid down above in relation to my property, my adult son and the executrix shall perform and manage all matters."

3. The will is dated 12th Sraban 1272=26th July 1865.

4. The testator died on the 8th Bhadro 1272=23rd August 1865.

5. On 16th Bysaek 1280=27th April 1873, Bhava Sundari and Jogendro, the executrix and executor under the testator's will granted an amalnamah of Sunderbun lot No. 44 to one Uzir Nuskur, who was to hold the land rent-free up to the year 1283, and at a rent of 4 annas per bigha in 1284, 6 annas in 1285, 8 annas in 1286, 10 annas in 1287 and 1288, and at 14 annas ever afterwards.

6. The amalnamah contained an agreement by Bhava Sundari and Jogendro to grant a mourasi pottah at the above rates.

7. As a matter of fact, the mourasi pottah was never granted to Uzir Nuskur.

8. Jogendro, the testator's eldest son, died on the 18th Bhadro 1280=2nd September 1873, leaving a minor son Jotendro, in respect of whose estate a certificate under Act XL of 1858 was granted to his unclد Bhu-pendro by the District Judge of the 24-Pergunnahs on 22nd December 1873.

9. The certificate states that Bhupendro shall not be able, without the leave of the Court, to grant any kind of pottah relating to the minor's estate for a longer period than five years.

10. In 1874 some negotiations took place with a view to a mortgage of some portion of the testator's property, a fourth share of which descended to Jotendro upon the death of his father Jogendro, and on 27th July the District Judge gave permission for the mortgage of the minor's one-fourth share.

11. The mortgage does not appear to have been carried out, and on 11th Kartick 1282=27th October 1875, a mourasi mokurari pottah of Sunder-bun lot No. 44 was granted by Bhava Sundari and Bhupendro "for self and for minor Jotendro" to Nemye Chand Mondul, free of rent up to 1286, and at a progressive rate up to 1291, in which year and ever afterwards the rent was to be 11 1/2 annas per bigha.

12. In 1882 Uzir Nuskur instituted proceedings in the Criminal Court against Nemye Chand Mondul u/s 145 of the Code of Criminal Procedure.

13. There can be no doubt that these proceedings were instigated by Bhupendro; they resulted in favour of Nemye Chand Mondul. In 1883 Bhupendro and his

brothers, who were then majors, and Jotendro, by Bhupeadro as his next friend, brought a suit against Nemye Chand Mondul.

14. The plaint in that suit set out the pottah of Kartick 1282, and alleged that defendant was in possession of 289 bighas in excess of the quantity of land granted to him thereby, and asked that he might be ejected therefrom, and for mesna profits.

15. This suit was compromised, the defendant undertaking to pay Re. 1 per bigha in respect of 286 bighas, being 4 1/2 annas per bigha in excess of the rent he was paying under the pottah.

16. In 1886 Bhupendro and his brothers, and Jotendro, through Bhupendro as his next friend, took proceedings u/s 158 of the Bengal Tenancy Act.

17. In their petition they alleged that Sunderbun lot No. 44 was their ancestral mourasi mokurari chuk; that Nemye Chand was holding possession thereof, setting up a permanent pottah alleged to have been obtained from Bhava Sundari during the minority of Ganendro and Norendro and from Bhupendro on behalf of himself and Jotendro without the sanction of the District Judge; that Ganendro, Norendro and Jotendro were all minors at the date of the pottah, and were not bound thereby; that Nemye Chand had no permanent right as he alleged; and they prayed that u/s 158 of the Bengal Tenancy Act the following matters might be determined:

(a) What sort of right the opposite party has to hold the said land?

(b) What class of tenant he belongs to?

(c) If he is a tenure-holder, whether he is a permanent tenure-holder?

(d) What rent is payable now by the opposite party?

(e) Whether the rate of rent which the opposite party claims (to pay) is liable to enhancement?

18. Nemye Chand filed a written statement, in which he alleged (inter alia) that the mode and object and the form in which the action was brought was not what was contemplated, and aimed at by law; that Section 158 of the Bengal Tenancy Act did not apply to the case; and upon the merits he alleged that he was a permanent tenure-holder under the pottah and that his rent was not liable to enhancement.

19. The Subordinate Judge, after a brief recital of the facts, gave judgment as follows:

The execution of the lease by Bhupendro was a deliberate act on his part, and he cannot now be allowed to recede from the obligation created by the contract. He made an attempt to prove fraud in connection with the execution of the lease, but failed. Even if his servants misinformed him that would not vitiate the contract, the defendant not having been shown to have done anything to deceive

him. Bhupendro entered into the contract with his eyes open, and the Exhibit marked B (the plaint in the suit of 1883), shows that even as late as January 1883 he recognized the lease, and the permanent character of the defendant's holding.

Moreover, I am of opinion that it is beyond the scope of the present summary proceeding to hold an enquiry into the question of the alleged fraud.

Bhupendro having executed the lease as guardian of the minor Jotendro cannot now, in the same capacity, ask the Court with good grace to set aside the lease as far as the interests of the minor are concerned.

The minor may or may not recognize the defendant to be a permanent tenure-holder, and I should not, therefore say anything at present either for or against his right to set aside or modify the lease. Bhava Sundari, as executrix of the will of her husband, appears to have acted in contravention of its terms in granting the lease, which is therefore void as against Ganendro and Norendro, who were minors at the time. The lease is void for the following reasons: The fifth clause of the will required Bhava Sundari in agreement with Jogendro to execute mourasi leases of jungle lands after ascertaining the exact quantity of the lands to be leased; and by the second clause he was to take the advice of Radha Nath Bose and Shambhu Chunder Bose.

Jogendro was dead when the lease was granted, and his consent could not be taken. The power of the executrix to grant such a lease, therefore, ceased upon the death of Jogendro, vide Sugden's Powers, p. 252. The quantity of the lands was never ascertained, and the advice of Radha Nath and Shambhu was not taken. The lease being thus void ab initio, the acceptance of rent by Ganendro and Norendro does not set up a lease, but only creates a tenancy.

In the case of instruments which are void and not voidable, no question of ratification can arise.

So far the case of these two plaintiffs is favourable but the matter does not stop here.

The Exhibit marked B shows that these two plaintiffs after attaining majority, brought a suit against this very defendant and recognized the defendant's tenure as created by the lease granted by their brother; this may be regarded as tantamount to a fresh grant by the former in favour of the latter.

The petitioner, Ganendro, disavows all knowledge of the contents of the plaint referred to above, but I cannot attach much weight to the evidence of an interested witness like him.

Under all these circumstances I am of opinion that the defendant is a permanent tenure-holder, and that his rent is not liable to enhancement.

20. Against this order, which u/s 158 of the Bengal Tenancy Act, has the effect of, and is subject to, the like appeal as a decree, the petitioners have appealed to

this Court.

21. Their grounds of appeal are as follows:

1st.--That the lower appellate Court is wrong in holding that it is beyond the legitimate scope of a proceeding u/s 158 of the Bengal Tenancy Act to hold an enquiry as to the question of fraud, more particularly when evidence was gone into without any objection by either side.

2nd.--That the Court below ought to have found upon the evidence on the record that the execution of the lease by Bhupendro set up by the defendant was brought about by the fraud of the defendant in collusion with the servant of the former, and therefore it is not binding on him.

3rd.--That the lower Court is wrong in holding that the execution of the lease was a deliberate act on the part of Bhupendro, and that he entered into the contract with his eyes open, and recognized the lease and the permanent character thereof.

4th.--That the Court below is wrong in declining to decide the questions as to how far the lease set up by the defendant is binding on the minor Jotendro.

5th.--That the Court below has erred in holding that Bhupendro as guardian of the said minor having once executed the lease cannot now in the same capacity ask the Court to set aside the lease, so far as the interest of the minor is concerned.

6th.--That the Court below ought to have held that, under the circumstances, the lease, so far as the said minor is concerned, is not binding on him.

7th.--That the lower Court has erred in acting and resting its decision upon Exhibit B, and regarding it as tantamount to a fresh grant of a permanent character by the petitioners Ganendro and Norendro in favour of the opposite party.

8th.--That the lower Court, having held that no question of ratification can arise when the lease is ab initio void, ought not to have given any effect in the present proceedings to the so-called fresh grant or recognition, if there was any.

9th.--That the lower Court, upon the whole evidence adduced in the case, ought to have held that the defendant's tenure is not a permanent one, and it ought to have enhanced the rate of rent according to the evidence on record,

10th.--That the lower Court, having refrained from passing any opinion as to how far the minor is bound by the said lease, has erred in coming to the conclusion that "the defendant is a permanent tenure-holder, and his rent is not liable to enhancement.

22. The appeal was argued before us some time since by Mr. Evans on the part of the appellant and Baboo Nil Madhub Bose for the respondent, and at the conclusion of the argument we took time to consider our judgment.

23. The first point that arises for consideration is, whether in a proceeding u/s 158 of the Bengal Tenancy Act it is open to the petitioners to dispute the validity of the pottah.

24. The petitioners seek in this proceeding to obtain the same relief as they would have claimed in a regular suit to set aside the pottah.

25. We were at first inclined to think that the appellants were not at liberty in such a proceeding to have the question of the validity of the pottah put in issue and tried; but on consideration we are of opinion that it is open to them to have the question thus determined, and that the Court is bound to go into it and decide it.

26. If the appellants had altogether denied the respondent's tenancy, they must have brought an action of ejectment, but by acknowledging him as their tenant they seem to bring themselves within the provisions of the section, and are entitled thereunder to ask the Court to determine the nature of the tenancy : and in determining that question, the Court must look into the title which the respondent sets up and pronounce upon its validity.

27. The only point on which the enquiry under this section seems to differ from the trial of a regular suit under the CPC is the omission on the part of the Legislature to provide for the levy of the usual Court-fee stamp on the institution of suits, and this omission we must presume was foreseen and intended. In connection with this matter we were referred by Mr. Evans to the provisions of Chap. X of the Act, relating to "Records of Rights and Settlement of Rents."

28. By Sections 101 and 102, the Local Government is empowered to order a record of rights to be prepared for any local area by a revenue officer, and in the preparation of such record the revenue officer may ascertain and determine the same questions as are referred to in Section 158.

29. By Section 106, if any dispute arises as to the correctness of any entry in the record, the revenue officer is to hear and decide the dispute, and, in so doing, he is, by Section 107, to adopt the procedure laid down in the CPC for the trial of suits. Then Section 108 provides for an appeal from the decision of such revenue officer to a special Judge, to be appointed by the local Government, and for a second appeal to the High Court from the decision of such special Judge.

30. Now Section 158 is apparently intended to apply to isolated cases the provisions of the foregoing sections of the Act with regard to the record of rights in local areas, with this difference that a local enquiry need only be made when found to be necessary (when it is to be made by a revenue officer), the matter being in the first instance determined by a Civil Court (instead of a revenue officer), and the appeal to this Court being in the nature of a first, and not a second, appeal.

31. Under these circumstances we are of opinion that it was open to the lower Court, and that it is open to us, to determine the question of the validity of the

lease under which the respondent claims to hold.

32. We proceed, therefore, to dispose of the appeal upon the merits.

33. And first as regards the appellant Bhupendro. It is admitted that Bhupendro was of full age when he executed the pottah of 11th Kartick 1282; but he now seeks to avoid it on the ground of misrepresentation and fraud.

34. Although the lower Court expressed an opinion that it was beyond the scope of the present summary proceeding to hold an enquiry into the question of the alleged fraud, it did in point of fact enquire into it, and found that fraud was not established.

35. We have gone through the evidence, and are of opinion that this finding is correct. The appellant's case is, that whereas he granted this pottah in respect of land, which he believed to be wholly covered with jungle, a considerable portion of the land had in fact been cleared and brought under cultivation by Uzir Nuskur, the former tenant; and that the respondent in collusion with his, Bhupendro's, servants falsely represented that the whole land was covered with jungle. We are of opinion that this case is not borne out by the evidence. There is not a suggestion to the above effect in the petition in this case; and the criminal proceedings and previous suit above referred to seem to us to point to a deliberate attempt to oust the respondent from the land after a large portion had been cleared, and brought under cultivation, and when neighbouring Sunderbun lots were being leased at higher rates of rent than the respondent was paying. As regards Bhupendro, therefore, we have no hesitation in holding that he is bound by the lease.

36. Then as regards appellants Nos. 2 and 3, Ganendro and Norendro, we are of opinion that they also are bound by the terms of the pottah. We agree with the Subordinate Judge that the power given by the will to grant a jungle-abadi lease was a joint power vested in Bhava Sundari and Jogendro--a power that could not be exercised by one after the death of the other.

37. We are not disposed, however, to agree with the Subordinate Judge in holding that the lease was necessarily void, because the advice of Radha Nath and Shambhu Chunder was not sought.

38. We are, however, of opinion that Ganendro and Norendro cannot now be heard to say that the lease was not validly granted. In the suit of 1883, after they had attained majority, they treated it as a valid and subsisting lease; they have accepted the benefit of the compromise made by the respondent, and have continued to receive rent from him, both for the lands granted by the pottah and for the excess lands.

39. Whether their conduct be considered as amounting to a ratification of the lease or to a grant of a new lease upon the same terms as those contained in the original pottah, or to an estoppel, the result is the same.

40. Lastly, we have to consider the case of the minor Jotendro.

41. The pottah was executed on his behalf by Bhupendro, his certificated guardian; but it is admitted that he executed it without having previously obtained the sanction of the Judge, as required by Section 18 of Act XL of 1858 and the terms of the certificate. The Subordinate Judge is of opinion that "Bhupendro, having executed the lease as guardian of the minor Jotendro, cannot now in the same capacity ask the Court with good grace to set it aside."

42. We fail to see what "good grace" has to do with the case. Either the lease is binding on Jotendro or it is not.

43. It has been held by this Court in Shurrut Chunder alias Bhola Nath Chattopadhyaya v. Rajkissen Mookerjee 15 B.L.R. 350 that a sale of a minor's immoveable property by a guardian appointed under Act XL of 1858, who was also karta of the joint family of which the minor was a member, is invalid if made without the sanction required by Section 18 of the Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor.

44. And in Buohraj Ram v. Ram Kissen Singh 11 C.L.R. 345 this Court held that a mortgage without the sanction of the Judge by a guardian of minor appointed under Act XL of 1858 is absolutely void; and the same view was taken by the Allahabad High Court in Mauji Ram v. Tara Singh 3 A. 852. We think the same rule must hold good in the case of a lease for a term exceeding five years by a certificated guardian without the sanction of the District Judge.

45. As far as the infant is concerned, the respondent can obtain no benefit from the proceedings in the suit of 1883. If the minor himself could not ratify the lease, it is clear that Bhupendro, whether as certificated guardian, or as next friend, could not do so on his behalf. If the proceedings in the suit of 1883 operated, as far as Ganendro and Norendro are concerned, as a grant of a new lease upon the same terms as those contained in the original pottah, they cannot so operate as regards Jotendro, for there is the same absence of sanction to those proceedings, and to the compromise, as there is to the original lease. Again, if these proceedings operate by way of estoppel as regards Ganendro and Norendro, they do not do so as regards Jotendro.

46. Therefore, in whatever light we look at this case, we are of opinion that the lease is not binding on Jotendro.

47. If this view be correct the respondent's position as regards Jotendro's four annas share in the land appears to be that of a non-permanent tenure-holder, whose rent is liable to enhancement.

48. The result, therefore, of our view of the whole case is that the decree of the Sub-Judge must be affirmed as far as regards twelve annas share of the lands held by the respondent, and reversed as regards four annas.

49. We determine--

(a) That the situation, quantity and boundaries of the land are as follows:

That it is situate in Pergunnah Moida, Sub-registration and Station Baripore, in Talook No. 1346 of the Towzee of the Collector of 24-Pergun-nahs, being Sunderbun Lot No. 44.

That the quantity of land is more or less 1,735 bighas, and that the boundaries are-

(1) South--North of the northern boundary embankment of the chuck belonging to Nogendro Nath Dutt.

(2) North--By measurement twenty-two russees north from the southern boundary.

(3) West--East of khal called Kaora Sote, and eastern side of Bhodury's khal.

(4) East--East of Jolkhola Road.

(b) That the name and description of the tenant thereof are as follows:

Nemye Cand Mondal, son of late Huro Mohun Mondul, landholder of Bhowanipore, pergunnah Magura, station Debipore, in the Diamond Harbour sub-division.

(c) That the said tenant is, as regards twelve annas share of the said lands, i.e., as regards Bhupendro's, four annas share, Ganendro's four annas, and Norendro's four annas share, a permanent tenure-holder whose rent is not liable to enhancement.

That the said tenant is, as regards a four annas share of the said lands, i.e., as regards Jotendro's four annas share, a non-permanent tenure-holder whose rent is liable to enhancement.

(d) That the rent payable by the said tenant in respect of the said twelve annas share at the time of the application was Rs. 935-3-17 1/2 gundas.

50. That the rent payable by the said tenant in respect of the said four annas share at the time of the application was Rs. 311-11-19 1/6 gundas.

51. Having regard to all the circumstances of the case, we think the respondent is entitled to his costs in all Courts.