
(1937) 06 CAL CK 0018
In the Calcutta High Court

Bibhuti Bhusan Pal Chaudhury and Others	APPELLANT
Vs	
Sm. Maya Deby and Another	RESPONDENT

Date of Decision : 10-06-1937

Acts Referred:

Bengal Patni Taluks Regulation, 1819 — Section 13(4)
Bengal Tenancy Act, 1885 — Section 88

Citation : AIR 1938 Cal 172

Hon'ble Judges : R.C. Mitter, J;Guha, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—This appeal, which is on behalf of the defendants, arises out of a suit for rent. The claim in the suit is for arrears of rent and cesses for the year 1336 and up to the Kartick Kist of 1337. It has been valued at Rs. 6948-13-9 in the plaint. The rate of rent according to the plaintiff was Rs. 2700 and cesses Rs. 450-11.0 per year. There are five defendants; defendants 1 and 2 may for brevity's sake be called the Pal Chaudhury defendants and Nos. 3 to 5 the Ray defendants. The plaintiff claims as the trustee of her husband and Debnandan Mukherjee. The trust deed was challenged in the lower Court, but the finding of that Court is that it is a valid instrument. This finding has not been challenged before us. The learned Subordinate Judge passed a decree for Rs. 4143-10-9. He held that the plaintiff was entitled to claim rent at the rate of Rs. 2609-8-6 and cesses at the rate of Rs. 151-13-0 per year. He further held that half of the rent and cesses due for the year 1336 had been satisfied by the Pal Chaudhury defendants before suit. Both sets of defendants have joined in this appeal, but the plaintiff has not filed any cross-objection. Debnandan Mukherjee was the patnidar and the defendants hold a darpatni taluk under him. This darpatni taluk was created by a registered potta on 2nd April 1868 (Ex. E-II-I), the demised premises being Mouza Hanspukuria included in a permanently settled estate (Touzi No. 431) and Char Hanspukuria included in a temporarily settled estate (No 988). Under the patni taluk owned by Debnandan Mukherjee and which is now vested in the plaintiff as trustee there was another darpatni taluk held by

the Midnapore Zamindary Co. Ltd. The plaintiff avers in the plaint that Debnandan Mukherjee failed to pay the patni rent due to the zamindar with the result that his patni taluk was advertised for sale under Regn. 8 of 1819, but the sale which was to have taken place on 1st Agrahayan 1337 was averted by the Midnapore Zamindary Co. Ltd. depositing the zamindar's dues, and the said Company thereafter took possession of the patni taluk under the provisions of Section 13 (4) of Regn. 8 of 1819, and

since then the said darpatnidar Company remained in possession as representative of the plaintiff by realizing rents by virtue of the plaintiff's right and kept the plaintiff's possession intact.

2. The plaintiff claimed rent for 1336 and up to Kartick 1337 on the footing that thereafter the Midnapore Zamindary Company went into possession as "girbidar" (para. 1 of the plaint). Two sets of written statement were filed, one by the Pal Chaudhury defendants, and the other by the Bay defendants. The specific pleas as taken by the Ray defendants in their written statement are: (a) that the trust deed executed by Debnandan Mukherjee was a fictitious, collusive and benami document, and also not executed and signed according to law; (b) that the plaintiff cannot recover as her name has not been registered in the zamindar's sheristha; (c) that the darpatni taluk can only be made liable; (d) that plaintiff's claim was barred by limitation; (e) no arrears due for the years in suit; (f) plaintiff cannot claim for the month of Kartick of 1337; (g) that Char Hanspukuria had been made khas by Government, and was not in possession either of the plaintiff or of the defendants, and the defendants are not liable for rent at the rate of Rs. 2700 but entitled to abatement. Debnandan agreed to grant an abatement at the rate of Rs. 225 per year. In any case there should be apportionment of rent of both mouzahs, e. g. Hanspukuria and Char Hanspukuria; (h) 300 bighas of land had gone under water, hence there should be further abatement of rent. There are general pleas that the plaintiff's suit is not maintainable and she is not entitled to claim rent. The Pal Chaudhury defendants in their written statement challenged the trust deed, pleaded that Debnandan agreed to allow abatement of rent at the rate of Rs. 225 per year on account of Char Hanspukuria. They further pleaded that Debnandan had split up the darpatni taluk into two tenures, one to be held by the Bay defendants and the other by the Pal Chaudhury defendants and that they, the Pal Chaudhury defendants, had paid up their dues for the year 1336. This written statement also contains vague pleas to the effect that the plaintiff's suit is not maintainable.

3. Mr. Chakraborty appearing for both sets of defendants raises four points before us : (1) that the plaintiff is not entitled to claim at all, the right to sue being in the Midnapore Zamindary Co. Ltd.; (2) that at any rate the Subordinate Judge ought to have deducted not Rs. 96-7-6 from the yearly jama but the sum of Rs. 225; (3) that the darpatni had been split up into two before the period in claim; and (4) the form of the decree is bad. The Pal Chaudhury defendants ought not to have been made liable for what remained due for the year 1336,

The second and third points have been dealt with by the learned Subordinate Judge, but there is no indication in his judgment of the questions raised and involved in points Nos. 1 and 4.

4. In support of point No. 1, Mr. Chakraborty, says that the plaintiff has admitted in para. 1 of her plaint that the darpatnidar, the Midnapore Zamindary Co. Ltd. had paid up the Astam dues and had taken possession on 1st Agrahayan 1337. Under the provision of Section 13 (4) of the Patni Regulation, the said Company is in the position of a mortgagee in possession and entitled to repay itself from the profits of the patni taluk. The profits include as well arrears of rent due from the darpatnidars, the defendants, for a period anterior to the taking of possession by the said Company. This he says follows from the language of Section 13 (4) of the Patni Regulation and has also been decided by a Division Bench of this Court in Abdul Aziz v. Behari Lall (1918) 5 AIR Cal 466. He further says that this defence was pleaded in para. 8 of the written state-ment of the Boys and that the Subordinate Judge was wrong in not considering it. The first thing that has to be considered by us is whether such a defence was in fact raised in the written statements. We have set out before the relevant passage in para. 1 of the plaint. Para. 8 of the written statement of the Boy runs as follows:

The claim of the plaintiff in the plaint is not given in detail and is indefinite. On examination of the accounts in the plaint it cannot be understood at all up to what date of 1337 the plaintiff has made her claim according to the statements in para. 1 of the plaint of the plaintiff. The rent from Kartick Kist of 1337 B.S. cannot be due to the plaintiff. The plaintiff is not entitled to get the rent of the period before 1st Agrahayan 1337 B.S. as she has mentioned to be due to her in para. 1 of the plaint.

5. The underlined (italicised) part of passage indicates that the right of the plaintiff to claim rent up to Assin of 1337 was not disputed, but the dispute was only in respect of the month of Kartick 1337. The arrears for which Astam sale was advertised was for the first six months of 1337 in arrears, from Bysack to Assin 1337 B.S. and these defendants only wanted to mention in the aforesaid part of the written statement, as Mr. Chakraborty in the course of his argument admitted, that on the analogy of the rights of a purchaser at a revenue sale the Midnapore Zamindary Co. Ltd. had the right to realize rent due to the patnidar from 1st Kartick 1337, the day of making default by the patnidar, for which Astam proceedings were taken although the said Company took possession a month later, i.e. 1st Agrahayan 1337. The last line of para. 8 of the written statement which is only a general statement accordingly was not intended to raise specifically by way of defence the point which Mr. Chakraborty now wants to raise before us. This passage is explainable on the basis of the preceding paragraphs of the written statement, they being that the trust deed was fictitious and that the plaintiff not having registered her name in the zamindar's sherista was not entitled to sue. No issue was raised to the effect that the right to claim the arrears in question was in the Midnapore Zamindary Co. The first issue was

no doubt as to whether the suit was maintainable at the instance of the plaintiff and under that issue the question as to whether the trust deed was valid or not and whether the plaintiff required her name to be registered in the zamindar's sheriatā for the maintenance of the suit was discussed and decided by the learned Subordinate Judge. On the materials we have before us we hold that the matter now sought to be canvassed before us was never placed before the Subordinate Judge at the hearing and is a new point altogether raised here for the first time.

6. The next thing for us to consider is whether we should allow the point to be raised before us for the first time. Mr. Chakraborty says that it being a pure question of law ought to be allowed to be raised here. It may be that a girbidar has the right to receive or recover arrears of rent due to the patnidar at the time when he takes possession, that is to say that his right extends to the unrealized arrears for a period before his possession. But there is nothing to prevent him from making arrangements in respect thereto with defaulting patnidar. We do not think that it would be just to rob the plaintiff of the case which she could or would have made to meet this point if it had been raised by the defendants in the lower Court. The materials in the record indicate that the Midnapore Zamindary Co. instituted a suit for arrears of rent for the darpatni taluk of the defendants (Rent suit No. 38 of 1933): see I-27 and Order No. 39, p. 10. We were invited by the plaintiff respondents to receive as additional evidence the judgment of that suit, but we have not acceded to that request as in our judgment we can dispose of the first point raised by Mr. Chakraborty on other grounds.

7. From the materials on the record we can safely infer that neither the Midnapore Zamindary had laid any claim against the defendants for the period now in suit nor the defendants had made any payments to the former for the same. If that had been the case the defendants would have said so either in the written statements or in their evidence seeing that the rent suit instituted by the plaintiff (Rent Suit No. 26 of 1933) and the rent suit instituted by the Midnapore Zamindary Co. (Rent Suit No. 38 of 1933) had been instituted at about the same time and had been pending; in the same Court. We cannot accordingly allow Mr. Chakraborty to raise the said point for the first time here.

8. Regarding the second point raised by Mr. Chakraborty the relevant facts are these : In the year 1929 Debnandan instituted a rent suit against the defendants for arrears of rent of the darpatni taluk (R.S. No. 3 of 1929) and recovered a decree on 31st August 1929. He put this decree into execution in Rent Execution Case No. 1 of 1929. In that execution case Debnandan filed an application on 19th November 1929. The said application (Ex. G II-8) recites that the defendants were about to file an appeal against the rent decree and as the result thereof, if filed, would be uncertain, "the matter is settled" according to the terms recited in the petition. In para. 1 it was recited that the decretal amount was Rs. 11,983-15-7 for rent and Rs. 1265-15-6 for costs-total Rs. 13,249-15.1,

that the judgment-debtors would on that day pay Rs. 4000, that the defendants would get deduction at the rate 225 per year from the darpatni jama, being the revenue then payable for Char Hanspukuria, and in future the deductions would amount to the revenue that may be assessed on the same. Para. 2 recites that the defendants had agreed to these terms and would desist from filing an appeal against the present decree. In para. 2 the manner of adjustment of the decree under execution is recited and the prayer made is to record the same in the register and execution be dismissed. On the petition is a note that it was disposed of by Order No. 8 dated 19th November 1929. That order has not been produced. This petition of compromise was not registered. In the darpatni potta (Ex. E) the parties contemplated the resettlement of Char Hanspukuria by the Government, which at the rate of the darpatni potta had been settled with the patnidar at a revenue of Rs. 96-7-6. The material terms are at p. 4, part 2 of the paper book. They are that after the current settlement with Government shall have expired, the darpatnidars would be entitled to take new settlement from the Government, and in that case the sum of Rs. 96-7-6 only would be the deduction from the darpatni rent fixed at Rs. 2700 per year and "the darpatni rent as fixed would not be allowed to be reduced or increased for any other reason except for any of the terms mentioned in the document". The finding of the learned Subordinate Judge is that the defendants have themselves taken settlement of the said Char from the Government. On the materials on the record, we cannot say that this finding is wrong. The learned Subordinate Judge held that Ex. G had in fact been filed by Debnandan, but as it was unregistered it could not vary the aforesaid terms of the darpatni potta which was a registered instrument. He accordingly gave an abatement of Rs. 96-7-6 only.

9. Mr. Chakraborty contends that his clients are entitled to get an abatement of Rs. 225 per year on the basis of Ex. G. He admits that the view of the law that the terms of a registered lease cannot be varied by an unregistered document is correct. This he has to admit in view of Section 107, Transfer of Property Act, and of the decision based thereon of the Pull Bench in *Lalit Mohan Ghose v. Gopali Chak Coal Co. Ltd.* (1912) 39 Cal 284 and of the observation of the Judicial Committee in *Durga Prosad Singh v. Rajendra Narain Bagchi* (1913) 41 Cal 493 . A darpatni lease is not a lease for agricultural purposes within the meaning of Section 117, Transfer of Property Act, and would accordingly be governed by Section 107 of the said Act.

10. Mr. Chakraborty wants to get round this difficulty by urging: (a) that here there is no variation of the darpatni potta in respect of rent. He says that the rent as mentioned therein is not reduced by Ex. G but only the abatement to be given for the Char Hanspukuria that had gone out of the pleader's hands is settled by agreement; (b) that in any event Ex. G being embodied in an order of Court want of registration does not affect his client's claim; (c) that as his clients did not file any appeal against the decree passed in Rent Suit No. 3 of 1929, the plaintiff, being the successor in interest of Debnandan is estopped from claiming anything more than Rs. 2475 per year, i.e. Rs. 2700 less 225. We cannot give

effect to any of these contentions.

11. Exhibit G varies the covenant of the darpatni potta which we have recited above. That is a very material covenant and its variation in the way suggested materially varies the amount of the landlord's claim for rent. In our judgment the case comes within the Full Bench case mentioned above. Regarding the second contention, we do not know what the order of Court indicated on Ex. G was. An order was no doubt passed by the execution Court but that order has not been produced. It may be that that order was in accordance with the prayer made in para. 3 of Ex. G, i.e. an order recording the adjustment of the decree and dismissing the execution. The execution Court had no power to record the compromise relating to the abatement of rent. Even if the order of the Court recorded the whole of the compromise as set out in Ex. G, that would not obviate the necessity of registration so far as the variation of the material covenant about rent of the darpatni potta is concerned. Section 17, Sub-section (2)r (vi), Registration Act, does not exempt from registration documents coming within Section 17 (1) (d) : Sarat Chandra Das alias Sachidananda Das Vs. Sm. Sarajini Rudraja, .

12. The question of estoppel was not raised in the lower Court and there are besides two difficulties in the way of Mr. Chakraborty. Firstly that doctrine cannot be invoked against statutory provisions, and secondly the doctrine has its foundation on representation of facts being made. A mere representation of an intention cannot be the basis of estoppel. A promise made is not a representation of a fact. This has been made clear by the House of Lords in Jordon v. Money (1854) 5 HLC 185 : see also observations of Lord Macnaghten in White Church Ltd. v. Cavanagh (1902) A C 117. Regarding the point about the splitting up of the darpatni, the foundation of the arguments of the appellants is on Ex. E and Ex. G (1). Ex. F is a receipt granted by Debnandan to the Pal Chaudhury defendants dated 12th January 1930 and Ex. G (1) is a petition filed by him in the execution Court for recording satisfaction in favour of the Pal Chaudhurys. These documents recited the split-ting up but to none of them are the Roys parties. In the written statement of the Roys also they do not say that there was any splitting up. The position therefore is that all the tenants did not consent to the splitting up. In view of Section 88, Ben-gal Tenancy Act, as amended now, which is applicable to this case, we hold in agree, ment with the Subordinate Judge that the darpatni taluk has not been validly split up into two tenures for the aforesaid reason.

13. Regarding the last point we hold that there is no substance in it. This question materially depends upon the question of splitting up. If the darpatni was not split up into two, as is our finding, the liability for rent continued to be joint and several. The payment of half the rent by the Pal Chaudhurya for the year 1336 as evidenced by Ex. F does not absolve them from liability for the unpaid balance of 1336. The last line of Ex. F which has not been correctly translated does not in our opinion discharge them of this liability. The result is that this

appeal is dismissed with costs. Hearing fee 5 gold mohurs.

Guha, J.

14. I agree.