

**(1925) 05 CAL CK 0066**  
**In the Calcutta High Court**

Bibi Jabeda Khatun and Another

APPELLANT

Vs

Syed Mahommad Mozaffar Ali Musani and Others

RESPONDENT

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**Date of Decision :** 13-05-1925

**Acts Referred:**

Limitation Act, 1963 — Article 134, 10

**Citation :** 90 Ind. Cas. 781

**Hon'ble Judges :** Mukerji, J;Ewart Greaves, J

**Bench :** Division Bench

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**Judgement**

Ewart Greaves, J.—This is an appeal by defendants Nos. 1-4 against a decision of the Officiating Subordinate Judge of Dinajpur.

2. The suit out of which this appeal arises was originally instituted by the Receiver of a wakf estate for a declaration that the father of the defendants had no right to enjoy the property in suit which consisted of 1440 bighas of nishkar land, at a permanent and invariable rent, for a declaration that neither Syed Sadaruddin-Al-Musari or any other mutwalli of the wakf estate had any right to permanently settle the land in suit and that if Syed Sadaruddin had so settled it, the plaintiff is not bound by the settlement and asked that it should be set aside, that the defendants might be ejected and the plaintiff given khas possession and a decree for mesne profits. There was an alternative prayer for enhancement of rent if a decree for ejectment was not passed.

3. The plaintiff became mutwalli of the wakf subsequent to the institution of the suit in the year 1325 and he was substituted as plaintiff in place of the Receiver.

4. The plaintiff states in his plaint that according to his information long after the Permanent Settlement during the time of Syed Sadaruddin-Al-Musari, the father of Syed Abdulla-Al-Musari, the last mutwalli, a non-permanent, non-heritable tenure was created without consideration and for a fixed term of the land in suit and that one Gafuruddin mukhtear, father of the defendants, purchased at a rent execution sale in the year 1902 a jote (being the lands in suit) at a jama of Rs.

387-11 annas 14 1/2 gandas which was described in the sale certificate as istimrari.

5. The defendant in his written statement claims that the jote is a transferable and heritable permanent tenure with the rent fixed in perpetuity and that the jama has never been altered and that this had been admitted unconditionally by the mutwallis who had treated the jote as a transferable and heritable istimrari jote with the rent fixed in perpetuity. They further claimed to have been in possession for more than 12 years as bona fide transferees for value and that the suit was barred by Articles 134, 142 and 144 of the Limitation Act and by estoppel arising from the conduct of the plaintiff and his predecessors. They further claim that Gafuruddin Ahmed made a wakf of the property by executing a tauliatnama of which defendant No. 2 is mutwalli and that the suit is not maintainable against him as he is not sued as mutwalli of the wakf.

6. By a sanad of the Emperor Shah Alam dated the 9th April 1772 the tauliat of the shrine of Onsub-ul-Aquetali together with wakf mehals appertaining thereto, which included the lands in suit, was granted to Syed Suduruddin and it was thereby provided that the mutwalli was not competent to grant istimrari or mokarrari or to lease at a low jama anything appertaining to the Pargana. Similar sanad, which, however, did not include this last provision, were granted to Syed Suduruddin by the Nawab Nazim of Murshidabad on the 1st September 1772 and by the East India Company on the 14th September 1773. The learned Judge in the Court below declared the plaintiff's title to the land in dispute and passed a decree for khas possession and for mesne profits for the three years 1325 to 1327. He states in his judgment that it was admitted that the tenure formed part of the endowment of the wakf and he finds that the endowment was founded in the 14th or 15th century. He further finds that the tenure was held at an unvaried rent for more than 100 years and that it was allowed to descend from father to son and that it was treated by most of the mutwallis as istimrari mokarrari. He finds that there was nothing to show that the tenure was created with the leave of the Court of the kazi and he holds that a mutwalli cannot permanently transfer a property by way of lease. The following points were urged before us on behalf of the appellants. (1) That they or their predecessors have acquired a title by adverse possession having been in possession of the tenure at any rate since 1860 or thereabouts and it is urged that the claims of any mutwalli were barred under the Limitation Act of 1859, which is said to govern the case, Section 10 and Article 134 of the present Limitation Act having no application.

(2) That the present plaintiff is estopped by the representations of his predecessors made in sale proclamations when the tenure was sold for arrears of rent that the tenure was istimrari mokarrari.

(3) That the onus is on the plaintiff to show that the tenure was created after the sanad of the 9th April 1772 and that as the plaintiff has not discharged, this onus, there is nothing to show that it was not created prior to 1772.

(4) That from the recognition by previous mutwallis of the tenure as istimrari mokarrari during a long period of years the Court should assume a legal origin and that it was created with the leave of the kazi.

(5) That as a wakf has been made of the tenure the mutwalli of this wakf should have been sued and that in his absence no valid decree could be passed.

(6) That under the provisions of Section 10 of the Bengal Tenancy Act a tenure-holder can only be ejected on breach of a condition.

7. Before dealing with these contentions it will be convenient to state what evidence there is on the record as to the existence of the tenure and who were the mutiwallis of the wakf from the date of the sanad. As already stated the first mutwalli was Syaruddin to whom the sanad was given in 1772. There is no evidence one way or other as to whether the tenure was in existence prior to the grant of the sanad and there is no evidence either as to the dealing of Syaruddin with the wakf estate. Syaruddin was succeeded by Syed Gafuruddin but there is no evidence as to the date of his succession or as to his dealings with the wakf estate.

8. He was succeeded by Karimuddin but the date of his succession does not appear. It is clear, however, that the tenure was in existence during, at any rate, a portion of the time that he was mutwalli but whether he created it is not established by the evidence, it is clear, however, that it must have existed in the year 1843 for in the year 1850 (see Ex. L) Karimuddin sued as mutwalli for the rent of an istimrari jote which is the land in dispute for the years 1843 to Bhadra 1257 (1850) at the rate of Rs. 387-11 odd per annum (the equivalent of Rs. 363-8 sicca rupees). In those proceedings the defendants relied amongst other documents on two acquittances of the years 1806 and 1807 which are referred to in the decree Ex. D, these documents are not before us but the appellants rely on them as showing that the istimrari jote existed at any rate from the year 1806. In another decree passed in the year 1859 (Ex. G) in favour of the same mutwalli the land is described as the ancestral istimrari jotes of the defendants the annual rental being Rs. 363-8 sicca rupees and in the sale certificate (Ex. 8) in execution of Ex. G, the land is described as istimrari.

9. The successors of Syed Karimuddin were Sadaruddin, Serajuddin and Safiruddin who continued as mutwallis to 1904 or 1905. Their successors were Syed Abdul Waris and Syed Abdulla who were succeeded by the present mutwalli.

10. This much, therefore, is clear that the tenure has existed since 1843, that so far as can be ascertained the rent has remained unchanged during three mutwalliships and for a period of nearly 70 years. It will now be convenient to deal with the points raised by the appellants.

11. With regard to the first point I do not think that any question of limitation or adverse possession can arise. These contentions are I think clearly untenable in view of the decision of the Judicial Committee in Vidya Varuthi Thirtha Swamigal

v. Balusami Ayyar 65 Ind. Cas. 161 : 48 I.A. 302 : (1921) M.W.N. 449 : 41 M.L.J. 346 : 44 M. 831 : 3 U.P.L.R. (P.C.) 62 : 15 L.W. 78 : 30 M.L.T. 66 : 3 P.L.T. 245 : 26 C.W.N. 537 : 24 Bom. L.R. 629 : 20 A.L.J. 497 : A.I.R (1922) . (P.C.) 123 (P.C.). That case deals with a Hindu math but the Board state that the principles there laid down apply equally to Muhammadan endowments and it is clear from that case that unless authorised by the kazi no mutwalli could create a leasehold interest to endure beyond his life, that the lessees acquired no title by adverse possession against the succeeding mutwalli and that if the succeeding mutwalli recognized the interest, the consent is only referable to a new tenancy created by him and that there is no adverse possession until his death or until a new mutwalli takes his place.

12. With regard to the second point the appellants contend that there is estoppel, as at the Court sales the mutwalli represented the deity, but I do not think that it was in the scope of the mutwalli's agency to make a representation of this nature if the lease \* was in the fact granted without the authority of kazi and consequently I think no question of estoppel arises.

13. The third point raises questions of some difficulty. The respondents contend that when as here the position of landlord and tenant exists, the onus of proving the existence of a tenure is on those who set it up and that this is always so, the only exceptions being in the case of raiyats or takhrajders.

14. What the respondents in effect say is this, by admitting you are a tenant, you admit that these lands are part of the permanently settled estate and as such liable to rent, which you acknowledge you are liable to pay, and that it is, therefore, for you, the tenant, to show that you hold a lease of these lands which entitles you to hold them in perpetuity at a fixed rent.

15. The appellants, on the other hand, rely on the cases of Hurryhur Mookhopadhya v. Madub Chunder 14 M I.A. 152 : 20 W.R. 459 : 8 B.L.R. 566 : 2 Suth. P.C.J. 484 : 2 Sar. P.C.J. 713 : 20 E.R. 743 and Bipradas Pal Chowdhury v. Kamini Kumar Lahiri 66 Ind. Cas. 674 : 48 I.A. 499 : 41 M.L.J. 638 : 15 L.W. 180 : 30 M.L.T. 138 : 26 C.W.N. 465 : 49 C. 27 : AIR (1922) (P.C.) 48 : 4 U.P.L.R. (P.C.) 53 (P.C.), the principles laid down in which, they say, are not to be confined to cases of lakheraj land and they cited authority to show that a lakherajdar was a lease-holder, Gokhul Sahu v. Jodu Nundun Roy 17 C. 721 : 8 Ind. Dec. 1023, and reliance was also placed on Section 3(3) of the Bengal Tenancy Act. It was further contended that the existence of a tenancy was admitted in the plaint and that it was for the respondents who sought to eject the appellants to show that it had determined. I am inclined to agree with the respondent's contention as to the onus, but I do not think that this disposes of the suit or that it is possible to ignore the fact that the tenure has existence since at any rate 1843 at a uniform rate of rent and that it has not been questioned by three generations of mutwalli.

16. I now come to the fourth contention raised by the appellants. In this

connection we were pressed with the decision in Chockalingam Pillai v. Rayandi Chettiar 19 M. 485 : 6 M.L.J. 247 : 6 Ind. Dec. (N.S.) 1043. In that case the manager of a Hindu temple had granted a permanent lease in 1813 which was continued by a fresh grant in 1832, the lessees being described as persons with an hereditary right to cultivate. There was no evidence to prove the purpose of the lease but it had existed unchallenged from 1832 down to 1893 when the suit was brought.

17. The Court in that case presumed a lawful origin having regard to the long period during which the lease existed.

18. The respondents contend that "assuming this can be done in the case of a Hindu temple, having regard to the rights of the managers to grant permanent leases in cases of necessity, no such assumption can be made in favour of grantees from a mutwalli who can only make such a grant with the leave of the kazi. I do not think, however, that such a presumption is impossible in the case of a Muhammadan endowment and I think that the Court under the circumstances of the present case should make the assumption that the grant was in its origin lawful having regard to the fact that the lease has existed unchallenged since at any rate 1843, that the grant has remained unchanged, that applications for enhancement have been made and failed and that no mutwalli has challenged it for a period of over 70 years. The respondent contends that istimrari mokarrari does not necessarily mean permanent and heritable but that it means permanent during the life of the grantee and that in the years 1859 and 1860, it was used in the sense of a grant for life and we were referred to the case of Narsingh Dayal Sahu v. Ram Narain Singh 30 C. 883 and Ram Narain Singh v. Chota Nagpur Banking Association 36 Ind. Cas. 321 : 43 C. 332. These cases lay down that the meaning of the term is not necessarily permanent and heritable but that the nature of the grant is to be determined from the circumstances and I think we should from the circumstances here infer that the grant was permanent and heritable.

19. I do not think that the fifth contention raises any difficulty and if necessary the title and plaint could have been amended. As to the sixth point, in my opinion, Section 10 of the Bengal Tenancy Act has no application as the argument based on it assumes that the tenure is permanent, if it was not validly created, in my opinion, it is not permanent. It follows from what has been stated before that the rent is not enhanceable.

20. In the result, the appeal succeeds and the suit will stand dismissed except as to the prayer for declaration of title and the claim for rent for the years 1324 to 1327.

21. The defendants contend that the rent for the year 1324 has in fact been paid. There is no decision on this point and accordingly the matter will go back to the lower Court in order that this question may be decided.

22. As to the rents for the years 1325 to 1327 they have admittedly not been

paid and there will accordingly be a decree in favour of the plaintiff for rent for these years. But a question arises as to whether the rents for these years were tendered or not and whether, therefore, the interest is payable. This question again has not been decided and this matter must also go back for the decision of the lower Court. The Judge in the Court below will finally dispose of these questions as to rent.

23. The appellants will be entitled to their costs both of this Court and of the Court below.

24. The costs of the remand will be decided by the Court below.

Mukerji, J.

25. I agree.