

(1916) 05 CAL CK 0006
In the Calcutta High Court

Bidhumukhi Chowdhurani

APPELLANT

Vs

Asmatulla and Others

RESPONDENT

Date of Decision : 16-05-1916

Acts Referred:

Citation : AIR 1914 Cal 893 : 36 Ind. Cas. 669

Hon'ble Judges : Lancelot Sanderson, C.J.; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—In my judgment this case raises a point of some interest.

2. It appears that on the 30th of April 1900, the zemindar Maharajah, who was the putnidar, got a decree for durpatni rent, and the result of that was that on the 25th of January 1907, the plaintiff at the execution sale which was held under the decree, purchased the durpatni interest, and thereupon the plaintiff gave a notice u/s 167 of the Bengal Tenancy Act to Bhairab, with reference to the se-patni interest which was in him at that time. That se-patni estate had been created by Juggomohan in the year 1886.

3. Now, the suit was brought in this case by the plaintiff against the defendants, the occupancy-holders, for rent. They set up the defence that the plaintiff was not entitled to sue for rent, the first ground for that defence being that the se-patni interest which was in Bhairab had not in fact been put an end to, and the "reason why they said it was not put an end to, was that it was a protected interest" within the meaning of Section 160, Clause (g) of the Bengal Tenancy Act, which runs as follows; any right or interest which the landlord, at whose instance the tenure or holding is sold, or his predecessor-in-title, has expressly and in writing given the tenant for the time being permission to create: "the landlord in question in this case being Lachmiput or his successor-in-title, namely, the zemindar Maharajah, the putnidar, to whom have already made reference.

4. Now, the deed upon which this question depends, made between Lachmiput and one Manulla Shah is set out at page 11 of the paper-book, and in that deed, the landlord, using the word as used in the section, granted a lease to Manulla, and after describing the land and the boundaries proceeded as follows: I give you right to alienate the same at pleasure by gift and sale, and to grant se-patni, etc., settlements of your own interest."

5. The first question raised in this appeal is whether those words used in that document bring this case within Clause (g) of Section 160 of the Bengal Tenancy Act: or, in other words, has the landlord, by the words which I have quoted, expressly and in writing given the tenant for the time being permission to create the particular interest, viz., the se-patni. In my judgment the landlord has done so. The words used are first of all general; and, they give the tenant a right to alienate the same at pleasure by gift and sale, and then they go on to specify this particular kind of interest, "to grant se-putni, etc., settlements of their own interest." In my judgment this case is not governed by either of the two cases which have been cited to us, namely, Afazuddi Khan v. Prasanna Gain 14 Ind. Cas. 991 : 39 C. 139 and Kristo Das Laha v. Jatindra Nath Basu 14 Ind. Can. 145 : 16 C.W.N. 681. The former of the two cases, namely Afazuddi Khan v. Prasanna Gain 14 Ind. Cas. 991 : 39 C. 139 in which the judgment was given by the late Chief Justice and Mr. Justice Digamber Chatterjee, to my mind, is of some assistance to us in coming to a conclusion in this case, because in that case the words were far more general than they are in the case now before us; the particular interest which was there created was not specified, whereas in this case the specific interest which was created by the tenant, namely, the se-patni was mentioned in the deed, and express authority in writing was given by the landlord to create such interest. It was argued that, in order to come within Clause (g) of Section 160, it was necessary for the landlord to specify the particular interest which the tenant was to create, giving, I suppose, the name of the person in whom the interest was to be vested. I cannot think that that was the meaning of the Act. It does not say so: and if that were the meaning I can imagine all kinds of difficulties arising; I do not think the section contemplated that the tenant had to come each time to the landlord and ask him for express authority in writing authorizing the specific interest which the tenant intended to create. I think that the words in the deed were sufficient to authorize the creation of the sub-tenancy which was created by Juggomohan in favour of Bhairab. Therefore, the first point taken on behalf of the defendants was a good one.

6. Then, it is said that even if this was a good point, the plaintiff was entitled to 1/3rds of the rent if the other land was to be paid to Bhairab. But this is quite inconsistent with the claim which was originally made in this case, and I do not think it would be right to deal with this matter on the fresh case which has now been made and I think that the judgment of Mr. Justice Mullick was right and the appeal from his judgment should be dismissed with costs.

Mookekjee, J.

7. The facts, material for the determination of the interesting question of law raised in this appeal, are not in controversy and may be briefly stated. On the 25th January 1907, the plaintiff purchased a dar-putni tenure at a sale held in execution of a decree for its own arrears obtained by the putnidar on the 30th April 1906. On the 14th April 1910, she instituted this suit for recovery of arrears of rent from the cultivators in actual occupation of the land. They pleaded that the rent was payable, not to her, but to a se-patnidar whose interest was still in force. The plaintiff replied that the se-patni interest was an encumbrance and had been annulled at her instance by service of notice in accordance with Section 167 of the Bengal Tenancy Act. The question thus arises for decision whether the se-patni interest was, as alleged by the plaintiff, an encumbrance capable of annulment u/s 167, or, as asserted by the defendants, a "protected interest" within the meaning of Clause (g) of Section 160. Now, that clause provides that "any right or interest which the landlord, at whose instance the tenure or holding is sold, or his predecessor-in-title, has expressly and in writing given the tenant for the time being permission to create" is a protected interest within the meaning of Chapter XIV of the Bengal Tenancy Act. The point for investigation consequently is, whether the se-patni is a right or interest which the putnidar at whose instance the dar-putni was brought to sale had expressly and in writing given the dar-putnidar permission to create. The plaintiff-appellant has argued that this question should be answered in the negative, because Section 160(g) implies that such permission, to be of any avail, must have been expressly given, at the time of the creation of the se-patni, by a document specially executed in this behalf,--and no such instrument was admittedly executed in this case. In support of this proposition reference has been made to the decision of *Kristo Das Laha v. Jatindra Nath Basu* 14 Ind. Cas. 145 : 16 C.W.N. 561. Our attention, however, has also been drawn to the decision in *Afazuddi Khan v. Pramanna Gain* 14 Ind. Cas. 99 : 39 C. 139 which possibly lends support to a different view. Neither of these decisions, however, directly bears upon the question raised before us, although, perhaps, the first of the two cases mentioned is more analogous than the second to the case now before the Court. As the matter is thus not concluded by authority, Section 160(g) requires to be construed, and I feel no doubt that we should not accept the interpretation put forward on behalf of the appellant, namely, that the express permission must be contained in a written instrument, other than the lease whereby the tenancy was created, which is specially executed when the encumbrance is created. If that had been the intention of the Legislature, Clause (g) would have been differently framed. There is, I think, no foundation for the contention that a-fl express written permission must be obtained from the landlord on the occasion when the particular encumbrance is created; there is in principle no difference between a permission to create an interest of a particular description given in the lease itself, and a permission subsequently given by a separate document.

8. The question next arises whether the dar-putni lease of the 4th June 1863 did

contain an express permission in writing sufficient for the purpose of Clause (g) in my opinion, the answer must be in the affirmative, for the document states expressly that the dar-putnidar would have authority to grant a se-patni and it was pursuant to the power thus conferred on the dar-pulnidar that he created the se-patni on the 21st January 1886. There is thus no escape from the position that the se-patni is a protected interest" within the meaning of Section 160(g) and has not been annulled, because it could not be annulled under the provisions of Section 167.

9. This really concludes the litigation. But as a last resort the argument has been put forward that as the se-patni covered only one-third of the property, the plaintiff is entitled to rent in respect of the remaining two-thirds share. The obvious answer is that this was not the case made in the plaint. If such a claim had been put forward, it would have been necessary to determine whether the rent in respect of a two-thirds share had hitherto been collected separately from the rent of the one-third share. This question has not been raised and could not be raised on the pleadings, nor could it be investigated in this suit, in the absence of the se-patnidar interested in the one-third share.

10. On these grounds, I agree that the decree made by Mr. Justice Mullick must be affirmed and this appeal dismissed with costs.