

(1925) 04 CAL CK 0047
In the Calcutta High Court

Durlav Chandra Chowdhuri and Others	APPELLANT
Vs	
Jamiruddin Ahamed Chowdhuri and Others	RESPONDENT

Date of Decision : 27-04-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 160(g), 167

Citation : 90 Ind. Cas. 405

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Division Bench

Judgement

1. This appeal by the darpatnidars raises important questions relating to the rights of the zemindar as against the darpatnidar. The predecessor of the plaintiff-respondent granted a patni settlement to one Lakshmi Narain in 1293 B.S. in respect of three mouzas. The rent reserved was Rs. 256 a year. Of two of these mouzas Lakshmi Narain granted in 1303 to one Masraf Ali, now represented by defendant No. 9, a darpatni lease on a yearly rent of Rs. 228. Lakshmi Narain died leaving four sons defendants Nos 10 to 13. In 1321 defendants Nos. 12 and 13 executed a darpatni lease in favour of one Madan Mohan of their share in the third mouza on a yearly rent of Rs. 20. In 1322 the other two sons of Lakshmi, the defendants Nos. 10 and 11, granted a darpatni lease in respect of their shares in the third mouza Mahabasi to their own sons defendants Nos. 1 and 2 for a yearly rent of Rs. 20. Plaintiff's case is that his predecessor had obtained a decree against the patnidar for arrears of rent in execution of which the patni was sold and purchased by the decree-holder. When attempting to collect rent the plaintiff discovered the existence of the darpatni leases and served the darpatnidars with notices u/s 167 of the Bengal Tenancy Act. In the present suit the plaintiff seeks to avoid the darpatnis on the grounds, first, that as incumbrances they have been annulled and, secondly, that they are liable to be set aside as fictitious and benami transactions.

2. The Trial Court found that the service of notice u/s 167, Bengal Tenancy Act was not proved but held that under the Patni Law the leases were not binding on

the plaintiff. It further found that the two leases in favour of Madan Mohan and defendants Nos. 1 and 2 were fictitious and not bona fide. Madan Mohan did not appeal against this decree and on the appeal by the other defendants the learned District Judge agreed with the Trial Court in all its findings. This second appeal is by the defendants Nos. 1, 2 and 9 representing two of the three darpatnis defendants Nos. 1 and 2's darpatni interest being alleged to be in respect of the share of Mouza Mahabashi held by two sons of Lakshmi Narain and defendant Nos. 9's interest being in the other two mouzas. With regard to the darpatni held by defendants Nos. 1 and 2 the finding of the fact of both the Courts is that it is a benami and fictitious one. This finding of fact cannot be assailed in second appeal and the appeal by these defendants must stand dismissed. As regards Masraf Ali's darpatni the question of law raised has to be examined and determined.

3. Mr. Chuckerbutty has said all that can be said on behalf of the appellants.

4. It is first contended that the plaintiff having purchased the patni in execution of a rent-decree obtained under the Bengal Tenancy Act, the provisions of the Patni Regulation VIII of 1819 do not apply in this case which must be governed by the Bengal Tenancy Act. It is also pointed out that the plaintiff himself has treated the case as coming under the Tenancy Act and based his claim for possession on the determination of appellant's tenancies by service of notice u/s 167, Bengal Tenancy Act. It is accordingly argued that service of notice u/s 167 not having been proved the plaintiff's suit must fail. It is further maintained that the defendant's tenancies are protected interests within the meaning of Section 160(g), Bengal Tenancy Act. This latter argument is founded on the recital in the patni patta to the effect that the patnidar would be "entitled to make a gift or sale or grant darpatni and sepatni settlement, etc."; and there can be no question that if the relation between the parties is governed by the Bengal Tenancy Act and nothing more the defendant's tenure must be deemed to be a "protected interest" having been created under the express permission given in the patni lease as required by Clause (g) of that section. In support of this view reference may be made to *Bidhumukhi v. Asmatullah* 36 Ind. Cas. 669 : 21 C.W.N. 829 : 24 C.L.J. 180, where the tenure concerned was a sepatni created by a darpatnidar and the provisions of the Tenancy Act were, on the authority of *Mohamed Abbas Mondal v. Brojo Sundari Debia* 18 C. 360 : 9 Ind. Dec. 240 rightly applied. But the Bengal Tenancy Act does not in view of the provisions in Section 195(e) affect the rights of patnidars under the Patni Regulation and so the rights of the parties have to be determined under it. The plaintiff has doubtless in the present case based his cause of action on the Bengal Tenancy Act, but if his right to recover possession is found to exist under some other provision of law it would be sacrificing substance to form to deny him such right: see *Sundari Dassee v. Mudhoo Chunder Sarkar* 14 C. 592 : 7 Ind. Dec. 392. For the course that commends itself to us we have the authority of *Kristo Das Laha v. Jatindra Nath Basu* 14 Ind. Cas. 145 : 16 C.W.N. 561, where under similar circumstances the provisions of the Patni Regulation were held applicable to a

case arising from a sale under the Bengal Tenancy Act. We accordingly propose to examine the law as laid down by the Regulation as affecting the rights of the parties.

5. The preamble to the Regulation declares, among the objects of the enactment, the objects "to define to relative rights of zemindars and patni talukdars". In Section 1 this object with reference to the under-leases by the patnidar is thus amplified: "It has accordingly been deemed necessary to regulate and define the nature of the property given and acquired on the creation of a patni taluq as above described, also to declare the legality of the practice of under-letting in the manner in which it has been exercised by patnidars and others, establishing at the same time such provisions as have appeared calculated to protect the under-lessee from any collusion of his immediate superior with the zemindar or others, for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure under the stipulations of the original engagements entered into with him". To secure the last object it is enacted in the second clause of Section 3 that the patni talukdars are "to possess the right of letting out the lands composing their taluks in any manner they may deem most conducive to their interests; and any engagements so entered into by such talukdars with others shall be legal and binding between the parties to the same, their heirs and assignees: Provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrances resulting from the act of his tenant". Section 11 partly qualifies the stringent rule contained in the above proviso. The first paragraph of the 1st clause of Section 11 does not help us as it applies to sales held under the rules of the Regulation. The second paragraph of that clause runs thus "No transfer by sale, gift, or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such zemindar." The first paragraph defines the right of the zemindar as against the transferee or sub-lessee of the patnidar in case the sale of patni is held under the Regulation. The second paragraph states the general right of the zemindar as against the transferee or the sub-lessee in all cases; otherwise this sub-clause would appear redundant. It accordingly becomes necessary to construe the words "condition to that effect." The phrase "to that effect" occurs also in the 1st sub-clause where it means to make incumbrances as are mentioned in that sub-clause. In the 2nd sub-clause the phrase "to that effect" must by logical interpretation mean to make such transfer by sale, etc., as to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent of the tenure. It demands something more than mere license to create sub-leases by the patnidar, a right, as has been observed in *Kristo v. Jotindro* 14 Ind. Cas. 145 : 16 C.W.N. 561 reserved to the patnidar by the

Regulation itself, and the mere mention of such right in the patni lease does not vest the patnidar with a higher right than is granted to him under the Patni Law. The sub-clause, therefore, requires that in order that the zemindar should be bound by the sub-lease created by the patnidar, and to defeat the zemindar's right to hold the tenure of his creation answerable in the state in which he created it for his rent, the patni lease must confer on the patnidar the right to create such an under-tenure as will bar the above indefeasible right of the zemindar. It looks anomalous that in the case of sale under the Regulation an incumbrance created under a stipulation in the written engagement conferring on the patnidar the right to create it is protected whereas if the zemindar acquires the patni in any other way a more stringent condition is necessary to make the incumbrance binding on him. But the law can only be construed as it stands.

6. It is, however, argued on behalf of, the appellant that the 2nd sub-clause above quoted contemplates cases of complete transfer such as transfer by gift or sale, except mortgage, and not leases which are transfers of a part of the interest of the patnidar. Learned Counsel, however, has not been able to assign any such meaning to the word "otherwise" following the words transfer by sale, gift or to the words "other limited assignment" in that sub-clause as to exclude leases. In our judgment the above expressions, include also a lease which is a transfer or limited assignment. If this construction is not correct, under the 2nd clause of Section 3 above quoted no engagement (including a lease) by the patnidar shall operate to prejudice the right of the zemindar to hold the patni tenure as it originally existed answerable for any arrear of rent. In any view, therefore, we hold that the darpatni created by the patnidar Lakshmi Narain in favour of Masraf Ali is of no avail as against the plaintiff. It is not necessary in this connection to consider the 2nd clause of Section 11 which deals with rent--farming leases, the authority to grant which should also have been "specially transferred", it being neither party's case that this clause has any application in the present suit.

7. The result of the above considerations is that the darpatni leases created by Lakshmi Narain are not binding on the plaintiff and he is entitled to obtain possession of the mouzas in the state in which they were when the patni lease was granted. In this view we hold that the decision of the Court below is correct and this appeal should be dismissed with costs.