

(1954) 04 CAL CK 0014

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 172 of 1949

Fakir Chand Mondal

APPELLANT

Vs

Mohini Devi

RESPONDENT

Date of Decision : 29-04-1954

Acts Referred:

Bengal Tenancy Act, 1885 — Section 160, 165, 167, 37

Citation : (1956) 2 ILR (Cal) 432

Hon'ble Judges : P.N. Mookerjee, J

Bench : Single Bench

Advocate : Shyama Charan Mitter, for the Appellant; Sitaram Banerjee and Narendra Nath Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—Under proprietors Gour Mohan Sarkar and others one Sourest Cliandra Sen held a raiyati jama of Rs. 52 per annum. That jama was recorded in khatian No. 34 of mouza Uttar Panchpotta, district Madia. Under the raiyati the present Appellant who was the Defendant in the trial court held a korfa in respect of two plots-c.s. dag Nos. 213 and 214. The first of the above two plots comprised a tank and the other a garden.

2. On October 20, 1946, the raiyati was purchased by the Plaintiff Sm. Mohini Debi at a rent-sale, held u/s 165 of the Bengal Tenancy Act and duly confirmed under that statute on November 29, 1946, and there is no dispute now that, by her purchase, the Plaintiff acquired the right to avoid all incumbrances by annulling them in the manner provided by Section 167 of the Bengal Tenancy Act. The Plaintiff took delivery of possession through court on January 18, 1947.

3. According to the Plaintiff's case, as made in the plaint, the Defendant had only jalkar right in the tank of c.s. plot No. 213 and falkar right in garden in the other c.s. plot No. 214 and the Defendants' rights in the said two plots which were incumbrances in law were duly annulled by service of the requisite notice u/

s 167 of the Bengal Tenancy Act. Such notice was alleged to have been served through court on May 3, 1947, in Non-Misc. Case No. 13 of 1947 (under Section 167 of the Bengal Tenancy Act) of the court of the munsif at Ranaghat. On August 22, 1947, the present suit was instituted for recovery of hhd's possession on declaration of the Plaintiff's title to the suit land (c.s. dags Nos. 213 and 214) as the Defendant refused to quit the same in spite of repeated demands. In the suit there was also a claim for mesne profits.

4. The defence, material for our present purpose, was of a twofold character—a claim of protection or "protected interest" u/s 160(c) of the Bengal Tenancy Act and a denial of the sufficiency and validity of the notice u/s 167 of the Act. The admitted existence of the tank and the garden was relied on in support of the first part of the defence and the second part was founded on the fact that the Plaintiff not having admitted the Defendant's interest in the suit land beyond a jalkar and falkar right, nothing more than such right was annulled by her notice u/s 167 of the Act and, for this purpose, reliance was placed particularly on the wording of the said notice.

5. The learned munsif gave effect to the defence in both its branches but, as he found title with the Plaintiff, he decreed her suit in part declaring her title to the suit land and refused her prayer for khas possession. On appeal by the Plaintiff this decision was modified by the learned subordinate judge who overruled all the defences and decreed the Plaintiff's suit in full both as regards title and possession and directed mesne profits to be ascertained in subsequent proceedings.

6. Before me the two questions under Sections 160(c) and 167 of the Bengal Tenancy Act have been re-argued and the learned subordinate judge's decision thereon has been assailed by the Defendant Appellant and supported by the Plaintiff-Respondent. These two questions will, therefore, have to be closely examined and the propriety of the appellate decision will have to be considered in the light of the relevant law on the point.

7. Section 160 of the Bengal Tenancy Act which defines "protected interest" contains inter alia the following description in Clause (c) thereof, viz.,

Any lease of land whereon * * * permanent gardens * * * tanks * * * have been made.

8. To attract the clause as quoted, there must, therefore, be (i) a lease of land and (ii) thereon permanent gardens or tanks must have been made. There is no dispute now that requisite (i) is satisfied in the present case. There is also no dispute that the suit land comprises a permanent garden and tank. But the parties differ as to the interpretation of the words "have been "made" used in the statute.

9. The Appellant contends—and that was also his contention in the two courts below—that the existence of the garden and the tank is sufficient to satisfy the

requirements envisaged by those words. The Respondent (the Plaintiff), on the other hand, seeks to construe and that was also the construction put forward by her in the courts below,-the words quoted as meaning "have been "made subsequent to the lease of the land referred to in the "earlier part of Clause (c)". The learned munsif apparently accepted the Appellant's (Defendant's) contention on this question of interpretation of the statute although he appears also to have come to the finding that the garden and the tank with which we are here concerned were made by the present Defendant. On both these questions, the learned subordinate judge took a different view. He agreed with the Plaintiff in the interpretation suggested by her of the relevant statutory provision and he also found, relying on para. 8 of the written statement, that the tank and the garden had not been made either by the Defendant or by his predecessor Majehar Biswas who, according to him, took the original settlement of the suit land.

10. On the question of construction of Section 160(c) of the Bengal Tenancy Act I am inclined to accept the Respondent's argument and agree with the learned subordinate judge in his view of the law. It seems to me that, to come within the said statutory provision, the "gardens", etc., must have been made on the land subsequent to the lease mentioned in the opening words of the said Clause (c) and the existence of such "gardens", etc., from before the said lease would not attract the application of the said clause. The language of the section sufficiently warrants this view which also plainly accords with reason and common sense and the scheme and intent of this particular legislation. A lease of land with "gardens", etc. will not answer the description, embodied in the statute, when it is closely examined in the proper context. This view receives support from the Bench decision of this Court in the case of Sm. Akiyannessa and Ors. v. Abdul Gani Sadagar (1917) 41 I.C. 1, which interpreted the analogous provision (Section 37, fourth exception) of the Revenue Sale Law and I find no reason why Section 160(c) of the Bengal Tenancy Act should not receive a similar interpretation. I hold, therefore, that the learned subordinate judge correctly interpreted the relevant Clause (c) of Section 160 of the Bengal Tenancy Act. I am also of the opinion that the learned subordinate judge was right in his reading of para. 8 of the written statement and in holding therefrom that the suit land and/or the garden were admittedly not made by either the Defendant-Appellant or any previous holder of the disputed tenancy and, that being so, in the view of Section 160(c) of the Bengal Tenancy Act which I have expressed above, the defence plea of protection under that statutory provision cannot stand. The Appellant's first contention must therefore, fail.

11. I may add further that, in the present case, the Defendant's under-raiyati was admittedly an "incumbrance" as it was the case of both the parties that it had been created by the defaulting raiyat Souresh Chandra Sen. That being so, the onus to prove that it was a "protected interest" u/s 160(c) of the Bengal Tenancy Act was clearly on the Defendant (vide, Samir Jana and Ors. v. Mahabharat Baktu (1910) 16 C.W.N. 777, 779, explaining Narmada Sundari Devi

v. Tarip Mollah (1909) 9 C.L.J. 490 : 13 C.W.N. 720) and, as there is no evidence to show that the disputed tank or garden had been made subsequent to the creation of the suit under-raiyati, that onus cannot be said to have been discharged and the defence u/s 160(c) of the statute must fail upon the construction of that section as made above by me.

12. The Appellant's first contention is, accordingly, overruled.

13. Mr. Mitter's second contention also deserves no better fate. The notice u/s 167 of the Bengal Tenancy Act is no doubt not very clearly worded and is, to some extent, ambiguous. Reading it, however, as a whole, I am convinced that the learned subordinate judge construed it quite correctly. In the notice the entire interest of the Defendant in the suit land was treated as an "incumbrance" and the whole of that interest or "incumbrance" was sought to be annulled by it. The fact that the Appellant's interest in the suit land was stated at one place in the notice u/s 167 to extend only to jalkar and falkar rights-and that statement had to be made as it was the Plaintiff's case that the Defendant had no other interest in the suit land (vide, the plaint and the evidence of the Plaintiff's witness No. 1) and as to the extent of the jalkar and falkar rights only the Defendant's interest was admitted, does not materially affect the position when the notice which was served upon the Defendant-Appellant and which he actually received specifically states-

14. The extract quoted, in the context in which it appears, supports the view that the whole of the Appellant's interest in the suit land, whatever be its nature or extent, was treated as an "incumbrance" and sought to be annulled as such. Thus reading the notice as a whole I have little doubt that it sought to annul the Appellant's entire interest in the suit land as an "" incumbrance"".

15. It was certainly open to the Plaintiff to admit the Defendant's interest in the suit land to the extent of jalkar and falkar rights only and yet seek to avoid and annul the whole of his actual interest therein, whatever its nature or extent. That is what the Plaintiff appears to have done in the present case. Such conduct on the Plaintiff's part is not necessarily self-inconsistent or in any way forbidden by law. It is perfectly legitimate and fully within the Plaintiff's legal competence and the sufficiency and validity of the notice of annulment is not in the least affected by it.

16. I am also fully convinced, on the materials before me, that the Defendant-Appellant had no misgivings in his mind on this point.

17. I hold, therefore, that, notwithstanding its somewhat defective phraseology in certain parts, the notice of annulment u/s 167 of the Bengal Tenancy Act was valid and sufficient for avoidance of the Defendant's under-raiyati except so far as it could claim the protection of a "protected interest" u/s 160(c) of the Act. That exception, however, has not been proved in this case and hence the annulment must prevail and the Defendant's interest in the suit land must be held to have been duly avoided under the law.

18. In taking the above view on the question of the notice u/s 167 of the Bengal Tenancy Act, I have not overlooked that the section, having the effect of destroying valuable rights, ought to be strictly construed, but, as I have recently held in the unreported case of Gati Gobinda Sahoo v. Haradhan Tanti and Ors. S.A. No. 581 of 1949 decided on March 31, 1954, the statute prescribing no form of the notice, it (the notice) should be accepted as valid and sufficient, if, in substance, it is in compliance with the relevant statutory provisions. The disputed notice, in my opinion, contains all the essential elements. It sufficiently describes, as I have held above, the "incumbrance" sought to be annulled, namely, the Appellant's entire interest in the suit land whatever its nature and extent and it expressly declares that the said "incumbrance" is annulled. This case differs fundamentally from the unreported decision to which reference has been made above, and the considerations which weighed with me in rejecting the notice in the said other case are not present here.

19. In the unreported case cited, the notice that was served was only a notice to show cause why the incumbrance should not be annulled. There was no notice served upon the incumbrance holder "declaring that the incumbrance is annulled". In the present case there was, admittedly, due service of a notice upon the Defendant "declaring that the incumbrance is annulled" and containing, as I have already held, all the essential elements of a notice of annulment as contemplated by law. It is true that along with the notice of annulment the Defendant also received a notice "to show cause"-which, though usual in such proceedings, is not so much in the contemplation of the statute or relevant for purposes of annulment-but that, in my opinion, did not alter the character and/or the effect of the notice of annulment and did not affect its sufficiency or validity. That is how I read the "notice"-which, to put it at the worst, was a combined notice of annulment and "show cause"-served upon the Defendant-Appellant and in that view of the matter I affirm its validity.

20. It follows then that the statutory requirements were all amply fulfilled in the present case and the notice u/s 167 of the Bengal Tenancy Act cannot be rejected in law as invalid or insufficient.

21. I hold, therefore, that the Defendant's under-raiyati was validly annulled by the Plaintiff-Respondent and this appeal must fail.

22. The appeal is accordingly dismissed.

23. But, in the circumstances of this case, I would make no order as to costs.