
(1910) 07 CAL CK 0061
In the Calcutta High Court

Ganada Dasi

APPELLANT

Vs

Maharaj Adhiraj Bijay Chand Mahatap Bahadur

RESPONDENT

Date of Decision : 28-07-1910

Acts Referred:

Transfer of Property Act, 1882 — Section 10, 111

Citation : 7 Ind. Cas. 346

Hon'ble Judges : Vincent, J

Bench : Single Bench

Judgement

Vincent, J.—The facts of this case are as follows:--One Fakir Roy was the patnidar of lot Jadabbati under the Burdwan Raj. In the year 1900, certain Chowkidary Chakran lands situate within that lot were settled by Government with the Maharaja of Burdwan and he again settled them in patni with Fakir Roy on the 4th May 1903. On the 23rd December 1903, Fakir Roy transferred his rights in these Chowkidary Chakran lands to the defendant-appellant. On the 14th May 1904, the parent patni lot Jadabbati was sold for arrears of rent under the patni Regulation and was bought in by the Raj. In the lease of the Chowkidari Chakran lands, there was a condition that, if the patni right in lot Jadabbati was transferred for arrears of rent or became extinct, the pudni right in the Chakran lands should similarly be transferred or become extinct.

2. In the present case, the Maharaja seeks to obtain possession of the Chowkidari Chakran lands in this mahal by virtue of this condition in the lease. His suit has been decreed in both the lower Courts and the defendant No. 3 appeals. A number of arguments have been addressed to me in support of the appeal.

3. It is first urged that the condition in the lease, of which the plaintiff seeks to obtain the benefit, is void for remoteness and by reason of the rule against perpetuities and the cases of Anath Nath Maitra v. Kumar Keshab Narain Roy 14 C.W.N. 601 : 5 Ind. Cas. 487, Chandi Charn Barua v. Sidheswari Debi 16 C. 71 (P.C.) : 15 I.A. 649, Nobin Chandra Soot v. Nabob Ali Sarkar 5 C.W.N. 343 and

have been quoted in support of this view. None of these cases, however, deals with the question of forfeiture of a lease and it has never been held, as far as I am aware, that a clause in a lease by which it is agreed that the lease should be forfeited in certain circumstances is against the rule regarding perpetuities. We know, however, that in many leases such conditions are common and, being for the benefit of the lessor, are enforced u/s 10 of the Transfer of Property Act. This point must, therefore, be decided against the appellant. Leases in perpetuity are, it may be observed, definitely sanctioned in India by the Transfer of Property Act.

4. It is then argued that the contingency contemplated by the lease has not occurred; but this argument does not bear examination. Clause 33 of the lease runs thus: "If, in future, the putni right in lot Jadabbati be transferred on account of arrears of rent or becomes extinct for any reason, my putni right in these Chakaran lands too shall be transferred or extinguished along with the parent putni right."

5. Now lot Jadabbati has been sold for arrears of rent and the putni right has been transferred to the Raj and it is now extinct, as it is merged in the zemindari right and, therefore, the right in the Chakaran lands is also transferred to the Raj and the defendant No. 3 has no subsisting right to these lands, if the conditions in the lease can be enforced.

6. It is urged that the doctrine of merger does not apply in this country on the authority of *Jibantm Nath Khan v. Gokool Chunder Chowdhury* 19 C. 760, which case is quoted with approval in the recent case of *Lal Mohammed Surkar v. Jagir Sheikh* 13 C.W.N. 913 : 2 Ind. Cas. 654. But Section 111 of the Transfer of Property Act is perfectly clear on the point and, in my opinion, the putni right is, in a case like the present, merged in the zemindary right [see *Suraj Narain Mandal v. Nanda Lal Sinha* 33 C. 1212; *Promotho Nath Mitter v. Kali Prasanna Chowdhury* 28 C. 744 and *Ulfat Hussain v. Gayani Das* 36 C. 802 : 3 Ind. Cas. 994]. The case in *Lal Mohammad Sarkar v. Jagir Sheikh* 13 C.W.N. 913 : 2 Ind. Cas. 654 refers also to an agricultural lease apparently and in such a case, it is possibly open to doubt (see Section 117 of the Transfer of Property Act) how far the doctrine of merger would apply. It may be noted that it is in the present case for the landlord's interest that the putni right should merge, and he himself describes the lot as being now held khas. This statement is an indication that there is now no subsisting interest.

7. The next argument raises a point of considerable difficulty and I think, after a careful consideration of the question, that the appeal must succeed on it. The present defendant-appellant is an assignee from the original lessee and it is argued before me that the clause in the putni lease of the Chakaran lands on which the plaintiff relies is a personal covenant which binds only the actual lessee and would not bind an assignee without notice. It is not suggested before me, I may observe, that the assignee had any notice at all of this clause in the lease. The learned pleader for the respondent, on the other hand, urges that the covenant is one which runs with the land I think, on a careful consideration of

the question, that the contentions of the appellant must prevail. A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee. Now the real effect of the covenant in this case was that, if the rent of the parent putni fell into arrears or if that putni became extinct, his putni of the Chakran lands should also become extinct and the liability for the due payment of the rent was not With the assignee nor had he any control over the management or due disposal of the parent putni and I doubt, therefore, if the covenant can be said to be one that runs with the land. At page 56 of Smith's Leading Cases (11th Edition), it is said that, where a covenant is made for the executant and his assignees, yet if the thing to be done be merely collateral to the land and doth not touch or concern the thing demised in any sort, there the assignee should not be charged. Again, at p. 70 of the same work, reference is made to a case which seems very similar to the present one, namely, *Gower v. Postmaster-General* 57 L.T. 527, where it was decided that a covenant by a lessee to pay to the lessor all taxes and rates in respect of properties other than those demised was a collateral covenant and that it, therefore, did not run with the land.

8. Dr. Gour at page 361 of his work on the Transfer of Property Act states that when a covenant relates to a thing not annexed nor to be annexed to the land or a tiling collateral or in its nature merely personal, it will not bind the assignee even if he be named. If these principles be accepted, it would appear to follow that the covenant in this case which is set forth at page 6 of the supplemental paper book is not a covenant that runs with the land, but a personal one which cannot bind the assignee of the original lessee. If this view of the covenant be correct, the present suit for possession cannot be maintained. This appeal must, therefore, be decreed and the plaintiff's suit dismissed with costs in all Courts.

9. There remains one other question which has been pressed with some force by the learned pleader for the appellant. He argues that this condition in the lease is repugnant to the law and cannot be enforced in view of the provisions of Section 3 of the Putni Sale Regulation: and the following cases are quoted in support of the contentions: *Mohebut Ali v. Mohamed Faiz-ullah* 2 C.W.N. 455, *Samant Radha Charan Das v. Atlanta Prasad Das* 4 C.L.J. 521. This last case, however, has no application as the lease there under discussion was one under the Bengal Tenancy Act which Act" does not apply in the case of putni leases at all. The circumstances of the other case referred to also differ materially from the circumstances of the present case. Having regard, however, to the view which has been taken on the question whether the covenant in this lease binds an assignee of the original lessee or not, it is not necessary to discuss this argument at any length. It is sufficient to say, for the reasons stated previously, that this appeal must succeed and the plaintiff's suit for khas possession must be dismissed with costs in all Courts by reason of the fact that he is not entitled to enforce the personal covenant made in the lease to Fakir Roy against his lessee's assignee.