

(1926) 05 CAL CK 0013
In the Calcutta High Court

Jogesh Chandra Roy

APPELLANT

Vs

Asaba Khatun and Others

RESPONDENT

Date of Decision : 19-05-1926

Acts Referred:

Bengal Tenancy Act, 1885 — Section 78, 78(1)

Citation : AIR 1927 Cal 41

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

Bench : Full Bench

Judgement

Greaves, J.—These appeals are by the plaintiff from a decision of the District Judge of Chittagong which reverses a decision of the Munsiff of the first Court of the same place. In the year 1851 one Har Chandra Roy let out certain lands by way of a grant which was in the nature of a putni lease to one Ramjoy Khansama. The lease contained a provision that the lessee would give back to the lessor if so required such portions of the land as he required. Ramjoy in the year 1862 executed in favour of one Cliunnn Misfcry a Kaimi Estemrari Mokurari raiyati lease of these lands. This contained a similar provision to that contained in the head lease as to giving back any lands required by the lessor. The present plaintiff is the successor in interest of Har Chandra Roy. He wanted back some of the lands in dispute for the purpose of a market and a College and he sued the successor in interest of Ramjoy for a reconveyance of the lands which he required. Eventually Ramjoy's predecessor or rather the Court on his behalf executed a reconveyance of these lands to the present plaintiff by virtue of the covenant to that effect contained in the lease of 1851. But the plaintiff found the lands in the occupation of the defendants who had, as I have stated, obtained them from Chunnu Mistry the original tenant under Ramjoy, and thereupon the suits, out of which these appeals arise, were commenced to obtain possession of the lands which had been reconvened to the plaintiff and to obtain vacant possession thereof. The first Court passed a decree, but the District Judge has dismissed the suit on the ground that the covenant was not enforceable by virtue of the provisions of Section 178 of the Bengal Tenancy Act; and the question

before us is whether the decision of the District Judge was correct. Section 178(1) provides that nothing in any contract between a landlord and a tenant made before or after the passing of this Act, (a) shall bar in perpetuity the acquisition of an occupancy right in land, or (c) shall entitle a landlord "to eject a tenant otherwise than in accordance with the provisions of the Act.

2. Sub-section (3) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act (a) shall prevent a raiyat acquiring in accordance with this Act an occupancy right in land. Section 179 to which reference was made provides that nothing in the Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mokurari lease on any terms agreed on between him and his tenant.

3. Now I will first dispose of the argument based on Section 178. In a decision of this Court reported in *Afiluddi v. Satish Chandra Banerjee* [1916] 29 C.L.J. 40, it has been decided that Section 179 only, applies to a tenancy created after the passing of the Act, and assuming for the purposes of this appeal that this decision is correct, Section 179 cannot therefore be relied on by the appellant as an answer to the defendants' contention in the suit. But in my opinion Section 178, Sub-section (1)(a) and (c) have no application in circumstances of this kind. Here the bargain was made between the proprietor of the land and the putnidar which was a valid and a legal bargain and did not infringe any provision of the Bengal Tenancy Act or of any other Act. It was provided as I have already stated that if the proprietor required certain of the lands leased out these would be re-conveyed or assigned to him by the putnidar and the lands therefore in the hands of the putnidar were subject to this obligation, that is to say, it was not possible for him to create any inferior interest in the lands except burdened with the condition which he himself was bound to observe if called upon to recovery and re-assign the lands by the proprietor. Looked at in this light it cannot be said that the covenant entered into by the lessee and the putnidar was any infringement of the provision of Section 178(1)(a) and (c). The lands as I have stated in the hands of the putnidar were not free for him to be dealt with as he wished. He could only create an interest subject to the obligation and liability to the reconveyance which he was bound to execute if called on so to do by his superior landlord. The result, therefore, I think, is that so far as this question is concerned Section 178 has no application in the facts and circumstances of these cases. The cases to which we were referred on the subject, some of them reported and some unreported were cases between a landlord and a tenant unaffected by any covenant with the superior landlord such as appears in the present case. They cannot therefore be taken as authorities for the purposes of this case. That I think disposes of the first and main question which arises in this appeal. But various other contentions had been urged before us on behalf of the respondents, and it is necessary to deal with them shortly. First of all it is said that the plaintiff in the present suit has no privity with the defendants and that the plaintiff cannot enforce the contract that was entered into by the tenant of

the putnidar and the putnidar. It is quite true that there is no privity of contract between these parties, but I think this difficulty is cured by the conveyance executed by the Court in favour of the plaintiff. That document although not happily drawn or expressed contains these words:

I do release in your favour the land &c, you being entitled to all the rights which your predecessor had therein.

4. Now one of the rights of the predecessor in the land was the right in the events which had happened to call upon his tenant to reconvey the land, and in my opinion although not aptly worded these words amount in equity to an assignment of the benefit covenant for reconveyance contained in the lease executed in 1862 in favour of the putnidar. No question therefore of privity of contract arises, for the plaintiff is enforcing his rights by virtue of the express assignment of the benefit of the covenant contained in the reconveyance to which I have just referred.

5. Then it is said that the covenant offends against the rule against perpetuities. This argument again I think founded upon a misconception. The rule against perpetuities is directed against the creation of interests in land which will not have effect within a certain period. But no interest in land was created at the time of the original lease of 1851, and at the time of the lease of 1862 no interest in land was created by virtue of these covenants, but rights were merely reserved to the proprietor on the one hand and to the putnidar on the other by virtue of the sub-lease of 1862. Accordingly the cases to which we were referred which were cases in which interests in land were created have no bearing in the facts and circumstances of the case before us.

6. That I think disposes of all the questions that were raised. But I should like to say as this question has been decided on the documents before us by other Benches of this Court that I entirely dissent from the view that this covenant can be looked upon as a covenant running with the land. A covenant that runs with the land is something which restricts the user of the land and not a positive covenant of this nature. A positive covenant never runs with the land either in law or in equity. Of course if this is construed as a covenant running with the land there would be no difficulty; but for the reasons which I have stated it cannot be treated as a covenant running with the land because it is a positive covenant. If authority is desired for this proposition it will be found in the decision of the Judicial Committee in *Maharaj Bahadur Singh v. Bal Chand Chowdhury* [1920] 6 PL.J. 163.

7. The result therefore is that the appeals succeed and the appellant will be entitled to his costs in these appeals in all Courts the reconveyance directed to be executed by the Court of first instance will be executed within 40 days of the arrival of the record in the lower Court. In default the reconveyance will be executed by this Court.

Mukerji, J.

8. I agree.