

(1915) 08 CAL CK 0010
In the Calcutta High Court

Khagendra Nath Chatterjee and Others	APPELLANT
Vs	
Sonatan Guha and Others	RESPONDENT

Date of Decision : 19-08-1915

Acts Referred:

Bengal Tenancy Act, 1885 — Section 12

Citation : 31 Ind. Cas. 987

Hon'ble Judges : Roe, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. The facts connected with the litigation out of which these appeals arise, may be stated as follows.

2. The lands in dispute are included in a Permanent tenure called Taluk Kamdeb Guha appertaining to the zemindari mahal No. 2694 belonging to the plaintiff-appellant. The taluk was sold in execution of a rent decree and purchased by one Ganga Charan in 1864, who sold it to four persons, Ramsagar, Gokul, Krishnapriya and Chandrakala, who were members of the Guha family to whom the taluk belonged before the sale under the rent-decree. The first three mortgaged a 14-annas 4-gundas share of the taluk to certain persons who sued and obtained a decree upon the mortgage and one Chandra Kumar Bose ostensibly purchased the said share at the sale held in execution of the said decree, but it has been found that Chandra Kumar was the benamdar of the said mortgagors. The fourth purchaser from Ganga Charan, viz., Chandrakala, appears to have had a 1-anna 16-gundas share in the taluk, which on her death devolved on her three sons in equal shares, two of whom Ananda and Iswar mortgaged their 1-anna 4-gundas share to one Kashinath, whose successors-in-interest (who are described in these cases as the Chakravartis and the Kanjibalis) purchased the said share at a sale held on the 1st June 1888 in execution of a decree obtained upon the said mortgage. These Chakravartis and Kanjibalis deposited the landlord's fee as required by Section 12 of the Bengal Tenancy Act but it was not accepted by the plaintiff, as Iswar and Ananda whose interest they

purchased or their mother had not got their names registered in the plaintiff's sherista. It appears that out of the four persons named above who purchased the taluk from Ganga Charan in 1864, only Ramsagar and Gokul got their names registered in the landlord's sherista and it was from them that the landlord used to realise rent for the tenure amicably or by suit. After the death of Ramsagar and Gokul, the landlord in 1889 brought a suit for rent against the four sons of Ramsagar and the widow of Gokul and the taluk having been sold in execution of the decree was purchased by one Chandra Kumar Chakravarti on the 17th March 1890. Then another decree was obtained for rent in 1890 for the period prior to the said sale. When execution of this decree was taken out, a mortgage (kistibandi) bond was executed by Chandra Kumar Chakravarti, Dinamani (widow of Gokul) and by three other persons who were members of the Guha family, viz., Rasik, Sonatan and Amar, in which it was stated that Chandra Kumar Chakravarti was the real owner of the taluk by purchase. From that time, the zemindar sued Chandra Kumar alone for rent, the last suit being No. 2767 of 1893. At the sale in execution of the decree passed in that suit, the taluk was purchased by one Manitarā on the 29th April 1895. By this time, the zemindar suspected that Chandra Kumar and Manitarā were benamdars for the Guhas, and in the next two rent suits Nos. 1572 of 1895 and No. 1574 of 1895, he joined the four sons of Ramsagar and the widow of Gokul (who were the defendants Nos. 4 to 8 in that suit), and Rasik, Sonatan and Amar who had joined Chandra Kumar in the kistibandi mortgage-bond and were made defendants Nos. 1 to 3, the 9th defendant in the 1st suit being the said Chandra Kumar and the 9th defendant in the second being Manitarā. The defence of the first eight defendants in those two rent suits was that defendants Nos. 4 to 8 (the heirs of Ramsagar and Gokul) were the real owners of the taluk, that the defendants Nos. 1 to 3 had no interest therein and that the defendant No. 9 Chandra Kumar in the first suit and defendant No. 9 Manitarā in the second, were the real auction-purchasers and decrees for rent should be passed against the said purchasers in each suit. The Court, however, found that Chandra Kumar and Manitarā were benamdars, that defendants Nos. 1 to 3 had no interest in the taluk and that defendants Nos. 4 to 8 were the real owners of the taluk, and accordingly passed decrees against them. In execution of the decree in suit No. 152 of 1895, the taluk was sold and purchased by the zemindar decree-holder on the 20th June 1898 and he obtained delivery of possession through Court on the 29th July 1899. The judgment-debtors applied to have the sale set aside, but the application was dismissed and the order of dismissal upheld up to this Court. On the plaintiff attempting to take khas possession, the judgment-debtors set up several under-tenures and notices u/s 167 of the Bengal Tenancy Act were thereupon served upon them and the plaintiff instituted several suits for recovery of possession.

3. In three cases, it was found that the notices were not served within the time allowed by law and with respect to those three the plaintiff instituted three rent suits which gave rise to Second Appeals Nos. 3625 to 3627. In the other two cases, the notices were served in proper time and they were for possession of

the lands in respect of which the defendants had set up under-tenures.

4. The defence of the defendants, so far as it is necessary to state for the purpose of the present appeals, substantially was that as some of the owners of the taluk, viz., the Chakravartis and Kanjibalis, were not made parties to the rent suit of 1895, the decree cannot operate as a decree for rent under the Bengal Tenancy Act and the sale held in execution of such a decree could not pass the taluk free of incumbrances, and the under-tenures held by the defendants, therefore, were not affected by the sale.

5. These two suits (which gave rise to Second Appeals Nos. 3624 and 2902) were decreed by the Munsif, but on appeal, the suits were dismissed; on second appeal (Second Appeal No. 2719 of 1914) the cases were remanded to the lower Court and that Court again decreed the suits. There were again second appeals (Second Appeals No. 2627 of 1907 and analogous appeals) and this Court was of opinion that if the Chakravartis and Kanjibalis had any subsisting interest at the date of the institution of the rent suit in 1895, the suits must be dismissed, but if they had no subsisting interest at that time, the suits must be decreed, and the Court below was directed to determine the said question.

6. On remand, the learned Subordinate Judge came to the conclusion that the Chakravartis and Kanjibalis had a subsisting interest in the taluk at the date of the rent suit, and accordingly dismissed the suits. The Second Appeals Nos. 3624 and 2902 have been preferred by the plaintiffs against the said decision.

7. The question for consideration in these appeals, therefore, is whether the Chakravartis and Kanjibalis had any subsisting interest at the date of the rent suit in 1895.

8. As regards the question of possession of the 1-anna 4-gundas share, the learned Subordinate Judge said: "were it necessary to come to a decision on this point, I would have unhesitatingly held that the Guhas were all along in possession of the land, that the Chakravartis and Kanjibalis never received rent from them and that evidence of payment of rent to and grant of dakhilas by the latter is concoction, pure and simple, to defeat the claim of the plaintiffs," but he was of opinion that as there was no conveyance by the Chakravartis and Kanjibalis in favour of Iswar and Ananda, nor possession for the statutory period by the latter, the former were not divested of their right and no title was created in favour of the latter. But his finding as to whether the Chakravartis and Kanjibalis relinquished their right on receipt of the decretal amount was not clear and definite. We accordingly remanded the case for a definite finding on the point. The finding has now been returned to this Court and the Court below has clearly found that the Chakravartis and Kanjibalis relinquished the share purchased by them on receipt of the decretal amount from the Guhas. As stated above, the Court below was of opinion that notwithstanding that the Chakravartis and Kanjibalis disclaimed their title to and possession of, the share purchased by them, the Guhas could not have acquired any title to the share for want of a

registered conveyance and relied upon the case of *Jadu Nath Poddar v. Rup Lal Poddar* 4 C.L.J. 22 : 10 C.W.N. 650 : 33 C. 967.

9. We think that the Court below is wrong in the view it took of the legal effect of the relinquishment in the present cases. It is true, a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title. In the case relied upon, there was a release executed by the real owner in favour of another person in order to protect his property from the claims of his creditors. The nominal transferee sold a portion of the property to another. The creditors were riot defrauded and it was held that the real owner could recover the property from the benamdar and the transferee from him. There is an observation of Mookerjee, J., that the title of the real owner could not pass by an admission. But in that case, the original transferee and the purchaser from him, were found not to be bona fide purchasers for value, and they were fully aware of the real nature of the transaction. It was under these circumstances, that Mookerjee, J., observed that title could not pass by a mere admission. In the case of *Musammat Oodey Koowur v. Musammat Ladoo* 13 M.I.A. 585 : 15 W.R.P.C. 16 : 6 B.L.R. 283 : 2 Suth. P.C.J. 388 : 2 Sar. P.C.J. 628 : 20 E.R. 669 in a suit to redeem a mortgage of an estate A, in order to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. The Judicial Committee held that in the circumstances and in the absence of any consideration given to A, the petition did not operate as a conveyance of A's right or as an estoppel to a suit by her for possession of the estate. Mookerjee, J., relied upon that case and observed that although under certain circumstances a person may be estopped from setting up a title in himself, title of the real owner could not pass by mere admission. The opinion expressed in that case was followed by Mookerjee and Beachcroft, JJ., in *Dharam Chand Boid v. Mouji Shahu* 16 Ind. Cas. 440 : 16 C.L.J. 436. There a partnership business was sought to be transferred by means of a deed of release. It does not appear that any consideration was paid or that there were circumstances which would in equity have precluded the transferor from challenging the validity of the transfer.

10. In the present case, the matter did not rest upon a mere admission. The Chakravartis and Kanjibalis on receipt of consideration gave up their rights as purchaser in favour of the Guhas and it is found that the former never took possession and the latter were allowed to remain in possession of the property. There is no doubt that the Guhas could sue the Chakravartis and Kanjibalis for specific performance. They could have successfully resisted a suit by the latter if they sued the Guhas for possession of the share. It is contended on behalf of the respondents, that u/s 54 of the Transfer of Property Act and Section 12 of the Bengal Tenancy Act) there can be no transfer except by a registered conveyance. But the equitable principle is well-established and we need only refer to *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 : 52 L.J. Ch. 2 : 46 L.T. 858 : 31 W.R. 109 and *Puchha Lal v. Kunj Behary Lal* 20 Ind. Cas. 803 : 18 C.W.N. 445 : 19 C.L.J. 213 decided by Jenkins, C. J., and Mookerjee, J. In the latter case, a purchaser under

an unregistered conveyance paid the agreed price to his vendor and was placed in possession, and it was held that in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser. Coxe, J., relied upon the provisions of Section 54 of the Transfer of Property Act and was of opinion that the transaction was a nullity and that the vendor himself was not estopped from disputing the validity of the transaction. He was, however, overruled by the Court of Appeal, and Jenkins, C. J., observed: "There is no invasion or evasion of the Registration Act. It is merely securing a party those rights to which he is entitled apart from the Act rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience."

11. In the recent case of *Mohamed Musa v. Aghore Kumar Ganguli* 28 Ind. Cas. 930 : 42 I.A. 1 : 19 C.W.N. 250 : 17 Bom. L.r. 420 : 42 C. 801 : 21 C.L.J. 231 : 28 M.L.J. 548 : 13 A.L.J. 229 : 17 M.L.T. 143 : 2 L.W. 258 : (1915) M.W.N. 621 where by a compromise made in a suit in 1873, it was agreed that mortgaged property should be released from two mortgages, the malikana being thenceforth allotted in agreed proportions to the two mortgagees and the mortgagor, and that the latter should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees, a decree was made in pursuance of the compromise, but the compromise agreement was not registered, nor were the transfers executed. All parties, however, thenceforward acted in every respect as if the transfers had been made, and there were dealings both by the mortgagor and the mortgagees with the shares allotted to them under the agreement. In 1908, a suit was instituted to redeem the mortgages and it was held by the Judicial Committee:

That whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption, were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished." Their Lordships observed: "The point which is made against giving effect to this compromise, is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction, are manifold and are in their Lordships opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this." Then referring to the case of

Maddison v. Alderson (1883) 8 App. Cas. 476 : 52 L.J.Q.B. 737 : 49 L.T. 303 : 31 W.R. 820 : 47 J.P. 821 their Lordships observed: "Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in Maddison v. Alderson (1883) 8 App. Cas. 476 : 52 L.J.Q.B. 737 : 49 L.T. 303 : 31 W.R. 820 : 47 J.P. 821 founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation, would follow.

12. It is contended on behalf of the respondents that all the cases where the above principles were applied were cases between parties claiming under the contract, that the Chakravartis and Kanjibalis are no parties to these suits and neither the plaintiffs nor the Guha defendants claim under them. But the plaintiffs purchased the tenure of which the Ohakravartis and Kanjibalis were at some time part owners and they had given up their rights in favour of Iswar and Ananda, and the Guhas set up the rights of those persons as having had a subsisting interest in the taluk when the rent suit was brought. If the contention of the respondents were valid, a creditor cannot avail himself of any estoppel or equities to which his debtor is entitled. If the debtor paid the purchase-money for a property and the vendor delivered possession of the property to him, the creditor cannot according to the respondents' contention avail himself of the equities arising from the transaction. We do not think that this case can be distinguished in principle from the cases cited above; and we are of opinion that the Chakravartis and Kanjibalis having given up their rights on receipt of consideration and allowed the Guhas to remain in possession of the 1-anna 4-gundas share, were precluded from setting up any title against the Guhas, and they had no subsisting right to the share at the date of the suit for rent. In the rent suits, the Guha defendants stated that they were the only owners of the taluk, but that their interest had passed to Chandra Kumar and Manitarā who had purchased the taluk at sales held in execution of previous rent decrees. They did not say a word about the Chakravartis and Kanjibalis having any subsisting interest in the taluk. Kamini Chakravarti, the head of the Chakravartis, was examined in the rent suits, and he disclaimed all interest, in the taluk. The Court found that Chandra Kumar and Manitarā were benamdars for the Guhas, and it was the Guhas (the defendants Nos. 4 to 8 in these suits) who were the real owners of the taluk and exclusively liable for rent, and it is they who now plead that the Chakravartis and Kanjibalis had a subsisting interest at the date of the suit.

13. It is contended on behalf of the respondents that the question of relinquishment or estoppel was never raised before; the only-question raised being whether the Chakravartis and Kanjibalis were benamdars and that the order of remand made by Mookerjee and Beachcroft, JJ., precludes us from

considering the said questions. We do not think that there is any substance in this contention. The plaintiffs did not allege in their plaint that the Chakravartis and Kanjibalis were benamdars; it was the defendants who set up their title, and when Kamini Chakravarti was examined, the question of relinquishment was raised. The question of relinquishment was considered by the Munsif so far back as the 15th February 1907 in certain suits between the parties. The question of relinquishment and the equities arising from it are involved in the decision of the question whether the Chakravartis and Kanjibalis had any subsisting interest, which Mookerjee and Beachcroft, JJ., by their remand order directed the lower Court to determine. It is contended that the only question for decision which the remand order contemplated was whether the Chakravartis and Kanjibalis were benamdars for the Guhas. But if they were benamdars for the Guhas, we fail to see how any question of their having a subsisting right, could arise. Then it is said that the learned Judges who remanded the case would have gone into the question of relinquishment and the other contentions founded upon it, had the question been raised before them. But the fact of relinquishment on receipt of consideration had not been found before the case was remanded, and in the absence of such a finding, the question of equitable considerations could not be gone into. Admittedly the Chakravartis and Kanjibalis did not execute any conveyance. The question whether their interest had determined otherwise than by execution of a conveyance for example, by relinquishment operating as estoppel or giving rise to equitable considerations was, therefore, involved in the order of remand and in no way inconsistent with it, and we do not see how we are precluded by the remand order from going into those questions when the remand order directed the Court below to decide the question whether the Chakravartis and Kanjibalis had any subsisting right at the date of the rent suit.

14. From what we have said above, it, is clear that the Chakravartis and Kanjibalis had no subsisting interest at the date of the rent suit and that their rights had vested in the Guhas. The suit for rent, therefore, was brought against proper parties and the sale held in execution of the rent-decree passed the entire, taluk with power to annul incumbrances. Notices u/s 167 of the Bengal Tenancy Act having been served in the two title suits, the under-tenures set up by the Guhas, must be held to have been cancelled.

15. These two appeals (Appeals Nos. 3624 and 2902 of 1912) are accordingly decreed, the decrees of the Court of Appeal below are set aside and those of the Court of first instance are restored with costs here and in the Court below.

16. Appeals Nos. 3625, 3626 and 3627 arise out of three rent suits mentioned above. The lower Appellate Court gave a decree for rent in respect of only 14-annas and odd gundas share, but having regard to our finding that the Chakravartis and Kanjibalis had no subsisting right, the plaintiffs should get a decree for the entire rent and the decrees of the lower Appellate Court will be varied accordingly, the result being that the suits will be decreed in full with costs in all Courts.