
(1925) 12 CAL CK 0018
In the Calcutta High Court

Mr. K.S. Bannerjee

APPELLANT

Vs

Maharaja Kumar Dharendra Krishna Deb Bahadur and Others

RESPONDENT

Date of Decision : 21-12-1925

Acts Referred:

Citation : 96 Ind. Cas. 659

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

Bench : Division Bench

Judgement

N.R. Chatterjea, J.—This appeal arises out of a suit for recovery of khans possession of 9 jotes under the following circumstances:

Purgannah Gangamondal within which these jotes are situated has been in the hands of the Official Receiver from a very long time and has been let out in ijara for terms of years from time to time. On the 11th August, 1896, there was an ijara for a term of 6 years granted to Raja Benoy Krishna Deb Bahadur, the predecessor of defendants Nos. 1 to 9. Then, the last lease to the Raja was for another term of 6 years commencing from the 11th January, 1905. During the term of the former lease, the Raja, the ijaradar, took kabuliyats us respect of certain lands which are the lands in dispute in the present suit from one Sani Mahamad and in the last term of the ijara he sued Sani Mahamad for arrears of rent and in execution of decrees for rent put up the jotes to sale and purchased them himself, and on his death, his heirs, defendants Nos. 1 to 9, are in possession of the same. On the expiry of the term of the last ijara the Official Receiver settled the lands with, some other persons as ijaradars; they were the co-plaintiffs in the present suit and have been made pro forma respondents in. this appeal.

2. The plaintiff's suit was for khas possession on the ground that there was no custom of transferability of the jotes and that the jotes having been purchased by the Raja during the currency of the ijara could not be retained by him or his heirs after the expiry of the term. There were a number of defendants in the suit.

3. The defence of defendants Nos. 1 to 9, shortly speaking, was that they had acquired a valid right as heirs of the Raja, the ijaradar, and they had transferred their interest to defendant No. 10. Defendant No. 10 also stated that he had purchased these jotes from the auction-purchaser and was in possession. Defendant No. 11 is Sani Mahamad against whom the rent-decrees were obtained. Defendant No. 12 is the father-in-law of defendant No. 11. Defendants Nos. 13 to 19 say that they had a 6-annas odd gundas share and the jote was sold by defendant No. 11, Sani Mahamad, to his wife, Azifa Khatoon and that the latter also got under certain deeds of gift from other persons a 9 annas share in the jote and that on Azifa Khatoon's death all the lands devolved upon defendant No. 11 and were sold to defendant No. 13 and the latter was in possession with defendants Nos. 14 to 19. Defendant No. 20 is the brother-in-law of defendant No. 11. He says that some of the lands of these 9 jotes were in his possession and belonged to him and that the purchaser did not acquire any title to these lands under his purchase.

4. The Court below has negated the plea of defendant No. 10 holding that the transfer to him was benami. It also negated the defence of defendants Nos. 13 to 19 on the ground that all the transactions regarding the sale by defendant No. 11 and defendant No. 1'A were colourable and benami transactions and, therefore, Azifa Khatun had no title and defendant No. 12 did not inherit any portion of these jotes. The Court below also negated the defence of defendant No. 20 on the ground that all these jotes belong to Sani Mahamad and that defendant No. 20 failed to prove that any portion of the jotes belonged to him.

5. An objection was raised on the ground that the persons to whom the auction-purchaser had sub let the lands were necessary parties to the suit and they were not made parties. The Court below overruled the contention on the ground that the plaintiff did not seek to turn out these tenants and that the plaintiff was entitled to receive rents from those who were holding under the auction-purchaser. On the merits, however, the Court below came to the conclusion that defendants Nos. 1 to 9 had acquired a title to the lands under the purchase made by the Raja and accordingly dismissed the suit of the plaintiff.

6. The plaintiff appealed to this Court, and the case was remanded to the Court below for a finding on the question as to whether the intention of the ijaradar was to keep the jotes purchased in execution separate from the ijara after giving the defendants in opportunity of producing the collection papers, The Court below has returned its finding on the point and that finding is against the defendants.

7. It is contended on behalf of the appellant that on a proper construction of the ijara lease the defendants have acquired no right to the lands in dispute. The ijara lease provides that " the lessee will not save and except for the purpose of granting dur-ijara settlements to dur-ijaradars or other tenants or persons by means of which the rents of the said demised premises or the greater portion thereof may be collected as heretofore, assign, under-let or otherwise part with

the possession of the said hereby demised premises or any part thereof and will not enter into any partnership with any other person or persons in respect of the demised premises or any part thereof or charge or assign the lessee's interest under these presents or any part thereof without the previous written consent of the Receiver for the time being of the said demised premises while the said demised premises shall be in the charge of a Receiver and if and when the said premises shall cease to be in charge of a Receiver, of the person or persons for the time being entitled to the premises in reversion expectant upon the determination of the term hereby granted." It is further provided that "at the end (expiration) or other sooner determination of the said term, peaceably and quietly surrender and yield up the said demised premises to the Receiver or his successors-in-office for the time being." "On breach of covenant or condition, the present demise on lease shall be wholly and absolutely void and it shall thereupon be lawful to the Receiver to re-enter."

8. It appears that the only settlement which the lessee was authorised to make was a dur-ijara settlement and he was to give up the demised premises on the expiry of "the ijara term.

9. It is contended on behalf of the respondents that the lease does not lay down all the incidents of the ijara, even the right to collect rents is not expressly granted. But the collection of rents "as heretofore" in the passage referred to above indicates that the right to collect rents was given. Then it is pointed out that the clause in the lease, viz., "And all and singular the rights, privileges, profits, commodities, advantages emoluments and appurtenances to the said purgannah and premises hereby demised or any of them or any part thereof respectively belonging or any wise appertaining" goes to show that all the rights of the lessor were granted to the lessee. I do not, however, think that, that is a proper construction of the clause. That clause merely refers to rights, which would otherwise pass under the lease such as rights of way and such other rights, and if it was intended that all the rights of the lessor would pass under the lease, then the provision that the lessee would not be entitled to assign, under-let or charge without a previous written consent of the Receiver would be meaningless.

9. It is also contended that for the purpose of managing the zamindari it was necessary that the ijaradar should have power to make ordinary raiyati settlements and to effect mutations of names on transfers of jotes. Reference is made to the evidence of some of the witnesses who say that the ijaradar or the dur-ijaradar makes settlement and recognises transfers; but the rights of the parties are to be governed by the terms of the contract. The right to grant a settlement and to recognise transfers may 1)3 conferred by the lease upon the ijaradar subject to the consent of the proprietor. In the present case it expressly provided that except for the purpose of granting dur-ijara, the lessee would not have the power to assign, under-let or otherwise part with the possession of the demised premises.

10. It is contended on behalf of the respondents that in any case the right to collect rents is vested in the ijaradar and he can for realising his rents put up the holding to sale and purchase it himself. That may be conceded. But such a purchase would be good only during the term of the ijara. "The lease expressly provides that at the end of the term the lessee shall peaceably and quietly surrender and yield up the demised premises. It may be rather hard upon the ijaradar, that the jotes purchased by him for arrears of rent cannot be enjoyed by him, but, on the other hand, the ijaradar may create tenancies and put them as also existing tenancies up to sale for arrears of rents and purchase them, himself and claim to hold them after the expiry of the ijara. In fact, in the present case kabuliyats were taken in respect of all the jutes from Hani Mahamad in favour of the Raja during the term of his former ijara. However that may be, the ijaradar is bound by the terms of the kabuliyat, and as stated above he agreed to surrender the demised premises at the end of the term. He cannot retain any land purchased by him during the term.

11. It is contended by the respondents that the ijaradar is the landlord as the tenants pay rents to him. But all the rights of the proprietor were not vested in the ijaradar in the present case. In cases where the ijaradar gets all the rights of the landlord he certainly would be entitled to retain any lands purchased by him after the expiry of the term or where the purchase is under the express terms of the ijara lease. The cases cited by the learned Advocate are distinguished. In the case of *Harrington v. Dwarka Prasad Chowdhuri* 55 Ind. Cas. 59 : (3920) Pat. 11 : P.L.T. 533 the ijaradar obtained from the whole body of the co-sharer landlords their entire rights as maliks. In another case in the same Volume (1920) Supplement to Calcutta Weekly Notes, Patna High Court Cases, page 168 *Morgan v. Ramjee Ram* 56 Ind. Cas. 366 : (1920) Pat. 168 : 5 P.L.J. 302 : 1 P.L.T. 310, it was held that where there was a special contract, the ijaradar would be entitled to purchase jotes in execution of decree for rent and retain them after the expiry of the ijara. In the case of *Nayanjan Bibi v. Durgadas Bandopadhaya* 60 Ind. Cas. 449 : 33 C.L.J. 75 "the ijara lease authorised the ijaradar to buy holdings at sales in execution for arrears of rent and also provided that during the term of the ijara he was at liberty to sub-let the same."

12. In the present case not only is there no such provision in the lease but the lease provides in express terms that the ijaradar would have no power to sub-let or to assign and he would have to give up the demised premises at the expiry of the term.

13. The alleged transfer by defendants Nos. 1 to 9 in favour of defendant No. 10 has been found as stated above to be a benami one. That being so, it is unnecessary to consider the question of abandonment raised by the learned Vakil for the appellant. The jotes were found to be in the possession of the ijaradar and his heirs and it has been found on remand by the Court below that there was no intention on the part of the ijaradar to keep the jote right separate from the ijara. The finding has been challenged by the respondents. The learned

Subordinate Judge disbelieved the nikash papers on the ground that some rents which, had been admittedly realised, did not find any place in the nikash.

14. It is pointed out by the learned Advocate for the respondents that some dakhilas were issued by unauthorised persons and some others were not genuine and, therefore, they were not entered in the nikash papers.

15. It is further contended that they were not admitted dakhilas. There is, however, no affidavit to show that the admission was not made before the Court below. Apart from that, the principal collection papers, namely, the shehas, amdanis and kharchas have not been produced. An explanation has been attempted to be given for the absence of these papers by stating that the papers were destroyed by rainwater and white ants. Basanta Sarkel, a Tehsildar however, produced some papers though not the sheha, amdani and kharcha papers. The explanation offered is not convincing and we are unable to hold that the Subordinate Judge's view is wrong.

16. Then, again, in granting leases the ijaradar granted raiyati leases and not underraiyati leases which, would have been the case had the ijaradar intended to keep the raiyati separate from the ijara. It is stated in the kabuliyata that the lessor was in khas possession of the land as malik dhakalikar. Then again dakhilas were granted to tenants in which it was stated, "Gangamandal estate, ijaradar Raja Benoy Krishna Deb Bahadur, Madafat (standing in the name of) Sani Mahamad. The same receipts were used in granting dakhilas to tenants of the lands purchased as ijaradar, as they were used in the case of dakhilas granted to other tenants of the mahal.

17. Lastly, in the Record of Rights the tenants were described as raiyats. It is stated that the Record of Rights took place some time after the Raja had ceased to be the ijaradar. But we do not see any reason why he or his heirs should not have taken steps to have the record corrected. Having regard to all these circumstances, we are unable to differ from the finding arrived at by the Court below that there was no intention to keep the jote right separate from the ijara.

118. That being so, it is unnecessary to consider the effect of the provisions of Section 22 of the Bengal Tenancy Act, Whatever rights the ijaradar might have purchased at the sale they could not be retained by him after the term of the ijara, having regard to the express terms of the lease.

18. An objection has been raised on behalf of the respondents that the plaintiff cannot get khas possession as he has already let out the estate in ijara to the pro forma respondents. But the plaintiff can get possession through the ijaradar and the decree, therefore, will be not one for khas possession, but for possession through the ijaradar.

19. The result, therefore, is that the appeal is allowed, the plaintiff will get possession of the lands through the ijaradars and the ijaradars will get rents from the undertenants in possession of the lands.

20. The appellant will be entitled to his costs in this appeal from defendants Nos. 1 to 9, respondents.

Page, J.

21. In this case the plaintiffs claim a declaration that the defendants possess no estate or interest in the lands in suit, and the plaintiff-appellant claims khas possession through the plaintiffs Nos. 2 to 5 now pro forma respondents.

22. The suit has occupied the attention of the Courts for over 7 years, but, as I apprehend the matter, the dispute between the parties may be determined by the recitation of a few admitted facts and the construction of a single document.

23. On the 11th August, 1896, Raja Benoy Kristo Deb Bahadur, the predecessor-in-title of defendants Nos. 1 to 9, under an indenture of even date was granted by a predecessor-in-title of the appellant an ijara of certain land (including the lands in dispute) for a term of six years from the 12th April, 1896; and under an indenture of the 7th January, 1908, the Raja obtained an ijara of the same lands from the appellant for a further term of six years until the 12th April, 1914. In 1913 the Raja died, and the defendants Nos. 1 to 9 are his heirs and inherited the Raja's interest in the said lands. On the 11th April, 1914, that is, one day prior to the expiration of this ijara, the defendants Nos. 1 to 9 purported to transfer under a kobala their interest in the lands in dispute to defendant No. 10.

24. The learned Subordinate Judge found that this transaction was not proved, but it matters not, for defendants Nos. 1 to 9 or defendant No. 10 through them or on their behalf admittedly since that date have been in possession of the lands in dispute. "In 1914 on the expiration of the last mentioned ijara plaintiffs Nos. 2 to 5, now pro forma respondents to the appeal, obtained from the appellant an ijara of the said lands and at all material times were the ijaradars thereof. After obtaining the ijara in 1896 the Raja took 9 kabuliyats in respect of certain jotes relating to the lands in suit from defendant No. 11 and between March 1908 and September, 1910, he purchased the said jotes at auction-sales held in execution of decrees which he himself had obtained in suits for arrears of rent in respect of 8 jotes, and to enforce payment of "a security bond in respect of jote No. 7. Having purchased the jotes, the Raja in more than one instance created an under-tenure in respect of the lands which he had purchased. The appellant claims khas possession of the lands in suit through the pro forma respondents on the ground that the ijara of 1908 has expired, and that the defendants are bound to yield up the demised premises pursuant to the terms of the said ijara. Under the ijara the ijaradar covenanted that he will not, save and except for the purpose of granting dur-ijara settlements to dur-ijaradan; or other tenants or persons by means of which rents of the said demised premises or the greater portion thereof may be collected as heretofore, assign, under-let or otherwise part with the possession of the said demised premises or any part thereof without the previous written consent of the Receiver for the time being or, as the case might be, of the persons entitled to the reversion. He further covenanted

that "he shall and will at the expiration or other sooner determination of the said term, peaceably and quietly surrender and yield up, the said demised premises to the Receiver or the persons thereto entitled," and it was further provided in the ijara that if the lessee or his representatives should not well and true observe and perform the covenants, conditions and agreements therein contained, the ijara should be wholly and absolutely void, and the grantor should be. entitled to re-enter and re-possess the said lands.

25. The situation which the Raja created may be illustrated by tracing the history of one of the under tenures in suit. On the 29th December, 1898, by a kabuliyat and pattah of even date, the Raja created an under-tenure of a raiyoti jote of 2 drones 7 kanis 7 gundas of land Mouza Gopalnagar in favour of one Sani Mahamad at an annual jama of Rs. 45-6-6. On the 9th April, 1908, the Raja purchased the said land at a public auction, in execution of a decree which he had obtained against Sani Mahamad for arrears of rent, and delivery of possession was made over to him on the 28th May, 1910. Subsequently, on the 4th November, 1913 the defendants Nos. 1 to 9 by a kabuliyab, and pattah again under-let a portion of the same lands to one Azizernessa Bibi. The defendant-respondents now contend the Raja having purchased the jotes in suit at public auctions held in execution of decrees, the defendants or their transferees are entitled to retain possession of the land as against the plaintiff notwithstanding the ijara from which their title to the lands has emanated. In my opinion, there is no defence to the plaintiff's claims. The Raja's title to an interest in the lands in suit was limited and controlled by the terms of the ijara into which he had entered. Apart from the rights, which he acquired under the ijara, the Raja was impotent to create under-tenures or any. subordinate interest in the said lands, and the incidence of any under-tenure which he was entitled to create would not affect the rights of the grantors of the ijara in so far as such under-tenures were inconsistent with the term of the instrument under which he held as ijaradar. Non dare potest quod non habet. None of the 9 jotedari tenures in suit which the Raja created were dur-ijara settlements, and the permission of the grantor to, grant such under-tenures was not obtained. The creation of these under-leases, in my opinion, was a clear breach of the Raja's covenants in that behalf and involved a forfeiture of the ijara. Again, it was not competent for the Raja to create under-tenures with incidental rights attaching thereto which in the event of non-payment of rent would entitle the Raja to retain possession of the premises after the term for which the ijara was held had come to an end, for under the provisions of the ijara the Raja had covenanted to yield up the said premises to the appellant, or to the persons entitled to the reversion as the case might be "at the expiration or other sooner determination of the said term."

26. It was contended on behalf of the defendants that such a construction of the ijara would work hardship upon the ijaradars. It may be so. But where the terms of a contract are clear and unambiguous, as I think that the provisions of this instrument are, there is no room for an argument ab inconvenienti and the parties must be held bound by the obligations into which they have entered. The

defendants by adopting the course pursued by the Raja, in my opinion, are not to be permitted to evade the performance of their obligations under the ijara or to deprive the grantor of his right to recover the lands according to the terms thereof.

27. It is further urged by the appellant that in the circumstances of this case the interest (if any) acquired by the Raja in the jotes under the sales at public auction became merged in the ijara. The rule of law which the Court must apply was laid down by the Judicial Committee in *Dulhin Lachhanbati Kumari v. Bodhnath Tiwari* 66 Ind. Cas. 551 : 48 I.A. 485 : (1922) M.W.N. 58 : 15 L.W. 313 : 30 M.L.T. 216 : 26 C.W.N. 565 : 3 P.L.T. 383 : 4 U.P.L.R. (P.C.) 42 : AIR 1922 P.C. 94 (P.C.). Lord Shaw in delivering the judgment of the Board stated that "Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others--in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain?"

28. Having regard to the evidence, I am of opinion that the decision of the Court below on the issue as to whether merger in fact had taken place was correct, and upon that ground also, if recourse may be had to the doctrine of merger, I should be prepared to hold that, inasmuch as the ijara has come to an end, the rights (if any) which the defendants acquired under the auction sale have also terminated. For these reasons, I refrain from expressing any opinion as to the other questions raised in this appeal, and I agree that: the appeal should be allowed with costs.