
(1928) 07 PAT CK 0003
In the Patna High Court

Saleha Bibi

APPELLANT

Vs

Amiruddin and Others

RESPONDENT

Date of Decision : 24-07-1928

Acts Referred:

Bengal Tenancy Act, 1885 — Section 161

Citation : AIR 1929 Patna 214

Hon'ble Judges : Wort, J;Das, J

Bench : Full Bench

Judgement

Das, J.—This was a suit for pre-emption, and the lower appellate Court has dismissed it. The plaintiff has appealed to this Court.

2. Shortly stated the facts are as follows: One Mt. Dhano Bibi had a 3 pies 10 karants milkiat interest in a certain village. Subsequently she acquired a two annas mukarrari interest in the same village. Partition proceedings took place in 1910, and a takhta was allotted to Mt. Dhano Bibi consisting of her two annas three pies ten karants share which comprised both her mukarrari interest and her milkiat interest.

3. On 12th February 1919, Dhano sold 1 anna 1 pie 15 karants of her interest to Malur and Ladowan, and one of the questions raised before us turns on the interpretation of the conveyance executed by Mt. Dhano in favour of the two persons whose names I have just mentioned. On 2nd July 1922, Malur and Ladowan conveyed the share purchased by them to the plaintiff. The remaining interest remained in Mt. Dhano Bibi, who conveyed it on 8th December 1923, to the defendants. The plaintiff claims that in the events which have happened she is entitled to a decree for pre-emption as against the defendants. The Courts below have concurrently found that the ceremonies were duly performed, so that we are not embarrassed by any of those questions in the appeal before us. The lower appellate Court has, however, dismissed the suit substantially on the ground that what passed to Malur and Ladowan under the conveyance of 12th February 1919, was the mukarrari interest of Dhano Bibi, and following a

decision of this Court the learned Judge-of the Court of appeal below has come to the conclusion that a mukarraridar is nofr entitled to a decree for pre-emption. (His Lordship then discussed evidence and after concluding that only mukarrarr interest passed to Malur and Ladowan proceeded). Then arises the question-whether as a mukarraridar the plaintiff is entitled to a decree for pre-emption. Now on this point Mr. S.M. Mullick relies on a decision of Sultan Ahmed, J., in Mahommad Jamil v. Khub Lal Baut [1920] 5 Pat. L.J. 740.

4. Sir Sultan Ahmed appearing on behalf of the plaintiff does not contend that the-decision of Sultan Ahmed, J., to which I have referred is erroneous, but he does-contend that there are certain passage in that judgment which are obiter dicta and that indeed the decision itself needs reconsideration having regard to what the-Judicial Committee has recently held in AIR 1925 97 (Privy Council) , The decision upon which Mr. Section M. Mullick relies decided that a cosharer cannot pre-empt against a mukarraridar of another cosharer, but in arriving at that decision Sultan Ahmed, J, reviewed the whole law of pre-emption very criti-1 call and had no difficulty in coming to; the conclusion to which he did come on the ground that a mukarraridar himself could not claim pre-emption the co-sharer on the doctrine of reciprocity, which is well understood in the Mahomedan law could not claim pre-emption against the mukarraridar. This decision has been constantly followed in this-Court. Speaking for myself I must say that I prefer the decision of Sultan Ahmed, J., to the arguments which have been advanced before us to-day by Sir Sultan Ahmed.

5. But Sir Sultan Ahmed contends that the decision needs reconsideration having regard to what the Judicial Committee has recently held in AIR 1925 97 (Privy Council) , Now that was a very simple case. What happened was this. A person having a permanent mukarrari in certain lands was dispossessed of a portion of the land by a person who was the husband of the appellant in the Privy Council. The landlord brought a suit for rent against the permanent mukarraridar and in due course the mukarrari interest was put up for sale and was actually purchased by the appellant. It was conceded that at the date of the purchase by the appellant her husband was in unlawful possession of a portion of the disputed land for six years, so that it was open to the appellant to bring a suit to protect her interest as against the trespasser her husband. She took no action as against her husband and in course of time her husband acquired a title by adverse possession as against her.

6. Now this being the position, the appellant, when a suit for rent was brought against her by the landlord, claimed that she was entitled to abatement of rent in regard to the portion of land of which she had been dispossessed by her husband. This was the whole case before the Judicial Committee, and the only point which the Judicial Committee had to consider was whether the appellant as having succeeded to the interest of the permanent mukarraridar was entitled to bring a suit to eject her husband, the trespasser, from the portion of the demised land. In dealing with this point the Judicial Committee says as follows:

The tenant under such a lease virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lesser and succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrear the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure, as has now been settled by a long series of authorities in the Indian Courts, which are enumerated in the learned and exhaustive judgment of Mockerjee, J., acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants. An incumbrance is defined by Section 161, Ben. Ten. Act 1885, as "any right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest," There is no question in this case of any protected interest but only of such right as the appellant's late husband may have acquired in respect of his possession of a portion of the lands embraced in the lease for appeared exceeding 12 years.

7. The Judicial Committee then proceeds to point out that at the date when the appellant acquired the lease by purchase only six years of adverse possession by her husband had run against the former tenant and that it was admitted that she could immediately have put an end to this tortious possession by her husband on her purchasing the tenure. The Judicial Committee came to the conclusion that it was her duty under a perpetual tenure to protect herself against illegal encroachments and, as she failed in her duty, she was not entitled to claim abatement of rent as against the landlord. Now this is the whole of the decision of the Judicial Committee. But Sir Sultan Ahmed contends that the expression used by their Lordships of the Judicial Committee in describing the perpetual mukarraridar as virtually a proprietor has in some mysterious way affected the decision of Sultan Ahmed, J., in the case to which I have referred. I am unable to agree with this contention. If authority be needed for the proposition that a mukarraridar is a lease-holder, it will be found in the celebrated decision of Sir Lawrence Jenkins in *Kally Dass v. Monmohini Dassee* [1897] 24 Cal. 440, where his Lordship pointed out that:

A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest.

8. A perpetual mukarraridar upon the express decision of Sir Lawrence Jenkins, which has been affirmed in a very conspicuous manner by their Lordships of the Judicial Committee, is a leaseholder, and not a proprietor. The expression which has been used by their Lordships of the Judicial Committee in the case to which Sir Sultan Ahmed has referred must be read and understood in connexion with the facts of that case. I am, therefore, of opinion that that case has no application to the facts of this case.

9. Sir Sultan Ahmed relies upon two decisions one of the Oudh Judicial Commissioner's Court and the other of the Calcutta High Court. In the case of the Oudh Chief Court, AIR 1925 624 (Oudh) , an under-proprietary right was

sold, and the question was whether the under-proprietor was entitled to claim pre-emption. It was held that he was entitled and the basis of the decision in the words of Mr. Daniels, Judicial Commissioner, is that

the transaction amounted to a sale of under-proprietary right and gave rise to a right of pre-emption.

10. Whether that learned Judge was right in the view which he took that the transaction amounted to a sale I am unable to say. But the decision itself is not an authority for the proposition that a mukarraridar is entitled to claim preemption. The only other case to which we have been referred is the decision of the Calcutta High Court in *Surama Musalmani v. Munsif Danes Mahomed* 12 C.W.N. 224. It is impossible from the report to say what the facts in that case were, and in any event I am not willing to differ from the decision of Sultan Ahmed, J., in the case to which I have referred.

11. In my opinion, the case has been correctly decided by the lower appellate Court, and I must dismiss this appeal with costs.

Wort, J.

I entirely agree.