

(1925) 02 CAL CK 0050
In the Calcutta High Court

Surendra Narayan Sinha and Others

APPELLANT

Vs

Raja Bijoya Singh Dudhuria and Another

RESPONDENT

Date of Decision : 26-02-1925

Acts Referred:

Citation : AIR 1925 Cal 962

Hon'ble Judges : Walmsley, J;Chakravarti, J

Bench : Full Bench

Judgement

Walmsley, J.—This is a novel case. The learned Subordinate Judge of Murshidabad has granted to the zamindar an injunction restraining the patnidar and his lessees, the defendants from making bricks anywhere in the patni, and also a nominal sum by way of damages for the mischief caused by the brick-making that has already taken place.

2. The defendants appeal, and urge that the decision is wrong on three grounds. firstly, because the relation between zamindar and patnidar is such that the former is not entitled to the relief claimed; secondly, because the document creating the patni contains no stipulation against brick-making; and thirdly because the practice was begun many years ago, and has been continued without objection by the zemindar until this suit was instituted.

3. It appears to me that the defendants are entitled to succeed on each of these grounds.

4. In regard to the first ground, the only matter to be considered is whether the use made of the land affects the landlord's security in the matter of the rent reserved. If the use does not threaten the complete destruction of the property, or if it does not threaten such a change as to endanger the rent, the zemindar has no cause for complaint: [See the case of Barada Prasad Banerjee and Another Vs. Bhupendra Nath Mukherjee, . In the present instance neither of those dangers is present: where the bricks are made the surface of the land will be changed no doubt but not irremediably; and the evidence is that at present

the area affected is about 1 per cent of the whole.

5. An attempt has been made to treat the relation between a zamindar and a patnidar as similar to the relation between the English owner in fee-simple and the lessee for a term of years, but the relation is really very different and the comparison does not assist us.

6. On the second point, the learned Judge (seems to think that because the patni instrument does not authorise brick-making, it, by implication, forbids it, and secondly that a reservation against digging tanks; without permission may be construed as a reservation against the excavations involved in brick-making. I do not think that either view is correct. There is no reservation against brick-making, and the zamindar cannot succeed by showing that there is no clause that permits brick-making. As for the clause about digging tanks, brick-making may not be such an old practice as tank digging but it was very well known in 1853 when the patni was created, and if the reservation had been intended to cover brick-making it might have done so expressly.

7. On the third point the learned Judge has treated evidence in a very strange manner. The defendants were able to show payments on account of brick-making as far back as the closing years of last century. These payments are entered in large books of account which appear to bear the marks of being genuine. The Judge however says nothing at all about the rokars containing these entries, and he objects to the sumors and chequemuris on the ground that they come from the custody of the patnidar's vendor and were produced late. The first objection con-fuses with title-deeds documents which are valuable in the information they give about incidents connected with the patni, but do not in themselves form any part of the evidence of title. The second objection springs from the same confusion of thought; the present patnidar had to call upon his vendor to produce the papers, and it is not shown to us that he was negligent in seeking the aid of the Court to compel the production; so he cannot be held responsible for the fact that the papers were produced late. Another remark must be made about the Judge's treatment of the evidence on this point. He says that the oral evidence is at variance with the contents of these papers and than deals very hardly with the evidence of plaintiff's witness Chandra Kanta. The learned Advocate for the respondent has been unable to show us where the oral evidence conflicts with the papers, and as for Chandra Kanta it would seem as though any suspicion to which his contradictions may give rise should go against the plaintiff rather than against the defendants.

8. My conclusion is that the learned Judge's judgment must be reversed on each of the grounds mentioned, and that the appeal must be allowed and the suit dismissed with costs in both Courts.

9. In the view which I have taken, the cross-objection preferred by the plaintiff-respondent must necessarily be dismissed with costs. Hearing fee three gold mohurs.

Chakravarti, J.

10. I wish only to add a few observations as to the real nature of the patni taluks as I understand it and how they differ from ordinary lease-hold interest.

11. Regulation VIII of 1793, Section 51, recognised the dependent taluks created by the zemindars before the Permanent Settlement, and full protection was granted to them subject to the payment of the fixed rent. A number of these taluqs were given the option of getting themselves separated from the zemindari and directly holding under the Government as owners of separate estates and the rent payable by them to the zemindar was deducted from revenue payable for the zemindari. This emphasises the fact, that these taluqdars, though in one sense lessees, were looked upon as the absolute owners of the lands, subject only to payment of the fixed rent. There was no restriction on or limitation to their rights as lessees.

12. It is in this sense it has been said that these taluqs were really transfer of the zemindar's interest, the consideration being payable not in a lump sum, but by annual payments in the shape of rent. The analogy of a lease-hold interest as defined by the Transfer of Property Act is out of place here. There are some features which are common, but the distinctive features cannot be ignored and the existing mode of enjoyment of these taluqs disturbed.

13. The Permanent Settlement imposed a limitation of 10 years' term to all future leases created by the zemindar, but this restriction was removed by Regulation V of 1812 and grant of permanent taluqs came into vogue and a number of taluqs called patni taluqs were created in the image of the istemrari mokarari taluqs as known before the Permanent Settlement, Regulation VIII of 1819, called the Patni Law, was enacted to grant facilities to the zemindar to create taluqs for punctual realisation of rent at stated times with a view to hold them to meet the demand of the sunset law as the Revenue Law was popularly called.

14. These patni taluqs were really grants of the zemindar's interest without restrictions unless specially mentioned in the pattah. Even a mokarai tenure was in some respects treated as not a mere lease: [see *Sonet Kooer v. Himmut Bahadoor* (1876) 1 Cal. 391.]

15. It appears to me therefore that it is not possible to apply all the provisions of the Transfer of Property Act by analogy to the patni taluqs, and I have no hesitation in saying that a putnidar is competent to use or lease out land for the manufacture of bricks and this is wholly consistent with a patnidar's right. The Transfer of Property Act contains a saving clause for the patois governed by Reg. VIII of 1819.

16. The question now at issue is really governed by the case of *Abhiram Goswami v. Shyama Charan Nandi* (1909) 36 Cal. 1003. The question as to whether the patnidar can by this mode or user destroy the security of the rent

payable need not be discussed now. It is not even suggested that the loss of the land used for manufacture of bricks has in the least diminished the value of the patni in question.

17. The clause restricting the digging of tanks cannot be enforced and cannot by analogy furnish a restrictive covenant against brick-making. I agree with my learned brother that the suit should be dismissed with costs as also the cross-objection.