
(1946) 12 CAL CK 0016

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1165 of 1942

Surja Kanta Jana and Another

APPELLANT

Vs

Sm. Nishu Bala Debi and Others

RESPONDENT

Date of Decision : 17-12-1946

Acts Referred:

Citation : (1946) 12 CAL CK 0016

Final Decision : Dismissed

Judgement

Chakravartti, J.—The Plaintiffs, who are the Appellants before us, brought the suit out of which this appeal arises for a declaration that they had a mourashi mokurari right in the darganti tenure held by them under Defendant No. 1, whose interest has since passed to Defendant No. 2, and that they were entitled to hold the darganti in perpetuity at the fixed rent of Rs. 505-6-6. The plaint as originally framed, contained a prayer for a further declaration that the action of the revenue authorities in recording a higher rent during the last settlement operations held under Chapter X, Part II of the Bengal Tenancy Act was illegal and ultra vires. The prayer for the second declaration was subsequently deleted by an amendment of the plaint after the Plaintiffs had been required to pay ad valorem court-fees, and ultimately they went to trial with the single prayer for a simple declaration of their mokurari right. The Plaintiffs' case, as laid in the plaint, was as follows: One Nawab Najarali Khan held Lot No. 100 of the Sunderbans Estates under a permanent settlement granted to him in April, 1834. He created a ganti tenure of a portion of the lands, and on the 11th June, 1857, granted a mourashi mokurari settlement of the ganti to one Bharat Chandra Roy. Subsequently, the ganti was sold for arrears of rent and purchased by one Ashutosh Dhar who was a predecessor-in-interest of Defendant No. 1. On the 28th February, 1872, Ashutosh, in his turn, granted a dorganti settlement of 500 bighas of land to one Nanda Kumar Jana in mourashi mokurari right, the rent being fixed at Rs. 505-6-6 pies per annum. On the 12th June, 1883, the executors of the estate of Nawab Najarali Khan surrendered the permanent grant to the Government and took instead a non-permanent lease for 99 years with

effect from the date of the original settlement. The period of 99 years expired in 1933, and thereupon followed settlement operations under Chapter X, Part II of the Bengal Tenancy Act during which the rent of the darganti was recorded by the revenue authorities as liable to enhancement, and it was settled by them at Rs. 1,205 per year. By such action of the revenue authorities, a cloud had been thrown on the mokurari incident of the darganti, and the Plaintiffs sought to have the cloud dispelled by means of a declaration by a Civil Court for which they prayed. They had taken up the matter with the revenue authorities, and carried it up to the Board of Revenue, but without success.

2. The record-of-rights was published in May, 1934, but the present suit was not brought till the 19th September, 1938.

3. The Plaintiffs are the son and the widow of Nanda Kumar Jana, referred to above. Defendant No. 1 was one Ruplal Dhar, a successor-in-interest of Ashutosh Dhar who had granted the darganti, but he having parted with his interest in favour of Defendant No. 2, has no subsisting interest in the lands; Defendant No. 2 was Nishu Bala Debi who had purchased the interest of Defendant No. 1. Defendants Nos. 3, 4 and 5 are persons upon whom the interest of Nawab Najarali Khan has devolved.

4. The suit was contested by all the Defendants on identical grounds except that Defendant No. 1 took a special plea of his own to the effect that he was not a necessary party to the suit at all. The common defence of all the Defendants, so far as is material for the purpose of the present appeal, was that neither the ganti nor the darganti tenure was a mokurari grant, and that the rent payable by the Plaintiffs was, in fact, enhancible, that the rent having been settled by the revenue authorities under sees. 104A to 104F of the Bengal Tenancy Act, and the present suit having been brought four years after the final publication of the record-of-rights, it was barred by limitation and that it was further barred under the proviso to sec. 42 of the Specific Relief Act.

5. As regards the darganti tenure granted to Nanda Kumar Jana, only a certified copy of the kabuliyat executed by Nanda Kumar was produced by the Plaintiffs, but they did not produce or were unable to produce the potta granted to Nanda Kumar, and neither was the original kabuliyat produced by the Defendants. The trial Court held on a construction of the certified copy that the rent reserved by the kabuliyat was a permanent rent, and held further that the mokurari right could lawfully be granted to the Plaintiffs as the rents payable by their lessors and the head-lessee were both mokurari. In any event, the Court held further, the surrender of the head-lease could not affect the sub-leases. The plea of limitation was repelled on the ground that the present suit being of a purely declaratory character, it could not have been brought under sec. 104H of the Bengal Tenancy Act, and it did not fall to be governed by that section. It was held finally that it was not too clear that the suit was barred under the proviso to sec. 42 of the Specific Relief Act and that a Court would not be justified in throwing out a suit on that ground when the applicability of the proviso was doubtful. In

the result, the trial Court dismissed the suit against Defendant No. 1, but decreed it against the rest of the Defendants.

6. On appeal, the lower Appellate Court affirmed the finding of the trial Court that the rent of the jama was not liable to enhancement. But differing from the trial Court, the learned Additional District Judge held that the suit came within the purview of clauses (e) and (g) of sec. 104H of the Bengal Tenancy Act, and consequently it was barred by limitation. The learned Judge held further that even if the suit could be regarded as coming under the proviso to sec. 111A of the Bengal Tenancy Act, it was still barred under the proviso to sec. 42 of the Specific Relief Act. The learned Judge appears to have thought that the second declaration originally prayed for was a "further relief" within the meaning of the proviso to sec. 42 of the Specific Relief Act, and that by abandoning it for the purpose of avoiding court-fees, the Plaintiffs had brought themselves under the mischief of the proviso. In the result, he allowed the appeal and dismissed the Plaintiffs' suit. There appears to have been a cross-objection by the Plaintiffs against the dismissal of the suit so far as Defendant No. 1 was concerned, and that also was dismissed.

7. From the decision of the lower Appellate Court, the Plaintiffs have preferred a second appeal to this Court, and Defendant No. 2 has preferred a cross-objection.

8. In support of the appeal, Mr. Gupta urged two points before us. He contended in the first place that the suit came within the purview of the proviso to sec. 111A of the Bengal Tenancy Act and was thus not barred by limitation; and secondly, that the suit was not barred under the proviso to sec. 42 of the Specific Relief Act.

9. In the cross-objection, it was urged that the findings as regards the mokurari character of the ganti and the darganti were both erroneous, and further that the lower Appellate Court ought to have admitted in evidence a lease granted by the Government to Nawab Najarali Khan in 1856 which it had refused to accept.

10. Before dealing with the contentions urged before us, it is necessary to state that the facts are not exactly as assumed by the Courts below. Before us they were clarified by a closer study of the documents on record as also by appropriate references to the well-known work of Pargiter,—"A Revenue History of the Sunderbans." It was also agreed by the parties that we should admit in evidence in this Court the lease obtained by Nawab Najarali Khan in 1856.

11. It appears from the facts, as now clarified, that the original grant of Lot No. 100 was made to certain Storm Brothers on the 1st September, 1834, with effect from the 12th April of that year. On some date which is not known, one Alexander purchased the estate from the Storm Brothers, and from him it was purchased by one Mir Sadek Ali Khan on the 31st July, 1849. Subsequently, the property passed to the Nawab of Murshidabad who on the 11th June, 1851, granted a ganti tenure of a portion of the lands to one Bharat Chandra Roy. Nawab Najarali Khan purchased the estate from the Nawab of Murshidabad on the 16th September, 1851. Subsequently, by a notice, dated the 8th March,

1854, Nawab Najarali Khan was asked by the Government to show cause why the grant should not be forfeited, apparently in pursuance of the condition contained in the Rules of 1829 that if a quarter of the area of the lease-hold was not brought under cultivation within live years, the grant would be liable to be forfeited. The Nawab showed cause,--indeed many causes,--and at the same time prayed that he might be granted the benefit of the Rules of 1853 which had meanwhile come into force, and allowed to take a lease for 99 years, on the more advantageous terms as to rent, in lieu of the permanent lease held by him. This prayer was allowed, and on the 28th July, 1856, a lease for 99 years, with effect from the 12th April, 1834, was granted to him in accordance with the Rules of 1853. Meanwhile, the ganti tenure granted by the Nawab of Murshidabad to Bharat Chandra Roy had been brought to sale for arrears of rent, and purchased by Ashutosh Dhar. On the 28th February, 1872, Ashutosh granted a darganti to Nanda Kumar Jana of 500 bighas of land to which the present suit relates. Lot No. 100 originally comprised 25,300 bighas, and the lease to Nawab Najarali Khan in 1856 was for the same area. But there was a protracted litigation with the lessees of Lot No. 104 in which the Privy Council ultimately adjudged a large area to the latter, and since in consequence of that decision, the area of Lot No. 100 was substantially reduced, a revised grant was made on the 12th June, 1883, to the executors of the estate of Nawab Najarali Khan for an area of 14,250 bighas only.

12. It will appear from the above recital of facts that the ganti tenure was granted to Bharat Chandra Roy not by Nawab Najarali Khan, but by the Nawab of Murshidabad; and that before the darganti grant was made to Nanda Kumar Jana, the permanent lease of Lot No. 100 had already been surrendered and a 99 years" lease taken.

13. We may now proceed to deal with the points urged in the appeal. The first contention was put in the following way: It was said that although by surrendering a head-lease, the head-lessee might terminate the estate as between himself and his lessor, the sub-leases could not be affected by such surrender, and the head-lease must be deemed to be continuing, so far as the rights and the privileges of the sub-lessees were concerned. Accordingly, in spite of the surrender of the permanent grant, Lot No. 100, so far as it comprised the 500 bighas let out in darganti to Nanda Kumar Jana, or even so far as it comprised the ganti granted to Bharat Chandra Roy, must be deemed to have remained a permanently settled estate for the purposes of the rights and privileges of the gantidars and dargantidars, and that if so, the revenue authorities had no jurisdiction to prepare a settlement rent roll with reference to these areas under Part II of Chapter X of the Bengal Tenancy Act as they had done. The case was thus one which did not fall under sec. 104H of the Bengal Tenancy Act, but came under the proviso to sec. 111A, as explained by the Judicial Committee in the case of *Kumar Chandra Singh Dudhuria v. Midnapore Zemindary Company, Limited* (1941) L.R. 69 IndAp. A suit under the proviso to sec. 111A of the Bengal Tenancy Act could be brought within six years from the

date of the final publication of the record-of-rights, and consequently, the present suit was not barred by limitation. For the principle that so far as the rights and privileges of sub-lessees are concerned, the head-lease must be deemed to be continuing, reference was made to *The London and Westminster Loan and Discount Company, Limited v. Drake* [1859] 6 C.B. (N.S.) 798 : 141 E.R. 654, *Pleasant, Lessee of Hayton, v. Benson* [1811] 14 East 234 : 104 E.R. 590 and *Saint v. Pilley* [1875] L.R. 10 Exchequer 137, all of which are based on a passage in Coke on Littleton which runs as follows:

But, having regard to strangers who were not parties or privies thereunto (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender), the estate surrendered hath in consideration of law a continuance.

14. In our opinion, attractive as this argument is and extremely ingenious, it will not bear examination. In the case of *Kumar Chandra Singh Dudhuria v. Midnapore Zemindary Company, Limited* (1941) L.R. 69 IndAp, the Privy Council did not define the scope of the proviso to sec. 111A of the Bengal Tenancy Act, but simply gave in general terms an instance of the kind of case that might come within its purview, and then proceeded to give a concrete illustration. Mr. Gupta contended that the general and the particular illustrations given by their Lordships were enough for his purpose and the present case was clearly covered by them. What the Judicial Committee said is as follows:

But, in the opinion of their Lordships, the proviso to sec. 111-A is satisfied, apart from any matter covered by sec. 104-H, by holding it to be applicable to for instance as to the right of the Settlement Officer to deal cases where the challenge is with the subjects under sees. 104-A to 104-F; an illustration of such a challenge may be found in the title suit of 1922; in the allegation that the lands were not added lands within sec. 6 of Act IX of 1847, and that therefore the Settlement Officer was not entitled to treat them as falling under sees. 104-A to 104-F of the Bengal Tenancy Act.

15. To our mind, the case contemplated by the Judicial Committee in the passage quoted above is one where there is an initial lack of jurisdiction, in the revenue authorities to proceed under sees. 104A to 104F of the Bengal Tenancy Act, in other words, a case where there cannot be any question of any land-revenue being settled at all. It is such a case that is envisaged by the concrete illustration given. But where an estate is, in fact, a temporarily settled estate, and a fresh settlement of land-revenue can properly be made and has to be made, there is no initial want of jurisdiction in the revenue authorities to proceed under Chapter X, Part II of the Bengal Tenancy Act with respect to the estate, and any special or unalterable incident which they may come across in the course of settling rents of subordinate tenancies cannot exclude their jurisdiction, although as a matter of law they may be bound to give effect to the incident. It is well known that even when the revenue authorities are dealing with an estate which is unquestionably temporarily settled, they come across contracts as to the rate of

rent, entered into with the tenants before the enactment of the Bengal Tenancy Act. They cannot alter such contracts, and must give effect to them as the Judicial Committee emphasised and as sec. 191 of the Act impliedly enjoins. But this limitation of their powers, or rather, this obligation to give effect to certain contracts is not the same thing as their having no jurisdiction: it is only a case of their having to apply a certain rule and having to honour certain rights in the course of exercising their jurisdiction. In essence, the present case is in no way different. There can be no question that, as between the Government and the grantee of Lot No. 100, the lot was a temporarily settled estate. There can be no question either that with regard to the whole of it, including the areas covered by the ganti and the- dorganti, a fresh settlement of land revenue had to be made, whether or not the rents payable by the subordinate tenancies could be altered. In these circumstances, it is beyond argument that the revenue authorities had jurisdiction to proceed with respect to the estate under Chapter X, Part II of the Bengal Tenancy Act. In the course of the proceedings, as they went on settling the rents of subordinate tenants, they would come across the mokurari grants in favour of the gantidar and the dargantidar, made at a time when the head-lease was permanently held, and if they applied the law correctly, they would have to hold, in accordance with the principle contended for by Mr; Gupta, that for the purpose of adjudging the liability or otherwise of the ganti and darganti to pay an enhancible rent, the head-lease must be deemed to be continuing as a permanent grant. We would concede that although the darganti was created after the surrender of the permanent grant, the holder of the darganti would also be entitled to the benefit of the same principle on the footing that his rights flowed from those of his lessor, that is, the gantidar, as they were at the time when the ganti was created. But in either instance, it would be a case of giving effect to the contract between the parties, exactly as in ordinary cases where a contract, entered into before the Bengal Tenancy Act, is given effect to, with only this difference that the fiction of the continuance of the head-lease would be called in aid. In essence, there is no difference between the two cases. It must be borne in mind that the principle of the continuance of the surrendered head-lease does not extend beyond requiring that the lessor's estate must be deemed to continue so far as is necessary to preserve the rights and privileges of the under-lessees. It is not deemed to continue for all purposes. In the present case, it cannot be deemed to have continued even for the purpose of excluding a fresh assessment of land revenue, and thereby excluding, operations under Chapter X, Part II of the Bengal Tenancy Act. In order to protect the rights of the sub-lessees, it was only necessary that the revenue authorities, when they came to settle rents of the ganti and the darganti, should have to presume the continuance of the permanent estate and, on that footing, treat the rents as unalterable and leave them as they were. It was not necessary that they should not deal with the matter of the settlement of rent at all. If they applied the principle and left rents unaltered, they would be acting legally. If they did not, they would only be committing an error in the exercise of their jurisdiction, in which case it would be a matter for correction by means of a suit under sec.

104H of the Bengal Tenancy Act, clauses (e) and (g) of sub-sec. (5) of the section, as the learned Judge has found. It could not possibly be a case of total want of jurisdiction, nor a case for a suit under the proviso to sec. 111A. We agree that the principle contended for by Mr. Gupta is correct, but we cannot see why effect cannot be given to the principle by and through the revenue officers, just as an ordinary contract is given effect to by and through them. It does not appear to us necessary that the principle of the continuance of the permanent lease should operate beyond being taken notice of by the revenue authorities in settling the rents of the ganti and the darganti and if that be so, we do not see how the present case can be treated as one falling under the proviso to sec. 111A. If the Plaintiffs, have lost their remedy which they had under sec. 104H, they have to thank themselves, but the fact that they have lost their remedy can be no reason for forcing their case into the proviso to sec. 111A where there is no room for it.

16. In our opinion, in the facts of the present case, the only method of challenging the entry made by the revenue authorities was that provided for by sec. 104H of the Bengal Tenancy Act, and that remedy not having been availed of, the entry has become final by virtue of the provisions of sec. 104J. The present suit, as a suit under the proviso to sec. 111A is not maintainable, or to put it otherwise, it is barred by limitation.

17. In view of our decision on the first question, it is not necessary to deal with the remaining contentions of the parties. If the present suit is not maintainable, or it is barred by limitation, as we have held it to be, it is not material to consider whether, as a suit under the proviso to sec. 111A, it is defective by reason of the absence of a prayer for further relief. Equally immaterial are the questions raised by the cross-objection, because, whether or not the rent payable on the darganti was, in fact, mokurari, the contract stands superseded by the entry made in the record-of-rights which has now become unchallengeable by efflux of time. We need not, therefore, deal with these questions at all.

18. In the result, the appeal and the cross-objection are both dismissed,-the appeal because it fails on merits, and the cross-objection because it is not necessary to deal with it.

19. With regard to costs, we consider it proper to take notice of the fact that it was only in December. 1941. that the Privy Council for the first time held that the long series of decisions of this Court on the respective sphere of sees. 104H and 111A were erroneous. At the time when the present suit was brought, and even when it was tried by the lower Appellate Court, the Appellants had every reason to think that it was a proper suit under the proviso to sec. 111A. as interpreted repeatedly by this Court. In the circumstances, the order that we would make is that each party should bear its own costs throughout the litigation. Let the lease, dated the 28th July. 1856, granted by the Government to Nawab Najarali Khan be marked as Exhibit H.C.(1).

Blank, J.

I agree.