

(1953) 08 CAL CK 0026

In the Calcutta High Court

Case No : Letters Patent Appeal No. 6 of 1948

Sushil Kumar Chakravarty

APPELLANT

Vs

Rajendra Lal Bhattachariya and Another

RESPONDENT

Date of Decision : 27-08-1953

Acts Referred:

Bengal Tenancy Act, 1885 — Section 160

Citation : AIR 1954 Cal 412 : (1956) 1 ILR (Cal) 178

Hon'ble Judges : Chakravartti, C.J.; Lahiri, J

Bench : Division Bench

Advocate : Atul Chandra Gupta and Amiya Kumar Mukherjee, for the Appellant; Sitaram Banerjee, Syamadas Bhattacharyya and Manindra Lal Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, J.—This appeal by the defendant under Clause 15 of the Letters Patent is directed against a judgment and decree of Mr. Justice Das dated March 24, 1948 whereby he has decreed a suit for eviction of the defendant.

2. The facts leading up to this litigation are broadly these. On 7-6-1857, the predecessor of one Bibhuti Bhusan Roy granted a Mokarari Mourashi lease to the predecessor of one Jatindra Nath Bose in respect of 1051 bighas and 13 cottas of land in the Sunderban area. Out of this total area, 1000 bighas were actually assessed to rent at a progressive rate. On 12-7-1936, Jatindra Nath Bose granted a mokorari mourashi lease in respect of 8 bighas and 10 cottas out of the lands of his tenancy in favour of the defendant, Sushil Kumar Chakravarty, at an annual rent of Rs. 17/. The estate of Bibhuti Bhusan Roy was taken over by the Court of Wards and in execution of a certificate for arrears of rent, the tenancy of Jatindra Nath Bose was sold on September 5, 1938, under the Public Demands Recovery Act and purchased by the plaintiffs. The sale was confirmed on 5-11-1938, and delivery of possession was taken on 7-12-1938.

Thereafter the plaintiffs served a notice on the defendant u/s 167, Bengal Tenancy Act, claiming that the Interest of the defendant under the lease of 1936 was an encumbrance and instituted the suit out of which this appeal arises, alleging that after the service of notice u/s 167, Bengal Tenancy Act the interest of the defendant had been avoided and that he had no longer any right to stay on the land.

3. The defendant contested the suit on various grounds alleging that the sale at which the plaintiffs purchased was not a rent sale and so the plaintiffs had not acquired any right to annul encumbrances, that the notice u/s 167, Bengal Tenancy Act had not been served and that, in any event, his interest was a protected one under Clause (g) of Section 160, Bengal Tenancy Act, inasmuch as under the lease of 1857 Jatindra Nath Bose had been expressly authorised in writing to create tenancies and in exercise of that authority Jatindra Nath Bose had granted the mokorari mourashi lease in favour of the defendant. The trial court held that the sale at which the plaintiffs purchased was a rent sale and as such the plaintiffs had acquired u/s 20(3), Public Demands Recovery Act the power to annul encumbrances. It further held that the notice u/s 167, Bengal Tenancy Act had been duly served upon the defendant, but it held that the interest of the defendant was protected u/s 160, Clause (g), Bengal Tenancy Act, the result being that the plaintiffs' suit was dismissed.

4. The decision of the trial court was affirmed on first appeal by the Subordinate Judge, First Court, at Alipore. The judgments and decrees of the Munsif and the Subordinate Judge however, were reversed on Second Appeal by Mr. Justice Das, and the plaintiffs' suit was decreed upon the finding that the interest of the defendant was not a protected interest within the meaning of Section 160 Clause (g) of the Bengal Tenancy Act. Against this judgment and decree of Mr. Justice Das the defendant has filed this appeal.

5. The only point which requires consideration in this appeal is whether the tenancy created in favour of the defendant by Jatindra Nath Bose in the year 1936 is a protected interest u/s 160(g), Bengal Tenancy Act. This section was enacted to protect a right created with the ex-press permission in writing of the landlord at whose instance the tenure or holding was sold. In order that a lease granted by a defaulting tenant may be a protected interest under this clause, the power to grant it must have been given "expressly and in writing" by his lessor. We have accordingly to consider whether Jatindra Nath Bose was "expressly and in writing" given the power to grant the lease of the description which has been granted in favour of the defendant. The kabuliat executed by the predecessor of Jatindra Nath Bose is Exhibit "A". The relevant recital of this kabuliat is as follows:

"Jamite pushkaradi Khanan o imarat o bag-bagicha o ghar chhappar tayyar o nijakarkite kimba projabili kariya pattai hakuke danbikra-yadir sattadhihari haiya putra poutradi warisan krame upasattadhi bhog tapab-shat karite thakibe."

6. It means that the lessee will be entitled to enjoy the usufruct of the land

through his sons and grandsons and successors in interest by digging tanks, constructing buildings and raising structures and by exercising rights of gift, sale etc., and by cultivating the land in khas or by establishing tenants. We are informed that the expression "Nija karkite" which occurs in this kabuliati means khas cultivation, that is, cultivation, by one's own labour. The expression "Projabili" (establishing tenants) has been judicially interpreted by reference to Section 160 (g) in some of the decisions of this Court. In the case of -- "Akhil Chandra Mandal v. Surendra Nath Dutt 11 Cal LJ 87 (A), the head lease authorised the lessee to raise embankments, bridges, damkhals, cut jungles and "establish tenants according to your desire, construct housesand do other acts." Acting under this authority, the lessee created an "istemrari maurasi mokarari makadami" tenure which is a kind of subordinate tenure and not a raiyati holding. Mr. Justice Sarada Charan Mitra who was affirmed on Letters Patent Appeal held :

"the words "established tenants" do not necessarily indicate that the lessor gave the lessee express authority to create tenancies of the kind set up by the plaintiffs in this case. They are words commonly used in leases to indicate that the tenure created entitled the tenure holder either to cultivate the land himself or cause cultivation by means of tenants."

It was accordingly held that the sub-lease was not a protected interest u/s 160(g), Bengal Tenancy Act. In our opinion what was decided by Mitra, J. in this case was that under the head lease right was conferred upon the lessee to bring in only the cultivating raiyats and as the lessee created a permanent tenure, his act was not an exercise of the power expressly and in writing given to him.

7. The recital in the original Bengali lease is not to be found in the judgment of Mitra J. We sent for the original record and from that record we find that the vernacular words do not appear anywhere in the record; but a reference to the terms of the lease is to be found in the judgment of the first appellate court. From that judgment it appears that at least the word "Proja" was used in the relevant document and there was also some word which was the vernacular equivalent of the word "et cetera". Whether the word "Bili" was also used is not clear, because the quotation made by the learned Judge is an incomplete quotation. From the trend of the rest of the judgment and the reference to the recital in the lease, it may, however, be presumed that the word used in the original was the word "Bili" or some near equivalent.

8. In the case of -- "Afazuddi Khan v. Pra-sanna Gain" 39 Cal 138 (B), Jenkins C. J. and D. Chatterjee J. in deciding another appeal under the Letters Patent however held that the expression "Projabili" includes the grant of a permanent tenure, in this case also we sent for the original record and we found the Bengali recital quoted in the judgment of the Munsif. That recital is in the following terms:

"Khajana adayapurbak radichhakrame danbikri sattadhikarite putra poutradi krame param sukhen bhoga dakhil karite rahilen..... teen shat taka kara adaya

karatah projabili eetyadi dwaraya bhogadakhai kariben."

9. The expression "Projabili" as used in this kabuliat was held to include the grant of a permanent tenure. With great respect to Mr. Justice Das, we must observe that he was not quite correct in distinguishing the case of Afazuddi (B) on the ground that what was held to be a protected Interest in that case was a non-occupancy right. The facts of that case will show that one Pra-sanna Kumar Mitra created a permanent tenure in favour of Bhojendra Kumar Sen who in his turn granted a permanent lease to one Ganesh Chandra Chatterjee and Ganesh Chandra Chatterjee created a raiyati lease in favour of the plaintiff. The tenancy of Bhojendra was sold in execution of a decree for arrears of rent and the purchaser at the rent sale sought to annul the interest of Ganesh and also of the plaintiff. Jen-kins C. J. and D. Chatterjee J. held that the interest of Ganesh was protected and therefore the interest of the plaintiff could not be touched.

It was clearly held in this case that the permanent tenure in favour of Ganesh was included in the expression "Projabili" which occurred in the head lease and therefore the interest of Ganesh was protected under Clause (g) of Section 160, Bengal Tenancy Act. Unfortunately the earlier decision in the case of -- "11 Cal LJ 87 (A)", was not brought to the notice of the learned Judges in --"Afazuddi's case, (B)" with the result that the expression "Projabili" was held to include the creation of a tenure in the latter case, while the decision in the former case was to the contrary. In the case before us, however, the recital in the head lease (Exhibit A) is somewhat different from the recitals in the leases in the two cases discussed above. In this case the expression "proja-bili" is placed in juxtaposition to the word "Nija-karkite" (cultivation by the lessee himself) and is an alternative to khas cultivation. From these facts it is reasonable to conclude that the expression "Projabili" in Exhibit "A" means settlement with cultivating raiyats only.

10. The next question that requires consideration is whether the presence of a general authority in the head lease is sufficient to clothe the lessee with power to create an interest which would be binding on the purchaser at a rent sale u/s 160 (g), Bengal Tenancy Act. In the case of -- "Kristo Das v. Jatindra Nath" 16 CWN 561 (C), there are some observations which would indicate that the mere recital in a putni lease of the ordinary incidents of a putni grant u/s 3, Putni Regulation would not be an express authority u/s 160(g), Bengal Tenancy Act, but their Lordships went on to say that even if the recitals could be regarded as an express authority u/s 160(g), Bengal Tenancy Act, they could not be so regarded u/s 11, Putni Regulation which requires "an express authority apart from the conditions of the lease" and by the operation of Section 195(e), Bengal Tenancy Act, Section 11, Putni Regulation would prevail.

In the case of -- "Bidhu Mukhi v. Asmatulla" AIR 1916 Cal 519 (D) *ganderson*, C. J. and Mookerjee J. held that if a "durputni" lease expressly authorised a "darputnidar" to create a "sepatni" and in exercise of that power the "darputnidar" creates a "sepatni" such a "sepatni" is a protected interest u/s 160(g), Bengal Tenancy Act and cannot be annulled by a purchaser at a rent

sale. The learned Judges pointed out that that case was not governed by the decision in the case of -- "16 Cal WN 561 (C)", presumably because in the latter case the court really proceeded on an interpretation of Section 11 of the Putni Regulation. In our opinion the decision in the case of -- "AIR 1916 Cal 519 (D)", lays down the correct principle with regard to Section 160 (g) of the Bengal Tenancy Act, because if the landlord expressly and in writing burdens a lease by giving an authority to the lessee to create a subordinate interest, he cannot be permitted to ignore it and the purchaser at a rent sale cannot also be allowed to avoid it.

11. We have now to examine whether the lease granted by Jatindra Nath Bose in favour of the defendant created a tenure or a lease for the purpose of cultivation, if it is found that the lease was created for the purpose of cultivation only, it would be within the authority granted to Jatindra Nath Bose. But if it is found that it created a tenure, it would be outside that authority, because we have already pointed out that under the head lease (Exhibit A) Jatindra Nath Bose had an authority to bring the land under cultivation either by his own labour or by settling it with cultivating raiyats.

The kabuliat executed by the defendant, Sushil. Kumar Chakravarty, in favour of Jatindra Nath Bose is Exhibit 6. Mr. Gupta for the appellant has urged that it is a lease for the purpose of cultivation only, whereas the respondents have argued that it creates a tenure. From the recitals in the kabuliat (Exhibit 6) it appears that it is a mokorari mourashi lease in respect of 8 1/2 bighas of land at a rental of Rs. 17/- per annum -- the lessee undertaking to pay separately to the lessor any additional imposition that might be levied upon the lessor. The recitals about the previous-history of the land as given in this kabuliat show that the lessor had obtained two rent decrees against two tenants in respect of two tenancies, comprising an area of 9 bighas, 13 cottas and 2 bighas, 9 cottas, and in execution of those rent decrees the lessor Jatindra Nath Bose had obtained khas possession of the-total area of 12 bighas, 2 cottas and he was in khas possession of the entire area by settling the land with thika tenants. Out of this total area, the lessor granted a mokorari mourashi lease of 8 bighas and 10 cottas to the defendant at a rental. of Rs. 17/-, that is, at the rate of Rs. 2/- per bigha. The lessee was to enjoy the land by khas. cultivation or by settling tenants, by making. gardens, digging tanks, planting and cutting down. trees, by erecting pucca structures and by exercising rights of gift and sale. The lessee further stipulated that he would pay the rent in four instalments -- in Assar, Aswin, Pous and Chaitra. every year, and in case of sale or gift the transferee. would pay one-fourth of the consideration money as Chouth to obtain "kharij" from the landlord.

These recitals in our opinion go to show that. the defendant Sushil Kumar Chakravarty was taking a lease for the purpose of cultivation. The expression "Projabili" which also occurs in this lease might imply that the lease was a tenure, but Mr. Gupta has rightly pointed out that this expression in Exhibit 6 means authority to grant under-raiyati leases. Having regard to the previous

history of the land and to the other terms and conditions of this lease, we think that this contention of Mr. Gupta is correct. Mr. Bhattacharyya appearing for the respondents relied upon the case of -- Bhut Nath Naskar and Another Vs. Surendra Nath Dutt and Another (E), for the proposition that the interest of a raiyat at a fixed rate is not a protected interest u/s 160, Bengal Tenancy Act, but that case does not deal with Clause (g) of that section, but deals with the general question whether apart from an express authority of the lessor a raiyat at a fixed rate is a protected interest u/s 160, Bengal Tenancy Act. That decision is therefore of no assistance to the respondents.

12. For the reasons given above, we hold that the interest of the defendant Sushil Kumar Chakravarty under the kabuliat Exhibit 6 of 1936 is a raiyati interest and as such it is within the authority given expressly and in writing to the lessor Jatindra Nath Bose by Exhibit A and is, therefore, a protected interest u/s 160(g), Bengal Tenancy Act.

13. In the result this appeal is allowed and the decision of Das J. is reversed and the decree of the first lower appellate Court restored. The appellant will have the costs of this appeal and of the appeal before Das J.

Chakravarti, C.J.

14. I agree that this appeal should be allowed, but as we are differing from Mr. Justice Das in his view of -- "39 Cal 138 (B)", I desire to add a word as to how, I think his Lordship was misled. As my Lord has pointed out, in that case the owner at the top was one Prasanna Kumar Mitra, who held a ganti tenure and under him there was Brojendra Kumar Sen who was a "darganti-dar". Brojendra granted a "darmaurashi kayemi ganti" to Ganesh Chandra Chatterji and others and Ganesh Chandra Chatterji created a raiyati interest in favour of the plaintiff. It was Brojendra's "darganti" which was sold in execution of a rent decree and accordingly the question which the learned Judges had to consider in that case was whether or not the interest created by Brojendra in favour of Ganesh Chandra Chatterji was a protected interest. If that interest was a protected interest, the plaintiff was safe, because the protection enjoyed by Ganesh Chandra Chatterjee would enure to his favour, inasmuch as the purchaser at the rent sale would not be able to reach down to him. That those are the real facts appear clearly from the statement of facts prefixed to the report? the judgments themselves. There is, however, an inaccuracy of expression in the judgment of Mr. Justice D. Chatterjee who delivered the leading judgment and, in my view, it was that inaccuracy which misled Mr. Justice Das. In stating the contention of the appellants before them, Mr. Justice D. Chatterjee expressed himself as follows :

"It is contended that the lease given by Prasanna Kumar Mitra and others to Brojendra Kumar Sen authorised Brojendra Kumar to grant subleases, and as the sub-lease granted by Ganesh Chatterjee and brothers was a sub-lease, and as it was therefore within the authority granted by the lease given to Brojendra Kumar Sen, it was a "protected interest"."

It will be noticed that the learned Judge spoke of "the sub-lease granted by Ganesh Chatterjee" The sub-lease granted by Ganesh Chatterjee was the sub-lease of the plaintiff with which Brojendra's darganti lease had no concern. Obviously, what the learned Judge intended to say was not "the sub-lease granted by Ganesh Chat terjee and brothers," but "the sub-lease granted to Ganesh Chatterjee and brothers". As the learn ed Judge was speaking of the sub-lease granted by Ganesh Chatterjee, Mr. Justice Das, I think, was misled into thinking that the learned Judges were directly dealing with the non-occupancy in terest of the plaintiff created by Ganesh Chatter jee, but the true effect of the decision is as my Lord has stated.