

## Hari Mohan Dalal Vs Purendra Nath Nag Choudhury and Others

**Court:** Calcutta High Court

**Date of Decision:** Feb. 24, 1925

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Section 47

**Citation:** AIR 1926 Cal 356

**Hon'ble Judges:** Mukerji, J; Greaves, J

**Bench:** Full Bench

### Judgement

Greaves, J.

This is an appeal from an order of the Third Subordinate Judge of Alipur dated the 6th of December 1924. For an

understanding of the matters that arise in the appeal and the Rule it is necessary to state a few facts. One Raj Mohan Nag Choudhury was the

owner of certain property. He died leaving a son, Chandra Nath Nag Choudhury, who had married a lady named Nisadini. Chandra Nath had six

sons, one of whom named Bhupendra Nath Nag Choudhury was dead at the time of the events hereinafter referred to and his interest has passed

to his son Chandi Charan Nag Choudhury. After the death of Raj Mohan who had left all his properties by Will to his grandsons, the sons of

Chandra Nath, a suit was commenced for partition of the estate of Raj Mohan and for administration thereof and a Receiver was appointed. In

order to clear off the debts of Raj Mohan's estate it was necessary to raise money in some way or other and the Receiver applied for and

obtained an order for the sale of a portion of Raj Mohan's estate for the liquidation of his debts. Against that order an appeal was presented to this

Court and was numbered 385 of 1913 and this Court decided that it was inadvisable to sell the two mehals in accordance with the order of the

Court below and that it would be better that a patni lease should be created of these two mehals and of another mehal and that out of the selami to

be paid by the patnidars the debts of Raj Mohan's estate should be paid off.... The patni was put up to auction to the highest bidder and eventually

Surendra Nath Nag, one of the grandsons of Raj Mohan Nag, and Nisadini Dad, the widow of Chandra Nath, were the highest bidders for the

patni. The patni was to be granted at an annual rent of Rs. 7,000 and at a selami. I should mention that several strangers competed for the patni

amongst others one Harendra Nath Ballav, Surendra Nath Nag Choudhury and Nisadini Dasi being the highest bidders. A patni was granted to

thorn at a patni rent of Rs. 7,000 and a selami of Rs. 1,82,000. Surendra and Nisadini had no money to pay the selami and accordingly they

mortgaged the patni to the applicant before us, Hari Mohan Dalai, in order to pay the selami. The mortgage included not merely the patni interest

but also the zamindari interest of Surendra, Nisidini and Upendra. Subsequently, Nisadini and Surendra failed to pay the patni rent and a suit was

brought for the rent and a decree was obtained. In execution of the decree the decree-holders sought to bring the patni to sale and it is against the

order for sale of the patni that this appeal has been preferred by Hari Mohan Dalai, the mortgagee of the patni interest and of a portion of the

zemindari interest. He applied under the provisions of Section 47 of the Civil P.C., to the lower Court asking for an order that the execution was

legally untenable and that the property should be sold subject to the liabilities for his mortgage which amounted to a sum of over 3 lacs of rupees

and in respect of which he has obtained a mortgage-decree. The Court below dismissed the mortgagee's application on various grounds which are

stated in the various orders, which appear in the paper book and accordingly this appeal has been preferred.

2. At the outset a preliminary objection was taken on behalf of the respondents that no appeal lay. The objection was based on the ground that the

present appellant before us, the mortgagee, was not a party to the rent suit which had been brought by the zamindars for the patni rent and that he

was not a representative within the meaning of that word and that accordingly he was not entitled to appeal to this Court. There is also a rule which

was obtained by the appellant before us having regard to the difficulty that was felt on this point. We think, however, that this objection must fail

because we think that within the meaning of the decisions of this Court the appellant is a representative and, therefore, comes within the scope of

the provisions of Section 47 of the Civil P.C. In the case of *Ishan Chunder Sirkar v. Beni Madhub Sirkar* [1897] 24 Cal. 62, the matter was

discussed by a Full Bench of this Court and according to the judgment of that Court a representative is a person who is bound by the decree and

the learned Judges further said that a person affected by the decree was really a representative within the meaning of the term as used in Section 47

and there is another case which has some bearing on the point, namely, the case of *Srimati Nissa Bibi v. Radha Kishore Manikya* 11 C.W.N. 312.

It was held in that case that the person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree was

a representative of the judgment-debtor within the meaning of Section 244 of the Civil P.C. We think, therefore, that the preliminary objection

must fail and that an appeal is permissible to this Court.

3. Now various questions have been raised before us in this appeal. It is not necessary, we think, to deal with all of them because we think that

two points that have been urged before us really dispose of the matter. Firstly, it has been urged before us that this is not a rent-decree but is

merely a money-decree. As against this we were referred to the provisions of Section 148-A of the Bengal Tenancy Act and it was argued on

behalf of the opposite parties that having regard to the words of that section and the decisions of this Court the decree passed was a rent-decree

and it could be executed as such. Section 148-A provides that "where a cosharer landlord who has instituted a suit to recover the rent due to all

the cosharer landlords in respect of an entire tenure or holding and has made all the remaining cosharers parties, defendants, to the suit is unable to

ascertain what rent is due for the whole tenure or holding or whether the rent due to the other cosharer landlords has been paid or not owing to the

refusal or neglect of the tenant or of the cosharer landlords, defendants to the suit, to furnish him with correct information, such plaintiff cosharer

landlord is entitled to proceed with the suit for his share only of the rent. The vakil for the opposite parties referred to us the plaint in the suit and to

the allegations there made as showing that the suit fell within the exact terms of Section 148-A and we were referred to various decisions of this

Court in support of this proposition, notably to Nunda Lal Choudhury v. Kala Chand Choudhary 15 C.W.N. 820, Brohmandan Nath Deb Sirkar

v. Hem Chandra Mitter 18 C.W.N. 1016, Baikuntha Nath Sen v. Ramapati Chatterjee [1918] 27 Cri.L.J. 101, Profulla Chandra Ghose v.

Baburam Mandal [1922] 34 Cri.L.J. 462 and Jagabandhu Nandi and Others Vs. Abdul Hamid Mea and Others, . In all these cases, in some of

which the suits were held to fall within the provisions of Section 148-A and in others not, what were the necessary allegations in a suit of this nature

were discussed and considered, and it seems to us that for a suit to fall under the provisions of Section 148-A it must be a suit which is to recover

the whole of the rent due. It is true that some of the rent may turn out not to be actually due as it may have been paid to some of the cosharers. But

it certainly seems to be of the essence of a suit u/s 148-A that either the whole rent is due or else the plaintiffs are unable to ascertain whether or

not the whole of the rent is due. Now it seems to us that the present case does not fall under any such principle. From the facts which I have

already stated it appears that some of the zamindars were themselves patnidars and, consequently, it was clear that no rent in respect of the patni

was due to those zamindars who occupied the dual positions of zamindars and patnidars as well. Consequently the suit was not and could not be

to the knowledge of the plaintiff in the suit--a suit for the whole rent in respect of a tenure or holding--and for these reasons we think that the suit

does not fall under the circumstances of this case, which are, of course, special under the provisions of Section 148-A; that is to say, it follows that

the decree which has been passed is not a rent decree within the meaning of Section 148-A but merely a money-decree which can only be

executed as such.

4. The second point which arises is whether the interest of the mortgagee here is a protected interest within the provisions of Section 160(g) of the

Bengal Tenancy Act or not. The opposite party says: "No." The appellant before us says: that it is a protected interest under the provisions of

Section 160(g) of the Bengal Tenancy Act. The Sub-section provides that any right or interest which the landlord, at whose instance the tenure or

holding is sold, or his predecessor-in-title has expressly and in writing given the tenant for the time being permission to create shall be deemed to

be protected interest within the meaning of Oh. XIV of the Bengal Tenancy Act. Now I have already stated the circumstances under which the

mortgage was created. It was created, if I may repeat what I have stated, to preserve the property which formed Raj Mohan's estate and to clear

that property from debts and to prevent a sale of any portion of that estate. The judgment of this Court in Appeal No. 385 of 1913, to which I

have referred, states that the patni lease was granted by the order of the Court and that it would be binding upon all the parties to the litigation, and

it directed that the patnidars who had borrowed the money for the purpose of paying the selami from the mortgagee should execute a mortgage in

his favour as arranged between the parties. On behalf of the opposite party it is urged that so far as the mortgage is concerned the plaintiffs in the

rent suit are not in any way parties thereto or bound thereby, and we were referred to the terms of the patni and to the mortgage itself. We were

further referred to the fact that the patni rent was a sum of Rs. 7,000 and that over and above the patni rent the collections from the mehals

amounted to an additional Rs. 10,000 or Rs. 11,000, and we were further referred to the fact, which I have already stated, that strangers came

forward and bid for the patni and that it was by mere accident that in the end Nisadini and Surendra happened to be the highest bidders and that

for the purpose of this suit they should be treated as strangers in respect of the transaction. We feel some difficulty in agreeing with this contention.

It seems to us that the mortgage was created for the benefit of the whole body of zamindars and certainly the plaintiffs in the rent suit, although they

were not patnidars and were not parties to the mortgage in any way, have been benefited by the creation of the mortgage and by the clearing of the

estate from the debts out of the money advanced by the mortgagee. It seems to us, therefore, that the interest that is to say, the mortgage in this

instance, which has been created is an interest which comes within the provision of Section 160 (g). It was created by the order of the Court and

with consent of all the parties to the suit and it seems inequitable to say that it is not an interest which should receive the protection given to such an

interest under the provisions of Section 160 (g). We were referred to various cases dealing with protected interests and to the words which are

said to be sufficient in a patni to bring an interest within the provisions of Section 160 (g). We do not think, however, that it is necessary to refer to

the cases in detail because, for the reasons which I have already indicated, we think that the interest is a protected interest within the provisions of

Section 160 (g) and we are fortified in this by the actual words of the patni which empowers (Cl. 2) the patnidar to exercise all acts of

proprietorship in accordance with his own will, to transfer the patni and to do all other acts of proprietorship.

5. The result, therefore, is that the appeal succeeds, and we hold that the decree obtained by some of the zamindars was merely a money-decree

and not a rent decree within the provisions of Section 148-A, and that the interest of the mortgagee is a protected interest within the provisions of

Section 160(g) of the Bengal Tenancy Act. The appellant will be entitled to his costs in this appeal which he will add to his mortgage. We assess

the hearing-fees at five gold mohurs.

6. Let the record be sent down at once.

Mukerji, J.

7. I agree.