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Jogendra Lal Sarkar Vs Mahesh Chandra Sadhu and Others

Court: Calcutta High Court

Date of Decision: Jan. 14, 1928

Final Decision: Allowed

Judgement

Mukerji, J.
The facts, so far as they are necessary for the purposes of the present appeal, are these. The suit out of which this appeal has

arisen was for recovery of minimum royalty (from kist Bhadra 1319 B. S. to kist 15th Joistha 1325 B.S.) and coal rent (from Aswin 1319 to

Aswin 1324) for some coal lands which the Defendants are alleged to be holding under the Plaintiff under a dar puini lease. The lease is dated

Falgun 1314 (February 1908) being in respect of the 3 annas 4 pies share of Touzi No. 12 Lot Churulia, to the extent of which share the Plaintiff

had then the interest of a putnidar in the said Lot under the zemindar the Burdwan Raj, and is one for a period of 999 years. The Defendants were

at the date of the lease the putnidars in respect of the remaining share in the Lot. They subsequently purchased at an auction two-thirds of the

Plaintiff"s putni interest. The suit accordingly was for the amounts due to the remaining one-third of the 3 annas 4 pies share which still belongs to

the Plaintiff.

2. Of the defences that were taken all that is relevant at the present stage is that the Plaintiff is only a putnidar and as such has no title to the

underground, that the Defendants were evicted by title paramount, namely, the Burdwan Raj, who in February 1913 served a notice on the

Defendants or their sub-lessees informing them that they had no title to the under-ground and asking them to stop work in the under-ground and

that accordingly the Defendants were obliged to take a prospecting lease from the Burdwan Raj on the 19th Magh 1313 B.S. (--February 1917).

3. The suit was instituted on the 31st August 1918. Thereafter in October 1919, the Defendants, it is said, have taken a regular mining lease of the

under-ground from the Burdwan Raj. It is clear, however, that the incidents of this transaction can have no bearing on the rights of the parties as

they, were during the period in suit.

4. The Subordinate Judge who tried the suit gave the Plaintiff a decree substantially for the entire period in suit. Its correctness has not been

challenged before us except as regards the view of the Defendants liability on which he proceeded and in respect of which the District Judge has

differed from him. On the decree being thus given the Defendants appealed to the District Judge. In the appeal the putni kabuliyat under which the

Plaintiff is alleged to be holding under the Burdwan Raj was produced on behalf of the Defendant and was proved and marked as Ex. X, being

received as a piece of additional evidence. The Plaintiff complained that the question of eviction by title paramount was not put in issue in so many

words and so he had no opportunity of meeting the point. On this the District Judge remanded the suit to the trial Court to determine two issues,

one of which was issue No. 3 and the other an additional issue on the question of eviction by title paramount.

5. Issue No. 3 was worded thus: ""Whether the Plaintiff had no title to the under-ground coal when he created the lease for the same in favour of

the Defendant No. 1 and his co-sharer? Whether the Plaintiff has no title to the under-ground of the lease-hold? Whether the Defendant No. 1

executed the kabuliyat under the representation of the Plaintiff that he had such right and in honest belief in that representation?"" This issue had

been decided by the trial Court in Plaintiff"s favour, but it was now to be decided again in the light of the terms of the document Ex. X. The

additional issue that was framed by the District Judge was in these words: ""Was there eviction of the Defendants by title paramount prior to their

taking a lease of the under-ground right from the Maharaja?

6. The Subordinate Judge on remand found on the 3rd issue that the putni kabuliyat Ex. X was not the original putni kabuliyat by which the putni

was created but it was merely a confirmatory kabuliyat which was executed by the predecessors-in-interest of the Plaintiff by way of getting

mutation of their names in the sherista of the Burdwan Raj, that the terms of the original grant not being in evidence it. was not possible to ascertain

whether the grant included minerals, that merely because the Plaintiff was a putnidar it could not be held that he was entitled to the under-ground,

that the Defendants themselves being putnidars to the extent of about 15 annas cannot be said to have executed the dar-putni kabuliyat in Plaintiff"s

favour by reason of any representation on the part of the Plaintiff as regards his title to the under-ground and that they themselves had the belief

that the Plaintiff had such title. As regards the additional issue the Subordinate Judge held that there was no eviction of the Defendants by title

paramount, that they never went out of possession or surrendered their tenancy under the Plaintiff but that they attorned to the Burdwan Raj only

with a view to facilitate their sub-letting of the lands which was in their contemplation, but the effect of that attornment was not a renunciation of

their character as dar-putnidars under the Plaintiff, though there was a sufficient claim or demand by the Burdwan Raj which was the reason for

their adopting this course, in other words by adopting this course, to use a homely phrase, the Defendants only added a second string to their bow.

7. On the findings arriving before the District Judge (who was the successor of the District Judge who had made the order of remand), that learned

Judge came to a series of findings which, to my mind, do not seem to be altogether clear or reconcilable with each other, except one very definite

finding at which he ultimately arrived and which he put down in the following words:"" The legal dispossession by title paramount must be held to

have taken place in this case with effect from the 19th Magh 1323 B.S., that is, the date of the prospecting lease"" (meaning the prospecting lease

which the Defendants executed in favour of the Burdwan Raj in February 1917). On that finding the learned District Judge modified the decree of

the trial Court by limiting it to the period down to the 18th Magh 1323 B. S.

8. From this decree of the District Judge the Plaintiff has appealed. The arguments that have been advanced on his behalf give rise to two

questions: first, whether the Defendants are estopped from pleading that the Plaintiff has no title to the underground, and second, whether there has

been an eviction such as would disentitle the Plaintiff to recover.

9. The first question must be decided upon the provisions contained in sec. 116 of the Evidence Act. The section as applicable to the case runs

thus: ""No tenant of immoveable property.... shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had,

at the beginning of the tenancy, a title to such immoveable property."" The Judicial Committee in the case of Musst. Bilas Kunwar v. Desraj Ranjit

Singh 19 C.W.N. 1207 (1915) had occasion to consider the provisions of this section and what was said by their Lordships in that case was this:

Sec. 116 of the Indian Evidence Act is perfectly clear on the point and rests on the principle well established by many English cases, that a tenant

who has been let into possession cannot deny his landlord''s title, however defective it may be so long as he was not openly restored to possession

by surrender to his landlord."" This, however, it may be contended and indeed it has been so contended, is not an exhaustive exposition of the

section, as the case in connexion with which these observations were made was one in which a tenant who had received a notice to quit never gave

up possession and yet denied his landlord''s title. At the same time, in the words of the section the estoppel operates only during the continuance of

the tenancy. There has not been, it must be conceded, a discontinuance of the tenancy in any of the modes by which a tenancy is ordinarily put an

end to. Treating the matter as a matter of fact only, all that was done by the tenants, upon the findings of the Courts below, is that they took a

prospecting lease from the Burdwan Raj and this they did, as far as can be made out, without reference to the Plaintiff and without giving him to

understand that they would thenceforward hold not under him but under the Burdwan Raj. As was pointed out in the case of Parbutti Dasi v. Ram

Chand Bhattacharjya 3C. L. R. 576 (P.O.) (1879) in which the circumstances were somewhat similar, mere payment of rent to a third party is not

enough to determine the tenancy and discontinuance of the tenancy in such circumstances must be satisfactorily proved by the party who alleges it.

Now "" a tenancy determines either by having run its prescribed course or by act of parties whilst it is running or by act of law. Instances of a

determination of the first kind are where a lease is made for a certain period and that period expires or where an event happens in itself uncertain

(e.g., the death of the lessee or some other person), upon the happening of which the term is expressly limited. A determination of the second kind

is brought about by one of the following acts: determination of the will (in tenancies-at-will), disclaimer and notice to quit (in yearly or other

periodical tenancies), surrender, merger, and forfeiture (in tenancies generally). A determination of the third kind, i.e., by act of law only, results

from the operation of the statute of limitation."" (Foa on Landlord and Tenant, 6th Ed., P. 649). An attornment to a third party is a disclaimer (Ibid

p. 653); but ""attornment"" in the sense in which the word is used and understood in English law is not a mere agreement in favour of a third party to

pay rent, but has been defined as"" the act of the tenants" putting one person in the place of another as his landlord"" [Cornish v. Searell SB & C

471(1828), per Holroyd, J.]. In the present case the tenancy of the Defendant under the Plaintiff has not run its prescribed course, nor has it been

determined by any act of the parties or by operation of the statute, and in my judgment that tenancy was continuing at the date of the suit. In

connection with the question of estoppel however, there is another part of the section that has got to be considered, namely, the point of time to

which the denial would relate. It is true that the defence was that the Plaintiff as putnidar had no title to the under-ground, and from that point of

view the denial of title related to the beginning of the tenancy as well as to any other point of time, but the estoppel would operate only as regards

the denial in so far as it relates to the beginning of the tenancy and not to any other point of time. Though the tenancy may be continuing it is quite

open to the tenant to plead and show that his liability to pay the rent has wholly or partially or for a time ceased. Such a plea does not amount-to

disputing the landlord''s title but is really one of confession and avoidance. One such plea is that that of non-liability to pay the rent on the ground

that the lessor''s title has been defeated by a title paramount or in other words that there has been eviction by title paramount. In the case of a

complete eviction it is not quite easy to see the distinction as the question of continuance of tenancy and the question of eviction by title paramount

terminating the liability to pay the rent would go hand in hand. But in the case of a partial eviction demanding not suspension but abatement of rent

the distinction is quite apparent. That under such circumstances a plea of this description is available to the tenant has been held in cases both

before and after sec. 116 of the Evidence Act came into being [Ammu v. Rama Krishna Sastri I. L. R. 2 Mad. 226 (1879), Gopananda Jha v.

Govinda Prosad 12 W. R. 109 (1869), Burn & Co. v. Rushomoyi Dasi 14 W. R. 86 (1870) and Mohun Mahtoo v. Shumsul Huda 21 W. B. 6

(1873) j. The second question then comes up for consideration. Against the covenant to pay the rent eviction by title paramount is a good defence.

That defence obviously must be established by the party who sets it up. For this proposition of onus no authority is needed."" Eviction by title

paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount of the lessor

which destroys the effect of the grant and with it the corresponding liability for payment of rent; so that mere eviction from or deprivation of the use

and enjoyment of the demised premises or part of them, whether such eviction be lawful or unlawful, is insufficient where the lessor''s title is not

affected or called in question. To constitute a good defence in this case three conditions must be fulfilled. The eviction must have been from

something actually forming part of the premises demised; the party evicting must have a good title, and the tenant must have quitted against his will.

(Ibid, page 194). Of these elements the first is undoubtedly present and as regards last its presence on the facts is at the least extremely doubtful;

but as regards the second element it is impossible to hold that the Defendants have succeeded in making it out. To constitute eviction forcible

expulsion is not necessary [Hill v. Saunders 4 B. & O. 529 (1825), followed in Noorijan Sirdar v. Bimala Sundari Gupta 18 C. W N. 552

(1812)]."" It is not necessary that the tenant should go out of possession, and if upon a claim being made by a person with title paramount he

consents to an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will

be equivalent to an eviction and a fresh taking."" [Foa on Landlord and Tenant, 6th Ed., pp. 194-195; Banku Behari Ghose v. Madan Mohan Roy

26 C. W N 143 (1921) and Ram Chandra Chatterji v. Pramatha Nath Chatterji 35 C. L. J. 146 (1921)]. But what the Defendants did amounts

not to an attornment in favour of, but merely an agreement to pay rent to, the Burdwan Raj, as I have already said. Moreover as explained by

Lord Denman, C. J., in Neale v. Mackenzie 1 M. & W. 747,759 (1836) title paramount is a title superior to those both of the lessor and the

lessee against which neither is enabled to make a defence. This the Defendants have failed to prove. The putni kabidiyat Ex. X is not the original

document creating the putni. It is dated 19th December 1818 only, a few months prior to the enactment of Reg. VIII of 1819. It describes the

status of the Plaintiff''s predecessors as being that of putnidars, and neither adds to nor subtracts from the rights that they or their predecessor-in-

interest had as holders of the putni. The preamble to the Regulation gives an idea as to the nature of the putni taluks such as they were understood

to mean in those days, but the mere use of the words ""putni"" and ""putnidar"" would not enable one to judge the exact incidents of the tenures or the

rights of the holders thereof to which or to whom the terms were applied. It is obvious that the terms of the Regulation cannot be called in aid for

the purpose of determining the incidents of a pre-Regulation putni such as the one in the present case. In my view it was for the Defendants to

show affirmatively that the Burdwan Raj and not the putnidar had the right to the under-ground, and that they have failed to discharge that burden.

It has been on behalf of the Respondents that the fact that the Burdwan Raj is the superior landlord relieves them of the burden they have to

discharge, but in this I cannot agree.

10. In this view of the matter I am of opinion that the effect of the grant made by the Plaintiff in favour of the Defendants has not been destroyed

and that their liability to pay the rent therefore continued.

11. It is not necessary in the present case to deal with the question whether in the absence of evidence as to the grant itself the Plaintiff as putnidar

can be held entitled to the underground, a position that has been contended for on behalf of the Appellant on the supposed authority of the decision

in Raja Bhupendra Narayan Sinha Bahadur v. Rajeswar Prosad Bhakat (13). The result is that in my judgment the appeal must succeed. I

therefore allow the appeal, reverse the decision of the District Judge and restore that of the Subordinate Judge with costs in this and the lower

Appellate Court.

Cuming, J.

I agree.