

(1958) 02 CAL CK 0023

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1455 of 1953

Santosh Kumar Mitra

APPELLANT

Vs

Arabinda Chowdhury and Others

RESPONDENT

Date of Decision: Feb. 5, 1958

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 178(1)(g), 178(3)(d)

Citation: 62 CWN 370

Hon'ble Judges: Law, J; Das Gupta, J

Bench: Division Bench

Advocate: Jitendra Kumar Sen Gupta and Samarendra Nath Banerjee, for the Appellant; Anil Kumar Das Gupta and Sushil Kumar Biswas, for the Respondent

Final Decision: Allowed

Judgement

Das Gupta, J.

The respondent brought the present suit for recovery of Rs. 2,500 paid by defendant No. 2 to defendant No. 1 as selami for the lease granted by defendant No. 1 to defendant No. 2. The claim was based on a stipulation in favour of the predecessor of the plaintiff at the time of the lease taken from him by the predecessor of defendant No. 1. The stipulation is in these words:

The plaintiff's case was that this entitled him to the selami that was paid to defendant No. 1 by the sub-lessee, defendant No. 2. The defence contention was that the words should be considered as synonymous with the words and that this term in the lease did not entitle the superior landlord to obtain any part of the selami forming part of the consideration for which the lease was being given. It was also contended that, in any case, the stipulation is not enforceable in view of the provisions of section 178(1)(g) of the Bengal Tenancy Act.

2. The trial court accepted the plaintiff's construction of the stipulation and held further that the stipulation was enforceable and that section 178(1)(g) of the Bengal

Tenancy Act had no application and only section 178(3)(d) of that Act applied. The appellate court agreed with the trial judge's construction of the stipulation and was of opinion the stipulation was not hit by section 178(3)(d) of the Bengal Tenancy Act. Though there is no clear finding that the provisions of section 178(1)(g) do not apply, it seems that that was what the learned judge who decided the appeal thought. He accordingly dismissed the appeal.

3. Three points are raised before us on behalf of defendant No. 1. who has preferred the present appeal; first, that the court below erred in the construction of the stipulation, secondly, that the stipulation, in any case, is not enforceable being hit by the provisions of section 178(1)(g) and thirdly that the stipulation was a personal covenant and did not run with the land.

4. On the question of construction of the stipulation, as set out above, I am of opinion that though the drafting is far from clear, it is not possible to accept the construction suggested by Mr. Sen Gupta on behalf of the appellant. The English translation of the stipulation suggested by Mr. Sen Gupta himself was in these words: "If I lease out or sell this land or any portion of it to another person, then you shall get the mutation fee or selami in respect of it. Any objection of me in that respect will not be maintainable." In the case of a sale the question of a mutation fee arises but there the question of selami does not arise. Again, in the case of a lease of the land, there will be no question of mutation in the books of the superior landlord and so there will be no question of mutation fee. Payment of selami, however, usually forms part of the consideration of a lease. It is difficult, therefore, to make any sense out of the stipulation unless one accepts the construction suggested by the plaintiff, that the selami, that would be received by the lessee in respect of any sub-lease granted by him would have to be paid to the superior landlord. The first point raised by Mr. Sen Gupta, therefore, fails.

5. In my opinion, the contention of Mr. Sen Gupta that this stipulation is not enforceable in the face of the provisions of section 178(1)(g) of the Bengal Tenancy Act is sound. The material portion of section 178(1)(g) is in these words:

Nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall take away or limit the right of an occupancy raiyat to transfer his holding or any share or portion thereof in accordance with the provisions of sections 26B to 26G.

6. Section 178(3)(d) is in these words:

Nothing in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of an occupancy raiyat to sub-let subject to and in accordance with the provisions of this Act.

7. The first question that arises for consideration is whether, in view of the provisions in section 178 (3)(d) as regards the right of an occupancy raiyat to sub-let,

the provisions of section 178(1)(g) are excluded as regards the right of an occupancy raiyat to sublet. It has to be noticed that the provisions of section 26B which are in these words:

The holding of an occupancy raiyat or a share or a portion thereof, together with the right of occupancy therein, shall, subject, to the provisions of this Act, be capable of being transferred in the same manner and to the same extent as other immovable property.

are wide enough to include cases of lease. That the right to lease was intended by the legislature to be included within the words, "capable of being transferred," used in section 26B, appears further clear from the fact that when section 26C of the Bengal Tenancy Act was amended, clause (6)(b) of that new section read: "Transfer does not include partition or a lease." The very fact, that the legislature thought it necessary to say in section 26C that transfer would not include a lease, justifies the conclusion that the word in section 26B does include "lease."

8. The position, therefore, is that while section 178(3)(d) contains a provision protecting the right of an occupancy raiyat to sub-let by saying that, "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of an occupancy raiyat to sublet subject to and in accordance with the provisions of this Act," section 178 (1)(g) used words which gave the occupancy raiyat even greater protection in respect of his right to transfer, including the right to lease. When in any statute one section gives a wider right than another section, I can see no justification for the view that the wider protection given by one section is cut down to the lower limit laid down by a different section I have, therefore, come to the conclusion that though the provisions of section 178 (3)(d) may apply in respect of the right of an occupancy raiyat to sublet, that is no reason for thinking that the provisions of section 178(1)(g) do not apply and that, in law, the provisions of section 178(1)(g) are also applicable. It is undisputed that the defendant No. 1 is an occupancy raiyat and that before him Sarada Dasi was an occupancy raiyat. If therefore, on a reasonable interpretation, the stipulation is held to limit her right to lease, the stipulation will not be enforceable.

9. On behalf of the respondents, it is argued, that the mere requirement, that the selami payable for the lease would have to be paid over to the superior landlord, does not amount to a limitation of the right to lessee. I agree that, in form, it is not a limitation. In my view, however, in substance, this is a limitation within the meaning of section 178(1)(B) of the Act. It is well-known that when a lease is granted, the yearly rent reserved usually forms only a part of the consideration-very often a minor part-and that the selami that is paid forms, if not a major part, certainly an important part of the consideration for the lease. An agreement that this entire selami would have to be paid over to the Superior landlord cannot, therefore, but be considered to be a serious inroad on the right of the raiyat to lease. My conclusion, therefore, is that the stipulation that the selami for the lease would have to be paid

over to the supereior landlord is hit by the provisions of section 178(1)(g) and is, therefore, not enforceable. The plaintiffs are not, therefore, entitled to a decree.

10. In view of my conclusion on this point, it is not necessary to discuss or decide the further point raised that this was a covenant not running with the land but only personal to Sarada Dasi.

11. I would therefore, allow the appeal, set aside the judgment and decree passed by the courts below and order that the suit be dismissed. The appellant will get his costs here and below.

Law, J.

I agree.