(1936) 07 CAL CK 0036

Calcutta High Court

Case No: Appeal from Original Decree No. 105 of 1933

Midnapore Zemindary Company, Limited		APPELLANT
	Vs	
Radhikanath Biswas		RESPONDENT

Date of Decision: July 2, 1936

Final Decision: Allowed

Judgement

1. The Plaintiff is the purchaser of a sepatni at a rent execution sale with power to annul all incumbrances. He instituted the suit for recovery of khas possession of certain lands together with mesne profits from the darpatnidars, the Midnapore Zemindary Co., Ltd., after service of notice under sec. 167 of the Bengal Tenancy Act on them, alleging that they had been in wrongful possession of the lands. The Subordinate Judge having decreed the suit the Defendant Company has preferred this appeal. The history of the creation of the tenures has been set out in detail in the judgment of the Court below. For the purposes of this appeal, the facts necessary to be stated are the following.

2. The patni under which the tenures are held was created in 1842. The deed of its creation is not on the record but there is evidence that it consisted of 96 Mouzas. In 1852, the darpatni was created in respect of 31 out of the said 96 Mouzas, two of which were Monaharpur and Nischindipur. It is an admitted fact that the lands of these different villages did not lie all in one block but lay scattered at different places within the Taraf. The patta in respect of this darpatni has not been produced but the kabuliyai is in evidence. In 1857, the sepatni concerned in this suit was created in favour of the then patnidar by a patta and a kabuliyat, both of which are in respect of Mouza Monoharpur and at a rental of Rs. 432 per annum. In 1866, the patnidar granted an ijara of the sepatni to the darpatnidar for a period of 15 years; and in 1867, during the currency of this ijara, the sepatni was sold to certain persons called the Duttas. After several successive devolutions, into the details of which it is not necessary for us to enter, the patni as well as the darpatni eventually passed to the Midnapore Zemindary Co., Ltd., in 1916, and in 1918.

3. The Company instituted a suit for rent, No. 21 of 1928, against the Dutts and obtained a decree. In execution of that decree the sepatni was put up to sale and on the 6th June, 1929, it was purchased by the Plaintiff with power to avoid all incumbrances.

4. Now, in the revenue-survey maps of 1853, the darpatni having, as already stated, been created in 1852 and the sepatni created later on in 1857,-the lands of Mouza Monoharpur were shown on the east of a river named Bhairab; and on the west of the said river certain lands were shown as comprising Monoharpur Chak. And in the revenue survey map of Mouza Monoharpur certain quantities of land lying within the ambit of Mouza Monoharpur were shown as Nischindipur. In the Thak map of that year, however, there was no mention of Mouza Nischindipur. In the Cadastral Survey Settlement operations which began about the year 1918 and ended sometime in 1922 or thereabouts, the lands of the Mouza and of the Chak were recorded in this way: (1) Monoharpur Mouza No. 46 within Khatian No. 177, area 306 02 acres, rental Rs. 452, consisting of a sepatni in the possession of the Duttas and Khatian No. 34, area 251 80 acres, forming part of a darpatni in the possession of the Company. (2) Chak of Monoharpur Mouza No. 1, Khatian No. 93, area 100 83 acres, with no separate jama but referable to Khatian No. 177 and so forming a part of the sepatni and Khatian No. 13, area 99 38 acres, forming part of a darpatni of the Company. The Plaintiff''s case in the plaint was that the lands of Khatians Nos. 34 and 13 appertained to the sepatni, that the Company were in wrongful possession of the lands as included in their darpatni and that accordingly he had served notice on the Company under sec. 167 of the Bengal Tenancy Act for annulling the incumbrance in respect of the lands and was entitled to recover possession of them.

5. Various defences were taken by the Company in their written statements amongst which it is necessary to mention only a few, namely the following: That the suit was not maintainable in the form in which it was brought; that it was barred by the principles of acquiescence, waiver and estoppel, that the sepatni purchased by the Plaintiff never included the lands for which the suit had been brought, the said lands lying with Chak Monoharpur and Mouza Nischindipur and that the title under which the Company held the lands was not an incumbrance which could be annulled in accordance with the provisions of sec. 167 of the Bengal Tenancy Act; and that the Plaintiff''s claim for khas possession and also for mesne profits was not sustainable.

6. As already stated, the Subordinate Judge made a decree in Plaintiff''s favour. He found that the Plaintiff had purchased the entire sepatni whatever may have been its extent, that the Chak Monoharpur or Mouza Nischindipur had no separate existence but they formed part of the original Mouza Monoharpur and that the adverse possession of the Company and their predecessor was an incumbrance which the Plaintiff as purchaser at a rent-execution sale was entitled to avoid under the law. The case has been argued in great detail and in all its aspects by the learned Advocates on both sides and after considering all the materials that there are on the

record, we have come to the conclusion that the decision of the Court below is wrong. And it seems to us that in arriving at this decision the Court below has entirely misdirected itself in construing the extent of the darpatbni grant in the light of a series of documents which are more or less irrelevant for that purpose, namely, the Thak and the Revenue Survey Maps, the Mahal-war Register and the General Register and it has entirely overlooked the terms of the sepatni grant itself which is the document primarily to be looked into for this purpose and it has also failed to take into account the effect of such documentary ''evidence as are on the record and as have a real bearing on the matter.

7. The first question to be considered in this connection is, what is it that the Plaintiff has purchased at the rent-execution sale?

[Their Lordships proceeded to examine the evidence and continued as follows.]

8. These are the documents that have got to be primarily looked to for the purpose of determining what was it that was sold and what was it that was purchased by the Plaintiff. We are unable to see that there is anything contained in any of these documents which would indicate that any lands, which had been recorded as the lands appertaining to the two Khatians, namely, Khatian No. 34 and Khatian No. 13 and as forming part and parcel of the darpatni in the possession of the Company, passed under the sale and were purchased by the Plaintiff. We are unable, therefore, to uphold the learned Judge''s finding that as a matter of fact the lands for which the suit has been instituted by the Plaintiff were lands to which he had acquired any title under his purchase.

9. But the Plaintiff''s case is that whatever might have been purchased by him, these lands originally formed part of the sepatni and inasmuch as the Company and their predecessors had kept him and his predecessors out of possession in respect of these lands under some sort of an adverse title, such possession on the part of the Company and their predecessors amounted in law to an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act and which under the law is entitled to be annulled inasmuch as he has purchased the sepatni at a rent-execution sale with power to annul all incumbrances. The definition of incumbrance as given in seel 161 of the Bengal Tenancy Act is in these terms:

For the purpose of this Chapter-the term ''in-cunibrauce'' used with reference to a tenancy, means any lion, subtenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in sec. 160.

There is a current of decisions of this Court that this definition includes not merely such interests as have been directly created by the tenant but also interests of the nature described in the definition which have been allowed to gro''w by his sufferance or negligence. The question as to whether the interpretation which this Court has thus put upon the meaning of the word "incumbrance" as defined in sec.

161 of the Bengal Tenancy Act (was correct?) arose for the consideration of the Judicial Committee in the case of Bipradas Pal Chowdhury v. Kamini Kumar Lahiri L. R. 48 I. A. 499: s.c. 26 C. W. N. 465 (1921), but it was not found necessary by their Lordships to decide that question. Assuming that the interpretation which this Court has given as aforesaid to the definition of "incumbrance" as given in sec. 161 of the Bengal Tenancy Act is correct, that meaning can by no stretch of imagination be taken to include the case of hinds of which the tenant had never been put in possession and in respect of which lands the landlords themselves by means of adverse possession on the strength of their own title, either real or supposed, have acquired an indefeasible title against the whole world. The provisions relating to annulment of incumbrance as contained in Chap. XIV of the Bengal Tenancy Act are provisions intended primarily for the benefit of the landlord and it is difficult to see how these provisions can ever be utilised by a purchaser at a rent-execution sale in order to defeat the title of the landlord himself. It may be stated here that nowhere on the record is to be found any allegation, far less is there any evidence, to suggest that the lands were ever in the possession of the sepatnidars, at any time since the commencement of the sepatni and that on the other hand the whole case of the Plaintiff seems to be this that although the sepatni patta and kabu-liat, as a matter of fact, included these lands, the sepatnidar was never put in possession of them. We are of opinion that the procedure that was resorted to by the Plaintiff, treating these lands as forming an incumbrance upon the sepatni and proceeding to annul| the incumbrance by service of notice under sec. 167 of the Bengal Tenancy Act and thereafter seeking to recover possession of them by instituting the present suit, was entirely misconceived.

10. What we have said above is perhaps sufficient for the disposal of the claim which has been put forward in the suit. But it has been argued that whatever may have been the procedure adopted by the Plaintiff, the Plaintiff was a purchaser at a rent-execution sale and so did not derive his title from the defaulting tenant and was not barred by any rule of estoppel or limitation, and therefore, there is nothing to stand in the way of his recovering possession in respect of these lands, once it is found that the lands formed part of the sepatni grant. We think, we ought to consider the merits of the case in order to see whether the lands can be regarded as having at all formed part of the sepatni.

[Their Lordships then went into the evidence and referring last to an observation in a judgment delivered by the High Court in a Second Appeal arising out of a suit brought by the Company against the Dutts for the rent of the sepatni, concluded as follows.]

11. The remark implies that, in the opinion of this Court, the lands which were in the possession of the Company and which had never been in possession of the sepatnidars were lands which were never intended to form part of the sepatnis. These are all the materials to which our attention has been drawn in connection

with this case; and having considered them as carefully as we could we have come to the conclusion that nothing has been established which would entitle the Plaintiff to the decree that he has obtained nor to any decree that he has claimed in the present suit. The result is that the appeal will succeed and the decision of the Court below will be set aside. The Plaintiff''s suit will be dismissed with costs in both the Courts. In calculating the costs of this appeal, the costs of preparation of Volume II of Part 2 of the paper-book will not be allowed to the Appellant.