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Calcutta High Court

Case No: Appeal from Original Decree No. 343 of 1911

Cheta Bahira Saheba		APPELLANT
	Vs	
Purna Chandra Choudhuri and Others		RESPONDENT

Date of Decision: July 20, 1914

Final Decision: Allowed

Judgement

1. The subject-matter of the litigation, which has culminated in this appeal, consists of eight villages included in, the Pachete Raj in the District of Manbhoom. In or about the year 1855, Nilmani Singh, the then holder of the Raj, granted these villages to his paternal aunt Puncham Kumari, the first Defendant in this suit, for her maintenance. On the 6th December 1878, Nilmani Singh granted a putni of the same villages to Joychandra Choudhuri, now represented by the Plaintiffs, on the allegation that the maintenance grant had been resumed. The putnidar was unable to obtain possession, as the villages had not in fact been resumed and the first Defendant was still in occupation. The putnidar in 1879, sued to eject the first Defendant and persons who had derived title from her, on the allegation that the maintenance grant had lapsed. The Raja who had granted the putni was also joined as a pro form﹀ Defendant. The suit was dismissed by the Subordinate Judge on the 1st October 1880, on the ground that the grant was not resumable by the grantor during the lifetime of the grantee. This decision was confirmed on appeal by the Judicial Commissioner on the 30th May 1881. But, although the putnidar was thus defeated in his attempt to obtain possession of the lands comprised in the putni, the Raja proceeded to realise the putni rent by recourse to the summary procedure laid down in the Putni Regulation. The putnidar was constrained to deposit the putni rent under protest, and on the 21st April 1887, he instituted a suit to obtain a refund of the amount deposited under compulsion of process of law and also to obtain an injunction to restrain the Raja from recourse in future to the provisions of the Putni Regulation for summary realisation of the putni rent. The suit was decreed by the Subordinate Judge on the 20th March 1888. On appeal to this Court, the decree of

the Subordinate Judge for refund of the amount deposited was confirmed on the 22nd January 1889; but the order for injunction was withdrawn, as it had not been properly framed and was also considered needless for the protection of the Plaintiff, Since the date of this decision, the putnidar has not paid rent to the holder of the Raj, as he has not been able to obtain possession of the villages comprised in the putni. Raja Nilmani Singh; the grantor of the putni, died in August 1898 and was succeeded by his son Raja Harinarayan Singh, who died in or about January 1903, and was succeeded by his son Raja Jyoti Prosad Singh. The Plaintiffs, who are the representatives in interest of the original putnidars, commenced this suit on the 22nd July 1910, to eject the first Defendant as also persons who had derived title from her on the ground that they were trespassers as the maintenance grant had lapsed on the death of the grantor Raja Nilmani Singh in August 1898. The claim is founded on the allegation of the existence of an immemorial family custom in the Pachete Raj, that the eldest son of the Raja succeeds to the Raj, that the other sons and relations of the Raja receive maintenance according to their rank and position and that on the death of the grantor or grantee, the maintenance property is resumed. The Raja repudiated the claim of the Plaintiffs, and asserted that, according to custom, the Raja was at liberty to resume or confirm a maintenance grant made by his predecessor, that it was entirely optional with him and was in no way obligatory. He added that his father had not resumed the grant made to the first Defendant, and that he himself had no intention to resume the grant. The first Defendant also resisted the claim on the ground, amongst others, that according to the family custom, maintenance grants were not resumable during the lifetime of the persons entitled to maintenance. The Subordinate Judge has held that the maintenance grant in favour of the first Defendant came to an end on the death of the grantor, that his successor became entitled to resume the grant although the grantee was alive, and that the Plaintiffs, as putnidars from the grantor, were vested with the right of resumption. In this view, the Subordinate Judge has decreed the suit. The first Defendant has appealed to this Court, and on her behalf the decision of the Subordinate Judge has been challenged on three grounds, namely, first, that the question of the nature of the title acquired by the first Defendant under the maintenance grant is res judicata; secondly, that the alleged custom whereby a maintenance grant comes to an end on the death of the grantor, has not been proved; and thirdly, that the Plaintiff''s have not acquired a title under their putni to obtain possession of the villages during the lifetime of the first Defendant. The determination of the first question depends upon the scope of the controversy in the litigation of 1879 and of the actual decision therein. At that time the grantor and grantee were both alive. The issue raised was, whether the maintenance grant of the villages in suit was or was not resumable by the grantor during the life of the grantee. The question thus put in issue was answered in the negative, against the contention of the then Plaintiff. The question now in controversy, namely, whether after the death of the grantor the maintenance grant may be resumed by his successor, during the life of the grantee, did not and could not arise in the previous

unit; such a question could arise only after the death of the grantor. The Subordinate Judge expressed the opinion that a grant of lands for the maintenance of any person continues presumably for the life of the grantee, and that the then Plaintiff had failed to discharge the onus which lay upon him to prove that the grant was resumable at pleasure. The Judicial Commissioner held that there was no proof of a custom of resumption by the grantor, during the lifetime of the grantee. It is plain, consequently, that the decision in the suit of 1879 was rested on the ground that the grantor himself was not competent to resume the grant during the lifetime of the grantee. This does not conclude in any way the decision of the question raised in this suit.

2. The determination of the second question depends upon the evidence of family custom on the record. The Plaintiffs have examined one of themselves as the solitary witness in support of their claim. This person, who gives his age as thirty-seven years, asserts that the family custom of the Raj of Pachete is that maintenance grants are resumed on the death of the grantor or grantee. This statement does not prove that every maintenance grant made in the Pachete Raj comes to an end on the death of the grantor. But it is plain that'' the evidence of this witness is otherwise valueless. He is in no way connected with the family, and when cross-examined as to the source of his knowledge of the alleged custom, he stated that he had heard of the family custom from assertions made by Raja Harinarayan Singh in several suits brought by him for khorposh (i.e., for resumption of maintenance grants). No foundation, however, has been laid for the reception of secondary evidence of statements made by Raja Harinarayan Singh; and the pleadings or depositions in which the alleged statements were made should have been produced. Apart from this, the statements of the witness are so vague and indefinite that no reliance can be placed thereon. He is unable to state with regard to different suits for resumption, whether there were any written grants in those cases, or even the decisions given by the Court. The testimony of this witness is wholly insufficient to establish the alleged custom. Reference however has been made to two suits relating to maintenance grants in the Pachete Raj, decided by the Sadar Dewany Adalat in 1837 and 1840. Punchum Human v. Gurunarain Deo 6 Mac. Sel. Rep. 166 (1887) and Gurunarain Deo v. Unund Lal Singh 6 Mac. Sel. Rep. 354 (1840). The litigation in the second case was ultimately taken up to the Judicial Committee of the Privy Council. Anand Lal Singh v. Gurood Narayan 5 M.I.A. 82 (1850). In the first of these cases, the suit was brought for the recovery of a maintenance grant made by a Raja of Pachete in favour of his daughter, the Plaintiff. The Court of first instance held that the allowance to daughters was usually discontinued on their marriage, unless their husbands should prove unable to support them, and that, consequently, the Plaintiff, who had been married to the son of the Raja of Nagpur, had no claim for maintenance on the Pachete Raj. On appeal the Sadar Dewany Adalat, confirmed this view, and added the following observation : --

The estate of the Raja of Pachete is one of those of the nature adverted to in Reg. X of 1880, which devolves entirely on the next heir of the reigning Raja, who, moreover, according to the family usage as established by evidence, has the power of revoking and cancelling all grants made by his predecessor, the power of making such grants being restricted, in regard to the period of the grant, to the lifetime of the grantor.

3. In the second case, the suit for resumption of the maintenance grant was brought by a successor of the grantor against the representatives of the grantee; the grantor and grantee were both dead at the date of the institution of the suit; consequently, no question could arise as to any family custom which might entitle the successor of the grantor to resume a maintenance grant from the grantee during the lifetime of the latter. The suit was brought by Garud Narain Deo, who had succeeded to the Pachete Raj, to recover Kashaepar from Ananda Lal Singh Deo. The property had been granted by Mani Lal a predecessor of the Plaintiff to Kanchanlal, a predecessor of the Defendant on the 26th July 1775. One of the questions in controversy between the parties was whether the grant was absolute or was only for purposes of maintenance. The Court of first instance found in favour of the Defendant and dismissed the suit. Upon appeal, the Suddar Court (Mr. Rattray) confirmed the decree of the Provincial Court. An application for review was granted and the appeal re-heard, with the result that Mr. Rattray, the Judge, who had heard the appeal in the first instance, decreed that his former decision should be reversed, while his colleague Mr. Dick held that the original decree was correct and should be affirmed. The third Judge Mr. Lee Warner to whom the appeal was referred, held that the second decision of Mr. Rattray was correct. The consequence was that the first decision of Mr. Rattray stood cancelled and the suit and appeal were decreed. The Defendant preferred an appeal to the Judicial Committee, which was dismissed on the ground that the grant was not absolute but for maintenance and had lapsed after the death of the grantee. There was no adjudication -- in fact, there was no occasion for any investigation of the question -- that the successor of the grantor of a maintenance grant was entitled to resume it on the death of the grantor during the lifetime of the grantee. Stress, however, is laid upon the following passage from the second judgment of Mr. Rattray : "it is placed beyond doubt that by the ancient custom of this family, the reigning Raja is succeeded by his eldest son and that the other sons as well as the minor branches of the family receive merely an allowance for their subsistence; and further that the successor to the Raj has full power to annul, cancel, alter, modify, or confirm the arrangements of the predecessor, as to him may seem fit." This statement is entitled to weight, subject to the important qualification that the matter in controversy between the parties did not raise directly or indirectly the question of the right of the successor of the grantor to cancel, modify or confirm a maintenance grant during the lifetime of the grantee. When the case was taken to the Judicial Committee, Lord Lang-dale observed that the Appellant, who claimed under the grant, had admitted that a grant for maintenance

ceased with the life of the grantor; consequently, if the grant was not absolute but for maintenance, the Appellant had no title. It cannot be disputed that the fact that both the grantor and the grantee were dead at the date of the institution of the suit takes away from the value of the decision for our present purposes. It cannot be treated as a judicial determination of the existence of the custom in a case in which the question arose directly for investigation At any rate, the decision of Mr. Rattray does not show that a maintenance grant necessarily lapses upon the death of the grantor. Consequently the two litigations on which reliance is placed do not really carry the case of the Plaintiffs beyond the oral testimony of the solitary witness cited by them; these cases show at most that a grant for maintenance may, after the death of the grantor, be resumed or confirmed at the choice of his successor; but it is entirely optional with him to resume or confirm the grant; there is no evidence to show that it is obligatory upon the successor of the grantor to resume the maintenance grant. This view is supported by the evidence of Khudu Lal Singh the paternal cousin of Raja Nil Moni Singh. This witness has been examined on behalf of the Defendants and describes the family custom of the Pachete Raj family in the following terms : "Khorposh granted to the junior members of the family are enjoyed by the grantee till her life, but if the grantor dies, his successor can resume the khorposh if he likes; he has the option of resuming the khorposh or allowing the khorposhdar to enjoy the khorposh property till his or her death." In cross-examination, he states that the khorposh grant is liable to resumption on the death of the grantor or grantee. He then proceeds to enumerate instances of khorposh grants which had been resumed on the death of the grantor, and also of grants which were not so resumed. In our opinion, the Plaintiffs have failed to establish that by custom a khorposh grant under the Pachete Raj lapses upon the death of the grantor and the lands revert forthwith to the Raj; on the other hand, the evidence indicates that such maintenance grants continue during the lifetime of the grantees, but that if, meanwhile, the grantor dies, they are liable to be resumed at the choice of his successor; it is entirely optional with him to resume the grant or to allow the grantee to continue to enjoy the property during his or her lifetime. Reliance, however, has been placed on the decision in Beni Prasad Koeri v. Dudhnath Roy 4 C.W.N. 274: s.c. ILR 27 Cal. 156 (1899), Ram Chandra v. Jogendra Nath 4 C.L.J. 399 (1905) and Jagannadha v. Pedda Pakir ILR 4 Mad. 371 (1881), to show that a grant for maintenance prim﹏ facie ceases with the life of the grantor. These cases are of no assistance to the Plaintiffs who set up a special family custom and can succeed in their claim only upon proof of such custom. On the evidence, they have failed to prove the alleged custom, while there is good ground for the view that a maintenance grant in the Pachete Raj is for the life of the grantee, but is liable to be resumed by the successor of grantor, should the latter die during the lifetime of the grantee. In the present instance Raja Harinarayan Singh, who succeeded to the Raj after the death of the grantor, never resumed the villages, while his successor the present Raja, has expressly stated that he has not resumed and does not intend to resume the khorposh villages. In these circumstances the

Plaintiffs cannot succeed on the hypothesis that the first Defendant became a trespasser the very moment the grantor died.

4. The determination of the third question involves the solution of the problem, whether the Plaintiffs have acquired a title to eject the Defendants under the putni granted to them by Raja Nilmani Singh Deo on the 6th December 1878. For this purpose, it is assumed that the putni Was validly created, on the principle that an impartible estate is not inalienable unless a custom in restraint of alienation is proved. Udaya v. Jadub L.R. 8 IndAp 218 : s.c. ILR 8 Cal. 199 (1881), Sartaj v. Deoraj L.R. 16 IndAp 51 : s.c. ILR 10 All. 272 (1888) and Venkata v. Court of Wards L.R. 26 IndAp 83 : s.c. 3 C.W.N. 415; ILR 22 Mad. 383 (1899). The Plaintiffs then rely in substance upon the doctrine of title by estoppel recognised in sec. 43 of the Transfer of Property Act. That section enacts as follows : -- "Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer, shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." It is plain that this section, construed according to its terms, does not assist the Plaintiffs. Nilmoni Singh did not erroneously represent that he was authorised to grant the putni; he was competent to grant the putni, subject to (he interest of the maintenance holder which could not continue in any event beyond her lifetime. But when he granted the putni, he stated what was not true, namely, that the maintenance grant had been resumed; as a matter of law he was not competent to resume the maintenance grant unless he survived the grantee; as a matter of fact, he had not resumed the grant. The condition mentioned in the first portion of sec. 43 is thus not fulfilled. The second part of the section provides that the transfer operates on such interest as the transferor may acquire in the property at any time during which the contract of transfer subsists. This condition also is not fulfilled, because the rights of Nilmoni Singh in the property remained what they were before the grant of the putni, they were not enlarged at any time after the grant of the putni and before his death. It is conceivable that if his rights had been enlarged, say, by the death of the grantee of the maintenance right the putnidar might have been entitled to the benefit not only against him but also against his heir, though there is authority, to the contrary. Lord St. Leonards in his Treatise on Vendors and Purchasers (1862, p. 355, Ch. 9, Sect. 2, para. 31), observes as follows: -- "If a man sell an estate to which he has no title and after the conveyance acquire the title, he will be compelled to convey it to the purchaser. Carme v. Mitchell 10 Jur. 909, 912 (1842). But this is said to be a personal equity attaching on the conscience of the party and not descending with the land; and '' therefore, if the vendor do not, in his lifetime confirm the title, and the estate descend to the heir-at-law, he will not be bound by his ancestor''s contract Morse v. Faulkener 1 Anst. 11; 3 Swan 429 n (1792), Carleton v. Leighton 3 Merivale 667 (1805), Bensley v. Bardon 2 Sim. and Stu. 519; affirmed on appeal 8 L.J. Ch. O.S. 85 (1826) and Murrell v. Goodyear 2 Giff. 51

(1859). This opinion, however, deserves great consideration." It is worthy of note that the decision in Morse v. Faulkener 1 Anst. 11; 3 Swan 429 n (1792) had been doubted by Sir Edward Sugden himself, when he was Lord Chancellor of Ireland, in Jones v. Kearney 1 Dr. and War. 134 (159) (1841), where he observed that no good reasons could be given why a contract should be binding upon the ancestor and not upon the heir. In that case, the seller had acquired the title after the conveyance but he died before the conveyance could be perfected. The contract could have been enforced against the seller and yet it was doubted whether the remedy was available against the heir, although, Sir Edward Sugden did not share the doubt. [See Trevivan v. Lawrance 1 Salk. 276; 6 Mod. 258.] The distinction, for which Sir Edward Sugden could see no good reason, may be regarded as unsound on principle, for as Bigelow observes (Estoppel 6th Ed., pp. 459 and 479), the heir of the transferor in such a case is rightly bound by the same estoppel as the transferor himself, because he takes without value and no injustice is done to him; he is bound as a privy because he gets the estate without costs, and it is right therefore, that he should stand in the situation of his ancestor. The true rule may accordingly be taken to be that if the transferor himself has once become entitled to valid estate in the land, the transferee''s equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice [(c.f. Specific Relief Act, secs. 18 and 27, Smith v. Osborne 6 H.L.C. 375 (390, 398) (1857), lie Bridgwater''s Settlement (1910) 2 Ch. 342, Taylor v. Wheeler 2 Vernon 564 (1706), Jennings v. Moore 2 Vernon 699 (1709) and Martin v. Seamore 1 Ch. Cas. 170]. To avoid misapplication of this principle, it is useful to bear in mind the successive steps of the process of reasoning by which the result is reached; first, a contract by X, for valuable consideration to assign property to be acquired by him whether it is expressed as a contract or whether it takes the form of an immediate assignment, merely binds X, personally, until the property comes into existence; secondly, when X acquires property which comes within the scope of the contract, that property is bound; X becomes a trustee of it for the assignee, who acquires an equitable interest therein, and it is not necessary, that any fresh act should be done by X to perfect such equitable interest of the assignee; thirdly, the interest acquired by the assignee in after-acquired property when it is acquired, is an equitable interest; as such it is not available against a purchaser for value without notice of a legal interest in the property. [Holroyd v. Marshall 10 H.L.C. 191 (1862) and Tailby v. Official Receiver 13 A.C. 523 (1888).] This analysis shows that the rule has no application to the present case: Here the grantor of the putni never acquired the right to resume the maintenance villages; consequently, the position is not precisely what it would have been if the right had accrued to him and the putnidar had sought to obtain the benefit thereof as against the heir. The right to resume the maintenance villages accrued for the first time to Harinarayan Singh who succeeded to the Raj on the death of Nilmoni Singh. On what principle, can it be held that he was bound to exercise his option for the benefit of the putnidar? To affirm the proposition that he was so bound is to hold that the Raja for the time being may

take away the option of his successor and determine that his choice is to be exercised in a particular mode. We are of opinion that the reasonable view of the rights of the parties is to hold that the successor is free to exercise his option and to determine whether he will or will not resume the maintenance lands; if he resumes, the putnidar obtains the benefit; if he does not, the putnidar has to await the termination of the maintenance grant by the death of the grantee. The Plaintiffs have contended that this conclusion places them at an unfair disadvantage; but we are not satisfied that they have any real grievance. They sued the Raja and obtained an order for suspension of the rent, so long as they are not placed in possession. No doubt, they paid a premium for the putni, for which they have not yet obtained any corresponding benefit; but when they found that they could not get possession, they might have sued either for suspension of rent till they could get possession or for cancellation of the lease and for refund of the premium; they deliberately chose the smaller measure of relief and were content with temporary suspension of rent. In our opinion, the suit is premature, as the title of the first Defendant had not terminated at the date of its institution. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs, in both the Courts.

Beachcroft, J.

I agree.