

(1881) 03 CAL CK 0026

Calcutta High Court

Case No: None

Grishchunder
Bundopadhya and
Others

APPELLANT

Vs

Dwarkanath Pal and
Others

RESPONDENT

Date of Decision: March 11, 1881

Citation: (1881) ILR (Cal) 827

Hon'ble Judges: Tottenham, J; Morris, J

Bench: Division Bench

Judgement

Morris, J.

This suit was instituted by one Grish Chunder Bundopadhya, one of two auction-purchasers, who, on the 13th January 1871, jointly purchased the estate, Talook Sributso Doss, when it was put up to sale for arrears of Government revenue on the default of the proprietors, Raj Coomar Bose and Dino Nath Bose. After their purchase, the auction-purchasers found themselves unable, in four villages of the property, to realize rent direct from the ryot-cultivators, owing to the opposition of the former proprietors, the Boses who asserted their right to collect the rent in virtue of holding certain intermediate tenures in the shape of two shikmi talooks and one howla tenure. Various suits for rent were instituted against the ryot-cultivators, either by the Boses as plaintiffs, in which the auction-purchasers intervened, or vice versa by the auction-purchasers as plaintiffs, in which the Boses intervened. The litigation was carried up to the High Court, and the final result in April 1875 was to establish the existence of these under-tenures and to declare the right of the Boses to collect the rent from the ryot-cultivators. But in February 1875, for about a month and-a-half before this decision, Brijnath Roy, the coparcener of Grish Chunder Bundopadhya, sold his interest in the property to certain persons who may be called generally the Pals. Then, on the 29th May 1876, Grish Chunder Bundapadhya created a patni of his eight annas share of the property in favour of

two persons, Kali Coomar Dutt and Nill Komul Dutt; and on the 4th July 1876, one of the Pals, the appellant now before us purchased, under a deed of sale of that date, all the rights and interests of the Boses in the three intermediate tenures which they set up. The effect of the last purchase was, to throw the estate practically into the hands and under the control of the Pals; and hence, on the 18th January 1877, Grish Chunder Bundopadhya brought the present suit to cancel or avoid these subordinate tenures. He made defendant the Boses, the Pale, and the various tenants whose rents he had failed to recover in the previous rent-suits.

2. The principal defendant, No. 3, who is the Present appellant, at once objected that Grish Chunder Bundopadhya had no right of suit or cause of action as he had parted with all his rights to the patnidars, Nil Komul and Kali Coomar Dutt; and further that as his entire interest in the estate amounted to an eight-anna share, he could not sue to cancel a part on these subordinate tenures. He took other objections, which it is not necessary now to mention. But the result of the first objection taken in his written statement was that the patnidars, Nil Komul and Kali Coomar Dutt, made an application to the Court to be added as parties to the suit and to this the Court acceded by an order dated April 21st 1877. The suit was then tried on its merits, and the Subordinate Judge dismissed the claim of Grish Chunder Bundopadhya with costs, but gave a partial decree in favour of the patnidars, dismissing their claim in respect to the two shikmi talooks, but directing the cancellation of the howla tenure. Against this order Grish Chunder Bundopadhya and the patnidars appealed, and a cross-appeal against the decision regarding the howla was preferred by the defendants. The District Judge dismissed the appeal of the defendants, and decreed the claim of the three plaintiffs in full, and it is this order which forms the subject of the present appeal.

3. Three points are urged before us in this appeal: First, that as Grish Chunder Bundopadhya, who instituted the suit, had no cause of action, he having previously parted with all his rights as zemindar, to cancel these tenures in favour of the patnidars, Kali Coomar and Nil Komul Dntt: his suit ought to have been at once dismissed. Second, that, when on right of action lay in Grish Chunder Bundopadhya, the Court could not add the patnidars as plaintiffs to the suit, and so introduce a right action which did not before exist; and third that, even on the assumption that the patnidars were properly made co-plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of these under-tenures both before and after the Government sale of the property.

4. We think that, on all these points, the appellant must succeed. On the first point the Judge considers the Subordinate Judge to be in error in holding Grish Chunder Bundopadhya, by his assignment of his rights as zemindar to the patnidars, have no longer any right to deal with under-tenants of those patnidars; and the reason he gives is this: "The grantor of a patni is bound to warrant his patnidars in the enjoyment of his patni as granted; and the zemindar has a right to see that there

are assets available to the patnidar, wherewith the patnidar may meet his half-yearly liability." But there appears to be some confusion of thought in this argument. There is no question that the patnidars received the property covered by the patni lease in exactly the same state as the zemindar had held it. And if the patnidars could not meet their half-yearly liability,---that is, pay the rent reserved,---the course for the zemindar to pursue was, not to bring suits against under-tenants, which the patnidars. alone have the right to bring, but to enforce their liability by bringing the patni to sale under the provisions of the patni law. That the patnidar alone can bring a suit such as the present; and that the zemindar having given away his rights in patni cannot do so, has been expressly declared by a Bench of this Court in the case of Sreemunt Ram Dey v. Kookoor Chund (15 W.R. 481). Their Lordships say: " We think there is no doubt whatever that an auction-purchaser can sue within twelve years of the date of his purchase to recover any land that was originally included within the estate sold for arrears of revenue. When he created a patni in favour of the present plaintiff, it is quite clear that he could not sue to annul an under-tenure within that patni, and that no one but the patnidar could do so." From this the second point taken in appeal follows, as a necessary consequence, viz., that when Grish Chunder Bundopadhya had no right of action against the defendants, he could not mend his case by joining as parties to the suit other persons, the patnidars, who had a right of action against them.

5. But, independently of these considerations, it seems to us that the plain was bad on the face of it, and ought to have been dismissed. We understand the suit to be one brought by an auction-purchaser to avoid certain under-tenures under the provisions of Section 37, Act XI of 1859. No doubt, the plaintiff alleges that these under-tenures are fictitious, and have been set up in fraud simply to deprive the auction-purchaser of the benefit of his purchase; but clearly this allegation cannot be maintained in the present suit. It was an allegation which ought to have been made, and doubtless was made, in the various suits for rent to which the present plaintiffs and defendants were parties. The effect of these suits was to declare the Boses entitled to collect the rent. Decrees were passed on the basis of the proof adduced by the Boses that, as under-tenure holders, they had previously collected the rent. The only ground, therefore, on which the plaintiff could bring this suit was that stated by him in the latter portion of his plaint, viz., that none of these subordinate tenures were created at the time of the Permanent Settlement and comprised within the talook (Sributso Doss), and that the present talook devolved on him "free from all encumbrances." This being so, we are of opinion, that neither Grish Chunder Bundopadhya as one of the original auction-purchasers, nor subsequently the patnidars to whom he assigned his rights, could bring this suit, inasmuch as, in the language of Section 37, Act XI of 1859, they were not "purchasers of an entire estate." By their own showing they purchased only an eight-anna share. Before proceeding, therefore, to avoid under-tenures comprised within the estate under the power granted to them by that Act, it was necessary to

join the co-purchaser, as co-plaintiff in the action. But admittedly the co-purchaser, who is now, as found by the District Judge, represented by the Pals, of whom the present appellant is one, refuses to do anything of the kind. This section of the Act is of a penal character. It presses hardly upon persons who may have rights of long standing, and was enacted simply for the purpose of protecting the Government revenue. It must, therefore, be construed strictly. But just as the law vests "the proprietor" of an estate with power to measure the lands of such estate, and our Courts have repeatedly held that no sharer only can be treated as a proprietor to enforce this right, so here we think we must hold that one of two joint auction-purchasers who, without the consent of his co-sharer, brings a suit to avoid under-tenures, within the estate purchased by them, cannot be recognised as an "auction-purchaser of an entire estate" within the meaning of Section 37 of the Act.

6. On all these grounds, therefore, we reverse the judgment of the Court below, and dismiss the suit of the plaintiff with costs in all Courts.