(1870) 07 CAL CK 0007

Calcutta High Court

Case No: Special Appeal No. 3027 of 1869

Niladhro Chowdhry		APPELLANT
	Vs	
Karunakar Mahati		RESPONDENT

Date of Decision: July 8, 1870

Judgement

Sir Richard Couch, Kt., C.J.
In this case, in the potta itself, the parties to it describe it as an istemrari potta, and its terms are:--"In future you shall cultivate the lands, and a mokurrari rent of rupees 8-12 every year you shall pay," followed by a provision for a remission in case of drought or flood. If the intention of the parties that the potta should be perpetual is not sufficiently shown by the use of the word "istemrari," the potta may be explained by what has been done under it, and the fact that the land has been allowed to descend from defendant"s grandfather to his father, and from him to the defendant, shows that it was intended to be hereditary, although it contains no words to that effect, and the Judge was wrong in laying any stress upon that omission. The principle that the absence of words importing the hereditary character of the tenure may be supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son was laid down by the Privy Council in Baboo Gopal Lall Thakoor vs. Teluck Chunder Rai and in Rajah Satyasaran Ghosal v. Mahesh Chandra Mitter 2 B.L.R., P.C., 27. In both those cases the enjoyment had been much longer than in the present; but the word "istemrari" had not been used as it is here. That word shows an intention that the lease should be perpetual; and if it were so, the hereditary character would follow from it. In Mussamut Lakhu Kowar v. Roy Harikrishna Singh 3 B.L.R., A.C., 226, it was held that the words "mokurrari" and "istemrari" in a potta must be taken in themselves to convey an hereditary right in perpetuity.

2. The objection that the rent is not fixed, because there is a provision for a remission, is of no weight, nor can the plaintiff, because there has been a new settlement, say that he is not bound by the potta. The new settlement has been made with him as representing the holder under the former settlement, and he cannot take the benefit of that

representation, without taking the burden also. He must, like any other heir, be bound by the acts of the ancestor from whom he derives the estate,

3. But it was also objected that this potta was rendered null and void by Regulation XIV of 1812, section 3, and upon this point we took time to consider our judgment. By that Regulation it is provided that (section 2) "no zamindar or other proprietor of land in the Ceded and Conquered Provinces shall grant leases or fix the rent of any land tenure for a term exceeding ten years, or if the term of his own engagement with Government be less than ten years, extending beyond such less term;" (section 3) "any evasion of this prohibition by entering into separate engagements or leases to take effect successively, or by dating an engagement or lease on a day other than that on which it was actually executed, or by any other device, shall be considered as an infringement of it; and every lease or engagement fixing the rent, which has been or shall be concluded or granted in opposition to this prohibition, is declared to be null and void."

4. Now it is a rule that the preamble of a Statute may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained. The allowing the grantor of a potta at any time, no matter how long after it was granted, to avail himself of this Regulation to nullify his deliberate act is, we think, an inconvenience which justifies our resorting to the preamble of the Regulation. That says:--"Whereas it is enacted by section 2, Regulation V of 1812, that proprietors of lands shall be competent to grant leases for any period which they may deem most convenient to themselves and tenants, and most conducive to the improvement of their estates; and whereas Regulations IX and X of 1812 contain rules under which the settlement which had been made in perpetuity in the Ceded and Conquered Provinces, with the reserve of the approval of the Honorable the Court of Directors, is subject to considerable modifications and restrictions; and whereas these rules consequently create a necessity for limiting the power granted by section 2, Regulation V of 1812, as above noticed,--the following rules have been enacted to be immediately in force in the Coded and Conquered Provinces, including the territory ceded by His Highness the Peishwa in Bundlecund, the District of Cuttack, and the pergunnas formerly dependent on that district, but now annexed to the Zilla of Midnapore."

5. The reason for making the Regulation is the necessity created by the rules in Regulations IX and X of 1812, and the term of ten years is fixed upon, as the settlement then in force was for ten years. When the period of the settlement had been extended, we find Regulation XIV of 1812 modified accordingly by Act XVI of 1842. The proper construction of the Regulation seems to be that the lease was to be null and void as against the Government, but not as against the lessor.

6. The decision of the Privy Council in Ranee Surnomoyee vs. Maharajah Sutteeschunder Roy, was upon this principle, and the case of the Statute of 1st Eliz., c. XIX, s. 5, referred to in the judgment, is closely applicable to the case now before us. The words of that statute are "shall be utterly void and of none effect to all intents,

constructions, and "purposes;" and it was held that the lease or grant is not void or voidable by the Bishop himself who made it, but remains good against him during such time as he continues Bishop;" and the reason given is, "because such leases or grants were good at the common law, and the statutes were made only for the benefit of the successors, that they should not be bound by those acts of their predecessors which might turn to their prejudice and disadvantage; but not to give the Bishop himself power to avoid or derogate from his own acts, which would be against all rules, both of law and equity, and therefore was not within the meaning of the said statutes; for then he would be empowered by Act of Parliament to do wrong to other persons, which it cannot be presumed the Parliament intended to allow"--Bacon"s Abridgment, Title Leases and Terms for Years, H. We are of opinion that the Judge was wrong in reversing the decision of the Deputy Collector who had held the potta to be valid, and that the Judge"s decision must be reversed, and the respondent must pay the costs of this appeal, and of the appeal in the lower Appellate Court.