APPELLATE CIVIL.

Before Richardson and Shams-ul-Huda JJ.

JOGESH CHANDRA ROY

v.

MAKBUL ALI.*

1920

April 6.

Itmam—"Taluk," what it imports—"Marfatdari" receipts, if conclusively shows tenure to be non-transferable—Settlement Reports and District Gazetteer, if admissible in evidence—Written instrument, terms of, inconsistent with ordinary implication of an expression, effect of—Grant for an indefinite period, nature of—Condition restraining alienation with no clause of re-entry—Transfer notwithstanding such condition, if operative—Evidence Act (I of 1872), s. 35.

The word "*itmam*" imports a permanent, heritable and transferable tenure, when applied to a tenure in the permanently-settled parts of Chittagong.

Makbul Ali Chowdhury v. *Jogesh Chandra Roy* (1) referred to.

The word "*taluk*" primarily imports permanency.

Sarada Kripa Laha v. *Akhil Bandhu Biswas* (2) and *Upendra Lal Gupta* v. *Jogesh Chandra Ray* (3) followed.

The fact that rent-receipts have been granted *marfatdari* in the name of the original grantee does not necessarily show that a tenure is not transferable.

There can be no objection to refer to Settlement Reports or District Gazetteers, whether they are strictly speaking evidence or not under section 35 of the Evidence Act.

Garuradhwaja Prasad v. *Superundhwaja Prasad* (4) referred to

If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life time and passes no interest to his heirs,

* Appeal from Original Decree, No. 294 of 1918, against the decree of Jagadish Chandra Goswami, Subordinate Judge of Chittagong, dated July 31, 1918.

(1) (1919) 23 C. W. N. 945.
(2) (1917) 21 C. W. N. 903.
(3) (1917) 22 C. W. N. 275.
(4) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238.

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unless there are some words showing an intention to grant an hereditary interest. But that rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Lekhraj Roy v. *Kunhya Singh* (1) referred to.

A condition against transfer does not without more render an assignment or transfer of the lease inoperative. Such a condition is often inserted merely as a foundation for a claim to *nazar* (or premium).

Nil Madhab Sikdar v. *Narattam Sikdar* (2) and *Basarat Ali Khan* v. *Manirulla* (3) referred to.

APPEAL by Jogesh Chandra Roy, the plaintiff.

This appeal arose out of a suit for ejectment of defendants from two tenures, one an *itmam* and the other a *taluk*. Harachandra Roy, grandfather of the plaintiff, granted a lease to Fateh Ali Miji and Asauddin Miji in Chait, 1271, creating the *itmam*, the lessor being the owner of eight annas share of the estate (*baje-ajti taluk*) Gaurishankar-Baidyanath, within which the *itmam* is situated. Magandas Dastidar was the owner of the other eight annas of the estate Gaurishankar-Baidyanath. Fateh Ali and Asauddin also held this share of the estate as a *taluk*. The eight annas share of the estate which belonged to Magandas was purchased by the Court of Wards on behalf of the plaintiff's adoptive mother, and so the plaintiff, as the heir of his adoptive father on the death of the widow, is the owner of the entire estate. Defendants are the heirs or descendants of Haidar, who purchased the *itmam* from the heirs of Fateh Ali Miji and Asauddin Miji. Plaintiff alleged that the *itmam* and *taluk* were temporary in character and that he had served notices to quit upon defendants by means of registered covers and through his peon. Defendants Nos. 1, 3, 4 and 5, who contested the suit, denied service of notices to quit and contended *inter alia* that

(1) (1877) I. L. R. 3 Calc. 210; L. R. 4 I. A. 223. (2) (1890) I. L. R. 17 Calc. 826. (3) (1909) I. L. R. 36 Calc. 745.

the notices, if any, were not good in law, that the *itmam* and *taluk* were permanent and transferable tenures and that the suit was time-barred. The Subordinate Judge held, on the terms of the *itmam*, that it was a permanent tenure and that, though it was non-transferable, the defendants and their predecessor, Haidar Ali, had acquired a qualified right to hold the land as tenants by reason of adverse possession of it for over twelve years as evidenced by *marfatdari* receipts. He also held that the *taluk* was a permanent one and that the claim to ejectment was also barred by limitation. He therefore dismissed the suit. Whereupon the plaintiff preferred this appeal.

Sir Rash Behary Ghose (with him *Babu Dheerendralal Kastgir* and *Babu Sarojenath Mukherji*), for the appellant. The terms of the *kabuliyat* executed by Fateh Ali and Asauddin show that the *itmam* was not a permanent tenure. True there is the clause that the *itmam* may be sold under the Putni Regulation. But section 8 of the Regulation clearly contemplates sale of all sorts of tenures by contract between the landlord and tenant. The word *bandobasti* occurring in the deed is enough for my purpose. I shall not, however, lay too much stress on it by itself. The Sub-Judge relies on Allen's letters in the *Noabad* Correspondence, Vol. V, as to the meaning of the word *itmam*, which again is based on Ameer Ali and Finucane's Bengal Tenancy Act, I think. See 2nd Ed., p. 867. But the letter is no evidence under the Evidence Act. Conceding, however, that it is, it has no value on the question in issue. See Philip's Tagore Lectures (for 1874-75), page 136. The Sub-Judge also refers to Allen's Settlement Report of 1888 to 1898 for Chittagong, page 27. But he does not refer

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to page 225 of the same book. This Report also is not of any value on the point in issue. It is plain that the word *itmam* refers to a cultivator. *Makbul Ali Chowdhury* v. *Jogesh Chandra Roy* (1) is the only authority on the meaning of the word. All that it holds is that *itmams* are tenures. It does not go further.

[*Babu Bipinbihari Ghose.* That was a *Noabad itmam* and does not help us one way or the other.]

There are no cases holding that the word *itmam primâ facie* implies permanency: see on this point *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2). The same case is authority for the contention that customary meaning of a term at the time of the grant is the true criterion. I shall not, however, raise any objection to the evidence adduced in this case as regards the accepted meaning of the term subsequent to the grant. Their own witness, a lawyer and a landholder himself, deposed in my favour.

The Subordinate Judge relies on two cases as to the meaning of the word *taluk*. As regards the first of these, *Sarada Kripa Laha* v. *Akhil Bandhu Biswas* (3), there are passages in my favour too. As for the other case, *Upendra Lal Gupta* v. *Jogesh Chandra Ray* (4), it was held that rent was enhanceable. See also *Krishno Chunder Goopto* v. *Sufdur Ali* (5) and *Budayar Rahman* v. *Karam Ali* (6).

The onus is on the tenant to prove exemption from ejectment.

The next point relates to adverse possession. My client was never dispossessed. He was getting rent all along. The only Article of the Limitation Act

(1) (1919) 23 C. W. N. 945.
(2) (1915) I. L. R. 43 Calc. 332.
(3) (1917) 21 C. W. N. 903, 904.
(4) (1917) 22 C. W. N. 275.
(5) (1874) 22 W. R. 326.
(6) (1913) 18 C. L. J. 271.

applicable in such a case is Article 144. The question would arise, when did the *marfatdar's* position become adverse. I say it never became adverse. The Subordinate Judge relies on *Prabhabati Dassi* v. *Taibatunnessa Chowdhurani* (1). That case was a peculiar one and is distinguishable. There, the plaintiff was on the horns of a dilemma. If he treated the defendant as a trespasser, his suit would be barred by limitation; if he treated him as a tenant, the suit was not maintainable. In the present case, I am suing in ejectment of a tenant: *Panchkari Chatterjee* v. *Maharaj Bahadur Sing* (2) only follows the case cited above and the respondent was not heard in the case. For other cases on *marfatdari* receipts, see *Khooderam Chatterjee* v. *Rookhinee Boistobee* (3), *Rasamoy Purkait* v. *Srinath Moyra* (4), *Debnarain Dutt* v. *Baidya Nath (Madak) Napit* (5), *Digbijoy Roy* v. *Shaikh Ata Rahman* (6) and Rampini's Bengal Tenancy Act, 6th Ed., page 134. On the question of limitation in such cases, see *Jadu Nath Belel* v. *Raj Narain Mukherjee* (7).

The next question is—does a *taluk* stand on a different footing from an *itmam*? It may be safely inferred that there is none. A *taluk* is described as an *itmam* in some cases.

Lastly, as regards expenses of commission, for local investigation, my client is not liable at all.

Babu Dheerendralal Kastgir followed, on the last question.

Babu Bipinbihari Ghose, Jr. (with him *Babu Chandrashekhar Sen* and *Babu Narendra Kumar Das*), for the respondents. The cases cited by my

(1) (1913) 17 C. W. N. 1088.
(2) (1914) 19 C. W. N. 136.
(3) (1871) 15 W. R. 197.
(4) (1902) 7 C. W. N. 132.
(5) (1909) 14 C. W. N. 68.
(6) (1911) 17 C. W. N. 156.
(7) (1912) 17 C. W. N. 459.

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learned brother do not assist us directly. I contend that a *taluk* is a permanent tenure. The record-of-rights is there. The *taluk* and *itmam* go together: if the one is permanent, the other is. If the one is not, the other is not. Dealing with *itmams* independently, I contend they are permanent. The expression has not always the same meaning. Allen's Settlement Report and the other books relied on by the Sub-Judge may certainly be referred to as lexicons.

[RICHARDSON J. Etymologically, words like *mokarari*, etc., do not denote permanency.]

They do not, either etymologically or according to accepted ideas. As regards *itmam*, perhaps there was never any question. That is why we have no cases on the point.

There is a fallacy in the contention that Regulation VIII, section 8, may refer to non-permanent tenures. It really means, it may apply to tenures similar to a *putni*, but not exactly a *putni*.

An *itmam* is a permanent and heritable tenancy, but rent may be altered in some cases. Even in *Noabad taluks*, *itmams* are permanent and heritable.

Evidence to show intention of permanency is admissible. There have been several transfers and successions.

A stipulation of non-transferability is void unless there is a clause for re-entry. An *itmam* is not *ipso facto* non-transferable. Of course the landlord was free to make stipulations: *Nil Madhab Sikdar* v. *Narattam Sikdar* (1).

Where words of inheritance are not found in a deed, surrounding circumstances may be looked to: *Ismail Khan Mahomed* v. *Nani Gopal Mukerji* (2). See also Bengal Tenancy Act, section 3, clause (8). See

(1) (1890) I. L. R. 17 Calc. 826. (2) (1903) 8 C. L. J. 513.

Netrapal Singh v. *Kalyan Das* (1), which follows *Nil Madhab's* case (2), on the question of the effect of the absence of clause for re-entry in such leases.

The question of adverse possession does not arise, as I claim under the *kabuliyat* as a tenant.

Sir Rash Behary Ghose, in reply. My friend's contention as regards the scope of section 8 of the Putni Regulation is not right. Transfers and successions in this case do not matter. It is a new grant. See Norton on Deeds on this point and *North Eastern Railway Company* v. *Hastings* (*Lord*) (3).

Cur. adv. vult.

RICHARDSON AND SHAMS-UL-HUDA JJ. An estate now vested in the plaintiff, the appellant before us was originally held in two undivided moieties. The owner of one moiety ganted a tenure thereof in favour of two persons Fateh Ali Miji and Asauddin Miji, evidenced by a *kabuliyat* which they executed, dated the 1st Chaitra, 1271 (1865). In this document the tenure is referred to as an *itmam*. The other moiety was also held by the same two persons as a tenure, described as a *taluk*. It may be conceded to the plaintiff, as his case is, that the *taluk* was created orally at the same time as the *itmam*, though there is really no evidence how the *taluk* came into existence.

In 1878, after the death of Fateh Ali and Asauddin, the widow and grandson of the former and the widow and daughter of the latter conveyed the two tenures to Haidar Ali, the predecessor-in-interest of the defendants.

The suit was brought on the basis that the terms and conditions of the *itmam*, as they appear in the

(1) (1906) I. L. R. 28 All. 400.
(2) (1890) I. L. R. 17 Calc. 826.
(3) [1900] A. C. 260.

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kabuliyat of 1865, are inconsistent with the permanent tenure which the defendants claim. As to the *taluk*, the plaintiff's theory, rather a weak one, is that it must be presumed to have been granted on the same terms as the *itmam*. There is more force in the argument for the defendants that the *taluk* is *primâ facie* a permanent tenure and that if there is any doubt as to the permanency of the *itmam*, it must be resolved in their favour. The plaintiff acting on his view of his rights, treated both tenures as tenancies from year to year and served notice to quit on the defendants. They refused to quit and the present suit was brought to eject them. The appeal is from the decree of the Subordinate Judge dismissing the suit.

We concur in the view taken by the learned Subordinate Judge.

As to the facts we have already indicated that the tenures descended from Fateh Ali and Asauddin to their heirs. They passed by transfer from the latter to Haidar Ali and have now devolved on Haidar Ali's heirs and representatives. The rent has never been raised since 1865. The fact that rent receipts were granted "*marfatdari*" in the names of the original grantees is certainly not conclusive in the present case to shew that the tenures were not transferable. A *taluk* is *prima facie* transferable and we shall hold on the construction of the *kabuliyat* of 1865 that the *itmam* is also of a transferable character.

There was some discussion whether the term "*itmam*," which is used in the heading of the *kabuliyat* and thrice in the body of the document, imports permanency. The term it appears may be applied to a *raiyati* holding or to a tenure. In Ameer Ali and Finucane's Tenancy Act (2nd Edition, page 807) it is stated that in the permanently-settled tracts of Chittagong, an "*itmam*" is transferable, heritable and held

at a fixed rate of rent in perpetuity. In temporarily-settled areas, the rent may be liable to enhancement, at any rate when a fresh settlement is made. *Makbul Ali Chowdhury* v. *Jogesh Chandra Roy* (1). Reference may also be made to Mr. Allen's Settlement Report of 1888—1898 for Chittagong (p.27), to his "Note upon *Itmamdars* and *Dar-itmamdars* in Chittagong to be found in Vol. V of the Selections from the Records of the Board of Revenue, L. P." (p. 200, esp. p. 225) and to the District Gazetteer of Chittagong (p. 149). It may be that such reports and books are not, strictly speaking, evidence, or that they do not come or do not at all come within the scope of section 35 of the Evidence Act, but we see no objection to their being read for what they may be worth [Cf. *Garuradhwaja*'s case (2)] and Sir Rash Behary did not insist on the objection which he rather suggested than argued. Our conclusion is that as applied to a tenure in the permanently-settled parts of Chittagong, the word "*itmam*" primarily imports a permanent, heritable and transferable tenure. It is well settled that the word *taluk* primarily imports permanency. *Sarada Kripa Laha* v. *Akhil Bandhu Biswas* (3), *Upendra Lal Gupta* v. *Jogesh Chandra Ray* (4). No loubt the terms of a written instrument may be inconsistent with the ordinary implication of either term. Either term may be loosely or mistakenly applied to a tenure which is not in fact permanent and which does not become permanent merely because it is called a *taluk* or an *itmam*.

We pass to the *kabuliyat*. It is described as a "*bandobasti kabuliyat*" or settlement *kabuliyat*. Nothing turns on that. The lease was for an indefinite

(1) (1919) 23 C. W. N. 945.
(2) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238, 248.
(3) (1917) 21 C. W. N. 903.
(4) (1917) 22 C. W. N. 275.

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period and there are no words of limitation or inheritance: "We shall," say the grantees, "pay into your *sarkar*, year after year, the aforesaid *jama* (or rent) in accordance with the *kists* (or instalments) mentioned above." A lease from year to year is really out of the question. That being so, the strict rule seems to be that "if a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest." But "that rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained:" *Lekhraj Roy* v. *Kunhya Singh* (1). The lease therefore enured at least for the life time of the grantees. Then there are words which go to indicate that a permanent lease was intended. The provisions of the Putni Regulation are expressly made applicable to the tenure and the tenure is described as an *itmam*. It was argued that under section 8, the Regulation might be made applicable by agreement to a lease for instance for a long term of years. That may be so, but the preamble (section 1) shows that the Legislature were thinking of "leases at a rent fixed in perpetuity." Moreover the lease in the present case is not a lease for a long term of years. It is absurd to suppose that the parties could ever have thought of applying the Regulation to a lease from year to year. As we have said the plaintiff's suggestion of a lease from year to year, cannot be entertained.

Much was made of the clause in which the grantees state that without the grantor's permission they will not be entitled to transfer the *itmam* to others. But there is no clause of re-entry. Such a condition

(1) (1877) I. L. R. 3 Calc. 210; L. R. 4 I. A. 223, 225.

against transfer is often inserted merely as a foundation for a claim to *nazar* (or premium) when a transfer is made, and if the condition is not void or of no effect at all, it does not in such a case as the present, render an assignment or transfer of the lease inoperative: *Nil Madhab Sikdar* v. *Narattam Sikdar* (1), *Basarat Ali Khan* v. *Manirulla* (2).

Regard being had to the terms of the *kabuliyat* of 1865 and to the history of the tenures, we are of opinion that they are permanent, heritable and transferable. The true title to the tenure is, therefore, in the defendants and no question of adverse possession arises.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

S. M.

(1) (1890) I. L. R. 17 Calc. 826. (2) (1909) I. L. R. 36 Calc. 745.