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I would, therefore, answer the question in the affirmative.

CHATTERJEA A. C. J. The result is that the appeal is dismissed with costs, hearing fee two gold mohurs in the Full Bench Reference and one gold mohur for the hearing before the Division Bench.

B. M. S. *Appeal dismissed.*

LETTERS PATENT APPEAL.

Before Cuming and B. B. Ghose JJ.

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Jan. 21.

PANCHUBALA DEBI

v.

JATINDRA NATH GOSWAMI AND ANOTHER.*

Lease—Patta and ekrarnama—Provision in the ekrarnama—Limitation on descent.

A lease was granted by a *patta* and an *ekrarnama*. In the *ekrarnama* it was provided that the lessee's daughters or daughters' sons should not be entitled to the leasehold as his heirs.

Held, that the proviso was a limitation on descent and was void. The lease was an ordinary heritable lease.

Rajindra Bahadur Singh v. *Raghubans Kunwar* (1), *Tagore* v. *Tagore* (2) and *Sonet Koer* v. *Himmut Bahadoor* (3) referred to.

LETTERS PATENT APPEAL from judgment of Chakravarti J.

* Letters Patent Appeal No. 41 of 1925, in Appeal from Appellate Decree No. 668 of 1923, against the decree of Chakravarti J., dated March 18, 1925.

(1) (1918) I. L. R. 40 All. 470; L. R. 45 I. A. 134.

(2) (1872) L. R. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. 359.

(3) (1876) I. L. R. 1 Calc. 391.

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In June 1901 Mati Lal Goswami and Doyal Goswami, predecessors of the plaintiffs-respondents, granted a lease of a house to one Abinash Chandra Banerjee, father of the defendant-appellant, at an annual rent of Rs. 2. A *patta* was granted by the Goswamis which stated that "on paying the settled "rent the lessee will continue to enjoy and possess "the house by residing therein through sons, grand-"sons, etc., (*putro poutradi krome*)." At the same time an *ekrarnama* was executed by the said Abinash Chandra Banerjee, whereby he stipulated that he would enjoy and possess by living in that house through his sons, grandsons, etc., but his daughters or his daughters' sons shall not be entitled to live in there as his heirs. After Abinash's death his widow was in occupation of the house and after her death Abinash's daughter Panchubala, the appellant, came into possession. The plaintiffs instituted this suit for ejectment of Panchubala from the house. The suit was decreed in the Court of first instance. From that decree appeal was filed to the Subordinate Judge and from that to the High Court. The learned Judge in the High Court dismissed the appeal and on that this Letters Patent appeal was filed.

Dr. Jadu Nath Kanjilal and *Babu Narendra Nath Chaudhury*, for the appellant.

Dr. Dwarka Nath Mitter and *Babu Debendra Nath Bhattacharjee*, for the respondents.

Cur. adv. vult.

CUMING J. This is an appeal against a judgment and decree of my learned brother Mr. Justice Chakravarti and raises an interesting point of law. The facts of the case are briefly these. The plaintiff

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granted to one Abinash Chandra Banerjee a permanent lease of a certain property. At the time of the execution of the document an *ekrarnama* was executed which provided that the grantee's daughter and daughter's sons should not be entitled to succeed as heirs.

The grantee died some time ago and was succeeded by his widow. She died in 1919 and the grantee's daughter then remained on in possession.

The grantor now seeks to eject her on the ground that under the terms of the patta and *ekrarnama* she is not entitled to inherit the property.

This contention found favour with the trial Court and both the Courts on appeal.

The defendant in third appeal has contended that the clause in the *ekrarnama* which is read as part of the lease excluding the daughters and daughters' sons of the grantee is inoperative on the ground that it was not open to the plaintiff to provide in the lease that the property should descend in a different order of succession to the normal one and that it was not open to him to grant an interest contrary to the usual order of succession. He relies on the case of *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (1).

The plaintiff, on the other hand, contends that the lease read with the *ekrarnama* is not a permanent lease. It is really a lease for a term of years, viz., the life-time of the male heirs of the grantee. Looking at the lease and the *ekrarnama*, I have little difficulty in coming to the finding that the lease purports to create a permanent heritable right in the land. It contains the usual word by which such rights have always been held to be created. It states that on paying the settled rent the lessee will continue to enjoy and possess by residing there through sons,

(1) (1918) I. L. R. 40 All. 470.

grandsons, etc. (*putro poutradi krome*). There is the further stipulation that the rent is not to be decreased or increased. In other words that it is fixed. There are certain clauses restraining alienation by gift, sale or mortgage but as there is no re-entry clause in this lease, these restrictions are inoperative. Then in the *ekrarnama* we find the clause around which the main controversy has centred, namely, the provision that the daughter and daughter's sons shall not succeed. The argument put forward is that the clause prevents the lease from being a permanent one. I do not think that it does. All it provides is that certain heirs shall not succeed, viz., the daughters and daughter's sons. It does not provide that in the event of the nearest heir being the daughter or daughter's sons, the property reverts to the grantor. There may be other persons who, if the daughter and daughter's sons are excluded, would be entitled to succeed. At the highest this clause would exclude certain persons but it by no means follows that this clause must mean that if the next heir is the daughter or daughter's sons, the property reverts to the grantor.

The lease is therefore in my opinion an ordinary absolute hereditary *mokarari* tenure.

The question to be answered in the present case then is: Does the clause regarding the exclusion of the daughters and daughters' sons give the landlord the right of re-entry in the event of the nearest heir being the daughters and daughters' sons? I am of opinion that it does not—for two reasons:

(*i*) The clause is inoperative. See the decision of the Privy Council in the case of *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (1) where it is held that a subject has no right to impose on land or other property any limitation of descent

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which is at variance with the ordinary law of descent of property applicable to his case.

(*ii*) Supposing for the sake of argument that the clause excluding the daughters and daughters' sons is operative, the grantor would have no right of re-entry on the failure of other heirs. The right to possession on the failure of heirs does not revert to the grantor but escheats to the Crown. [See the case of *Sonet Kooer* v. *Himmut Bahadoor* (1)].

I find that the plaintiff is not entitled to eject the defendant.

The result is that the appeal must succeed, the order of Mr. Justice Chakravarti must be set aside and the plaintiff's suit entirely dismissed. The appellant is entitled to her costs in all the Courts.

GHOSE J. This appeal raises a question of nicety which does not appear to be directly covered by authority. Plaintiffs sued for *khas* possession by ejecting the defendant from the property in suit on the basis of their title as heirs of Matilal and Doyal Goswami. The father of the defendant, one Abinash, obtained a lease of the property from those two persons by exchange of *patta* and *kabuliat*, dated the 4th of June 1901. On the same date Abinash executed an *ekrarnama* in favour of the lessors. Abinash died in 1914 while in possession of the leasehold leaving a widow and the defendant his daughter, who has a son. The widow remained in possession of the property till her death in 1919, and after her death the defendant who was the legal heir of her father has been in possession of the property. The plaintiffs seek to eject the defendant on the ground that by virtue of certain terms in the *ekrarnama* executed by her father, the defendant is not entitled to succeed to the

(1) (1876) I. L. R. 1 Calc. 391.

disputed property as his heir and she is therefore a mere trespasser from whom the plaintiffs are entitled to recover *khas* possession. The trial Court made a decree in ejectment which was confirmed by the Subordinate Judge with a slight variation which is not necessary to mention. On second appeal to this Court, the decree in ejectment has again been affirmed by my learned brother Mr. Justice Chakravarti. The contention of the defendant against that decision is that the provision in the *ekrarnama* is not valid in law and the plaintiffs are not entitled to enforce it nor can they claim any benefit under it. In order to appreciate the point it would be convenient to give extracts of the relevant portions of the *patta* and *ekrarnama*. The *patta* provides, "On paying the settled rent you will continue to enjoy and possess (the premises) by residing therein through sons, grandsons, etc. (*putra poutradi krome*) * * * * The said rent shall not be increased or decreased". The *ekrarnama* contains the following provisions. "I and my sons, grandsons, etc., shall continue to enjoy and possess the said land and rooms by dwelling therein, etc. But my daughter or my daughter's son shall not be able to reside therein as my heirs and they shall not be entitled to the said property". There can hardly be any doubt on a proper construction of the documents, which it is admitted must be read together, that the lease is a permanent heritable one. Although the words "*putra poutradi krome*" literally signify descendants of the male sex, they ordinarily mean and include female heirs where by law the estate would descend to such heirs, and are apt for conferring an estate of inheritance to either male or female heirs. The question then is whether after the grant of a permanent heritable interest the grantor and the grantee can validly

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enter into a covenant that a certain class of heirs shall not be entitled to succeed to the property. The appellant relies on the case of *Rajindra Bahadur Singh* v. *Rughubans Kunwar* (1), in support of his contention that such a stipulation is not valid. In that case the Privy Council laid down that "a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case". Their Lordships quote with approval the observation of Sir Edward Chamier "that it is settled law that a subject can not make his property descendible in a manner not recognized by the ordinary law." The general principle on which this rule is based was discussed in the well known case of *Tagore* v. *Tagore* (2). Their Lordships say: "Whilst, however, rules of "detail prevailing in England are to be laid aside, "there are general principles affecting the transfer of "property which must prevail wherever law exists, "and to which resort must be had in deciding "several questions of an elementary character, which "have been strongly argued in this case, and as "to which there is no precise authority. The "power of parting with property once acquired, "so as to confer the same property upon another, "must take effect by inheritance or transfer, each "according to law. Inheritance does not depend "upon the will of the individual owner: transfer does. "Inheritance is a rule laid down (or, in the case of "custom recognized) by the State, not merely for the "benefit of individuals, but for reasons of public "policy (Domat, 2413)". Their Lordships further observe: "This was well expressed by Lord Justice "Turner in *Soorjeemonee Dossee* v. *Denobundoo*

(1) (1918) L. R. 45 I. A. 134; I. L. R. 40 All 470

(2) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47, 64.

"*Mullick* (1). A man cannot create a new form of "estate or alter the line of succession allowed by law, "for the purpose of carrying out his own wishes or "views of policy". On the principle laid down in these cases it must be held that it was not competent in Abinash to exclude one class of his heirs from inheriting this leasehold property, altering the rule of succession under the Hindu Law, by the covenant in the *ekrarnama* and this must be held to be void and not enforceable under the law. The defendant is therefore entitled to the property under the ordinary law of succession.

The next question urged on behalf of the appellant is that assuming that the daughter was not entitled to succeed by reason of the agreement, the plaintiffs have no right to claim ejectment. There is no stipulation that on failure of heirs of Abinash the property would revert to the lessors. In this case it was not found that if the daughter and her son were excluded from the line of heirs of Abinash there were no other heirs. But even if there are no other heirs of Abinash plaintiff can not claim *khas* possession, as on the authority of the case of *Sonet Kooer* v. *Himmut Bahadoor* (2) decided by the Privy Council, the Crown will take the property by escheat. This objection also seems to me to be of substance. The appeal must therefore succeed on both the grounds taken and the suit dismissed with costs in all Courts.

N. G.

(1) (1857) 6 Moo. I. A. 526.

(2) (1876) L. R. 3 I. A. 92 ; I. L. R. 1 Calc. 391.