

APPELLATE CIVIL.

Before Mukerji and Bose JJ.

NAZAR ALI.

v.

INDRA KUMAR SUTAR.*

1928.

June 26.

Solenama—Sub-lease—Solenama, whether operative as lease—Bengal Tenancy Act (VIII of 1888), ss. 49 (b), 85 (2)—Indian Registration Act (XVI of 1908), s. 17 (1), cl. (d), and s. 17 (2), cl. (vi).

Where, by the terms of a *solenama*, on which a decree was founded, the plaintiff, an ordinary *raiyat*, stipulated with the defendant his *dar-raiyat* that the latter would continue to hold the land in suit as his *under-raiyat* on an enhanced rent from generation to generation;

Held that it was impossible to escape from the conclusion that the *solenama* created a new lease in respect of land which the defendant held from before and that it would not be operative as a lease unless it was registered under section 17, sub-section (1), clause (d) of the Registration Act. Section 85, clause (2) of the Bengal Tenancy Act, however, bars its registration.

Chandra Kanta Nath v. Amjad Ali Haji (1) and *Rajani Kanta Banerjee v. Raj Kumari Dasi* (2) followed.

Held, also, that the fact that this lease was embodied in a decree did not make it any the more operative as a lease because section 17, sub-section (2), clause (vi) excepts documents falling within clauses (b) and (c) and not those falling within clause (d) of section 17, sub-section (1) of the Registration Act.

Rajani Kanta Banerjee v. Raj Kumari Dasi (2) referred to.

Jagadish Chandra Mukerji v. Rasik Mondal (3) distinguished.

SECOND APPEAL by the defendant.

The plaintiffs who had ordinary *raiyati* right in the land in suit served on the defendant, a *korfa* tenant under them, notice under section 49 (2) of the Bengal Tenancy Act to quit the land at the end of the following agricultural year. The suit for ejectment that the plaintiffs then instituted was resisted by the defendant on two main grounds, viz., that notice to quit was not duly served on him and that, by virtue of a *solenama* filed by the parties in Rent Suit No. 941

* Appeal from Appellate Decree, No. 406 of 1926, against the decree of Hem Chandra Das Gupta, Subordinate Judge of Chittagong, dated Sep. 10, 1925, reversing the decree of Hiran Chandra Mitter, Munsif of Patiya, dated Aug. 27, 1924.

(1) (1920) I. L. R. 48 Calc. 783. (2) (1927) 31 C. W. N. 1099.

(3) (1925) 30 C. W. N. 307.

1928.

NAZAR ALI
v.
INDRA KUMAR
SUTAR.

of 1920, it was agreed between them that, in consideration of an enhancement of rent, the defendant would be allowed to continue as the plaintiff's subtenant on the land from generation to generation, and the said suit was decreed in terms of the said *solenama*. The trial court dismissed the suit, holding against the plaintiffs on both the above points. On appeal, the Subordinate Judge held that the notice to quit was duly served and that though morally the plaintiffs were under an obligation not to disturb the defendants' possession, in view of section 85 of the Bengal Tenancy Act the permanent lease purported to be granted by the plaintiffs to the defendant by the *solenama* above referred to was void and that this question had now been finally set at rest by the Full Bench case of *Chandra Kanta Nath v. Amjad Ali Haji* (1), inasmuch as the plaintiffs were ordinary *raiyats* and the defendant a *dar-raiyat* under them whose tenancy can be determined by a notice to quit under section 49 (b) of the Bengal Tenancy Act. In the circumstances, however, the Subordinate Judge did not allow either party any costs against the other in both the courts. The defendant preferred the present Second Appeal.

Babu Chandrasekhar Sen, for the appellant. The present action is barred by *res judicata*. There is a decree between the parties which declares the defendant's right to be a right to remain on the land from generation to generation. There is no difference in principle between a decree passed on contest and one passed on consent. See the judgment in S. A. No. 506 of 1924 and the case of *Jagadish Chandra Mukerji v. Rasik Mondal* (2). The Full Bench case of *Chandra Kanta Nath v. Amjad Ali Haji* (1) is not against me. There is a clear reservation regarding cases of estoppel whether by representation or by judgment. The same principle would apply in either case.

Babu Charuchandra Sen, for the respondents. The *solenama* is not admissible in evidence, as it was

(1) (1920) I. L. R. 48 Calc. 783.

(2) (1925) 30 C. W. N. 307.

not registered: *Rajani Kanta Banerjee v. Raj Kumari Dasi* (1).

1928.

NAZAR ALI

v.

INDRA KUMAR
SUTAR.

Babu Chandrasekhar Sen, in reply. The *solenama* related to the subject matter of the suit. It did not create a new lease, hence no registration was necessary. Assuming the *solenama* as a contract was not admissible, even then I could rely on the decree. The decree operated as *res judicata*. A decree passed by a court on an illegal contract is a good decree unless it is set aside.

MUKERJI AND BOSE JJ. The plaintiffs alleging that they are *raiyats* and that the defendant holds under them as an under-*raiyat* sued the latter in ejectment on service of a notice to quit under section 49 of the Bengal Tenancy Act. The defendant denied the service of the notice and pleaded that the plaintiffs are not entitled to evict him. He rested his case upon a decree passed on the basis of a *solenama* in a previous suit for rent which the plaintiffs had instituted against him. By the *solenama*, the plaintiffs, in consideration of an enhancement of rent,—his case being that the rent previously payable was Rs. 17 and it was enhanced to Rs. 25 and odd,—consented to allow him to hold this land permanently.

The trial court dismissed the suit, holding that service of the notice was not proved and that the plaintiffs are not entitled to ignore the *solenama*. The Subordinate Judge on appeal has reversed that decision and decreed the suit. The defendant has appealed to this Court.

The Subordinate Judge has found for the plaintiffs on the question of service of the notice. This finding sets that matter at rest.

As regards the *solenama* and the decree, the Subordinate Judge has observed that a compromise decree is none the less a contract, and treating it as such he has held in substance that as in the *solenama* it was stated that the plaintiffs had *raiyati* right and the defendant *dar-raiyati* right, the lease that was created

1928.

NAZAR ALI
v.
INDRA KUMAR
SUTAR.

by the *solenama* came within the purview of the first of the three propositions laid down in the Full Bench decision of this Court in the case of *Chandra Kanta Nath v. Amjad Ali Haji* (1).

It is contended on behalf of the appellant that the view taken by the Subordinate Judge was erroneous and he relies for this contention upon two decisions of this Court, one in the case of *Jagadish Chandru Mukerji v. Rasik Mondal* (2), and the other an unreported case, viz., the decision in S. A. No. 506 of 1924, dated the 21st April, 1926. The respondents, on the other hand, rely on the case of *Rajani Kanta Banerjee v. Raj Kumari Dasi* (3).

The decree in the rent suit recites that the suit is decreed between the parties in accordance with the terms of the *solenama*. The material terms of the *solenama* were as follow: That the possession of the defendant in the lands would continue as before on the defendant paying a rent inclusive of cess, etc., of Rs. 25 and odd; that on the defendant giving the plaintiffs a goat at the time of the Saradiya Puja a deduction of Rs. 2-8 would be allowed from the rent; that the defendant would hold as under-*raiyat* under the *raiyati* of the plaintiffs; that the defendant would continue to hold the land from generation to generation on payment of such rent; that, in case of default, damages would have to be paid at 4 annas per rupee; that no payment would be valid except on *dakhilas*, etc., etc. The defendant's case is that the rent that he used to pay before was Rs. 17 and a new rent was fixed by the *solenama*. It is not a term of the *solenama* that the defendant had the right to hold from generation to generation from before or that any such existing right was being admitted by it. It is, therefore, impossible to escape from the conclusion that the *solenama* created a new lease in respect of land which the defendant held from before. It would not be operative as a lease unless it was registered under section 17, sub-section (1), clause (d) of the Registration Act, but section 85 clause (2) of the

(1) (1920) I. L. R. 48 Calc. 783. (2) (1925) 30 C. W. N. 307.

(3) (1927) 31 C. W. N. 1099.

Bengal Tenancy Act bars its registration. The fact that this lease was embodied in a decree did not make it any the more operative as a lease because section 17, sub-section (2), clause (vi) excepts documents falling within clauses (b) and (c) and not clause (d) of sub-section (1) of section 17. See *Rajani Kanta Banerjee v Raj Kumari Dasi* (1). The case also comes directly within the first of the propositions laid down by the Full Bench in the case of *Chandra Kanta Nath v. Amjad Ali Haji* (2), and there is no estoppel.

The two cases relied upon by the appellant appear to have overlooked the distinction that there is between a document coming under clause (d) and one coming under clause (b) or clause (c) of sub-section (1) of section 17, when incorporated in a decree. The decree did not declare any rights, but merely superadded to the contract between the parties the command of a Judge, and it did not take the rights of the parties any further than the contract itself. In the said two cases something has been said as to the *solenama* having been used for proving an admission. In the *solenama* before us there was, as already stated, no admission of any existing right, but only a statement of the right that was being created by it.

We are of opinion that the view taken by the Subordinate Judge is correct and that this appeal, therefore, should be dismissed with costs.

Appeal dismissed.

R. K. C.

(1) (1927) 31 C. W. N. 1099, 1101. (2) (1920) I. L. R. 48 Calc. 783.

1928.

NAZAR ALI
v.
INDRA KUMAR
SUTAR.