APPELLATE CIVIL.

Before Mukerji and Guha JJ.

KALIKADAS BANDOPADHYAY

v.

JILLAR RAHMAN.*

1930

Nov. 25, 27 ; *Dec.* 3.

Patni Tâluk—Benâmdâr—*Purchaser—Indemnity*—Darpatni—*Transferable—Heritable—Bengal Patni Tâluk Regulation (Reg. VIII of 1819), s. 14.*

The provision in section 14 of Regulation VIII of 1819, which says that upon a decree for reversal of a sale the court shall be careful to indemnify the purchaser against all loss *etc.*, was never meant to be applicable to the case of a *benâmdâr* for the defaulter, who has intentionally brought about a sale for his own benefit.

If a *darpatni*, as meaning a *patni tâluk* of the second degree within the meaning of section 4 of the Regulation, is created, it cannot but be a heritable and transferable tenure.

If the word "*darpatni*" used in a document was a misnomer and the intention was to create merely a subordinate permanent tenure, such a tenure could be made a *non*-transferable one.

A transferee from the original *darpatnidâr*, who was in possession of the *darpatni* at the date of the *patni* sale even though the transfer was not binding on the defaulting *patnidâr*, has ample interest in defending their possession as against a *patni* sale.

FIRST APPEAL by the defendant.

The facts of the case, out of which this appeal arose, appear fully in the judgment under report herein.

Rupendrakumar Mitra, *Mahendrakumar Ghosh* and *Kapilendrakrishna Deb* for the appellant.

Amarendranath Basu, *Apurbacharan Mukerji*, *Durgadas Ray* and *Bhutnath Chatterji* for the plaintiffs respondents.

Saratchandra Basak and *Saratkumar Mitra* for defendant No. 4, respondent.

Cur. adv. vult.

*Appeal from Original Decree, No. 141 of 1928, against the decree of Gopalchandra Basu, Subordinate Judge of Murshidabad, dated Dec. 23, 1927.

1930

Kalikadas Bandopadhyay v. *Jillar Rahman.*

MUKERJI AND GUHA JJ. This is an appeal by the defendant No. 1 from a decree of the Subordinate Judge of Burdwan setting aside a *patni* sale.

The plaintiffs' case was that Lot Teora, bearing *touzi* No. 1 of the Burdwan Collectorate, appertains to the *zemindâri* of the Maharaja of Burdwan, the defendant No. 4 in the suit, and that in respect of the said lot there was a *patni*, which the defendant No. 2 held as *patnidârs*. Their case further was that defendant No. 3 held in *darpatni* a *mehâl*, named *mouzâ* Chandanpur *alias* Sisua under the *patni*, at a rental of Rs. 1,100 *per annum*; that by a *wâkfnâmâ* in respect of that *mehâl*, executed in 1321, she had constituted herself and her husband, the plaintiff No. 1, as *mutawâllis*, and that, subsequently in 1330, she appointed her son, the plaintiff No. 2, in her place as *mutawâlli*. The plaintiffs' case thus was that they were *mutawâllis* and in that capacity in possession of the said *darpatni*. The plaintiffs' case further was that there were other *darpatnidârs* under the *patni*, the defendant No. 2 himself having a *darpatni* in some *mehâls*, which stood in the name of his mother, and the defendants Nos. 5 to 7 also holding other *darpatnis*. The plaintiffs alleged that they were not really in default, but the defendant No. [illegible] fraudulently and, out of evil motive, prevented [illegible]ficer [illegible] from paying in their *darpatni* rent, and intentionally defaulted in the payment of the rent of the [illegible]e. and thus brought about a sale for the arrears due [illegible]ant the last half year of 1330 amounting to Rs. 2,361-4-3 and fraudulently got the *patni*, which was worth Rs. 50,000, purchased by his father-in-law, the defendant No. 1, for a paltry sum of Rs. 2,500 in *benâmi* for himself. The plaintiffs, on these allegations, instituted the suit to set the sale aside.

The defendants Nos. 5 to 7 supported the plaintiffs and Nos. 1, 2 and 4 contested the suit. All pleas taken in defence were overruled and the court below made a decree in plaintiffs' favour setting aside the *patni* sale, and declaring that the plaintiffs'

1930

Kalikadas Bandopadhyay v. *Jillar Rahman.*

darpatni mehâl was not affected by it and that the plaintiffs should recover possession of the same.

The defendant No. 1 is the appellant before us. The contesting respondents in the appeal are the plaintiffs, and the defendant No. 4, whose estate is now represented by the Court of Wards.

The appellant's contentions are four in number and they are the following: *First*, that the plaintiffs are not entitled to maintain this suit; *second*, that the sale notices were duly published and served; *third*, that there was no fraud on the part of the defendant No. 2 and the defendant No. 1 is not a *benâmdâr* for the defendant No. 2 but a real and *bonafide* purchaser; and *fourth*, that the form of the decree is bad in law. The plaintiffs are interested in the first three contentions, and the defendant No. 4 in the last two.

On the evidence, the second contention cannot possibly be sustained. The Subordinate Judge has discussed the evidence in great detail and has come to a definite conclusion that the sale notice was not published in the *mofussil kâchâri;* and we entirely agree in his view. Basantakumar Palit (D. W. 3) was the officer of the Raj entrusted to publish this notice in the *mofussil.* He has denied his own signature on the return of service, though that signature has been proved by another witness (D. W. 4) as being of Basanta himself. The Subordinate Judge in looking at the signatures of the attesting witnesses on the return of service (Ex. D 1), has remarked that the signatures of the attesting witnesses on that document resemble Basanta's handwriting. The appellant has removed the original Ext. D 1, on keeping a copy of it on the record, and we have thus been deprived of the opportunity of examining the signatures ourselves and must accept the Subordinate Judge's remark as correct. The post card (Ex. D) is but a poor corroboration of Basanta's own evidence as to service and we can only attribute his denial of his signature on the return as due to an anxiety to dissociate himself with a palpable forgery. On the return

appear the signatures of one Kartikchandra Ghosh, said to be the *gomâsta* of the *mehâl*, of one Maniram Bagdi, *chaukidâr*, by the pen of the said Kartikchandra Ghosh and of one Kalidas Ghosh. The plaintiffs have proved from Exts. 9 to 9 (*b*) that Kartik was not a Ghosh but a De. Kartik Ghosh himself, called as P. W. 3, has denied that the two signatures on the return are his. He has further said that Kalipada Ghosh is not really Ghosh, but De. He has further deposed that Kalipada De is illiterate; but perhaps he went too far in making this statement, though of this there is no great certainty one way or the other. The *chaukidâr* Maniram Bagdi's (D. W. 8) evidence is extremely unconvincing. Krishna Khandait (D. W. 9) has given evidence, which it is difficult to believe, because, if he was present, he would certainly have been an attesting witness. The learned Judge's finding on the question of service of the notice in the *mofussil* must be upheld.

As regards the third contention, the relevant evidence, oral and documentary, has been placed before us and we have come to the conclusion that the plaintiffs' case on the point is substantially true. We consider it proved that the plaintiffs had duly paid up the *darpatni* rent up to the end of the year 1329, that one Debendranath Banerji, an officer of the defendant No. 2, came to the plaintiff No. 1 at Gorâbâzâr and took payment of a part of the rent for 1330, that, thereafter, in the middle of Chaitra, 1331, he came again and proposed that the balance need not be paid then but that it would be set off against the consideration for a *darpatni* settlement in respect of *mehâl* Gobindabati, which was close to the defendant No. 2's *mehâl* Rambari, and that, thereafter, on the 30th *Baisâkh*, 1331, the plaintiffs' man took the balance of *darpatni* rent for 1330 to the defendant No. 2's house at Purulia, but came back as he was told that none was there to receive payment. The plaintiff No. 1 has examined himself on commission. He appears to be a very respectable gentleman and his deposition satisfies us that he has

1930

Kalikadas Bandopadhyay v. *Jillar Rahman.*

ample regard for truth. He is corroborated by his books of account, and is supported by the oral evidence of P. W. 11. Debendra, though he was conducting the litigation on behalf of the defendants, did not venture to go into the witness box. P. W. 6, it is true, has tried to make out that nobody went to the house of the defendant No. 2 to pay the *darpatni* rent, but we are not satisfied that this evidence is true. We are of opinion that the plaintiff No. 1 was put on a wrong scent and the defendant No. 2 evaded receiving the *darpatni* rent, in order to make out a case as to why he could not pay the rent for the *patni*. The oral and documentary evidence adduced on behalf of the defendants, for the purpose of showing that genuine efforts had been made by the defendant No. 2 to raise money in order to pay the *patni* rent, in our judgment, is not fit to be relied on. We do not propose to discuss that evidence here; and it would be enough for us to say that we approve of the reasons given by the Subordinate Judge. If the fraud alleged be taken to be proved, as we hold that it has been, an inference as to *benâmi* is very easy to make: the only motive, that the defendant No. 2 could have in acting in the way he did, must have been to purchase the *patni* again for his own benefit and in somebody else's name.

In view of the opinion we have expressed on the second and the third contentions of the appellants, the fourth contention cannot prevail. The provision in section 14 of Regulation VIII of 1819, which says that upon a decree for reversal of a sale the court shall be careful to indemnify the purchaser against all loss, *etc.*, was never meant to be applicable to the case of a *benâmdâr* for the defaulter, who has intentionally brought about a sale for his own benefit.

There remains now the first contention to be considered. The original *darpatni pâttâ* of 1857 (Ex. N) contained a clause, which may be translated either as "I and my heirs will not make a gift, sale "or *hebâ*, or grant *sepatni* settlement of my *darpatni* "by reducing the aforementioned *jamâ*," or as "I and

"my heirs will not make a gift or sale or *hebâ* of my "*darpatni* or grant *sepatni* settlement thereof by "reducing the aforementioned *jamâ.*" The appellants defendants contend that it is the latter meaning which the clause bears and that the *darpatni* was not transferable and that consequently the plaintiffs as *mutâwâllis* under the *wâkf* and the deed of appointment had not acquired any right as against the *patnidar* and so were not competent to maintain the suit. In support of this contention they have urged that, though clause 1 of section 3 of the Regulation makes all *patni tâluks* heritable and transferable, by clause 2 *patni tâlukdârs* are declared to possess the right of letting out the lands of their *tâluks* in any manner that may deem most conducive to their interest and that any engagement so entered into by the *tâlukdârs* with others shall be legal and binding between the parties to the same, their heirs and assigns. They contend further that under section 4 it is only if the *patnidâr* has underlet in such manner as to have conveyed a similar interest to that enjoyed by himself that the holder of the tenure acquires similar rights and immunities as attach to *patni tâluks*. They say that in the present case the parties engaged to make the tenure inalienable and that engagement is binding between them, as prior to the Transfer of Property Act permanent tenures even were ordinarily not transferable. The defendant No. 4, as supporting the appellant, argued that the mere use of the word "*darpat*n" in the document signifies nothing and that by it a non-transferable permanent tenure was created. The plaintiffs have, on the other hand, relied on the other meaning mentioned above which the clause may bear and say that in order to make the terms of the document consistent that is the meaning, which should be put on the clause, as was done in the case of a *patni* lease in the case of *Tarini Charan Ganguli* v. *John Watson* (1). They have also argued that the word "tenures" in clause (*1*) of section 3 should be

(1) (1869) 3 B. L. R. A. C. J. 427.

1930

Kalikadas Bandopadhyay v. *Jillar Rahman.*

read as including *darpatni* tenures, and this contention they seek to support by reference to certain words in the preamble and also the words "other "superior" in section 6. In our opinion it is not necessary to determine in the present case the precise import of this clause or to consider whether the restriction it seeks to impose is a valid one or not. There is no doubt that if a *darpatni*, as meaning a *patni tâluk* of the second degree within the meaning of section 4 of the Regulation, was created it could not but be a heritable and transferable tenure [*Khettur Paul Singh* v. *Luckhee Narain Mitter* (1), approved by the Judicial Committee in *Luckhinarain Mitter* v. *Khettro Pal Singh Roy* (2), *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Chowdhry* (3)]. If the word "*darpatni*" in the document was a misnomer and the intention was to create merely a subordinate permanent tenure, such a tenure could be made a *non*-transferable one. But in any case, the plaintiffs were in possession of the lands of the tenure on payment of rent and as transferees from the original *darpatnidâr*, and the *patnidâr* was accepting the rent but granting *dâkhilâs* in the name of the transferor, the defendant No. 3, which was the name recorded in their *sheristâ*. Such persons have, in our judgment, ample interest in defending their possession as against a *patni* sale. Section 14 of the Regulation enacts that "it shall be competent to any "[illegible] desirous of contesting the right of the "ze[illegible]dâr to make the sale." Of course, a man in the street would not come within the meaning of these words, but one having a cause of action, such as the plaintiffs have in this case, would, in our judgment, undoubtedly come within the meaning of these words.

In the result we affirm the decision of the court below and dismiss this appeal with costs to the plaintiffs respondents.

Appeal dismissed.

G. S.

(1) (1871) 15 W. R. 125. (2) (1873) 13 B. L. R. 146.
(3) (1874) 13 B. L. R. 408; L. R. 1 I. A. 178.