## APPELLATE CIVIL.

*Before S. K. Ghose and Panckridge JJ.*

# JANAKINATH RAY

*v.*

# MAHENDRANARAYAN RAY CHAUDHURI*.

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*June* 26.

*Evidence — Secondary evidence — Admission* — Vakâlâtnâmâ—"Warishân-krame"—"Bemeâdi"—*Strict proof—Compulsory registration—Indian Registration Act (XVI of 1908), s. 17, sub-s. (1), cl. (d); sub-s. (2), cl. (vi)—Indian Evidence Act (I of 1872), s. 63.*

A *vakâlâtnâmâ* executed before a *solenâmâ* had come into existence cannot be treated as secondary evidence of the contents of the latter, for this would be against the terms of section 63 of the Evidence Act, nor as an admission.

The words "*warishdn-krame*" and "*bemeâdi*" cannot always be construed to mean a permanent tenancy. These words are clear indications to show that the *jamâ* was not permanent and that the tenancy was a tenancy at will to be extinguished by the landlord after one year's notice, if necessary.

*Dinanath Kundu* v. *Janaki Nath Roy* (1) distinguished.

*Per* PANCKRIDGE J. A party should not be permitted in the appellate court to insist upon strict proof of a document which he did not require in the trial court.

Even if the contents of this *solenâmâ* be regarded as proved, it is not admissible in evidence for want of registration. The terms of a compromise, even although not concerned with the operative part of the decree, form part of the decree for the purpose of section 17, sub-section (2), clause (*vi*) of the Registration Act, but this saving clause has no application to the case of a lease, which falls under clause (*d*) of sub-section (1) of section 17.

*Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (2) followed.

"Lease" in its ordinary significance bears much the same meaning as it does in section 105 of the Transfer of Property Act and includes leases made in perpetuity.

*Parshan Kuer* v. *Tulsi Kuer* (3) referred to.

SECOND APPEAL by Raja Janakinath Ray and others, plaintiffs.

*Appeal from Appellate Decree, No. 2138 of 1927, against the decree of Nirod Ranjan Guha, Additional District Judge of Faridpur, dated May 14, 1927, reversing the decree of Birendra Kumar Dutta, Subordinate Judge of Faridpur, dated April 28, 1926.

(1) (1927) I. L. R. 55 Calc. 435. (2) (1919) I. L. R. 47 Calc. 485.
(3) (1917) 2 Pat. L. J. 180.

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The facts of the case out of which this Second Appeal arose are briefly as follows:—

The plaintiffs, who had purchased a *patni tâluk* in execution of a mortgage decree, alleged that the defendant's vendor held a non-permanent tenure under the *patni tâluk*, which had been created before the creation of this *patni tâluk* by a *dowl kabuliyat* dated the 19th *Aswin*, 1249 B. S.; that it was a non-transferable tenure and the plaintiffs had acquired a right of entry owing to the transfer of the tenure to the defendant in 1330 B. S. The defendant pleaded that the tenure in question was a permanent tenure and was legally transferable and the plaintiffs had no cause of action. The trial court having decreed this ejectment suit, holding that the tenure in question was non-permanent and non-transferable and the plaintiffs were entitled to *khas* possession, the defendant successfully appealed to the District Court. Thereupon, the plaintiffs preferred this Second Appeal to the High Court.

*Mr. Sharatchandra Ray Chaudhuri, Dr. Saratchandra Basak* and *Mr. Jatindramohan Basu*, for appellants.

*Mr. Brajalal Chakravarti, Dr. Nareshchandra Sen Gupta, Mr. Jahnabicharan Das Gupta* and *Mr. Surendralal Mukherji*, for respondent.

*Cur. adv. vult.*

S. K. GHOSE J. The plaintiffs, who are the purchasers of a *patni tâluk* in execution of a mortgage decree, allege that the defendant's vendor held a tenure under the *patni* and created by a *dowl kabuliyat* bearing the date 19th *Aswin*, 1249. According to the plaintiffs' case, the tenure is non-permanent and non-transferable. The defendant having purchased in 1330, the plaintiffs sue to eject him. The defence is that the tenure is permanent and transferable. The learned Additional District Judge on appeal has agreed with the trial court in holding that the *dowl*

*kabuliyat* created a non-permanent and non-transferable tenure, but he has found that, as the result of a compromise arrived at in a rent suit of 1911, the tenure in suit has become permanent and transferable. He has, therefore, reversed the decree of the trial court and dismissed the suit. The plaintiffs now come in Second Appeal.

The first point taken on behalf of the appellants is that the learned Additional District Judge is wrong in holding that the *vakâlâtnâmâ*, exhibit J, can be treated as secondary evidence of the *solenâmâ* in the aforesaid rent suit of 1911. It appears that that was a suit for rent at the rate of Rs. 269. The predecessors of the defendants claimed abatement of rent on the ground of diminution of area and suspension of rent on the ground of dispossession. The suit was ultimately decreed on compromise, by which the rent was reduced to Rs. 207 odd. The decree and the *solenâmâ* are not now available. But the defendant relies on a *vakâlâtnâmâ*, which is marked exhibit J. This document contains certain terms, which are now put forward as the terms of the compromise, as the original record of the rent suit has been destroyed. The learned District Judge considers exhibit J to be secondary evidence of the *solenâmâ*. This is obviously against the terms of section 63 of the Evidence Act, and the learned advocate for the respondent admits that exhibit J is not admissible as secondary evidence. Thus the position is that, as regards the *solenâmâ*, neither primary nor secondary evidence is available. The only other evidence is the Register of Suits (exhibit N) which merely contains an entry to the effect that the suit was decreed on compromise. For the respondent it is contended that there is the deposition of one Upendramohan Ghosh Chaudhuri, who is defendant's witness No. 3, and who was one of the defendants in the rent suit of 1911. He was, however, no party to the *vakâlâtnâmâ*. The learned advocate for the respondent argues that the *vakâlâtnâmâ* is at least admissible as admission on the part of the plaintiffs'

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predecessors. But admission of what? It cannot be admission of the terms of the compromise which had not yet come into existence and there the matter ends. Thus it seems to me that there is no evidence to prove the terms of the *solenâmâ*, on which the defence case of permanency and transferability rests. This point, therefore, must be decided in favour of the plaintiffs appellants.

Another point that may be considered is that, conceding that the *vakâlâtnâmâ* is evidence of the terms of the compromise, did those terms really mean that the tenure was being converted into a permanent and transferable one? The learned trial court has treated the matter as follows: "Exhibit J shows "among other things that the contract was that though "the term of the *kabuliyat* had expired and the rent "and the lands had diminished, still in other respects "the terms of the *kabuliyat* were to remain intact and "that thenceforward the tenants defendants were to "hold the lands and the rent *bemeâdi*, *i.e.*, without "term by succession. The defendant's learned pleader "wants to have the words *'warishân-krame'* and "*'bemeâdi'* construed to mean a permanent tenancy. "That is not so. These words are clear indication to "show that the *jamâ* was not permanent and that the "tenancy was a tenancy at will to be extinguished by "the landlord after one year's notice, if necessary. If "the tenure were indeed a permanent one, there was "nothing to prevent the parties from having it so "described by clear and unambiguous terms. That "this had not been done shows that it is not such a "tenure." I may say at once that I am in entire agreement with this reasoning. It has been contended that the word "*bemeâdi*" really means not terminable, in other words permanent, and I am referred to the case of *Dinanath Kundu* v. *Janaki Nath Roy* (1). But that case is different on the facts.

It has been contended that the courts below were wrong in taking the view that the 14 *jamâs*, out of which the *jamâ* in question was constituted, were not

(1) (1927) I. L. R. 55 Calc. 435.

permanent and transferable. In support of this I am referred to the *dowl kabuliyat*, exhibit 1. It shows that the executants of the *kabuliyat* had purchased certain *jamâs* in 1822, 1833, and other years, and that they were asking for mutation of their names in 1842. It is contended that this shows that these *jamâs* were at least transferable. But this does not seem to follow. It appears that the landlord accepted rent in respect of these *jamâs* from the purchasers. But it was in 1842 that mutation of names was asked for for the first time and the result was this *kabuliyat*, which was limited to a term of 8 years. The cases of *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (2), to which I am referred on behalf of the respondents, were based on much stronger grounds. It is contended that the *kabuliyat* itself was not limited to the period of 8 years, but that only a certain portion of the rent was remitted for that term. I do not think that the document would bear this construction. The concluding words clearly show that the *kabuliyat* was executed for a term of 8 years; and this is supported by the document Exhibit J, if it is at all to be considered.

On behalf of the defendants respondents, it is contended that the learned Additional District Judge was in error in holding that the defendant could not acquire a permanent right by adverse possession. It is pointed out that in 1896 certain applications were filed on behalf of the predecessors of the defendant going to show that they were claiming a permanent tenancy right and that in the finally published record of rights of 1913 the tenure was also described as permanent. But the position here is that the tenant was in possession as tenant as the result, first of the *kabuliyat*, which was executed in 1842, and later on as the result of the arrangement, which was arrived at in the rent suit of 1911. So long as the tenant did not transfer his tenancy, the question of interference by the landlord did not arise. See, for

(1) (1904) I. L. R. 32 Calc. 41. (2) (1904) I. L. R. 32 Calc. 51.

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instance, *Muhammad Mumtaz Ali Khan* v. *Mohan Sing* (1), *Maharaja Birendra Kishore Manikya Bahadur* v. *Munshi Mahamed Doulat Khan* (2). The defendant's purchase was only in 1330 and so it is not possible that he could have acquired a permanent and transferable right by adverse possession. My findings on the above points are sufficient to show that the appeal must succeed. It is unnecessary therefore to deal with the other points that have been raised. The decree of the lower appellate court is set aside and that of the trial court restored. The plaintiffs appellants will get his costs of this appeal and of the appeal before the lower appellate court.

PANCKRIDGE J. I agree. With regard to the alleged permanency of the tenure, it may very well be urged that this is a question of fact and we are bound by the findings of fact of the lower appellate court. But as the case has proceeded, it has become necessary to investigate the question on its merits. I am satisfied that the tenure in respect of which the earlier *kabuliyat* was executed was not a permanent tenure for the reasons given by the courts below and by my learned brother. The judgments of the courts below have satisfied me that no title to permanent tenure has been acquired by the defendant or his predecessor by adverse possession. Therefore, as the court below has pointed out, the only ground on which the defendant can claim permanency is the compromise of 1912. Now, I am clear that the trial court was in error in admitting the document Exhibit J, a *vakâlâtnâmâ*, signed by the administrator acting on behalf of the predecessors of the defendants. I do not think that it is a sufficient answer to the argument advanced here that no objection was taken to its admissibility in the trial court. It appears to me to be one thing when a litigant takes no objection to a document, which is tendered for the purpose of convenience, and there is no doubt that if any objection were taken the

(1) (1923) I. L. R. 45 All. 419; (2) (1917) 22 C. W. N. 856. L. R. 50 I. A. 202.

strict method of proof could be employed; in such cases it is clearly wrong that the litigant should be permitted in the appellate court to insist upon strict proof which he did not require in the trial court. But the position is not the same where, as here, the document is inadmissible and unless it is admitted there is not any alternative method of proving it. In my opinion it is certainly not secondary evidence. Secondary evidence was tendered inasmuch as one of the defendants spoke to the fact of the compromise but was apparently not in a position to speak to its terms from independent recollection. No attempt was made to satisfy any of the conditions precedent, which would have justified him in refreshing his memory from the *vakâlâtnâmâ*. Nor indeed was the *vakâlâtnâmâ* employed by the defendant for that purpose. It was possibly an error in tactics on the part of the plaintiffs to cross-examine the witness as to the contents of the *vakâlâtnâmâ*. But I do not think that this would materially alter the position, for it is upon the *vakâlâtnâmâ* and not upon the oral deposition with regard to the contents of the *solenâmâ* that the learned Judge in the court below has based his judgment. In these circumstances, it appears to me that there is no evidence as to the contents of the *solenâmâ*.

With regard to the other points raised, I am by no means satisfied by the appellant's argument on the question of the presumed contents of the decree. It seems to me that it is probably right to say that, inasmuch as the Code specifically requires that the compromise should be recorded, in the absence of any evidence to the contrary, it may be presumed that record was made of the compromise, and if such record was in fact made it appears to me that the decision of the Privy Council in the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (1) is an authority for the proposition that the terms of the compromise, even although not concerned with the operative part of the decree, form part of the decree

(1) (1919) I. L. R. 47 Calc. 485.

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for the purpose of section 17, sub-section 2, clause (*vi*) of the Registration Act. At the same time, I am inclined to agree with the contention of the appellant based on the fact that this saving clause has no application to the case of a lease which falls under clause (*d*) of sub-section 1 of section 17 of the Registration Act. "Lease" is not expressly defined in the Registration Act. It is defined in section 105 of the Transfer of Property Act and although I apprehend this definition is strictly applicable only for the purposes of that Act, "lease" in its ordinary significance bears much the same meaning as it does in the section to which I have referred and it includes leases made in perpetuity. Therefore I consider that if we regard the contents of the *solenâmâ* as proved, and if we regard them, as the respondent would urge, as creating a tenancy in perpetuity, even so the *solenâmâ* is not admissible in evidence for want of registration.

With regard to the construction of the *solenâmâ* that turns upon the interpretation of the term "*bemeâdi*," I agree with my learned brother that "*bemeâdi*" does not mean permanent. This view is supported by the decision of the Patna High Court in the case of *Parshan Kuer* v. *Tulsi Kuer* (1).

I need only add that I do not think that the argument based on the fact that the *vakâlâtnâmâ* was executed by the administrator is well founded. That would only make the lease voidable and not void and would not, I think, make the agreement of compromise an illegal one.

I agree in the order proposed by my learned brother.

*Appeal allowed.*

G. S.

(1) (1917) 2 Pat. L. J. 180.