APPELLATE CIVIL.

Before Mukerji and Guha JJ.

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April 23, 24; *June* 2.

HARANCHANDRA CHAKRABARTI

v.

KALIPRASANNA SARKAR.*

Registration—Âmalnâmâ—*Unregistered lease, if admissible in evidence—Terms of lease—Collateral facts—Indian Registration Act (XVI of 1908), ss. 17* (d), *49* (a) *and* (c)—*Indian Evidence Act (I of 1872), s. 91—Transfer of Property (Amendment) Supplementary Act (XXI of 1929), s. 10.*

An unregistered *âmalnâmâ* was executed to the following effect: "I settle with you in *sarâsari* right the *patit* lands lying immediately to the east of, and appertaining to, the house purchased by the late Ramchandra Majumdar, situated in Bibir Chak, police-station Rampur Boalia, with a proper *nazar* and a *nirikh* calculated at Rs. 80 *per bighâ*. I shall afterwards measure the said lands and take the *nazar* found due to me and shall fix the rental. Now, on taking in all Rs. 20 as *nazar* from you, I execute this *âmalnâmâ*. Be it mentioned that you may erect, if you so desire, *puccâ* structures on the lands."

Held that it did not contemplate the execution of any further document in future to complete the transaction: in these circumstances it was impossible to regard the *âmalnâmâ* as anything but a lease; and, as the document reserved a yearly rent, it required to be registered under the provisions of clause (*d*) of section 17 of the Registration Act.

Not being registered, the document cannot affect the property it concerns and cannot be received as evidence of any transaction affecting the same [*cf.* clauses (*a*) and (*c*) of section 49 of the Registration Act].

There is no question, however, that this unregistered lease may be used for proving such collateral facts as the fact of the tenant's possession or the nature of such possession, or the date on which such possession began and similar other matters.

But this unregistered lease may not be used to prove the fact that the tenant had authority to erect *puccâ* structures on the land, if he so desired, as this is not a collateral fact, but, being one of the terms of the lease, is nothing less than a transaction, affecting the property on which the structures are to be erected, within the meaning of clause (*c*) of section 49 of the Registration Act.

It is impossible to regard this clause as a mere personal right or obligation collateral to rights or obligations created by this lease.

*Appeal from Appellate Order, No. 304 of 1930, against the order of Jatindranath Mukherji, Subordinate Judge of Rajshahi, dated March 18, 1930, reversing the order of Surendranath Palit, Additional Munsif of Boalia, dated April 3, 1928.

Subramanian Chettiar v. *Arunachalam Chettiar* (1) followed.

Vyravan Chetti v. *Subramanian Chetti* (2) and *Varada Pillai* v. *Jeevarathnammal* (3) distinguished and explained.

APPEAL FROM APPELLATE ORDER by the defendants.

The facts of the case as well as the arguments at the hearing of this appeal appear fully in the judgment.

Sharatchandra Ray Chaudhuri, Beereshwar Bagchi and *Priyanath Bhattacharya* for the appellants.

None for the respondent.

Cur. adv. vult.

MUKERJI AND GUHA JJ. This appeal has been preferred from an order of remand, by which the Subordinate Judge, holding in an appeal that an *âmalnâmâ,* which had been filed by the defendants in the trial court as evidence on their behalf and on the basis of which they succeeded in that court, was not admissible, has remanded the suit to that court for a fresh decision, after taking such evidence as the parties may choose to adduce. The facts necessary to be stated are the following.

The plaintiff sued the defendants for a permanent injunction, restraining the latter from erecting a *puccâ* boundary wall on a small plot of land, and also a mandatory injunction calling upon them to demolish a *puccâ* wall, which they had already erected. These and other consequential and incidental reliefs were asked for on the basis of a declaration, that was also sought to the effect that the defendant No. 1 was a mere tenant-at-will with respect to the said plot of land.

On behalf of the defendants, it was pleaded *inter alia* that the defendant No. 1 is a permanent tenant on the land with his rental fixed and that he

(1) (1902) I. L. R. 25 Mad. 603; L. R. 29 I. A. 138.

(2) (1920) I. L. R. 43 Mad. 660.

(3) (1919) I. L. R. 43 Mad. 244.

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had, accordingly, a right to build *puccâ* structures on the land. Other objections were also taken, but for the purposes of this appeal it is not necessary to set them out.

The *âmalnâmâ* was filed by the defendants in support of their defence. It runs in these words :—

An *âmalnâmâ* is executed to the following effect. I settle with you in *sarâsari* right the *patit* lands lying immediately to the east of, and appertaining to, the house purchased by late Ramchandra Majumdar, situated in Bibir Chak, police-station Rampur Boalia, with a proper *nazar* and a *nirikh* calculated at Rs. 80 *per bighâ*. I shall afterwards measure the said lands and take the *nazar* found due to me and shall fix the rental. Now, on taking in all Rs. 20 as *nazar* from you, I execute this *âmalnâmâ*. Be it mentioned that you may erect, if you so desire, *puccâ* structures (on the lands).

The document contains all the terms of the tenancy, places the tenant in possession and discloses an intention to create a present demise. It describes the land settled and only reserves the measurement of it for determining its area for the future and states that, on ascertainment of the area on measurement, the rental would be calculated. It, nevertheless, specifies the *nirikh* or rate of rent at Rs. 80 *per bighâ*. It recites that the *nazar*, Rs. 20, has been received. It recites also that the executant settles the land by it in *sarâsari* rights. It further states thus :—"Be it mentioned that you may erect, "if you so desire, *puccâ* structures (on the lands)." It does not contemplate the execution of any further document in future to complete the transaction. In these circumstances, it is impossible to regard the *âmalnâmâ* as anything but a lease. The Subordinate Judge has taken the same view.

The settlement evidenced by this document is not from year to year, nor for any term exceeding one year, and is a settlement with no term fixed, but it reserves a yearly rent of Rs. 80 *per bighâ* and is, accordingly, hit by clause (*d*) of section 17 of the Registration Act. Not being registered, the document cannot affect the property it concerns and cannot be received as evidence of any transaction

affecting the same [*cf.* clauses (*a*) and (*c*) of section 49 of the Registration Act]. The question then is whether, notwithstanding section 49 of the Act, the document may be used for other purposes. There is no question that it may be so used for proving such collateral facts as the fact of the defendant No. 1's possession or the nature of such possession, or the date on which such possession began and similar other matters. But what is the fact, to prove which the defendants desire to use the document in the present case? Plainly, the fact that they had authority, to erect *puccâ* structures on the land, if they so desired. This, in our opinion, is not a collateral fact but one of the terms of the lease itself. Not being admissible as a lease, the document cannot, in our opinion, be received in evidence to prove one of the terms of the lease. The permission granted or authority conferred by the document to erect *puccâ* structures, in our judgment, is nothing less than a transaction, affecting the property on which the structures are to be erected, within the meaning of clause (*c*) of section 49 of the Registration Act.

Two decisions have been strongly relied on on behalf of the appellants. One of them is the decision of the Judicial Committee in the case of *Vyravan Chetti* v. *Subramanian Chetti* (1), in which there was an agreement between the first and the second mortgagees in respect of an identical property that both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as *per* terms mentioned therein, whatever amount may be realised, on the date of realisation. Their Lordships held, on a construction of the agreement, that, if the whole effect of the agreement was to provide merely that the realised money was to be divided in equal shares, there was nothing to require it to be registered; and, if, on the other hand, there were two distinct provisions—the

(1) (1920) I. L. R. 43 Mad. 660.

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one relating to the rights of the property and the other with regard to the division of the money realised—then, as the proceedings in the suit related merely to the question of the realised money, the agreement need not be registered for the purpose of being given in evidence in that suit, although it would require registration in a suit relating to the regulation of the rights against the estate itself. In relation to this decision, it may be stated that it is impossible to separate the provision as to permission or authority to erect *puccâ* structures from the other terms of the document, under which the defendant No. 1 came into possession and the purpose for which it is now sought to be used is to establish the incidents of the tenancy created by the document. The test, in a case like the present one, has been sufficiently indicated by the Judicial Committee in the case of *Subramanian Chettiar* v. *Arunachalam Chettiar* (1), in which their Lordships, in holding that a particular clause in a lease did not require registration, observed as follows: "Its provisions "form no part of the terms of the holding under the "lease; their effect will be exhausted some years "before the lease takes effect. The payment "bargained for is no charge on the property; it is not "rent nor recoverable as rent, but a mere personal "obligation collateral to the lease." In our opinion, it is impossible to regard the clause, with which we have to deal, as a mere personal right or obligation collateral to those created by lease. The other case relied on on behalf of the appellants is that of the Judicial Committee in *Varada Pillai* v. *Jeevarathnammal* (2), in which recitals in certain petitions of the fact that there was a gift were used not as evidence that the gift was actually made, such evidence being excluded by section 91 of the Evidence Act, but for the collateral purpose of

(1) (1902) I. L. R. 25 Mad. 603; (2) (1919) I. L. R. 43 Mad. 244. L. R. 29 I. A. 138.

showing the nature of possession held by the alleged donee.

Some other decisions were cited at the bar, but we do not refer to them, as, in our opinion, they do not bear upon the case. Reference was made by the learned advocate for the appellants to the proviso added to section 49 of the Indian Registration Act by section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929. In view of our decision that the *âmalnâmâ* could be used as evidence of any collateral transaction, but that, in the present case, the purpose, for which it has been sought to be used, does not fall within that description, the proviso, even if it may be availed of by the appellants, will not be of any assistance to them.

The decision complained of is, in our judgment, right. We, accordingly, dismiss the appeal, but without costs, the respondents not having appeared in it.

Appeal dismissed.

G. S.