APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice E. M. Nanavutty

HIRA LAL AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* THAKUR-AIN GAJRAJ KUER AND OTHERS (DEFENDANTS-RESPONDENTS)* 1935 *March*, 12

Construction of documents—Perpetual lease acknowledging occupancy rights for life enjoyed by lessee—Naslan bad naslan *in perpetual lease, meaning of*—Malikana—*Rent payable by lessee described as* malikana—*Lessee liable to pay for* chaukidar *and* patwari—*Right of re-entry not expressly reserved to lessor—Rights conferred on lessee, nature of Under-proprietary rights, presumption of.*

Where a Taluqdar executed a perpetual lease of a village in favour of an old servant of the Estate, who was occupying it from before under a settlement decree for occupancy rights for life, acknowledging those rights and directing that he was to remain in possession and occupation generation after generation ("*naslan bad naslan*") on payment of Government revenue and *malikana* dues at the rate of two annas to the Taluqdar and his heirs and the lessee and his heirs were to appropriate the remaining six annas and the lessee was further to provide for the pay of the *chaukidar* and the *patwari, held,* that the lease conferred only a heritable occupancy right and not an under-proprietary right. In the absence of any words which would indicate any clear intention of conferring a proprietary or transferable interest the mere use of the words *naslan bad naslan* in a perpetual lease connotes only a heritable but not a transferable interest. *Karim Dad Khan* v. *Bibi Ghafuran* (1), and *Kalka Singh* v. *Suraj Bali Lal* (2), referred to. *Harihar Bakhsh Singh* v. *Uman Prasad* (3), and *Binda Din Tewari* v. *Ram Harakh Dubey* (4), distinguished.

Where a grant confers hereditary rights and there is nothing to show that they are non-transferable, they may be presumed to be transferable but where there are clear indications in the grant that the estate conferred is not meant to be transferable, there can be no such presumption. *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (5), distinguished.

*First Civil Appeal No. 27 of 1933, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 12th of December, 1932.

(1) (1921) 9 O.L.J., 104. (2) (1917) 5 O.L.J., 80.
(3) (1886) I.L.R., 14 Cal., 296. (4) (1929) 6 O.W.N., 722.
(5) (1926) 4 O.W.N., 15.

1935

HIRA LAL v. THAKURAIN GAJRAJ KUER

It is true that the word "*malikana*" is not generally applied to the rent paid by an occupancy tenant but the mere use of this word is not sufficient to show that there is any intention of conferring under-proprietary rights. Similarly the liability to pay for the *chaukidar* and the *patwari* or the fact that no right of re-entry has been expressly reserved to the lessor does not necessarily indicate that the lessees are to be considered under-proprietors.

Messrs. *Hyder Husain* and *P. N. Chaudhri*, for the appellants.

Messrs. *Radha Krishna Srivastava* and *Parmeshwari Dayal*, for the respondents.

KING, C.J. and NANAVUTTY, J.:—This is a plaintiffs' appeal arising out of a suit for possession of a village named Ailahi. The plaintiffs claimed on the basis of a perpetual lease (exhibit 2) executed in favour of their predecessors by the Taluqdar on the 8th of July, 1891. Their claim is that under the terms of that lease they acquired under-proprietary rights in the village. The defendants denied that the lease in question conferred anything more than heritable and non-transferable rights.

It is unnecessary for the purpose of this appeal to set forth the facts in any detail. The only question for our decision is whether the plaintiffs hold the village as under-proprietors or whether they hold it merely as perpetual lessees with heritable but non-transferable rights. The trial court held against the plaintiffs on that point and that is the only question for our consideration.

The first point to consider is the decree passed in favour of the plaintiffs' ancestors at the time of the first regular settlement. Their ancestors claimed under-proprietary rights in the village. Their claim was opposed by the Taluqdar and the Settlement Officer rejected their claim *in toto*. They appealed to the Settlement Commissioner who agreed that the plaintiffs in that suit had no under-proprietary rights but he modified the decree of the Settlement Officer by granting the plaintiffs a lease of the property for their joint lives at a rent of Rs.201 per annum. This decree was passed

1935

HIRA LAL v. THAKURAIN GAJRAJ KUER

on the 27th of January, 1864. It is perfectly clear therefore that at that time the plaintiffs' ancestors were found to have no under-proprietary rights and they were merely granted a decree for tenancy rights for life.

At the second regular settlement the Taluqdar granted a fresh lease (exhibit 2) on the 8th of July, 1891, and the decision of the question before us turns upon the interpretation of that lease. The Taluqdar starts by reciting the previous history and mentions that a *Qabza dari* decree for life had been passed in respect of the village in favour of Sital Lal and Bisheshwar Lal by the Settlement Commissioner and that those persons are in possession and occupation under the terms of that decree. He goes on to say that as these persons are old servants and well-wishers of the estate so now "we acknowledge that occupancy right, which was for life, to be perpetual". He goes on to exempt from the property leased certain specified plots measuring 110 bighas and he fixes the amount of rent which the lessees will have to pay. They have to pay the Government revenue and *sewai* and have to pay at the rate of 2 annas as *malikana* dues to the taluqdar himself and his heirs and the lessees and their heirs are permitted to appropriate the remaining six annas. The lessees have to provide for the pay of the *chaukidar* and the *patwari* and for the village expenses. He ends up by saying that he executes a "perpetual lease" in favour of the persons mentioned and states that it behoves the lessees to remain in possession and occupation generation after generation *"naslan bad naslan"* according to the conditions of this lease and pay rent to the estate and always remain obedient and loyal to the estate.

King, C J. and Nanavutty, J.

It will be observed that there is nothing to show clearly any intention of conferring a transferable estate. The language is certainly clear on the point that heritable rights are conferred.

It has been argued by the learned Advocate for the appellants that the use of the expression *"naslan bad*

1935

HIRA LAL v. THAKURAIN GAJRAJ KUER

King, C.J. and Nanavutty, J.

naslan" connotes a heritable and transferable estate. For this proposition he relies upon the case of *Karim Dad Khan* v. *Bibi Ghafuran* (1). The learned Judges observed that the words "*naslan bad naslan*" have acquired a technical import in Indian conveyances. They refer to a decision of their Lordships of the judicial Committee in the case of *Thakur Harihar Bakhsh Singh* v. *Thakur Uman Prasad* (2) in which their Lordships laid down that the words "*naslan bad naslan*" indicate an intention to confer absolute ownership.

The learned Advocate for the respondents seeks to distinguish this case on the ground that in the case cited the learned Judges did not rely only upon the expression "*naslan bad naslan*" but also laid great stress upon another provision in the lease to the effect that the lessee should "exercise all sorts of proprietary powers". These words were certainly of great importance as showing an intention of conferring a proprietary interest and when such an intention is clear the words "*naslan bad naslan*" would unquestionably indicate that the proprietary interest was to be heritable and was not to be an estate for life only. The case of *Binda Din Tewari* v. *Ram Harakh Dubey* (3) has been cited in support of the same proposition but in that case it is clear that transferable rights had been given and the only question was whether the interest conferred was a life estate or a heritable estate. The words "*naslan bad naslan*" were no doubt conclusive on that point.

In the present case however we have no words, which would indicate any clear intention of conferring a proprietary interest or a transferable interest. For the respondents reliance has been placed upon a ruling of a learned Judge of the Judicial Commissioner's Court in *Kalka Singh* v. *Suraj Bali Lal* (4). That case was somewhat similar to the case before us and the language of the document which had to be interpreted in that case

(1) (1921) 9 O.L.J., 104(107).
(2) (1886) I.L.R., 14 Cal., 296.
(3) (1929) 6 O.W.N., 722.
(4) (1917) 5 O.L.J., 80.

was more indicative of proprietary rights than the language of the document under consideration before us. In the ruling cited the words *"naslan bad naslan"* were used, and over and above that expression it was provided that the grantor was to have mutation made in favour of the grantee by getting his name recorded in the *khana milkiat*. There were certain other points which were stressed as showing an indication of conferring under-proprietary rights, such as the mention of *malikana*, but the learned Judge took the view that there was no intention of conferring anything more than the rights of a perpetual lessee and that no under-proprietary rights had been conferred. Another argument advanced for the appellants is that when a heritable estate is given it should be presumed that the intention was to confer also a transferable estate. For this proposition the case of *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (1) has been cited. There is no doubt an observation by one of the learned Judges at page 42 to the effect that where a man is proved to have hereditary rights, and where there is nothing to show that they are non-transferable, they must be presumed to be transferable. In that case there was nothing to show that they were not transferable. In the case before us we think that there are indications that the estate was not meant to be transferable.

It has also been argued that the lease provided for payment of *malikana* dues to the lessor *and to his heirs* and that as the lessor would undoubtedly be entitled to transfer his estate and the transferee would be entitled to claim the *malikana* dues, therefore, the word "heirs" should be understood as including a transferee. If the word "heirs" includes a transferee in that context it is further argued that when the "heirs" of the lessees are spoken of that term must also be held to include the transferees of the lessees. The argument is no doubt ingenious but we do not think that it is sound.

(1) (1926) 4 O.W.N., 15.

1935

HIRA LAL v. THAKURAIN GAJRAJ KUER

The lessor as a full proprietor can no doubt transfer his estate and his transferee would be entitled to claim the *malikana,* but he would make his claim as a transferee under the rights conferred by the ordinary law and he would not base his claim on being an "heir" of the original lessor, within the meaning of the expression used in the deed of lease. The mere fact that the lease is granted to the lessees and their heirs does not go further than showing that heritable rights are conferred.

King, C.J. and Nanavutty, J.

It is also pointed out that the word *"malikana"* is more appropriate to the rent paid by an under-proprietor than to the rent paid by a tenant. It is true that the word *"malikana"* is not generally applied to the rent paid by an occupancy tenant, but the mere use of this word is not sufficient to show that there was any intention of conferring under-proprietary rights. As regards the liability to pay for the *chaukidar* and the *patwari,* this was simply a matter of agreement between the lessor and the lessees and does not necessarily indicate that the lessees were to be considered under-proprietors.

The fact that no right of re-entry has been expressly reserved to the lessor has also been stressed by the appellants as showing the intention of conferring under-proprietary rights. We do not think that this argument is convincing because if the lessor intended to give only the rights of a perpetual lessee the power of ejectment would be given by statute and there would be no need to include any special provision for ejectment in the terms of the lease.

For the respondents it has been strongly argued that the lessor was clearly intending merely to extend the occupancy rights, which had previously been decreed only for the life time of the lessees, into heritable occupancy rights, and there was no intention of converting the occupancy rights into under-proprietary rights. Taking the language of the document as a whole we agree with this view. The lessor referred to the decree passed at the time of the first regular settlement in which the plaintiffs'

1935

HIRA LAL v. THAKURAIN GAJRAJ KUER

under-proprietary claims were expressly denied. We think that the Taluqdar merely wished to grant to the lessees heritable occupancy rights in place of the occupancy rights for life which had previously been conferred upon them by the Settlement decree. We find no indication of any intention of going beyond this and converting their occupancy rights into the rights of under-proprietors.

King, C.J. and Nanavutty, J.

In our opinion the Court below has taken the correct view and we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

SHER BAHADUR SINGH AND OTHERS (DEFENDANTS-APPELLANTS) *v.* SRI MADHO PRASAD SINGH, (PLAINTIFF-RESPONDENT)*

1935 *March*, 22

*Oudh Estates Act (I of 1869), section 8—Taluqdar's widow holding life estate under her husband's will—Confiscation of estate under Lord Canning's proclamation—Summary settlement made with widow—*Sanad *granted to her—Widow's name entered in lists prepared under section 8—Widow, whether constituted trustee for remainderman—Widow gifting property and afterwards contesting suit for declaration of under-proprietary rights—Under-proprietary rights decreed against her—Decree, whether binding on remainderman—Trust—*Cestui que trust, *whether bound by* bona fide *acts of trustees—Civil Procedure Code (Act V of* 1908), *sections* 11 *and* 100—Res Judicata—*Lessee's suit against third person, whether operates as* res judicata *in subsequent suit by lessor against same person—Under-proprietary title established—Presumption of possession as under-proprietor—Evidence Act (I of* 1872), *section* 13—*Judgment not* inter partes, *whether admissible as evidence of possession—*

*Second Civil Appeal No. 133 of 1933, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Fyzabad, dated the 31st of January, 1933, modifying the decree of Pandit Hari Kishen Kaul, Munsif, Havali, Fyzabad, dated the 19th of July, 1932.