

32 C. 911 (=9 C. W. N. 803.)
 [911] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice
 Mitra.

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MAHOMED KAZEM v. NAFFAR CHUNDR PAL CHOWDHRY,*
 [16th May 1905.]

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Putni—Sale—Rights and liabilities of purchaser—Protected interest—Incumbrance, annulment of—Notice to annul incumbrance—Bengal Tenancy Act (VIII of 1885), s. 160 (g), s. 167.

A clause in a putni lease to the effect that, if the putnidar should grant a darputni, the darputnidar shall act according to the terms of the putni kabuliat, does not amount to a permission to the putnidar to create a darputni within the meaning of s. 160 cl. (g) of the Bengal Tenancy Act.

Knowledge on the part of the proprietor of the creation of the darputni and acceptance by him of the putni rent from the darputnidar are not sufficient to constitute the darputni a protected interest within the meaning of that section.

Where an application under s. 167 of the Bengal Tenancy Act was made to the Collector and both the application and the notice issued bore the seal of the Collector and the notice was duly served.

Held that the provisions of the section were complied with although the application was received by a Deputy Collector in charge and the notice was signed by a Deputy Collector "for the Collector."

It is not necessary that the Collector should personally receive the petition or personally cause the notice to be served.

Akhoy Kumar Soor v. Bejoy Chand Mohatap (1) approved on this point.

[Ref: 13 C. W. N. 720=9 C. L. J. 490; Fol: 13 C. L. J. 613=16 C. W. N. 64=9 I. C. 1001.]

APPEAL by the defendant No. 1 Mahomed Kazem.

The plaintiffs Naffar Chundra Pal Chowdhry and Dipradas Pal Chowdhry purchased a putni taluk on the 10th July 1900 at a sale in execution of a decree for rent with power to avoid all incumbrances. Three villages namely Gōbindapur, Panchpata and Kutabpur appertaining to the putni taluk were held by the [912] defendants, Nos. 1 and 2 as darputnidar. The plaintiffs then presented an application addressed to the Collector of Nadia on the 4th June 1901 under s. 167 of the Bengal Tenancy Act for service of notices on several incumbrancers, including the defendants, declaring that the incumbrances were annulled; on the same day the following order was made thereon signed by J. D. Bysack, Deputy Collector: "Issue notice accordingly on payment of proper process fees." On the 5th June the following order was made under the signature of the same officer: "Process fee paid and notices have been issued and put up on 17-6-01;" and on the 17th June the order recorded over his signature was: "Notices duly served and case is disposed of." The order sheet bore the seal of the Collector of Nadia. The notice issued to the defendants under s. 167 of the Bengal Tenancy Act was signed by "A. C. Chatterjee for Collector." In attempting to take possession of the aforesaid villages the plaintiffs were resisted by the defendants and the latter were ordered to be retained in possession by the Subdivisional Officer of Ranaghat in a proceeding under s. 145 of the Code of Criminal Procedure. The plaintiff thereupon brought the present suit against the defendants

* Appeal from Original Decree No. 290 of 1903, against the decree of Ehuban Mohon Ghose, Subordinate Judge of Nadia, dated the 22nd of July 1913.

(1) (1902) I. L. R. 29 Cal. 813, 820.

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Nos. 1 and 2 for Khas possession of the villages on a declaration that the plaintiffs had by their purchase acquired the taluk with power to annul incumbrances, and that the defendants alleged the darputni right had been annulled.

The defendant No. 1 appeared and pleaded in defence that the original putnidar, who obtained the putni settlement with power to grant darputni and other settlements, had by virtue of such authority and with the knowledge of the zamindar, granted the darputni to his predecessors and that the zamindar had by receipt of rent from them under an assignment from the putnidar and by other acts recognized their darputni right. He pleaded that under these circumstances the darputni was not liable to be annulled. He further pleaded that the plaintiffs had not by their purchase acquired the right to annul incumbrances and that the notice under s. 167 of the Bengal Tenancy Act was not served through the Collector of the district himself and had not been regularly served according to law. The defendant No. 2, he said, was only a benamidar for him.

[913] The following issues were framed for trial:—

- (1) Had the putnidar any express authority in writing to create darputni tenure; if so, whether it is liable to be set aside?
- (2) Whether the defendant paid any rent to the superior landlord; if so, whether the latter recognized the darputni by receipt of such rent or by any other act?
- (3) Whether the plaintiffs purchased the putni tenure with power to avoid all incumbrances? Whether the defendant's tenure was in the nature of an incumbrance?
- (4) Whether the requirements of s. 165 were complied with in effecting the sale?
- (5) Whether notice under s. 167 was served and if so whether it was legal and sufficient?
- (6) Are the plaintiffs entitled to any mesne profits; if so, to what extent?

The putni lease was not produced, but the putni kabuliat executed by the original putnidar contained the following clause: "If I should let out this mahal in darputni to any person, such darputni talukdar shall act according to the terms of my kabuliat."

The Subordinate Judge decided all the issues in favour of the plaintiffs and made a decree in their favour.

The defendant No. 1 appealed to the High Court.

Babu *Nilmadhab Bose* (Babu *Jadru Nath Kanjilal* with him) for the appellant. The putni kabuliat shows that the putnidar had the permission of the proprietor to grant a darputni settlement. The document is drawn inartistically, but looking at the substance the document is sufficient.

The petition under s. 167 of the Bengal Tenancy Act was merely addressed to the Collector; the law requires that the petition should be entertained and the notice issued by the Collector. The term Collector is defined in s. 3 of the Act to mean, either the Collector of the district or some officer specially authorized by the Local Government to discharge any of the [914] functions of a Collector under the Act: *Ishabut Singh v. Umahil Fatima* (1). Here there is nothing to show that the petition was entertained by the Collector; J. D. Bysack, Deputy Collector, who entertained the petition, for he was the officer who passed the first order thereon, and who directed the issue of the notice, was not an officer authorized

(1) (1900) I. L. R. 28 Cal. 66, 69.

under s. 167 of the Act. The notice itself was signed by "A. C. Chatterjee for Collector;" A. C. Chatterjee does not hold any general power-of-attorney from the Collector, neither was he authorized under the section. The law requires that the petition must be presented to and every step under it must be taken by the Collector of the district or by some officer specially empowered; the Collector cannot delegate his powers to a Deputy Collector. It is necessary that the provisions of s. 167 should be strictly complied with: *Mohabut Singh v. Umahil Fatima* (1). In *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (2) the application was made to the Collector.

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Babu Mahendra Nath Roy (Dr. Rash Behary Ghose and Babu Amarendra Nath Bose with him) for the respondents. The objection under s. 167 is highly technical. *Mohabut Singh v. Umahil Fatima* (1) does not apply, here the application was made to the Collector, it was received by an officer deputed by the Collector to receive such applications and the notice that was issued was signed by an officer, who signed for the Collector and it bore the seal of the Collector. The Collector's functions under the section are purely ministerial and may be delegated: he cannot be expected to attend to all these details personally: *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (2).

Babu Nilmadhab Bose in reply: The objection is not one of form, but of substance: *Baij Nath Sahai v. Ramgout Singh* (3).

Cur adv. vult.

MACLEAN, C. J. The plaintiff respondent is a purchaser of a putni taluk on a sale for arrears of rent. The defendant appellant is the holder of a subordinate tenure within the taluk. The sub-tenure was created by the putnidar subsequent to the grant of the putni.

[915] Within a year of his purchase, the plaintiff took steps under section 167 of the Bengal Tenancy Act for avoidance of the defendant's sub-tenure, and shortly after instituted the suit under appeal.

Various defences were raised in the lower Court, but only two questions have been submitted for our decision. The first is based on section 160 clause (g) of the Act.

Did the proprietor expressly and in writing give the putnidar permission to create the sub-tenure?

The appellant has this initial difficulty to face: he can produce no such writing. He, however, relies on the following clause in the putni kabuliat:—"If I (putnidar) should let out this mehal in darputni to any person, such darputnidar shall act according to the terms of my kabuliat." The *putni pottah* has not been put in, nor any copy of it. It would be straining the language of the clause in the kabuliat to say that these words amounted to an express permission to create the sub-tenure. The clause simply means that, if the putnidar creates a subordinate tenure and (section 3 of Regulation VIII of 1819 gives him the power to do so), the subordinate tenure-holder must perform the duties imposed upon the putnidar himself by the lease. It does not contain even the implication of a permission, assuming that the *putni pottah* contains a counterpart of the clause.

There is some evidence to show that the proprietor knew of the creation of the sub-tenure and accepted the rent of the putni taluk through the sub-tenure-holder; but this is not sufficient to constitute the sub-tenure a protected interest within the meaning of section 160.

(1) (1900) I. L. R. 28 Cal. 66, 69.

(3) (1896) I. L. R. 23 Cal. 775.

(2) (1902) I. L. R. 29 Cal. 813, 820.

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The second question relates to procedure under section 167 of the Act. The written application for service of notice was made to the Collector of Nadia as prescribed by the first clause of the section. According to the practice which prevails in the Collectorate of Nadia, the application was received by a Deputy Collector in charge. Notice was thereafter issued from the Collectorate as prescribed by the third clause of the section, and there is no question but that the notice was duly served in compliance with the Act. The application, when presented, was [916] sealed with the Collectorate seal, and the notice was also sealed with the Collector's seal, though it was signed by a Deputy Collector "for the Collector."

The provisions of the Act were complied with: the applicant did all that the law required him to do. The Collectorate was merely the medium for service, and the officers in charge caused the notice to be served in the manner prescribed by the rules. There was no illegality or irregularity. We agree with the observations of the Court on this point in *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1).

We are unable to accept the view of the appellant that the proceedings were either illegal or irregular, because the Collector did not personally receive the petition, or personally cause the notice to be served. Having regard to the many and multifarious duties of the Collector, it is impracticable that he could personally attend to such details, and the fact that both the application and the notice bear the seal of the Collectorate is, to our minds, sufficient to warrant the conclusion that the application was presented to the Collector, and that he caused the notice to be served within the meaning of section 167.

The appeal therefore fails and is dismissed with costs.

MITRA, J. I agree.

Appeal dismissed.

32 C. 917 (=9 C. W. N. 1004).

[917] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

GOPAL SAHU v. BRIJ KISHORE PERSHAD.*

[25th and 29th May, 1905.]

Civil Procedure Code (Act XIV of 1882), s. 257A—Agreement to give time on condition of payment of higher rate of interest—Sanction of Court not accorded—Non-extinction of judgment-debt—Separate suit to recover enhanced interest, maintainability of.

It is only when the judgment-debt is extinguished and a new contract made that an agreement giving time for the satisfaction of the judgment-debt, not sanctioned by the Court, can be enforced.

Where, therefore, the judgment-debtors filed an application before the Court executing the decree for a postponement of the sale, as they had agreed to pay interest at a rate higher than the decretal rate, but the sanction of the Court was not accorded to such payment.

Held that, as the agreement contained in the petition did not put an end to the plaintiffs' claim on their previous decree and substitute something else in

* Appeal from Appellate decrees No. 2752 of 1902 against the decree of G. Gordon, District Judge of Saran, dated the 18th June 1902, reversing the decree of Gopi Nath Mattay, Subordinate Judge of Saran, dated the 30th of September 1897.

(1) (1902) I. L. R. 29 Cal. 813, 820.