

Privy Council Appeal No. 84 of 1917.
Bengal Appeal No. 30 of 1914.

Srimati Giribala Dasi - - - - - *Appellant*

v.

Kalidas Bhanja and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8th JULY, 1920.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

The plaintiffs in the action out of which this appeal has arisen were maliks of an 8 annas' share of taluk No. 381, within the Collectorate touzi of District 24 Pergunnahs, one Jogen-dranath Bose and Nagendrabala Dasi resident in Calcutta were maliks of a 4 annas' share of this same taluk. Of this latter share the plaintiffs had ever since the death of their father been in possession as ijaras of the said owners thereof, and one Hari Charan Bose resident within the aforesaid district was the malik of the remaining 4 annas' share. In order to overcome inconvenience and to facilitate the plaintiffs in collecting the rents payable by the tenants of the 12 annas' share of the entire taluk, the plaintiffs desired to purchase the 4 annas' share of Hari Charan Bose, and thus become entitled to collect the rents of the tenants of the entire taluk treated as one estate. They accordingly proposed to the said Hari Charan that he should sell to Hem Chandra Bhanja, acting on behalf of himself and his

co-plaintiffs, his aforesaid share for the sum of Rs. 14,000, of which Rs. 500 were to be paid as earnest money. This proposal was accepted by Charan Bose. In pursuance of this arrangement a deed styled a deed of agreement of sale, dated the 31st August, 1901, was executed by Hari Chandra Bose by which after acknowledging the receipt of the Rs. 500 earnest money, it was provided that upon payment to him, his heirs or representatives of Rs. 13,500, the balance of the purchase money within two years from the date of the deed, he or they would execute in favour of Hem Chandra Bhanja an "out and out deed of sale free from all incumbrances and cause the registration of the same." It is averred in paragraph 3 of the plaint filed by the plaintiffs that when Nayan Chandra Bose, a kinsman of theirs, heard that Hari Chandra had agreed to sell his 4 annas' share in the manner suggested he earnestly requested the plaintiffs to procure that the sale should be made to him, Nayan Chandra, instead of to Hem Chandra, and that the necessity the plaintiffs were under to purchase the property having been explained by them to him, Nayan Chandra, he promised that, after this purchase of the said share should be made, he would grant to them a mourasi mokurari ijara lease of the share so purchased for the annual jumma of Rs. 840, exclusive of the revenue and road cess payable in respect thereof, so that the plaintiffs would thus have in their own hand the collection of the rents of the entire 16 annas; that yielding to his importunities the plaintiffs agreed to his proposal and got the share purchased from Hari Chandra Bose to be conveyed to him, Nayan Chandra Bose.

That is the case made in the plaint upon this point. The plaint does not contain any further statement whatever as to the particulars of the lease to be given; when it was to commence or what was to be its duration.

By deed bearing date of the 21st November, 1903, made between Hari Charan Bose and Nayan Chandra Bose; after reciting that the former had agreed with the latter for the absolute sale of the aforesaid share for Rs. 14,000, and had received Rs. 7,000 portion thereof, as earnest money, this one 4 annas' share was conveyed to Nayan Chandra. It appears from a memorandum printed at page 27 of the record, that Rs. 7,000 had been received by the vendor, in addition to two sums of Rs. 2,000 and Rs. 5,000 paid on the 7th and 8th of September respectively, the receipts for which are printed at pages 15 and 13 of the record.

Mr. De Gruyther contended on behalf of the respondents that the first sum of Rs. 7,000 so averred to have been paid was paid out of the proper monies of the plaintiffs, and that the further sum of Rs. 7,000 was, with the aid of the plaintiffs, borrowed by Nayan Chandra Bose from some friends for which loan he remains indebted. This may be so. It has not been made as clear as it might be, but if the fact be so, then as 6 per cent. on Rs. 7,000 would only amount to Rs. 420 per annum, Nayan Chandra was to receive from the plaintiffs double the amount of this interest.

In this same paragraph 3 it is further averred that Nayan Chandra had been receiving from the plaintiffs after they had been put into possession as ijardars, from the date of the purchase up to his death, this sum of Rs. 840, but that as he had incurred this debt to effect the purchase of the property, and had promised to execute and cause the registration of the mourasi ijara lease agreed upon after its liquidation they, the plaintiffs, relying upon his word continued to collect the rent as ijaradars and did not experience much inconvenience.

In paragraph 4 of the plaint it is averred, that "thereafter" (no date being given), the plaintiffs gave Nayan Chandra a draft of a mourasi ijara lease which he kept for a long time, that he subsequently demanded a larger sum as the profits of the ijara which the plaintiffs refused to pay, that the plaintiffs thereupon offered to purchase the 4 annas' share from him for Rs. 16,000, that he took time to consider this offer, asked the plaintiffs to collect the rents for the year 1316 B.S. as ijardars, and ultimately agreed to sell to them this property with all arrears and profits for the sum of Rs. 16,000, and asked the plaintiffs to prepare a draft kobala.

In paragraph 5 of the plaint it is averred that soon after this he got ill and died.

When the plaint is referred to it will be found that the relief first prayed for by the plaintiffs is that this agreement for the sale of the four annas' share for Rs. 16,000 should be specifically performed and, in the alternative, that the agreement, made before the sale to Nayan Chandra as an inducement to the plaintiffs to consent to that sale being made to Nayan Chandra instead of to Hem Chandra Bose, should be specifically performed. There is in the plaint no reference whatever other than this to the grant by Nayan Chandra to the plaintiffs of an ijara or any other kind of lease of the 4 annas' share in the property. The appellant, the defendant in the suit, in her written statement admits that her deceased husband Nayan Chandra purchased the property in suit, and also that the plaintiffs having requested him to entrust them with the collection of the rent of the property, did so; but puts the plaintiffs on proof of all the other allegations in their plaint. The only issues on these pleadings are the following :—

" 1.—Are the allegations of contract for a permanent lease and subsequently for sale made in the plaint, correct ?

" 2.—Are the terms of the alleged contracts vague and uncertain and not fit for being enforced specifically ?

" 3.—Are the alleged contracts invalid in law, not having been reduced to writing and registered ?

" 4.—Is the allegation of tender correct ? If not, have plaintiffs failed to perform their part of the contract ?

" 5.—What amount of damages, if any, are plaintiffs entitled to recover ?"

It will be observed that the first issue deals only with the contract for the lease named in the plaint. That was and must

have been a parol contract. That is not the issue which has been tried in the case. The issue which has been tried is wholly different. It is this, whether an agreement in writing in the shape of a letter written days after the date of the conveyance to Nayan Chandra of Hari Chandra Bose's four anna share, *i.e.*, the 21st November, 1903, signed by Nayan Chandra and addressed to Hem Chandra, contained within itself (either in express words or by necessary implication) an indication of the terms which the contemplated lease was to contain, so full, precise and unambiguous in character that specific performance of the agreement could according to established principles, be decreed. It is by no means, having regard to the facts proved, an easy issue to determine.

The letter runs thus :—

“ The 21st November, 1903.

“ MY DEAR HEM,

“ On my assuring you that I would lease out after my purchase of the 4 annas share of the estate No. 381, Alipur, Rangafala and Durganagar, permanently to you and your brothers, at an annual jumma of Rs. 840, eight hundred and forty, excluding the Government revenue and road and public cess, you requested Babu Hari Charan Bose of Bhowanipore to execute the conveyance of his share in the said property in my name, according to the terms and conditions of the agreement executed by him in your favour on the 15th day of Bhadra 1308 B. S. In consideration whereof I do hereby promise and agree to execute a permanent ijara hereafter. I have this day issued notices to the tenants of the said mahals to pay their respective rents, &c., to you as my ijaradars.

“ Your well-wisher,

“ NAYAN CHANDRA BOSE.”

It is admitted that this letter was not written on the day it bears date. It was purposely antedated so that its transmission would synchronise with the date of the execution of the conveyance to Nayan Chandra. The first ambiguity in it arises from the use of the words “ permanently,” and “ permanent.” The next and more serious ambiguity arises from the use of the word “ hereafter,” but the defect in it which, unless it can be remedied by legitimate implication, is fatal is that it does not indicate the date from which the term of the lease to be granted is to run. It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or implied to be granted fixes the date from which the term is to run.

It was contended on behalf of the respondents, that the word “ permanently ” means “ in perpetuity,” and the word “ hereafter ” means within a reasonable time in that behalf after the date of the letter. The most serious defect, however, remains, namely, from what date does the term of the lease commence? It is contended that that date is to be implied from the contents of a notice purporting to be dated on the 21st November, 1903, served upon the tenants therein named. It runs as follows :—

“ NAYAN CHANDRA BOSE,

“ *Zamindar.*

“ The tenants in mahals taraf Alipur, &c., and Durganagar and Rangafala, &c., appertaining to towzi No. 381, are hereby informed that

I have this day purchased from Babu Hari Charan Bose of Bhowanipur, the 4 annas share that he had in the said taluks, and I, this day, do let out the said mahals in ijara to Babus Kalidas Bhanja, Debendranath Bhanja, Upendranath Bhanja and Hem Chandra Bhanja. You will pay to the said Babus or their karpardazes the rents, &c., respectively payable by you, and take dakhilas therefor. You will not get credit for any amount paid on any account to any persons other than the said Babus or their authorised karpardazes. Dated the 5th Aghran 1310 B. S.

“(Torn) ended and rejected.

“ S. C. HALDAR.

“ *Munsiff.*”

As this notice is referred to in the letter addressed to Hem Chandra, it may of course be looked at and considered. It is contended that as on that day Nayan Chandra Bose clothed the plaintiffs with authority in ijara to receive the rents of the tenants and required the tenants to respect that authority and pay their rents to those endowed with it, that the only source from which this authority could be derived was the agreement embodied in the letter that it must be implied therefore that the lease contracted to be given, was when given to commence and become operative from that date, which would then be the commencement of the contemplated term.

Mr. Harman, on behalf of the appellant, admits that this possibly might be so if attention were to be confined exclusively to the two written documents; but that when the circumstances surrounding the issue of this notice and the facts from which it emerged are considered, it becomes clear that the respondents did not derive their authority to receive the rent from the agreement embodied in this letter, but from other and wholly different arrangements made between the parties, and that the creation of the authority to receive their rent therefore becomes an equivocal fact equally consistent with two conflicting conditions of things.

Their Lordships feel that they have reason to complain that, owing possibly to the defective manner in which the pleadings in the case have been framed, they have been not only deprived of the great advantage of having before them the opinions entertained by the learned judges in the Courts below, on the difficult questions already indicated, but that in addition the facts bearing upon those questions have not been so fully and effectually elicited as they should have been for the satisfactory disposal of this appeal.

Both of these Courts below held in their Lordships' view rightly, that a concluded agreement for the purchase by the plaintiffs from Nayan Chandra of the share of the taluk bought by him for Rs. 16,000 had not been proved, and that therefore the first relief prayed for could not be granted.

The Subordinate Judge held first that by reason of the use of the word “ hereafter ” in the letter dated the 21st November, 1903, the contract supposed to be embodied in it was rendered so vague and uncertain that it could not be enforced,

and second that the statement made by Nayan Chandra in or about November, 1904, in reply to the repeated requests of the plaintiffs that he should execute to them the promised lease to the effect that he could not do so until he had paid off the debt he had contracted to enable him to effect the purchase, amounted to an absolute refusal by him to fulfil his contract; that the statute of limitations accordingly began to run from the date of that refusal, and as the present suit was not instituted till the 30th May, 1910, the remedy of the plaintiffs was barred by time. The learned judges in the High Court disagreed with this finding, their Lordships think, rightly. The Subordinate Judge, however, in his judgment, pointed out that even if when Nayan Chandra refused to grant the lease until he had discharged this debt, the plaintiffs consented that he should have that extended time to carry out his contract, that would amount to a new agreement conditional upon his clearing off his debt; but that as the debt had not been cleared off, the condition had not been fulfilled and the modified agreement could not be enforced. The Judges of the High Court differed from the Subordinate Judge on each of these points. They held first that the word "hereafter" meant after the date of the contract, and that its use did not make the contract vague or uncertain, and, second, that Nayan's statement that he could not grant the lease till his debt had been paid off did not amount to an absolute refusal by him to perform his contract, that the statute did not commence to run from that date, and that therefore the remedy of the plaintiffs was not, on this ground, time barred. They point out that this point was not raised in the pleadings, and that the plaintiff Upenda, when examined in the case as a witness, was asked the question, "Did you and your brothers agree to the putting off of the execution of the deed till after Nayan's debts had been paid off?" replied, "Yes, we made no objection, as we had confidence in him and fully believed he would act up to his word." The learned Judges, however, do not deal in any way with the effect of this consent, or with the suggestion of the Subordinate Judge that it added a condition precedent to the original contract to execute a lease, which condition had not been fulfilled. On the contrary they decided that the appeal should be allowed and that a decree ought to be passed for the specific performance of contract to grant a lease contained in this letter of the 21st November, 1903 (E. 12) as it stands.

Their Lordships concur with the learned Judges of the High Court that the word "hereafter" as used in this letter meant after the date of the letter, *i.e.*, after the 21st November, 1903, but so read the letter cannot mean that Nayan Chandra should have all time from and after its date to perform his contract. It must, in its proper construction as it stands, and without any reference to the alleged new arrangement, mean that he should execute the lease within a reasonable time from that date.

What would be such reasonable time under the circumstances has never been alluded to in the case.

Their Lordships are further of opinion that the consent of the plaintiffs to Nayan Chandra's not being required to execute the promised lease until he had paid off the debt in effect, by the agreement of the parties, attached a condition precedent to his obligation to execute this lease, which condition must be fulfilled before he could be compelled to do so. Their Lordships are of opinion that this arrangement did not require any new and additional consideration to support it. It is admitted that Nayan's debt is still due. The condition has not been fulfilled. But for this new arrangement, the delay for five and a half years to institute the suit, would have been perfectly inexcusable and be a bar to all relief. Their Lordships are therefore of opinion on this ground, apart from all others, that this condition precedent not having been fulfilled, the decision appealed from was erroneous, and that the action cannot be maintained. But that does not end the embarrassment. Their Lordships feel it impossible for them to deal with this letter of the 21st November, 1903, as it has been dealt with in the Courts below, namely, as if upon its face it contained within itself all the terms necessary to make it a binding and enforceable contract to grant a lease. The term of a lease must commence from a certain date. On the face of the letter no such date is fixed. Their Lordships must therefore deal with Mr. Harman's point.

An appeal, No. 18 of 1910, was on the 23rd August taken from the Munsiff's decision to the Court of the Additional District of Alipur. In that case the appellants are Kalidas Bhanja (described as a solicitor of the High Court) and others. It is to be regretted that the names of those others are not given. The suit out of which the present appeal has arisen, which is No. 109 of 1910, was then pending, and one of the plaintiffs in it is this same Kalidas Bhanja. Judgment was delivered on the 10th February, 1911.

The learned Additional Judge sets out the facts established before him in that suit. He says Dwarkanath Bhanja held 8 annas' share in taluk No. 381 of the 24 Pergunnahs Collectorate; that his shareholders were Bhuban Mohini Dasi in 4 annas, and Hari Charan Bose in 4 annas; that Bhuban Mohini Dasi, by a verbal arrangement, permitted Dwarkanath to collect her rent and pay to her a fixed sum yearly; that Dwarkanath's heirs continued to collect their share under this arrangement; that Hari Charan Bose gave a lease to these heirs for two years, and at the expiry of the term sold his interest to Nayan Chandra Bose; that the heirs of Dwarkanath continued to collect the rents of Nayan's share without protest up to the date of the present suit; that this suit was one for rent from 1313 to the Asar Kist 1316 by the heirs of Dwarkanath as plaintiffs against Jiban Kristo Pal and Girish Chandra Pal, the tenant defendants, and the widow of Nayan Chandra in addition to the heirs of Bhuban Mohini, as *pro forma* defendants;

that the tenant defendants took the plea that the plaintiffs were entitled to collect for the 8 annas' share only, and also pleaded a plea of payment which was disallowed; that the lower Court decided that the plaintiffs were entitled to collect Bhuban Mohini's share but not the share of Nayan; that the plaintiffs appealed and the tenants cross-appealed; that on behalf of the executors of Nayan Chandra it was admitted that the plaintiffs were without protest allowed to collect the rents of the share of Nayan Chandra, and that it was not contended that their title to collect the rents for the period in suit was not good and valid; that he, the Judge, was asked to note that the question whether the arrangement under which the plaintiffs were collecting the rents of this share was or was not an agreement binding on Nayan Chandra's heirs must be decided in a suit on the title. This he said he did.

Shama Charan Mukerji, the Ammuktar of the plaintiffs, when examined stated that the plaintiffs used to realise the rents of Hari Charan's 4 annas' share while it belonged to him, from 1901 to 1903, and of Nayan's share since 1903, that no document was executed for the ijara of Nayan Chandra's 4 annas, that Nayan said he would afterwards execute a mourasi moukurari pottah and that the plaintiffs should for the present collect rents as ijaradars. On cross-examination he said during the first talk he had with Kalidas Bhanja that Nayan Babu said that he would give either an ijara or mourasi lease just as Kalidas would like, that an ijara is a temporary settlement, a mourasi a permanent one, that the notice to the tenants was written at his instance, that Hem Babu said, "Would it not be better to have something in writing about the ijara," that thereupon the letter was written by Hem Babu, that he wrote it as he thought fit. Kalidas Bhanja, one of the plaintiffs, a solicitor of the High Court when examined, said: "We were yearly ijaradars of the 4 annas of Nayan." The first agreement was that Nayan should give a permanent lease and execute a pottah to that effect, there was then no mention of an ijara. Four or five months after the conveyance in favour of Nayan was executed, when he said he could not execute a permanent lease before he had satisfied his debt, he said that they were to continue to be ijaradars in the same way as they were under Hari Charan till the pottah for a permanent lease was executed, that they (the plaintiffs) considered themselves as yearly ijaradars, as there could not be a permanent lease for more than a year without a registered instrument, that the arrangement was that every year they should collect the rent as ijaradars, that he could not say in what capacity they were in possession during the four or five months following the conveyance, that Nayan Chandra renewed the ijara every year but Nayan's heirs did not do so. By renewing, he said he meant that Nayan was at the end of every year shown the dakhilo form for the new year and approved of it, but he admitted that this latter was not done in his presence. That is substantive evidence given on behalf of all the plaintiffs in the present case.

Upandranath Bhanja, one of the plaintiffs, on being examined,

said there was to be a permanent lease in writing, but Nayan wanted to execute the lease after payment of the debt he had to incur in purchasing the property, that until the execution of the permanent lease he allowed them to remain in possession of the share as ijaradars. The deposition of this solicitor of the High Court Kalidas Bhanja in three rent suits was then put in evidence. No doubt it is only evidence as an admission against himself. In it, he says, on cross-examination, "The talk of the renewal of the ijara with Nayan Bose took place three or four times in my presence, the last talk was five or six months before his death ; it was yearly ijara renewable every year." That this was the view taken by the plaintiffs of their true position is further shown by the statement contained, in their solicitor's letter, dated the 15th September, 1909, written to the pleader of Nayan's widow and executrix in reply to the notice served upon her behalf, informing them that she was about to take up, herself, the collection of her rents. In that letter it is stated "my clients have been in possession of the said property as ijaradars from year to year of your clients' husband since his purchase." In their Lordships' view these facts establish Mr. Harman's contention in reference to the notice dated the 21st November, 1903. They show conclusively that the direction to the tenants to attorn to the plaintiffs is not necessarily so exclusively attributable to the agreement contained in the letter of the same date that the date of the notice, or the service of it, must be taken as the day from which the term of the promised lease was to commence to run. The existence of an authority to the plaintiff to collect the rents is equally consistent with the practice followed by Nayan Chandra from the date of his purchase till the time of his death, namely the uninterrupted employment by him under recurring arrangements of the plaintiffs as his ijaradars for that purpose. Their Lordships are therefore of opinion that this appeal must be allowed, the decision appealed from be reversed and that of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The respondents must pay the costs of this appeal here and in the Courts below.

In the Privy Council.

SRIMATI GIRIBALA DASI

o.

KALIDAS BHANJA AND OTHERS.

DELIVERED BY LORD ATKINSON.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1920.