

**PATNA HIGH COURT**

Ganesh Sonar

Vs

Purnendu Narayan Singha

L.P.A. No. 128 of 1958

(V. Ramaswami, C.J. and N.L. Untwalia, J.)

21.11.1961

**JUDGMENT**

**V. Ramaswami, C.J.**

1. In the suit out of which this appeal arises the plaintiffs alleged that on the 31st July, 1921, there was a registered lease granted by the father of plaintiff No.1 in favour of the defendant for the purpose of homestead. Both the patta and the kabuliyat were registered and one of the terms and conditions of the lease was that the lessor would re-enter on the land if it was required for the purpose of hat and the lessee would vacate the same, and in that case the lessee would be entitled to money value of any construction that might be existing thereon. The relevant clause of the kabuliyat is to the following effect : -

"10. That I have taken settlement of the said land for the purpose of dwelling therein and should I fail to construct a dwelling house on the said land within one year and from the date of settlement, you shall, without the help of the Court, bring the said land under your khas possession or make another settlement thereof. No claim for the refund of the amount of salami or any other kind of plea or objection raised by me or by my heirs shall be valid. As the said land is near the katras hat and should you require the said land in future for the said hat, I and my heirs shall, without any objection, relinquish the said leasehold land, but I shall get the price of the house constructed thereon-

Paragraph 11 of the kabuliyat also states as follows :

"11. That I together with my sons, grandsons etc. in succession shall enjoy and possess, in great happiness, the said land, by only living in the said land according to the terms of this deed and by paying the said rent. Should I violate any one of the terms of this deed, you shall, without the help of the Court, bring the said land under your khas possession and make another settlement thereof. No objection raised by me and my heirs thereto shall be valid".

The plaintiff claimed that the land in question was required by him for the purposes of hat. On the 31st March, 1948, the plaintiff No. 1 served a notice on the defendant expressing his intention to determine the tenancy and asked the defendant to vacate the land within seven days. The suit was resisted by the defendant on the ground that the plaintiffs did not require the land for the purpose of creating a hat and that the notice served by plaintiff No. 1 on the defendant was invalid and did not determine the lease. The trial court as also the lower appellate court concurrently found that the plaintiffs genuinely required the disputed land for the purpose of holding a hat and that the lease was terminable on the exercise of the option by the plaintiffs to hold a hat, and, therefore, the defendant was not entitled in law to resist the suit for possession. The lower courts accordingly granted a decree to the plaintiffs for khas possession, subject to the payment by the plaintiffs to the defendant of a sum of Rs.724/- and odd as compensation for the structures erected by the defendant on the land. The defendant appealed to the High Court and on the 3rd December, 1958, the learned Single Judge of the High Court affirmed the decree of the lower courts and dismissed the appeal. This appeal has been presented by the defendant under clause 10 of the Letters Patent against the judgment of the learned Single Judge.

2. It was submitted by learned Counsel for the appellant in the first place that clause 10 of the kabuliyat by which an option was given to the lessor to determine the lease and take possession of the leasehold land was a covenant between the parties creating interest in land and offended the rule against perpetuities and must, therefore, be treated as null and void. In support of this proposition learned Counsel referred to *Woodall v. Clifton*<sup>1</sup>, where it was held by the Court of Appeal that a proviso in a lease giving an option to the lessor to purchase the fee simple of the land at a certain rate was held to be invalid on the ground of remoteness. In our opinion the principle laid down in this case has no application to Indian law. The reason is that in India an ordinary contract of purchase of land does not by itself create an interest in land and there is no distinction in Indian law as compared to English law between legal estates and equitable estates. In English law a contract for purchase of land creates immediately an equitable interest in the land, but the position in India under section 54 of the Transfer of Property Act is different. Section 54 of the statute expressly provides that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property. In view of this vital distinction between the English and the Indian law the principle laid down in (1905) 2 Ch 257 cannot be applied to the present case. Learned Counsel for the appellant then referred to the decision of the Privy Council in *Maharaj Bahadur Singh v. Balchand*<sup>2</sup>, where Lord Buckmaster observed in the course of his judgment as follows : -

"Further, if the case be regarded in another light namely, an agreement to grant in the future whatever land might be selected as a site for a temple as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest in present, but would rest at the expiration of an indefinite time which might extend beyond the expiration of the proper period".

But it should be remembered that the contract in that case was of the year 1872, long before the enactment of the Transfer of Property Act, and it is obvious that Lord Buckmaster was thinking of English law when he was speaking of a contract of sale as creating an interest in the property.

The view we have expressed is borne out by a decision of a Full Bench of the Calcutta High Court in *Ali Hossain Hian v. Rajkumar Haldar*<sup>3</sup>, where it was held that there was no such conception in India as legal estates and equitable estates, and all interests in property, whether the full ownership or an interest carve out of full ownership, are rights in rem, and that a covenant for pre-emption, or a covenant for repurchase, did not of itself create an interest in law. The same view has been expressed in a decision of the Madras High Court in *Rama Rao v. Thimmappa*<sup>5</sup>, where it was held by Devadoss, J. that a clause entitling a lessor to terminate the lease at any time contained in a lease which is described as permanent and under which a fixed rent is payable and the land is stated to be enjoyable from generation to generation did not offend against the rule of perpetuities. The same principle has been enunciated in a decision of the Calcutta High Court in *Jogesh Chandra Roy v. Asaba Khatun*<sup>5</sup>, where the proprietor of certain land created a putni lease with the condition that the putnidar should re-convey such land as might be required by the proprietor and the putnidar leased out the land on the same condition. It was held by Greaves and Mukerji, JJ. that there was merely reservation of the rights in favour of the proprietor and the putnidar respectively, and the covenant did not offend against the rule of perpetuities. In view of the principle laid down by these authorities we are of opinion that the option given by the lessee to the lessor to resume the leasehold land contained in paragraph 10 of the kabuliyat is merely a personal covenant and is not a covenant creating an interest in land and so the rule against perpetuities contained in section 14 of the Transfer of Property Act is not attracted to this case.

3. It was then submitted on behalf of the appellant that in any case the kabuliyat should be construed as if the lessee had given an option to the lessor for relinquishment of the land and not to the heirs of the lessor, and the present plaintiffs have, therefore, no right to enforce the contract against the defendant. We do not think there is any substance in this argument. It is true that clause 10 of the kabuliyat states that the lessee and his heirs shall, without any objection, relinquish the whole land "should the lessor require the said land". In our opinion clause 10 of the kabuliyat should be construed in the language and context of the other clauses of this document and, if so construed, we are of opinion that the option given by the lessee was not merely to the lessor for his lifetime but also to his heirs should they in future require the demised land for a hat. We, therefore reject the argument of learned Counsel on this point.

4. Lastly it was urged on behalf of the appellant that a notice should have been given to the defendant under Section 106 of the Transfer of Property Act, and the notice should have been of at least fifteen days duration. In the present case it is admitted that notice was given of only seven days, and the argument put forward on behalf of the appellant is that the notice is invalid in law. We do not think there is any substance in this argument. In our opinion it was not necessary for the plaintiffs in this case to determine the lease by a notice given under Section 106 of the Transfer of Property Act. We think that the case falls under Section 111 (e) of the Transfer of Property Act, by which a lease of immoveable property is determined

"by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them". It is obvious in the present case that the plaintiffs were seeking to take possession of the land because of an express term in the contract of lease itself under section 111(e) of the Transfer of Property Act. It was, therefore, not necessary for the plaintiffs to give notice under Section 106 of the statute.

5. For these reasons we hold that there is no merit in this appeal under the Letters Patent. We accordingly dismiss this Letters Patent Appeal, but there will be no order as to costs.

Appeal dismissed.

Cases Referred.

<sup>1</sup>(1905) 2 Ch 257

<sup>2</sup> AIR 1923 PC 165

<sup>3</sup> AIR 1943 Cal 417

<sup>4</sup> AIR 1925 Mad 73

<sup>5</sup> AIR 1927 Cal 41