

(1921) 01 CAL CK 0022
In the Calcutta High Court

Biseswar Roy Chowdhury and on his death, his Legal
Representative Rajeswar Roy Chowdhury, as Executor to his
Estate

APPELLANT

Vs

Brojo Kanta Roy Chowdhury

RESPONDENT

Date of Decision : 05-01-1921

Acts Referred:

Citation : AIR 1921 Cal 424 : 62 Ind. Cas. 49

Hon'ble Judges : Newbould, J; N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for enhancement of rent of an osta-nim-howla.
2. It appears that the defendant, who is the talukdar, granted a howla lease in respect of the disputed land in favour of one Kalam Mridha at a rent of Rs. 232 annas 8 on the 10th Sraban 1299 B.S. This howla interest was purchased in 1300 by the plaintiff and he thus became howladar under the defendant who is the talukdar. Simultaneously with the sale by Kalam Mridha of the howla interest to the plaintiff, an osat nim howla was granted by the plaintiff to Kalam Mridha at a rent of Rs. 272 annas 8. This osat nim-howla interest was transferred by Kalam to defendant and it is said that on the same day the defendant granted a mirash ijara in favour of Kalam at a rent of Rs. 275 annas 8. This was on the 20th Chaitra 1302. In 1897, the defendant as talukdar brought a suit for enhancement of rent of the howla against the plaintiff and the rent was enhanced from Rs. 232 annas 8 to Rs. 482 annas 6. The plaintiff has now brought a suit for enhancement of rent against the defendant in respect of the osat-nim-howla tenure which was let out at a rent of Rs. 272 annas 8.
3. The main defense was that the rent of the osat-nim howla was fixed and could not be enhanced.
4. The Court of first instance was of opinion that the rent was not fixed, and raised it to Rs. 522 annas 6, thus leaving a profit of Rs. 40 to the plaintiff.

5. On appeal the learned Subordinate Judge came to the conclusion that the rent could not be altered, and the plaintiff has appealed to this Court.

6. The kabuliyats relating to the howla and the osat-nim-howla have been placed before us. In the first, there is an express provision that the tenant would be liable to pay rent at the rate of Rs. 2-8 per bigha in respect of lands found to be contained in the tenure on measurement in the year 1303, and the defendant obtained a decree for enhancement of rent on that basis against the plaintiff in the suit brought in 1897. The result is that the plaintiff is entitled to realise Rs. 272 annas 8 from the defendant as rent under the osat-nim-howla, whereas he has to pay Rs. 432 annas 8 as rent for the howla to the defendant.

7. In the kabuliyat with respect to the osat-nim-howla, there is no such express provision; but the judgment of the learned Subordinate Judge, is vitiated by the fact that he construed the word "borokta" as meaning always or for ever." If there were those words in the kabuliyat, the Court below would have been justified in coming to the conclusion that the rent was fixed and unalterable. The word "borokta"," however, has been explained by the Persian Translator of this Court as meaning "in due or proper time." The expression, therefore, does not import any fixity as to rent.

8. The tenure, no doubt, is a descendible one, but as pointed out in the case of *Maharanee Shibessouree Debia v. Mothooranath Acharjo* 13 M.I.A. 270 : 13 W.R.P.C. 18 : 2 Suth. P.C.J. 300 : 2 Sar. P.C.J. 528 : 20 E.R. 552 "where variableness of jama is the normal condition, the mere naming a sum certain in connection with the grant of a descendible tenure does not import of itself fixity to that sum, in the absence of positive words or of other evidence to show that such was the original design."

9. We have been referred to the case of *Soorasoonderee Debea v. Golam Ali* 19 W.R. 141 : 15 B.L.R. 125n. There the lease was for reclamation of jungle. The tenure was to be held rent-free or at a partly progressive jama for the first few years and the full customary rent of Rs. 5 per kani was thereafter to be paid from 1264. Mr. Justice Bayley See judgment of Bayley, J. in 9 W.R. 65--[Ed.] observed as follows:--"I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, the terms such as that the lessee should bear all the expense and trouble of reclamation and having done so, was in the first year after full rent would be paid, viz , after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rate of neighbouring cultivated lands, as to which no jungle waste had to be cleared.... " On appeal the Judicial Committee observed:--"Looking at the words of the kabuliyat, their Lordships are of opinion that it was the intention of the parties that, in and after the year 1261, the defendant should hold at the fixed rent of Rs. 5 per kani and that consequently the rent was not liable to enhancement beyond that rate.... It is a much more reasonable construction to hold that Rs. 5 a kani was intended to be the rent for 1264 and during the remainder of the holding." That case, therefore, is

distinguishable from the present.

10. We think that the rent was liable to enhancement, having regard to all the terms of the document and in the absence of any provision that the rent would not be enhanced.

11. The learned Subordinate Judge has expressed his opinion upon the second question, namely, on the question of the amount of enhancement, but having regard to the fact that he has come to an erroneous conclusion on the first question, the case should go back to the lower Appellate Court in order that the amount of enhancement may be gone into and the case disposed of according to law.

12. Costs to abide the result.