

(1927) 06 CAL CK 0025
In the Calcutta High Court

Dinanath Kundu and Others

APPELLANT

Vs

Janaki Nath Roy and Others

RESPONDENT

Date of Decision : 23-06-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : AIR 1928 Cal 392 : 110 Ind. Cas. 368

Hon'ble Judges : Roy, J;B.B. Ghosh, J

Bench : Full Bench

Judgement

B.B. Ghosh, J.—These two appeals by the defendants arise out of two actions in ejectment which were decreed by the Subordinate Judge. The plaintiffs brought the suits on the ground that the defendants were in possession of the leaseholds in temporary right under two leases evidenced by two kabuliyats, dated 21st September 1900 and 4th August 1903, respectively. The suit, out of which appeal No. 135 of 1925 arises, relates to the kabuliyat of the 21st September 1900. The parties to the two suits are the same. The questions on which the decision of the two appeals depends are also the same. There were two suits, only because there were two separate leaseholds under two separate leases. Notices were served, dated 20th Bhadra 1329 B.S., corresponding to 6th September 1922, and it was alleged that the notices were to terminate the lease at the end of the Bengali year on 30th Chaitra 1329 corresponding to some date in the middle of April 1923. The suits were brought on 20th September 1923. The Subordinate Judge decreed both the suits and various grounds were discussed in his judgment. In these appeals the appellants raise only two points for consideration and those two points are, in my opinion, the only two effective points in the appeals. The first and the most important point is as to the construction of the leases and the second question is as to the legality and sufficiency of the notices served on which, it is alleged by the plaintiffs, the leases were terminated. The leasehold properties and I need mentioned only one property and the observations would apply to the other also consist of a haut, bandar and bazar situated on the bank of a streamlet. The property originally

belonged to a zamindar named Bepin Behari Roy. The predecessor-in-interest of the defendants first took a lease of the property on 7th April 1876 for a term of three years at a rent of Rs. 375 per annum. On the expiry of the term of that lease, other leases were taken for different terms from time to time by the same lessees from the landlord which it is unnecessary to mention in detail. The lease just before the one in question was dated 2nd August 1895. This was for a term of six years, which was to terminate at the end of the Bengali year 1307, corresponding to the middle of April 1901. Before the expiry of the term of that lease, the present defendants represented by one of them, Dina Nath Kundu, took the lease in dispute from Bepin Behari Roy, by executing a kabuliyat, in his favour, dated 21st September 1900. The kabuliyat with respect to the other leasehold property was executed by the same defendant in favour of the son and the administrator to the estate of Bepin Behari Roy, who had died in the meantime on 4th August 1903. This lease was executed with regard to some excess land lying contiguous to the land which was the subject-matter of the previous lease of 1900.

2. The whole question in dispute is whether by these leases the lessees obtained a permanent, heritable right to the leasehold properties subject to certain restrictions as to the use of the properties and with the liability of the rent (being variable under certain conditions or not. The plaintiffs in the suits acquired the interest which originally belonged to Bepin Behari Roy by virtue of a purchase at a sale in execution of a mortgage-decree on 25th April 1921, The contention on behalf of the plaintiff as that the defendants hold under a temporary lease or, at the utmost, under a lease from year to year which was terminable by six months" notice to quit and, such a notice having been served upon them, they have no right to remain on the land. The plaintiffs are, therefore, entitled to khas possession by ejecting the defendants. We have thus to see which of the contentions should prevail. The contention of the" plaintiffs found favour with the Subordinate Judge. The most important provisions in the lease are these:

I had been till now in possession of the haut, etc., by taking a temporary miadi ijara settlement of the same and realizing rents. I prayed to you for having granted a bemiadi settlement of the haut, etc...and you, on receiving a salami of Rs. 3,500 from me and fixing the annual rent at Rs. 800, granted my prayer and made with me a bemiadi settlement of the haut.... I appear before you and, agreeing to pay a rent of Rs. 800 per annum, I execute this deed of bemiadi kabuliyat.

3. If due to my default or neglect of duty the conditions of the haut deteriorate or are likely to deteriorate instead of being improved, you shall forthwith be able to take khas possession by ejecting me from the haut, etc., and no objection on the part of myself and my heirs shall be entertained.

4. Paragraph 4, provides that the tenant shall pay all necessary expenses for the improvement of the property.

5. Paragraph 5 runs thus:

If in future the present condition of the haut, bazar, bandar and ghat be improved, I shall pay without objection the increased rent that may be assessed by you over and above the jama fixed. I shall not be entitled to raise any plea or objection thereto...nor shall I be able to make an istafa (surrender) thereof.

Without your permission I shall not be competent to dig any tank or build any permanent masonry structure within the lands of this haut, bazar and bandar or to allow any shopkeeper to do so. I shall not be competent to grant any bemiadi settlement of any land of the haut....

6. Paragraph 9 restricts the power of transfer, etc.

7. Paragraph 13 ends in this way:

In default, you shall be competent to bring a suit according to law and realize compensation and to take khas possession of the haut, etc., if you so desire, and no objection thereto on the part of myself or my heirs will be entertained. I and my heirs remain bound by the terms of this kabuliyat.

8. The learned Subordinate Judge held that this only created a temporary lease. It is argued on behalf of the appellants that the word "bemiadi" is synonymous to "permanent" In support of the contention, they have referred us to a publication by the Government named "A Guide and Glossary to Survey and Settlement Records in "Bengal." There, a "permanent tenure" is translated as bemiadi muthusthuth and the contention on behalf of the appellants is that this is the correct translation of the term "bemiadi".

9. The next contention of the appellants is that in the record-of-rights the interest of the appellants was recorded as a permanent tenure. The then landlord, Upendra Nath Boy, raised an objection to the record. The objection was to the expression "tenure" and not to the permanency of the right. This appears to be so from the order of the Settlement Officer who decided the objection. The landlord urged that no interest in the land had been created and, therefore, it was only a sayar jama and the Bengal Tenancy Act had no application to this sort of jama. The learned advocate for the respondents very rightly contends, in my opinion, that no inference can be drawn from this, as the landlord took exception to the authority of the Settlement Officer to make any record whatsoever of this property. The appellants next rely upon the case of Mr. A.H. Forbes Vs. Hanuman Bhagat and Others, , where the learned Judges held that the lease which made a bemiadi settlement was, upon its proper construction, intended to be permanent and not from year to year. On the other hand, the learned advocate for the respondents relies upon another case of the Patna High Court, Parshan Kuer v. Tulsi Kuer [1917] 2 Pat. L.J. 180, in support of the contrary contention where the learned Judges held that a bemiadi lease, although the grant included the minerals and was hereditary according to its terms, created only a lease from year to year. The real question seems to me to be to construe the lease

according to the expressions used in it taking it along with the surrounding circumstances. It has been held in a series of cases that, unless the words clearly indicate permanency of lease, the surrounding circumstances and the entire terms of the lease must be looked into in order to ascertain the nature of the grant; and I propose to do so in the present case in order to discover what the meaning of the expression bemiadi was in this lease. Beginning from the very beginning, I may refer to the meaning of the word "miadi" as it appears in Wilson's-Glossary. According to that authority "miadi" means "limited, terminable, conditional." The prefix "bey" implies "absence"; literally, the word "bemiadi" must, therefore, mean "unlimited, not" terminable, unconditional." Now, contrast this lease where the word "bemiadi" has been used with the expression "miadi" as applied to the previous lease which was then running. The previous lease was a lease for a term. The tenant says that instead of a miadi lease, i.e.; lease for a term, he was desirous to take a bemiadi lease, i.e., a lease which was not terminable. Add to this fact, that the tenant had been taking terminable leases for certain fixed periods from the year 1876 and the period of the last of such leases was running at the time of the lease in question. It can hardly be reasonable to suppose that the tenant paid Rs. 3,500 as salami and consented to increase the rent to Rs. 800 at that time in order to take a lease which might be terminated the next month or the next year at the will of the landlord. The next question is this : so long as the lease was for a term, the rent fixed was not at all liable to be increased, as would appear from Ex. D(5), the previous lease for the land, dated 2nd August 1895. In the present lease, the landlord has been given the power of unlimited increase of rent on certain grounds. Then again, contrast the right to create subleases. In para. 9, of Ex. D(5) it is stipulated by the tenant:

I shall not be competent to settle any tenant, under me for any period is excess of the prescribed term of my ijara;

that is to say, the tenant was entitled to create a sub-tenancy to the extent of six years. Under the lease in question, the corresponding provision is, as I have already stated, I shall not be competent to grant any bemiadi settlement of any land of haut, etc." Here, again, the word "bemiadi" appears. Now, in my judgment, it cannot be conceived that the tenant was restricted from giving even a temporary sublease. What was provided there was, in my opinion, that the tenant would not be entitled to create a permanent sublease and that gives, in my judgment, a key to the meaning of the word as understood by the parties. It may then be asked: why are these restrictions prescribed against the right to dig tanks, build permanent masonry structures, houses, etc? If the landlord finds that a tenant at will is behaving in such a manner as to jeopardize his interest so as to deteriorate the value of the property, it is open to him simply to serve a notice to quit if the lease was terminable at his will. But if the lease was not terminable, then these provisions would be of importance. The land was let out for the purpose of a haut, bazar, etc. Digging of tanks would be incompatible with the purpose of a haut or bazar and necessarily the income derived from the

haut or bazar would be diminished and thereby the landlord's interest would be affected as he would not be, under the circumstances, entitled to assess, a higher rent. There was no such restriction in the previous lease for a term: see Ex. D(5), dated 2nd August 1895. The obvious reason is that no tenant would go to the expense of spending money in digging tanks or raising permanent masonry structures on a leasehold property let out only for a short term. Much less would a tenant do so if the lease was not even for a term but liable to be terminated at the will of the landlord.

10. These restrictions, therefore, indicate to my mind that the lease was such a one that the tenant might find it advantageous to himself to spend money for those purposes, and hence the restrictions were imposed. This leads me to the conclusion that the lease was intended to be a permanent one. Next, there is an indication that this lease would be heritable. From the passages in paras. 3 and 13 of the lease, which I have already cited, it appears that the heirs were also to be bound by the stipulations contained in the kabuliyat. Taking all these facts into consideration, it seems to me the only reasonable conclusion is that the lease was a permanent one, instead of giving the lessee a more precarious right than what he had under the temporary lease which preceded it. This was also the opinion of both the trial and the appellate Courts in the judgments in suit No. 2 of 1913, which, although not binding on the plaintiffs in this case, is entitled to consideration as what was understood by the Judges to be the effect of the lease. I have omitted to mention that some argument was based on the expression "sarasari bemiadi kubuliat" in the last line of the kabuliyat of 4th August, 1903. The Subordinate Judge has held that "sarasari" means a summary and temporary settlement. It really means "variable." A "sarasari " lease no doubt connotes the idea of a temporary settlement. But coupled with the expression "bemiadi," it can only mean, in my view, a permanent lease but variable as to rent. If only a temporary lease was intended to be given, it would have been sufficient to call it a "sarasari" lease. In this connexion, I may refer to the definition of a "permanent tenure" in the Bengal Tenancy Act, only as an illustration, to show how these leases are understood. In that Act, a "permanent tenure" means "a tenure which is heritable and which is not held for a limited time." In my view these leases are not terminable on service of notice to quit. This puts an end to the principal contention which has been raised as to the right of ejectment in these cases.

11. But I think I should make my observations with regard to the sufficiency and legality of notices served by the landlord upon the defendants. No question arises before us as to the proper service of the notice. It is, however, contended that the notice is bad on the grounds stated below. The notice runs as follows:

You are hereby informed that the bemiadi, settlement (then describes the property and the lease) will expire on 30th Chaitra 1329 B.S., and the said bemiadi settlement shall not remain in force after 30th Chaitra. 1329 B.S. After 30th Chaitra, 1329 B.S. that is to say, from 1st Baisakh, 1330 B.S., you, shall

give up khas possession....

12. The contentions are these: (1) This, notice does not in its terms terminate the tenancy, but only mentions the fact that the lease will expire on a certain date. The intention is to show that the term of the lease will end of its own effect on, that date. If that is not the fact this. notice is bad in law. (2) The tenancy, commenced on 5th Aswin from the date of the kabuliyat and, therefore, any notice" served u/s 106, T.P. Act must terminate with the end of the year of the tenancy. The end of the tenancy would be. the 4th of Aswin of any Bengali year. As the notice was to terminate on 30th Chaitra, 1329 B.S., it is insufficient. In, support of the last contention, the appellants cite the case of Kishori Mohun Roy v. Nund Kumar Ghosal [1897] 24 Cal. 720, and particularly the following observations of Banerjee, J., at page 724:

I think it must be at least held that the tenancy was one reserving a yearly rent, and the year of the tenancy commenced on the 14th day of Pous 1294.

13. The respondents, on the other hand, contend that, although the kabuliyat ,is dated 5th Aswin 1307 B.S., the rent was payable according to the Bengali year as would appear from the schedule of the kistibandi at the end of the document, Further, it is urged that rents were realized as shown by the rent receipts according to the Bengali year. Therefore, the year of the tenancy should be considered as the ordinary Bengali year. In support of this contention, the learned advocate for the - respondents cites the case of Ismail Khan v. Jaigun Bibi [1900] 27 Cal. 570. In this case, Banerjee and Stevens, JJ. at p. 577, make the following observations with regard to the argument that

as the tenancy was created by a kabuliyat, Ex. 3, dated 19th Chait. 1257 B.S., and the notice was served on 23rd Ashw in 1303 B.S. and expired on the last day of Chait of that year, it did not expire with the end of the year of the tenancy and was, therefore, a bad notice. We do not consider this argument valid. For though the tenancy was, as appears on the face of Ex. 3, created by that document, and, the document ia dated 19th of Chait, rent has all along been paid, as is clear from the rent receipts filed...according to the ordinary Bengali year, so that a year of the tenancy would be the ordinary Bengali year.

14. In this state of divergence of opinion pronounced by the same learned Judge, I do not feel called upon to express any definite opinion on the question in these cases. My inclination is that unless it could be definitely shown that the tenancy was to commence at a particular date different from the date of the document by which it was created, it must be held ordinarily that the year of the tenancy commences from the date of the document. In that view, in this particular case it may be held that the tenancy commenced from the 5th Aswin 1307 B.S

15. There is one other point which I need mention and which was raised by the learned advocate for the respondents here for the first time. What he urged was this that the lease in question being evidenced only by a kabuliyat, which was said to have been accepted by the lessor, under the terms of Section 107, T.P.

Act, such a kabuliyat cannot be held to create any lease which was beyond the term of one year. This question, as I have said, was not raised in the Court below either in the issues or during the course of the argument. We have not got here the opinion of the learned Judge below on the question, nor can it be definitely said that no patta was executed. If this point had been raised by the plaintiffs, the defendants might have met that objection by other pleas. The question, however, so far as this Court is concerned, is concluded by the authority of the case of Raimoni Dasi v. Mathura Mohan Dey [1912] 39 Cal. 1016. I may also mention that it has ail-along been the practice, in this province at any rate, to create large leasehold interests of a permanent nature by accepting a kabuliyat from the tenant, or, in other words, a kabuliyat executed by the tenant and accepted by the landlord is as much a lease as a patta executed by the landlord and accepted by the tenant. Indentures are unknown in the mofussil in this country. From the view that I have taken on the first point the only conclusion that I can arrive at, is that these appeals must be allowed and the suits dismissed with costs in both the Courts.

Roy, J.

16. I. agree.