
(1908) 03 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Original Decree No. 26 of 1906

Girish Chandra Das Mazumdar

APPELLANT

Vs

Kunjo Behari Malo and Others

RESPONDENT

Date of Decision : 17-03-1908

Acts Referred:

Citation : (1908) 03 CAL CK 0006

Judgement

Maclean, C.J.—This is an action upon a covenant contained in a pottah, dated the 27th of June 1892. By that pottah one Umesh Chandra Ghose who admittedly was a benamdar for the principal Defendant, Defendant No. 1, Girish Chandra Dass,—and for the purposes of this argument Girish Chandra Dass has been treated as the covenantor and the person liable under the covenant,—took an ijara pottah, for a certain term of certain land: and, the agreement between the lessor and the lessee was that the lessee was to pay to the superior landlords the rents which the Plaintiffs were bound to pay to them under their contract with the superior landlords and to make certain other payments. The covenant was that out of the hastabud of Rs. 2,487 odd the lessee was to have Rs. 100 every year to the end of the term for collection charges; that out of the balance he was to pay the rent due to the maliks, the amount being Rs. 1,234 annually; that he was also to pay the Road-cess and Public Works Cess—matters with which we are not concerned today,—and out of the hastabud of Rs. 2,487-6 he was also to make certain other payments, and to pay the ultimate surplus to the Plaintiffs. The lessee did not execute the pottah, and no kabuliyat was executed : but it has not been disputed that the only contract between the parties was that contained in the pottah, and the Defendant No. 1 has always treated that as being the contract between the parties. The Defendant No. 1 failed to pay the rent due to superior landlords, and the Plaintiff brought the present suit claiming to recover the amount due to them under the covenant as rent. It was held by this Court that they could not sue for the amount as rent, that they must sue for damages for the breach of the covenant I have referred to : and, the suit was then remanded to the Subordinate Judge, and the Subordinate Judge has allowed the

Plaintiffs a sum of between thirteen and fourteen thousand rupees, in respect of damages for breach of this covenant. The Defendant No. 1 has appealed : and, only two points have been submitted for our consideration. Both are points of law. The first is that, inasmuch as there was no default in making the payments within three years from the date of the suit, which was instituted on the 17th of April 1900, the suit is barred under Art. 115 of the second Schedule to the Limitation Act. The Plaintiffs, however, contend that it is Art. 116 and not Art. 115 which applies to the present case, Art. 116 giving them a period of six years instead of three years : and, if the six years" rule applies, there will be, at any rate, a substantial sum due to them from the Defendant. This is the first point. The second point is that the Subordinate Judge has proceeded upon an erroneous principle in measuring the damages. It appears that, after the Defendant had failed to pay the rent due to the superior landlords, they sued the Plaintiffs who were his tenants, and recovered the amount and in execution of their decree the tenures were sold and the Plaintiffs consequently lost their property. The Subordinate Judge has held that Defendant No. 1 is liable for this loss under his covenant, and has assessed the amount at over Rs. 10,000. He has also allowed a sum of three or four thousand rupees in respect of the rents which the Defendants ought to have paid to the superior landlords and which they failed to pay. The Defendants contend that this is a wrong principle and that the Plaintiffs can only recover in respect of damages on the covenant the moneys which the Defendant covenanted to pay to the superior landlords, with interest on the same. Those are the two questions we have to deal with.

2. Upon the first question which is not free from difficulty, my view is that Art. 116 applies. The only contract between the parties was that which was evidenced by the pottah, the terms of which were accepted by the Defendant and acted upon by him, although he did not sign the pottah nor did he execute any kibuliyat, and, that contract was in writing and registered. Does it not then fall within the language of Art. 116 as "a contract in writing registered." It is said that that article does not apply, because the pottah was not executed by the Defendant, and "contract" must mean a contract executed by both parties. If there had been a kibuliyat executed by the Defendant No. 1 as ordinarily there would have been, no question could have arisen. But does the fact, as this is admittedly the only contract between the parties, make it less a "contract in writing registered," because the Defendant has not himself executed it 1 If it is conceded, as it is conceded, that this was the only contract between the parties, then, it is difficult to say that it is not a "contract in writing registered." The matter is not free from authority, although there appears to be no authority in this Court. But there are two or three decisions of the Madras High Court which certainly support the view I have stated. I may refer to the case of *Ambalavana v. Vaguran* ILR 19 Mad. 52 (1895) where it was held that in a suit for rent accrued due more than three years before the date of the plaint, where it appeared that the contract between the landlord and tenant was comprised in a registered document which was signed only by the latter, the suit was not barred

by limitation : in other words, that the case fell within Art. 116. And, the learned Judges there say this : " In our opinion a contract which has, in fact, been registered is no less a "contract in writing registered" within the meaning of Art. 116, because it bears the signature of only one of the parties in the absence of any statutory provision requiring the signature of both parties." The same view was taken, or at any rate the same principle was adopted in two cases reported in the twenty-fifth volume of the Madras Series. The first is the case of Kotappa v. Vallur Zamindar ILR 25 Mad. 50 (1901), where it was held that "the undertaking in the mortgage was an "agreement in writing registered" within the meaning of Art. 116 of the Limitation Act and that consequently the claim was not barred. The fact that the instrument was not signed by B did not take the case out of the operation of that article." I may also refer to the case of Zemindar of Viznagram v. Behara Suryanarayana ILR 25 Mad. 587 (1901), where the same view was taken. No doubt, a contrary view has been taken by the Bombay High Court in the case of Apaji v. Nilkantha 3 Bom. L.R. 667 (1901), where it was held that the words " contract in writing contemplate an agreement in writing signed by both parties affected thereby." That view seems to import words into the section which are not to be found there. There is no Statute of Frauds in India which in order to bind Defendant No. 1 would make it necessary that the pottah should have been executed by him. Here the assent of the Defendant No. 1 to the term of the pottah has been clearly substantiated, and the document has been acted upon by him: and, though the point is not free from difficulty, I think the case falls within Art. 116 and that the suit is not barred by limitation.

3. Then on the other point I am unable to agree with the learned Subordinate Judge. His damages for the loss of the Plaintiffs' property which was attributable to their own default are too remote. It was entirely their fault that they allowed the property to be sold. The Plaintiffs were primarily liable for the rent: and directly they found that the Defendant No. 1 had broken his covenant and had not paid the rents, they ought to have paid it. If they have done so, the property would not have been sold and they would have sustained no loss. I do not think that the loss, which they sustained and which is attributable to their own default, is the natural consequence of the default of the Defendant No. 1 to comply with his covenant. It is reasonably clear, if we look at sec. 73 of the Indian Contract Act, that the Plaintiffs were only entitled to compensation for any loss or damage which naturally arose in the usual course of things from the breach of the contract: and, illustration (n) to that section supports this view.

4. The result then is that the decree of the Subordinate Judge must be discharged, and the matter must go back to him to ascertain what sums the Defendant No. 1 defaulted to pay under his covenant: and, those sums the Plaintiffs are entitled to recover, with interest, and both parties will be entitled to proportionate costs of this appeal, and also to proportionate costs of the suit. We are now told that there was a breach of the covenant to pay Rs. 200 a year for three years and Rs. 100 for the fourth year as rent due to the maliks--Maharajah

Durga Churn Law and others. We are told now,--I did not understand it before,-- that there has been a breach of that covenant also. If there has been a breach of that covenant, and if these sums have not been paid by Defendant No. 1, and the Plaintiffs have had to pay them, then the Plaintiffs are entitled to recover them against Defendant No. 1 with interest.

Doss, J.

I agree.