
(1928) 01 CAL CK 0017
In the Calcutta High Court

Gopeswar Sen and Others

APPELLANT

Vs

Burdwanadhipati Maharajadhiraj Bijoy Chand Mahatab
Bahadur

RESPONDENT

Date of Decision : 23-01-1928

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105

Citation : AIR 1928 Cal 854 : 108 Ind. Cas. 883

Hon'ble Judges : Mukherji, J; Mukherii, J; Cuming, J

Bench : Full Bench

Judgement

Cuming, J.—The facts of the case out of which this appeal has arisen are briefly these. The landlord applied u/s 105, Ben. Ten. Act for the enhancement of the rent of a certain tenure. In the Record-of-Rights the tenancy had been described as a permanent non-mukurari tenure bearing a jama of Rs. 16-8-7. The defence was that it was a mokurari. tenure and the rent was not liable to be enhanced. The first Court held that the presumption u/s 50, B.T. Act which the defendants had succeeded in establishing had been rebutted.

2. The Court fixed Rs. 55 8-0 as the rent of the tenancy. The lower appellate Court upheld this decision.

3. The first point that has been urged by the appellant is that if he can prove that he has held at the same rate of rent for 20 years it will be presumed not only that he had held at the same rate of rent but that the tenancy was in existence at the time of the permanent settlement and hence the principles of Section 6, Ben. Ten. Act apply and that the Court should have applied these principles.

4. The simple answer to this contention is that it was never put forward in either of the lower Courts or even in the grounds of appeal to this Court. If the appellant succeeded in the contention the case might have to be remanded in order that further evidence should be adduced. We are not prepared to allow the point to be taken for the first time in second appeal more specially as it finds no

place even in the grounds of appeal to this Court. The next point which has been contended is that the hudabandi papers on which the lower Courts have relied are not admissible in evidence to rebut the presumption u/s 50, Ben. Ten. Act having regard to the provisions of Section 34, Evidence Act. The appellant's main reliance is placed on a decision reported in *Aktowli v. Tarah Nath* [1912] 16 C.L.J. 328. Now Section 34, Evidence Act, states that books of accounts regularly kept in the ordinary course of business are relevant whenever they refer to a matter into which the Court has to inquire but such statement shall not alone be sufficient evidence to charge a person with liability.

5. Now Section 34 does not make books of accounts inadmissible unless corroborated. It states distinctly that such books are admissible but not sufficient by themselves to charge any person with liability. Even though they are uncorroborated they are still evidence. It is not correct to say that such books are inadmissible. They are admissible. It is not therefore correct to say that such books of accounts are inadmissible unless corroborated if required to charge a person with liability. It would be more correct to say that though admissible they do not establish the facts required to be proved i.e., that a person owed a certain sum of money, unless corroborated.

6. In the case on which the appellant has relied *Aktowli v. Tarah Nath* [1912] 16 C.L.J. 328, Mukerji, J., seems to have held that in that case the jamabandi papers were improperly admitted in evidence. Presumably it was held though this is not quite clear that they were inadmissible because not corroborated by virtue of Section 34, Evidence Act.

7. But Section 34 does not make such books inadmissible if not corroborated. It makes them admissible but provides that by themselves they are not sufficient to charge with liability. If I understand that decision rightly it would appear to be held that such books uncorroborated cannot be, used to rebut the presumption u/s 20, Ben. Ten. Act.

8. But in the concluding portion of the judgment the learned Judge remarks that it was pointed out in the case of *Rampyarabai v. Balaji* [1904] 28 Bom. 294, that if a statement is admissible u/s 32, corroboration would not be needed in terms of Section 34 and that that view was accepted by this Court in *Dukha Mandal v. Grant* [1912] 16 C.L.J. 24. If that be so then the decision does not support the view the appellant would have us take. In the case of *Umed Ali v. Khajeh Habibulla* [1920] 47 Cal. 266, it seems to have been held that if the talub-baki papers were admissible u/s 32(2) it was unnecessary to consider whether they were relevant u/s 34.

9. In the case of *Dukha Mandal v. W.M. Grant* [1912] 16 C.L.J. 24, it seems to have been held that if the entries were admissible either u/s 32 or Section 34 no corroborating evidence was necessary and that they could be used to show variation in the rent.

10. In the case of *Jonab Biswas Vs. Siva Kumari Debi and Another*, it seems to

have been held that there were not the necessary elements to bring the papers within Section 32 and that, therefore, they were admissible only u/s 34 and in that case they required corroboration.

11. There is another case to be also considered, an unreported case being appeal from appellate decree No. 3631 of 1914 decided by D. Chatterji and Beach-croft, JJ. In that case it was held that these jama-wasil-baki papers could be used to rebut a presumption u/s 50 because they do not by themselves charge any person with liability.

12. The general trend of the authorities would seem to be that if the papers are admissible u/s 32, Section 34 has no application. There is further authority for the proposition that they do not of themselves charge a person with liability if used merely to rebut the presumption u/s 50.

13. For the purposes of this appeal these authorities are sufficient for the proposition that these papers are admissible in evidence to rebut the presumption u/s 50.

14. The next question which has been urged in appeal is that these entries do not rebut the presumption u/s 50. The question is whether these entries do show an alteration in the rate of rent. The particular entry on which the plaintiff-respondent relied to prove the alteration in the rate of rent is an entry in the jama-wasil-baki papers of 1210 and a hudabandi of 1201. These are the documents or evidence that have been produced to show any change of rent. We have carefully considered these documents and we are not prepared to say that on a proper construction of these documents any change in the rate of rent has been proved for the simple reason that it is not possible to say exactly what these documents really mean.

15. In the document of 1201 we find the following entry against this tenancy.

16. Jama including cesses Rs. 19. Less Rs. 3 and balance jama Rs. 16 Total jama Rs. 16. What the sum of Rs. 3 deducted is, it is impossible to say. Equally is it impossible to say how much of the jama is rent and how much cesses. That being so the document of 1201 does not show clearly what, was the jama then. There is the same difficulty in dealing with the papers of 1210. Against this particular tenancy is entered, detail of Panchak Rs. 14. Total jama Rs. 14. Balance jama Rs. 14. Excess after taking accounts Rs. 1-8-0. Pull jama Rs. 15-8-0.

17. The figure for the full jama Rs. 15-8-0 is sicca rupee and equivalent to Rs. 16-8-10 the present jama. So in 1210 the rent apparently was the same as it is now.

18. The respondent would contend that the papers show that the rent has increased from Rs. 14 to Rs. 15-8-0. I cannot say that it does.

19. The total jama is shown as Rs. 14 and the full jama as Rs. 15-8-0. What is

the distinction between total and full jama I do not understand nor do I understand what is ment by "excess after accounts" which suit added to Rs. 14 make up Rs. 15-8-0.

20. All I can say is that it is not clear what these documents mean and that they cannot be construed as proving that there has been any change in the rate of rent. The result is that the appeal must succeed and the plaintiffs' claim for enhanced rent be entirely dismissed with costs in all Courts.

Mukherji, J.

21. I agree and desire to add a few words.

22. Section 43, Act 2 of 1855 was as follows:

Books proved to have been kept in the course of business shall be admissible as corroborative, and not as independent proof of the facts therein stated.

23. In Section 34, Act 1 of 1872 the words "regularly kept" are substituted for the words "proved to have been regularly kept," and in the illustration to the section the word used is "shows" and not "proves." It is apparent, therefore, that the law embodied in Section 34, Act 1 of 1872 is not quite the same that was contained in Section 43, Act 2 of 1855, and this seems to be conceded on all hands. The expressions "corroborative evidence," "independent evidence" and substantive evidence" that are found in many of the reported decisions bearing upon Section 34, Act 1 of 1872 are somewhat out of place in view of the wording of that section and have but been handed down to us from the words corroborative" and independent" that appeared in Section 43 of the old Act and those words as well as the word "substantive" that were used in the decisions thereunder. The present Act deals, amongst others, with the relevancy of evidence and in some instances with its probative value.

24. The plain words of Section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business, in the firm"; place, making them relevant whenever they refer to a matter into which the Court has to enquire, and nextly, providing that when such entries are sought to be used as statements (for a particular purpose, namely to charge any person with liability, they shall not alone be sufficient evidence for that purpose. Section 32, Clause (2) makes relevant a statement, consisting of an entry made by a person who is not a witness before this Court, in books, not necessarily books of account but, kept in the ordinary course of business. A book of account may be one of such books, and where an entry appears in a book of account it comes both u/s 32, Clause (2) and Section 34. The Illustration to Section 34 makes it plain that if the book of account is regularly kept in the course of business, the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. The only material difference as between an entry relevant u/s 34 and one relevant u/s 32, Clause (2) is that in

the former case the person who made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant u/s 32, Clause (2) from the disability that it imposed on entries relevant u/s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other, are not to be considered as alone sufficient to charge any person with liability. The other view, however, namely, that the latter part of Section 34 applies only to such entries which are relevant only u/s 34 and not u/s 32, Clause (2) is backed by the high authority of Sir Lawrence Jenkins, C.J., in the case of *Bam Pyarabai v. Balaji Shridhar* [1904] 28 Bom. 294, and has been accepted as correct in other cases (e.g., *Daji Abaji Khare Vs. Govind Narayen Bapat*, , *Dukha Mandal v. W.N. Grant* [1912] 16 C.L.J. 24, *Aktowli v. Tarak Nath Ghose* [1912] 16 C.L.J. 328, and it is perhaps too late to contest it. If this other view is adopted it should be held that it was intended by the legislature that where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraph of Section 32 being present, there is no statutory obligation to look for anything else to found the liability.

25. Personally I entertain grave doubts as to whether this could have been the intention of the legislature or if it was, it would not have been declared in much clearer terms. Fortunately, however, in practice we seldom come across a case in which the entry which comes u/s 32, 01. (2) is really sought to be U3ed alone to charge any person with liability. The present case, in my opinion, is certainly not one of that description. The ekwal hudabandi papers of 1201 and the jama-wasil-baki papers of 1210, upon which reliance has been placed on behalf of the plaintiff in the present case, in my judgment, have not been used alone to charge the defendant with the liability to pay enhanced rent. They have been used to rebut the presumption which the defendant claims u/s 50, Ben. Ten, Act, and quoting the words of Markby, J., in the case of *Belait Khan v. Rash Behary Mookherjee* [1874] 22 W.R. 549 where jama-wasil-baki papers were used for a similar purpose, I may say:

I do not consider that it can be said that these documents have been used alone in order to charge the defendants with the liability that has been imposed on him. He is charged with the rent of the land by reason of its occupation by him, that rent being considered to be a fair and equitable rent for the land occupied and what these documents have been used for is not to charge him with the liability but to answer the claim which he set up to exemption from what would be the ordinary liability of a tenant. It, therefore, seems to me that those documents have not been used in this case as alone sufficient to charge him with that liability in the sense in which these words are used in Section 34, Evidence Act.

26. The decision of Markby, J., was dissented from by Prinsep and Bose, JJ., in *Suamomoyi v. Jahur Muhammad Nasyo* [1882] 10 C.L.R. 545. It should, however, be noted that in *Belait Khan v. Rash Behary* [1874] 22 W.R. 549, there were, in fact, other materials on the record in support of these papers; and as regards the view of Markby, J., as to the nature and scope of the use of the papers when the presumption of fixity of rent is sought to be rebutted by them, it does not appear to have been dissented from in the other decision referred to above. This view of Markby, J., has been adopted in recent times in this Court in the case of *Nirod Krishna Ghose v. Prodyot Kumar Tagore* [1916] 32 I.C. 794 where the learned Judges D. O'hafterjee and Beachcroft, JJ. said:

It is not right to say that these papers have the effect of imposing any liability upon the tenants. Their effect is to rebut the presumption u/s 50, Ben. Ten. Act by showing that previous to the 20 years for which uniform payment of rent has been shown, there was realization of different rates of rent. The liability to enhancement is imposed not by these papers but by the law which in the absence of the presumption u/s 50 or upon a rebuttal of that presumption, imposes a liability to enhancement on tenants.

27. So also in the case of *Dukha Mandal v. Grant* [1912] 16 C.L.J. 24, Harington, J., and Caspersz, J., concurring said that by the jamabandi papers that were similarly used in that case

it was not sought to impose a particular liability on any person, but it was only sought to show what the nature of the tenancy was.

28. I am aware that in *Aktowli v. Tar ah Nath Ghose* [1912] 16 C.L.J. 328, the learned Judges of this Court suggested that a wider meaning should be given to the latter part of Section 34 and that though the papers may not directly impose the liability they ultimately lead to that result and they treated the decision in *Surnomoyi v. Jahur Muhammad Nasyo* [1882] 10 C.L.R. 545 as supporting their view. With the utmost respect to the learned Judges I should venture to say that though the point may have arisen in the case of *Surnomoyi v. Jahur Muhammad Nasya* [1882] 10 C.L.R. 545, it does not appear to have been decided in that case; and there is, indeed, very little authority in support of this view. Moreover this view if I may say so, ignores the word "alone" which appears in the section and to which effect must be given. I should say also that the case of *Jonab Biswas Vs. Siva Kumari Debi and Another*, upon which reliance was placed on" behalf of the appellants, in this connexion, in my opinion does not touch this question.

29. The fact that ekjai hudabandi papers and the jama-wasil-baki papers on which the plaintiff relies in the present case are relevant u/s 32, Clause (2), does not, if the latter part of Section 34 does not apply, mean that they should necessarily, in any event, be regarded as conclusive of the truth of the entries contained in them. The evidentiary value of such entries when they are sought to be used against, the tenant has got to be carefully appraised, the entries

themselves being scrutinized with care and the circumstances under which they were made being carefully considered. The occasions on which they have, without corroboration, been implicitly relied on against the tenants are few and far between. The reason why they find this disfavour is that they are made behind the back of the tenants and they put the tenants entirely at the mercy of the zemindar or his agents. When, however, there is nothing to suggest that they were made with a motive and all the circumstances point to their having been made in the ordinary course of business, the chances of their accuracy and of the transactions to which they relate being true are considerably enhanced. It depends therefore on all the circumstances of any particular case whether, used for a purpose such as the present, they would require corroboration or not for their acceptance.

30. It is unnecessary, however, to discuss the probative value of the papers now before us because I am clearly of opinion that taking them at their face value, they fail to establish, with any degree of certainty, either that the defendant's tenancy came into existence after the permanent settlement or that there was realization of rent at any time since then at a rate different from what the defendant has now been paying for about a century and a quarter.