

(1924) 05 CAL CK 0012
In the Calcutta High Court

Gosta Behari Pramanik and Others

APPELLANT

Vs

Hem Chandra Das De and Others

RESPONDENT

Date of Decision : 28-05-1924

Acts Referred:

Bengal Tenancy Act, 1885 — Section 38, 52

Citation : AIR 1925 Cal 356

Judgement

1. This appeal is from the judgment of the District Judge of Murshidabad. The appellant is the plaintiff in a rent suit, the respondent No. 1 being the tenant and No. 2 a co-sharer landlord. The suit related to an occupancy holding governed by the terms of a kabuliyat executed in 1875. In 1911 four bighas odd was acquired for railway purposes under the Land Acquisition Act, and the compensation money, some Rs. 470, was paid over to the tenant. In 1919 this suit was brought for the rent, for the years 1322 to 1325. The defendant claimed abatement and also pleaded certain payments. The first Court gave effect to both pleas and made a decree in part. The learned District Judge dismissed the appeal. Before us various points have been taken in argument which were not touched in the Courts below. It is argued first of all that having regard to the terms of the kabuliyat no question of abatement can arise at all, because it is expressly provided against. The terms are as follows according to the translation before us:

Any loss arising from leaving the lands fallow or from floods or drought will be mine; you will not have anything to do with it, nor shall I be entitled to claim abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained.

2. We think that what is contemplated by those clauses of the kabuliyat is loss arising from the natural causes referred to, or due to the tenants own default, and that when the clause goes on to provide that abatement cannot be claimed, "on any account whatsoever", it must be read as a whole along with what precedes it, and should be taken as meaning that abatement would not be claimable in the case of loss by reason of causes ejusdem generis with those

specified. It cannot be taken to include a case where the deficiency is due to compulsory acquisition under the law of a portion of the land. The question has to be decided as a matter of construction of this particular document, but mention may perhaps be made of the case of *Watson & Co. v. Nistarini Gupta* [1884] 10 Cal. 544, where a very similar question arose for decision.

3. It is next contended that under the provisions of the Bengal Tenancy Act it is not permissible for a tenant to set up a claim for abatement in answer to a rent suit, and that having regard to the provisions of Section 38 and Section 52 of that Act, the only procedure open to him is himself to institute a suit for the purpose of establishing his claim to abatement and a refund of anything already overpaid. The cases under Act X of 1859 show that under the law as then existing such matters could be raised and adjudicated upon in a rent suit: See *Deendyal Lal v. Thukroo Koonwar* (1866) 6 W.R. Act X 24, *Maharajah Dheraj Mahtab Chand v. Chittro Cuomaree Bebee* (1871) 16 W.R. 201, and *Gour Kishore Chunder v. Bonomalee Chowdhury* (1874) 22 W.R. 117. in the case of *Siba Kumari Debi v. Biprodas Pal Chowdhury* 12 C.W.N. 167 it was held that a tenant could set up such a plea in a rent suit in a case where he had never actually obtained possession of a portion of the land, though it was held that Sections 38 and 52 of the Act were not applicable. The same principle is illustrated in *Beni Madhab Roy and Others Vs. Krishna Kamini Gupta*, .

4. The case of *Babu Sukhraj Rai Vs. Ganga Dayal Singh and Others*, is directly in point, and upholds the principle that abatement may be claimed in a rent suit. By Section 52 of the Act a right is conferred upon the tenant to claim abatement for deficiency in area, and I do not think it is possible to say that anything in the language of Section 38 necessarily limits the assertion of that right to the case of a tenant coming forward as plaintiff in a suit instituted specifically for the purpose. it is further argued that the matter ought not to be entertained as there has been no compliance with the provisions of the CPC in regard to the pleading of set-off, but there appears to be no substance in this. The defendant in his written statement definitely claimed a specified amount under the heading of abatement and though it may be that the term " set-off " was not used that is immaterial so long as the matter has been substantially and unmistakeably raised as in the present case.

5. Then it is contended that there has been no measurement as contemplated by Section 52, and without that no claim to abatement can be allowed. The *kabuliyat* gives the area as 23 bighas 14 kanals 19 gandas of land " described in the schedule below" and the schedule contains the particular area and rent of a large number of smaller plots making up the whole. The acquisition by the Railway related to a portion of two of those plots only amounting to 4 bighas 1 kanals 5 ch. That was the measurement arrived at in the Land Acquisition proceedings. The learned Munsiff found that that amount had been so acquired, and apparently no question of fresh measurement was ever raised by the plaintiff at any stage of the suit is the original Court. The proof so far as it went was

unchallenged, and afforded some evidence of measurement of the land.

6. It is further urged that if the abatement is allowed at all it should be confined to that claimable for the years covered by the suit, and no questions of payment should have been gone into. But as to a matter of set-off there has been no reason suggested why the claim should be so limited, and as to the question of payment, there is no reason why the Munsiff should not have gone into the character of the payments as he has done, and, after finding that a specified amount had been wrongly debited against the defendant under the guise of interest, direct that credit should be allowed him in this suit for the amount.

7. Upon the whole, therefore, the appeal fails and must be dismissed with costs.