

(1904) 06 CAL CK 0005
In the Calcutta High Court
Case No : Appeal No. 420 Of 1902

Hemendra Nath Mukerjee and others

APPELLANT

Vs

Kumar Nath Roy and others

RESPONDENT

Date of Decision : 07-06-1904

Acts Referred:

Citation : (1904) 06 CAL CK 0005

Final Decision : Allowed

Judgement

Rampini, J.—This appeal arises out of a suit brought by the Plaintiffs to recover damages from the Defendants for breach of contract. The Defendants are the tenants of the Plaintiffs. They hold under them certain dur-putni and se-putni taluks. By a kabuliyat, dated 4th July 1881, they undertook to pay to the Plaintiffs Rs. 1,800 per annum and to the Plaintiffs' landlords Rs. 3,191-12-3 per annum. They further stipulated that if on failure of payment by them to the Plaintiffs' landlords, the latter sued the Plaintiffs, the Plaintiffs were to be at liberty to sue them for arrears of rent, and to recover from them the amount with interest and costs by the sale of the dur-putni and se-putni taluks. The Plaintiffs alleged that the Defendants failed in 1303 and 1304 to pay to their landlords what they had agreed to pay. Their landlords consequently sued them, and in execution of their decrees attached and advertised the properties for sale. They (the Plaintiffs) accordingly had to pay two sums of Rs. 3,124-8-0 and Rs. 1,266-9-18, total Rs. 4,391-1-18. Hence, they sue the Defendants for this sum as damages for breach of contract with interest.

2. The learned Subordinate Judge dismissed the suit without going into the merits. He held (1) that the suit was not maintainable in its present form; and (2) that it was barred by limitation. In his opinion under the authority of the Full Bench decision in *Basanta Kumari Debya v. Ashutosh Chuckerbutty* 4 C.W.N. 3: s.c. ILR 27 Cal. 67 (1899), the suit is one for rent. Further, under the terms of the kabuliyat, the Plaintiffs were bound to sue for rent, and consequently the suit being brought after the period of limitation presented for suits for arrears of rent,

the suit is out of time.

3. Dr. Asutosh Mookerjee for the Plaintiffs contends that these views of the Subordinate Judge are wrong. Babu Nil Madhub Bose for the Respondents supports them, except that he does not urge, as held by the Subordinate Judge, that the Plaintiffs are bound by the terms of the kabuliyat to sue for rent. There has, therefore, been no discussion before us as to the effect of the terms of the kabuliyat. It is accordingly sufficient for me to say that in my opinion the Plaintiffs are not restricted by any clause in the kabuliyat from bringing against the Defendants any suit other than a suit for arrears of rent. There is nothing in the kabuliyat restraining them from having recourse to any remedy other than a suit for arrears of rent, if they have any such remedy. The clause in the kabuliyat giving them a right to sue for arrears of rent was, I consider, intended not to restrict their remedies, but to give them the additional right of proceeding against the Defendants' dur-putni and se-putni taluks and of selling them in satisfaction of any decree they might obtain against the Defendants for sums they had defaulted to pay to the Plaintiffs' landlords.

4. Turning to the main contention raised by the Respondents, viz., that this is a suit for rent, I would say that in my opinion it is not a suit for rent, but really, as it is ostensibly, a suit for damages for breach of contract, and that there is no authority for holding it to be a suit for rent.

5. Rent is defined as whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. The Plaintiffs are not suing for such money. They do not in this suit seek for any money payable by the Defendants as their tenants to them as their landlords for the use or occupation of the land held by them. They were suing for entirely distinct and different sums. They sue for sums of money paid by them to save their properties from sale in execution of decrees obtained by their landlords for the use and occupation of the land held by them, which the Defendants had contracted to pay for them and failed to pay. They do not sue for the rent of dur-putni and se-putni taluks, but for the sums paid by them to satisfy decrees obtained against them by their landlords for their putni and dur-putni rents. Hence, the sums claimed by the Plaintiffs in this suit do not come within the definition of rent. Further, they are different in amount from the sums which the Defendants would have had to pay them, if they had sued them for rent, and, thirdly, the dates on which their cause of action in respect of these sums accrued, viz., the 8th September 1898, is different from the dates on which their causes of action would have accrued if they had been seeking to obtain rent from the Defendants. For the same reasons, the sums now sued for by the Plaintiffs cannot, as contended by the learned pleader for the Respondents, be a part of the sums which the Plaintiffs were entitled to claim from the Defendants as rent.

6. The case of *Basanta Kumari Debya v. Ashutosh Chuckerbutty* 4 C.W.N. 3 : s.c. ILR 27 Cal. 67 (1899) is no authority for the Subordinate Judge's view that the

sums sued for by the Plaintiffs in this suit are rent. In that case the Plaintiff sued the Defendant for a sum of money which the Defendant had agreed to pay to the Plaintiffs' landlord and had not paid. The Plaintiffs' landlord had instituted no suit. The Defendant was no longer required to pay this amount to the Plaintiffs' landlord. Hence, the Full Bench held that when the Plaintiff sued for this sum, it was still rent due by the Defendant to him and that it had not lost its character of rent, because it had been assigned to the Plaintiffs' landlord, which assignment had not been given effect to. Here the facts are entirely different. The Plaintiffs are not suing for any sum due as rent by the Defendants to them as their tenants. They are suing for damages for breach of contract and for sums which they have had to pay in discharge of their judgment-debts to their own landlords. Such sums never were rent, qua the Defendants and there is no authority for regarding them as such.

7. It has been said that, if the Plaintiffs sued for and obtained damages for breach of contract in a suit such as the present, and then, supposing their claim for rent not to be barred by limitation, sued for rent, the Defendants would be entitled to have the amount due by them for rent diminished by the sums obtained by the Plaintiffs as damages. The Defendants would not, I think, be entitled in strict law to such a set-off, but they no doubt obtain such a set-off on equitable principles. But this does not in my opinion make the amount claimed in this suit rent.

8. Lastly, I would say that even if the present suit be regarded as a suit for rent, which in my opinion it should not be, still on the principle laid down in *Mohesh Chunder v. Joykishen* 22 W.R. 362 (1874) it cannot be barred by limitation.

9. The next question that arises is does the suit lie as framed? There is in my opinion no reason why it should not be, as framed. It is a suit for damages for breach of contract. Whether the Plaintiffs are entitled on the merits to such damages is another matter which has not yet been gone into. It has been concluded that the Plaintiffs should have sued the Defendants for rent as soon as they discovered that the Defendants had failed to fulfill their contract to them, and were not justified in lying by so as to increase the burden and the Defendants' responsibilities. But there is no reason or authority for holding that the Plaintiffs though they might have sued for rent, are debarred from suing for damages for breach of contract, the right to which has arisen under perfectly different circumstances from those entitling them to sue for rent. As for their lying by, firstly, there is nothing on the record to show that the Plaintiffs knew of the Defendants' failure to fulfill their contract to them, until their own landlords sued them for rent; secondly, it is doubtful if the lying by would do the Defendants any harm for the sums the Plaintiffs would be entitled to claim from the Defendants as rent are *prima facie* larger than the amount the Plaintiffs owed to their landlords, and which would seem to be the proper measure of damages in a suit as the present. Then, it has been said that the Plaintiffs should not have defended the suits brought against, them by their landlords. We do not know

that they did. They may have confessed judgment and the decrees may have been given against them by consent. But this is a matter, which only affects the measure of damages. It has no bearing on the question whether the suit, as framed, will lie.

10. To lay down, as we have been invited in this case to lay down, that a landlord who has contracted with his tenant for the payment to his superior landlord of part of the rent payable to him has no remedy but to sue the tenant for rent, as it falls due, even when ignorant of tenant's failure to fulfill his contract with him, would in my opinion be going much too far, and would be to lay down a rule that might result in both hardship and fraud. Suppose the tenant fails to pay the portion for rent assigned to the superior landlord, that immediate landlord is unaware of his failure, and that the superior landlord either inadvertently or in collusion with the tenant delays to sue the landlord till the day before that on which the period of limitation for a suit for rent expires, is the landlord to have no remedy, and to lose his money, through no fault of his own? It seems to me that this is not and should not be the law.

11. I would therefore decree this appeal and remand the suit to the lower Court for decision of the other issues.

12. As my learned brother Bodilly does not agree with me, the appeal must be laid before the Hon^{ble} Chief Justice for reference to a third Judge.

Bodilly, J.

13. I regret that in this case I am unable to agree with my brother Rampini as to the main point at issue, i.e., does the suit lie as framed? It seems to me that this case comes within the principle of the case cited to us of *Basanta Kumari Debya v. Ashutosh Chuckerbutty* 4 C.W.N. 3 : s.c. ILR 27 Cal. 67 (1899). In that case it was decided by a Full Bench that when rent is payable by a tenant to his landlord and the said tenant sublets with a covenant for payment by the sub-tenant of a portion of his rent to the superior landlord, on the breach of such covenant by the sub-tenant, an action does not lie against him for damages for breach of contract, but for rent only.

14. That case only differs from the present in that in the present case the Plaintiff failed to sue the Defendant (the subtenant) for the rent due from him, and instead of doing so allowed the superior landlord to obtain decrees against him (the Plaintiff) for the amount of rent due and whilst the Defendant had covenanted to pay, and the main question we have to decide is does the fact of such decrees having been obtained alter the character of the relief to which the Plaintiff is entitled ? Or in other words the character of the debt due from the Defendant to the Plaintiff ? I think it does not, the Plaintiff's cause of action was complete at the time the contract was broken by the Defendant to pay the sums contracted to be paid by him to the superior landlord, and a debt became due from the Defendant to the Plaintiff which the Full Bench has decided to be rent and not damages for breach of contract, and I do not think that anything that

subsequently took place between the Plaintiff and his superior landlord to which the Defendant was not privy, can alter the nature of the cause of action already accrued, or the character of the debt already due, or create a new debt.

15. It has been admitted by the learned pleader for the Appellant that if the Plaintiff had voluntarily without waiting for a decree paid the superior landlord the amount the Defendant had contracted to pay his only claim against the Defendant would have been one for rent and it seems to me that his duty was on finding that the Defendant had not so paid or on the amount being demanded to pay the amount at once without waiting for a decree to be obtained against him and he cannot by his own act in defaulting in the duty every debtor is under to pay on demand, to seek out his creditor and pay him, obtain an advantage against the Defendant he otherwise would not have had. Especially in that the Defendant would be so deprived of the benefit of the Statute of Limitation applying to a claim for rent.

16. I think the correct way to test the argument for the Appellants in the present case and to see whether or not a new debt has been created is to ask whether or not if the Plaintiff obtains a decree for damages in the present case the Defendant would or would not in a subsequent action by the Plaintiff against him, for the full amount of the rent he agreed to pay under his kabuliyat both to the superior landlord and to the Plaintiff be entitled to credit as rent pro tanto for the amount he had already paid to the Plaintiff under a decree obtained in the present action for damages for breach of contract. If so the present action is a claim of rent. If not, any decree for damages in the present case still leaves him liable (assuming the period of limitation not to have elapsed) to a claim of rent as such in a subsequent action and I know of no doctrine of equity that would apply in such a case (having regard to the ruling in the case I have already referred to) to relieve the Defendant from such liability. I am far from saying that there might not be cases (although it is not necessary to decide whether there are or are not) in which an action for damages for breach of contract to pay rent might not lie. In such cases I think such a claim would be separate and distinct from a claim for rent and should be separately claimed, and different periods of limitation would apply.

17. The fact that the amounts sued for are less than could have been recovered from the Defendants in an action for rent prior to the decrees seems to me to make no difference, for if a landlord sues for a portion of rent due instead of the whole, the action does not in my opinion become less an action for rent and in the same way the dates of the alleged causes of action are immaterial, if I am right in the opinion I have above expressed. Further I do not think it necessary in considering this as a point of law to dwell upon a possible hardship in certain hypothetical cases. If it were necessary to so consider consequences, I could well conceive that (if the Plaintiffs' contention is correct) any one in his position with rent payable by his tenant on his behalf to a superior landlord and finding such claim by his own laches barred by the Statute of Limitation might well collude

with his superior landlord to sue him and obtain a decree to enable him to revive a debt under another name that would otherwise be irrecoverable. I do not and cannot think that such can be the law. For these reasons I regret I cannot agree with my learned brother Rampini on the main point in issue and I think this appeal should be dismissed with costs.

Macleay, C.J.

18. This is a suit by the Plaintiffs for damages for an alleged breach of a covenant contained in a kabuliyat dated the 21st Assar 1288.

19. The Defendants say that the suit, as a suit for damages, will not lie; that it is properly a suit for rent and being a suit for rent, it is barred by limitation.

20. It has been practically conceded that, if it is a suit for rent, the objection as to limitation ought properly to prevail, but that, if it be an action for recovery of damages, subject to anything that may be said in relation to a point which is suggested by Dr. Rash Behari Ghose but which is not now before me, the Statute does not apply. The question to my mind turns upon the construction of the contract between the parties. The Defendants took certain land from the Plaintiffs in dur-putni and se-putni settlements. The aggregate rent payable to the superior landlords was Rs. 3,191-12-3. The material portions of the kabuliyat are as follows:--"In all fixing the annual rent in your 16 annas share as aforesaid at Rs. 4,991-12-3 and granting a permanent dur-putni and se-putni settlements from the 1st Bysak of the current year, you have executed in my favor the dur-putni and se-putni settlement pottah. I, therefore, execute this kabuliyat and agree that I shall pay Rs. 3,191-12-3, the annual rent payable into the estate of your said putnidars and maliks year by year and installment by installment and pay the remaining profit of Rs. 1,800 a year to you according to the following installments:" Then, lower down, we have this clause "I shall pay the putni and dur-putni rents and cesses of those mehals payable by you into the estate of the above maliks year by year, and installment by instalment, and take dakhilas for that and make them over to you and I shall take dakhilas from you. Should I make default in paying the said rent into the estate of the above maliks according to the installments, I shall pay interest on the over-due installments. If by reason of my default in the payment of the said rents the maliks bring suits for arrears of rent, and in execution of decree, your said putni and dur-putni rights be attached, and brought up for sale, or if your other properties, moveable and immoveable, be attached, then you will deposit the said amount of rent, and bring a suit against one for arrears of rent, and recover that amount with interest and costs by sale of this my dur-putni rent and se-putni rights, and from other properties, and no objection thereto on my part shall be entertained." This being the contract between the parties it fell out that the Defendants failed to pay the rent due to the superior landlords, and the superior landlords thereupon took proceedings against the Plaintiffs. The Plaintiffs had to pay and did pay the amount claimed, and they bring the present suit against the Defendants claiming damages against the Defendants for the breach of their covenant to pay the Rs.

3,191 odd to the superior landlords. It is said that this is not a suit for damages but a suit for rent.

21. It is essential to see, in order to arrive at a conclusion upon this question, what was the bargain between the parties, and especially, what the Defendants covenanted to pay the Plaintiff, by way of rent. It seems reasonably clear, upon the language of the kabuliyat, that all that the Defendants covenanted to pay to the Plaintiffs as rent was the Rs. 1,800 a year, and that, for reasons which perhaps are fairly obvious, they declined to treat the rent due to the superior landlords as rent due from them to the Plaintiffs, but entered into a separate and distinct covenant as regards that rent, viz., to pay it to the superior landlords direct. There is no covenant by the Defendants to pay the total amount of Rs. 4,991 odd as rent to the Plaintiffs. Rent, as defined in the Bengal Tenancy Act, means whatever is lawfully payable or deliverable in money or in kind by a tenant to his landlord for the use and occupation of the land, etc. No portion of the Rs. 3,191 was payable or deliverable to the landlord. There are here two separate and distinct covenants--one to pay Rs. 3,191 odd to the superior landlords, and the other to pay Rs. 1,800 as rent to the Plaintiffs, as landlords, and the contract was doubtless taken in this form for the benefit of the tenant. Great stress has been laid upon the words to which I have referred "in all fixing the annual rent in your 16 annas share as aforesaid at Rs. 4,991 odd" etc. This, I think, only means that the total sum to be paid for the use and occupation of the land was to be the Rs. 40,991 odd, but this is subject to the later provisions in the deed which show how that sum is to be dealt with. It does not occur to me that the passage which I have read beginning, "I shall pay the putni and dur-putni rents and cesses" helps the Defendants' case. It is consistent with the previous covenant that the Defendants should pay the rent due to the superior landlords, take receipts from them for such payments and hand such receipts over to the Plaintiffs taking again from them receipts to show that as between themselves and the Plaintiff they had discharged their obligations under their covenants.

22. Some stress has been laid upon the clause:--"You will bring a suit against me for arrears of rent and recover that amount with interest" etc., as indicating that the parties intended to treat the whole sum as rent. I do not think this reference can avail as against the clear terms of the previous portion of the contract. It cannot be successfully contended that these words mean that the Plaintiff could only bring a suit for arrears of rent, as opposed to any other form of action which the law allowed. It would be going far to hold that this reference to a suit for arrears of rent implied, in the presence of the special covenants in the deed, that there was an implied contract on the part of the Defendants to pay the sum of Rs. 3,191 as rent to the Plaintiffs: the word "arrears of rent" apparently refer to the arrears due to the superior landlord.

23. Upon the best construction that I can put upon the deed, I do not think that the sum of Rs. 3,191 odd was rent payable by the Defendants to the Plaintiffs,

and I think that the Plaintiffs' proper remedy was, as has been done, to bring a suit for damages for the breach of the Defendants' covenant. With respect to the authorities cited, it seems to me that the Full Bench case of Basanta Kumari Debya v. Ashutosh Chuckerbutty 4 C.W.N. 3 : s.c. ILR 27 Cal. 67 (1899) is clearly distinguishable. In that case the whole amount was to be paid to the landlords by the tenants as rent due. There is no such covenant in the present case: but there is a covenant to pay Rs. 3,191 to some one other than the Defendants' landlord. The present case seems to me to be undistinguishable from the case of (sic) Ratnessur Biswas v. Hurish Chunder Bose ILR 11 Cal. 221 (1884) which, although referred to, was certainly not overruled by the Full Bench case to which I have referred. I think, therefore, that the view taken by Mr. Justice Rampini was correct, and that the case must go back to the lower Court to be tried out on the merits. I allow to the Plaintiffs-Appellants ten gold mohurs as costs of this hearing before me, and they must also have the costs of the appeal before the Division Bench.