

(1924) 07 CAL CK 0054
In the Calcutta High Court

Kasem Sheik and Others

APPELLANT

Vs

Tarakeswar Dutta and Another

RESPONDENT

Date of Decision : 30-07-1924

Acts Referred:

Citation : AIR 1925 Cal 1065 : 85 Ind. Cas. 793

Judgement

1. This is an appeal from a suit brought by the plaintiffs-respondents for enforcement of the terms of an agreement embodied in a registered agreement and a kabuliyat executed by the parties on the :24th Aswin 1319. By this contract the plaintiffs leased out a certain jama to the defendant as kaimi at the rate of Rs. 2 per bigha. In the agreement executed by the defendant in favour of the plaintiff, there is a clause that if the plaintiffs returned to the defendants a sum of Rs. 300 which the defendants had paid to the plaintiff as premium on account of the lease, the defendants would vacate the land in their favour. The plaintiffs' case is that they offered this sum of money to the defendant several times but he refused to accept it, and, therefore, on the terms of the agreement between the parties they brought this suit to enforce the contract embodied in this agreement. The Court of first instance found for the defendant and dismissed the suit holding that the agreement and the kabuliyat were not simultaneous and that the contract between the parties was in contravention of Section 178, Bengal Tenancy Act, and, therefore, bad and not legally enforceable. The plaintiffs appealed and the District Judge has reversed the decision of the lower Court and decreed the plaintiffs' suit on the view he has taken of the contract which in his opinion does not contravene the provisions of Section 178, Bengal Tenancy Act. The learned Judge found that the two documents were written out and executed at one and the same lime and therefore, together constituted, a contract between the parties. He meets the argument of the defendant that the contract contravenes the provisions of Section 178 of the Bengal Tenancy Act which prohibits any agreement the effect of which will be to prevent the acquisition of an occupancy right or to entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the

Bengal Tenancy Act, by saying that there was no occupancy right in existence on the date of the agreement, and, therefore, the agreement could not operate to destroy that right or to entitle a landlord to eject a person who was not his tenant at the time when the contract was entered into. This, in our opinion, is too narrow a construction of Section 178. That section was enacted as has been observed in several cases, in order to safeguard the interests of raiyats. The scope of that section is to prevent certain contracts between, landlord and tenant, the effect of which may be to place the raiyat out of the, protection afforded to him by the Bengal Tenancy Act. It, therefore, enacts that the rights conferred by the Bengal Tenancy Act upon the raiyat cannot be destroyed by means of any agreement; in other words, no contract between landlord and tenant can override the express terms of the Bengal Tenancy Act. The effect of the present agreement is to prevent the defendant who has been found to be a settled raiyat of the village acquiring the right of occupancy in the land in suit u/s 21 of the Bengal Tenancy Act. The view, therefore, taken by the learned Judge is that, because at the time when the agreement was entered into there was no right in the defendant, the agreement could not in any sense contravene the provisions of Section 178, Bengal Tenancy Act is not correct. But we think that the decree passed by the learned Judge may be maintained on another view of the case. The two documents taken together constitute a contract to the following effect. The plaintiff lets out the land to the defendant as a kaimi jama which means a permanent tenancy. There are also expressions in the document making it heritable. With regard to the rent, the rate is fixed at Rs. 2 per bigha. There are restrictive covenants such as the defendant will not be entitled to excavate a pond or tank or to cut trees. The tenant further agrees to pay additional rent for any additional area that may be found by measurement in his possession but shall not be entitled to claim reduction of rent for diminution in area. He also undertook to pay in future any sum that might be assessed by the original maliks of the land or by the Government. The entire contract leaves no doubt in our mind, that what the parties intended was to fix the rent in perpetuity at a certain rate. Our view is supported by the case of *Golam Rahman Mistri v. Gurdas Kundu Choudhry* AIR 1928 Cal. 505. The contract there, was very similar in terms to the contract in the present case and it was held there that the restricted covenants such as mentioned there did not prevent the tenancy from being regarded as a tenancy at a fixed rate of rent. The result, therefore, is that by the contract a permanent mokarari tenancy was created in favour of the defendants such being the routine of the lease, it is governed by Section 179, Bengal Tenancy Act, under which the plaintiff and the defendant were at liberty to enter into a contract on any terms agreed upon by them. The plaintiffs are, therefore, entitled to sue for specific performance of the contract, namely, that the defendants should vacate the land on receipt of the agreed amount. It has been found by both the Courts below that the plaintiffs offered this amount to the defendants several times before the expiration of the period mentioned in the contract. In the view that we have taken in this case, as stated above, it is not necessary to consider most of the other points that have been

raised by the learned Vakils on both sides.

2. One other point has been raised which requires consideration and that there is a stipulation that if the defendants do not vacate the land according to the contract, they will be liable to pay Rs. 300 to the plaintiffs. It is argued that this amount should be considered as a penalty. It is found that since the defendants occupied the land they never paid rent and unlawfully refused to give back the land to the plaintiffs. On these findings and taking all the circumstances of the case into consideration, we do not think that the amount of compensation Rs. 300 is excessive.

3. We accordingly dismiss this appeal with costs.