
(1899) 05 CAL CK 0012
In the Calcutta High Court

Krishna Chandra Sen and Others

APPELLANT

Vs

Sushila Soondury Dassee and Others

RESPONDENT

Date of Decision : 05-05-1899

Acts Referred:

Bengal Tenancy Act, 1885 — Section 179

Citation : (1899) ILR (Cal) 615

Hon'ble Judges : Rampini, J;Hill, J

Bench : Division Bench

Judgement

Hill and Rampini, JJ.—This is an appeal against a decree of the Subordinate Judge of Birbhum, dated the 10th December 1897.

2. Two grounds of appeal have been urged before us: (1) that the sum of Rs. 4 per annum, which the Subordinate Judge has held to be an abwab and disallowed, is not an abwab; and (2) that even if it is an abwab, as the plaintiffs are patnidars and the defendants dur-patnidars, the plaintiffs are, u/s 179 of the Bengal Tenancy Act, entitled to recover the amount.

3. On the first point, we think we must affirm the finding of the Subordinate Judge. The annual payment of Rs. 4 is, according to the defendants' kabuliyat, not part of the rent. It is payable in lieu of certain quantities of jack fruit, bamboos and fish, which the defendants were to present annually to the plaintiffs, and is stipulated for in a perfectly distinct clause from that in which the payment of the rent is contracted for. Further, the rent is payable quarterly. The quantities of produce, or their money equivalent, were to be given, or paid, in one instalment. We think that in these circumstances the Rs. 4 per annum now in dispute is undoubtedly an abwab.

4. The second contention of the appellant is not so easily dealt with. The learned pleader for the appellant relies on the provisions of Section 179, and on the cases of Assanulla Khan v. Tirtha Bashini I.L.R (1895) 22 Cal, 680, and Atulya Churn Bose v. Tulsi Das Sarkar (1895) 2 C.W.N., 543. In the former case it is

said, though by way of an obiter dictum, that though there is some repugnancy between Section 179 and Section 74, there seems good reason for thinking that Section 179 is not controlled by Section 74. In other words, the provisions of Section 74 do not prevent the holder of a permanent tenure (such as a patnidar) from granting a permanent mokurari lease (such as has been granted to the defendant in this case) "on any terms" he pleases, that is, even stipulating for the payment of abwabs.

5. The second case cited by the pleader for the appellant is analogous in principle to that of *Assanulla Khan v. Tirtha Bashini* (1895) ., 22 Cal, 680. It rules that Section 179 controls Section 178(3)(c); so that a permanent tenure-holder may in granting a sub-lease of his tenure stipulate for the payment of interest at a higher rate than that allowed by Section 67. The contrary has, however, been laid down in *Basanta Kumar Roy Chowdhry v. Promotha Nath Bhattacharjee* (1898) Ante, p. 130. The learned Judges who decided this latter case make no reference to the case of *Atulya Churn Bose v. Tulsi Das Sarkar*, probably because it was not brought to their notice.

6. Another case which has some analogy to the question under discussion is *Mokbul Hossain v. Ameer Sheikh* (1897) I.L.R., 25 Cal., 131, in which it has been held that, notwithstanding the provisions of Section 89, holders of service tenures can be ejected otherwise than in execution of a decree.

7. The learned pleader for the appellants contends that the Sections 179, 180, 181, 182 and 183, all contained in Chap. XV, take the tenures and holdings to which they relate to a large extent outside the other provisions of the Bengal Tenancy Act; and though it is somewhat difficult to suppose that the framers of the Act can have intended to allow the proprietors or permanent tenure-holders to stipulate for the payment of abwabs by their tenants, yet it may be that it was considered that an arrangement of this nature, so objectionable and liable to give rise to oppression in the case of ordinary raiyats, was fraught with less danger in the case of permanent mokurari leaseholders. Anyhow, the words of Section 179 "nothing in this Act" are so wide that it seems impossible to resist the contention of the learned pleader for the appellants, and we are therefore constrained to give effect to it.

8. We accordingly decree this appeal with costs.