

(1931) 06 CAL CK 0048
In the Calcutta High Court

Lakshan Chandra Mandal and Others

APPELLANT

Vs

Narim Sardar and Others

RESPONDENT

Date of Decision : 11-06-1931

Acts Referred:

Bengal Tenancy Act, 1885 — Section 30(b)

Citation : AIR 1932 Cal 508 : 138 Ind. Cas. 545

Hon'ble Judges : Suhrawardy, J;Graham, J

Bench : Division Bench

Judgement

Suhrawardy, J.—This is an appeal by the landlords arising out of proceedings u/s 105, Ben. Ten. Act, in which they claimed enhancement of rent u/s 30 (b), Ben. Ten. Act, on the ground of rise in the price of staple food-crops and also u/s 52, Ben. Ten. Act, for increase in the area of the holding. The tenancy in question in this appeal was created by a kabuliyat executed by the tenant in March 1911. The case we are now concerned with was Suit No. 2343 of 1925 in the trial Court and Appeal No. 797 of 1927 in the lower appellate Court. The defence was that under the terms of the kabuliyat the plaintiffs were not entitle to claim any enhancement u/s 30(b), Ben. Ten. Act, as the rent was mukarrari. The trial Court did not accept this plea and on a reading of the kabuliyat was of opinion that the rent was not fixed and allowed enhancement u/s 30 (b), Ben. Ten. Act, at the rate of 2 annas, in the rupee. The learned Munsif also allowed enhancement for excess area which decision has not been questioned before us or in the lower appellate Court;. On appeal by the defendant the learned Special Judge of Khulna held on a construction of the kabuliyat that the rent was fixed in perpetuity and was not liable to be enhanced u/s 30 (b), Ben. Ten. Act. In this view he disallowed the plaintiff's claim for enhancement on that ground.

2. The landlords appeal and it is argued on their behalf that the Court of appeal below has put an erroneous construction upon the kabuliyat. The learned Judge has referred to some decisions of this Court in his judgment but it is indisputable that every case of this nature has to be decided on its own facts and upon the

peculiar terms of the contract involved in it.

3. The kahuliyat in this case opens with the words which if translated will mean that the kabuliyat relates to "jamijama" which is not transferable with the further qualification that it is liable to enhancement and abatement. The appellants translate the expression "jamijama" as meaning the land and rent both being liable to enhancement and abatement. The respondents on the other hand translate "jamijama" as meaning holding with the qualification of its being liable to enhancement or abatement only with regard to the area. I do not think that such a restricted construction can be put upon these words; "jamijama" is used to indicate land as well as rent or when taken together in the "abstract it means rent-bearing tenanted land. The plain meaning of the above words seems to me to be that the rent of the tenanted holding is liable to enhancement or reduction. There is no jurisdiction for holding that the qualification that the holding is "liable to enhancement or reduction" should apply only to the area which is not very intelligible and not to the rent. This interpretation is supported by the other terms of the kabuliyat which are that the tenant may plant fruit trees on the land and enjoy the fruits of the trees that are on the land but they shall not cut or sell them without the permission of the landlord; they shall not construct any building, dig any tank on the land; they shall not be entitled to sell, mortgage or make any gift of the land to anybody; they would simply live on the land with their family and children. All these terms indicate that the lease is an ordinary lease of an agricultural holding without conferring any right to the tenants higher than what the law gives them.

4. In support of the construction put upon the kabuliyat by the learned advocate for the respondent stress has been laid upon one of the terms of the kabuliyat that if there was any increase of the area found, the rent would be paid at the stipulated rate which was Re. 1-8-0 per bigha for the excess area and if the landlord took any portion of the land for setting up a market or bazar the rent would be reduced at the same stipulated rate. I may here mention that the learned Judge seems to have been greatly influenced by the expression dhajyaniyam" as meaning settled or fixed rate whereas with refer-once to the context it can only mean stipulated rate as fixed by the kabuliyat. It has been held that the existence of a condition that on increase or reduction of area the rent would be increased or reduced at a particular rate is not sufficient to hold that the tenure is mokarrari, *Surja Prosad Sukul v. Midnapore Zamindary Co. Ltd.* [1908] 38 C.L.J. 369.

5. The question whether the rent is fixed tinder the contract, as I have already said, must be decided on the construction of the terms of the contract itself in each particular case. One important feature in the cases which have held that rent is presumed to be fixed in perpetuity when one of the terms is that the rate should not vary in case of increase or decrease in area is the character of the particular lease which is generally a maurashi lease. If a lease is maurashi or perpetual the question whether it is also mukarrari becomes all important. In

temporary leases very strong expressions are necessary in order to hold that though the lease is not perpetual the rent fixed under the lease is fixed in perpetuity. The lease before us is very much similar to that under consideration in the case of *Ram Kumar Singh v. Messrs. Robert Watson & Co., Ltd.* 9 C.W.N. 384. The learned Judges, in holding that the lease there does not fix the rate of rent mentioned therein in perpetuity refer to the fact that there is no period fixed in the kabuliyat during which the settlement was to last. It was neither expressed to be for any term of years nor in perpetuity. The same sort of lease was under consideration in the case of *Surjya Prosad Sukul v, Midnapore Zamindary Co., Ltd.* [1908] 38 C.L.J. 369.

6. The lease before us is a bomiadi lease or lease for an indefinite period. It is a lease from year to year and the tenant was liable to be ejected at the will of the landlord. The fact that he was not ejected for a sufficiently long time to enable him to acquire right of occupancy in the land could not throw any light on the construction of the lease itself. It was created with the idea that it would be temporary from year to year and the landlord would be entitled to recover the land whenever he liked and therefore there was no express stipulation relating to future contingencies with regard to variation of rent. In much stronger cases the Court has required strict terms to hold that the landlord intended to give away the right to enhancement of rent for all time to come. One of the terms is found generally in such leases, and which is also present in the lease before us, that the tenant would pay all the impositions in the shape of taxes and cesses and would be liable to pay fresh impositions. In the case of AIR 1927 20 (Privy Council) there was an istemrari lease of which the terms were that the tenant could on no account be competent to pray for reduction of rent, and should any new tax be imposed by Government he should pay the same separately in addition to the rent mentioned in the patta. The Judicial Committee held that the landlord has, by the general law, an absolute right to claim enhancement of rent and that right was not taken by the terms mentioned above though their Lordships observe that in cases where the parties intend to create a Mukarrari tenure, the word "mukarrari" is generally used though there may be terms of a lease where the lease is not described as mukarrari which would indicate that it was intended to be so.

7. The learned Special Judge has relied greatly upon the decision in the case of *Amar Nath v. Hrishikeshlaha* [1922] 64 I.C.829. On the particular terms of the lease under consideration in that case it was held that the tenure created was not only permanent and heritable, but was held at a fixed rate of rent. The terms which induced the learned Judges to take that view were that the tenant would be in occupation from generation to generation and that he would be liable to pay any additional sum if levied by the Crown. There were other terms of the contract also which influenced the Court to hold that the rent was fixed in perpetuity. These terms do not appear in the present lease which must be construed on its own terms. A reference has also been made to the case of *Kamini Mohan Basu and Others Vs. Nibaran Chundra Mitra and Others*, . The

report of the case does not show whether the lease was permanent or otherwise but there were terms there which do not appear in the present case especially the expression with regard to the jama and the mode in which the jama was described in the contract there.

8. The document is of a comparatively recent date. It was executed in 1911 and the suit is brought against, the original tenant. There is no case of succession by inheritance or transfer which may indicate some sort of acquiescence on the part of the landlord. It is an ordinary lease of agricultural land lot out to a tenant from year to year on a certain rent. We cannot therefore hold that he has become by his occupation for more than the statutory period, a raiyat at a fixed rent.

9. I am accordingly of opinion that the view taken by the lower appellate Court cannot be supported and this appeal should be allowed and the judgment and dooree of the lower appellate Court are sot aside and those of the Court of first instance restored with costs the hearing fee being assessed at two gold moburs.

Graham, J.

10. I agree.

11. Having regard to the terms of the kabuliyat Ex. 1 (S) it appears to me that there is nothing in it _which can be held to preclude the plaintiffs from enhancing the rent of the holding in accordance with the provisions of the Bengal Tenancy Act. The learned Special Judge attached a good deal of importance to the use of the expression rent settled" and aforesaid rate" which he said occur repeatedly throughout the lease, and he thought that they pointed to the conclusion that the rate mentioned in para. 1 of the lease was (intended to be a fixed rate. The use of these expressions however does not seem to me necessarily to hear that interpretation and may merely have reference to the rate then being fixed. It is to be observed that the usual expressions which are to be found in leases of a permanent character such as mukarrari or putrapau-tradikrame do not find any place in this lease. I agree that the appeal succeeds and must be allowed.