
(1913) 05 CAL CK 0032

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 193 of 1911

Luchmi Missir

APPELLANT

Vs

Deoki Kuar

RESPONDENT

Date of Decision : 06-05-1913

Acts Referred:

Citation : (1913) 05 CAL CK 0032

Judgement

1. The Defendant-Appellant is the tenant of the Plaintiff-Respondent. There was an adjustment of accounts between them as regards rent on the 26th Agrahayan, 1312 F.S., corresponding to the 18th December 1904. This adjustment of account is embodied in a wasil-baki, and it appears that the Defendant was found liable for Rs. 158-14-3 on account of rent for the years 1309 to 1312 F.S., out of which Rs. 136-2 was left with the Defendant as a deposit for payment to the superior landlord on account of rent payable by the Plaintiff to the latter for the years 1309 to 1312 and the balance, viz., Rs. 22-12-3 was stated as payable to the Plaintiff. The Defendant did not pay the said sum of Rs. 136-2 to the superior landlord and the latter sued the Plaintiff and obtained a decree for Rs. 225 which was realised from her on the 28th January 1907. The Plaintiff thereupon brought the present suit to recover the sum of Rs. 599-2-3 from the Defendant on account of rent for the years 1313 to 1315 and the amount which she had to pay to the superior landlord with interest. There is no dispute as to the rent for the years 1313 to 1315 in this appeal. As regards the claim for the amount which the Plaintiff had to pay to the superior landlord, the defence is that the claim should be considered as one for rent and that it was barred by limitation and that the Plaintiff alone had no right to sue for the amount, the wasil-baki being in favour of the Plaintiff and her mother-in-law who was not joined as a party to the suit. The Court of the first instance decreed the suit in part on account of rent for the years 1313 to 1315 and held that the other portion of the claim was barred by limitation. That decree was confirmed on appeal, but, on review, the lower Appellate Court held that the claim was not barred by limitation except as to the Rs. 22-8, and gave a decree accordingly to

the Plaintiff. The Defendant has appealed to this Court. It has been contended on his behalf that the amount which was assigned by the Plaintiff for payment to the superior landlord was part of the rent and the claim for recovery of the said amount must be considered as one for rent and not for damages, and reliance is placed upon the Full Bench case of *Basanta Kumari v. Ashutosh I. L. R. 27 Cal. 67.*(1899). In that case it was held upon a construction of the lease that the money which the tenant agreed to pay to the superior landlord, by assignment of his landlord was rent and recoverable as such and that it did not cease to be rent by reason of the so-called assignment--an assignment to which the assignee was not a party and which was not accepted by him. Macpherson, J., in delivering his judgment (with which the majority of the learned Judges agreed) said, "the money was undoubtedly a part of the entire sum which the Defendant undertook to pay the Plaintiff, his landlord, as rent for the use of the land. According to the terms of his lease he was to pay this money on the landlord's account to certain persons who were the Plaintiff's landlords. He was to take from them receipts in the Plaintiff's name for the money so paid, and at the end of the year he was to produce those receipts and take from the Plaintiff a receipt for the entire sum of the rent inclusive of the balance which he was to pay to the Plaintiff direct. This, I think, clearly shows that in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such. If the Defendant defaulted to pay the money in the way agreed on between himself and his landlord, the assignee had no cause of action against him and the Plaintiff never in any way lost or waived his right to recover the money which was not so paid as a part of rent. In fact, there was to be no discharge of the rent unless and until the Defendant produced the receipts for the payments which he undertook to make." The determination of the matter depends upon the terms of the contract in each case. In the present case the *wasil-baki* shows that Rs. 186-2 which was to be paid to the superior landlord was left in deposit with the Defendant, and we think that the lower Appellate Court was right in holding that there was a discharge for this portion of the rent. It is true, the assignee was no party to the contract, but if, as the contract shows, the amount was left in deposit with the Defendant for payment to a third party and it amounted to a discharge, so far as that portion of the rent was concerned, we think it ceased to be rent and recoverable as such. The case, therefore, does not fall within the principle laid down by the Full Bench in *Basanta Kumari's* case *I. L. R. 27 Cal. 67* (1899), but would fall within the principle of the case of *Hemendru Nath v. Kumar Nath I. L. R. 32 Cal. 169* (1904). But as we have said, each case must depend upon the terms of the particular contract, and it seems to us, having regard to the terms of the contract contained in the *wasil-baki*, that the amount left in deposit with the Defendant ceased to be part of the rent. We are accordingly of opinion that the claim for recovery of the amount which the Plaintiff had to pay to the superior landlord is one for damages and not for rent, and we agree with the lower Court upon this point. We also agree with that Court in holding that Art. 115 of the Limitation Act is applicable to the case. That article provides that the period of limitation, in a suit for compensation for the breach of any contract, express or

implied, not in writing, registered and not herein "specially provided for", is three years from the time when the contract is broken. It has not been found, however, by the Court below when the contract was broken. The Court below held that the Plaintiff was within time, as she came within three years from the date when the plaint was filed against her by her landlord on account of non-payment of the money by the Defendant, i.e., on the 9th June 1906. So that it assumed that, that was the date on which the contract was broken. It has been contended on behalf of the Appellant that the money having been left with the Defendant for payment to the superior landlord on account of the rent due by the Plaintiff to the latter for the years 1309 to 1312, the Plaintiff must have intended that the money was to be paid by the Defendant to the superior landlord at once, at any rate, at the end of the agricultural year, and the agricultural year 1312 having come to an end in September 1905, the contract must be deemed to have been broken in September 1905, which was more than three years before the suit was instituted and that, at any rate, as no time was fixed for the performance of the contract, it ought to have been performed within a reasonable time. It has been contended on the other hand, on behalf of the Respondent, that the Defendant could have paid the rent to the superior landlord even after the end of the agricultural year 1312, or at any time before the suit for rent was brought by the superior landlord against the Plaintiff and that the contract must be taken to have been broken when the superior landlord instituted the suit for rent against the Plaintiff. Under sec. 46 of the Indian Contract Act, where by the contract a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time, and under that section "what is a reasonable time" is in each particular case a question of fact. We think, therefore, that the case ought to go back to the lower Appellate Court for a finding as to when the parties intended the contract to be performed. If it was intended by the parties, that the contract was to be performed at any time before the superior landlord instituted the suit for rent against, the Plaintiff, then the contract must be taken to have been broken when that suit was instituted, and in that case the suit is not barred by limitation. If, on the other hand, the parties intended that the money kept in deposit with the Defendant was to be paid by him to the superior landlord at the end of the agricultural year 1312, or within a reasonable time from the date on which the contract was entered into, the Court will have to find whether the time was within three years of the date of the institution of the suit. The Court will come to a finding upon this point upon a consideration of the contract, as well as all the circumstances of the case, and dispose of the appeal accordingly. The next question is, whether the suit can be maintained by the Plaintiff. The wasil-baki was no doubt in favour of the Plaintiff and her mother-in-law, and the superior landlord brought the suit for rent both against the Plaintiff and her mother-in-law. It has, however, been found by the Munsif as well as by the learned Sub-Judge, who heard the appeal originally, that the Plaintiff's mother-in-law had no right to the holding in respect of which the wasil-baki account was made, as the holding belonged to the Plaintiff's husband and the Plaintiff alone was her

heiress. But that by itself would not be a sufficient answer to the objection raised on behalf of the Defendant, because the contract in question is a contract with respect to certain sum of money and does not deal with the holding itself. The question, however, does not appear to have been raised before the learned Subordinate Judge who heard the appeal on review. It is open to the Defendant to waive non-joinder of one of the joint promisees, and it may be that having regard to the fact that both the Courts below found the question against the Defendant, he waived the question of non-joinder at the hearing of the appeal after review. Under these circumstances we decline to entertain the objection at this stage of the case. The result is that so far as the claim for rent of years 1313 to 1315, and the claim for Rs. 22-8 i.e., the amount shown as balance due by the Defendant in the wasil-baki are concerned, the decree of the lower Appellate Court will stand confirmed with proportionate costs, and that the decree, in so far as the claim for the amount the Plaintiff had to pay to her landlord is concerned, is set aside and the case sent back to the Court of Appeal below to be dealt with according to the directions given above and for disposal according to law. Costs to abide the result.