

(1917) 02 CAL CK 0031
In the Calcutta High Court

Maharaja Birendra Kishore Manikya Bahadur	APPELLANT
Vs	
Srimati Fuljan Bibi and Others	RESPONDENT

Date of Decision : 12-02-1917

Acts Referred:

Citation : 38 Ind. Cas. 469

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiff in a suit for assessment of rent.
2. The case for the plaintiff is that the lands in dispute are included in a tenancy created on the 25th August 1849, and that rent has not hitherto been assessed for these lands, and that the defendant is not entitled to hold the lands without payment of rent.
3. The defence in substance is that under the terms of the contract between the parties, the defendant is entitled to hold these lands without payment of rent, and that the lands were exempted from payment of rent in consideration, that the tenant would bring under cultivation the other lands included in the lease.
4. In 1895, proceedings were taken under Chapter X of the Bengal Tenancy Act for preparation of a Record of Rights and the tenant then claimed to be entitled to hold these lands without payment of rent. His contention, however, was overruled, and an entry was made in the Record of Rights to the effect that the lands were included in the lease, and were not, under the contract, specially exempted from payment of rent.
5. The present suit was instituted by the landlord on the 4th October 1909 for assessment of rent.
6. The District Judge has held, in concurrence with the Court of first instance, that the allegation of the defendant that he was entitled to hold these lands without payment of rent for the consideration that he would bring under

cultivation the other lands included in the lease had not been established. But, while the primary Court overruled the plea of limitation on the authority of the decisions in *Beni Pershad Koeri v. Dudhnath Roy* 27 C. 156pc : 26 I.A. 216 : 4 C.W.N. 274 : 7 S P.C.J. 580 : 14 Ind. Dec. (N.S.) 103 and *Seshamma Shettoti v. Chickaya Hegade* 25 M. 507 : 12 M.L.J. 119 the lower Appellate Court has dismissed the suit as barred by limitation, inasmuch as more than twelve years before its institution, the tenant had, to the knowledge of his landlord, denied his liability to pay rent in respect of these lands. We are of opinion that this view cannot possibly be supported.

7. The defendant, no doubt, asserted before the Settlement Authorities, that under the terms of the contract between the parties, he was entitled to hold these lands without payment of rent; that case, however, failed. He now seeks to succeed on the ground that as he has denied his liability to pay rent for more than twelve years, he has thereby secured a variation of the terms of the contract between him and his landlord. Neither authority nor principle has been invoked in support of this position. It is, indeed, a novel proposition that while a contract of tenancy is in force, either party can practically obtain a variation thereof, if he persists long enough in his assertion that one of the terms, is otherwise than what it really is. The decisions in *Birendra Kisore v. Lahsmi* 30 Ind. Cas. 896 : 22 C.L.J. 129 and *Kali Mohan Tripura v. Birendra Kisore* 31 Ind. Cas. 391 : 22 C.L.J. 309 lend no support to the contention of the respondent which is clearly negated by the cases relied upon by the Court of first instance.

8. The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and before the lower Appellate Court.