
(1936) 08 CAL CK 0039
In the Calcutta High Court

Case No : Appeals from Appellate Decrees Nos. 473 to 553 of 1934

Manager, Murshidabad Estate

APPELLANT

Vs

Hira Bewa

RESPONDENT

Date of Decision : 12-08-1936

Acts Referred:

Citation : (1936) 08 CAL CK 0039

Final Decision : Dismissed

Judgement

Edgley, J.—In the suits out of which these appeals arise the Plaintiff sued the Defendants for arrears of rent. It was the Plaintiff's case that at the inception of the tenancies falkar was assessed as part of the rent for the demised land. The case for the Defendants appears to have been that the falkar in question did not form part of the rent of the holdings in suit but was realised by the Plaintiff as an abwdb against the will of the Defendants. The learned Munsif dismissed the Plaintiff's claim on the ground that there was no contract for the payment of falkar between the parties at the time of the inception of the tenancies. The finding of the learned Munsif was, however, reversed on appeal by the learned Subordinate Judge whose findings were:

(1) That the Defendants had paid the falkar just as regularly as rent since the inception of the tenancies;

(2) that the falkar claimed had been in existence from the time of the inception of the tenancies; and

(3) that these tenancies came into existence within the last 50 years.

2. The lower Appellate Court, however, held that inasmuch as the Defendants had raiyati rights in their holdings, the landlord was not entitled to recover falkar, having regard to the provisions of sees. 23A and 178 (h) of the Bengal Tenancy Act.

3. When this case came before this Court on appeal on the 25th May, 1936,

having regard to the fact that the judgment of the learned Subordinate Judge contained an inadequate discussion of the evidence in the case, I remanded the case to the lower Appellate Court for a finding upon the following issue:

Was the falkar claimed a term of the tenancies at the time of their inception and has the landlord proved that he has realised falkar as rent from the tenants since the inception of the tenancies in question ?

4. The matter has been further considered by Babu Jogendra Narayan Roy Choudhury, Subordinate Judge of Midnapur, who after a very careful and exhaustive consideration of the evidence, has found that the falkar claimed by the Plaintiff was a term of the tenancies at the time of their inception except in the case of a tenancy in suit No. 804 and he also found that the Plaintiff had realised falkar as rent from all the Defendants except in the case of the tenancies covered by Suits Nos. 804, 770 and 778.

5. The most important point for decision in connection with these appeals is whether or not falkar forms part of the rent of the demised land. With regard to this point the position taken by the Respondents is that the falkar in question is in the nature of an abwob, that it was not one of the incidents of the tenancies at the time of their inception, and that during recent years the Plaintiff has been realising falkar from the Defendants against their Will.

6. It seems to be clear on the authorities that, if falkar was part of the consideration for the use and occupation of the land at the time of the inception of the tenancies, it must be regarded as part of the rent. With regard to this point it was pointed out by Chatterjea and Sheepshanks, JJ., in the case of Upendra Lai Gupta v. Meheraj Bibi 21 C. W. N. 108 (1916) that

the question whether any particular item is or is not an abwab must depend upon the construction of the contract of lease in each case and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

7. Further, in the case of Bejoy Singh Dudhuria v. Krishna Behari Biswas 21 C. W. N. 959 (1917). Sanderson, C. J., made the following observations:

It seems therefore that the rule which has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if, upon a fair interpretation of the contract, it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, i.e., if it is really part of the rent, although" not described as such, the landlord can recover it.

8. These and other cases were cited before the Judicial Committee of the Privy Council in the case of Rani Chattra Kumari Devi v. W. W. Broucke (L. R. 54 I. A. 432: s. c. 32 O. W. N.280 (1927) and on this point Lord Sinha said:

A large number of cases decided by the Calcutta and Fatna High Courts were

referred to in the judgments and cited at the bar. Their Lordships do not consider it necessary to refer to them beyond expressing their agreement in the view that in each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

9. It would appear, therefore, that the views of this Court with reference to this question have been generally accepted by the Judicial Committee of the Privy Council and the principle laid down by the Privy Council was followed by this Court in the case of Abdul Gani Chaudkuri v. Angri Bhikhu I. L. R. 56 Gal. 919 (1928).

10. The distinction between an abwab and rent was very clearly drawn by Cammiade, J., in the case of Jogesh Chandm Roy v. Sharfuddin ILR 54 Cal, 799: s. c, 32 C.WN. 81 (1927). In discussing this matter his Lordship said:

Rent is defined as whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. In each case it has to be determined whether or not the item called in question as an abwab is covered by the definition of the term "rent". To put it in other words, it must be found that that item is part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land provided that such consideration is lawful. The consideration may be wholly monetary or wholly one in kind or it may be partly in money and partly in kind.

11. His Lordship went on to say:

Keal abwabs are payments or deliveries, sometimes fixed and customary and sometimes arbitrary and uncertain, which were not agreed upon between the parties as consideration for the use and occupation of the land.

12. From the findings of the lower Appellate Court after remand it is now clear that the disputed tenancies Were created in 1305 or 1306 and that

the falkar claimed by the Plaintiff in respect of all tenancies in dispute save and except the tenancy in Snit No. 804, in which Appeal No. 67 has arisen, was a term of those tenancies at the time of their inception. He has reaised falkar as rent from all the Defendants barring those in Suits Nos. 804, 770 and 778 which have given rise to Appeals Nos. 67, 52 and 56 respectively.

13. These findings are based on a very careful consideration of the evidence. In my view, there were ample materials on the record to justify the learned Subordinate Judge in arriving at these findings and I have no hesitation in accepting them. I, therefore, hold that falkar forms part of the rent of the demised land except in the case of the lands covered by Suits Nos. 804, 770 and 778.

14. It is, however, urged by the learned Advocate for the Respondents that, in any view of the case, the falkar claimed cannot be recovered by the Appellant in view of the provisions of secs. 23A and 178 (h) of the Bengal Tenancy Act. With

regard to this point, it is not disputed that the Respondents are occupancy raiyats. Under sec. 23A of the Bengal Tenancy Act it is provided that, subject to the provisions of sec. 23 of the Act, an occupancy raiyat is entitled to enjoy the produce of trees on his land, to fell them and to utilise and dispose of the timber of such trees; and it is further provided by sec. 178 (h) of the Act that nothing in any contract between the landlord and tenant made before or after the passing of the Act shall take away or limit the rights of occupancy raiyats in trees on their holdings as provided in sec. 23 A.

15. In this connection, it is admitted by the learned Advocate for the Appellant that, as the law now stands, subject to the provisions of sec. 23 of the Bengal Tenancy Act, even if the assessment at the rate of nine pies per tree on each holding formed part of the original rent at the time of the inception of the tenancies, the tenants would be at liberty to fell these trees and would thereafter be entitled to a remission of falkar in respect of the trees so felled. He also admits that the landlords would not be entitled to levy falkar in respect of any trees planted by the tenants after their induction. This being the case, the advantage to the landlord of imposing fallcar as a portion of the rent would often be nugatory and unsatisfactory. At the same time, in my view, if the landlord so desires there is nothing in the law to prevent him from levying falkar on the trees standing on the holding at the inception of the tenancy as part of the consideration for the use and occupation of the demised land and this is what appears to have happened with reference to the holdings with which we are now concerned. By doing so, the landlord has merely placed himself to some extent the hands of his tenants who, provided that they do not materially impair the value of the land or render it unfit for the purpose of the tenancy, are entitled to fell the trees on which the falkar rent has been assessed and thus avoid the payment of this item of the rent. By assessing the rent payable to him by imposing falkar as one of its component items, the landlord does nothing to interfere with the rights of his tenants under secs. 23A and 178 (h) of the Bengal Tenancy Act and, if he chooses to do this, the law entitles him to levy falkar as rent in respect of any trees with regard to which the assessment was originally made.

16. With regard to this point, however, it is contended by the learned Advocate for the Respondents that there the plaint is vague and there is nothing to show that the trees, in respect of which falkar is now claimed, were those on which this item of rent was originally assessed. It is, however, clear that, except in the case of three holdings, the landlord has shown that the payment of falkar as part of the rent was one of the terms of the tenants' leases at the time of the inception of the tenancies and that, ever since the holdings in suit were demised to the tenants, he has been collecting falkar from them and their predecessors as part of the rent. He has also been able to show that falkar has been realised from the tenants not as an above but as part of the consideration for the use and occupation of the land.

17. If the tenants had wished to raise a defence to the effect that the trees in respect of which the landlord sought to recover falkar were not on their holdings at the time of the inception of their tenancies or had been planted by them, they would have been at liberty to do so, but this was no part of their case. On the other hand, they appear to have admitted that falkar had actually been paid by them for many years, their contention being that they had paid falkar as an abwab and against their will. Further, it is not now open to them to make a grievance of any vagueness in the Plaintiff's pleadings, because, had they so desired, it would have been open to them to apply for further; and better particulars under Or. 6, r. 5, of the Code of Civil Procedure. This they failed to do.

18. In view, therefore, of the facts which have been clearly established by, the Plaintiff and the state of the pleadings and also, having regard to the provisions of secs. 103 and 106 of the Indian Evidence Act, I think the onus clearly lay upon the Defendants to prove that they were entitled to any reduction of the falkar rent by reason of the fact that any of the trees on which the assessment had originally, been made had ceased to exist or that any of the trees in respect of which it was sought to recover falkar had been planted by the tenants themselves. The onus which lay upon them with regard to this point they have not discharged.

19. The learned Advocate for the Appellant, having regard to the findings of the lower Appellate Court, does not wish to press his client's claims in the appeals arising from Suits Nos. 804, 770 and 778. With regard to the other suits, in view of the considerations mentioned above, I am of opinion that the Plaintiff has succeeded in establishing his case. The appeals arising from those suits will therefore be allowed with five sets of costs in all the Courts, and the costs against the minor Respondents will be passed (paid?) out of the minor's estates. With regard to the Appeals Nos. 473, 477 and 488 arising from Suits Nos. 804, 770 and 778, these appeals will be dismissed with costs in the case of appeal No. 477. There will be no order for costs as regards Appeals Nos. 473 and 488. The learned Advocate for the Respondent to-day asked for leave to file an appeal under sec. 15 of the Letters Patent in Appeals Nos. 473 and 479. This application is rejected.