

(1915) 07 CAL CK 0045
In the Calcutta High Court

Nadir Chand Saha and Others

APPELLANT

Vs

Birendra Nath Dutt Chowdhury and Others

RESPONDENT

Date of Decision : 28-07-1915

Acts Referred:

Evidence Act, 1872 — Section 92(4)

Citation : 37 Ind. Cas. 126

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

Bench : Division Bench

Judgement

1. This is an appeal by the defendant in a suit for recovery of arrears of rent on the basis of a kabuliyat executed on the 11th April 1895, for a term of one year. The kabuliyat provided that rent would be paid on the 30th July and that on default, the arrear would carry interest at the rate of 75 per cent. per year. The year expired and the tenant held over, Rent is claimed in this suit for the years 1909-10 and 1910-11, and the only question in controversy is, at what rate is interest payable on the arrears. The defendant pleaded that before the kabuliyat was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent, per annum would not be enforced, and it was on the faith of this assurance that he agreed to the insertion of the Clause in the document. The Court of first instance found that the allegation of the defendant was true and held that the landlord was not entitled to claim interest on the arrears at the rate of 75 per cent, per year. On appeal the District Judge has expressed no opinion upon the question of fact, but has decreed interest at the rate claimed, on the ground that oral evidence was not admissible to contradict the terms of the kabuliyat. He has referred to proviso (4) of Section 92 of the Indian Evidence Act, and has concluded that as that proviso deals with a subsequent oral agreement, it has no application to the case before us, while none of the other provisos was of avail to the defendant.

2. On the present appeal, reliance has been placed by the defendant upon the first proviso to Section 92, which is in these terms: Any fact may be proved

which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure; of consideration, or mistake in fact or law. We may parenthetically observe that this is not an exhaustive enumeration of the circumstances which may invalidate a document or may entitle a person to a decree or order relating thereto.

3. The appellant contends that the execution of the kabuliyat was secured by fraud or imposition, in respect of the Clause for payment of interest, and in support of this view refers to the decision of the Judicial Committee in *Pertap Chunder Ghose v. Mohendranath Purkait* 17 C. 291 : 16 I.A. 233 : 5 Sar. P. C. J. 444 : 13 Ind. Jur. 370 : 8 Ind. Deo. 733. Sir Richard Couch observed in that case that where one party induced another to contract on the faith of representations, made to him, any one of which is untrue, the whole, contract is, in a Court of Equity, considered as having been obtained fraudulently. Consequently, where a tenant executes a kabuliyat containing a stipulation which the landlord has told him will not be enforced, the tenant cannot be held to have assented to it, and the kabuliyat is not the oral agreement between the parties. A similar view was taken by this Court in the cases of *Kashi Nath Chukerbati v. Brindabun Chukerbati* 10 C. 649 : 8 Ind. Jur. 617 : 5 Ind. Dec. 437 and *Beni Madhub Gorani v. Lalmoti Dassi* 6 C.W.N. 242. The test is, whether the tenant can maintain a suit for rescission, cancellation or variation, of the contract; if he can, he may successfully resist the claim on the basis of the contract. There is no room for controversy in this case that such a suit could be maintained by the tenant, But it has been ingeniously argued on behalf of the respondent that as the kabuliyat in this case was for a term of one year only and as since the expiry of the term the defendant has held over, he is bound by the terms entered in the document. This contention is obviously fallacious. As there was an agreement that this particular Clause in the deed would not be enforced, the relative position of the parties is, the same as if the Clause was deleted from the document, and tenant must be deemed to have held over according to what constituted the true terms of the agreement between him and his landlord. [*Bajinath Prosad V. Raghunath Rai* 14 Ind. Cas. 817 : 16 C.W.N. 496. *Durgi Nikarini v. Goberdhon Bose* 24 Ind. Cas. 183 : 20 C. L.J. 448 : 19 C.W.N. 525.]. The tenant could, after the expiry of the terra, be made liable for interest only if there was a subsequent agreement to pay interest at the specific rate. None such is alleged in this case.

4. 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. The appellant will have his costs in this Court, but the parties will bear their own costs before the District Judge.

5. We may add that the respondent has not insisted upon a remand in view of the small amount in controversy, otherwise a remand would have been necessary for a determination of the question of fact which was raised in the Court of first instance and decided against the plaintiff but has been left undecided by the

District Judge.

6. This judgment will govern Second Appeal No. 1185 of 1913 : in that case also, the decree of the District Judge will be set aside and that of the Court of first instance restored; there will be the same order for costs as in the other case.

7. Second Appeals Nos. 1180, 1181, 1182, 1183, 184, 1186 and 1187 of 1913.

8. These appeals are obviously incompetent u/s 102 of Act VIII of 1869 (B. C). They are, therefore, dismissed with costs.

9. Appeals Nos. 1104 and 1185 allowed; Other appeals dismissed.