
(1906) 08 CAL CK 0031

In the Calcutta High Court

Case No : Appeal from Appellate: Order No. 301 of 1905

Naffer Chundra Majie

APPELLANT

Vs

Jyoti Kumar Mukerjee

RESPONDENT

Date of Decision : 03-08-1906

Acts Referred:

Citation : (1906) 08 CAL CK 0031

Final Decision : Allowed

Judgement

1. This is an appeal on behalf of the Defendant in an action commenced against him by the Plaintiff-Respondent for the recovery of a sum of money alleged to be payable by the Defendant as drainage charges under the Bengal Drainage Act of 1880. The Plaintiff alleged that on the 26th February 1898 he entered into an engagement with the Government undertaking to pay the expenses of the excavation of Rajapur khal and that he is entitled under sec. 42, cl. b of the Drainage Act to recover from the Defendant who holds a permanent tenure under him, a proportionate share of the total expenses. The Defendant resisted the claim on various grounds which included the plea of limitation. The Court of first instance held that the claim was barred, inasmuch as the suit had been instituted more than three years after the date on which the Plaintiff entered into an engagement with the Government to pay the drainage charges. Upon appeal the learned District Judge held that as the Defendant had agreed in the registered kabuliyat executed by him in favour of the Plaintiff, to pay these drainage charges, the six years' rule of limitation prescribed by Art. 116, Sch. II of the Limitation Act was applicable. In this view of the matter, the learned Judge held that no portion of the claim was barred by limitation and he accordingly remanded the case to the Court of first instance for trial on the merits. Against this order of remand, the Defendant has appealed to this Court, and on his behalf it has been contended that the suit is barred by limitation. In our opinion this contention is partially well-founded and the views taken by both the Courts below are unsound. Before, however, we deal with this question, it is necessary to advert for a moment to the provisions of the Bengal Drainage Act, 1880. The

Bengal Drainage Act-, after providing for the appointments of Commissioners for the preparation of schemes for the better drainage and improvement of any tract of land and for the conduct of business by them, lays down in sec. 28, sub sec. (2), that the Commissioners so appointed shall after completion of the works classify the improved and reclaimed lands and apportion the total cost of construction together with interest, upon all lands benefited, and shall also draw up a statement showing the amount payable to the Collector by each landholder in respect of his Improved and reclaimed lands respectively. Sees. 32 to 36 then prescribed the procedure for apportionment of the sums payable in respect of all the lands of any village by the holders thereof. Sec 42 next provides that every landholder, who has been charged with any sum under the sections just referred to, may, after he has paid or engaged to pay the same to the Government, either enhance the rents of tenants holding lands under him or recover from such tenants the whole or a part of the sum he has himself engaged to pay, according to certain proportions defined subsequently. Cl. (c) of sec 42 defines the proportions in which such sum is recoverable by the landholder from his subordinate tenants and is based upon the principle that the amount payable by any tenant should vary as the area and quality of land in his occupation vary. The same clause contains the important restriction in favour of the tenant, that no tenant shall be liable to pay to his superior landholder in any one year more than one-tenth part of the total sum recoverable from him. Sec. 44 next lays down that the sum payable to a landholder in any one year shall be payable by equal instalments upon the days appointed for the payment of the rent of the lands concerned and shall be recoverable as if the same were an arrear of rent. Cls. (2) and (3) of sec 44 provide for a reference to the Collector in case of dispute as to the amount to be paid and for decision of the objection by the Collector. In case of such dispute and reference, the Collector is apparently authorised to direct at his discretion the payment of the amount due for any year in a number of annual instalments not exceeding ten. It is obvious from a comparison of secs. 42 and 44 that the Collector cannot nullify the provision of sec 42, cl. (c) which fixes the maximum amount payable by the tenant in any one year at one-tenth of the total sum recoverable from him. This view receives considerable support from sec. 44A which expressly saves the rule of proportion laid down in cl. (c) of sec. 42 and the rule of instalments laid down in sub-sec. (1) of sec. 44.

2. It is manifest from an examination of the provisions of the Bengal Drainage Act analysed above that a portion of the claim of the Plaintiff is premature. According to the Plaintiff he entered into an engagement with the Government on the 26th February 1898 to pay the sum assessed by the Commissioners under the Act. Under sec. 42 therefore as pointed out in the case of *Monmohini v. Prso Nath* 8 C.W.N. 640 (1904), the right of the Plaintiff to recover any sum from the Defendant accrued on that date. Under cl. (c) of sec. 42, the Plaintiff cannot recover from the Defendant in any one year more than one-tenth of the total sum payable by him. As the suit was instituted on the 12th April 1904, at the date of the commencement of the action, the Plaintiff was entitled to claim six-

tenths of the total sum recoverable. It is obvious therefore that as regards four-tenths of the claim, it is premature, and must accordingly be disallowed.

3. As regards the remaining six-tenths of the claim which as we have explained above, had accrued due at the date of the institution of the suit, the question arises what portion, if any, is barred by limitation. Now, under sec. 44, sub-sec. (1) the amount payable by the tenant in any one year is payable by equal instalments upon the days appointed for the payment of rent and is recoverable as an arrear of rent. It may be conceded that, as pointed out by this Court in the case of *Brojo Nath v. Gopi Shakrani* ILR 23 Cal. 835 (1896), the mere fact that a sum of money is recoverable in the same manner as rent does not invest it with the characteristics of rent for all purposes. But when we look to the definition of rent contained in sec. 3, sub-sec. 5 of the Bengal Tenancy Act we find that in Sch. III of that Act, the term "rent" includes also money recoverable under any enactment for the time being in force as if it was rent. Consequently under cl. (2) of Sch. III of the Bengal Tenancy Act, a suit for the recovery of drainage charges payable by a tenant to his landlord under sec. 42, cl. (b) and sec. 44, sub-sec. (1) of the Bengal Drainage Act must be brought within three years from the last day of the Bengali year in which the sum claimed fell due. The learned vakil for the Respondent contended that the provision of law referred to has no application because the Plaintiff sues to enforce a registered contract and does not claim to recover any sum under the Drainage Act. In our opinion there is no force in this contention. No doubt, as pointed out by this Court in *Jyoti Kumar v. Haridas* ILR 32 Cal. 1019 (1905), it is perfectly lawful for parties to substitute for their statutory obligation under the Drainage Act, a contractual obligation. When, however, we look to the contract of tenancy in the case before us, we find that it contains nothing more than a covenant by the tenant to pay to his landlord drainage charges in accordance with the statute. It is obvious from the terms of the agreement that no contractual obligation was created in supersession or modification of the statutory obligation; the lease contained merely a recital of the statutory obligation. It is clear, therefore, that Art. 116 of Sch. II of the Limitation Act has no application, as the suit cannot by any stretch of language be described as a suit for compensation for the breach of a contract in writing registered. This view receives some support from the principle which underlies the decision of the Full Bench in *Mackenzie v. Haji* ILR 19 Cal. 1 (1891). If therefore Sch. III, cl. (2) of the Bengal Tenancy Act is applicable, as we hold it is, the question remains what portion of the claim is barred by limitation. The Plaintiff entered into his engagement with the Government on the 26th February 1898, and one-tenth of the total sum payable by the tenant became recoverable in the course of the year ending on the 26th February 1899 which corresponds to the 15th Falgun 1305, B. S. In respect of this first instalment therefore the period of limitation ran from the last day of 1305, B.S., that is from the 12th April 1899. The claim for this one tenth is accordingly clearly barred by limitation. The one-tenth which fell due in the next following year 1306, B.S., is also similarly barred. The claim for the subsequent instalments however is in

time. In other words only two-tenths of the claim advanced by the Plaintiff is barred by limitation. The view we take is supported by the decision of this Court in *Monmohini v. Preo Nath* 8 C.W.N. 640 (1904). The learned vakil for the Plaintiff-Respondent, however, strenuously contended that our view is inconsistent with the rule laid down in that case and invited us to refer the question to a Full Bench for decision. He argued that the case referred to is an authority for the proposition that the period of limitation for a landlord to recover sums payable by a tenant under sec. 42, cl. (b) begins to run from the date on which the landlord has engaged to pay the costs with which he was charged under that Act. The language used in the first paragraph of the judgment in that case may perhaps lend some apparent support to this argument. But the judgment, taken as a whole, makes it obvious that what Mr. justice Geidt intended to lay down, was that the right of a landlord to recover any sum from his tenant under sec. 42, cl. (b) accrues, not on the date on which the Collector assesses the amount payable by the tenant under sec. 44, but on the date on which the landlord himself enter into an engagement with the Government to pay the costs with which he is charged under the Act. In other words although the right of the landlord to recover any sum from the tenant does not accrue till he himself has entered into an engagement with the Government, and although consequently he cannot maintain an action before such date, it does not necessarily follow that the period of limitation for the recovery of the sum payable by the tenant in any one year runs from the date of the engagement; for this purpose, the time runs from the date mentioned in Sch. III which is expressly referred to by Mr. Justice Geldt in a latter portion of his judgment. We have consulted our learned brother and have ascertained that this is what he intended to lay down. We may point out that there is no inconsistency whatever in the view indicated above; although a sum of money may be payable on a specified date, the limitation for a suit for the recovery thereof need not necessarily run from such date; thus to take one illustration only, although under sec. 53 of the Bengal Tenancy Act, rent may fall due on the last day of each quarter of the agricultural year, and although, therefore, the landlord may be entitled to bring a suit for rent as soon as an instalment has fallen due (subject to the provisions of sec 147) nevertheless the period of limitation for a suit for the recovery of arrears of rent runs only from the end of the agricultural year in which the instalment claimed fell due. The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The suit of the Plaintiff will stand dismissed as regards four-tenths of the claim on the ground that it is premature. As regards two-tenths of the claim the suit will stand dismissed on the ground that it is barred by limitation. As regards the remaining four-tenths of the claim, the suit is remanded to the Court of first instance to be tried on the merits. The Appellant will have his costs in this Court. We assess the hearing fee at one gold mohur.