

(1938) 03 CAL CK 0016
In the Calcutta High Court

Pravat Chandra Syam

APPELLANT

Vs

Bengal Central Bank Ltd.

RESPONDENT

Date of Decision : 29-03-1938

Acts Referred:

Transfer of Property Act, 1882 — Section 117

Citation : AIR 1938 Cal 589

Judgement

1. The defendant is the appellant before us. The subject-matter of the suit is a tea estate named Longucharra Tea Estate, of which the defendant is the lessee under the plaintiff. The suit is one for possession on the ground that the defendant's lease has been determined by forfeiture. To follow the controversy between the parties in this appeal, the following facts have to be stated: The said Tea Estate originally belonged to the Union Tea and Trading Co., comprising an area of 400 Hals, some portion of which had already been planted with tea shrubs and on a portion whereof was a factory for manufacturing tea. The plaintiff purchased the said tea estate at a court sale and thereafter two transactions followed between the plaintiff and the defendant. Both these transactions were of the same date, namely 28th June 1935. The first is an agreement for sale between the plaintiff and the defendant. It is Ex. 1, Part 2, page 42. By this agreement, the defendant agreed to purchase the said tea estate, that is to say the lands including the factory and the machinery at the price of two lacs of rupees free from all incumbrances. The price was not to be paid all at once but was to be paid in instalments. Rs. 10,000 was paid by the defendant on the date of the agreement, and the balance of Rs. 1,90,000 was to be paid in 11 yearly instalments, each instalment being not less than Rs. 10,000 and payable on 15th day of January every year, the first of such instalments to be paid on 15th day of January 1936 and the last instalment on 15th day of January 1946. Clause 9 of the said agreement is material. It states that should the purchaser fail to pay any one of the instalments of the balance of the purchase money on the fixed date, the vendor would have the option of extending the time for payment of any defaulted instalment up to three months;

but whether the extension would be given or not depended upon his option, and that in case the vendor refused to extend the time for payment of any defaulted instalment, or if the instalment be not paid within the time so extended by the vendor, the whole of the balance of the purchase money then remaining unpaid would become immediately payable and the vendor would be entitled to call upon the purchaser to pay the same; and if the purchaser failed or neglected to do so within a month after having been so called upon, the vendor would be entitled to rescind the agreement and resell the property after forfeiting all instalments paid up to date and also would have the option of suing the purchaser for specific performance of the agreement and for damages. The next transaction is a lease executed on the same date by the plaintiff in favour of the defendant. Ex. 2 is the lease printed at p. 50, Part 2. The subject-matter of the lease was the said tea estate, that is to say, the lands as well as the factory and the machineries. The lease is a lease from year to year terminable at the end of the year of tenancy by three months" previous notice in writing given by either party to the other. The rent was fixed at Rs. 1600 payable on 15th day of August every year, the first payment to be made on 15th day of August 1935. In para. (2) of the lease, there are many covenants, one of them being in these terms:

The tenant is not to break up or convert any part of the land which is under tea cultivation for any other purpose; but the said tenant shall be at liberty to cultivate or utilize the surplus lands not at present under tea cultivation for any other purpose but not so as to affect prejudicially the said tea estate.

2. Paragraph (4) of the lease is the clause dealing with the right of the landlord to re-enter. The material portion of the said paragraph is as follows:

Provided always that if default is made by the tenant in the payment of any instalment in pursuance of the agreement of even date (Ex. 1) and made between the parties hereto, or if the tenant or other person in whom for the time being the term hereby created shall be vested, shall become insolvent . . . then and in any of the said cases it shall be lawful for the landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and therefrom this demise shall absolutely determine.

3. The first instalment payable under Ex. 1 fell due on 15th January 1936, but the same was not paid. On 16th January 1936, the plaintiff gave a notice in writing to the defendant in these terms:

Re : Longuchara Tea Estate in Sylhet Lease

dated 28th June 1935.

Dear Sir,

Please take notice that as you have defaulted in payment of instalment due on 15th January 1936 as stipulated in the agreement dated 28th June 1935 the lease in your favour of the same date (i.e. 28th June 1935) is determined and you are asked to make over possession of the demised garden with buildings,

fixtures, factories, plants machineries, crops, etc., forthwith. Failing compliance necessary action will be taken up against you. [Ex. 3 (a), p. 21, Part 2]

4. On 18th January following, another notice was given by the plaintiff to the defendant in terms of Clause (9) of the agreement for sale. It is in these terms:

Please take notice that as you have defaulted in payment of the sum of Rs. 10,000 due and payable on 15th January 1936, we call upon you, as we are entitled to do, under the terms of the said agreement to pay down the entire balance of Rs. 1,90,000 and interest due and complete the purchase within one month.

We have already addressed you by letter dated 16th January 1936 intimating determination and forfeiture of the lease also dated 28th June 1935 and claiming possession for default in the payment of the said instalment of Rs. 10,000 due as aforesaid on 15th January 1936. (Ex. 3, p. 32, Part 2)

5. On 27th February 1936 the present suit was filed. The learned Subordinate Judge by his judgment dated 29th June 1936 decreed the same. Hence this appeal by the defendant. Dr. Basak who appears for the appellant raises four points before us, three in his opening and the fourth for the first time in reply. The first two are : (1) that the Transfer of Property Act governs the lease, Ex. 2, and two notices in writing, one u/s 111(g) and another u/s 114-A are required, and that in any event the notice, Ex. 3 (a), is a bad notice, inasmuch as it does not require the tenant to repair the breach within a reasonable time, and (2) that even if the Transfer of Property Act does not govern this lease, the notice Ex. 3 (a) is a bad notice inasmuch as it has required the tenant to vacate forthwith, the contention being that under the Common law an agricultural tenant is entitled to remain in possession till the end of the agricultural year, and that any notice to be valid must be one which would require him to vacate only at the end of the agricultural year. We shall deal with the second point so raised first, and the question is whether the lease which we have before us was excluded by reason of the provisions of Section 117, T.P. Act, that is to say, whether the lease is one for agricultural purposes. For the decision of this question, we must look into the lease in the first instance, and also to the pleadings in the case. In para. (6) of the plaint, the plaintiff specifically stated that the lease of the tea garden with buildings, etc. was taken by the defendant for the purpose of cultivation. There is no specific statement in the written statement stating that the purpose of the lease was other than cultivation. It is not stated either in the defendant's pleadings or in his evidence how much of the land was actually under cultivation at the time of demise, how much was uncultivated and how much was the site on which the factory stood.

6. Keeping in view this state of the pleadings and the evidence, we must now refer to the lease itself. The land comprised in the demise is described in the Schedule A as 400 Hals in area. The lease is of the said area together with the structure described in Part 1 of Schedule B and the machineries described in Part

2 of the said schedule. The covenants contained in para. (2) of the lease relate not only to the area under cultivation at the time as also the area which could be cultivated, but also to the buildings and structures, as for instance there is a covenant to repair and keep in tenant-able repair every part of the demised premises which included the factory building. There is also a covenant to insure or to keep insured at all times during the terms of the lease various structures, machineries etc. The question therefore is what was the main purpose of this lease. The tenant was not to break up or convert any part of the land which was then- under tea cultivation for any other purpose; he could use the rest of the land for tea cultivation or cultivate it with other crops or use it for any other purpose. Having regard to the nature of the land and to the fact that the lessee intended to use it as a tea garden, we have no doubt that the main purpose of the lease was the cultivation, and incidentally the manufacture of tea. As we have already stated, we do not know what was the size of the factory on the site. In the absence of any evidence to the contrary and the absence of any denial on the part of the defendant in his written statement, we can take it that the statement made in para. (6) of the plaint is a true statement, that is to say, that the bulk of the area of 400 Hals was either used or could be used for cultivation. Bearing of tea plants would in our judgment be an agricultural purpose. Tea crops are to be raised on good portions, and the remainder not then under tea cultivation could be used for raising tea-crops or other agricultural produce. It may be that under the law then in force the lessee could not extend tea cultivation without a licence from the Tea Central Board but that does not detract from the purpose of the lease. The factory on the land which would occupy a small area was an adjunct and a necessary adjunct to the cultivation of the land with tea. On these facts we have come to the conclusion that the main purpose was agriculture and the lease is excepted from the operation of Ch. 5, T.P. Act, by reason of the provisions of Section 117 of the said Act.

7. The Bengal Tenancy Act was never in force in Sylhet, and this case does not come within the Sylhet Tenancy Act (Act 11 of 1936) which has excepted from the operation of the said Act land grown with tea shrubs. The Act which was in force at the time when the lease was executed and the suit filed, regulating the relations of agricultural tenants, was Act 8 of 1869 which leaves landlords and agricultural tenants free to regulate their rights by contract. There is nothing in that Act which would render invalid a forfeiture clause in an agricultural lease. The clause in the present lease is therefore valid. In fact, Dr. Basak has not contended before us that the said clause is in its entirety affected by any of the provisions of Act 8 of 1869 or by the general law, or as he puts it the Common law in India regulating the rights of landlords and agricultural tenants. What he says is that a forfeiture can only be availed of by the landlord at the end of the agricultural year; and for this purpose he has drawn our attention to a passage at pages 22-23 of the Phillip's "Law relating to the Land Tenures of Lower Bengal" (Tagore Law Lectures of the years 1874.1875). In that passage the learned author was dealing with the position of Paikast raiyats. The definition

given of Paikast raiyats is as follows: They were cultivators usually of the neighbouring villages who came to cultivate the lands of the village which the khud casts were unable to cultivate. Their status is defined by the learned author in these terms : that they were tenants-at-will or more usually from year to year but some times for fixed periods. This class of cultivators, although they had no proprietary right, could not be ousted between sowing and harvest. Apart from the question whether the Paikast raiyats of the old days have disappeared or not, it would not be right in our judgment to draw an analogy between the Paikast raiyats of the old days cultivators of small areas of land who depended for their maintenance upon the crops raised by their own manual labour and a company or an individual cultivating a modern tea estate of an extensive area in Assam. We accordingly do not see our way to accept Dr. Basak's contention that the forfeiture could be availed of in spite of the contract to the contrary contained in a written lease, only at the end of the agricultural year. This being the position, no particular form of notice is required under the law to terminate a tenancy forfeited according to a covenant contained in the lease. Cases in this Court have gone so far as to lay down that no manifestation of the landlord's election to forfeit need be made before the suit, and the suit itself would be sufficient: see *Dwarka Nath Roy v. Mathura Nath Roy* AIR 1917 Cal 236. It is not necessary for us to go to that extent, for in this case the plaintiff landlord by Ex. 3 (a) intimated to the defendant before suit his election to determine the lease. We are accordingly of opinion that the lease had been validly terminated before suit, and that the plaintiff is entitled to khas possession.

8. We shall now deal with the first point raised by Dr. Basak. Assuming that the Transfer of Property Act governs the lease in question, our view is that one written notice is required under the law and not one u/s 111(g) and another u/s 114-A, as contended for by Dr. Basak. Section 111(g) requires a written notice on the part of the landlord to be served upon the tenant intimating his intention to forfeit the lease, and Section 114-A which was added to the statute by the amendment of 1929 only defined the form in which that notice has to be given by the landlord. Section 114-A contemplates two classes of cases, (i) where the breach is capable of remedy, and (ii) where it is not. In cases where the breach is not capable of remedy, all that the law requires is that a written notice should be given by the landlord before suit, conveying his election of forfeiting the tenancy. But if the breach is one capable of remedy, it is further necessary that he should require the lessee to remedy the breach and must give to the lessee reasonable time to do so from the date of service of notice. If therefore the breach complained of in the case before us is capable of remedy, Ex. 3 (a) is a bad notice. If however the breach is not capable of remedy, it is a good notice, because it had conveyed the election of the plaintiff forfeiting the lease. Ex. 3 (a) has mentioned the breach complained of and has also demanded possession from the lessee. This leads to the question whether the breach complained of, namely the non. payment of the instalment due under the agreement for sale on 15th January 1936, was one capable of remedy. If the date, 15th January 1936,

was of the essence of the contract, the breach incurred by the non-payment of money was an irremediable one. Para. (4) of the lease does not by itself furnish any criterion for deciding the question; but it must be borne in mind that the agreement for sale and the lease were parts of the same scheme, which was that, pending the completion of the purchase, the purchaser would remain in possession, but only in his character as lessee with no additional burden in the shape of rent, the rent reserved being exactly the head rent payable by the plaintiff to his landlord. Clause 9 of the agreement for sale must in our judgment be looked into for the purpose of determining this question. From Clause 9 of the agreement for sale, it is quite clear that the parties intended that the due dates of payment of the instalments were to be of the essence of the contract, for, if default was made on the due date, the whole of the balance of the purchase-money then outstanding became at once payable, and on such a contingency other rights and obligations accrued to the respective parties. We are accordingly of opinion that in this view of the matter, the dates of payment of instalments due under the agreement for sale were of the essence of the contract and the breach committed on the part of the lessee was not capable of remedy, because the landlord could not be put into the same position as before by mere subsequent payment of the overdue instalment together with interest. In this view of the matter we do hold that even if the Transfer of Property Act governs the case, the notice Ex. 3 (a) is in accordance with the provisions of the law.

9. The two other points taken by Dr. Basak are (1) that para. (4) of the lease is a penalty clause and this Court ought to relieve the penalty, and (2) that the notice Ex. 3 (a) is bad in view of the terms of another notice given by the plaintiff to the defendant on 16th January 1936, namely, Ex. A (9) (p. 20, Part 2 of the paper book). Both these points were not raised in the Court below, and the last mentioned one was urged only at the time of the reply. With regard to the last mentioned point, we do not know anything about the terms of the mortgage mentioned in Ex. A (9). It has not been exhibited. It had not been even hinted at by the defendant's advocate when the case was opened before us. This point has been raised for the first time and that in this Court after the respondent's advocate had replied to the contentions raised in the opening, which we have already noticed. This point cannot accordingly be allowed to be urged. Regarding the remaining contention, Dr. Basak refers to Section 74, Contract Act and says that the forfeiture cannot be insisted on by the plaintiff and all he should get is compensation in the shape of money. We cannot agree to this contention. We have already expressed our view that Ex. 1 and Ex. 2 must be taken together, being parts of the same scheme enabling the defendant to complete the purchase by easy payments spread over a course of 11 years, in the meantime securing to him the benefit of the property. Moreover the defendant in his evidence at p. 70 has made it clear that he was not prepared to pay any compensation. The result of our decision as indicated above is that this appeal should be dismissed with costs.

10. There is one point however to which our attention has been drawn by Dr.

Basak. He says that after the decree was passed by the lower Court, the plaintiff obtained the export quota rights for the years 1936-1937. He says that the learned Subordinate Judge has assessed mesne profits at a daily rate and therefore his client is entitled to the benefit of the export quota rights for the said years 1936-37 and that inasmuch as the plaintiff has appropriated the same, his client is entitled to get credit in respect of the same when the amount of mesne profits is calculated, or when the decree for mesne profits is put into execution. With this end in view he has filed an application before us. The subject-matter of this application does not come within the purview of the appeal, and it would be wrong on our part to express any opinion on the merits of the said application. The time for considering the merits of the said application would be, as Dr. Basak himself admits, either the time when the total amount of mesne profits is calculated, or when the decree for mesne profits is put into execution. His client would be at liberty then to renew the said application before the proper Court. Whether that application could be then entertained or not, or if it is entertained whether it would be given effect to, are matters on which we express no opinion whatsoever.