
(1935) 02 CAL CK 0034
In the Calcutta High Court

Rai Satyendra Nath Ray Chaudhury Bahadur

APPELLANT

Vs

Pramananda Haldar and Others

RESPONDENT

Date of Decision : 01-02-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 30(6)
Evidence Act, 1872 — Section 92

Citation : 164 Ind. Cas. 437

Hon'ble Judges : R.C. Mitter, J

Bench : Single Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of the plaintiff in a suit for recovery of arrears of rent and for enhancement of rent u/s 30 (6) of the Bengal Tenancy Act. So far as the last mentioned claim is concerned, there is no controversy before me. The controversy is only with regard to the rate of rent of the holding in suit.

2. The plaintiff in the plaint as originally filed claimed rent at the rate Rs. 12-15-10 per year in accordance with the entry made in the Record of Rights published under Chap. X of the Bengal Tenancy Act. On August 1, 1930, he amended his plaint. By the amendment he introduced the case that the incidents of the holding was governed by a registered kabuliyat, dated 2nd Assar 1312 executed by the predecessors of the defendants in favour of his predecessor-in-interest wherein there was a stipulation to pay rent at the rate of Rs. 16-11-6 a year. By the amendment he laid his claim at a rate of Rs. 916-11-6. On September 15, 1930, the defendants filed their additional written statement. In the additional defence they did not plead that the rent was formerly Rs. 16-11-6 but had been varied by any contemporaneous or subsequent oral agreement, but their plea was that the kabuliyat was never intended to be acted upon from the beginning. The Courts below have found that rent had all along been realized at the rate of Rs. 12-15-10, and never at the rate of Rs. 16-11-6, and that the kabuliyat was not intended to be acted upon from the very first and had not in fact been acted upon. In this view of the matter the suit has been decreed at the

rate of Rs. 12-15-1.0 per year. The plaintiff appeals and urges that he is entitled to have a decree at the rate of Rs. 16-11-6.

3. Mr. Bhattacharjya on behalf of the appellant has contended before me that the defence in substance is that the rent mentioned in the kabuliyat was varied or reduced by an oral agreement, contemporaneous with or subsequent to the execution of the kabuliyat and that no oral evidence is admissible for such purposes. He contended further that even if the defence be taken to be that the kabuliyat was never intended to be acted upon, oral evidence or evidence furnished by conduct is not admissible and the terms of the kabuliyat must be given full force. This is his first contention. He referred to the provisions of Section 92 of the Evidence Act and to the cases of Radha Raman Chaudhury v. Bhawani Prosad Bhoumick 6 CWN 60 , Lakhatulla Sheikh v. Bishambhar Ray 12 CLJ 646 : 6 Ind. Cas. 577, Kailash Chandra Saha v. Darbaria Sheikh 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101 , Manindra Chandra Nandi v. Durga Sundari Dassi 20 CWN 680 : 32 Ind. Cas. 185 : AIR 1917 Cal. 734 Narendra Lal Khan v. Bhola Nath Bhuya 27 CWN 336 : 77 Ind. Cas. 154 : AIR 1923 Cal. 417 and Lakshmi Charan Majumdar Vs. Nabadwip Chandra Pandit, . His second contention is that from the mere fact that rent has been realised at the lower rate, an inference that the kabuliyat was not acted upon cannot in law be drawn and to support this proposition he cited the case of Isab Vs. Guru Charan Shaha, . I am afraid I cannot accept his contentions and having regard to the finding of the Court of appeal below that the kabuliyat was not intended to be acted upon from the very beginning, I must dismiss the appeal. Some of the cases cited by him, I will indicate hereafter, are distinguishable; there is besides weighty authority against his contention and two of the cases cited by him, namely, Kailash Chandra Saha v. Darbaria Sheikh 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101 and Manindra Chandra Nandi v. Durga Sundary Dassi 20 CWN 680 : 32 Ind. Cas. 185 : AIR 1917 Cal. 734, are decidedly against his contentions.

4. Before examining the cases it would be profitable to examine Section 92 of the Indian Evidence Act. Where there is a written contract, grant or other disposition of property, the parties to the document or their privies cannot adduce oral evidence to establish a modification or variation of the terms of the document. They cannot prove a contemporaneous oral agreement for such a purpose. Where the case of the parties is that the terms had been varied but not by a written instrument, evidence of conduct is really indirect or circumstantial evidence of an oral agreement, and cannot be admissible, on the principle that when direct evidence of an oral agreement is inadmissible by the rules embodied in the Evidence Act, indirect or circumstantial evidence which tends to prove such an agreement would be also inadmissible. It is on this principle Jenkins, C.J., holds that evidence of conduct is inadmissible in such a case in Lakhatullah Sheikh v. Bkhambhar Roy 12 CLJ 646 : 6 Ind. Cas. 577 and in Dattoo Tataram v. Ram Chandra Tataram 30 B 119, and that must now be taken as settled law, inasmuch as Lord Shaw of Dunfermline has in terms approved the decision

pronounced in Dattoo Tataravi's case 30 B 119 [Maung Kyin v. Ma Shwe La 44 IA 236 : 42 Ind. Cas. 642 : 15 ALJ 825 : 33 MLJ 648 : 3 PLW 185 : 6 LW 777 : 22 CWN 257 : 23 MLT 36 : 27 CLJ 175 : 20 B. LR 278 : (1918) MWN 300 : 45 C 320 : 9 LBR 114 : 14 B.LT 21. A subsequent oral agreement to rescind or modify the terms of a written instrument is also inadmissible where the law requires a written instrument for the contract, grant or other disposition of the property or where an instrument has been registered. But under proviso 1 to Section 92, oral evidence is admissible to prove the circumstances which would invalidate any such document. The circumstances enumerated in the said proviso, e.g., fraud, etc., are illustrative and not exhaustive. In my opinion the fact that an instrument, registered or unregistered, was not intended to be acted upon from the very beginning is a fact which comes within proviso 1 and can be proved either by direct oral evidence or by indirect or circumstantial evidence furnished by the conduct of the parties. If the cases are examined in this light) there is no conflict whatsoever. Cases where the defence taken is that there has been a contemporaneous oral agreement, varying the terms of an instrument, or a subsequent oral agreement varying the terms of a contract or grant required by law to be in writing, or of a registered instrument, are essentially different from the cases where the defence is that the instrument was never intended by the parties to be acted upon. The case of Satyesh Chandra Sarkar v. Dhanpal Singh 24 C 20 , which falls under the first class stand on a distinct principle formulated therein which may be right or wrong, namely that as the plaintiff had admitted the variation of the rent fixed by a registered lease, it was not necessary for the defendant to prove the subsequent oral agreement [Rampini, J., in Radha Raman Chaadhury v. Bhawani Prosad Bhowmik 6 CWN 60].

5. In Radha Raman's case 6 CWN 60 , where the defence to the suit for rent was that there was a contemporaneous oral agreement by which the rent was reduced, Rampini and Gupta, JJ., rightly held that evidence to support the oral agreement was not admissible and it would vary the terms of a written instrument. In the case Bini Madhub Gorani v. Labnoii Dassi 6 CWN 242, where the defence in a suit for rent based upon a registered kabuliyat, was that the kabuliyat was never intended to be acted upon; Rampini, J., sitting singly held that oral evidence adduced to sustain the defence was not admissible but on Letters Patent Appeal he was overruled by Maclean, C.J., and Macpherson, J. Maclean, C.J., observed, firstly, that:

Evidence would be admissible to show that, as between the landlord and the tenant, the document was never intended to be acted upon.

6. The learned Chief Justice further observed (in which observation Macpherson, J. also concurred) that evidence would also be admissible "to show that there has been, as between the parties to this document, a waiver of some of its terms." As I shall show later on the last mentioned observation only has been taken exception to in later cases and must be held to be not good law in view of the decision of the Full Bench in the case of Lalit Mohan Ghost v. Gopali Chuck Coal

Company 39 C 284 : 12 Ind. Cas. 723 : 16 CWN 55 : 11 CLJ 411 , but I am not aware of any case of this Court which has either dissented from or even cast doubt upon the first mentioned observation of the learned Chief Justice. In the same case Macpherson, J. made the following observations:

The defendant in this case does not attempt to give any evidence of an oral agreement rescinding or contradicting the contract as to amount of the rent payable, but as both the lower Courts have found, he did prove that since the time the agreement was entered into he had always paid rent at a lower rate than that stated in the agreement. The evidence was, in my opinion, distinctly admissible, not for the purpose of contradicting the terms of the agreement, but for the purpose of showing, as the learned Chief Justice has pointed out, that the intention of the parties was, that the agreement was from the first not intended to be acted upon.

7. In Lakhatulla's case 12 CLJ 646 : 6 Ind. Cas. 577 , the defence seems to have been, as would appear from the passage from the learned District Judge's judgment quoted by Richardson, J., not that the registered kabuliyat was never intended from the first to be acted upon, but that the amount of rent mentioned therein was varied subsequently. In that very case Richardson, J. distinguished Beni Madhub Gorani's case 6 CWN 242 , on the ground that the defence there was not that one of the terms of the kabuliyat (e. g. for rent) had been varied by oral agreement but that the kabuliyat was never intended from the very first to be acted upon. In the case of Kailash Chandra Shaha v. Darbari Shaik 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101, where from, the fact of the rent being not realised at the kabuliyat rate the learned District Judge had held that the rate of rent as mentioned in the registered kabuliyat had been varied and reduced; N. R. Chatterjea and Newbould, J., pointed out that; oral evidence was not admissible for such a purpose, but inasmuch as there was the defence that the stipulation in the kabuliyat relating to the payment of hajat after a certain date was not intended by the landlord and tenant to be acted upon, remanded the case to the lower Appellate Court to consider the said plea remarking that the oral evidence would be admissible for that purpose, the said learned Judges following Beni Madhub's case 6 CWN 242. In the case of Manindra Chandra Nandi v. Durga Sundari Dassi 20 CWN 680 : 32 Ind. Cas. 185 : AIR 1917 Cal. 734 , which was of the same type as the case of Kailash Chandra Shaha v. Darbaria Shaikh 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101 , the same learned Judges held that the learned District Judge was not right in allowing the defendant to prove by evidence a parol agreement to prove a change in the rental. In second appeals Nos. 2993 and 3005, which were in suits based on unregistered kabuliyats where the defence was not that the rent was varied by subsequent parol agreement, but that the instruments were not intended to be acted upon, the same learned Judges following Beni Madhub's case 6 CWN 242 , held that evidence that rent was never paid at the rate stipulated in the instrument but a lower figure was admissible for the purpose of proving that the kabuliyat was not intended to be acted upon. In both these cases the learned

Judges, however, also quoted with approval the observations made in Beni Madhub's case 6 CWN 242, that such evidence would also be admissible to show waiver by the landlord of the strict terms of the lease. In the case of Narendra Lal Khan v. Bhola Nath Bhuya 27 CWN 336 : 77 Ind. Cas. 154 : AIR 1923 Cal. 417 , N. R. Chat-terjea, J. only said that having regard to the judgment of the Full Bench in Lalit Mohan Ghose v. Gopali Chuck Coal Company 39 C 284 : 12 Ind. Cas. 723 : 16 CWN 55 : 11 CLJ 411 , the observations made by him in the two cases last mentioned and the observations of Maclean, C.J. and Macpherson, J. in Beni Madhub's case 6 CWN 242 , that there can be waiver of the essential terms of a registered lease, otherwise than by another registered instrument was open to doubt, but he did not cast any doubt upon the proposition "that oral evidence or evidence furnished by conduct of the landlord and tenant was admissible to prove that a registered instrument was not intended from the very first to be acted upon. In the case of Lakshmi Charan Majumdar Vs. Nabadwip Chandra Pandit, , the registered kabuliyat was executed on Chaitra 28, 1293, B.S. It provided that rent was to be paid at the rate of Rs. 5 up to the year 1298 B.S. and thereafter, at the rate of Rs. 7-15-0 a year. The landlord instituted the suit for the arrears of years 1325 to 1328 B.S. claiming rent at the rate of Rs. 7-15-0. The tenant pleaded that he was liable to pay rent at Rs. 5 a year and in support proved that all along rent has been realised from him at that rate. The lower Appellate Court gave effect to the defence and the plaintiff appealed to this Court and succeeded. In that case the common ground was that the kabuliyat, had been acted upon up to the year 1298, (top of p. 205) but the defence was that thereafter there was a waiver of stipulation for payment at the rate of Rs. 7-15-0 after 1296 B.S. The question before this Court therefore, was not whether oral evidence or evidence of conduct was admissible for the purpose of showing that the kabuliyat was never intended from the very first to be acted upon. The learned Judges had not to consider nor did consider the correctness of what I have termed the first proposition laid down in Beni Madhub's case 6 CWN 242 . They had to consider the correctness of what I have termed the further or second proposition laid down in that case. They distinguished Beni Madhub's case 6 CWN 242, on the ground that the defence there was that the parties never intended the kabuliyat to be acted upon, and observed that N.R. Chatterjea, J. who had been a party to the decision, in Kailash Chandra's case 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101 , in the case of Narendra Lal Khan v. Bhola Nath Bhuya 27 CWN 336 : 77 Ind. Cas. 154 : AIR 1923 Cal. 417, had himself cast doubt upon the second proposition laid down by Maclean, C.J. and Macpherson, J. in Beni Madhub's case 6 CWN 242. Lakshmi Charan Majumdar Vs. Nabadwip Chandra Pandit, , is, therefore, no authority for the proposition formulated by Mr. Bhattacharya. I accordingly overrule his first contention.

8. With regard to his second contention, I hold that it cannot be said as a matter of law that no inference can be drawn from the fact, that rent was never realised at the kabuliyat rate but at a lower rate, that the parties never meant to act

upon the kabuliyat from the beginning. From such facts such an inference was drawn in Beni Madhub's case 6 CWN 242 and such a fact was held relevant in Kailash Chandra's case 29 CWN 317 : 32 Ind. Cas. 251 : AIR 1916 Cal 101 and Manindra Chandra Nandi's case 20 CWN 680 : 32 Ind. Cas. 185 : AIR 1917 Cal. 734 . The inference drawn by the Court of Appeal is in my judgment, an inference of fact based on admissible evidence and is not open to challenge in a second appeal. The case of Isab Vs. Guru Charan Shaha, , is distinguishable. In that case (which was a suit for recovery of arrears of rent) the defendant denied the relationship of landlord and tenant between him and the plaintiff. Such relationship was sought to be established by the plaintiff by proving a kabuliyat. The defence was that the kabuliyat was not acted upon as no rent had ever been realised according to the rate fixed in the kabuliyat. The lower Appellate Court had found that the kabuliyat had been acted upon. This finding was based upon cogent proof. This finding was sought to be reopened by the defendant- appellant in second appeal. The learned Judges held that this finding was sufficient to dispose of the appeal. In the face of the said findings the learned Judges repelled the contention of the defendant-appellant by observing that the mere fact that rent had not been paid according to the rate mentioned in the kabuliyat would not necessarily lead to the inference that the kabuliyat was never meant to be acted upon. A Court of fact would no doubt be at liberty to hold that realisation by the landlord at a lower rate was an act of grace or in diligence shown to the tenant, but, when the last Court of fact does not draw the last-mentioned inference but draws the other inference from the said fact that the kabuliyat was not intended to be acted upon from the very first, I do not see how in second appeal this Court can say that the inference so drawn is in point of law erroneous.

9. I accordingly hold that there is no substance in the appeal and it must be dismissed with costs.

10. Leave to appeal under the Letters Patent asked for is refused.