
(1914) 05 CAL CK 0010
In the Calcutta High Court

Rajah Kalanand Singh and Another

APPELLANT

Vs

Musammat Saira and Others

RESPONDENT

Date of Decision : 26-05-1914

Acts Referred:

Citation : AIR 1915 Cal 17 : 25 Ind. Cas. 540

Hon'ble Judges : D. Chatterjee, J;Coxe, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for rent based on a kabuliai. The only question that arises is whether the defendant is bound to pay certain charges to the landlord. The Courts below have held that these charges are abwabs and have disallowed them. The plaintiffs appeal. The plaintiffs belong to the family of the Beneli Raj who were also plaintiffs in the case of Pudmanand Singh Bahadur v. Baij Nath Singh 15 C. 828 and the charges are the same as were claimed in that case. The present case is based on a kabuliati of 1673 while the case cited was based on one of 1869. The learned Judges in that case held that these charges were not abwabs and that they were included in the rent. This case, however, was considered in the case of Radha Prosad Singh v. Bal Kowar Koeri 17 C. 726 (F.B.). It must be conceded that the charges in that case were very different from the charges in this case. But it seems to me perfectly clear that the correctness of the decision in Pudmanand Singh Bahadur v. Baij Nath Singh 15 C. 828 was fully considered in that case and that all the learned Judges, including Ghose, J., who was a party to the former decision, were unanimously of opinion that it was wrongly decided. In the referring order the learned Judges (Petheram, C.J., and Banerjee, J.) said: "We are unable to agree in the interpretation put upon the Full Bench ruling, Chultan Mahtoh v. Tilukdhari Singh 11 C. 175 (F.B.), by the decision in Pudmanand Singh Bahadur v. Baij Nath Singh 15 C. 828." In the first decision Betheram, C.J., observed : We must hold the case of Pudmanand Singh Bahadur v. Baij Nath Singh 15 C. 828 to be overruled by the decision of the Privy Council in that of Tilukdhari, Singh v. Chulhan Mahton 17 C. 131 (P.C.) : 16 I.A. 152." And he held that no imposition under any name

whatever should be recovered from the tenant for or in respect of the occupation or tenure of the land beyond the sum which had been fixed for rent, whether that sum had been fixed by agreement or by judicial determination between the landlord and the tenant. O'Kinealy, J., dealt exhaustively with the history of the law on the subject. He held that the finding of the Courts below that these charges were not included in the rent, could not be questioned in second appeal. He dissented from the decision in *Pudmanand Singh Bahadur v. Baij Tsiath Singh* 15 C. 828 as it seemed to him to be in direct conflict with the decision of the Full Bench in the case of *Tilukdhari Singh v. Chulhan Mahton* 17 C. 131 (P.C.) : 16 I.A. 152. Prinsep, J., was of the same opinion and Piggot, J., entirely agreed. Ghose, J., thought that if in any given case the Court found that any particular sum specified in the lease or agreed to be paid was a lawful consideration for the use and occupation of any land, that is to say, if it was really part of the rent although not described as such, it would be justified in holding that it was not an *abwab* and was recoverable by the land-lord. But he held that the findings of fact arrived at by the lower Court that the charges were not part of the rent, were binding on him in second appeal, and that the legality or otherwise of the so-called *abwabs* hardly arose in second appeal. With regard to the case of *Pudmanand Singh Bahadur v. Baij Nath Singh* 15 C. 828 he observed: "Having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of *tahwari* and *salami* were part of the rent stipulated to be paid under the lease. They were, I now think, *abwabs*." It seems to me to follow from this decision that on the question whether these charges are part of the rent or not, the findings of the Courts below are binding on us in second appeal. It also follows that the decision in the case of *Pudmanand Singh Bahadur v. Baij Nath Singh* 15 C. 828 that these charges of *tahwari* and *salami* were part of the rent was wrong. That being so, I do not think that it is open to us in second appeal to interfere with the decision of the Courts below in this case. Moreover, in my opinion, that decision is right. Under the *kubuliat* the defendant agreed to pay "At a uniform annual *jama* of Rs. 350-8-0 of the imperial coin, half of which is Rs. 175-4, as per instalments given below." The instalments are *Assin* Rs. 43-18; *Pous* Rs. 65-11-6, *Magh* Rs. 87-10-6, *Falgun* Rs. 65-11-6, *Baisakh* Rs. 43-13-6, *Jaith* Rs. 43-13-6 or total Rs. 350-8. The stipulation for paying *tahwan* and *salami* is totally distinct and is not said to be in consideration of the lease but to be paid in accordance with the *zemindari* practice. In this connection I may refer to the case of *Radha Churn Boy Chaudhuri v. Golap Chandra Ghose* 8 C.W.N. 529. In that case the so-called *abwabs* were included in the *kists* by which the rent was to be paid. But whether this decision of the Court below is right or not, that these two items are not part of the rent, it cannot, in my opinion, after the decision of the Full Bench, be questioned by us in second appeal.

2. It has been contended that as the sums were specifically agreed on between the parties, they must be paid u/s 3 of the Regulation V of 1812. This argument seems to me to have great force, though I may observe that in the Full Bench

case of Chultan Mahton v. Tilukdhari Singh 11 C. 175 (F.B.) it, was held that this provision referred only to the amount fixed as rent payable to the landlord. Therefore, if these charges are not included in the rent, they would not come within the scope of that provision. But whether that view is correct or not, we cannot, in my opinion, give effect to it in second appeal.

3. Our attention has been drawn to the case of Kumar Kalanand Singh v. Eastern Mortgage and Agency Co. Ltd. 19 Ind. Cas. 701 : 18 C.L.J. 83. That was a suit relating to a lease of 1874 which contained a stipulation for paying" these charges of salami and tahwari. It was held in that case that these were part of the rent. That case was, however, a regular appeal and the learned Judges were Judges of fact and were entitled to form their own opinion on the point whether these charges were or were not included within the rent. That being a question of fact the Judges were not bound by the decision of the Full Bench upon it. We are, however, in a different position. I would, therefore, hold that it is not open to us in second appeal to disturb the finding of the Court below that these charges are not included within the rent, even if we desired to do so, and I would, therefore, dismiss the appeal.

D. Chatterjee, J.

4. I agree.