

(1934) 01 PAT CK 0018
In the Patna High Court

Rameshwar Lal and Others		APPELLANT
	Vs	
Butto Kristo Rai and Others		RESPONDENT

Date of Decision : 11-01-1934

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 175

Citation : AIR 1934 Patna 653

Hon'ble Judges : Mohammad Noor, J;Agarwala, J

Bench : Full Bench

Judgement

Mohammad Noor, J.—This is an appeal against a decree of the Sub-divisional Officer of Giridih passed in a rent suit instituted under the provisions of the Chota Nagpur Tenancy Act. The plaintiff is the usufructuary mortgagee from the landlord of Palaganj and the defendants are the lessees under him. The lease was executed on 15th August 1919, and the usufructuary mortgage concerning the leased properties was executed on 11th December 1926, and the plaintiff is entitled to collect rents. The annual rent fixed in the lease was Rs. 2,777-7-9, but the suit which is for the years 1335 to 1337. is on the basis of an annual rent of Rs. 2,648-6-9. The lease was of 15 villages and reduced rent has been claimed on the ground that possession of one of the leased village, namely Isri, was not given to the defendants by the proprietor himself.

2. The suit was resisted on two grounds, first, that the defendants were evicted by the mortgagor proprietor from village Ishri and therefore the defendants were entitled to suspend the payment of the entire rent; ana, secondly that the rent of 1335, was collected in advance by the proprietor himself before he granted the usufructuary mortgage to the plaintiff. The learned Sub-divisional Officer has overruled these two pleas and has decreed the plaintiff's suit. The defendants have preferred this appeal and the same two pleas have been repeated before us. There is a cross-objection on behalf of the respondent on the question of interest. The learned Sub-divisional Officer granted the plaintiff a decree for principal and interest.

3. The judgment however did not specify up to what date the interest would be calculated. The interest decreed is at the statutory rate under the Chota Nagpur Tenancy Act, namely 12½ percent per annum. In the decree however the interest has been calculated only up to the date of the suit. The respondent contends that this ought to have been up to the date of the passing of the decree and that some interest should have been allowed subsequent to the decree till realization. The main controversy involved is whether the defendants have been evicted by the landlord from a portion of the leased premises so as to justify the total suspension of payment of rent. The case of the plaintiff as mentioned in para. 5 of the plaint was to this effect:

It may be noted that together with the villages rent where of has been claimed village Isri also was given in thika to the defendants for Rs. 2,777-7-9. But the defendants with their own consent were not given possession over village Isri. It remained in khas possession of the malik. Therefore instead of the annual rent of Rs. 2,777-7-9, Rs. 2,648-6-9 was settled and the defendants had been paying rent in accordance with this (amount) to the malik of Palganj before the rehan was given to the plaintiff.

4. This version of the plaintiff was controverted by the defendants in para. 5. of the written statement. The relevant portion runs thus:

These defendants got peaceful possession over all the villages including Isri and a few years after, viz. in 1329 Fasli the malik lessor. Raja Ran Bahadur Singh wrongfully without any justification whatsoever evicted these defendants from village Isri.... All along these defendants protested but as the said Raja Ran Bahadur Singh, the lessor, had been involved in heavy debts he requested these defendants to pay part of the fixed yearly thika rents on protest, and he promised to adjust and to make amends for these defendants' losses in the near future and delivery of possession over the said village Isri. On this understanding these defendants went on, for fear of displeasure of the malik lessor, paying part of the fixed thika rent, never according to the agreed kists but always in advance according to the special needs and requests of the said Malik Raja Ran Bahadur Singh and in this way these defendants, etc.

5. It has been established beyond doubt and in fact is not disputed that the defendants were put in possession of all the leasehold properties including Isri and it was a few years late--probably in the year 1329--that the defendants lost possession of Isri. The story as put forward in the plaint is not correct. But the plaintiff in my opinion cannot be taken seriously for what he has stated in the plaint. His connexion with these villages started much later than the commencement of the defendants' lease. He being an absolute stranger the statement in the plaint must have been an honest mistake. It being admitted that the defendants are not in possession of Isri, the question for consideration is what were the circumstances under which they lost possession of that village and whether they are such as to entitle them to suspend payment of the entire rent.

6. Now, evidence which entitles a tenant to suspend payment of rent is a doctrine of common law of England which has been introduced in India as one based on justice, equity and good conscience. It is based on the ground that it is the duty of the landlord to allow peaceful tenure of lease to his tenant and if he does any act which disturbs that possession the public policy requires that the landlord must suffer the penalty and that he should be deprived of his rent for the period during which he keeps his tenant out of possession of the leased property. It applies to cases where the rent is lump rent and every bit of the leased property is liable for that rent.

7. There are however certain exceptions in which on equitable considerations the Court will allow apportionment of rent and give a decree only for that portion which is in possession of the tenant. Now, we have to see what eviction is in law which justifies suspension of rent. For on the Law of Landlord and Tenant, Edn. 6, at p. 192, speaks about eviction in these terms:

To constitute an eviction at law the lessee must establish that the lessor, without his consent and against his will, wrongfully entered upon the demised premises, and evicted him and kept him so evicted.

8. What really happened in this case nobody knows. The plaintiff, who came on the scene much later, was not expected to adduce any evidence on this point. We shall later on see that the proprietor Raja Ran Bahadur Singh himself seems to be favouring the defendants. But the fact was in the special knowledge of the defendants. They have not come to depose as to the circumstances under which they were dispossessed of Isri and under what circumstances they went on paying rent as has been stated by them in their written statement.

9. Whatever evidence is on the record is only of witness No. 3 for the defendants, Iswari Prasad. He was the Tahsildar of the defendants for collecting rent from the leasehold villages. He says:

I was the tahsildar of the defendants. I used to collect for them in Isri. I collected for 1327 and 1328, from a few tenants for 1329.... In 1329 while I was collecting rent the Raja's tahsildar, Bhikhari Lal, proclaimed that he would collect khas. I wrote to my master; who told me to collect in other villages. I can't say who collected after 1329. We did not give up possession amicably.

If this evidence be accepted--and probably it is true--it appears that in 1329 the Raja's amla went to make collection in Isri. Under what circumstances he did so has not been explained. Whether there was any previous arrangement in this matter between the Raja and the defendants has not been disclosed. We only know that when the Raja's amla went for collection and the information was sent to the defendants they asked their own amla not to make collection in village Isri. From this fact it is very difficult to infer that the interference of the Raja with the possession of the defendants of village Isri was without some previous arrangement with the defendants themselves.

10. But the matter does not end here. We find that after this incident the defendants began paying rent to the Raja at the reduced rate of Rs. 2,648.6-9. The receipts produced by the defendants themselves clearly show this. How this odd figure of Rs. 2,648.6-9 was arrived, if not by some arrangement between the Raja and the defendants, has not been explained. The defendants ask us to believe that they went on paying rent to the Raja under protest simply to oblige him because the Raja was in distress and they did not like to incur his displeasure. One could understand this if the payment had been of a sum in round figures on account, but one cannot accept this if the payment is of a specific sum, year after year, not only in odd rupees, but in annas and pies, and this not for one year, but for several years one after the other.

11. In fact except for one or two years when the payment, was not exactly of the amount I have stated, the payment has always been at the rate of rupees 2,648-6-9. Not only this, but the defendants themselves when claiming credit for the advance payment made to the Raja for the year 1335 claimed that the advance paid was Rs. 2,648-6-9. Therefore we get these facts which cannot be got over, namely that after the interference with possession by the Raja no step whatsoever was taken and not even a protest was made by the defendants. They simply asked their amla not to make collection in Isri and thereafter began paying rent at a reduced figure without any objection whatsoever and continued doing so not Only when rent became due, but also paid one year's rent at that rate in advance.

12. It is impossible under the circumstances to hold that the dispossession has been against the will, or without the consent of the defendants. Mr. S.M. Mullick, has contended that the very fact that the defendants are not in possession of a portion of the demised premises is by itself a ground for total suspension of rent. Nothing has been placed before us to justify this proposition. Depriving the landlord of his rent is a sort of penalty imposed upon him for his wrongful act in withholding the possession from his tenant. It is obvious that this penalty cannot be imposed upon him unless his act is wrongful and is of such a nature as to give the tenant a cause of action in the Courts of law. Suppose A gives a house in lease to B.

13. Afterwards with the permission of B he occupies a room or two-of that house undertaking to give abatement of rent. Can it be said on any ground of law or equity that this act of the landlords will justify the tenant in withholding the payment of the entire rent? Mr. Mullick further contended that he was not called upon to meet a case of consent. On the allegation in the plaint no question of suspension of rent arose. According to the plaint it was from the beginning of the lease that Isri was not given to the defendants and by mutual agreement a reduced rent was fixed. It was the defendants who pleaded their right to suspend payment of rent and it was for them to prove that the circumstances were such as to justify them in doing so; and, as I have said, the defendants entirely failed to do so. Rather the circumstances are such which clearly indicate that the

landlord took possession of Isri under some arrangement between him and the defendants.

14. I shall later on take up the contention of the learned advocate that independent of the question of suspension of rent on the facts found a suit for rent was not maintainable on the original contract. At present I am dealing with the question of the defendants' right to suspension of rent.

Now, coming to the cases relied upon by the learned advocate, the first case which I shall deal with is the case of *Upton v. Greenless*, (1855) 1 Jur NS 1089. In that case A leased out a certain property to B undertaking that he would rebuild the buildings if destroyed by fire. B in his turn subleased in two portions to C and D. It so happened that the property was destroyed by fire and A on the basis of his covenant proceeded to rebuild them.

15. He submitted plans to B (his lessee) for his approval and the plans of the two buildings were approved of by him. On so rebuilding the building occupied by O became considerably reduced in size and that of D increased. When B in his turn sued C for rent the plea was taken that C was not in possession of the entire leased premises and this plea prevailed. But the judgment itself clearly shows that the decision was on the footing that the reduction in the size of the premises in possession of C was made without his consent. The judgment of Jervis, C.J., is to be found at p. 992 of the Report with the following passage in it:

These clearly were acts of a permanent character done by the landlord, without the assent of the tenants, showing an intention to oust them from the possession of the premises. As a matter of fact therefore it seems to me that there is enough to satisfy us that there has been, an eviction of the tenants, with the consent and procurement of the landlord, so as to disentitle the latter to maintain this action.

16. The next case relied upon by the learned advocate is *Abhoya Charan Sen v. Hem Chandra Pal*, 1929 Cal 568. The learned advocate has relied, upon this case for the proposition that in every case where there is a lump rental and the tenant has been dispossessed by his landlord from a portion of the demised premises, however small that portion may be, the rule of total suspension of rent must be applied. In such a case the landlord can recover nothing during the continuance of the dispossession, unless he can prove some right or equity to an apportionment. In this case the Court relied upon a passage of Peacock C.J., in *Gopanund Jha v. Lalla Gobind Pershad* (1869) 12 WR 109, taken from Bacon's *Abridgment Title Rent (M)*, which clearly shows that in order to justify the withholding of the rent the act of the landlord must be forcible or at any rate tortious.

17. This in no way supports the contention of the learned advocate that dispossession of any kind even if it be with the consent of the tenant justifies the with-holding of the payment of rent. It is needless for me to refer to other decisions; it is sufficient to state that no decision, as I have said, has been

placed before us in support of such a proposition as has been urged by Mr. Mullick.

I now take up the other branch of the argument of the learned advocate which is that apart from the question of the suspension of rent, the suit was not maintainable. On the facts as found a fresh contract of lease for 14 villages only at a reduced rent came into existence and this not being registered was not enforceable in law. He relies upon the decision in *Durga Prasad Singh v. Rajendra Narayan Bagchi* (1913) 41 Cal 493. There a smaller area of coal land than leased was in possession of the tenant and he was paying at a reduced rent. Later on a suit for the entire rent was instituted and the Privy Council held that an oral agreement to modify the term of the original lease was not admissible in evidence.

18. The facts in this case are rather different. We do not know the exact arrangement under which the defendants agreed to give up possession of Isri and pay a reduced rent, though there is no doubt that some agreement was made between them. I have remarked above that the defendant was the best person to give us information in this respect; but he scrupulously kept himself away from the witness-box. It may be that the arrangement was not a permanent one modifying the terms of the lease at all it might have been a temporary arrangement by which a portion of the lease-hold was occupied by the landlord himself and he began accepting a reduced rent.

19. It is difficult on the facts as they are to hold that there was modification of the original lease and a new lease came into existence. The only fact which has been proved is that by some sort of arrangement a portion of the lease-hold is not in possession of the lessees and that they have since then all along been paying reduced rent at a fixed figure. Under these circumstances, in my opinion, a case has been made out for the apportionment of rent and the equity is against the defendants. For many years they have been paying a reduced rent and they got an advantage of it. In this connexion I would quote the observation of Rankin, C.J., in *Sajjad Ahmad v. Trailakha Nath*, 1928 Cal 479. There the learned Chief Justice observes as follows:

But the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. If therefore the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and, unless he has a right or some equity to an apportionment he can recover nothing on the contract. But the whole basis of the doctrine, is that the rent due is one entire sum.

20. Now, in this case the rent claimed is not the entire rent and an apportionment seems to have been made by the parties themselves; and I see no reason why the Court should not pass a decree for the apportioned rent which the defendants themselves, as I have said more than once, had all along been paying to the landlord. It also appears in evidence that after his usufructuary

mortgage the plaintiff gave notice to the defendants. This notice was not answered. Then there is evidence of plaintiff's witness No. 1, Raghunandan Lal, that when he went to demand rent from the defendants they said they were willing to pay provided that Rs. 1,800 which they alleged they had paid in advance to the proprietor be given credit for. This evidence remains unrebutted.

21. In fact this story is corroborated by the fact that immediately after this the plaintiff wrote a letter, to the Manager of the proprietor inquiring about the correctness of the allegation of the defendants about the advance payment of Rupees 1,800. It is clear to me that this plea of eviction has been raised as there was disagreement between the parties about the giving of credit for the money which the defendants alleged was paid as advance rent to the proprietor. In my opinion, therefore the learned Subdivisional Officer has correctly overruled this contention of the defendants.

The next question is whether the defendants are entitled to any credit for the money which they paid in advance for the year 1335. It is to be noticed that the two receipts Exs. B and C make, up the total amount of Rs. 2,648-6-9, exactly the amount of the annual rent as claimed by the plaintiff.

22. The money, if paid, was paid before even the year 1335 commenced. The question is whether the defendants can claim credit for it against the plaintiff. Woodfall, Edn. 22, at pp. 305-6, says:

Payment of rent to the mortgagor without notice of the mortgage is valid, but a voluntary payment of rent in advance is not within this rule, so as to discharge a tenant who had notice of the mortgage before the rent was due, for a voluntary payment of rent in advance is merely a loan by the tenant to the landlord. A payment however is a payment of rent when the rent falls due, and becomes irrecoverable by the mortgagee, so far as it is made in respect of rent due before the notice.

In this case the payment alleged was before the mortgage and before the rent became due. That can in sense be called a payment of rent. No doubt it will be a good discharge for rent as soon as each instalment of the rent becomes due, but not before that and the plaintiff who acquired his right before the rent became due can recover it from the defendants who had notice of the mortgage before the rent in question became" due. The fact that the case is governed by the Chota Nagpur Tenancy Act, makes, to my mind, no difference whatsoever.

23. The learned advocate has drawn our attention to the form of the rent receipts as prescribed under the Act which has a column for advance payment. Certainly an advance payment if made must be entered in the receipt; but whether such a payment is binding on the transferee who obtains a transfer before the rent becomes due and gives notice of his transfer to the tenant is quite a different matter. In my opinion the defendants are not entitled to any credit in this respect. Apart from this I have grave doubts whether the entire amount of rent was actually paid before the defendants had notice of the

mortgage. According to the plaintiff's witness whose evidence I have quoted above and which, as I have said, has not been rebutted by the defendants, the defendants at first claimed an advance payment of Rs. 1,800 only, but they now claim the full amount of rent. No receipt seems to have been shown on that occasion,

24. I have also shown that the statement of the plaintiff's witness in this respect is reliable inasmuch as immediately afterwards the plaintiff wrote a letter making inquiries about this payment of Rs. 1,800 from the manager of the proprietor. The reply given was an evasive one, namely, that no money was collected after the mortgage and then afterwards another letter was sent by the manager to Mr. Harakh Lal Mukhtar to the effect that some advance collection was made. It is needless to pursue the point. In my opinion, even if the payment was made, it was not rent due and the defendants have their remedy against the proprietor the Raja. They cannot insist that the transferee of the landlord who acquired his right before the rent became due should give credit for it. This view was taken by this Court in *Ram Lal Marwari v. Mahadeo Marwari*, 1922 Pat 339.

25. I now come to the cross-objection which is about interest. The decree of the learned Sub-divisional Officer calculates interests on the statutory rate up to the date of the institution of the suit, and allows no interest thereafter. I see no reason why the plaintiff who has been kept out of his money be not allowed the statutory rate of interest till the decree and some interest thereafter, as is authorized by Section 175 of the Chota Nagpur Tenancy Act. In my opinion the plaintiff is entitled to interest at 12 per cent. per annum up to the date of the decree of the learned Sub-divisional Officer and thereafter the entire amount of the decree including that of costs will bear interest at six per cent. from that date up to the date of realization. The cross-objection is allowed with costs and the appeal is dismissed with costs.

Agarwala, J.

26. I agree. With respect to the question of the right of a tenant to suspension of rent on being evicted from a part of the demised premises, it appears from the authorities which have been cited in *Abhoya Charan Sen v. Hem Chandra Pal*, 1929 Cal 568, that the right has been recognized in India at least since the decision of Sir Barnes Peacock, C.J., in *Gopanund Jha v. Lalla Gobind Pershad* (1869) 12 WR 109. In that case the learned Chief Justice of the Calcutta High Court referred to the following statement in Bacon's Abridgment. *Tit Rent(M)*:

Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, and it seems to be the better opinion, and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man, may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law he ought to protect and defend.

27. It is quite clear, in my opinion, from this passage in the Abridgment that, in order to justify the lessee to a suspension of rent, the entry by the lessor must be tortious, which implies that the entry must be against the consent of the tenant. The same question is dealt with in Gilbert on Rents, p. 178, where speaking of apportionment of rent, the learned author says:

But, if the lessor takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions whether the entire rent shall not be suspended during, the continuance of such lease or tortious entry. Some have held that there shall be no apportionment in either case, but that the whole should be suspended; for this reason, I suppose, because, by the demise, every part of the land was equally chargeable with the whole rent; and therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This, indeed, may be a good reason why the whole rent-service shall be suspended, if the lord or lessor disseizes or ousts his tenant or lessee of any part of the land; because this is a wrongful act, to which the tenant consented not; and, if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract; and so, by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law. Therefore, to prevent these inconveniences, and that no man might be encouraged to injure or disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him, these resolutions have been, and so the law is at this day, that such disseisin or tortious entry suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it, till he be restored to the whole possession. But there is no colour or reason why the whole rent should be suspended, when the lord or lessor takes a lease of part of the land: because here is the concurrence of the tenant, who, by his own act and consent, parts with so much of the land as is redemised and thereby supersedes the former contract as to such part.

28. It was clearly the opinion of the learned author that if the lessee redemises a part of the demised premises to the lessor and the latter enters into possession of the part of the premises so redemised, that would not give the lessee a right to suspension of rent. No authority contrary to this view has been brought to our notice. During the course of the argument in *Upton v. Greenless*, (1855) 1 Jur NS 1089, (the case referred to by my learned brother) Jervis, C.J., pointed out that Lord Coke uses the word eviction as synonymous with tortious dispossession. An entry by arrangement with, or with the consent of the lessee is not tortious. I can see no distinction between a case where the lessee redemises a part of the demised premises to the lessor and a case where he voluntarily surrenders a part of the demised premises to the lessor, either with or without consideration.

29. As has been shown by my learned brother the only reasonable inference that

can be drawn from the evidence in this case is that the Raja took possession of village Isri under an agreement with the defendants' lessees. There was therefore no eviction in the sense that entitles the defendants to suspension of payment of rent.