

(1882) 04 CAL CK 0017
In the Calcutta High Court

Roushan Bibee

APPELLANT

Vs

Hurray Kristo Nath and Another

RESPONDENT

Date of Decision : 20-04-1882

Acts Referred:

Contract Act, 1872 — Section 62

Citation : (1882) ILR (Cal) 926

Hon'ble Judges : Richard Garth, C.J.;Bose, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—We are under the necessity of remanding this case to the lower Appellate Court for retrial, inasmuch as the District Judge appears to have decided it upon Section 62 1 of the Contract Act, which, so far as we can see, has nothing to do with the matter. In fact, the Judge seems quite to have misapprehended the meaning of that section.

2. The suit was brought by the plaintiff against the two defendants, father and son, alleging that the father was his tenant up to the year 1281; but that, in that year, the other defendant, the son, gave him a kabuliat at an increased annual jama of Rs. 69; that thus both defendants became his tenants at the higher jama, and paid it for one year; but that, they having since failed to pay it for the years 1283 and 1284 and part of the year 1282, he brought this suit to recover the rents of those years with damages, road cess, house tax, &c.

3. The defendants denied not only that a kabuliat was ever given, but that the relationship of landlord and tenant ever existed between them and the plaintiff. Accordingly the first issue raised for trial was—" whether the relationship of landlord and tenant existed between the parties; and what was the jama payable by the defendants." There were also other issues which it is not necessary now to consider.

4. The Court of First Instance found that the alleged kabuliat was not executed by the defendant No. 2; but it also found upon the evidence (inter alia) of certain

wasil-baki papers, that the defendant No. 1 had been the plaintiff's tenant at the rent of Rs. 50-14, and eventually gave the plaintiff a decree for that rent against the defendant No. 1, for the years 1282, 1283 and 1284, as well as for damages and other charges, amounting altogether to Rs. 172.

5. The lower Appellate Court, without apparently considering any of the other points raised in the case, held, that the suit ought to have been dismissed u/s 62 of the Contract Act, simply upon the ground that the kabuliat was found not to have been executed by the defendant No. 2. That section enacts that "it the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

6. The District Judge then argues in this way: As the plaintiff himself alleges that the defendant No. 2 executed a kabuliat which put an end to the old tenancy, and created a new one at a higher rent, the old contract was at an end, and was not enforceable against the defendant No. 1, although the first Court may have found that in point of fact the kabuliat was not executed.

7. It is clear that this view is founded upon an entire misapprehension of the meaning of the section.

8. If the parties to a contract have in fact made a new contract in substitution of the old, or have modified the old contract, then the old contract is at an end, and the new or the modified contract takes its place; but the mere fact of one party alleging that a new contract has been substituted for the old one does not of itself put an end to the old contract, even as against the party who so alleges, unless the allegation is proved to be true. Section 62 of the Contract Act made no difference in the law in that respect.

9. But then it is said that although the District Judge may have been wrong in that respect, still the Munsif was not justified, according to the law which has been laid down in this Court, to give the plaintiff any relief at all, and the Full Bench case of *Lukhee Kanto Doss Chowdhry v. Sumeeruddi Lasker* 13 B.L.R. 243; s. C 21 W.R. 208 has been cited in support of that position.

10. But as I read that case it is an authority distinctly in favour of the course which the Munsif has taken.

11. In that case the plaintiff sued a ryot for arrears of rent alleged to be due under a kabuliat. The Court found that the kabuliat had not been executed, though the ryot had occupied land under the plaintiff. But it does not appear from the report of the case that the plaintiff had given or offered any proof, other than the kabuliat, as to the amount of rent, which the defendant ought to pay.

12. Both the lower Courts, under these circumstances, dismissed the suit; and then it was contended by the plaintiff, on appeal to this Court, that the plaintiff was entitled, as a matter of right, to have a further trial of the question as to how much rent was due to the plaintiff on account of the ryot's occupation.

13. That question was referred to the Full Bench; and, as I understand their judgment, it only decides that, under such circumstances, the landlord is not entitled, as a matter of right, to have a further trial.

14. It is a question for the discretion of the Court in each case, whether it will frame issues, or amend the plaint if necessary, so as to allow the plaintiff to enforce his alternative claim.

15. The Full Bench say: "It is in the discretion of the Court to amend the plaint or the issues, and to allow it (that is the alternative claim) to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so."

16. Now in this case it appears to me, that although in the plaint the claim was not expressly made in the alternative, still the fact is undoubtedly disclosed there, that the defendant No. 1 had, previously to the alleged kabuliat, been occupying the land at a lower rent as the plaintiff's tenant; and the issues appear to have been framed with a view to this alternative claim; the first issue being, whether the defendants or either of them held the land under the plaintiff, and what was the jama payable to him for it.

17. As to the latter branch of this issue the questions tried in the first Court were, whether the kabuliat alleged by the plaintiff had been executed or not; and if not, what was the former rent which had been paid by the defendant No. 1.

18. If the Munsif found (as we understand he did) that the kabuliat had not been executed, but that the defendant No. 1 had been in fact the plaintiff's tenant, and had paid the annual sum of Rs. 50-14 for rent, it was clearly the duty of the Munsif, having regard to the circumstances under which the suit was brought, and the nature of the issues raised, to give the plaintiff a decree as against the defendant No. 1. If he had refused to make such a decree, he would not have done his duty. He would have compelled the plaintiff to bring a new suit, and would have put the parties to the expense of a fresh litigation, for the purpose of trying the very question, which one of the issues in the suit distinctly raised, and he would also probably have deprived the plaintiff of a large portion of his claim, which would thus have been barred by limitation.

19. Then it is said that, in the first Court, the Munsif relied improperly upon certain jama-wasil-baki papers. These jama-wasil-baki papers, we all know, are not evidence by themselves. The mere production of such papers is not enough. But, coupled with other evidence, these papers often afford a very useful guide to the truth in cases of this kind; and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court.

20. How far this evidence is to be relied upon in this case will be a question for the Judge when the case goes before him on remand. All we now say to the Judge is, that he has done wrong in dismissing the case upon the strength of Section 62 of the Contract Act.

21. He does not appear to have tried some of the most material questions in the cause; and we, therefore, send it back with the above remarks to guide him in disposing of it.

22. The costs of this Court, and of the lower Appellate Court, will abide the ultimate result of the suit.

1[Sec. 62: If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.]

Contract changed rescinded, or altered, need not be performed.