

(1941) 01 CAL CK 0022
In the Calcutta High Court

Srikanta Mridha and Others

APPELLANT

Vs

Prafullya Chandra Ghosh and Others

RESPONDENT

Date of Decision : 17-01-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 67

Citation : AIR 1942 Cal 133

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the defendants and it arises out of a suit commenced by the plaintiffs for recovery of j arrears of rent in respect of a Darganti for the years 1341 to 1343 B.S. together with cesses and interest on the basis of a kabuliat executed by the defendants' predecessors in the year 1294 B.S. The lands are situated within a temporary settled estate and were originally jungle lands. The plaintiffs based their claim upon a kabuliat which was executed in 1294 and by which two persons, Chandra Mandal and Kamal Mandal, took lease of the disputed lands which were stated to cover an area of two hundred bighas. The kabuliat provided for progressive rents for successive years and mentioned a maximum which could never be increased, and it further provided that in case of default in the payment of any instalment of rent, the tenants would have to pay interest at the rate of 371/2 per cent. per annum. It appears that in the year 1932 there was a resettlement of revenue and rent under part II, chap. 10, Ben. Ten. Act, and the annual rent payable by the defendants was increased to Rs. 388. The whole controversy now centres round the point as to whether the plaintiffs are entitled to recover interest on arrears of rent at the rate of 371/2 per cent. per annum. The trial Court decided this point against the plaintiffs and was of opinion that u/s 178, Sub-section (1), Clause (i), Ben. Ten. Act, the landlord cannot get interest at a rate higher than that provided for in Section 67, Ben. Ten. Act. The lower appellate Court, on the other hand, has come to the conclusion that the case comes under proviso 1 to Section 178 and the plaintiffs are entitled to get interest at the contract rate. It is the

propriety of this decision that has been assailed before me in this second appeal.

2. It is not disputed that u/s 178, Sub-section (1), Clause (i) the landlord is incapable of recovering interest on the basis of any contract entered into either before or after the Bengal Tenancy Act beyond what is Laid down in Section 67, Ben. Ten. Act. The question is whether the plaintiffs can, in the present circumstances of the case, invoke the assistance of proviso 1 to Section 178, as has been held by the lower appellate Court. Mr. Sitaram Bannerjee, who appears for the appellants, has argued in the first place that this proviso is really engrafted upon and controls Sub-section (3) of Section 178 and not Sub-section (1) which makes unenforceable any contract between the landlord and tenant affecting, the provisions of Section 67, Ben. Ten. Act. It is argued also, though somewhat faintly, that the lease is not a reclamation lease and hence does not attract the operation of the proviso. I do not think that I can accept this contention as sound. The opening words of the proviso indicate beyond doubt that it is a limitation upon the entire section and not upon Sub-section (3) only. The words are "nothing in this section which affects etc. etc." If therefore the lease was granted bona fide for reclamation of waste lands, proviso 1 will apply and any stipulation for payment of interest, even though it contravened Section 67, Ben. Ten. Act, will be valid and operative: vide Upendra Nath v. Surendra Nath Roy Sircar 63 Cri.L.J. 283. On the question as to whether the lease was a reclamation lease or not, the only thing that has been pointed out by Mr. Bannerjee is that there is no provision in the kabuliat that the lessee will forfeit his rights if the reclamation was not made within a particular period. I do not think that a stipulation is essential. The lands are admittedly jungle lands and the fact that no rent was to be paid for the first years and then also it was payable at a progressive rate from year to year till the maximum was reached show beyond doubt that it was a reclamation lease. I agree therefore with the lower appellate Court in holding that the stipulation regarding the payment of interest at the rate of 37 1/2 per cent. per annum is not hit by Section 178, Sub-section (1), Clause (i), Ben. Ten. Act.

3. It is next contended by Mr. Bannerjee that the stipulation in the kabuliat ceased to be operative as soon as the plaintiffs themselves got a fresh lease from the Government in the year 1931 and a fresh settlement of rent was made under Part II, Chap. 10 Ben. Ten. Act. In my opinion, this contention also cannot prevail. As was Laid down by the Judicial Committee in *Pria Nath Das v. Ramtaran Chatterjee* ('03) 30 Cal. 811, a fresh settlement would not abrogate the rights of the tenant if the landlord got a lease from the Government and was in a position to fulfil his obligations to the tenant. If the kabuliat in this case had been created prior to the Bengal Tenancy Act, the defendants could have argued on the authority of the case in *Prafulla Nath v. T.C. Tweedie* (Receiver) AIR 1922 WB. 248, that the rent could not be enhanced by the settlement authorities in the resettlement proceedings. But as the lease here was after the passing of the Bengal Tenancy Act, the provisions of Section 191, Ben. Ten. Act, are applicable and the settlement authorities have jurisdiction to enhance the rent; the other

covenants in the lease however remain intact and binding between the parties.

4. The last point taken by Mr. Bannerjee is, that his clients being the purchasers of the tenancy at a rent sale, are not bound by this unusual covenant to pay interest at an exorbitant rate, this being not an ordinary incident of a tenancy governed by the Bengal Tenancy Act and the landlords, when they put up this property to sale, did not disclose anything about this unusual Stipulation in the sale proclamation. In support of this contention, reliance has been placed upon the decision in *Ananda Moyee Debi v. Saudamini Debya* AIR 1923 WB. 559. The learned Judges who decided that case following an earlier decision in *Kali Nath Sen v. Trailokya Nath* 26 WB. 315 held that a stipulation for the payment of interest at an unusual or exorbitant rate cannot be an ordinary incident of a tenancy which would attach to it even after a sale for arrears of rent. In both these cases, the tenancy in dispute was a raiyati holding and the reason for making a distinction between a private purchase and a purchase at a rent sale was thus stated by Chatterjea J. in the former case:

In the case of a private transfer the transferee can and should call for the title deeds of the vendor; and if there is a lease providing for interest at a high rate, the purchaser becomes aware of such a contract before his purchase. He therefore purchases with full knowledge of the terms of the lease and he cannot in these circumstances complain that the rate of interest is an exorbitant one. In the case of a rent sale, on the other hand, the purchaser ordinarily cannot have any knowledge of the terms of the contract between the landlord and the tenant unless the landlord chooses to specify, in the sale proclamation any incident of the tenancy or refer to the contract under which the tenancy is held.

5. The propriety of this decision was doubted by Suhrawardy and Garlick JJ. in a later decision, vide order of reference in *Tarini Charan Bhattacharjee and Others Vs. Kedar Nath Halder*, and the learned Judges referred to an earlier Full Bench decision in *Gopal Dutt v. Monmotha Lal* 32 WB. 258, where a contrary view was taken. It was further observed that no distinction could be made between a holding and a tenure and it was against established principles to give the purchaser at a rent sale a better title than the judgment-debtor whose property is sold, or a different tenure. There was however no pronouncement on this point by the Full Bench and the divergence in judicial opinion still remains.

6. So far as the present case is concerned, I think that the decisions are of no assistance to the defendants. In the first place it was nowhere alleged in the written statement that the defendants were the purchasers at a rent sale with no notice of this covenant. After the case was closed on both sides, they made an application to the learned Munsif praying for time to enable them to file the sale certificate and other documents and this application the trial Court rejected. I have no materials therefore to hold that the defendants were purchasers at a rent sale and that the plaintiffs had themselves put up the property to sale without mentioning any thing about the kabuliati or the stipulation relating to interest. In the next place I think that the stipulation itself can hardly be said to

be an unusual stipulation having regard to the fact that the lease was a reclamation lease. In an ordinary agricultural tenancy which is not governed by any lease, the purchaser could very well assume that the interest was payable at the rate provided for in Section 67, Ben. Ten. Act, unless there was something to the contrary specified in the sale proclamation. Here it was a case of a tenure covering an area more than two hundred bighas of land and the lease was in writing and registered. A reclamation lease has been placed in the Bengal Tenancy Act itself on a somewhat different footing than ordinary tenancies and that I think furnishes an explanation for the proviso that is engrafted upon Section 178, Ben. Ten. Act. I do not think myself that a stipulation to pay a high rate of interest by itself can be regarded as an unusual covenant in a reclamation lease of this character. But whatever that may be, and I am not going to express any final opinion on this point, I am unable to give the defendants a fresh opportunity of proving a case for which there was no foundation made either in the pleadings or in the evidence. The result is that this appeal is dismissed, but having regard to the facts and circumstances of the case I make no order as to costs in this appeal.