

(1921) 05 CAL CK 0006
In the Calcutta High Court

Srimati Katyani Devi

APPELLANT

Vs

Uday Kumar Das
 Idols Lakhi Janardan and Others Vs
Srimati Katyani Debi

RESPONDENT

Date of Decision : 31-05-1921

Acts Referred:

Citation : AIR 1922 Cal 348 : 69 Ind. Cas. 117

Hon'ble Judges : John Woodroffe, J;Cuming, J

Bench : Division Bench

Judgement

John Woodroffe, J.—The facts are as follows: The plaintiff brought two rent suits, one for the rent of the Falgun instalment of 1322 B.S. and the whole of 1323 B.S. and the other for the rent of 1324 B S of a certain Ganti, which suits were partly decreed in favour of the plaintiff.

2. Appeal No. 221 arises out of the first of these suits and there is also a cross objection by the plaintiff.

3. Appeal No. 285 arises out of the second of these suits and there is in that suit also a separate Appeal No. 17 by the plaintiff.

4. The plaintiff's case is that Satyendra Nath Tagore, his predecessor-in-interest, in 1878 granted to one Ananda Chandra Bandopa-dhaya and others a tenure or Ganti of certain lands within certain boundaries, and from these persons by various transfers the tenancy came into the hands of the present defendant in 1894. The land was at that time estimated by guess to be some 3800 bighas and the rent was fixed at Rs. 3,087, the rate being 13 annas per bigha. Subsequently on a measurement being taken the amount of land was found to be 4300 bighas on which the rent to be paid was Rs. 3,493 3-0.

5. Since the institution of the first suit the land was measured and the defendant was found to be in possession of an additional 1221 bighas.

6. In the first suit plaintiff sued for Rs. 5,301 made up as follows: Rent Rs.

3,928, Cesses Rs. 497 and interest Rs. 875.

7. In the second suit he sued for Rs, 1,897 odd made up as follows:

Rent Rs. 3,493-13-0, Cesses, Rs. 441-12-15, Interest Rs, 410-14.5 less Rs. 1,897 deposited in Court and in both cases a certain amount found due on the increased area found by measurement by the Commissioner in the case is also sued for after mending the plaints.

8. The defendant's main contention is that she is entitled to a suspension of the entire rent as she or her predecessor-in-interest had been dispossessed by the plaintiff of certain land included in the tenancy, that she was entitled to abatement of rent by reason of eviction by title paramount and that she was not bound to pay rent on certain lands which did not form part of the tenancy and to which the plaintiff had no title.

9. The two suits were tried together and dealt with in one judgment.

10. The Trial Court held that the land comprised in block A formed part of the Ganti and that the defendant's predecessor-in-interest had been dispossessed from it in 1880 by the plaintiffs but that under the circumstances of the case the defendant was entitled to an abatement of rent for the area but not to a suspension of rent of the whole jama. He then found that Murarikati (E) formed part of the Ganti and the defendant was in possession and liable to pay rent for it. He next found that Khal Kalyan 40 Ind. Cas. 271 : 25 C.L.J. 635 : 21 C.W.N. 1001 formed no part of the Ganti and the defendant was not liable to pay rent for it.

11. He found that defendant was in possession of Chur H(H) a part of the Ganti and so she was liable to pay rent for it at the rate fixed in the kabuliyat.

12. As to the plots F and G she was liable to pay rent.

13. He held that with regard to Mouza Daskati (C.D.D. 1) the defendant's husband had obtained a title by adverse possession and defendant was not liable to pay rent for it.

14. Finally he found that the defendant was liable to pay rent for blocks B, B1, E, E1, F, G, H of which the area was 4383 bighas.

15. He allowed a deduction of 240 bighas for Khal and found the defendant liable to pay rent on 4143 bighas at 13 annas per bigha.

16. The defendant has filed two appeals Nos-221 and 285. In one case the plaintiff has filed cross-objection and in the other an independent appeal.

17. The first point argued by the defendant is that she is entitled to a suspension of the whole rent on the ground that her predecessor-in-interest was dispossessed of a portion of the Ganti which is known as Mararikati or plot A by the plaintiff and that the plaintiff did not put her in possession of the portion of the Ganti at the time of her purchase in 1894. Her case is that the Ganti was

constituted in 1878 and that her predecessor-in-interest was in possession till 1880 when he was dispossessed. The plaintiff granted a darpatni of plot A to certain persons who dispossessed her predecessor.

18. Her contention now is that it is immaterial that she and her predecessor-in-interest have continued to pay rent without raising the question of dispossession. Her case would seem to be that she did not know till after the institution of the present suit that she had been dispossessed of any portion of the tenancy and that, therefore, she cannot be said to have acquiesced in the dispossession.

19. The plaintiff has filed an independent appeal and also a cross-objection and has contended that the plot A never formed part of the Ganti in question.

20. In reply to the defendant's appeal he contends that the defendant having acquiesced in the dispossession for some 40 years cannot now raise the question and ask for a total suspension of the whole rent. His case would seem to be that by a compromise entered into in a certain suit on the 5 th March 1887 what amounted to a new tenancy was created. He farther contends that as the question of suspension of rent due to dispossession was not raised in a former rent suit it cannot be now raised being res judicata. He contends that the suspension should be claimed immediately after the dispossession and unless this is done the tenant must be considered to have acquiesced in the dispossession.

21. The first point to be decided is whether plot A was or was not included in the Ganti.

22. The plaintiff to establish his case that plot A lies outside the Ganti relies first of all on the fact that no mention of the Mouzas which constitute plot A are given in the kabuliyat of which the Ganti was constituted. He points out that a list of villages constituting the Ganti is given and that Matiullah and Kulta Ramchandrapur which according to him make up the Ganti are not mentioned in the kabuliyat nor in any other document of the defendant in which a list of the villages constituting the Ganti are given. The defendant's reply to this is that it is clear from the kabuliyat that the list of Mouza is not exhaustive, for at the end of the list of Mouzas the words "and other" appear. She contends that we must look to the boundaries.

23. Now the western boundary as, given in the kabuliyat is the river Kalinadi. This would seem at once to dispose of the plaintiff's case. Plaintiff's explanation of this is that the river Kalinadi is only the boundary of the southern portion of the western boundary line of the Ganti. The northern portion of the western boundary according to him is the Dhormos-khali khal which runs from the river Kalinadi first east and then north. It might be asked then, why did he not give Dhor-moskhali khal as the boundary and his answer to that is that as the khal was included in the Ganti it could not be given as a boundary. Obviously the western boundary might have been described as the western bank of the khal.

24. Another difficulty in accepting the plaintiff's version is the northern boundary.
25. The western end of the northern boundary is given as the forest of Kulta Ramchandra-pur. Plaintiff has made an effort to locate Ramchandrapur apparently either South East of Matiullah or forming part of it. The Amia's map does not support this nor, in my opinion, does the Thak map of Matiullah. Had Ramchandrapur been Thanked with Matiulla the Thak map would probably have said so. The plaintiff has then argued that the only Ram-chandrapur shown on any map is north of Rajapur which is admittedly north of the northern boundary line and so this Ram-chandrapur cannot be the Ramohandrapur referred to in the kabuliyat. But it will be noted that the boundary is given not as Ramchandrapur Mouza but the forest of Kulta Ramchandrapur and the forest of Kulta Ramchandrapur may be in a different plate entirely to Ramchandrapur.
26. The point is not free from difficulty but I am not satisfied that the plaintiff has succeeded in displacing the findings of the Trial Court.
27. We must, therefore, agree with the Trial Court that plot A forms part of the Ganti leased to the defendant. The next points to be dealt with in the case of the defendant is that as she has been dispossessed by the landlord from a portion of the demised land she is entitled to a suspension of rent for the whole tenancy.
28. To deal with the point it is necessary to set forth the facts of the case in detail.
29. Babu katyendra Nath Tagore who held patni and Zemindari right over the land on 21st November 1878 granted a Ganti tenure of certain lards within his patni to Annada Chandra Banerjee and others. These lands are described in the kabuliyat. The tenure covered some 4000 or 5000 bighas of land which apparently were then lands covered largely with jungle.
30. According to the defendant the patnidar, in 1880 dispossessed the Banerjees of a portion of the land, viz., plot A by granting a dar-patni to a third party. It does not seem to be disputed that the patnidar did grant the dar-patni to the third party in 1880. Having regard to the facts that the darpatni was created only two years after the creation of the Ganti, that the land was largely jungle, that even the defendant himself was not aware that plot A belonged to the Ganti until the time of the institution of the suit and the presumption against all wrongdoing, we must assume that, if as we are constrained to hold, plot A did form part of the Ganti, then this fact was unknown to the patnidar when creating the darpatni. This fact is of importance in this case when dealing with the question whether the landlord's conduct has been such as to entail a total suspension of rent.
31. Litigation then ensued between the patnidar and the Banerjees which was settled in 1886 by a decree based on a solchnama. In execution of the decree the tenure was sold in 1889 and purchased by Nil Kanta Singh. He was again sued in 1890 by the patnidars for rent and in execution of the decree passed in

the suit the tenure was purchased by the present defendant in 1894.

32. Meanwhile the patni had passed in 1894 by purchase to Srinath Das from whom the present plaintiff inherited it.

33. After a careful consideration of the fact of the case I am not prepared to say that the learned Judge was wrong in holding that there should not be a suspension of the entire test but merely an abatement of rent so far as regards block A.

34. No doubt the dispossession was by the landlord, for in 1880 he granted a darpatni of the land to a third party. But this dispossession was, as I have shown, in good faith and in ignorance of facts which indeed were not known apparently to the tenants themselves. It is remarkable that no objection apparently was raised to this dispossession by the tenant. It may well be, feeling the nature of the land, that he was as unaware that he had been dispossessed as the landlord was of dispossession. The Ganti covered a large tract of land in the Sunderbans largely covered with forest at that time. The plaintiff has contended that there was by the solchnama of 1889 an acquiescence in the dispossession, Defendant contends that on purchase at the rent sale she is entitled to the tenure as it was at its inception and she is in no way bound by the solehnama. Probably she is right as to both these contentions but it does not follow that there should be a total suspension of rent. We must look to the other circumstances in the case. The defendant, as far as can be seen since her purchase in 1894, has not applied either to the Court or to the Zemindar to put her in possession.

35. In fact she does not appear to have known till after the institution of the first suit, that she was entitled to the possession of block A, for she does not in the first suit raise the objection and it was not until a Commissioner had surveyed and demarcated the land that she raised the question in paragraph 8 of her written statement. She still states in that written statement, paragraph 14, that she is willing to pay rent for the area that may be found on measurement to be in her actual possession which is hardly consistent with the case. She now puts forward that she is entitled to a suspension of the entire rent until she is put in possession of ? block A.

36. Ordinarily the tenant goes to take possession and if he is unable to do so he invokes his landlord's assistance and the lessor is bound on his request to put him in possession of the property. In the present case there is no evidence and nothing to show either that the defendant ever attempted to take possession of the property block A or asked her landlord to put her in possession. It is, no doubt, a general principle that a lessor is bound to give peaceful possession to the lessee. But there is no case of which I am aware in which the law as to suspension of rent has been applied to such a case as this where there is every reason to suppose that the landlord acted bona fide in respect of lands largely jungle and, therefore, little known where there has been for 40 years no objection from the tenant but payment of rent and where there have been other

special circumstances to which I have referred. In such circumstances I am of opinion that the learned Judge's decision that the defendant is not entitled to a suspension of the rent of the entire tenure should not be reversed. It is obviously in accord with the justice of the case.

37. The next question is with regard to E1 Murarikati. This the defendant contends belongs to her husband and forms no part of the Ganti. As the learned Subordinate Judge has pointed out the defendant herself had admitted that Murarikati formed part of the Ganti. The learned Judge has rightly refused to put any reliance on the two tenant witnesses, for admittedly the same officers collected rent for the defendant and her husband.

38. I am not prepared to disturb the finding of the Trial Court on this point.

39. Then with regard to the plots F and G. The defendant argues that they formed so part of the Ganti but belong to her husband. The Commissioner found on comparison with the Survey maps that they did form part of the Ganti. The Trial Court accepted the finding and I see no reason to differ from it.

40. I now proceed to deal with plot H. This is a piece of chur land. The case that the defendant puts forward with regard to this piece of land is that she is not liable to pay rent for it for any period antecedent to the measurement by the Commissioner. The plaintiff, on the other hand, contends that she is liable to pay rent for it from the time that it became culturable. That, I think, is the correct construction of the kabuliyat. The measurement is only for the purpose of ascertaining for how much land she is to pay rent. The evidence shows that the chur had been fit for cultivation for sometime, for there are big trees grown on it and the Trial Court found that it had been fit for cultivation for some years. I agree with the Trial Court that the defendant is liable to pay rent for plot H. With regard to the plot Khal Kalyan the Trial Court has, I think, rightly held that it is not included in the Ganti.

41. I now proceed to the issue relating to Mouza Daskati which comprises plot C, D and D1 as to which my learned brother and myself have come to different conclusions.

42. As regards plots C, D and D1 of which the defendant says she has been deprived by title paramount, the lower Court has allowed an abatement of rent. Except as to 61 acres part of Mouza 982 to which the defendant's husband has title since 1875, Daskati belongs to the Ganti and, therefore, to the tenancy of the defendant. But in 1888 the defendant's husband dispossessed the former tenants. The plaintiffs knew of this dispossession. The defendant purchased the Ganti in 1894 but did not get possession of the lands of Daskati in possession of her husband as she was aware. It is argued that there could be no adverse possession against the plaintiffs by the defendant's husband as the defendant held the land on a lease and during the term of the lease the plaintiffs could not sue. But the lease was a permanent one and I am not prepared to hold that the plaintiffs could not have sued the trespasser in order to give land, of which the

latter was wrongly in possession, to his tenant. But, however this be, we are not concerned with these questions. The position is this. The plaintiffs are getting rent for the Ganti which includes these lands (other than the 61 acres) from the defendant. But the defendant is not in possession of some lands for which she is paying rent by reason of the claim of her husband. She cannot be called on to pay for lands of which she has no possession. It does not seem to me of importance in this case whether the tenant asked to be put in possession or not, for there is nothing to show me that the landlord could or would have given possession. He could offer to give possession now but he has not done so. He contends that he is not bound to give possession. I would not, therefore, disturb the order which the Court has passed. As there is no majority for reversing the judgment of the Subordinate Judge on this point, his conclusions and the decree on this head will stand as it stands on all other points in this appeal with which my learned brother and myself are in agreement.

43. All the three appeals and the cross-objection fail and the appeals are dismissed with costs.

44. The cross-objection is dismissed with costs,

Cuming, J.

45. I am in agreement with the judgment which has just been delivered by my learned brother except with regard to Mouza Daskati which comprises plot C, D, DI, and covers an area of some 1350 bighas. The Trial Court has held that the plaintiff has now no title to the land but that the defendant's husband has acquired in it a title by adverse possession and against this finding the plaintiff has filed a separate appeal in one case and cross-appeal in the other. The Trial Court found that the land was originally in the possession of the Ganti-dars, Annada Chandra Banerjee and Protap Narain Sardar. That they cleared the land and raised embankments and that the defendant's husband ousted them and got possession in 1888 and has been in possession since adversely to the plaintiff. He finds that plaintiff knew of the dispossession in 1888.

46. He finds that defendant's husband had acquired title to 61 acres only by his auction-purchase in 1875 of Estate No. 982. He finds that Daskati Mouza comprised 4 Estates, Nos. 982, 991, 992, 993 and that defendant admits that the title to Estates Nos. 991, 992, 993 was with the plaintiff.

47. The plaintiff's argument now is that admitting the defendant's husband's title to Estate No. 982 comprising 61 acres he has no title to the remainder of Daskati, namely, Estate Nos. 991, 992, 993. The title of the defendant's husband to that portion of Daskati rests on adverse possession and plaintiff contends that as against him the defendant's husband can have no title by adverse possession. His argument is briefly this. The dispossession of the tenant was in 1888, that is to say, 10 years after the inception of the Ganti which was created in 1878. The possession of a trespasser during the continuance of a lease does not become adverse as against the lessor. *Hajra Sardara v. Kunja Behari Nag Choudhury* 40

Ind. Cas. 271 : 25 C.L.J. 635 : 21 C.W.N. 1001]. He further contends that so long as the lease continues he cannot fine for possession against the trespasser. He, therefore, argued that it is the duty of the tenant to take the necessary steps to get rid of the trespasser and that the tenant cannot allow the trespasser to remain in possession and take no steps to evict him and allow the title by adverse possession to materialise while the landlord is not in a position himself to take any steps and at the same time to refuse to pay rent for the land. The defendant has never asked him to give her possession. It is for the defendant, he contends, to ask to be put in possession and if she has not done this she cannot ask for an abatement of rent on the ground she is not in possession. He contends that the adverse possession of the defendant's husband was an incumbrance which the purchaser in 1894 could have avoided. The defendant has argued that a permanent tenancy is on a different footing. That the rulings cited only apply to tenancies for a term of years and that the possession in the case of a permanent tenancy is adverse, against the lessor from the time that he has notice of the trespass. She contends that the lessor should have put her into possession in 1894 at the time when she purchased the tenure. That the landlord knew at the time of sale that he was not in possession and hence cannot now get rent from her.

48. Now, accepting the findings of the Trial Court as to the facts which finding I am not prepared to disturb, I am of opinion that the defendant must pay rent for Mou-za Daskati except for that portion to which the defendant's husband has proved his title by purchase viz., 61 acres.

49. The defendant purchased in 1884 and it was then open to her to take possession of all the land covered by her purchase. If he was unable to take possession she could then go to the landlord and ask to be put in possession. There is nothing to show that she ever went to the landlord and complained to him that she was not in possession. On the findings of fact of the lower Court which I have accepted no title by adverse possession could then have accrued against the plaintiff, for defendant's husband had then been in possession at the longest 6 years. She has, no doubt, stated at times that there are differences about the land of the Ganti but she never stated that she is out of possession, specifically of Daskati. The landlord has no means of knowing whether she was or was not in possession, as admittedly the same officers collect rent for both her and her husband. On the other hand, the facts were known to the defendant. She must be pre-sumed to know what she purchased in 1894 and she must have known then that her husband was in possession. It seems to me that before a tenant in a suit for rent can claim a remission of rent on the ground that he has not got possession of part of the demised premises it must be shown that he asked the landlord to put him in possession and the landlord failed to do so, I would vary the decrees of the Trial Court to the extent that the defendant is held liable for the rent of C, D, and DI, except of 61 acres to which her husband has proved her title by purchase.

50. By the Court.--Having regard to the fact that, according to the scale of this Court, Regular Appeal No. 221 of 1919 carries with it a hearing fee of Rs. 300, we fix the hearing fee in each of the other two oases at Rs. 150.