

(1927) 07 CAL CK 0058
In the Calcutta High Court

Susil Kumar Biswas and Others

APPELLANT

Vs

Rajani Kanta Chakrabutty and Others

RESPONDENT

Date of Decision : 22-07-1927

Acts Referred:

Citation : AIR 1927 Cal 737

Judgement

1. These appeals are by the plaintiffs and arise out of two suits for rent. The suits are based upon two kabuliyats Exs. B and B(1), which refer to eight-annas share each of the land in question which originally belonged to two owners. The plaintiffs have purchased the interest of both the landlords and. Thus they are entitled to both the shares. The fact that there were two kabuliyats was the reason for bringing two suits. The question in both the appeals is the same. The defendant pleaded that there was no relationship of landlord and tenant between the parties; and secondly, that the whole rent had been suspended as they have been dispossessed of some portion of the demised premises. The following may be taken from the judgment of the lower appellate Court which; dismissed the plaintiffs' suit affirming the decision of the Munsif.

The defendant is an auction-purchaser of the tenancies at a rent sale held at the instance of the plaintiffs. SD the defendant is a tenant under the plaintiffs in respect of the tenancies in arrears. Now, the question is whether the plaintiffs are entitled to get a decree for the arrears claimed, and this leads us to the consideration of the next point....

2. Then the Subordinate Judge states the history of the previous litigations and the fact that the plaintiff obtained a decree for rent for the year 1314 B.S., the landlords put the tenure to sale in execution of that decree and both the tenancies were purchased by the defendant under two sale-certificates, Exs., K and L. The Subordinate Judge then states that

after the purchase the defendant took symbolical possession but, when he attempted to take actual possession he found that out of an area of 94 bighas, 14 1/2 cottahs of lands covered by the two kabuliyats, nearly 50 bighas of lands

were in possession of Badan Sheikh and others, who secured a lease from the landlords on the basis of a subsequent registered kabuliyat Ex. M.

3. The Subordinate Judge finds that the kabuliyat Ex. M. was accepted by the landlords and it was so conceded on behalf of the plaintiffs before him. It was also found that the 50 bighas out of the kabuliyat Ex. M. were actually portions of the lands of the aforesaid two kabuliyats Exs. B and B(1) executed by the previous tenant the question that the Subordinate Judge decided was that, under the circumstances, there should be an entire suspension of rent with regard to these two tenancies. There is another fact which should be mentioned, that both the kabuliyats were permanent leases. Ex. M also appears to have been a permanent lease. The question to be decided in this case is whether on account of such dispossession of the tenant the entire rent should be suspended. There is one other fact which should be mentioned that the rent reserved in the kabuliyats was Re. 1-10-0 per bigha and not a consolidated rent for the entire area that was stated in the kabuliyats to have been demigod to the defendant. The rule that rent is suspended on account of dispossession of the tenant from a portion of the demised premises is one derived from the English common law. An application of this rule to this country in its rigid form can hardly lead to justice. The origin of the rule in England has its historical basis. I need not detail those circumstances. The application of this rule may be salutary in certain circumstances but it can only be applied in this country as a rule of equity, justice and good conscience. In many cases where permanent leases are granted to tenants of lands which have not been measured or the boundaries of which are indefinite, it so happens that when a lease is granted of contiguous lands to another tenant, the subsequent tenant oversteps the boundaries of his leasehold and encroaches upon the lands included in the former lease. In such a case, if the previous tenant does not take any steps to recover possession of his own property and allows the trespasser to remain in possession for the statutory period, he has been held in some of the cases decided in this Court, to be entitled to raise the plea of suspension of rent if under that circumstance the landlord sues him for rent. This appears to me to be a wrong application of the rule of suspension of rent. In England, so far as I have been able to see, the rule is not so stringent, the cases which are relied upon as having decided the question in England in favour of suspension of rent may be examined to see whether they support the rule as applied here to the full extent the first of the case is *Reeve v. Bird* [1834] 1 Cr. M. & R. 3. That was a case in which the landlord brought assumpsit for not keeping a certain messuage and other premises in tenantable repair. The facts are these, which may be taken from the head-note:

A, the tenant of a house, three cottages and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned, all the premises to B, for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of A, the landlord accepted a sum of money as rent up to the day of the assignment,

which was in the middle of a, quarter. B took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold.

4. It was held under the circumstances that there was a surrender by operation of law of all the premises and the plaintiff, was non-suited. Baron Alderson concluded his judgment thus:

Under all these circumstances, the question is, whether the plaintiff did not accept another person as his tenant; and whether there was not, consequently, a surrender by operation of law. If the question had been left to the jury, they could hardly have entertained any doubt.

5. The case, therefore, is not a case of suspension of rent for dispossession of a portion of the premises by the landlord. In the course of the argument, however, the counsel for the landlord argued that

although, after an eviction from part, the landlord cannot recover upon the original contract and the tenant by giving up possession of the remainder is entirely discharged, yet that, if the tenant after the eviction continues in possession of the residue, he may be liable upon a quantum meruit,

and he cited the case of *Stokes v. Gooper* [1814] 3 Camp. 514, in support of his contention. Baron Parkes observed that

that decision was at variance with the older authorities the distinction was between an eviction by the landlord and an eviction by a stranger.

6. On the basis of this observation by Baron Parkes, this rule has been held to be established but, as will be found in a note at page 193 in Foa's "Landlord and Tenant," (6th Ed.), where, citing the case of *Reeve v. Bird* [1834] 1 Cr. M. & R. 3, as well as *Neale v. Mackenzie* [1836] 1 M. & W. 747, the learned author observes:

In neither of these cases, however, it was actually decided (in accordance with Parkes B.'s dictum and as it seems with principle) that no payment of compensation in lieu of rent could be enforced if possession of the residue be retained. The law is also stated to the effect given in the text in *I Wins. Saund*, 211 (Ed. 1871).

7. By reference to *Wins. Saund* it will be found that the learned editor deals with the previous case including *Neale v. Mackenzie* [1836] 1 M. & W. 747, and the opinion of Dallas, C.J. in *Stokes v. Cooper* [1814] 3 Camp. 514, is cited as having laid down that, even where there was an eviction from a part of the demised premises by some act of the lessor, the tenant may be liable upon the quantum meruit if he continues in possession of the residue.

8. The next case I propose to deal with is the case of *Neale v. Mackenzie* [1836]

1 M. & W. 747, That was a case of trespass for breaking and entering the dwelling-house of the plaintiff, and seizing and distraining divers household furniture, etc., (see for the facts the report of the case in the Court of Exchequer, 2 G.M. & B. 84). There a lessee of 100 acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a fixed lease from the lessor and that person remained in possession until a half-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. The prior lease was for a term extending beyond the duration of the latter lease. It was held, on appeal (reversing the judgment of the Court of Exchequer) that the latter demise was wholly void as to the eight acres : and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it. It was argued on behalf of the plaintiff (the tenant)

whether he (the landlord) has a right to distrain or not depends on the question whether the rent, under the circumstances disclosed in the pleadings, was apportionable or not.

9. Lord Denman, C.J. observed in his judgment at page 263:

We are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any event, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire-rent was reserved.

10. His Lordship next dealt with the case in which apportionment was allowed the observation that I desire to make on this case is that it was decided with reference to the right of the landlord to distrain under the English law. The power of distress there is said to have been derived from the ancient feudal law. This power became the means of great oppression in the hands of the barons and continual enactments were passed for a series of years for the protection of tenants. The right of distress is hemmed in with a number of conditions. One of the conditions of the right to distrain at common law is that there must be an actual demise at a fixed rent: *Sea Wood-fall, Landlord and Tenant* 21st edition, pp. 525, et seq. p. 534; *Eoa*, 6th edition, p. 533. In order to appreciate the decision in that case one must bear in mind the technicalities of the common law in England as regards the right of distraint. But even in that case Lord Denman did not lay down any rule that there can be no apportionment of rent where the landlord dispossesses the tenant of a portion of the demised premises subsequent to the demise and the tenant continues in occupation of the rest. The last case which is often cited in support of the rule is the case of *Upton v. Townend* [1834] 1 Cr. M. & R. 3. The facts of this case are very peculiar and I need not discuss them in detail. Eviction by the lessor may be an answer to the claim on the covenant, but it seems that the landlord is not absolutely debarred

from claiming upon the quantum meruit for the remainder in possession of the tenant. I do not think that the cases can be said to have laid down any general rule as stated in some of the decided cases here.

11. But whatever may be the law in England I do not think that the technicalities of the English common law should be imported in this country, particularly in the morass irrespective of any consideration whether the application of such rule would meet the ends of Justice. It is conceivable that cases may arise where suspension of rent as a penalty maybe properly imposed on the landlord, e.g., when a house is let and the landlord dispossesses the tenant from some of the rooms depriving the tenant of the enjoyment of the house. But to hold that in every case of dispossession of the tenant from a part there should be an entire suspension of rent so as to entitle the tenant to hold the remainder rent free in perpetuity, where the lease is permanent and the landlord is unable to put the tenant into possession of the whole for some reason or other, seems to me hardly consistent with justice. We may apply any rule of English Law as a rule of equity, justice and good conscience with reference to the circumstances of a case, but such a rule must be applied with caution. In this country the Courts are always open to the tenant to give redress in the case of a trespass by any person. If the tenant does not take any step, but allows the trespass to continue it may be because he finds it advantageous to himself. I do not see why he should not pay rent for the land of which he remains in possession. In my judgment the Court should always endeavour to apportion the rent whenever possible and be very careful in applying the rule of suspension of rent which can only be allowed in exceptional cases having regard to the circumstances of the case.

12. The rule of apportionment of rent has been applied in several cases in this Court : See *Dhunput Singh v. Mahomed Kazim* [1896] 24 Cal. 296 and *Annada v. Mathura* 13 C.W.N. 702. This case was dissented from in *Manindra v. Narendra* [1919] 46 Cal. 956 relying upon *Neale v. Mackenzie* [1836] 1 M. & W. 747, which I have already dealt with; *Rai Charan Shar Mauzumdar v. Administrator-General* [1909] 36 Cal. 856 and *Narendra v. Manindra* AIR 1922 Cal. 153.

13. I should, however state that the present case falls within the observations of their Lordships of the Privy Council in the case of AIR 1925 97 (Privy Council) their Lordships say:

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased, treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

14. In the present case, the rent was stipulated at Re. 1-10-0 per bigha. So, according to this observation, the rule can have no application to the present case. But I venture to think that their Lordships did not lay down that where the

rent is fixed in a lump, there would be suspension of rent on the ground of dispossession of a part of the demised premises by the landlord and there should not be any apportionment in any case, It was not necessary for their Lordships to express either disapproval or approval of the application of the doctrine of suspension of rent in the cases in which it has been applied, but their Lordships only stated the circumstances in which it has been applied. In my opinion the judgment and decree of the Subordinate Judge must be set aside.

15. The next thing we have to consider is whether a decree should be made in favour of the appellant here or the case sent back for further consideration. The only consideration necessary in this case is to find what is the actual area in the possession of the tenant. The kabuliats mention 94 and odd bighas as being included in the demised premises. If the tenant has been dispossessed by the landlord of any land having less than 94 and odd bighas in his possession, he is entitled to an abatement of that quantity of land at the rate of Re. 1-10 annas per bigha. If it is found that the tenant is in possession of the full area of 94 bighas and odd, then the landlord would be entitled to the rent which has been claimed at the rate of Re. 1-10 annas per bigha. There has been a local investigation in this case. But it is disputed before us by the learned advocate for the defendant-respondent that the commissioner has not found definitely what is the area of the land actually in possession of the defendant as comprised within the kabuliats, Exs. B and B(1). The learned vakil for the appellant informs us that, according to the measurement of the commissioner of the lands, as pointed out by the defendant as comprised within their kabuliats the land in their possession is much in excess of 94 and odd bighas. As the point is disputed and the evidence does not appear to have been dealt with by the Court below at the request of the learned advocate for the defendant-respondent we send back the case to the Court below in order to come to a decision as to the actual area in the possession of the defendant. In no case, however, the plaintiffs could be entitled to a decree for any amount in this suit in excess of their claim. The plaintiffs-appellants are entitled to the costs of the appeal as well as the costs of the Courts below. The subsequent costs will depend upon the result.

16. Whether or not the parties will be allowed to adduce additional evidence will be considered by the lower Appellate Court in the exercise of its discretion. But any order for adducing additional evidence by the defendant must depend upon his previous payment of costs of all the Courts and appeals hitherto incurred.