
(1930) 04 PAT CK 0007
In the Patna High Court

(Thakur) Naunit Prayaji

APPELLANT

Vs

Bandhu Mahton and Others

RESPONDENT

Date of Decision : 25-04-1930

Acts Referred:

Bengal Tenancy Act, 1885 — Section 150

Citation : AIR 1930 Patna 414

Hon'ble Judges : Ross, J

Bench : Division Bench

Judgement

Ross, J.—This is an appeal against a decree of the Sudordinate Judge of Patna modifying a decision of the Additional Munsif of Barh in a suit for rent. It appears that the tenant respondent had a holding which was partly nakdi and partly bhaoli. The bhaoli rent was commuted to nakdi in 1924 by private agreement and a kabuliyat was executed.

2. One of the terms of the kabuliyat was that in addition to Rs. 9-8-0 a bigha, which was fixed as the cash rent, the tenant should deliver certain specified quantities of newari, bhusa and poal. The sole question with which this appeal is concerned is whether this delivery in kind is an abwab or not. The Munsif held that it was not; and the Subordinate Judge held that it was. It is settled law that this question depends upon the construction of the particular contract. The decided cases are therefore not of any great assistance but, at the same time, certain tests have been laid down.

3. In *Bijoy Singha v. Krishna Behari Biswas* [1918] 45 Cal. 259 Nalini Ranjan Chatterjea, J. in a very elaborate judgment which refers to numerous cases on abwabs, in dealing with the contention that the

fact that a certain item is dealt; with in the kabuliyat in a separate clause or that it in not included in the instalments of rant ought not to make any difference in determining whether the item is or is not rent,

said:

But these facts have an important bearing upon the question of the intention of the parties to the contract. They show, whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent, and those facts have accordingly been taken into consideration.

In the decided cases his Lordship goes on to point out that

The question whether a particular item is or is not rent no doubt depends upon the construction of the lease in each case. But once it is held that a particular item has not been agreed upon by the parties as "rent" nor described in the lease as such, the further question whether such sum, although it may form part of the consideration mentioned in the contract is recoverable or not, must depend upon the law as laid down in the regulations and Acts on the point.

4. This last observation meets one of the arguments advanced on behalf of the appellant that because this item stands in the contract therefore it is recoverable inasmuch as it is part of the agreement between the parties. I shall refer to the terms of this lease later; but it may be stated here on the points mentioned in this passage that the stipulation with regard to newari, bhusa and poal is in a separate clause and in a different part of the lease from the stipulation with regard to the ash rent and that the delivery in kind is not subject to the instalments of the cash rent.

5. There are other cases in which the test has been applied whether the disputed item falls under the instalments which are specified in the lease and also whether it is consolidated with the rest of the rent. In *Radha Charan Ray v. Bolak Chandra Ghose* [1904] 31 Cal. 125, where the disputed item was entered in these words: "mucurari akhrajat samil khazna" it was held that this was not an abwab. It was pointed out that the sum represented by this item, Rs. 38-4-0, was consolidated with the main rent into a total of Rs. 205 which was apportioned according to the kistbandi and this was a material consideration in the conclusion at which their Lordships arrived in that case.

6. In the decision of the Judicial Committee, upon which the learned advocate for the appellant relied in AIR 1927 250 (Privy Council) it was pointed out that the disputed items were included in the total sum of the annual jama and were divided into four kists like the rest. Another test which was applied in *Kala Singh v. Mathura Prosad* [1914] 25 I.C. 547 was whether cess had been claimed or paid on the basis of the disputed item being part of the rent. None of these tests is satisfied in the present case.

7. I should now turn to the language of the kabuliyat itself. After recital of the fact that the tenant had 20 bighas 16 katchas 17 dhurs of batai land and of the difficulties incidental to the payment of rent in kind, it was agreed that instead of the batai system an annual nakdi rent, Rs. 9-8-0, should be fixed per bigha and it was declared that:

the rent of 20 bighis 16 kathas and 17 dhurs of kasht batai land mentioned below has been fixed annually at, Rs. 193-0-1 from 1332 Fs

to be paid annually according to the instalments mentioned below. The instalments, which are contained in the schedule, are four annas in Pous, six annas in Chait and six annas in Jeth. Then follows a stipulation with regard to damages in default of regular payment of rent. The lease then goes on:

Be it known that at the time of batai the declarant used to give paddy straw, husks and poal to the said malik from a long time according to the custom of the village on each plough, i.e., on each 10 bighas 150 anti of paddy straw and one bundle of poal and one mote of bhusa as part of the rent (bataur juzvo malguzari) and so the same will be given continually along with the rent as usual (basba-mul nakdi malguzari).

8. It seems clear on the language of this instrument that the delivery of straw was not part of the consideration for the commutation of the rent. The produce rent is commuted at the rate of Rs, 9-8-0 a bigha for a total annual sum of Rs. 198. The stipulation as to the delivery of straw is altogether independent of that part of the agreement. But it is contended for the appellant that, when rent was paid in kind, delivery of straw was made as the lease itself states and that this system was continued under this agreement as part of the rent.

9. It seems to me that the language indicates that the delivery of straw was not part of the rent. The language is that it used to be delivered as if it had been part of the rent and that it would continue to be delivered along with the cash rent. This indicates that a distinction was made between the rent and the delivery of the straw. More over the learned Judge has come to an important finding of fact which has a material bearing upon the question whether this is an abwab or not, namely that this recital in the lease is untrue. The defendant denied in his written statement that there had been any delivery of straw. The khatian did not show it. The plaintiff did not produce collection papers to prove it except a receipt book for 1332 to show collections from other tenants, while the tahsildar of a cosharer proprietor under the Court of Wards admitted that this delivery of straw was not made to the Court of Wards. It was contended that; the learned Judge had wrongly thrown the burden of proof on the plaintiff and that after this statement was made in the kabuliyat it was for the defendant) to show that the facts were otherwise, But the learned Judge has referred to all the evidence on the point including the recital in the kabuliyat, and his finding, in my opinion, is a finding of fact; that the plaintiff failed to prove that nawari, bhusa and poal used to be realized by the landlord as of the rent. The case is certainly not free from difficulty; but looking at this finding of fact and construing the kabuliyat as a whole, I am of opinion that the agreement to deliver straw is independent of the commuted cash rent of this holding and that this is an illegal abwab.

10. An objection was taken that the Court should not have taken cognizance of

the defence in this case because the defendant admitted that money was due and he had not paid into Court the amount which he admitted to be due. I doubt whether Section 150, Ben. Ten. Act, applies to a case where the question is whether part of the claim of the plaintiff is an abwab or not. But in any case the amount was deposited in the Court of appeal below and the learned Judge was right in accepting this deposit on the authority of (The Hon''ble Maharaja Bahadur) Kesheo Prasad Singh Vs. Triloke Nath Tewari, The appeal must therefore be dismissed with costs. This decision will govern Second Appeals Nos. 1432, 1433 and 1434 of 1927. There will be only one hearing fee. The cross-objection is not pressed and is dismissed.