

(1919) 06 PAT CK 0023
In the Patna High Court

Thakur Rudreshwari Prasad Singh

APPELLANT

Vs

Dhana Mahto and Others

RESPONDENT

Date of Decision : 23-06-1919

Acts Referred:

Citation : AIR 1919 Patna 334 : 52 Ind. Cas. 119

Hon'ble Judges : Das, J

Bench : Single Bench

Judgement

Das, J.—This appeal arises out of a suit by the appellant for the recovery of arrears of rent for the years 1322 and 1323 F. S., and for four-annas Met of 1321 F. S., and the only question which I have to determine is whether certain items called Hak Patwari, Salami, etc, should be disallowed as illegal cesses or Abwabs. The lower Appellate Court is of opinion that they are not part of the rent but are illegal impositions by the landlord and has accordingly disallowed those items. The whole judgment of the lower Appellate Court consists of two sentences and is as follows: "It is difficult to define exactly when items like these are really part of " the rent and in the present case I am not inclined to hold so. I prefer to follow the Record of Bights, and do not agree with the Munsif holding it to be incorrect." Why the learned District Judge does not agree with the learned Munsif he does not say, but apparently he relies on the Record of Rights because the subject of investigation is difficult and somewhat tedious. It is greatly to be regretted that a judgment of reversal, such as the judgment of the lower Appellate Court is, should be so perfunctory in its character, and I am not prepared to accept this judgment as a judgment in accordance with law. Under ordinary circumstances I would have felt compelled to return the records to the lower Appellate Court in order to enable it to write out a proper judgment, but as the question involved in the appeal is a question of law and depends on the construction of a single document, I have thought it unnecessary to remand the case to the lower Appellate Court.

2. A preliminary question arises whether the finding of the lower Appellate Court

is a finding of fact and, therefore, binding on this Court. "The question whether any particular item is, or is not, an Abwab, must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed in each case is really part of the rent agreed upon to be paid as consideration for the lease;" *Upendra Lal Gupta v. Ataulla* 36 Ind. Cas. 404 : 21 C.W.N. 108. In this case there is a written contract of lease between the parties, and the rights and liabilities of the parties must depend on the construction of the document which constitutes the contract between the parties. It is well settled that a question of construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High Court will interfere in second appeal if the lower Appellate Court has misconstrued such a document. In this case, of course, the lower Appellate Court has not attempted to construe the document. It thought that it was a matter of some difficulty and, therefore, it threw the whole responsibility on the Revenue authorities. In my opinion, this is clearly a case entertainable by the High Court in second appeal.

3. As I have said before, the tenancy in this case commenced with a document dated the 15th Aghan 1310. This is a Kabuliyat executed by the respondents in favour of the appellant. By this document the tenants covenanted to pay mal jama, amounting to Rs. 167-7-5, annually together with Zemindari rasum year after year as per details given. The details are as follows: Mal Jama, Rs. 156-9-9. Dasahra Salami, Re. 1. Dasahra Patta, 3 heads, price Rs. 3. Price of Ghee for Shami Puja, 1 1/2 seer, Re. 1. Price of Dahi for Dasahra, Re. 1. Tehrir of Patwari, Rs. 4-14-5. It will be noticed that if all the items are added up, the total comes up to Rs. 167-7-5 which is described as the mal jama and which the tenants covenanted to pay as per instalment" year by year."

4. It is argued on behalf of the appellant that the document shows that the sums claimed are really part of the rent agreed to be paid as consideration for the lease and, therefore, no portion of it should have been disallowed by the lower Appellate Court. The respondent, however, argues that the details show clearly that Rs. 156-9-0 is the rent, and that all the other items are illegal impositions not forming part of the rent but forming part of the "Zemindari rasum" and that they were rightly disallowed by the lower Appellate Court.

5. The question was debated in the case of *Kalanand Singh v. Eastern Mortgage Agency Company, Ltd.* 19 Ind. Cas. 701 : 18 C.L.J. 83. In that case the lease provided that the lessee shall pay to the lessor year by year a fixed sum of Rs 4,310, of which the sum of Rs. 4,300 was described as jama, Rs. 5 as Salami Touzi and Rs. 5 as "Tehwari Dasahra." It was argued on behalf of the lessee that the imposition of Salami Touzi and Tehwari Dasahra was illegal and could not be recovered by the lessor. The learned Judges in the course of their judgment said: "Now, no doubt, if the lease had provided for an annual payment of only Rs. 4,800 and the landlord had at some subsequent date demanded from his tenant a further sum or sums by way of Salami and Tehwari, such additional demands,

even if for sometime acquiesced in, would still be regarded as Abwabs or illegal cesses not recoverable in law. But where (as in the present case) the payment of these specific sums is provided for and agreed upon in the lease creating the tenancy, the stipulation for such payment is not, in our opinion, a stipulation or reservation for the payment of arbitrary and indefinite cesses but in the language of Section 3 of Regulation V of 1812 is "a definite clause in the engagement contracted between the parties," which should be "maintained and given effect to." "The learned Judges proceeded to say: In fact the two sums now in question, though not described in the lease as rent, are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid." In the case of Radha Charan Ray Chowdhry v. Golak Chandra Ghose 31 C. 884 : 8 C.W.N. 529 Maclean, C.J., said that "a fixed sum mentioned in a lease as payable annually for collection charges, in addition to rent, the total being described as the jama and forming the consideration for the lease, is not to be regarded as an Abwab, but is in reality a part of the rent and recoverable as such."

6. The two oases above cited were considered and followed in this Court by Mullick and Atkinson JJ., in the case of Sadanand Tewari v. Deb Nath Manjhi 37 Ind. Cas. 980 : (1917) Pat. 287 : 3 P.L.W. 270. The learned Judges laid down that where upon the contract entered into by the defendants it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain quantities of paddy or ghee or both, as the case might be, and that the total of these two items was to constitute one whole rent or jama which was payable by the defendants, and there was no indication whatever that the price of paddy and ghee was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amounts claimed for ghee and paddy must be held to be part of the total rent payable for the land and the objection on the ground that the Zemindar was claiming as Abwab would not be tenable.

7. I entertain no doubt whatever that, if the test laid down in these oases be the correct test for ascertaining whether particular items claimed as rent are or are not Abwabs, the items in the case before me which are objected to by the tenants must be held to be part of the rent agreed to be paid by the tenants to the Zemindar and must accordingly be allowed. As I read the agreement between the parties, the items in respect of Dasahra Salami, Dasahra Patta, price of ghee and price of Dahi are in substitution of a portion of rent and not in addition thereto. The total rent agreed to be paid by the tenants is clearly and definitely stated to be Rs. 167-7-5, and, in my opinion, it does not matter that he takes Rs. 10-14-6 out of the total rent, and not in addition thereto, under other heads, the charges being definite and certain in their nature and forming part of the consideration for the lease.

8. But it has been argued on behalf of the respondents that those oases were wrongly decided and that the learned Judges who heard those cases did not pay

sufficient attention to two Full Bench decisions of the Calcutta High Court and a decision of the Judicial Committee in appeal from one of the Full Bench decisions. The learned Vakil insists that if the principle laid down in those cases be adopted, I am bound to hold that the items claimed in this appeal are illegal impositions and cannot be allowed. Having regard to the confident manner in which the case has been argued by the learned Vakil on behalf of the respondents, I have thought it necessary to deal with these cases very shortly in order to show that they were decided on their own facts and do not support the contention of the respondents.

9. The first case relied upon by the respondent is that of Chultan Mahton v. Tilukdari Singh 11 C. 175 (F.B.) : 5 Ind. Dec. 876. In that case the plaintiff himself claimed the disputed items as Abwabs, but he insisted that he was entitled to them as they were "old usual Abwabs" and had been paid by the tenants for many years. In other words, he admitted that the items claimed by him were Abwabs, but he relied upon custom as sanctioning his demand. It was admitted in the case that the contract of tenancy did not provide for the payment of these disputed items and that these Abwabs were not consolidated with the assalrent, the only question before the Full Bench being whether, assuming that the Abwabs in question had by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs although they were not actually proved to have been paid or payable before the time of the Permanent Settlement. And the Full Bench had no difficulty in answering the question in the negative. It will be noticed that Sir Richard Garth presided over the Full Bench and, in the course of his judgment, said as follows: "They are called Abwabs by the plaintiff himself, and they are Abwabs, as it seems to me, to all intents and purposes, and I consider that the Regulation VIII of 1793, as well as the Rent Law of 1859, intended to put an end to the Abwab system, and to render them illegal." The same learned Chief Justice in the case of Mahommed Fayez Chowdhry v. Jamoo Gazee 8 C. 730 : 4 Ind. Dec. 471 laid down that "a condition in a lease that a tenant will pay to the landlord collection charges can be enforced, if the condition is definite and certain in its nature and forms part of the consideration for the lease." I cannot think that the late Chief Justice of the Calcutta High Court intended, in the Full Bench case, to go back on his opinion expressed three years previously and to hold that even if the conditions for payment were definite and certain in their nature and formed part of the consideration for the lease, they could not be insisted upon in a suit between the landlord and the tenant if they were not called rent by the landlord. The decision of the Full Bench was affirmed by the Judicial Committee in the case of Tilukhdari Singh v. Chulhan Mahton 17 C. 131 (P.C.): 16 I.A. 152 : 13 Ind Jur 251 : 5 P.C.J. 408 : 8 Ind. Dec. 625 Some of the Judges in a subsequent Full Bench case thought that the Judicial Committee went further than the Full Bench, but I cannot agree that it did. The Judicial Committee said: "If they were payable at the time of the Permanent Settlement, they ought to have been consolidated

with the rent u/s 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered u/s 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new Abwabs in Section 55." It seems to me that the decision of the Judicial Committee is an authority only for the proposition that if there are impositions on the tenant subsequent to the contract of tenancy, they cannot be enforced because it is impossible to say that they form part of the consideration for the lease.

10. The next case relied upon by the respondent is that of *Radha Prosad Singh v. Bal Kowar Koeri* 17 C. 726 (F.B.) : 8 Ind. Dec. 1026. In that case the plaintiff alleged that the yearly rent of the tenant was Rs. 22-2-0. The defence was that the yearly rent was Rs. 18-10-6 and that the difference was made up of illegal cesses which were not recoverable. The lower Appellate Court came to the conclusion that the yearly rent was Rs. 18-10-6, although for years the tenant had paid Rs. 22-2-0 as rent. In coming to this conclusion the lower Appellate Court relied upon the *jamahbandi* of 1286, which showed that the rent in 1286 was Rs. 18-10-6 and that the difference was made up of various impositions and charges. So far as facts are concerned it was established, therefore, that the original consideration for the letting was Rs. 18-10-6 and that the difference was made up of cesses which must have been subsequently imposed by the landlord. Ghose, J., in the course of his judgment said: "There is nothing to show that these items ever formed any part of the consideration for which the land was leased to the defendant; for if they did, they would, I think, be really rent, though described in the *Zemindari* papers under other denominations. They were apparently Abwabs imposed subsequent to the rent being fixed at Rs. 18-10-6; and it is not proved that the ryot at any time agreed to pay an enhanced rent including the said items as part of the rent." It is difficult to see how the actual decision of the Full Bench is or can be any authority in favour of the respondents' contention, though it must be freely admitted that certain observations of O'Kinealy, J., went further than the actual decision of the case demanded.

11. All the cases relied upon by the respondents were fully considered by the learned Judges in the case of *Kalanand Singh v. Eastern Mortgage Agency Co. Ltd.* 19 Ind. Cas. 701 : 18 C.L.J. 83. With reference to these cases, the learned Judges said as follows: "In these cases there were no written engagements and the sums claimed represented impositions or demands made upon the ryot defendants at various times subsequently to the creation of their tenancies and settlement of their rents. It was, therefore, held, and no doubt properly held, that though in accordance with practice or custom the tenants had paid these impositions for a long period, yet by virtue of the provisions of Sections 54, 55 and 61 of Regulation VIII of 1793, they were not legally recoverable." In my opinion the cases relied upon by the respondent do not support the broad contention advanced by him and I entertain no doubt whatever that every item is recoverable as rent if it did form part of the consideration for the letting, though

it might not have been described in the lease as rent. If that test is applied in this case, then; in my opinion, all the items are recoverable as rent, as I have no doubt that the rent agreed to be paid by the tenant is Rs. 167-7-5 annually.

12. It was next contended by the learned Vakil on behalf of the respondent that, in any event, the item of Rs. 3 for Dasahra Patta (goats for Dasahra festival) must be disallowed, as goats can never stand for rent, and he relied on the case of Gayratulla Sardar v. Girish Chandra Bhaumik 12 C.W.N. 175. It is true that that case supports the contention of the respondent, but, as no reasons are given for that decision. I cannot see on what principle that case was decided. The true test is to see, not whether any particular item is or can be rent, but whether it is in substitution of any portion of rent. If I were to disallow this item, the total rent payable by the defendant would be Rs. 164-7-5, although he agreed to pay Rs. 167-7-5 as rent. If Salami Touzi, Tehwari Dasahra and collection charges may be said to form part of rent, I cannot see on what principle it can be said that an item for Dasahra Patta is not recoverable as rent. Certainly the definition of rent in the Bengal Tenancy Act does not support the contention of the respondent. Having given the subject my most anxious consideration. I have come to the conclusion that the appellant is entitled to recover every item which the respondent agreed to pay or deliver to the appellant by his Kabuliyat, dated the 15th Aghan 1310. I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance. The appellant must have his costs throughout.