
(1916) 07 CAL CK 0029
In the Calcutta High Court

Upendra Lal Gupta and Others

APPELLANT

Vs

Ataulla and Others

RESPONDENT

Date of Decision : 03-07-1916

Acts Referred:

Citation : 36 Ind. Cas. 404

Hon'ble Judges : Sheepshanks, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

Appeal No. 3957 of 1913.

1. This appeal arises out of a suit for rent on the basis of a Kabuliat, dated the 25th August 1884. The Kabuliat after describing the land let out states the Sunder jama as Rs. 21-7 3, the enhanced rent for hadish collection charges Rs. 3-1-0, the total jama being described as Rs. 24-8-3, which together with certain other items which are not in dispute came up to the grand total of Rs. 29-4 0. The total amount of Rs. 29 4-0 is made payable in 4 instalments and the tenant agrees to pay the aforesaid rent according to the tests mentioned above." Then the Kabuliat goes on to say: If we fail to do so, we shall not take any objections to your realising the rent together with interest for breach of instalment at the rate of 1 anna and damages at the rate of 4 annas per rupee per mensem by causing this taluk to be sold by auction twice in the year according to Act VIII of 1819, and by bringing a suit according to the laws that are now or may in future be in force and attaching and selling our moveable and Immovable properties. The jama is assessed at the aforesaid rate after keeping in abeyance 8 annas per Kani from the jama on account of nazar and subscription on the occasions of marriage, puja, namkaran and churakaran, and other ceremonies at the house of the landlord. If we do not pay nazar and subscription on the occasions of marriage, puja, namakaran, churakaran and other ceremonies, we shall not take objection to the adding of the said 8 annas per kani to jama.

2. The Courts below disallowed the amount of Rs. 3 on account of hadish as abwab and allowed damages only at 25 per cent.

3. The questions raised in the appeal, therefore, are whether the plaintiffs are entitled to recover the said amount of Rs. 31 and whether they are entitled to the interest and damages as stipulated in the Kabuliat.

4. We are of opinion that the said sum of Rs. 31 is not an illegal imposition but is part of the rent. It is true that in arriving at the total amount of rent. Rs. 21-7-0 is described as the Sunder jama and Rs. 3-1-0 as enhanced rent for collection charges. But the details of the instalments do not deal with the Kists of the Sunder jama only, but with the whole amount including the collection charges and the total amount is throughout referred to as the rent.

5. It is to be observed that this jama is distinguished from the hajat jama of 8 annas per Kani on account of nazar and subscription on the occasions of marriage and such other ceremonies at the house of the landlord, which was to be added to the jama if the lessee did not pay the said nazar and subscription.

6. We think that upon a proper construction of the Kabuliat, the sum of Rs. 3-1-0 is part of the consideration for the lease, and is as much part of the rent as the Sunder jama, and is not an abwab.

7. We have been referred to several cases dealing with the question of abwabs. But 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 is really part of the rent agreed upon to be paid as consideration for the lease. We may refer to the case of Radha Charan Ray Chowdhry v. Golak Chandra Ghose 31 C. 834 : 8 C.W.N. 529 in which, upon a construction of a lease, certain collections charges were held by the learned Judges (Maclean, C.J., and Bodilly, J.,) to be part of the rent and not an abwab. See also the case to Mahomed Fayez choivdhry v. Jamoo Gazee 8 C. 730, in which Chief Justice Garth took a similar view of such a covenant in a lease. The cases cited before us on behalf of the respondent are clearly distinguishable. In the case of SrEe Kanta Persad Hajari v, Irshad Ali Sarkar 17 ind. Cas. 173 : 16 C.L.J. 225 an agreement to pay Rs. 17-4-0 as the "price of presents and unpaid labour" was disallowed as an abwab, although the said sum together with a rent of Rs. 360 was put down as amounting to Rs. 377-4-0 under the head of total rent. But as the learned Judges pointed out, there were other facts in other parts of the document which had an important bearing on the question. The tenant agreed to pay the rent proper, that is, the amount specified as the rent, and then the Kabuliat went on to provide that the tenant would have no objection to pay the sum of Rs. 17-4-0 as the price of the said presents and labour" in addition to the amount of rent. Moreover, in the plaint itself a distinction was made by the plaintiff between the rent and the value of the presents and labour. Similarly in the case of Mathura Prasad v. Tota Singh 17 Ind. Cas. 177 : 40 C. 806 : 16 C.L.J. 296, where a certain yearly rent was specified as assessed at a certain rate, and at the end of the lease, in a clause entirely distinct from the one where the rent was assessed, a provision was made for delivery of husk which was not expressly or by implication made part of the rent: it was held that it could not be

recovered. In the case of Gayratulla Sardar v. Girish Chandra Bhaumik 12 C.W.N. 175 an agreement to deliver two goats at puja or to pay Rs. 3 as the price thereof was held [to be an abwab, as the goats obviously could not be held to be part of the rent.

8. We have been pressed with certain observations made by some of the Judges in the Full Bench case of Radha Prosad Singh v. Bal Kowar Koeri 17 C. 726 (F.B.). But the question in that case was whether certain cases under the denomination of sarak, neg and khuruch were illegal, or recoverable as rent by reason of their having been paid for a long time along with the rent and without specification in the rent receipts. There was no written engagement to pay the said amount as part of the rent at the creation of the lease and they appear to have been subsequent impositions. The observations relied upon on behalf of the respondents were made by some of the learned Judges in that case in discussing the question of abwabs generally. The question, whether in a case where there is a written engagement and a specific sum, which is neither indefinite nor arbitrary and which is agreed upon to be paid as part of the rent in the lease creating the tenancy, can be recovered, was not referred to the Full Bench.

9. In the case of Tilukdhari Singh v. Chulhan Mahton 17 C. 131 (P.C.) : 16 I.A. 152 : 13 Ind. Jur. 251 : 5 Sar. P.C.J. 408 : 8 Ind. Dec. (N.S.) the items claimed were described in the plaint as old usual "abwabs" and were also described as "abwabs" in the zamindari accounts, so that they were claimed expressly as abwabs. The Judicial Committee held that if they existed at the time of the Permanent Settlement they ought to have been consolidated with the rent u/s 54 of Act VIII of 1793. Not being so consolidated they could not be recovered u/s 61 of the Regulation, and if they were not payable at the time of the Permanent Settlement they would come under the description of new abwabs in Section 55, and that this Court was right in treating them as abwabs, and not as part of the rent. The cases of Radha Prosad Singh v. Bal Kowar Koeri 17 C. 726 (F.B.) and Tilukdhari Singh v. Ghulhan Mahton 17 C. 131 (P.C.) : 16 I.A. 152 : 13 Ind. Jur. 251 : 5 Sar. P.C.J. 408 : 8 Ind. Dec. (N.S.) were considered in the recent case of Kumar Kalanand Singh v. Eastern Mortgage and Agency Co. Ltd. 19 Ind. Cas. 701 : 18 C.L.J. 83 and the learned Judge distinguished the above cases, on the ground that in those 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 the settlement of their rents." In that case the lease by which a permanent tenure was created in 1874 provided for payment of a fixed sum of Rs. 4,310 of which the sum of Rs. 4,300 was described as jama, Rs. 5 as "salami touji" and Rs. 5 as tehvari dasahara". The learned Judges observed: 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 or indefinite cases 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 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.

10. It is to be noted that in all the cases subsequent to the Full Bench decision the question whether a particular item is an abwab or not, is treated as one of construction of the. lease although more items than one are described as constituting the rent, the question considered in each case being whether the item objected to is really a part of the rent agreed upon between the parties. Having regard to all the terms of the lease in the present case, we are of opinion that the sum of Rs. 3-1-0 is not an abwab.

11. The next question is whether the stipulation to pay interest at the rate of 75 per cent, and damages at the rate of 4 annas per rupee per mensem is a valid one. The learned Judge says: I do not think the agreement was a deliberate one by the tenants, nor was it meant to be enforced except, as a threat or penalty." The damages at 4 annas per rupee per mensem amount to 300 per cent, per annum. The lease, no doubt, is a permanent mokatari one. But interest represents compensation for detention of the rent, and we think that a stipulation to pay interest at 75 per cent, and damages at 300 per cent, is intended to secure rather than represent the loss to which the landlord is put for the non-payment of the rent. Any stipulation by way of penalty may come u/s 74 of the Contract Act as amended. In any case the Court can grant relief in the exercise of its equitable jurisdiction if the contract is unconscionable. We think the contract is an unconscionable one, and that the Court below was right in awarding damages at 25 per cent., which is a reasonable compensation.

12. The result is that the decree of the Court below will be varied. The plaintiff will get a decree for the amount of Rs. 3-1-0 as part of the rent. He will not, however, be entitled to interest and damages as claimed, but will only get the damages allowed by the lower Appellate Court. The decree will be varied accordingly. Each party will pay his own costs in this Court and in the Court of Appeal below.

13. Appeal NOS. 3958, 3959 and 3960 of 1913. Our judgment in Appeal No. 3957 will govern these appeals also.