
(1922) 05 PAT CK 0016
In the Patna High Court
Case No : L.P.A. Nos. 109 to 111 of 1921

W.M. Grant and others

APPELLANT

Vs

Eklal Jha and others

RESPONDENT

Date of Decision : 09-05-1922

Acts Referred:

Citation : (1922) 05 PAT CK 0016

Final Decision : Allowed

Judgement

Dawson-Miller, C.J.—These three appeals are brought under the Letters Patent from a decision of Mr. Justice Ross, dated the 22nd November last year reversing the decision of the lower appellate Court.

2. The suits out of which the appeals arise were tried together along with three others of a similar nature before the Munsif at Bhagalpur and determined by the same judgment. The plaintiffs, who are the proprietors of the Lattipur indigo factory at Narainpur, are the same in each case. The defendants, who are the same in two cases but different in the other, are tenants holding under the factory and the same questions for determination arise in each of the cases.

3. The claim of the plaintiffs, who are the appellants before us, is for the recovery of rent payable under the term of certain kabuliats executed by the defendants respectively in the year 1909, whereby they agreed to pay an enhanced rent amounting to about 4 annas in the rupee in excess of the rent formerly payable under the earlier kabuliats in consideration of being released from the obligation imposed by the earlier kabuliats of cultivating indigo on a portion of their holdings.

4. It is the plaintiff's case that the defendants held their land at specially low rate of rent before the date of the kabuliats sued on in consideration of cultivating indigo for the landlords' convenience within the meaning of the third proviso of Section 29 of the Bengal Tenancy Act, and that in consideration of being released from that obligation, they agreed to pay the increased rent which

they deemed fair and equitable. Section 29 of the Act in so far as it is material reads as follows:-

"The money rent of an occupancy raiyat may be enhanced by contract, subject to the following conditions.

* * *

(b) The rent must not be enhanced so as to exceed by more than 2 annas in the rupee the rent previously payable by raiyat.

Provided as follows:-

(iii) When a raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in Clause (b) shall prevent the raiyat from agreeing in consideration of his being released from the obligation of cultivating that crop to pay such rent as he may deem fair and equitable."

5. It is the defendants' case that there is no proof that they held their lands at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the proviso and, that therefore, although they executed the kabuliats agreeing to pay the rent claimed such an agreement cannot be enforced as the enhancement was in excess of the maximum allowed under Clause (b) of Section 29 of the Act. The defendants farther rely upon Sections 23 and 178 (3)(b). The former section gives occupancy raiyats the right to use the land in any manner which does not materially impair its value or render it unfit for the purposes of the tenancy, whilst the latter section provides that nothing in any contract made between the landlord and the tenant after the passing of the Act shall take away or limit that right.

6. It is important to bear in mind that the Bengal Tenancy Act was passed in the year 1885, before which date it is conceded that the restrictions imposed by Section 29 upon the freedom of contract had no operation. The first kabuliats of which here is any evidence in the case are dated the 3rd June, 1888. These documents refer to the lands settled as sabek jote nij, but when the lands were first settled upon the defendants or their predecessors, there is nothing to show. It has been found however, that the defendants are occupancy raiyats.

7. The kabuliats in the case of each of the defendants are of the same tenor. Those of 1888 are for a period of 10 years from 1295 to 1304 F. They provide in paragraph 6 that-

"I, the raiyat, will from year to year till the expiration of the term of this kabuliat sow indigo only or indigo with certain mixed crops such as linseed and mustard, upon one-fourth of the said holding after taking indigo seeds from the factory without payment of any price for the same, according to the choice of the sahebs and amlas of the Lattipur indigo concern."

8. Then follow certain stipulations as to the landlord's rights if this obligation is

not complied with and to the harvesting of the indigo and the price to be paid for it. Paragraph 7 says :

"The conditions in paragraph 6 above are according to the old custom of the village and upon these conditions the rent of the holding has been fixed. If I, the raiyat refuse in any year to set apart one-fourth of the land at the time of measuring the same for the purpose of sowing indigo I, the raiyat, will pay excess rent at the rate of Re. 1 per bigha for the entire area of the holding from that year until the expiration of the term of this kubaliat.

Paragraph 9 provides :-

"In the beginning of the year when the term of this kabuliat will expire I shall appear before you, the patnidars, and shall put in a kabuliat for a fresh settlement and shall obtain a patta for the same and if I do not put in a kabuliat and obtain a patta then until I obtain a settlement I shall pay rent at the rate of Re. 1 in excess for the entire area as provided by paragraph 7 hereof. "

9. When these kabuliats expired they were renewed for a further term which expired in 1315 F. that is, in September 1908. A few months later on the 14th January, 1909, fresh kabuliats were executed after a fresh measurement of the land. These were for 9 years from 1317 to 1325 F. inclusive.

10. It was found by the method of measurement adopted that there had been an increase in the area, in excess of the area mentioned under the previous kabuliats and for this the tenants agreed to pay an additional rent. They further agreed to pay an enhanced rent at rate which worked out at about 4 annas in the rupee. The stipulation as to growing indigo finds no place in these kabuliats. Clause 14 provides as follows:

"Be it known that for my having grown indigo on one-fourth of my nagdi holding the maliks had settled the land with me at a low rate, but the maliks have now closed the indigo business, therefore, the excess rate which has been assessed upon my nagdi holding according to my wish, neither I, nor my heirs and representatives have or will have any objection to pay."

11. One of the questions which arose for determination by the Munsif was whether in fact under these kabuliats the area had been properly measured. The lagga used as stated in the kabuliats themselves was a lagga of 5 3/4 cubits, whereas the tenants contended that the standard lagga in use in the village was 6 1/2 cubits, and when measured by this standard no increase in area had in fact taken place.

12. This question was decided by the Munsif in favour of the defendants and the additional rent proportionate to the excess area was disallowed. The learned Munsif also came to the conclusion that the agreement to enhance the rent in excess of 2 annas in the rupee was in contravention of Section 29 (b) of the Bengal Tenancy Act and was not taken out of the operation of the section by the third proviso.

13. He considered that although it was proved that the rent was low in consideration of growing indigo, it was not shown that it was specially low. He further held that the kabuliats of 1888 were executed in respect of lands held by the tenants previously, and that there was nothing to show that there was any obligation upon them to cultivate indigo at the inception of the tenancy and unless this could be shown the proviso had no application. He also found that there was nothing to show that the defendants deemed the rent agreed upon to be fair and equitable.

14. I may mention here that in some of the other cases which are not subject of this appeal where similar kabuliats were proved showing the original settlements with the tenants he found upon exactly the same evidence that the rent was specially low and that the tenants deemed the enhancement to be fair and equitable. A further point was taken and decided against the landlords that the kabuliats sued on represented a bona fide settlement of a dispute for rent between the parties and should not, therefore, be treated as a case of enhancement.

15. The plaintiffs appealed from this decision to the District Judge, who affirmed the decision of the Munsif as to the claim for excess area, but allowed the appeal in so far as it claimed an enhancement in respect of the area allowed, being of the opinion that on the evidence the case came within the terms of the third proviso of Section 29. There was no direct evidence to show whether the obligation to grow indigo was one binding on the tenants at the inception of the tenancy, but the learned Judge considered that as the origin of the tenancy was lost in obscurity he was entitled to consider the surrounding circumstances and the conduct of the parties and the inferences to be drawn from the kabuliats themselves in determining whether the obligation to grow indigo was an incident attaching to the tenancy at its inception.

16. The fact that the kabuliats as far back as 1888 recited an obligation to grow indigo on a fourth part of their Holdings according to the custom of the village, he considered, indicated that no new obligation was then imposed but that it was pre-existing and in accordance with custom and usage, and the conduct of the parties in agreeing to pay an enhanced rent in 1909 and for several years afterwards complying with that agreement was also indicative of the nature of the tenancy in its origin.

17. He further relied upon a petition in connection with a fresh settlement with one of the defendants in 1905 as showing that indigo cultivation was one of the purposes for which the land was settled. He also found upon the oral evidence as well as from the defendants' own admissions in the kabuliats that the lands had been settled with the tenants at a specially low rate in consideration of growing indigo and that the new rate was fair and equitable.

18. On second appeal to this Court by the tenants, the learned Judge before whom the appeal came reversed the decision of the learned District Judge. The

evidence upon which the lower appellate Court's decision was based, in so far as it was given orally, was not before the learned Judge in second appeal, but he referred to certain passages in the Munsif's judgment in which some of the oral evidence was dealt with and arrived at the conclusion that this was no proof that the raiyats held their land at a specially low rate of rent in consideration of cultivating indigo.

19. He further considered that the admission that they had previously held at a low rate, in consideration of this obligation contained in the kabuliats sued on, could not be relied upon, as the kabuliats themselves were repudiated as void, and that, in these circumstances the admission itself would not prove the truth of what it states. He further considered that the admission itself was not sufficient, as it did not show that the purpose of the tenancy was the growing of a particular crop or that in consideration thereof the rent was specially low.

20. He considered, however, that at the time of the kabuliats in 1888 a less rent was fixed than would otherwise have been fixed because the proprietors wanted indigo on one-fourth of the land. He also considered that although there was an obligation to grow indigo under the kabuliats of 1888 and again under the renewal in 1902 this obligation came to an end with the kabuliats of 1902 and had ceased to exist when the new kabuliats agreeing to the enhanced rent were executed.

21. It would follow, therefore, u/s 23 of the Act that the tenants were then entitled to use the land for any purpose they chose consistent with the provisions of that section and the agreement to pay enhanced rent in consideration for the release of a non existing obligation was void under the provisions of Section 178 (3)(b).

22. The determination of these appeals ultimately depends upon the answer to the question whether there was evidence to support the conclusions of fact arrived at by the first appellate Court. The findings must be accepted in second appeal unless it can be shown that there was no evidence to support them. In the present case the evidence was both oral and documentary. The kabuliats which were relied upon by both parties in support of their respective contentions have been placed before us, but we are not in a position to deal with the oral evidence nor can we say to what extent it justified the findings except in so far as appears from the judgment of the Munsif and the learned District judge.

23. Had either of the parties intended to raise the point that there was no oral evidence to justify the findings in so far as they are based thereon, it was their duty to have placed that evidence on the record to enable the Court to decide this question and not merely to rely upon certain references thereto in the judgment of the lower Courts.

24. I should have had little hesitation in coming to the conclusion that the findings of the lower appellate Court could not be disturbed but for the fact that the learned Judge of this Court in second appeal has taken a different view and

considers that there was no evidence upon which those findings can legally be supported. His opinion is entitled to all respect.

25. He concisely states the question for decision when he states that the enhancement being in excess of that allowed by Section 29, the agreement by the tenants to pay the enhanced rent is void, unless it is protected by the third proviso, and that, in order to bring it within that; proviso, three factors must be present: (1) the raiyat must have held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord, (2) he must have been released from an existing obligation of cultivating this crop, and (3) he must have deemed that the rent which he agreed to pay was fair and equitable.

26. The learned Judge thought that neither of the first two factors existed upon the evidence and that it was unnecessary, therefore, to consider the third. With regard to the first point the two earlier kabuliats contain an admission that the tenants are under an obligation to grow indigo on a part of their holdings according to the old custom of the village and that upon these conditions the rent of the holdings has been fixed. They further agree that if they refuse in any year to set apart a fourth of the land for the purpose of sowing indigo they will pay an excess rent the rate of one rupee per bigha for the entire area of the holding.

27. It appears from the Munsif's judgment that the plaintiff's witnesses said that the tenants were under an obligation to grow indigo and three of them stated that the rent was low in consideration of so doing. They do not appear, however, according to the Munsif to have stated that the rate was specially low. The learned District Judge on the other hand found in these words:-

"The former rates at which the respondents held are specially low as appears from the oral evidence as well as from their own admissions in the kabuliats"

28. I may mention here that in the kabuliats of 1909 there is a further admission that in consideration of growing indigo the maliks had previously settled the land at a low rate. In my opinion, this evidence was amply sufficient to justify the finding that the land was previously held, that is to say, under the kabuliats of 1888 and 1902, at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the third proviso of Section 29.

29. The word specially, as used in the section has, in my opinion, no reference to the quantum of the reduction of rent allowed for the consideration there mentioned, but merely required that owing to special circumstances, viz., the agreement to cultivate a particular crop, the rent is lower than it otherwise would have been. Mere proof that the rent was a low rent would not be sufficient to comply with the section, unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop.

30. But once it is proved that this is the case, then the actual amount whereby the rent is reduced below what it otherwise would have been, if no such

obligation had existed, is not a matter to be taken into consideration in deciding whether the proviso has been complied with. I may also point out that this appears to have been the view of the learned Munsif, although it would seem that in deciding the question he subsequently lost sight of it. In considering this point he first of all says :-

"The first thing to be shown is that the defendant in this case has been holding at a specially low rate of rent or in other words at a rate lower than what it would have been if there were no obligation to grow indigo."

31. But in considering the evidence in order to ascertain whether it proved such a state of affairs, he found that it did not, merely because the witnesses did not use the words " specially low," and as already pointed out in one of the other cases, not now on appeal before us, in which he came to a different conclusion of fact he says:-

"The kabuliats, however, do not state expressly that the rent was fixed at a specially low rate of rent in consideration of this obligation but that a specially low rate of rent was partly the consideration for the settlement is clear."

32. It would appear, therefore, that upon precisely the same evidence he came to two diametrically opposite conclusions of fact. In my opinion, the decision arrived at by the learned District Judge upon this question was amply justified by the evidence, even if it be taken to have gone no further than what appears from the judgment of the learned Munsif.

33. The decision of this question, however merely goes to the state of affairs existing from 1888 onwards and it still remains to consider whether in 1909, when the new kabuliats were executed after the old ones had expired, the obligation to grow indigo still existed. If it did not, there was no consideration for the agreement to pay enhanced rent beyond that prescribed by the statute and any obligation undertaken by the tenants to do so would not be binding upon them.

34. Whether that obligation existed or not depends upon whether either at the inception of the tenancy or at least at some time before 1885 when the Bengal Tenancy Act was passed, the tenants were under an obligation to grow indigo. I think it must be conceded that it is not necessary to go back to the inception of the tenancy. If at any time before 1885 this obligation was a part of the terms under which the tenants held, then it would be a binding obligation as there was no law to prevent the freedom of contract.

35. It is conceded that there is no direct evidence as to the terms upon which the tenants held before 1888 and the question for consideration is whether the learned District Judge was justified in drawing the inferences from the evidence contained in the kabuliats themselves and from the acts of the parties that the obligation was one of old standing and not newly created by the kabuliats of 1888, I have already stated the grounds upon which the learned District Judge

arrived at his finding upon this question.

36. The reference in the earlier kabuliats to the custom of the village, the agreement by the tenants to pay an enhanced rent of one rupee per bigha if they failed to comply with their obligation and the fact that in 1909 they willingly agreed to pay excess rent after due consideration and without any coercion on the part of the landlord, which was found as a fact in the case, coupled with the admission in the kabuliats of that date that the maliks had settled the land with them at a low rate for having grown indigo, all seem to me to lead to the inference that the obligation was not imposed for the first time in 1888 but was in existence at all events before the passing of the Bengal Tenancy Act in 1885.

37. It will be observed that the admission referred to speaks of the land being settled with the tenants upon certain terms and, to my mind, this clearly points to the original settlement. There were other matters also referred to by the learned District Judge arising on the evidence but which we are not in a position to deal with as the evidence is not before us and which pointed towards the same conclusion viz., that indigo cultivation was one of the purposes for which the land was settled. Added to this there is not a scintilla of evidence adduced by the defendants to show that the obligation arose for the first time under the kabuliats of 1888. In my opinion, therefore, the findings of the learned District Judge on these two points were in fact supported by the evidence.

38. The only other question is whether the tenants can be said to have deemed as fair and equitable the enhanced rent which they agreed to pay. The mere fact that they entered into a formal written agreement with the landlord to pay it is insufficient to raise the presumption that they deemed it fair and equitable. There is nothing in the rate enhanced which militates against this view, and the parties were dealing at arms' length and without any coercion on the part of the landlord. The question was one of fact and in the circumstances I can see no ground upon which the finding can be disturbed.

39. The learned Judge of this Court whose decision is now under appeal took the view that the admission contained in the kabuliat of 1909 could not be regarded as evidence because the kabuliat itself was challenged as void. If the kabuliat was valid, as I have found it to be, this question does not arise, but in many cases I am unable to follow the learned Judge's reasoning that, because a document may not be valid for the purpose for which it was intended, it cannot be used as evidence of an admission by the person executing it when its execution has been admitted or proved.

40. The admission therein contained, that the lands were previously held at a low rent, was made by the tenants without coercion and even if the document as an agreement to pay enhanced rent should not be binding, I cannot see any reason why it should be rejected as an admission of the facts stated.

41. A further question was raised before us in argument by the learned Government Pleader on behalf of the respondents which was not taken in any of

the Courts below. It was contended that the whole agreement of 1909 was void because one of the considerations for paying an enhanced rent, viz., an increase in the area had been found not to exist and even if the other consideration, viz., the release from the obligation should be valid, the promise to pay an enhanced rent could not stand. Reliance was placed upon Sections 23 and 24 of the Contract Act. It was contended that part of the consideration for the enhancement of rent was the increased area shown to exist by the form of measurement adopted, whereas in fact it was found that the area had not increased at all, a wrong method of measurement having been employed.

42. It was argued that in this state of affairs, a part of the consideration for the enhancement of rent having failed, it must be treated as unlawful u/s 23 of the Contract Act as, if permitted, it would defeat the provisions of Section 29 (b) of the Bengal Tenancy Act relating to enhancement. I agree that u/s 24 of the Contract Act if one of the several considerations for a single object is unlawful the agreement is void, but even assuming that the consideration in the circumstances stated was unlawful it would appear that the increase of area alleged to exist was no part of the consideration for the enhancement of rent.

43. As this point had never been taken in any of the lower Courts the schedule attached to the kabuliats of 1909 had not been placed in evidence before us, but we were informed by the learned Counsel for the appellants, and it was not contradicted, that the schedule clearly shows how the rent was arrived at. It sets out the original area and the original rent and the additional area and additional rent, and then shows the enhancement of rent in consideration of the release from the obligation.

44. The additional rent was disallowed by the lower Courts and although there was a cross-appeal by the plaintiffs on that question to this Court, the cross-appeal was not pressed as no point was taken about separating the legal from the illegal part of the consideration. The engagements to pay additional rent and enhanced rent are entirely separate and distinct. One cannot ask the Court to make a new contract in place of that which is illegal, but where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal, the performance of those which are legal can be enforced although the performance of those which are illegal cannot.

45. Section 29 of the Bengal Tenancy Act has no application to an increase in the amount of rent by reason of an increase in the area. It applies only to an increase in the rate of rent, and the engagements by the defendants to pay additional rent for an additional area and an enhanced rent for release from an obligation are entirely separate and distinct. The tenants are not entitled to say because we have undertaken to pay additional rent for an additional area which cannot be enforced, therefore, we shall not pay enhanced rent in consideration of being released from an existing obligation although that consideration is perfectly good.

46. I am further of opinion that at this stage, although the question raised is one of law, we ought not to entertain it in the particular circumstances which have arisen. The present appellants, who were respondents in the Court below, entered a cross-appeal in that Court challenging the findings as to the additional rent and further contending that the kabuliat sued on represented a bona fide settlement of a dispute for rent between the parties and the case should not be treated as one of enhancement, but as no point was taken before Mr. Justice Ross about separating the legal from the illegal part of the consideration they were content not to press their cross-appeal.

47. For both these reasons, I think, that this question should be determined against the respondents and in favour of the appellants. In my opinion, this appeal should be allowed, the decree appealed from should be set aside, and that of the District Judge restored. The appellants are entitled to their costs of this appeal and of the appeal of the defendants before Mr. Justice Ross.

48. Adami, J.

49. I agree.