(1918) 06 CAL CK 0003

Calcutta High Court

Case No: None

Srijukta Sarajubala Debi Chowdhurani and Others		APPELLANT
	Vs	
Saradanath Bhattacharjee and Others		RESPONDENT

Date of Decision: June 27, 1918

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 193
- Limitation Act, 1963 - Article 116, 20

Citation: 50 Ind. Cas. 862

Hon'ble Judges: Teunon, J; Richardson, J

Bench: Division Bench

Judgement

Teunon, J.

These three appeals arise out of two counter-suits brought on a contract entered into between the parties or rather by their predecessors-in-interest on the 30th Baisakh 1313 and registered on the 15th May of 1906.

2. By the deed the predecessor of the plaintiffs in Suit No, 134/52 (Appeal No. 67), who may be compendiously described as the Bhawal Raj, conferred upon one Biswanath Bhattacharjee the right to fell and remove Guzari or sal trees of a certain girth and other'' miscellaneous trees, not being fruit trees, from the "Garhs" or forests lying within the Mouzas appertaining to their Zemindari No. 9 and also from the Garhs lying within certain Mouzas included in Sikmi Taluk Baidya Nath Sen appertaining to Zemindari No. 10. The contract, which may be spoken of as a lease, also provided that the grantee should have the right to out and remove trees of specified classes from the Jote lands of tenants, and the grantor further undertook to provide convenient sites for roads, residential quarters, offices, storage and export depots, to take appropriate measures against, and pay compensation for, loss incurred by reason of obstruction or dispossession, the acts whether of tenants

or third parties. The term was a period of five years beginning from the 1st Baisakh 1313, and of the consideration Rs. 80,000, Rs. 20,000 having been paid in advance and the balance Rs. 60,000 was to be paid in four instalments in the month of Assin in each of the years 1313--16.

3. In their suit, after giving credit for sums paid, the Bhawal Raj claim a sum of Rs. 71,770 by way of arrears unpaid with interest at the stipulated rate.

4. In their suits Nos. 119 of 1912 and 51 of 1915 the grantees claimed a sum of Rs. 1,46,950 as compensation for various acts of obstruction and dispossession.

5. In Suit No. 134/52, the Subordinate Judge found that the claim for the balances due on account of the kists preceding the kists of Assin 1316, was barred by limitation. He decreed the claim for, Rs. 20,000 on account of the instalment payable in Assin 1316, with interest at the stipulated rate up to date of suit. He disallowed interest on the principal sum claimed pending suit, and on the decretal amount and costs allowed interest at the rate of only 4 per cent, per annum.

6. In Suit No. 134/32 the Subordinate Judge found that the lessees or grantees had proved damage aggregating Rs. 5,037 under two heads, but setting this amount off against the barred rents dismissed the suit with costs.

7. Both sides have appealed. In Appeal No. 37 the only questions discussed before us are: (1) whether the Subordinate Judge was right in holding that the claim for the balances due on account of the kists of Assin 1314 and Assin 1315 was barred by limitation and (2) whether the Subordinate Judge had exercised a sound judicial discretion in disallowing interest pending suit and in reducing interest on the decretal amount and costs below the ordinary Court rate.

8. The contract being one in writing registered, the rule of limitation ordinarily applicable is Article 116 of the Schedule to the Limitation Act and the period of limitation six years. In that view no part of the claim would be barred. But here the lease or grant confers upon the grantee the right to fell, remove and sell all trees of specified kinds growing within certain local limits in so far as he may be able to do so within the five years'' period. The lessee is given the right to sublet and in certain eventualities to re-enter and make other arrangements for the remainder of the term setting off the sums thereby realised against the sums due from the lessee. If the trees be not out down, or out down but not removed before the expiration of the term, the lessee has no rights or interests or is divested of any such rights. We cannot, therefore, regard this transaction, as the appellant would contend, as one merely of sale whether of a specified number of trees or of all trees of specified kinds to be found within the ambit of certain Mouzas. Nor, simply because in order to facilitate his operations the lessee is permitted to construct roads, to build a Katchari and residential quarters, to stack timber and make export depots on sites to be selected by the lessor, can I regard the lease, as the appellant next contends, as one falling within the scope of the Transfer of Property Act, on the analogy of the

case of the coal depot forming the subject-matter of the case reported as Baniganj Coal Association Limited v. Judoonath Ghose 19 C. 489 : 9 Ind. Dec. (N.S.) 770.

9. In fact the lease or grant in the present case cannot be distinguished from those in question in the cases reported as Abdul-ullah Sarkar v. Asraf Ali Mandal 7 C.L.J. 152 and Bandi Ali Fakir v. Amud Sarkar 26 Ind. Cas. 380 : 9 C.W.N. 415 : 20 C.L.J. 227. On the authority of those cases it must, therefore, be held that the grant in question here is one of forest rights'' and that under the provisions of sections 84 and 193 of the Bengal Tenancy Act the rule of limitation applicable is the special rule of 3 years to be found in the Bengal Tenancy Act, Schedule III, Part I, Article 2.

10. It is next contended that even if the 3 years'' rule be applicable, a payment of Rs. 15, made on the 5th Bhadro 1316, gives a fresh starting point and removes the bar. It is not disputed that Nanda Kumar Das was the general manager of the defendants in their Chandpur Garh, or in this timber business, and having therefore general authority to make such payments, made this payment through a Mohurrir or servant of the name of Ismail and that under date the 6th of Bhadro in his account book (Exhibit 65) there is an entry of this payment. As all the entries in this book of accounts are admittedly in the handwriting of Nanda Kumar Das, it is contended that under the provisions of Section 20 of the Limitation Act the entry of this payment gives a fresh starting point. In reply it is contended (1) that under the provisions of the Civil Procedure Code, Order VII, Rule 6, this ground of exemption from the bar of limitation should have been and was not pleaded, (2) that the payment in fact was made not in respect of the general balance of arrears, but in respect of the instalment following due in Assar 1316, (3) that an entry in the books of the defendants, that is the payer was not sufficient to satisfy the provisions of Section 20 of the Limitation Act and (4) that to satisfy the said provisions the entry should have been in the handwriting of Ismail.

11. Obviously it was not possible for the plaintiffs lessors to plead this special ground of exemption. They were relying on the six years'' rule and were ignorant of this entry in the defendants'' books.

12. The provisions of Section 20 have been enlarged by the removal of the restriction to be found in the corresponding sections of the earlier Limitation Acts as to, inter alia, the books of the debtor and the books of the creditor. This and the decision of their Lordships of the Judicial Committee in Maniram Seth v. Seth Rupchand 33 C. 1047 : 4 C.L.J. 94 (P.C.) : 8 Bom. L.R. 501 : 10 C.W.N. 874 : 1 M.L.T. 199 : 3 A.L.J. 526 : 16 M.L.J. 300 : 2 N.L.R. 130 : 33 I.A. 165 sufficiently meet the third contention.

13. No doubt the payment was by the hand of Ismail, but he is a person having no control over monies and acted merely as a messenger. The payment was by the manager out of the monies in his hand, and for the purposes of Section 20 of the Limitation Act he should, in my opinion, be regarded as the person making the

payment.

14. The substantial objection is the second and the question is, what was the intention of the person making the payment. Now, the books of accounts were produced by the defendants for another purpose and apparently this entry was not discovered by the plaintiffs until the examination of witnesses had closed and the parties were addressing the Court. In the result Sanda Kumar Das was not questioned by either side with specific reference to this payment. No doubt in the account appended to the plaint the payment has been appropriated by the plaintiffs to the general arrear balance and that appropriation was not challenged in the written statement but when pleading, neither party were aware that any special importance attached to this item. But the 5th of Bhadro was the Panyaha or the ceremonial opening day of the Zemindari year. Payments made on that day spoken of as Punyaha payments'' (vide lessors'' witness No. 67) appear to have a special ceremonial or formal character. There was a similar payment also of Rs. 15 on the Punyaha day of the preceding year. The Subordinate Judge, therefore, inferred that the payment was on account of the new year i.e., on account of the instalment following due in Assin 1316. In this view he is supported by the dissertation on the word "Punyaha" to be found in Wilson''s Glossary (which has been referred to in this Court and discussed by both parties) and also I think by the entry in the account books. That runs thus: "gather khazanar o cess, barabar raj sarkar darun kistir thakar madhya punyaha deoya" Rs. 15" which may be translated thus: Rs. 15, forest rent and cesses, paid to the Raj on the Punyaha day out of the money (payable) on account of the kist." This indicates a payment made not on account of a general arrear balance but on account of a special kist or instalment, that is, the kist of the newly opened year, On the materials placed before us I am unable to differ from the Subordinate Judge on this point.

15. In the result on the question of limitation this Appeal No. 37 fails. The question of interest I shall deal with after discussing the questions that arise in the appeal preferred by the lessees.

16. Their principal appeal is No. 69 of 1916 and in this their contentions before us are (1) that they should be allowed damages, to the extent of Rs. 12,000 on the ground that the co-sharers with the Raj in Taluk Baidya Nath Sen prevented them from cutting trees within that, Taluk, (2) that they should be allowed damages to the extent of Rs. 1,785 inasmuch as the lessors did not put them in possession of Mouza Masak which appertains in part to Zemindari No. 9, (3) that they should be allowed damages (laid in the plaint at Rs. 5,508) because four tenants claiming Miras (permanent) or rent-free rights prevented the cutting of trees within their tenures or holdings and (4) that they should be allowed damages to the extent of Rs. 3,252 by reason of the obstructive acts of certain ordinary raiyats.

17. In Taluk Baidya Nath Sen in Zemindari No. 10 the Bhawal Raj admittedly has only a 1/6th share. Their co-sharers are (1) one Swarnamoyi, widow of one Rash Mohan

Mukherjee, the owner of a half share and (2) Hara Lochan and Kumud Chandra Sen, owners of the remaining third. The evidence, however, shows that the lessees were aware of the state of the title and believed that the Raj would be able to arrange matters with their co-sharers. Kumud Chandra''s petition of 3rd Baisakh 1313 (Exhibit J-8) and Swarnamoyi''s letter of 12th Chait 1313 (Exhibit 218) show that the co-sharers were not unwilling that the settlement should be effected by the Raj but were desirous merely that the sums payable on account of the Taluk should be definitely and separately ascertained. It was arranged between the Raj Manager and the lessee that of the Rs. 80,000 Rs. 68.000 should be taken as the consideration or rent in respect of Zemindari No. 9, and Rs. 12,000 as payable on the Taluk The co-sharers thought Rs. 12,000 insufficient and demanded Rs. 20,000. The difference of opinion not having been settled, on the 22nd Sravan 1313, August 1906,by a notice, Exhibit 2, Swarnamoyi prohibited the lessee on pain of suit from cutting trees within the Taluk (vide Exhibit 79). Later, on the 24th Baisakh 1315, 7th May 1908, one of her officers reported to the local Thana the probability of a breach of the peace and on the 11th June of that year obtained the issue of a prohibitory order under the provisions of Section 144 of the Criminal Procedure Code. This apparently expedited the negotiations between the lessees, the Raj and its co-sharers and it was eventually arranged that to the Taluk should be apportioned the sum of Rs. 20,000, that out of the monies paid by the lessees the Raj should pay its co-sharers and that to compensate the lessee for the loss, if any, caused to him, his lease of the Garhs within the Taluk should be extended without further payment to the close of Chait 1320. The lessee appellant urges that the negotiations were for the extension of the term of the lease in respect of both Zemindari No. 9 and the Taluk and that the negotiations fell through. In support of this they produce certain drafts and letters [e.g., Exhibits 12, 15, 13, 14(1)] for their possession of which they have not given a satisfactory explanation, but it is clear from Exhibit J-l, dated 2nd Kartiok 1315, October 1908, Exhibit K, the oral evidence of Swarnamoyi and of Rani Bhutan Banerjee (Swarnamyi''s son-in-law), Exhibit C, Jogesh Bhattacharjee''s letter of 13th Assin 1315, September and October 1908, also from the evidence of Nanda Kumar, who says that in Assin 1315, September and October 1908, he received instructions from Jogesh to proceed with the cutting of trees in the Garb, of the Taluk, that an arrangement was arrived at and was as I have already stated. If no document was executed as the appellants now complain, that was evidently because neither the lessee nor any one else considered it necessary. Payment in so far as the Taluk was concerned had been made in full.

18. This concludes the lessee''s claim for damages in so far as this head is concerned. But apart from this, in my opinion, the Subordinate Judge has not taken a correct view of the evidence regarding the number of trees removed by the lessee from the Taluk. That they did out trees both before, the prohibitory order and again after the settlement arrived at in or about September 1908 is clear. If a large number of witnesses have to be examined they must necessarily be examined on

different dates, and the trifling discrepancies and mistakes made by some of the lessors'' witnesses do not appear to be sufficient reasons for discrediting them or for believing that they had been tutored. Overmuch importance again appears to have been attached to the lessors'' refusal to consent to a local investigation. The suit was instituted on the 15th April 1912 and the application for local investigation was not made until 26th February and again on the 29th May 1914, some three years after the expiration of the original lease. Moreover, from the deposition of Rajendra Chandra Nag, formerly in Government service and in 1913 acting as ohief manager of the Bhowal Raj, it appears that in July of that year, corresponding with Sraban 1320, he accompanied the Collector of the District to Dihi Chandpur and Taluk Baidya Nath Sen to investigate the alleged grievances of the lessee with a view to a compromise. This was at the instance of the lessee and yet at this investigation they were represented by one Raj Behari Das, who had no personal knowledge of the matters in question, and by Tarak Brother of Jogesh, who has not been examined. There can be no reason for disbelieving Raj Chandra Nag when he says (refreshing his memory from his diary) that in Mauza Kote Bujali within Taluk Baidya Nath Sen, in two of the ''Teks'' pointed out here were no eligible trees left, that in a third most had been removed and that in only two was there any appreciable number of eligible trees uncut (say 350 in Momaraar Baro Tek, half in Manjuskhola Tek, and some 6 trees on a homestead). This goes to corroborate the evidence of the other witnesses, the general effect of which is to show, as the Subordinate Judge states, that only 1,000 trees fit for the axe were left in the Taluk. As the lessees deny the cutting of any trees, the evidence of the lessors'' witnesses stands unrebutted and, in my opinion, should have been believed. On this footing, taking an average of Rs. 2 as the net value of the standing trees, the lessees would be entitled under this head to a sum of Rs. 2,000 by way of damages. The contention of the appellant that damages should be calculated on the footing that the premium, the capital expended in the operations, and the profits are 3 equal parts of that whole, is an effort of the imagination and is inconsistent with his claim as laid in the plaint under other heads.

19. That the lessees were kept out of possession of Mouza Masak is not disputed. The contention of the lessors is that Masak was not included in the lease.

20. The right to settlement, it may be observed, was put up to auction, the auction being conducted by the officers of the Raj. The bidding began in Sraban 1311, and was interrupted by the fact that from the month of Assin to the month of Chait 1311, the estate was in the hands of the Court of Wards. The auction was re opened in Jeth 1312 and was closed in Chait 1312 when on the 25th of that month [vide Exhibits I (I) and I (2)] the settlement with the Thakurs was concluded. The bid sheet, Exhibit M, has been produced. In the description of the ''Grarh'' put up to auction by the use of the words "Sewai (except) Masak", Masak is expressly excluded. The authenticity of Exhibit M is not and cannot be questioned, but the Subordinate Judge thinks that the words "Sewai Masak" are a fraudulent interpolation inasmuch as the letters of

the words "Sewai Masak" touch or impinge upon the horizantal stroke or dash finishing off the words ''Gujarigarh.'' I am unable to agree. No doubt, it would seem that the words were added after the dash had been made but this is consistent with the correction of a mistake. The words "Sewai Masak" are in the same handwriting with the rest of that portion of the bid sheet. The writer, one Sarada Charan Chakerbutty, it has been shown, left the service of the Estate in Chait 1311 and the piper is now produced from the Court of Wards. Of the bidders, Monmohan Adhikari, a man of 73, who appears to be a substantial and disinterested witness, swears that be knew of the exception of Masak and saw the words when he signed the bid sheet. He is corroborated by another witness Kali Mohan Das, also a Talukdar and apparently independent. The lessee''s Manager Nanda Kumar Das also signed the bid sheet, but evades this question by saying that he did not look at that side of the sheet, where he would also have seen the estimated number of trees and the matter on which the parties were in controversy.

21. I am, therefore, of opinion that the intention of the lessors at the time of the -bidding was to exclude Masak, but as Masak is admittedly in part within Zemindari No. 9 and within Dihi Chandpur, and as the lease covers not merely specified Mouzas but also expressly "all the Mouzas and Paras within the jurisdiction (ambit) of Dihi Chandpur appertaining to the said Zsmindari", this finding is not sufficient to exclude Masak. Fraud was not expressly pleaded by the lessors and that being so merely on the basis of the letters, Exhibits N-1 and N-5 (though these letters do appear to be in the writing of Nanda Kumar Das) and the delay made by the lessees in attempting to enter or sublet Masak (vide Exhibits 17 and P-14) it cannot, I think, be held that fraud was practised.

22. The lessees'' claim to damages for their exclusion from Masak is, therefore, established and having regard to the Amalnama, P-14 (though this includes Ghatkur, as well as Masak) and the oral evidence (vide, for instance, the deposition of lessors'' witness No. 1), we cannot say that the figure Rs. 1,785 taken by the Subordinate Judge is too high.

23. In respect of the four permanent or rent free tenures, the evidence on both sides appears to be meagre and we have not been referred to it in any detail. The evidence of Jogesh Thakur shows that he was aware of the existence of many such tenures and that the trees standing thereon were not within his lease. On this part of the case we must accept the finding of the Subordinate Judge.

24. With regard to the opposition offered by other tenants, which, under the terms of the lease, it was for the lessor to overcome, the Subordinate Judge has acted on the evidence of Nanda Kumar Das who refreshes his memory by reference to copies of reports submitted by him at the time (Exhibits 27 and 31 to 52). But in the most important case, that of Amani Sheikh in respect of whom the claim is laid at Rs. 2,100, Nanda Kumar cannot say that he did not ultimately get the trees. Moreover, he admits a receipt (P-13) given to Amani for a sum of Rs. 60. With respect to this

matter Amani and Monmohan Adhikari have given evidence. The Subordinate Judge appears to be of opinion that their evidence and the receipt relate to a second and later transaction, but this suggestion does not appear to have been made by Nanda Kumar or to Manmohan and if Amani refused to pay on one occasion there seems to be no reason why he should agree to pay on a second. The claim in so far as regards Amani, in my opinion, has not been made out.

25. In the case of the other 22 tenants we have not been referred to any rebutting evidence and we, therefore, accept the Sub-ordinate Judge''s finding and hold that the lessees have established their claim under this head to the extent of Rs. 1,152.

26. We thus find that the lessees have proved damage to the extent of Rs. 1,785 plus Rs. 1,152=Rs. 2,937 which sums should carry interest at the Kabuliyat rate, Rs. 1,785 from the date of Exhibit P-14 and Rs. 1,152 from the last day of Chait 1317.

27. But we have next to consider whether the Subordinate Judge was right in refusing to make a decree for damages on the ground that the damage proved falls far short of the rent withheld by the lessees and now barred by limitation. We are of opinion that the lessees having thus recouped themselves, the lessons are entitled to make this claim. In the result, therefore, Appeal No. 89 will be dismissed with costs both in this Court and in the Court of first instance.

28. Appeal No. 75 is in the nature of a cross-objection to Appeal No. 37. Here the lessee appellants contend that by reason of their exclusion from Mouza Masak they are entitled not merely to the damage claimed but also to suspension or remission of the whole rent on the principles applicable to agricultural holdings. From what date this suspension, should take effect has not been clearly stated but if the principle be at all applicable, the suspension could not take effect from any date prior to the execution of the Amalnama P-14 on the 23rd Falgoon 1317. But in my judgment this principle does not at all apply. Here the lump sum to be paid is arrived at on a consideration of the number or estimated number of trees fit to be out and removed, and this number is again arrived at by counting roughly the number within each Garh or Mouza. In working out a contract of this sort the value of each Garh or Mouza can then be, and in fact is, separately ascertained. The lessees were aware that the lessors contended that Masak was not within the lease and were content to continue operations until the close of Falgoon 1316 when the whole sum payable was long overdue. In this state of facts the appropriate remedy appears to be in damages calculated on the net value of the trees of which he has been deprived.

29. In the result Appeal No. 75 should also be dismissed with costs.

30. We have lastly to consider the question of interest in Appeal No. 37. No doubt interest pending suit is in the discretion of the Court. But such discretion should be exercised on sound judicial principles. Oar examination of the facts has led us to the conclusion that the lessors did all in their power to facilitate the operations of the

lessees, that in the matter of Mouza Masak their contention was well founded in equity, that in the matter of Taluk Baidya Nath Sen they made with the lessees a sufficient and equitable arrangement. We must, therefore, conclude that in withholding the consideration as it fell due the conduct of the lessees was unreasonable and dishonest. The suit remained pending for three years and four months and there appears no just reason why for this long period the lessors should be deprived of interest on the money due to them.

31. We, therefore, direct that the sum adjudged due shall carry interest at the Kabuliyat rate up to the date of decree in the suit and that the aggregate sum adjudged and costs in the Court of first instance and in this Court shall carry interest at the usual Court rate, six per cent, per annum.

32. In the result, Appeal No. 37 is decreed in part as indicated above with proportionate costs.

33. With regard to the cross-objection in Appeal No. 89 nothing was said to us at the hearing of the appeals. It appears to be covered by the decision in the appeals and no separate order is necessary.

Richardson, J.

34. I agree. On the question whether the lessors'' suit for the balance due to them from the lessees under the agreement of 1906 was governed as to limitation by Schedule" III of the Bengal Tenancy Act or by the General Act of 1908, Mr. Sarkar, I think, said that he had not been able to find any authority on the meaning of the expression "forest rights" as used in Section 193 of the Tenancy Act. The expression, no doubt, is a general one corresponding to the Indian term "Bankar," just as "Jalkar" means water rights" Amriteswari Bebi v. Secretary of State for India 24 I.A. 33 : 24 C. 504 (P.C.) : 1 C.W.N. 249 7 Sar. P.C.J. 101 : 12 Ind. Dec. (N.S.) 1003 In that case Lord Watson delivering the judgment of the Board observed that their Lordships were satisfied that the term Jalkar was a general one, signifying water rights and might, therefore, aptly include the right to drift and stranded timber, as well as the right to fishings or any other interest of a similar kind in the produce of the river.

35. In the present case there seems no doubt that the lessors'' suit was for the recovery of money payable in respect of fore it lights within the meaning of the Act.