

164 Ind. Cas. 457**Calcutta High Court****Case No: None**Prosanna Kumar Mistri
and Another

APPELLANT

Vs

Sudhangsu Kumar Roy
Choudhury and OthersRESPONDENT

Date of Decision: Dec. 14, 1934**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 188, 52

Citation: 164 Ind. Cas. 457**Hon'ble Judges:** R.C. Mitter, J**Bench:** Single Bench

Judgement

R.C. Mitter, J.

This appeal is on behalf of the legal representatives of defendant No. 9, in a suit instituted by the plaintiffs for recovery of rent for the years 1332 to 1335 B.S. The plaintiffs are the 10 annas co-sharer landlords and they instituted the suit for recovery of their share of the rent at the rate of Rs. 70-12-6 per year in their share making the six annas co-sharer landlords parties defendants. In the plaint they state that they have separate collections and that they have not been able to ascertain what amount of rent is due for the period in suit to their co-sharers. In para. 3 of the plaint they state that Nrishna Mohan Mistry and another, the predecessors-in-interest of the tenant defendants, executed a kabuliyat in favour of their predecessor-in-interest on Sravan 26, 1299, B.S. by which they stipulated to pay rent at the rate of Rs. 4 per bigha on an area of 20 bighas 1 catta 5 chittaks 13 1/2 dhurs of land, that is, Rs. 80-5-4 a year. They further state that the lands of the tenancy have been found now to measure 28 bighas 6 cattas 1 dhur. They further state that in the kabuliyat there is a stipulation that if on measurement the lands held by the tenants be found to be more, the tenants bound themselves to pay rent at the same rate according to the area found on measurement. On the basis of this contract they say that the rent would be Rs. 113-3-4, and in their share Rs. 70-12-6 a year. Both the Courts below have found

that the area in the possession of the defendants is 28 bighas 6 cattas 1 dhur according to the local standard of measurement but an allowance of 5 per cent. has been made in favour of the tenants and the plaintiffs have been given a decree at the rate of Rs. 67-4-9 per year in their share. There is no kabuliyat in favour of the six annas landlords.

2. Before me the appellants contend that the plaintiffs cannot in the suit as framed claim at a rate of more than 10-16th of Rs. 80-5-4 per year. They say that (1) Section 188 of the Bengal Tenancy Act is a bar to their claim for additional rent inasmuch as the six annas co-sharers landlords have not joined as plaintiffs and that Section 148-A cannot help the plaintiffs and (2) that the said claim is barred by res judicata.

3. It would be convenient to deal with the last point first. The facts bearing upon the said question are the following. In the year 1925 the present plaintiffs and the six annas co-sharer landlords as plaintiffs instituted a suit for additional rent for additional area under s 52 of the Bengal Tenancy Act. In the plaint of that suit the kabuliyat of Sravan 26, 1299, was also pleaded. This suit was carried on appeal to this Court. It was held that the claim u/s 52 of the Bengal Tenancy Act was not admissible as the tenancy, which is a ryoti one, included undivided plots of land. The claim on the basis of the contract as evidenced by the said kabuliyat was also held not maintainable on the ground that the said kabuliyat had not been executed in favour of all the landlords who were then suing jointly for additional rent [[Benod Kumar Roy Chowdhury and Others Vs. Ganga Charan Mestari and Others](#),]. On these facts the appellants contend that the present suit is barred by the rule of constructive res judicata. The question then is whether the claim as laid in this suit might and ought to have been laid in the suit of, 1925. The kabuliyat was pleaded there and the claim was laid on its basis also in that plaint but the Court held that the 10 annas co-sharer landlords could not succeed on its basis as they had joined with them the six annas co-sharers who were not parties to the kabuliyat. The Court in effect held that the claim on the basis of the kabuliyat could not be pleaded in that suit as framed. I do not see how after this it can be urged that the present claim is barred by the rule of constructive res judicata. In this view of the matter it is not necessary to consider how far the decisions which lay down that in constructive res judicata there must be identity of the subject-matter. *Surjeram Marwari v. Barhamdeo* 1 CLJ 337, *Gurudeo v. Ghandrikh Singh* 5 CLJ 611 : 1 Ind. Cas. 913 : 36 AC 193, have been affected by the decision of the Judicial Committee in AIR 1925 55 (Privy Council) . I hold accordingly that there is no substance of the appellants' contention on this point.

4. I am also unable to uphold the first contention of the appellants. Section 188 of the Bengal Tenancy Act has in my judgment no application as the suit is based not on Section 52 of the Bengal Tenancy Act but on the contract as evidenced by the kabuliyat. In order to succeed the plaintiffs have not to call in their aid any of the provisions of the Bengal Tenancy Act. Their suit is based on contract pure and simple and they seek the aid only of the general law. The case of *Bhosai v. Aminuddin* 21 CWN 371 : 37 Ind. Cas. 847 : AIR 1917 Cal. 585 : 22 CLJ 469 and *Govinda v. Hamidulla* 7 CWN 670, are direct authorities in favour of the plaintiffs. In the first mentioned case the suit was also framed

u/s 148-A as in the case before me. Two cases apparently seem to militate against the view I am taking. These are Darik Dhakai v. Aswini Kumar 18 CWN 942 : 20 Ind. Cas. 659 : AIR 1914 Cal. 141 and Baidyanath v. Sheikh Him 2 CWN 44 : 25 AC 917. In the latter case a co-sharer landlord in whose favour the tenants had executed a kabuliyat instituted a suit for enhancement of rent u/s 30 of the Bengal Tenancy Act and also prayed for additional rent for additional area, without making his co-sharer landlords parties. The claim u/s 30 of the Act was clearly inadmissible but to support the claim for additional rent he relied upon the kabuliyat. It was held that the claim for additional rent was not maintainable, his co-sharers not having joined in the suit. This case was cited in Govinda V. Hamidulla 7 CWN 670, and Prinsep, J. distinguished it on the ground that the kabuliyat there had not been acted upon in regard to separate payment of rent to the plaintiff. I think that Baidyanath's case 2 CWN 44 : 25 AC 917, is distinguishable also on another ground. In the kabuliyat the tenant agreed to pay rent due to Baidyanath's share separately. The clause relating to the recovery of additional rent was in the following terms:

If according to your measurement jamabandi the jama of my jote is increased I shall pay rent and give kabuliyat without objection according to the increased rate.

5. The learned Judges held on a construction of this clause that:

if the rent of the entire holding be increased, increased rent shall be paid to the plaintiffs for their share of the holding.

6. The underlining (Italicised words) is mine.

7. But they said that the rent of the entire holding could be increased only under the Bengal Tenancy Act. In Darik Dhakai's case 18 CWN 942 : 20 Ind. Cas. 659 : AIR 1914 Cal. 141 where Baidyanath's case 2 CWN 44 : 25 AC 917, was followed Coxe, J. took Baidyanath's case 2 CWN 44 : 25 AC 917, as laying down the proposition that the existence of an agreement to pay additional rent does not necessarily take the suit out of the Tenancy Act. The said learned Judge observed thus:

It is provided by the Tenancy Act and it must be common knowledge that a tenant is bound to pay additional rent for additional land and is entitled to reduction of rent if the area is reduced. If the landlord and tenant include a stipulation to that effect in their contract, it certainly seems to me unreasonable that the existence of such a stipulation should oust the application of the Tenancy Act from which it was in all probability derived.

8. It would have been necessary for me to examine the correctness of this dictum if the kabuliyat in the case before me had been executed in favour of all the landlords as was the case before Coxe and Ray, JJ. in Darik Dhaka's case 18 CWN 942 : 20 Ind. Cas. 659 : AIR 1914 Cal. 141. Coxe, J. however, himself laid down in that case that the said dictum would not apply to a case where the kabuliyat stipulating for payment of additional rent is not in favour of all the landlords but in favour of some of them. In the latter case he held

that a suit by such co-sharer landlords only, would be maintainable. On giving my anxious consideration to the question I hold that the first point urged by the appellants is not sound on the reasons I have given above. The result is that the appeal is dismissed with costs.

9. Leave to appeal under the Letters Patent asked for is granted.