

Rai Moni Dasi and Others Vs Mathura Mohan Roy

Court: Calcutta High Court

Date of Decision: April 2, 1912

Acts Referred: Registration Act, 1877 " Section 3
Transfer of Property Act, 1882 " Section 105, 107

Citation: 14 Ind. Cas. 540

Hon'ble Judges: N. Chatterjea, J; D. Chatterjee, J

Bench: Division Bench

Judgement

N. Chatterjea, J.

This appeal arises out of a suit for recovery of ijara rent, based upon as ijara kabuliat executed by the defendant in

favour of the predecessor-in-interest of the plaintiffs, whereby the defendants undertook to collect rent of 48 and odd hits of land for four years

and agreed to pay to the lessor Rs. 400 a year.

2. The defence was that the contract was not completed as no pattah was granted by the lessor, that the lessor never allowed the defendants to

take possession of the lands, that one hat of land (nine plots) which really belonged to the defendants had been fraudulently included in the kabuliat

which was executed without full knowledge of its contents and that as the kabuliat was not corrected, the defendant surrendered the lease, that the

kabuliat was never acted upon and that the defendant was not, therefore, liable to pay anything.

3. The Court of first instance finding all the above pleas in favour of the defendant dismissed the suit. On appeal, the lower Appellate Court held

that the registration of the kabuliat was a sufficient compliance with the provisions of Section 107 of the Transfer of Property Act, that the absence

of a pattah does not invalidate the contract, that the kabulit was duly executed and there was no fraud or mis-representation practised on the

defendant to secure its execution.

4. As regards the nine plots of land, the lower Appellate Court held that there was some difficulty in ascertaining the actual facts as there had been

no local investigation but that he agreed with the Subordinate Judge, who had gone into the question incidentally, in holding that the nine plots were

in possession of the defendant and his co-sharers from long before the date of the kabuliat as maliks, The lower Appellate Court, however, held

that an agreement to pay rent for land already in the lessee's possession as owner is void and that the mistake in including the nine plots of land

was regarding a matter of fact essential to the agreement and, therefore, the agreement was altogether void and plaintiff was not entitled to recover

rent.

5. The plaintiffs have appealed to this Court. It has been contended on their behalf that the lower Appellate Court having held that the kabuliati

constituted the contract of lease and was duly executed, and the case of fraudulent mis-representation having been found against the defendant, the

lower Appellate Court ought to have decided the question whether, as a matter of fact, the nine plots really belonged to the defendant, and even if

they belonged to the defendant, the plaintiffs ought to have been given a decree for proportionate rent for the remaining lands.

6. On behalf of the defendant-respondent, it has been contended that in the absence of a pattah, the kabuliati could not constitute a lease within the

meaning of Section 107 of the Transfer of Property Act. It has been further contended that even if the kabuliati operated as a lease and if the case

should be remanded at all, there were a number of questions raised in the case which were decided by the Court of first instance, but were not

decided by the lower Appellate Court and that the latter should be directed to decide the said questions.

7. So the first question for determination is whether a registered kabuliati executed by the lessee and accepted by the lessor operates as a lease

within the meaning of Section 107 of the Transfer of Property Act.

8. There can be no question in this case that the kabuliati was accepted by the lessor, as the suit has been based upon it.

9. Section 105 of the Transfer of Property Act defines a lease of Immovable property as a transfer of a right to enjoy such property made for a

certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, or share of crops, service or any other

thing of value to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms. The

section does not prescribe how the transfer is to be effected. Section 107 prescribes the mode in which a lease is to be effected and provides that

a lease of Immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered

instrument. Section 4 of the Transfer of Property Act provides that Section 107 and certain other sections shall be read as supplemental to the

Indian Registration Act, 1877, which means that it is to be read as supplemental to all the provisions of the Registration Act. u/s 3 of the

Registration Act of 1877, a lease includes a kahuliat. Reading Sections 4 and 107 of the Transfer of Property Act together with Section 3 of the

Registration Act of 1877, it would appear that a lease in Section 107 includes a kahuliat. Section 107 of the Transfer of Property Act does not

require that the instrument shall be signed by the lessor. The only thing required by it is that the lease (i.e., the transfer of a right to enjoy property)

should be effected by a registered instrument, Now if the parties to a lease, viz., the lessor and the lessee, agree that the lessee is to have a right to

enjoy a property on certain terms and that the fact of the transfer of such right is to be embodied in an instrument, to be executed by the lessee only

and accepted by the lessor, there is no reason why a lease cannot be effected by such an instrument provided it is registered which is the only

condition required by Section 107 of the Transfer of Property Act. The argument that in order to constitute a lease there must be a paitah, i.e., a

writing signed by the lessor, proceeds upon the assumption that the kahuliat is only an unilateral expression of intention on the part of the lessee

only, but it is, as I have said above, the embodiment of the whole contract between the lessor and the lessee viz., the transfer by the lessor of the

right to enjoy the property on certain terms and the acceptance by the lessee of the right on those terms.

10. The case of a sale does not stand on the same footing, as there is no provision in the Registration Act relating to sales such as is contained in

Section 3 relating to a lease, viz., that it includes a kahuliat.

11. It is a common practice in this country, where no pattah is executed, to treat a kahuliat, accepted by the lessor, as the instrument creating a

tenancy and there can be no question that, before the passing of the Transfer of Property Act, a lease could be effected by an instrument signed by

the lessee only and registered in cases where registration was compulsory. u/s 3 of the Registration Act of 1877, a lease includes a kahuliat; so that

before the passing of the Transfer of Property Act in cases where a registered instrument was necessary under the Registration Act, a kahuliat

executed by the lessee, if registered, was legally sufficient to constitute a lease. It was not necessary for the creation of a lease that the landlord

should grant a pattah. It was sufficient if the tenant executed a kahuliat which was accepted by the landlord. See Akram Ali v. Burga Prosonna

Roy Chowdhry 14 C.L.J. 614 : 10 Ind. Cas. 489. Section 105 of the Transfer of Property Act does not introduce any change in the legal

conception of a lease which, before the passing of that Act, could be effected by a registered instrument signed by the lessee only. The provision in

Section 4 of the Transfer of Property Act that Section 107 and certain other sections of that Act shall be read as supplemental to the Indian

Registration Act, 1877, was introduced with that Act by the amending Act of 1885 (Act III of 1885). So far, therefore, from laying down that an

instrument of lease does not include a kahuliat and, therefore, must be an instrument signed by the lessor, it makes Section 107 supplemental to all

the provisions of the Registration Act including Section 3 and the provision in Section 3 of the Registration Act, III of 1877 that a lease includes a

kahuliat has been re-enacted without any modification in Section 2(7) of the Registration Act of 1903.

12. The Legislature has prescribed no form for a lease and, in the absence of any provision in the Transfer of Property Act that a lease in order to

be valid must be signed by the lessor, I am unable to hold that a registered kahuliat, which is accepted by the lessor, is not a lease within the

meaning of Section 107 of the Transfer of Property Act.

13. As to the authorities on the point, the earlier cases in the Allahabad High Court were in favour of the view that a kahuliat cannot be considered

as a lease within the meaning of Section 107, Transfer of Property Act. In Nand Lal v. Hanuman Das 26 A. 368 Blair, J., followed an earlier

decision of Edge, C.J., and Burkitt, J., in which the learned Judges held that a kahuliat is merely an agreement executed by a tenant to take the

tenancy and that in itself it contains no agreement of the landlord on his part to lease the land. It does not appear whether in that case, there was

acceptance of the kahuliat by the landlord. Blair, J., was of opinion that the word "instrument" in Section 107 shows that the document must be one

which must have certain executive force and that upon its execution the lease is completed. Banerjee, J., did not desire to express any opinion on

the question having regard to the fact that it is a common practice in these Provinces to treat a kahuliat as the instrument creating a tenancy and that

a ruling upholding the contrary view may unsettle titles. The case of Kashi Gir v. Jogendro Nath Ghose 27 A. 136 : A.W.N. (1904) 189 was

heard by Blair, J., sitting singly and he followed his judgment in Nand Lal v. Hanuman Das 26 A. 368.

14. The question was raised before a Full Bench of the Allahabad High Court in the case of Sheo Karan Singh v. Maharaja Parbhu Narain Singh

31 A. 276 : 2 Ind. Cas. 211 : 6 A.L.J. 167 : 5 M.L.T. 347 but the Full Bench expressed no opinion on the point inasmuch as they found that

under the circumstances of the case, the plaintiff was clearly entitled to recover compensation for use and occupation. The Full Bench seem to have

been in doubt as to the correctness of the earlier decisions as they declined to express any opinion as to their correctness.

15. In the Madras High Court, Benson and Wallis, JJ., held, in Turof Sahib v. Esuf Sahib 30 M. 322 : 2 M.L.T. 270 : 17 M.L.J. 395 that a lease

must be an instrument bearing the signature of the lessor, and that case was followed by Benson and Miller, JJ., in *Kaki Subbanadri v. Muthu*

Rangayya 32 M. 532 : 4 Ind. Cas. 1039 : 6 M.L.T. 175. In none of the cases cited above, except in the last case, was any reference made to

Section 4 of the Transfer of Property Act. It is not necessary to consider, however, the cases in the Madras High Court in detail because in the

recent case of *Ajam Sahib v. Madura* 21 M.L.J. 202 : 1 M.W.N. 766 : 8 Ind. Cas. 668 : 8 M.L.T. 437 : 35 M. 95 a Full Bench of that Court

held, after an exhaustive discussion of the matter, that the registered instrument referred to in Section 107 of the Transfer of Property Act in order

to be valid need not be signed by the lessor.

16. In our Court in the case of *Nil Mamud Sarkar v. Bowl Chandra Das* 14 C.W.N. 73 : 2 Ind. Cas. 994 : 10 C.L.J. 555 the learned Judges

(Chitty and Carnduff, JJ.) agreeing with the cases of *Nand Lal v. Hanuman Das* 26 A. 368; *Kashi Gir v. Jogendro Nath Ghosh* 27 A. 136 :

A.W.N. (1904) 189 and *Turof Saheb v. Esuf Sahib* 30 M. 322 : 2 M.L.T. 270 : 17 M.L.J. 395 held that a *kabuliat*, which is only an undertaking

by the prospective tenant to take the tenancy, is not a lease. Of course, a *kabuliat* executed by a lessee in itself, does not create a lease unless it is

accepted by the landlord; and that case is distinguishable, as in that case one of the landlords at any rate did not accept the lease.

17. In a later case *Akram Ali y. Durga prosonna Roy Chowdhry* 14 C.L.J. 614 : 10 Ind. Cas. 489, *Mookerjee and Coxe, JJ.*, held that it was

impossible to maintain the view that for the creation of a permanent lease before the Transfer of Property Act it was necessary that the landlord

should grant a *pattah*. The *kabuliat* that case was executed before the Transfer of Property Act but the learned Judges, with reference to the case

of *Nil Mamud v. Bowl Das* 14 C.W.N. 73 : 2 Ind. Cas. 994 : 10 C.L.J. 555 observed: "we need not, therefore decide whether under the Transfer

of Property Act the law is different, but we observe that a Full Bench of the Madras High Court--*Ajam v. Madura* 21 M.L.J. 202 : 1 M.W.N.

766 : 8 Ind. Cas. 668 : 8 M.L.T. 437 : 35 M. 95 has assigned as reasons in support of the view contrary to that, maintained in *Nil Mamud v.*

Bowl Das 14 C.W.N. 73 : 2 Ind. Cas. 994 : 10 C.L.J. 555.

18. The result of the authorities, therefore is this: In the Madras High Court, the earlier cases which held the contrary view must now be taken to

have been overruled by the recent Full Bench which supports our view. In the Allahabad High Court, although the earlier cases took a contrary

view, a Full Bench of that Court declined to express any opinion as to the correctness of the earlier ruling and in our own Court though in one case

the learned Judges agreed with the earlier Allahabad cases and one of the Madras cases, the case is distinguishable on the ground that one of the

landlords did not accept the kabuliati, and in the latest case, *Akram Ali v. Durga Prosunno Roy* 14 C.L.J. 614 : 10 Ind. Cas. 489 the learned

Judges observed that the reasons given by the Full Bench of the Madras High Court were weighty, though the observation was by way of obiter

dictum.

19. The weight of authority, therefore, appears to be rather in favour of the view I take, than against it and I am of opinion that a registered kabuliati

signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of Section 107 of the Transfer of Property Act.

20. The first contention raised on behalf of the respondent, therefore, must be overruled.

21. The next question is whether the inclusion of the nine plots of land in the possession of the defendant in the kabuliati renders it void. The lower

Appellate Court has found that there was no fraud or mis-representation in the matter and that there was only a mistake, but held that the mistake

was regarding a matter of fact essential to the agreement and, therefore, the agreement was void.

22. I cannot agree to this view. In the present case, the lands in the possession of the defendant which are included in the kabuliati are small in

comparison with the total lands demised and I am unable to hold that in the absence of any fraud or mis-representation, the mere inclusion by

mistake of some lands in the possession of the defendant or belonging to him, in the kabuliati renders it altogether void. In such a case, I think there

should be an apportionment of the rent for the remaining lands.

23. I am of opinion that the lower Appellate Court should come to proper findings upon the following questions:

1st, whether the plaintiffs had a title to the nine plots (one hat) of land of which the defendant was already in possession? How long was defendant

in possession and whether he had acquired any title by such possession?

2nd, whether the plaintiff failed to deliver possession of the remaining 47 hats of land and failed to supply the defendant with the towzi and

collection papers in order to enable the defendant to collect rent?

3rd, whether the kabuliati was acted upon?

4th, whether the defendant surrendered the iara and was there a valid surrender?

24. If the last three questions are found in favour of the plaintiffs, and the first against them, the lower Appellate Court will apportion the rent with

respect to the remaining lands. If the last three questions are found against the plaintiffs, the first question need not be gone into. The decree of the

lower Appellate Court is accordingly set aside and the case sent back to that Court for a decision of the case in accordance with the observations

made above. Costs to abide the result.

D. Chatterjee, J.

26. I agree.