(1922) 04 CAL CK 0017

Calcutta High Court

Case No: None

Krishnendra Nathsarkar and Others		APPELLANT
	Vs	
Rani Kusum Kamani Debi and Others		RESPONDENT

Date of Decision: April 8, 1922

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 7

Citation: AIR 1923 Cal 351 : 76 Ind. Cas. 324

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

Bench: Division Bench

Judgement

1. This appeal arises out of a suit for enhancement of rent of a jote and also for additional rent for increase in area. The defence was that the tenure was a mourasi mokarrari one, that the rent was not liable to enhancement; and that there was no increase in area. The claim for additional rent for additional area was dropped in the lower Appellate Court. The Court of first instance, held that the rent was not liable to enhancement. The Court of Appeal below held that it was, and gave a decree for enhancement of rent. The defendants have appealed to this Court.

2. It appears that the plaintiff''s father-in law granted a jote. potta in favour of one Biswanath Sarkar, the defendant''s predecessor, on the 22nd Poush 1276 B.S. in respect of an entire mourn (Malda,); and two jotes situated in two other villages, one of which stood in the name of Biswanath''s father and the other in the name of his uncle. The rent settled for the entire tenancy was Rs. 418-9-5. The material portion of the potta runs as follows:

You will enjoy from generation to, generation keeping intact the boundaries as before, The profit and, loss are yours, You will on no account ''be entitled to claim a reduction of rent. When required by me you will submit to, jariy jamabandi If any

new imposition, be made by the Government, you will pay it, besides; the jama, of this potta.

3. The expression "jote" in the potta, does not mean that the tenancy is a raiyati holding. The expression ""'jote" is a general term and does not necessarily mean a raiyati jote (see Midnapur gemndari Com pany v. Naresh Narayan, Roy 64 Ind. Cas. 231 : 48 I.A. 49 : 48 C. 460 : 14 L.W. 265 : 30 M.L.T. 279 : A.I.R 1922 P.C 241 (P.C.), The petto. comprised an entire mouza, and the respondent, does not dispute- that it is a tenure. In tact the claim for enhancement has been treated in the Courts, below as being one u/s 7 of the Bengal Tenancy Act.

4. In the case of Bamasoondery Dassyah v, Radhika Chawdhrain 13 M.I.A. 248 : 4. B.L.R. 8 : 13 W.R.P.C. 11 : Suth P.C.J. 293 : 2 P.C.J. 524 : 20 E.R. 544, the Judicial Committee observed: "A suit to enhance rents proceeds on the presumption that a zemindar, holding, under the perpetual settlement has the right from time to time to raise the rents of all the rent paying lands within his zemindari according to the perganah or current rates, unless either he is precluded from the exercise of that right by a contract binding on the heirs, or the lands in question can be brought within one of the exemptions recognized by Bengal Regulation VIII of 1793". The contention of the appellant in the present case is that the rent is, fixed by the contract, and not liable to alteration.

5. The expression "mokarrari" oridinarily used to indicate fixity of rent, does not appear in the potta, but the absence of the. expression does not negative'' fixity of rent if it can be gathered from the terms of the document.

6. The lease provides, that lessee is to enjoy from "generation to generation." That, no doubt, shows that a heritable right was. given, Reliance is placed on the case of Sonet Kooer v. Hammut Baha-door 1 C. 391 : 3 I.A. 92 : 25 W.R. 239 : 3 P.C.J. 608 : 3 P.C.J. 257 : 1 Ind. Dec. 245 (P.C.) where their Lordships observed that: "The grant was clearly intended to create en absolute and hereditary mohair rari tenure, inasmuch, as it contains the essential words generation to generation which in documents of that kind have always been'' considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary mokarrari istimrari tenure." But in that case a mokarrari right was expressly granted, and there was no question about the fixity of rent. Reference was also made to Port Canning and Land Improvement Co. v. Katyani Deli 53 Ind. Cas. 522 : 47 C. 280 : 46 I.A. 279 : 32 C.L.J. 1 : 24 C.W.N. 369 : 37 M.L.J. 578 : 17 C.L.J 1061 : 1 U.P.L.R. 91 : (1920) W.N. 160 : 11 L.W. 296 : 22 Bom. L.R. 437 : 27 M.L.T. 195 (P.C.), where the Judicial Committee referring to the fact that the tenure in question was admitted to be heritable (mourasi) and by their conduct in bringing it to sale admitted it to be transferable observed. "Ordinarily, the two admitted characteristics would create a presumption in favour of the tenant, and throw on the plaintiff the onus of showing that the tenure is wanting in the characteristic of fixity of rent. But assuming that the onus lay on the defendant, their Lord ships are

of opinion that she had fully discharged it."

7. The lease in that case was a reclamation lease of jungle lands in the Sunder bans, no rent was payable for some years from the beginning of the tenancy and there was a progressive scale of rent. Their Lordships held that the rent mentioned In the lease as the last in the series of the progressive rents was intended to be fixed in perpetutiy. The decision proceeded upon the principle laid down in Golam Ali v. Gopal Lal Thakoor 9 W.R. 65, on appeal to the Privy Council and Huro Prasad Roy v. Chundee Churn 9 C. 505 : 12 C. L.R. 251 : 4 Ind. Dec. 984. The mere fact that the tenure is heritable and a sum is mentioned as the rent does not show that the rent is fixed. In Maharanee Shibessouree Debia v. Mothooranath Acharjo 13 M. I.A. 270 : 13 W.R.P.C. 18 : 2 P.C.J. 300 : 2 P.C.J. 528 : 20 E.R. 552, their Lordships observed: "Where variableness of Jama is the normal condition, the mere naming a sum certain in connection with the grant of a descendible tenure does not impart of itself fixity to that sunt in the absence of positive words, or other evidence to show that such was the original design." In the case of Gayratulla Sardar v. Girish Chandra'' Bhaumik 12 C.W.N. 175, there was a grant of a ''kaimi mourasi'' (a permanent heritable) lease, nevertheless it was held not to be a mokarrari. In Nirod Chandra Singha Sarma v. Harihar Chakravarti Chowdhury 58 Ind. Cas. 867 : 32 C.L.J. 19 : 24 C.W.N. 874, where the lessee was given the right of enjoyment down to sons, grandsons, etc., the learned Judges (Mookerjee, A.C.J., and Fletcher, J,) held that the mere fact that the tenure is hereditary does not show that the rent of the tenure has been fixed in perpetuity. In Upendralal Gupta v. Jogesh Chandra Roy 38 Ind. Cas. 56 : 22 C.W. N. 275. It was observed by the learned Judges that, "in this country the grant of a permanent lease does not mean that the rent is also fixed in perpetuity. The decisions in this Court which have come down from the old Sudder Dewani Court show that the rule has always been in this country that, generally, when the lease is a permanent one, the rent is liable to enhancement, unless the landlord has precluded himself by a contract or is by law precluded from claiming an enhancement."

8. The leashed Subordinate Judge laid great stress upon the words "the profit and loss are yours" in the potta, and it is contended before us on behalf of the appellants that they indicate that the increase in the assets would belong to the lessee, and that, therefore, the previsions of Section 7 of the Bengal Tenancy Act which proceed upon the assets could not apply. But, as observed by the learned District Judge, they would seem to mean that the Zemindar held the tenure-holder liable for the rent whether the tenure-holder made loss or a profit on the collections from the raiyats; it did not mean that the rent was fixed for ever.

9. The words which follow are that the It is contended that the expression merely means that if any excess lands be found on measurement the lessee will have to lessee submit to pay additional rent on such excess area. But the tenancy comprised two jotes, and an entire mouza. No boundaries were given of the mouza and we do

not see how any excess area could be found out by any measurement of the mouza.

10. It is to be observed that no right of transfer is given. It is contended that a permanent tenure, i.e., a tenure which is heriditable and not held for a limited period [See Section 3, Clause (8)] is transferable u/s 11 of the Bengal Tenancy Act. But the tenure was created so far back as 1869.

11. The lessee was the naib of the Raja and must have known the usual expressions used for denoting fixity of rent in connection with a tenure. Not only was the expression "mokarrari" not used but there was no stipulation that the rent would not be increased though there was an express condition that the rent would not be reduced.

12. It is said that no attempt has ever been made to enhance the rent of the tenure which was created about 44 years before the suit. But the lessee Biswanath Sarkar and on his death his son was the naib of the Raja, until 1910, and in these circumstances we are unable to attach any weight to that fact.

13. On a consideration of the potta as a whole, we are unable to hold that the learned District Judge was wrong in the view he took of it. The appeal will accordingly be dismissed with costs: