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(1920) 08 CAL CK 0048

Calcutta High Court

Case No: S.A. No. 1930 of 1918

Narendra Lal Khan		APPELLANT
	Vs	
Bhola Nath Bhuya and others		RESPONDENT

Date of Decision: Aug. 24, 1920

Final Decision: Dismissed

Judgement

1. This appeal arises out of a suit for recovery of Rs. 1,290 from the Defendants as damages on account of the Defendants'' failure to deliver certain papers under the terms of a patni kabuliyat.

2. The patni kabuliyat is dated the 23rd February, 1880, and was executed by the grand-father of the Defendants. There is a stipulation in the kabuliyat which runs as follows:- "I shall deliver one set (or one copy) of the Chita, khatian jamabandi, and sheha, thoka and jama wasil baki and other lawazima papers of the patni mahals, signed by the persons preparing the same and bearing my signature, into your (sic)hta after the expiry of two consecutive years at the end of every third year, and obtain receipt for the same, on failure to do so, you will take from me Rs. 215, the cost of preparing the papers at the end of every 3 years, and if I do not pay the same amicably, you will realize the same by having recourse to law and get the said papers prepared by making mofussil survey and tumar by appointing Amin at the end of every third year. To this neither 1 nor my heirs will be able to make any objection."

3. The suit was instituted on the 21st September, 1915. It is found that during the course of 35 years since the execution of the kabuliyat the putnidar never submitted any paper as aforesaid, nor did the zamindar ever demand the same. The Court of first instance held that the stipulation was stringent and unreasonable and was never meant to be acted upon, and that in any case the Plaintiff was entitled only to compensation not exceeding Rs. 215, but there was no evidence to show the amount of loss actually sustained by the Plaintiff. In the result the suit was dismissed. On appeal the learned District Judge was of opinion that the terms of the

kabuliyat cannot reasonably bear the interpretation sought to be put upon it by the Plaintiff, that ever since the execution of the kabuliyat the papers had never been demanded or submitted, and that the stipulation was never meant to be enforced. The appeal was accordingly dismissed. The Plaintiff has appealed to this Court.

4. It is contended that the evidence of conduct relied upon by the Courts below is not admissible in evidence having regard to the provisions of sec. 92 of the Evidence Act. The authorities upon the point are not uniform. A Full Bench of this Court in the case of Preonath Shaha v. Madhu Sudan Bhuiya (1898) 25 Cal. 603 : 2 C.W.N. 562 held that oral evidence of the acts and conduct of parties such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale is admissible to prove that the deed was intended to operate only as a mortgage. A question was, however, raised in some later cases whether the Full Bench decision had not been affected by the decision of the Judicial Committee in the case of Balkeshen Das v. Legge (1899) 22 All. 149 : 27 I.A. 58 : 4 C.W.N. 153 : 2 Bom. L.R. 523 : 7 Sar. 601. But the evidence which was held to be inadmissible by the Judicial Committee in the case was certain oral evidence of intention which had been admitted in the Court below and the ground upon which their decision is based is that such evidence is excluded by the provisions of sec. 92 of the Evidence Act. The evidence there, consisted only of oral statements of the parties, and there was no other evidence of the acts and conduct of the parties adduced in that case which was considered by the Privy Council. It is upon these grounds that the decision in Balkishen''s case (1899) 22 All. 149 : 27 I.A. 58 : 4 C.W.N. 153 : 2 Bom. L.R. 523 : 7 Sar. 601 was distinguished by Banerji and Brett, JJ., in Khankar Abdur Rahman v. Ali Hafz (1900) 28 Cal. 256 : 5 C.W.N. 351 and the learned Judges held that Balkeshen''s case (1899) 22 All. 149 : 27 I.A. 58 : 4 C.W.N. 153 : 2 Bom. L.R. 523 : 7 Sar. 601 did not ''in any way affect the rule laid down by the Full. Bench in Preonath Shah v. Madhu Sudan Bhuiya (1898) 25 Cal. 603 : 2 C.W.N. 562, The same view was taken by Maclean, C.J., Banerji and Brett, JJ., in Mahomed Ali Hossein v. Nazar Ali (1901) 28 Cal. 289 - 5 C.W.N. 326.

5. In the case of Radharaman Chowdry v. Bhowani Prosad (1901) 6 C.W.N. 60, Rampini and Gupta, JJ., were of opinion that oral evidence of the subsequent acts and conduct of the parties is not admissible to show that the rent is less than what was stated in a registered Kabuliyat. A similar view was taken by Rampini, J., in the case of Beni Madhub Gorani v. Lalmoti Dasi (1898) 6 C.W.N. 242, but his decision was set aside on appeal by Maclean, C.J., and Macpherson, J., and the learned Judges held that certain rent receipts showing payment of a smaller rent than that provided in a registered lease were admissible to show either that the parties never intended the terms of the kabuliyat to be strictly carried out, or that as between the parties there had been a waiver of the strict terms of the lease-The case was followed in the case of Kailas Chandra v. Darbaria (1915) 20 C.W.N. 347 = 32 I.C. 251 and Manindra Chandra v. Durga Sundari (1915) 20 C.W.N. 680 = 32 I.C. 185, one of the members of the present Bench being a party to both the decisions, it may be open to doubt,

however, whether there can be a waiver of the essential terms of a registered lease except by a registered instrument having regard to the decision of the Full Bench in the case of Lalit Mohan Gosh v. Gopali Chuck Coal Company (1911) 39 Cal. 284 = 14 C.L.J. 411 - 16 C.W.N. 55 = 12 I.C. 728 (F.B.), where, however, the variation was sought to be effected by documents. But in the cases mentioned above, the Court held, upon the evidence of the subsequent acts and conduct of the parties, that certain terms of the contract were never intended to be acted upon. On the other hand, in the case of Lakhatulla v. Bishwambkar (1910) 12 C.L.J. 616 = 6 I.C. 577, Jenkins, C.J. and Doss, J., held that an agreement is none the less oral because it is to be inferred from the conduct of the parties.

6. The question was raised before the Judicial Committee in the case of Maung Kyin v. Ma Shwe La (1911) 38 Cal. 892 : 38 I.A. 146 : 15 C.W.N. 958 : 10 M.L.T. 103 : (1911) 2 M.W.N. 30 : 14 C.L.J. 276 : 13 Bom. L.R. 797 : 8 A.L.J. 1184 : 21 M.L.J. 1105 : 4 Bur. L.T. 273 : 12 I.C. 39 (P.C.), but was not decided. Their Lordships observed:- "The evidence which the Appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

7. This may give rise to important and difficult questions under sec. 92 of the Indian Evidence Act, which provides that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by sees. 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

8. We have not referred to the decisions of the other High Courts, some of which have taken a view contrary to that taken by the Full Bench of this Court in Preonath''s case (1898) 25 Cal. 603 : 2 C.W.N. 562 of the effect of the decision in Balkishen''s case decision in Balki. The question therefore is not free from difficulty nor settled. But the weight of authority so far as this Court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties, and as stated above in some cases, this Court has held upon the subsequent acts and conduct of the parties that certain terms of a contract were never intended to be acted upon i.e., from the very beginning.

9. It is unnecessary, however, to discuss the matter further having regard to the view we take of the construction of the kabuliyat. The covenant relied upon provides that one set (or one copy) of "chita, khatian, jamabandi, seha, thoka, jama wasil baki and other lawazima papers" are to be submitted at the end of every third year bearing the signature of the persons preparing the same. The tenure created by the kabuliyat was acceded against for damages, they too made patni tenure. Ordinarily no such papers are delivered by the patnidar to the zamindar. There is, however, nothing in the law to prevent the parties from entering into such a contract. But child, khatian and jamabandi can be prepared only after measurement of lands. Such papers are not prepared every third year and under sec. 90 of the Bengal Tenancy Act, the landlord can (subject to any contract) cause a measurement of the lands of tenants only once in 10 years except in certain cases which do not apply to the present. The palnidar therefore cannot have such measurement made and therefore cannot have chita, khatian and jamabandi prepared every third year. It was not possible therefore for the patnidar to comply with such a stipulation.The zamindar could not also for the same reason get a measurement of the lands by appointing an Amin every third year, even if he could realize Rs. 215 every third year from the patnidar. It is probably for those reasons that such papers were never demanded nor submitted. It is true selui, thoka and jama wasil baki papers are prepared every year, but the sum of Rs. 215 agreed upon to be paid in the event of the breach of the contract includes the cost of preparation of the chita, khatian and jamabandi, as well as for preparation of shea, thoka and jama wasil baki papers. As stated above, the papers were never demanded nor submitted at any time during the 35 years that the patni is in existence, and the Plaintiff after having acted in a particular way for 35 years has instituted a suit for recovery of Rs. 1,290 as damages for failure to submit such papers for six years, claiming Rs. 215 for each year. We are of opinion that the Courts below are right in dismissing the suit. In this view it is unnecessary to consider the other contentions raised before us.

10. The appeal is accordingly dismissed with costs.