(1918) 06 CAL CK 0051

Calcutta High Court

Case No: None

Abhoy Sankar Mozumdar and Others		APPELLANT
	Vs	
Rajani Mandal and Others		RESPONDENT

Date of Decision: June 20, 1918

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 105, 50

Citation: AIR 1919 Cal 611 : 47 Ind. Cas. 359

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

Bench: Division Bench

Judgement

Teunon, J.

These 18 appeals arise out of as many proceedings taken on the application of the landlord" for the settlement of fair rents, in other words, for the enhancement of rent, u/s 105 of the Bengal Tenancy Act. u/s 105-A the tenants contended that they held at fixed rents. In 16 oases the tenants succeeded in both Courts below, and in two they succeeded in the 2nd Court. Hence these 18 appeals by the landlord.

2. In all the oases it has been established that the tenants and their predecessors have held at a rent which has not been changed during the 20 years immediately preceding suit and they are, therefore, prima facie entitled to the benefit of the presumption arising under seotion 50, Sub-section (2) of the Bengal Tenancy Act. In all the oases but one (Appeal No. 2181) Kabuliyats were executed by the tenants in the years 1295, 1296, 1297, or 1299. In eleven oases (Appeals, Nos. 218C, 2184-88, 2190-92, 2194, 2196), these Kabuliyats show that the holdings as now constituted were formed by the amalgamation of inherited holdings with holdings otherwise acquired. The holdings are nontransferable.

3. The contentions of the landlords-appellants before us then are, firstly, that in the eleven cases just referred to the presumption is rebutted inasmuch as the

acquisition of a non-transferable holding represents the creation of a new tenancy, and, secondly, that in these eleven oases and in six others (that is, in all except Appeal No. 2181) the presumption is rebutted by the further terms of the Kabuliyat.

4. I am unable to accede to either of these contentions. No doubt the purchaser of a non-transferable holding cannot claim recognition by the landlord as a matter of right, but if he obtains recognition from the landlord, whether by payment or otherwise, then in the absence of special circumstances, which do not here appear, he is admitted into the original tenancy with all its incidents and becomes the successor-in-interest of his vendor.

5. Even if the opposite view were to be taken, still u/s 50(3) the presumption would not be rebutted as regards the portion or portions of the amalgamated holding representing the inherited holding. This point not having been taken in the Courts below the facts have not been investigated.

6. The 2nd contention is based on two portions of the Kabuliyats, one (the Kabuliyat in 1654) has been translated and we have been asked to take this as typical of all. The Kabuliyat begins thus: "Kismat nij Pushamla? madhye nowaji 1 Khada, 11 Pakhis, 22 Kanis jamir hat kami beshi sutre hajat asall bade Rs. 11-8-17 gondar jamar...Je ektihani jote mahasoy diger jamidari sherestai lejha jai....

7. Of this passage we have had placed before us translations made or examined by fqur different translators. One version runs: "Within Kismat Nij Pushamla there is recorded in your Zemindari Sherista a jote of 1 Khada, 11 Pakhis, 22 Kanis bearing an annual rent of Rs. 11-8-17 exclusive of all contingencies owing to variations.

8. The second runs thus: "in Kismat Nij Pushamla there is a jote of 1 Khada, 11 Pakhis, 22 Kanis of land bearing a variable rent of Rs. 11-8-17 exclusive of the amount payment whereof is kept in suspense by way of relief."

9. Neither of these translations can, in my opinion, be accepted as correct. Hajat is a well-known expression for a sum which never having been part of the rent is held in terrorem over the Raiyat and recorded as held in suspense for the time being.

10. The difficulty experienced by the translators is caused by the words "kami beshi sutre", but these words in reality convey nothing more than the expression "less or more", and whether read with the figure of area or with the figure of rent contain no admission that the rent has ever varied or is liable to variation.

11. The later portion of the Kabuliyat on which reliance is placed is as follows: "Hereafter when you will cause the lands of my said jote (or jotes) to be measured, I, remaining present at all time3 with the measurement Amin, shall without concealment have all the, lands in my possession measured: Furthermore, on the occasion of such measurement, on taking into consideration the quantity and quality of the land of the said jote, the nature and price of the crop and other local conditions; whatever rent you will (may) assess in a just and proper manner, I,

bringing into force (abiding by) all the terms of this Kabuliyat, will pay the rent so assessed without demur (excuse)."

12. The learned Subordinate Judge was in doubt whether the Clause above translated referred merely to excess lands, if any, or to all the lands comprised within the holding, but though the language is somewhat obscure and was possibly not intended to be plain to the Raiyat, the Clause is, I think, to be read as providing not merely for additional rent on excess land but also for enhancement of rent, roughly on the grounds set out in Section 30 of the Act.

13. But no variation has ever in fact taken place. The Raiyats have held at a rent which has not varied for the 20 years immediately preceding suit. They are, therefore, entitled to the presumption that they have held at the same rent from the time of the Permanent Settlement. The agreements, whether intended or not intended to have effect at some uncertain date after the years 1295 to 1299, certainly do not show that the holdings were created at sometime later than the Permanent Settlement or that between the time of the Permanent Settlement and the years 1295, 1296, 1297 or 1299 (as the case may be) the rent had been changed or had varied.

14. At the hearing on this point, we have been referred by the appellant to the case of Upendra Nath Ghose v. Dwarkanath Biswas 44 Ind. Cas. 593 : 22 C.W.N. 322 and by the respondent to the case of Bisseswar Ray Chowdhry v. Rajendra Kumar Singha 25 Ind. Cas. 228 : 18 C.W.N. 949. The first mentioned case appears to support the contention of the appellant and the second to support the view I take, but the reports do not set out the terms of the Kabuliyat there under consideration and neither case, therefore, San be regarded as an authority on the question before us. In the first mentioned ease, moreover, the learned Judges appear to have found the creation of a new tenancy on admissions as to the state of things prior to the execution of the. Kabuliyat there in question. In the Kabuliyat before us I -find neither of these things.

15. On behalf of the appellants it has also been faintly suggested that the Subordinate Judge should have held that the tenants were in possession of excess lands. It is sufficient to say that I agree with the Subordinate Judge''s decision on this point.

16. In Appeal No. 2181, it has also been, faintly suggested that the Subordinate Judge has come to his finding as regards the rent for the 20 years preceding suit on insufficient materials. He has proceeded on receipts or dahhilas from the years 1297 to 1308 on the oral evidence of the tenant, and on the non-production of the landlord''s papers. In so doing he has fallen into no error of law. In this case there is no Kabuliyat and, therefore, nothing on which the appellant can rely as rebutting the presumption arising u/s 50 of the Act.

17. For these reasons 1 should dismiss all these appeals.

18. In 16 of these appeals respondents have not appeared. These appeals will be dismissed without costs. In the remaining two the respondents have appeared and these appeals will be dismissed with costs.

Richardson, J.

19. The language of Clause (1) of Section 50 is elliptical. "When a tenure-holder or Raiyat and his predecessor-in-interest have held at a rent or rate of rent, etc." To complete the sense something must be understood after the word "held." If we insert merely the word "land", then the rule laid down might apply to land which only forms part of a tenure or holding when the question arises. It is true that in Clause (3) which relates back to Clause (1), the expression used is land held by a Raiyat'', but the exception at the end of Clause (sic) which speaks of ''the tenure or holding" militates against such a construction of that and it would seem that the words which must be supplied are ''a tenure or holding'' or ''land constituting a tenure or holding.'' This is also consistent with the words alteration'' in the exception. Alteration implies comparison. The area of the tenure or holding, when the question arises, must under this clause, be compared with the area of the tenure or holding at the time of the Permanent Settlement.

20. The word, ''held'' is similarly used in Clause (2) and grammar requires that the same words should be supplied after it as in Clause (1).

21. In this view both the principal rule enacted in Clause (1) and the subsidiary, but in practice extremely important, presumption created by Clause (2) assume the continuity and identity of the tenure or holding throughout the whole period from the Permanent Settlement onwards. The result so arrived at is, I think, in accord with reported oases decided under the Bengal Tenancy Act.

22. The question of continuity may sometimes give rise to difficulty. In the case of Ryoti holdings, Clauses (1) and (2) must be read subject to Clause (3), which lays down that the operation of this section, so far as it relates to land held by a Raiyat shall not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding." In this Clause "land held-by a Raiyat" obviously refers to land which eithor constituted or formed part of the original holding and the word "affected" means adversely affected, adversely, that is, to the Raiyat. The result seems to be that the main rule and the presumption are made applicable to land which at the time, when the question arises, may form part only of the Raiyat''s holding. The Raiyat must, of course, show in the first instance that he has held the land at the same rent at; least for the twenty years before suit.

23. The rule and the presumption may thus be applicable to the several parcels of land of which the holding consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another Raiyat. In either case the Raiyat may tack on his own occupation of the land at an unvaried

rent to the occupation at an unvaried rent of his predecessors-in-interest, who, as regards land acquired by purchase from another Raiyat will include his vendor and his vendor''s predecessors.

24. In the present case we are dealing with Raiyati holdings. The holdings, it may be taken, are of composite character, consisting partly of land belonging to the Raiyat''a original inherited holdings and partly, it may be, of land acquired by purchase or exchange. The first contention of the appellant landlords is that the Court below was wrong in applying the presumption created by Clause (2) of Section 50 to holdings of this character or at any rate to the whole of the lands comprised in them, The point turns on Clause (3) of the Section and I agree with my learned brother that on the materials before us the contention must be rejected.

25. The second point presents more -difficulty and it may be put in this way. If the tenant proves that he has held at the same rent or rate of rent from the time, of the Permanent Settlement or for the twenty years before suit, is it a sufficient answer on the part of the landlord to say that while the. rent has not in fact been changed, the tenant has held under an agreement express or implied, according to which the rent would be a variable rent? If we are to be guided by the plain language of Clause (1) of Section 50, the mere fact that variability of rent is one of the original incidents of the tenancy affords the landlord no protection. When an occupancy Raiyat pays his rent in money, the rent is, generally speaking, subject to enhancement within the limite prescribed by the Act. That is to say, variability of rent is, generally speaking, an original incident of the holding. If it be sufficient for the landlord to advert to that fact, then Section 50 would be of little avail to occupancy Raiyats. The section, however, does not provide a method of proving that the rent was originally fixed in perpetuity. It lays down that if the rent has not been changed for a certain time, it shall not be subject to enhancement.

26. This appears to have been the view taken in Bisseswar Ray Chowdhry v. Rajendrn Kumar Singha 25 Ind. Cas. 228 : 18 C.W.N. 949. That case was referred to and distinguished in Upendra Nath Ghose v. Gopi Charan Saha 44 Ind. Cas. 595 : 22 C.W.N. 321. There, however, the question related to a tenure and the ground of the decision seems to have been that the agreement by which four tenures were amalgamated into one at a variable rent created a new tenancy. If the agreement created a new tenancy as from its date, it would not signify whether the rent was or was not subsequently varied so as to exceed the total of the rent previously payable for the four tenures. The case of Upendra Nath Ghose v. Dwarkanath Biswas 44 Ind. Cas. 593 : 22 C.W.N. 322 decided by the same learned Judges while it also related to a tenure is not so easy to distinguish. There a tenure appears to have been held for about 37 years at an unvaried rent but the landlord produced a Kabuliyat of the year 1840, by which the tenure-holders-predecessor-in-interest had expressly agreed to pay enhanced rent according to the Pergana rate." It does not appear that the rent had ever in fact been enhanced. The learned Judges say: "The Kabuliyat may be

considered either as a new contract under which the "tenants agreed to pay enhanced" rent or as a contract containing recitals of the incidents of the tenancy which was in existence from before. In either view of the matter it shows that the rent was enhanceable." It cannot be denied that if these observations were intended as an expression of general opinion on the construction and effect of Section 50 they would apply as well to a Raiyati holding as to a tenure. But the learned Judges did not refer to the language of Section 50 or to Bisseswar''s case 25 Ind. Cas. 228 : 18 C.W.N. 949. Moreover, the terms of the Kabuliyat are not stated and if the Kabuliyat created a new tenancy, there was an end of the matter.

27. In the present case the transactions by which the landlord agreed to receive a lump sum as rent for all the lands comprised in each holding were, no doubt, accompanied by the execution of Kabuliyats importing that the rent so fixed was variable. But the lump sum was in each case merely the total of the rents previously payable for the separate parcels of land then amalgamated. Regard being had to Clause (3), the mere amalgamation of the land, as we have already decided, would not have affected the operation of Section 50 in favour of the Raiyat. Does the inclusion in the Kabuliyats of the condition relating to variability of rent make by itself any difference? Does it entitle the landlord to say offhand that here are new tenancies dating from the amalgamation?

28. In my opinion, when the questions I have put are fairly faced, they must be answered in the negative. Section 50 is not affected by the variability of the rent at the inception of a tenancy. Assume the creation of the tenancy prior to the Permanent Settlement under an agreement, which, whether in writing or not, must be understood to have provided that the rent should be variable. Nevertheless, under Clause (1) of Section 50 if the rent has not in fact been "changed from the time of the Permanent Settlement," then it "shall not be liable to be increased." If an instrument is subsequently executed forty or fifty years later, the mere fact that the rent is expressed to be variable will by itself make no difference. The provision for variability of rent may be merely a repetition of one of the original incidents of the holding, an incident which does not exclude the operation of Section 50. The true question in such cases would seem to be whether the instrument on which the landlord relies is merely confirmatory of the pre-existing interest or tenancy or whether it creates a new tenancy, and in the case of Raiyati holdings this question must be considered with reference to the provision contained in Clause (3).

29. In these appeals, I agree with my learned brother that the landlord has not succeeded in rebutting the presumption created by Clause (2) by showing the contrary within the meaning of that clause.

30. I agree, therefore, that the appeals should be dismissed.