(1924) 02 CAL CK 0059

Calcutta High Court

Case No: None

Nalini Bhusan Gupta		APPELLANT
	Vs	
Ali Mia		RESPONDENT

Date of Decision: Feb. 1, 1924

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 74

Citation: AIR 1924 Cal 877 : (1924) ILR (Cal) 643 : 79 Ind. Cas. 346

Hon'ble Judges: Suhrawardy, J; Page, J

Bench: Division Bench

Judgement

Suhrawardy, J.

This is a suit for rent for the years 1322 to 1325 at the rate of Rs. 33 per annum, and interest on arrears of rent has also been claimed. The claim for rent is based upon a kabuliat, dated the 23rd June 1875. The defence was that rent was not as claimed by the plaintiff but the actual rent was Rs. 28-12-9, the balance being in the nature of an abwab and hence irrecoverable. The determination of tills question depends upon the construction to be pat upon the kabuliat. A large number of cases have been placed before us in which the question as to whether a portion of the rent claimed was abwab or not was raised and decided in one way or the other on the construction of the contract in each particular case. It will not be necessary, therefore, to examine those cases as we are called upon to construe the contract in the present case. It will serve no useful purpose to seek help from other forms of contract in interpreting the terms of the contract in this case, as the learned Chief Justice observed in the case of Bejoy Singh Dudhuria v. Krishna Behary Biswas I.L.R (1917) Cal 259; 21 C.W.N. 959. It seems that the rule followed in that case is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, that is, if it is really a part of the rent, although

not described as such, the landlord can recover it. Proceeding to interpret the contract before me it would be necessary to quote that portion of the kabuliat which relates to the present enquiry. In the first part of this kabuliat no doubt rent has been fixed of culturable and homestead lands at a certain rate per kani. To the total amount of the sum thus obtained certain other sums have been added under the heads of improvement of Dak and Bhet expenses and the rent total is put down as Rs. 33. Then follow the instalments in which not the rent of the lands as fixed at a certain rate per kani but the whole 33 rupees are to be paid. This sum of Rs. 33 has to be paid according to the instalments mentioned therein and has to be paid in ten instalments annually. After the instalments have been mentioned follow the following words which really have a great bearing on the true construction of this kabuliat. The words are "Rents Rs. 33 according to above instalments I shall pay to your estate and receive dakhilas for same." Reading these words it seems to me that what the parties intended was that the rent of the land was fixed at a certain rate, but over and above that the tenant had to pay a certain amount for improvement of Dak and Bhet expenses in respect of the land which also was intended to form part of the rent. No case has been placed before us in which all these circumstances have been combined. But there are cases in which one of these conditions exists; for instance in the case of Mathura Prosad v. Tola Singh (1912) 16 C.L.J. 296, the circumstance that rent was fixed at so much per bigha was mentioned in the kabuliat. But in other respects the kabuliat is very different from the present one. In that case the tenant undertook to pay a cart-load of husk over and above the rent, or in default, its value which was assessed at Rs. 5 per cart-load. Two other circumstances there were in that case, namely, that the plaintiff did not claim the price of the husk at the rate mentioned in the kabuliat but at a higher rate alleging that that was the market rate at the time and this additional sum was not made a part of the rent. Then again, in that case cesses were not calculated on the rent as claimed. In these circumstances the Court held that the claim for the value of the husk must be taken as not a part of the rent. In tins case we have got a very important factor, namely, that the total amount payable by the tenant according to the calculation mentioned in the kabuliat was distributed over certain instalments and the whole sum is mentioned in the kabuliat as rent. This is a circumstance which is of very great importance as is observed by Chatterjea J. in the case of Bejoy Singh Dudhuria v. Krishna Behary Biswas I.L.R (1917) Cal 259; 21 C.W.N. 959. The real question is what was the intention of the parties when they entered into the contract. That intention is to be gathered from the terms of the contract. On the construction of the kabuliat before us I have no hesitation in coming to the conclusion that the parties intended that the sum of Rs. 5-3 under the heads of improvement of Dak and Bhet expenses should be a part of the rent payable by the tenant. This view is further strengthened by the last clause of the above document. There it is stipulated that on occasions of marriage and other auspicious ceremonies the tenant shall pay rajdhuti and selami according to the practice prevailing in the mouza. This is clearly an abwab as it does not form part of the actual rent. It has

been held in several cases that where a payment of certain sum is embodied in a certain portion of the document and in another portion of the document some excess amount is mentioned it may fairly be inferred from this circumstance that the latter amount was hot intended as a part of the rent. In the present kabuliat the entire sum of Rs. 33 has been mentioned in one place where the different items payable by the tenant are mentioned. Both the Courts below have taken the view that this amount claimed under the heads of the improvement of Dak and Bhet expenses is an abwab. They have come to this conclusion by the fact that the rent of the land has been fixed at a certain rate per kant. No doubt that is an important circumstance to be taken into consideration but that is not all. The whole document has to be construed and the intention of the parties gathered from the nature of the entire contract. There are some other circumstances mentioned by the learned Munsif in his judgment though the lower Appellate Court does not rely upon them. But those circumstances do not go very far to enable us to interpret the document. It is found that the plaintiff has failed to prove that he had realized rent at the rate claimed. But it is also found that the defendants had paid sums of money from time to time to the plaintiff which he appropriated at the rate now claimed. Then the entry in the record of rights is also in favour of the defendants. That only raised the presumption that the rent payable by the defendant is so much. I may mention here that the defendant admits that he is liable to pay rent at the rate of Rs. 28-12-6, but the record of rights shows the amount of rent as only Rs. 28. In construing a contract, it is not necessary that it must be proved that rent was realised at the amount mentioned in it. No doubt that circumstance would be of great assistance where the terms are ambiguous. But I do not think that there is any ambiguity about the terms here. I am of opinion that the view taken by the Courts below is wrong and that this appeal ought to succeed. In the construction I put upon the kabuliat in this case the plaintiff is entitled to a decree at the rate claimed by him.

2. The result is that this appeal is allowed, the decree of the Courts below set aside and the plaintiff''s suit decreed for the amount of rent claimed with costs in all the Courts.

Page, J.

3. I am of the same opinion. The question which falls for determination is whether the items of Dak and Bhet expenses form part of the rent payable for the use and occupation of the premises, or are illegal abwabs u/s 74, Bengal Tenancy Act. In the course of the argument a number of cases were cited before us. The law on the subject may, I think, to ascertained from the following cases: Chidam Mahton v. Tilakdhari Singh ILR (1885) Cal 175, Radha Prosad Singh v. Balkower Koeri I.L.R (1890) Cal 726, Srikanta Prosad Hazari v. Irshad Ali Sarkar (1894) 16 C.L.J. 225, Kalanand Singh v. Eastern Mortgage Agency Company (1913) 18 C.L.J. 83 and Bejoy Singh Dudhuria v. Krishna Behary Biswas I.L.R (1917) Cal 259 : 21 C.W.N. 959. Little, if any, assistance can be obtained from the consideration of the facts in other cases,

because, in my opinion, the determination of the question as to whether the items in question form part of the rent, or whether they are abwabs, depends upon the construction of the terms of the particular tenancy in each case. The rule of construction to be applied, in my opinion, is that laid down by Mr. Justice Ghose in the case of Radha Prosad Singh v. Balkower Koeri I. L R (1890) Cal 726. His Lordship observed: "It appears to me that if in any given case the Court finds that any particular sum specified in the lease is a lawful consideration for the use and occupation of any land, that is to say, if it is really a part of the rent although not described as such, it would be justified in holding that it is not an abwab and is recoverable by the land- lord." I agree with Mr. Justice Chatterjea (1917) I.L.B. 45 Cal 259 : 21 C.W.N. 959 that if the items other than the rent proper are consolidated with it, and appear from the construction of the lease to have been included in and treated as part ot the rent, so that the two items constituted the rent agreed upon at the creation of the tenancy, then the mere fact that there are two items would not make the item other than the rent proper an "abwab." Applying the above test to the terms of the kabuliat in this case, in my opinion, it is clear that the disputed items form part of the consolidated rent payable for the use and occupation of the premises, and are not to be regarded as abwabs, or illegal imposts on the tenant, within the meaning of Section 74, Bengal Tenancy Act. It was urged on behalf of the tenant that, because in the kabuliat Rs. 6 a kani in respect of cultural paddy land and Rs. 8 a kani in respect of homestead land is set out as the rent of such land, the rent must be regarded as made up of these two Hums. But, I think, reading the kabuliat as a whole, that that contention is not sound. In my opinion, by stating the particular rates in respect of the paddy land and homestead land, the parties intended to discriminate between the rate which was payable for culturable land and the rate payable for homestead land. But it was not intended that the rent calculated on that basis should be the sole rent payable in respect of the lands in question. This appears to me to be clear from a perusal of the kabuliat, because there is found in the kabuliat, in addition to the sum payable on the basis which I have stated, a further fixed sum for dak and bhet kharach of Rs. 5 and odd. A line is then drawn, and a total of Rs. 33 is entered. From that it would appear that the sum of Rs. 33 was the sum which it was intended should be the amount payable for the use and occupation of the land. The matter does not rest there, because it is specifically provided in the kabuliat that the Rs. 33 shall be payable in stated instalments month by month: and further, it ia provided that "rent Rs. 33 according to above instalments I shall pay to your estate and accept dakhilas for same. In case of default in the payment of any instalment I shall pay interest at the rate of one anna per rupee per mensem." Now, in my opinion, having regard to the form of the kabuliat, it would be unreasonable to come to any conclusion other than that the fixed and definite sum of Rs. 5 and odd in respect of dak and bhet kharach forms part of the consolidated rent payable in respect of the premises. This view is further supported by the provision which is found in the kabuliat that if any marriages or other auspicious ceremonies take place the tenant shall pay rajdhuti and selami

according to the practice prevalent in the mouza. The parties in this manner appear to me to have indicated that a distinction is to be drawn between such occasional payments and the fixed and definite payment of the items in dispute in this case. For these reasons I concur in the order which has been proposed.