

(1863) 07 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 2216 of 1862

Bhubun Mohun Biswas

APPELLANT

Vs

Ram Kanth Chowdhry

RESPONDENT

Date of Decision: July 7, 1863

Judgement

Kemp, J.

The material point for a consideration in this reference is, whether a suit for kabuliat, under the provisions of clause 1, section 23 of Act X of 1859, will lie, without previous notice u/s 13 of the same Act. I am of opinion that no such notice is necessary. This point, I observe, has already been before the Court, and six Judges have concurred in opinion that when a suit is brought under clause 1, section 23, Act X of 1859, for delivery of a kabuliat, no notice is required,--see Goorsoonder Chowdhry v. Meenoo Shaha S.D.A., 1862, 206 before Raikes, Bailey, and Steer, JJ., on the 29th May 1862, and Eshan Chunder Roy v. Mahomed Noorbux Ibid, 278 before Trevor, Kemp, and Seton-Karr, JJ., on the 26th June 1862. Landholders have their rights under the Act as well as ryots, and among these rights is the right to receive a kabuliat or counterpart of the patta. A suit for the delivery of a kabuliat, and for the determination of the rate of rent at which such kabuliat is to be delivered, is cognizable by the Collector, and by no other Court, The Collector, in determining the rate of rent at which such kabuliat is to be delivered, will be guided by the provisions of section 5 of Act X. Again, section 31 of the Act pays that suits for the delivery of kabalities, and for the determination of the rent at which such kabalities are to be delivered, may be instituted at any time during the tenancy, thus clearly contemplating that no previous notice, which if the suit be for enhancement of rent must be given at a particular season of the year, is necessary in a suit for a kabuliat. It is true that "no ryot" is liable to pay any higher rent for the previous year, unless "a written notice shall have been served upon him" (section 13); but this section does not enact that a suit for a kabuliat and determination of the rate, which must be fair and equitable (section 5), at which such kabuliat is to be delivered, cannot be heard and decided without notice u/s 13. I am supported in the above opinion by

the remarks of the learned Chief Justice Sir Barnes Peacock, in the case of *Ishore Ghose v. James Hills*⁽¹⁾. I would confirm the decision of the lower Appellate Court.

Sir Barnes Peacock, Kt., C.J.

2. This is a suit to fix the rental of one kani and 12 gandas of land at the Chowallah rates, and for obtaining a kabuliat from the defendants. The plaintiff alleges that this land having been secreted by the defendant at the time of a survey and partition, he instituted a suit for possession, and got a decree from the Moonsiff on the 16th of May 1860, under which he was put into possession on the 16th Bhadro (September 1860). This suit was instituted on the 16th September. The Judge gave the plaintiff a decree for a kabuliat at Rs. 3 per kani.

3. As against the plaintiff, the defendant was a mere trespasser, and not a tenant, and therefore the plaintiff could not sue him to obtain a kabuliat under Act X of 1859. The question, whether as against his tenant a zamindar can sue for a kabuliat at an enhanced rent without giving notice of enhancement, does not arise. I think that the decisions of the Court below must be reversed.

Norman, J.

4. I entirely agree with the judgment of the Chief Justice. But as this case was submitted for the purpose of obtaining the opinion of a Full Bench upon the question whether a zamindar who has not given notice of enhancement u/s 13, Act X of 1859, can maintain a suit for a kabuliat at an enhanced rent, upon which there are conflicting decisions, and as my learned colleagues have given judgments upon the point, in which I regret to say I cannot concur, I feel bound to state the reasons upon which my conclusion that such suits cannot be maintained is based.

5. A patta and a kabuliat are simply a lease and counterparts; in other words, a written statement of the terms of the tenancy. Now, there is no common-law obligation binding any man to put his agreement into writing, and therefore the right to a kabuliat is one which can only be founded on some express enactment. After the passing of Regulation V of 1812, on the 4th September 1816, by construction 257 the Sudder Court pointed out that that Regulation contained no provisions for a summary suit to compel ryots to take pattas and give kabieliats, and that landholders (as against tenants refusing to take pattas or give kabieliats at enhanced rates), might proceed in conformity with section 5, Regulation IV of 1794, and sections 9 and 10, Regulation V of 1812. I believe it is admitted that if the right exists at present, it must be founded on Act X of 1859. Sections 2, 3, and 5 of that Act give to ryots the right to demand pattas under certain circumstances. The right of landholders to demand a kabuliat is created by section 9, which is as follows:--

Every person who grants a patta is entitled to receive, from the "person to whom the patta is granted, a kabuliat, or counterpart engagement, in conformity with the terms of the patta. The tender to any "ryots of a patta, such as a ryot is entitled to

receive, shall he held "to entitle the person to whom the rent is payable to receive a kabuliat from such ryot."

6. Then, upon the plain language of this section, it seems to me clear that the terms of the holding must be settled, and a patta embodying such terms must be drawn up, and actually tendered to the ryot before the landlord can acquire a right to call on the ryot to give a kabuliat; or, in other words, execute the counterpart of the patta tendered to him. It is needless to point out how reasonable and natural is this order of proceeding. Such being the right as created by the Act, section 23 does no more than provide a tribunal before which alone disputes relating to such right are to be litigated; and under that section, if the patta tendered and the kabuliat demanded are for an enhanced rent, the Collector may, of course, determine whether notice of enhancement has been duly given, or whether the rent named in the patta tendered is fair and equitable. Sections 30, 31, 32, and 33 are simply clauses regulating the period of Limitation for suits under the Act. Section 31 provides that suits for the delivery of pattas or kabiats, or for the determination of the rates of rent at which they should be delivered, may be instituted at any time during the tenancy,—that is to say, any rights which the parties may have with reference to such matters may be enforced, not merely in the first or second year, but at any time while the relation of landlord and tenant continue to exist.

7. There is nothing which leads me to infer that section 31, a mere limitation clause, was intended to give any rights inconsistent with or larger than those created by section 9. The question is important, because, if a suit for a kabuliat at an enhanced rate can be maintained without first giving to the ryot notice of enhancement u/s 13, the ryot would be deprived of the privileges secured to him by section 13 of Act X, and which he formerly possessed under sections 9 and 10, Regulation V of 1812.

8. A Full Bench of this Court has decided in *Gumani Kazi v. Harihar Mookerjee Ante*, 15 that, in a suit for enhancement, if a mokurrari patta is set up, which the Court find out to be genuine, though the Court may declare the tenure liable to enhancement, it cannot proceed to determine what the rates shall be, unless notice of enhancement u/s 13 has been given. That decision seems to me to conclude the present question.

9. It is suggested that, treating the suit as equivalent to notice u/s 13, the kabuliat might be made applicable to a period commencing with the year ensuing that in which the plaint was filed. But a suit is not the notice which the Legislature has prescribed; and if it were construed equivalent (a species of interpretation which I do not think legitimate), the suit would be instituted before the cause of action had arisen, and ryots would not only be put to needless expense, but would be liable to be harassed by a litigation as to what should be the terms of an agreement into which they might never choose, or even never like to enter. These considerations confirm me in the opinion that the construction I put on the several clauses of the Act referred to by my learned colleagues, is correct.

10. My opinion is in accordance with the judgment of Sir Barnes Peacock and Mr. Justice L.S. Jackson, in *Hamatoolah Daffadar v. Gunga Gobind Roy*².

11. I agree with the Judge of the Court below that, in this case, which was a suit for assessment of rent where no rent has ever been paid, and not for enhancement, no notice for enhancement was necessary u/s 13 of Act X; and therefore the question, whether the plaintiff is entitled to a kabuliat as well as to a decree assessing a rent on the land, is not of great importance in the present case.

Steer, J.

12. The only point argued before the Full Bench which heard this case, was whether a notice of enhancement was necessary before an action for a kabuliat could be entertained. Whether such a question properly arose or not, could not now be determined without a re-opening of the case, and without hearing counsel on that point; and whatever my views might be on the doctrine of trespass which my learned colleagues, the Chief Justice and Mr. Justice Norman, have held to apply to this case, I could not take upon myself to decide that point without hearing argument upon it. But both the parties to this suit admit the existence of the tenancy, and I see no reason to raise a contention which they have not thought fit to raise. Regarding the defendant as a tenant, I hold upon the only argument upon which we were called upon to decide, that a notice u/s 13, Act X of 1859, is not necessary to sustain an action for the determination of rent and for a kabuliat. Such a suit, it is clear from the wording of section 3, will lie, and it is nowhere said that the suit will not lie unless the preliminary measure of issue of notice has been complied with. Where a landlord claims rent at an enhanced rate, he is bound to show that he has issued the notice prescribed in section 13, and without it he cannot obtain any enhanced rent prior to the institution of his suit brought to enforce his claim to enhancement. But where a suit is brought to determine the prospective rent, and to obtain a kabuliat after determination of rent, the provision of the law which requires the issue of a notice is supererogatory and superfluous, for the action does more effectually what the notice is designed to do,--viz., to advertise the tenant that his landlord expects in future an enhanced rent from him. No doubt, in some cases, a tenant might be prejudiced by a suit being brought against him without the issue of a notice. He would be prejudiced by having to defend a suit where, perhaps, he had no objection to offer to the claim of enhanced rent; but that is not the case in the suit before us, and if it had been the case that a mere notice would have obtained what the action has done, complete relief might have been afforded to the defendant by all the costs of the suit being thrown on the landlord.

13. In this view, I would uphold the decision of the Lower Court, and dismiss the special appeal with costs.

Seton-Karr, J.

14. The question which has been referred for a decision to a Full Bench, in this case, is whether a landlord is entitled to receive a kabuliat from a tenant without issue of notice of enhancement, u/s 13 of Act X of 1859, and whether such an action will lie without the issue of such a notice.

15. I concur with Mr. Justice Kemp in thinking that such a suit will lie, and that no previous issue of notice in such a case is necessary. The decisions of the late Sudder Court in *Goorsoonder Chowdhry v. Meenoo Shaha S.D.A.*, 1862, 206 and *Eshan Chunder Roy v. Mahomed Noorbux Ibid*, 278, seem to be founded on law and justice. The suit, from its very nature, is the very best possible notice of a demand of enhancement. It is nowhere stated in Act X that such a suit must be preceded by a notice. It is expressly provided that such a suit (section 31) may be instituted at any time during the tenancy, and if a landholder chooses rather to bring his tenant into Court at once, and there to settle the question of enhancement, which rarely, if ever, is determined without a formal litigation on the subject, I do not see what there is in law to prevent his following this course. The case of *Hamatoolah Daffadar v. Gunga Gobind Roy*³ relied on by Mr. Justice Norman, ended in a remand; and I do not hold the matter now before us to have been conclusively settled by that judgment. Neither can I see any inconsistency in decreeing enhanced rents only from the commencement of the next Bengalee year, or after the end of the month of Chaitra following the decision of the suit in question.

16. The claim to rent or to enhanced rent is a cause of action which may exist or recur at any time. It is the zamindar's right, and does not commence only with the end of Chaitra in each year. The mention of this month in section 13 is designed for the protection of the ryot; and this protection of the latter will be effectually secured, if the enhanced rent be denied against him only from the termination of the month in question; due notice of the same having been served on him either by the process described in the latter part of section 13, or by the more formal, precise, and certain method of a suit in a competent Court. It would seem to be hard on the zamindar to rule that a Collector, on an application on plain paper by a landholder, may notify a demand of enhancement to the ryot, but that the same official, when the same demand is preferred on stamped paper, and with more formality, is not competent to notify to the ryot, that enhanced rent will be demanded from him; the enhancement in either case running from the commencement of the next year. Holding these views, I would affirm the decision of the lower Appellate Court without alteration in any way.

⁽¹⁾Hills 1 Hay, 350; S.C., Special Vol., W.R., 48; and see *James Hills v. Ishore Ghose*, *ibid*, 131; on review, *ibid*, 138

² Unreported

³ Unreported