(1868) 03 CAL CK 0009

Calcutta High Court

Case No: Special Appeal No. 1175 of 1867

Asmut Ali Khan Chowdhry		APPELLANT
	Vs	
Gholam Mohamed and Another		RESPONDENT

Date of Decision: March 19, 1868

Judgement

Sir Barnes Peacock, Kt., C.J., L.S. Jackson and Macpherson, JJ.

The question is whether when a landlord sues to obtain from his ryot a kabuliat at a given rate of rent which in the judgment of the Court upon the evidence before it exceeds the amount which would be fair and equitable, ought the suit to be dismissed? It appears to me that that question ought to be answered in the affirmative, and that when the plaintiff seeks to compel a tenant to execute a kabuliat of a particular description, and fails to make out a right to a kabuliat of that description, he is not entitled to have a decree ordering the ryot to execute a kabuliat of the description to which he is entitled.

2. This opinion is not founded upon a mere technicality but upon principles of justice. A man ought not to have a decree to compel a ryot to execute a kabuliat, unless, at the time when he commences the suit, he is willing to execute a corresponding potta. S. 9 of Act X of 1859 enacts that the tender of a potta, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kabuliat from such ryot. The Court went to a great extent when it held that a tender was not actually necessary: and I think that we ought not to extend the rule, and to hold that a landlord is entitled to obtain a decree against a ryot to compel him to execute a kabuliat, when from the plaint it is clear that the landlord was not ready or willing to execute a corresponding potta. If, instead of suing for a kabuliat, the landlord had by himself or his agent gone to the ryot and endeavoured to agree upon the amount of rent which would be fair and equitable, the ryot would possibly have been willing to execute a kabuliat at the amount which the Court upon the evidence has considered reasonable. But apparently without any notice whatever to the ryot, without any notice of enhancement in accordance with the provisions of s. 13 of the Act, the landowner commences a suit against the ryot,

and asks that he may be compelled to execute a kabuliat at a rent much higher than the ryot was then paying, and much higher than that which the Court has considered that the landowner was entitled to demand. When a suit for a kabuliat at a given rent is brought, a ryot has no opportunity of avoiding litigation, unless he complies with the landowner''s demand: and when the decree of the Court shows that the amount of rent demanded was more than that which, under the circumstances, the ryot ought to pay, the suit ought to be dismissed.

3. The facts of the present case afford a good illustration. The landlord demanded at the rate of Rs. 20 a kanee. The first Court awarded a kabuliat at the rate of Rs. 12. The landowner appealed to the higher Court, which shows that he was not willing to execute a potta at Rs. 12, and to accept a kabuliat at that rate. The Judge increased the rate to Rs. 16, and the plaintiff says that he ought to have had a kabuliat awarded to him at the rate of Rs. 16. It does not appear that even then the landlord was willing to execute a potta at Rs. 16.

4. But it is contended that that is immaterial, because he could not have obtained execution against the ryot to compel him to execute a kabuliat at Rs. 16 until he had offered to give a potta at that rate. This is the first time in which I ever heard it contended that a decree ought to be given against a ryot to compel him to execute a kabuliat at a given rate of rent, leaving it optional with the landlord to give a potta at that rate or not; or that a decree ought to he given against a ryot which could not be executed, except upon the contingency of the landlord''s doing something which the Court had no power to compel him to do. Such a decree would be a one-sided decree, binding the ryot but leaving the landowner free.

5. These are my reasons with reference to the general question which has been propounded; but I think that there is a still stronger reason why in the present case the landowner ought not to have a decree against the ryot ordering him to execute a kabuliat at the rate of rent found by the Court to be reasonable.

6. S. 13 of Act X of 1859 says, that a ryot shall not be liable to pay any higher rent than the rent payable for the previous year, unless a notice of enhancement shall be served in or before the month of Cheyt. That section applies to all ryots, whether they have rights of occupancy or not. S. 17 lays down the ground upon which alone ryots having a right of occupancy are liable to enhancement.

7. It has been held by a majority of Judges in a Full Bench, in the case of Thakooranee Dossee v. Bisheshur Mookerjee Ante, p. 202, that a suit for a kabuliat at an enhanced rate may be brought without notice of enhancement, but that, in such a suit brought without notice, the kabuliat cannot be decreed except from the year following that in which the decree is given But see per Peacock, C.J., in Akhoy Sankar Chuckerbutty v. Raja Indra Bhusan Deb Roy, 4 B.L.R., F.B., 58, at p. 61.

8. In this case, the plaintiff, it is said, relying upon that ruling, brought his suit for a kabuliat at an enhanced rent without giving notice of enhancement. The suit was

commenced on the 29th of August 1866. The suit was decided on 3rd April 1867. Assuming the commencement of the suit to be tantamount to notice of enhancement according to the Full Bench ruling, a decree could not, according to that ruling, be given for a kabuliat at an enhanced rate to commence before the year 1868. But upon what evidence could the Judge, on the 3rd April 1867, hold that in consequence of the increase of produce the rent commencing from 1868 ought to be enhanced beyond that which the tenant was then paying? Could the Judge by anticipation, upon the evidence given in 1867, decree that the rent for 1868 should be at the rate of Rs. 16?

9. Suppose, after April 1867, circumstances had arisen, such as one unfortunately saw in Orissa two years ago, suppose from drought at the end of 1867, or from other causes, a prospect existed of a total failure of crops in 1868, would the tenant be bound to execute a kabuliat at that rate for 1868?

10. It is said that the tenant might bring a fresh suit under s. 18 for the purpose of showing that the produce had been reduced in 1868, by causes beyond his power. But was the Judge entitled, on the 3rd of April 1867, to pronounce a speculative decree as to 1868, which the tenant would have to get rid of by a fresh suit in 1868 when the circumstances of 1868 became known. It appears to me that the plaintiff was no more entitled in 1867 to obtain a decree in 1867, declaring that he was entitled to a kabuliat for 1868 binding the tenant to pay Rs. 16 a kanee, than he would have been to file a suit in 1867, without notice of enhancement, to declare that the fair rate of rent in 1868 would be Rs. 16 a kanee. I apprehend that such a suit Could not be maintained upon the ground that the Court could not speculate in 1866 or 1867 as to what would be the value of the land in 1868; nor would they allow a ryot to be harassed in 1866 by a suit for determining what would be a fair rent for 1868, when the tenant had a right, under s. 19, to give up possession at the end of either 1866 or 1867, and might never become liable to pay rent at all for 1868.

11. I do not understand the majority of the Judges to have held that if a man sues for a kabuliat at a specific rent, and fails to prove that he is entitled to that rent, the Court will speculate as to what may or may not be the value of the land at the commencement of the year following their decree, in order that the landlord may have a decree for a kabuliat at a less rate of rent than he demanded.

12. I am of opinion that the plaintiff, having asked for a kabuliat at a specific rate of rent, and having failed to show that he was entitled to that rate at the time of the decree, he was not entitled to a decree for a kabuliat at a less rate. It appears to me that he was entitled to a decree only upon proof that he was entitled to a kabuliat at the rate which he demanded.

13. As to the second point, it appears to me that the plaint, not specifying the date for the commencement of the kabuliat sought for, was not sufficiently specific, and

that the Court in which it was presented ought to have returned it; but that the plaint having been admitted and the case heard, the Judge might have supplied the omission by the decree by specifying the time from which the kabuliat ought to commence. In this very decree the Judge has ordered a kabuliat at an enhanced rate, without specifying the date from which it was to commence. If the ryot were compelled to execute such a kabuliat from the date of the decree, he would in fact be compelled to pay an enhanced rent from a period earlier than that from which in point of law he was bound to pay it.

14. It is said that landowners will be placed in difficulties. But there will be no difficulty at all, if they will only follow the course which Act X points out. If they wish to enhance the rent of a ryot, they should give notice under s. 13; and if, after that notice takes effect, the tenant fail to pay the enhanced rent demanded, the landowner may sue for rent at the rate demanded by the notice. The Court will then determine whether the plaintiff is entitled to enhance and whether he has served the necessary notice, and then will decree payment to him, either at the old rate, or at the enhanced rate demanded, or at the rate to which the Court may consider the landlord to be entitled to enhance the rent.

15. It is by suits for kabuliats at enhanced rates without notice, suits for declarations of rights where relief is not necessary, and other proceedings of that nature, that ryots are constantly harassed. In my opinion suits of the nature which I have described, ought to be discouraged.

16. S. 23, cl. 1, Act X of 1859, has been referred to. But that section was intended to point out the tribunals which were to have cognizance of suits of this nature, not to point out the cases in which such suits ought to be brought.

17. The decision of both the lower Courts is reversed, and the suit of the plaintiff is dismissed with costs in all the Courts.

Phear, J.

18. I am of opinion that the first question must be answered in the affirmative; but as I have given my views at length in the judgment which I delivered in the Division Bench, I do not think it necessary to repeat them now.

19. I also think that the second question should be answered in the negative, for it appears to me that a plaintiff suing to obtain a kabuliat without specifying the time at which that kabuliat is to commence, fails to state a definite cause of action. I quite agree, therefore, with the Chief Justice in thinking that, in the Court of first instance, when a plaint of that character is presented, it would be the duty of the Court to reject it. But I do not at present feel myself justified in going so far as to say that that deficiency (supposing the plaint had been admitted and the case tried) could be supplied by the Court from the materials before it. At the same time, I have not that confidence in my own view on this point as would induce me to give a judicial

opinion in opposition to that of the Chief Justice which he has just expressed in regard to it.

Mitter, J.

20. I concur generally in the judgment delivered by the learned Chief Justice. I think that a suit for a kabuliat at enhanced rates cannot be maintained without a previous notice of enhancement under s. 13, Act X of 1859. The unfairness of such a course on the part of the landlord towards the tenant has been already pointed out by the Chief Justice, and I do not wish to add anything to the remarks that have already been made by him upon that point. As how ever it has been previously determined by a majority of the Judges of this Court that a notice of enhancement is not necessary, I am bound to submit to that decision. But whilst submitting to it, I am not prepared to give to the landlord anything more than what he is strictly entitled to get under that decision. If the landlord chooses to avoid the ordinary process which is prescribed for him by the law, and thereby attempts to take an unfair advantage over his antagonist, he cannot in justice complain if he is held strictly to terms of the contract he wishes to impose upon the latter. Upon this ground I hold that the first question referred to us ought to be answered in the affirmative. With reference to the second point, I am also of the same opinion as the learned Chief Justice. I wish to add, however, that it is a point of little or no importance. According to the Full Bench case referred to by the learned Chief Justice, it has been decided that the kabuliat is to come into operation from the commencement of the year following that in which it is finally decreed by the Court. The landlord could not have possibly anticipated at the time when he filed his plaint as to when this decree would be passed in his favor, and the utmost that he could have done was to state therein that the kabuliat he sues for is to come into operation on some date unknown to himself, but depending upon the date when his suit will be finally disposed of. I think that the omission of such a statement is not of much consequence, and that, if any stress be laid upon the point upon purely technical grounds, the defect might be permitted to be rectified without dismissing the suit.

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[1] See Bens. Act VIII of 1869, s. 14.

[2] See Kasimuddi Khundkar v. Nadir Ali Tarufdar, 2 B.L.R., A.C., 265; Nieamat Ali v. Ramesh Chandra Roy, 3 B.L.R., A.C., 78; Narattam Das Chowdhry v. Roso Pyari Chowdhrain, Id., 271; Shib Ram Ghose v. Pran Pria, 4 B.L.R., App., 89; Ramanath Rukhit v. Chand Hari Bhuya, 6 B.L.R., 356.