APPELLATE CIVIL.

Before Sanderson C. J., Mookerjee and Newbould JJ.

ASUTOSH MUKERJEE

v.

HARAN CHANDRA MUKERJEE.*

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May 16.

Rent—Kabuliyat, construction of—Rent payable partly in cash, partly in kind—Value of paddy stated—Mourashi mokarari kabuliyat—"Jama abadharita and dharjya," meaning of—Bengal Tenancy Act (VIII of 1885), s. 68.

Where a mourashi mokarari kabuliyat in respect of 4 bighas recited *inter alia*, the following :—"At the rent of Re. 1-6-0 each and 7 aries of paddy," . . . "taking the cash and the price of paddy together assessing the total rent of Rs. 16-6-8 gds." . . . "and on payment of Rs. 30 as salami and covenant that I will maintain the boundaries and shall pay the cash rent fixed every year in Bhadra and Pous and the paddy in the month of Magh every year in one kist" . . . "there shall be no increase or abatement in the *jama*"

Held, per CURIAM : (Newbould J. dissenting), that looking at the evidence as a whole the parties did intend to fix the total rent which should be paid in the event of non-delivery of paddy, namely, Rs. 16-6-8 gds.

Dwarka Nath Mukerjee v. *Durijendra Nath Ghosal* (1) followed.

Baneswar Mukherji v. *Umesh Chandra Chakrabarti* (2) distinguished.

Per SANDERSON C. J. "When a *mourashi mokarari* lease mentions a certain sum of money as the '*jama abadharita*' which words may well be rendered as 'the fixed rent', the meaning of the document seems to be very clear, that the parties wanted to fix the value of the paddy, that is the part of the rent which was payable in kind."

*Appeal from Appellate Decree, No. 2358 of 1917, against the decree of H. P. Duval, Additional District Judge of 24-Pergannahs, dated Aug. 20, 1917, affirming the decree of Bipin Behari Chatterjee, Munsif of Baraset, dated July 28, 1916.

(1) (1897) I. L. R. 47 Calc. p. 139, (2) (1910) I. L. R. 37 Calc. 626.
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Per MOOKERJEE J. The two words "*abadharita*" and "*dharjya*" (which latter is used in the present case) are derived from the same root and they have clearly the same significance.

Per NEWBOULD J. The facts of this case seem to me to be indistinguishable from the facts of the case of *Baneswar Mukerji* v. *Umesh Chandra Chakrabarti* (1).

When the value of the paddy varies, the value of the cash may also be said to vary in comparison with the paddy. The effect of variation is diminished by fixing, as in this case, the rent partly in cash and partly in kind. The statement fixing the total rent at Rs. 16-6-8 gds. cannot be given any other meaning than a statement added to the document for the purpose of fixing the stamp duty and the registration fee.

SECOND APPEAL by Asutosh Mukerjee and another (defendants).

One Haran Chandra Mukerjee and another brought the suit (out of which this second appeal arises) in the 1st Court of the Munsif at Baraset to recover arrears of rent with damages for the year 1321 B.S. to the Bhadra kist of 1322 B.S. at a jama of Re. 1-6 annas 8 gandas in cash and 7 aries 7½ katis of paddy per year, the paddy being valued at Rs. 4 per *ari*. The plaintiffs alleged that one Sabaid Mondol held the jama in suit under one Menazuddin Mondol by executing a maurashi mokarari kabuliyat; that the plaintiffs had purchased the right of Menazuddin with back rent for 1321 and the principal defendants had purchased the jama of Sabaid and that these defendants had not paid the rent for the period in suit, on demand. The defendants denied the relationship of landlord and tenant with the plaintiffs and stated that the jama was a consolidated one of Rs. 16-6 annas 8 gandas and that the plaintiffs could not recover more, if they were entitled to rent at all, and that the rent for the period in suit had been paid. The price of paddy they said was Rs. 2 or Rs. 2-4 per ari. The learned Munsif decided entirely in favour of the plaintiffs holding

(1) (1910) I. L. R. 37 Calc. 626.

that the intention was to pay paddy rent or its then market value. On appeal by the defendants, Mr. H. P. Duval, the Additional District Judge of 24-Parganas, confirmed the decision of the trial Court holding "that the intention of the parties was that a certain amount of paddy was to be paid by way of rent, and that its value at the date of the kabuliyat (1903) was given in the deed for the purpose of stamp duty. The plaintiffs are entitled to recover this paddy or its equivalent, and it is no one's case that at the present day Rs. 15 is the cash equivalent for 7 aries odd of paddy." The defendants thereupon preferred this second appeal to the High Court. It was at first heard by Sanderson C. J. and Newbould J. but as the construction of the kabuliyat was in dispute as well as the meaning to be attached to certain Bengali words, this second appeal was finally heard by Sanderson C. J., Mookerjee and Newbould JJ.

Dr. Dwarkanath Mitter and *Babu Narayan Chandra Kar*, for the appellants. The construction of the whole document turns on those words in Bengali which suggest that money value was put on the paddy and which I translate thus—"Taking the cash and the price of the paddy together the total rent being fixed at Rs. 16-6-8 gds." . . . "There shall be no increase or abatement in the *jama* at any time." The words *mourasi mokarari* also occur in the kabuliyat. These words all show that the rent is fixed. I rely on the unreported decision of Maclean C. J. and Banerjee J. in *Dwarka Nath Mukerjee* v. *Dwijendra Nath Ghosal*(1).

[MOOKERJEE J. *Abadharita* comes from the same root as "*dharjya*."]

The only difficulty comes from the decision of Jenkins C. J. in *Baneswar Mukherji* v. *Umesh Chandra*

(1) (1897) I. L. R. 47 Calc. p. 139, (footnote.)

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Chakrabarti (1). It must have been from Behar. These words do not occur in that case.

[MOOKERJEE J. There are twelve such decisions as in *Nilmadhab* v. *Sitanath* (2), four of which are mine.]

My submission is that the document has been placed before your Lordships and my construction is the proper one.

Babu Atindra Nath Mookerji, for the respondent. I do not contest that the lease is permanent. No option was given to the tenant to pay the whole rent in cash. The real intention of the parties was that Rs. 15 should be the fixed value of the paddy rent. But that was merely for stamp valuation. I want 7 aries of paddy. I don't want cash rent. I want so much paddy now specifically.

[MOOKERJEE J. That is not in your plaint. You are claiming rent at Rs. 35 odd and are also claiming 25 per cent. damages on that Rs. 35 rent.]

I rely on the decision in *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1), the terms of that lease and this lease being almost similar.

[SANDERSON C. J. You are really claiming damages for non-delivery of paddy at market rates.]

I want my paddy as stipulated.

[MOOKERJEE J. Do you suggest that the Court should direct specific performance of the contract to deliver paddy by ordering the defendants to bring it into Court or suffer imprisonment on failure to do so. I have never heard of such a suit.]

I rely on the ruling in *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1), *Akbar Ali* v. *Durga Kripa Sen* (3) and *Sheikh Isaf* v. *Gopal Chandra Dey* (4). In these suits the rent was payable in kind

(1) (1910) I. L. R. 37 Calc. 626.
(2) (1916) 26 C. L. J. 94.
(3) (1900) 12 C. L. J. 589.
(4) (1910) 12 C. L. J. 593.

and on failure to pay it, the agreement was to pay its price. The case of *Nilmadhab* v. *Sitanath* (1) is distinguishable, because in it there was an option on the part of the tenant to pay the whole rent in cash. The unreported decision of Maclean C J. in *Dwarkanath Mukerjee* v. *Dwijendra Nath Ghosal* (2) (S. A. No. 966 of 1895) is contrary to the decision of Jenkins C. J. in *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (3). As there are conflicting decisions, there should be a reference to a Full Bench. If the tenant offers to pay in kind I cannot refuse it: *Chandra Kumar Singh Roy* v. *Kali Prosad Chuckerbutty* (4).

The appellant was not called upon to reply.

SANDERSON C. J. This is an appeal from the judgment of the learned Additional District Judge of 24-Pergannahs, whereby he affirmed the judgment of the Court below; and, the only question which arises on this appeal is with reference to the amount of rent which is payable under the contract in writing, a translation of which has been handed up to us.

I think it is desirable in this case to draw attention to the terms of the plaintiffs' claim, and we are indebted to my learned brother Mr. Justice Mookerjee, who is sitting with us at our request, for having our attention drawn to the claim; the claim is one for Rs. 1-6-8 gds. in cash; the value of the paddy is Rs. 28-12 annas, making a total of something over Rs. 30: then in addition to that, the plaintiffs have claimed 25 per cent. on the Rs. 30 odd, making an amount of Rs. 7 odd —and altogether Rs. 38-9 annas. The 25 per cent. is obviously a claim in pursuance of section 68 of the

(1) (1916) 26 C. L. J. 94.
(2) (1897) I. L. R. 47 Calc. p. 139, (foot-note.)
(3) (1910) I. L. R. 37 Calc. 626.
(4) (1911) 9 Ind. Cases 223.

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Bengal Tenancy Act. Therefore, it is obvious that that is a claim for rent and nothing else: otherwise, the plaintiffs could not have claimed 25 per cent. on the amount which they had claimed.

In order to justify this claim, the plaintiffs must satisfy us that there was a covenant in the contract to pay such a claim.

The document was a *mokarari* and *maurashi kabuliyat*. The kabulyat was in respect of 4 bighas and "at the rent at Re. 1-6-0 each and 7 aris of paddy the market value whereof is Rs. 15." Then comes a phrase as to the translation of which there was a little dispute, although I think the translation given by the learned vakil for the appellants and that given by the learned vakil for the respondents did not differ very much. On behalf of the appellants it was said that the Bengali words (of that phrase) ought to be translated as follows: "Taking the cash and the price of paddy together the total rent being fixed at Rs. 16-6-8 gds. The learned vakil for the respondents translated them as follows: "Taking the cash and the price of "paddy together assessing the total rent at Rs. 16-6-8 gds." Then the document goes on as follows:—"And on payment of Rs. 30 as *salami*, and covenant that I will maintain the boundaries and shall pay the cash rent fixed every year in Bhadra and Pous and the paddy in the month of Magh every year in one kist." Then there are several other provisions to which I need not refer. Then there is the following clause: "There shall be no increase or abatement in the *jama*." At the end are these words. "To this effect I hereby execute this *mokarari mourashi kabuliyat*."

On behalf of the respondents it was contended that the material sentence, to which I have referred, was inserted merely for the purpose of determining the registration fee. On the other hand, on behalf

of the appellants it was contended that the parties had agreed to fix the total rent which was payable under this contract and had fixed this amount at Rs. 16-6-8 gds. The question we have to decide is which of these constructions is the correct one.

In my judgment the appellants' contention is the correct one.

The first thing to be noticed is that this is a *mourashi mokarari kabuliyat*; and, therefore, one would expect to find a fixed rent. In the next place, the parties should be held to that which they have said in the contract and I do not see why the Court should speculate and as a result of that speculation arrive at the conclusion that the important provision to which I have referred had been inserted merely for the purpose of determining the registration fee. I think there might be good reason for the parties having fixed the rent—the parties may have thought that it would be more prudent, as between themselves, to fix the amount which should be taken as the value of the paddy rather than have a dispute upon each occasion as to the market value of it, in case it were not delivered. That is a point to which the late Chief Justice Sir Francis Maclean drew attention in giving his judgment in an unreported case decided by Sir Francis Maclean and Mr. Justice Banerjee (Appeal from Appellate Decree No. 966 of 1895) *Dwarka Nath Mukerjee* v. *Dwijendra Nath Ghosal** to which our

* *Before Maclean C. J. and Banerjee J.*

DWARKA NATH MUKERJEE

v.

DWIJENDRA NATH GHOSAL.

1897

March 17

(*S. A. No. 966 of 1895.*)

MACLEAN C. J. This is a rent suit, the rent being payable partly in cash and partly in kind, and the question which we have to decide depends

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attention was drawn. The Bengali words which were used in the present contract are no doubt not the same as the Bengali words in the contract with which Sir Francis Maclean and Mr. Justice Banerjee had to deal; but it was contended by the learned vakils for the appellants, and I think it is not denied by the learned vakil for the respondents, that there was practically no difference in the meaning of the two phrases, and I was much struck with the judgment of Mr. Justice Banerjee, when referring to the Bengali phrase used in the contract in that case, he said, "the words in the original . . . . . are a well-known Bengali expression which means a great deal more than a provisional settlement of the rent for the incidental purpose of ascertaining the

upon the true construction of the *kabuliyat* which is set out at page 11 of the paper book. The defendant, the present appellant, who is the tenant, says, that under the document, if the paddy which he agreed to deliver were not delivered the parties themselves put a value upon it, namely a value of Rs. 30. The plaintiff's contention is, that if the paddy were not delivered then that he was entitled to get the value of it at the market rate of the day. Now by the argument, the defendant, who as I have just said is the tenant, agreed to pay a rent which amounted to Rs. 59-10 and also to deliver to the plaintiff 1½ bish of paddy "which may be valued at Rs. 30 by guess" which I understand is by estimation "making a total of Rs. 89-10 as the assessed rent, as also to offer a bonus of Rs. 16." Then the document goes on to say that he "would pay every year the rent fixed," by that, I suppose, was meant the Rs. 59-10, and then the document goes on to say that the defendant should carry to the house the amount of paddy to which I have referred. Then if we look at the clause at page 12, we find this "if there be any negligence in the payment of rent or the delivery of paddy, an interest at the rate of 3 pies per rupee per month shall be charged till the day of payment or delivery. No plea of payment shall be put forth on the basis of any receipt or document, other than the *dakhila*, and if the rent is neglected to be paid, it shall be realised by taking legal measures." The question is what effect looking at the document as a whole is to be given to the language used. If the plaintiff's contention is sound it is difficult to see what real effect is given to the words "paddy

stamp duty. The lease was a *mokarari mourashi* lease; and, when such a document mentions a certain sum of money as the *jama abadharita* which words may well be rendered 'as the fixed rent', the meaning of the document seems to be very clear, that the parties wanted to fix the value of the paddy, that is the part of the rent which was payable in kind."

Being impressed with the learned Judge's judgment as to the meaning of the words, I thought it was desirable that we should have the assistance of one of the learned Judges of this Court who are thoroughly acquainted with the Bengali language,

which may be valued at Rs. 30, by estimation making a total of Rs. 89-10 as the assessed rent." It is suggested for the plaintiff that these words are adopted merely for stamp purposes, for the purpose, that is, of estimating the stamp duty payable for the document. But that is a mere suggestion and I do not think that that is a suggstion which we can accept. It seems to me, taking the document as a whole, that what the parties intended was this, that the defendant was to pay so much rent in money and so much rent in kind, but that in order to avoid disputes and the going into any question as to the value of the paddy in the event of its non-delivery the parties agreed that it should be valued at Rs. 30 by estimation and that view is supported by the words " making a total of Rs. 89-10 as the assessed rent." This view is also supported by the subsequent clause at page 12 which provides for payment of interest in the event of non-payment of rent and non-delivery of paddy : it says that it shall be charged till the date of payment and delivery Charged upon what ? I think that must mean upon the amount of rent and upon the amount at which they estimated the value of the paddy. The last clause provides that the plaintiff shall be entitled to realise the rent if it be not paid, by taking legal measures. There is nothing said as to what the plaintiff is to do if the paddy is not delivered. That seems to me again to point to the conclusion that when they speak of " rent " there, they mean not only the rent in cash but the rent in kind the value of which had been assessed as between the parties at Rs. 30. It may very well be that there were good reasons for this ; the parties may have thought that it would be more prudent as between themselves to fix the amount which should be taken as the value of the paddy if it were not delivered rather than have a dispute upon each occasion as to the market value of the paddy at the time of the breach.

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and that is the reason why I asked my learned brother Mr. Justice Mookerjee to sit with us—and we shall have the advantage of his judgment presently. The best construction that I can put upon this contract is the one that is contended for by the appellants. Looking at the document as a whole, I think the parties did intend to fix the total rent which should be paid in the event of non-delivery of paddy, namely, Rs. 16-6-8 gds.

There are several cases dealing with points somewhat similar to the point which we have had before us to-day, but there is no case which is exactly the same. The words in each of the cases differ to some extent from the words of the contract in this case. Consequently, I do not think there is any question which should be referred to a Full Bench, as we were asked to do by the learned vakil for the respondents.

Looking at the document as a whole, I think the contention of the appellant is sound and that the decree of the lower Appellate Court must be varied by reducing the amount decreed to the plaintiff, in accordance with our decision, and the appellant must have the costs of the appeal.

BANERJEE J. I concur with the learned Chief Justice in thinking that this appeal ought to be allowed. I only wish to add that whatever weight the explanation offered for the plaintiff, that the estimated value of the paddy is given in the *kabuliyat* for the purpose of determining the amount of stamp duty, might have had if the *kabuliyat* had not contained the words "making a total of Rs. 89-10 only as the assessed rent," in the presence of those words, that explanation loses all its force. The words in the original are "*ekune 89 taka 10 ana jama abadharita*" and "*jama abadharita* is a well known Bengali expression which means a great deal more than a provisional settlement of the rent for the incidental purpose of ascertaining the stamp duty. The lease was a *mokarari* and *mourashi* lease; and when such a document mentions a certain sum of money as the *jama abadharita*," which words may well be rendered as "the fixed rent," the meaning of the document seems to be very clear, that the parties wanted to fix the value of the paddy, that is the part of the rent which was payable in kind.

Appeal allowed.

In my judgment, it is our duty to put on the contract the best construction we can.

For these reasons, I think that the appeal should be allowed with costs.

MOOKERJEE J. I agree that this appeal must be allowed. In my opinion, in the events which have happened, the landlords are entitled to recover rent from the tenants, only at the rate of Rs. 16-6-8 gandas under the terms of the contract between them.

The lease is described as a *maurashi mokarari kabuliyat:* and the rent payable thereunder is fixed in perpetuity. This is manifest from the concluding words "ধার্য্য জমি জমার উপর কমি বেশী আমলে আসিবেক না" in other words, at no time would *there be reduction or increase in the land and the rent fixed.*

The document states that the rent is payable partly in cash and partly in kind. The cash rent is payable at the rate of Re. 1-6-8 gandas and the paddy rent is payable at the rate of Rs. 7-3-16 gandas an *ari.* The document further states that the market value of the paddy is Rs. 15 and that the total rent is Rs. 16-6-8 gandas (obtained by the addition of the rent in cash and the money value of the rent in kind). It is fairly clear that upon the lease taken as a whole the rent was fixed at Rs. 16-6-8 gandas, if the tenant should fail to deliver the paddy under the terms of the contract.

It has been suggested by the learned vakil for the respondents that this was not the true intention of the parties; but we must remember that we have to give effect only to such intention as the parties were able to express by the language used in the document, the Court is not concerned with any unexpressed intention which they might have entertained. The suggestion that the quantity of paddy deliverable might have been valued for the purpose of payment

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of the registration fee is a speculation for which there is no foundation either in the document or in the evidence.

There are many cases to be found in the books on the construction of documents of this character, more or less varying in their terms. The earliest case I have been able to trace in which the suggestion was made that the money value of the paddy was stated for purposes of the registration laws is that of *Sohobut* v. *Abdool Ali* (1). The theory that the paddy is valued either for the purpose of convenience of the parties or for the purpose of registration re-appears in two later cases, *Akbar Ali* v. *Durga Kripa Sen* (2) and *Sheikh Isaf* v. *Gopal Chunder Dey* (3); the latest case where it is reiterated is *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (4). On the other hand, there are decisions where the Court has construed the agreement strictly, without travelling beyond the terms expressed there : and amongst cases of this class reference may be made to *Bipro* v. *Suchand* (5), *Afer Morole* v *Prosonno Kumar Ghose* (6) and *Nilmadhab* v. *Sitanath* (7). It now transpires that the earliest case on the point is in the same direction, namely, the unreported decision of the late Chief Justice Sir Francis Maclean and Mr. Justice Banerjee in *Dwarka Nath Mukerjee* v. *Dwijendra Nath Ghosal* (8) (S. A. No. 966 of 1895), and it is probable that if that ruling had been reported, the current of decisions of this Court might have been uniform. I have read the judgment of Mr. Justice Banerjee in the case just mentioned, and I entirely agree with that learned Judge as to the meaning of

(1) (1898) 3 C. W. N. 151.
(2) (1900) 12 C. L. J. 589.
(3) (1910) 12 C. L. J. 593.
(4) (1910) I. L. R. 37 Calc. 626.
(5) (1910) 12 C. L. J. 595.
(6) (1910) 12 C. L. J. 649.
(7) (1916) 26 C. L. J. 94.
(8) See Foot Note at p. 139.

the expression "*abadharita jama*". The expression used in this case is not "*abadharita*", but "*dharjya:*" the two words, however, are derived from the same root, and, in my opinion, they have clearly the same significance.

If we were to accede to the contention of the respondents, the result would be to destroy the character of this lease as a *maurashi mokarari kabuliyat*; the amount of rent payable would vary from year to year according to the market price of the paddy. This, in my opinion, was not the intention of the parties, so far as that intention can be gathered from the words used in the document.

NEWBOULD J. With respect, I find myself unable to agree with the learned Chief Justice and my learned brother Mr. Justice Mookerjee.

The facts of this case seem to me to be indistinguishable from the facts of the case of *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1). There was, as here, a *maurashi kabuliyat*, the annual rent was a cash rent and a paddy rent. In the *kabuliyat* the paddy was valued and the total of the cash rent and valuation of the paddy rent was stated as settled in perpetuity, and it was held that the statement as to the market value of the paddy was explicable by the desirability of stating that amount for the purpose of fixing the stamp duty. It seems to me that to give any other meaning to this portion of the *kabuliyat*, we have now had to consider, would contradict the terms of the document. The market value of the paddy rent and the total rental of Rs 16-6-8 gandas are stated at the commencement of the document and subsequently comes the covenant to pay the cash rent on two different occasions and the paddy

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at a later date each year. There is nothing in the covenant suggesting that there is any option given to the tenant to substitute cash rent for the portion of the rent which is payable in paddy. The recovery of the paddy rent at its cash value, as it varies from year to year, does not seem to me to be inconsistent with the tenure being a *mokarari* one. When the value of the paddy varies, the value of the cash may also be said to vary in comparison with the paddy. The effect of variation is diminished by fixing, as in this case, the rent partly in cash and partly in kind. In the absence of any agreement in the *kabuliyat* to pay the total rent in cash, I cannot see that the statement fixing the total rent at Rs. 16-6-8 gandas can be given any other meaning than a statement added to the document for the purpose of fixing the stamp duty and the registration fee. I would, therefore, dismiss the appeal.

SANDERSON C. J. The result is that we allow the appeal, set aside the decrees of the Courts below, and direct that a decree be drawn according to the judgment of the majority of the Court.

G. S.

Appeal allowed.