APPELLATE CIVIL.

Before Suhrawardy and Page JJ.

NALINI BHUSAN GUPTA

v.

ALI MIA*.

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Abwab—Bengal Tenancy Act (VIII of 1885), s. 74—Stipulation for payment of Dak and Bhet expenses, if an abwab.

Where in a kabuliyat rent was fixed at a certain rate per *kani* of land and a further sum was mentioned as payable on account of improvement of *Dak* and *Bhet* expenses and the whole sum was put down as rent total :—

Held, that the sum mentioned for *Dak* and *Bhet* expenses formed part of the rent payable for the land, and did not constitute an *abwab* within the meaning of section 74 of the Bengal Tenancy Act:

Mathura Prosad v. *Tota Singh* (1) distinguished.

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 :

Bijoy Singh Dudhuria v. *Krishna Behary Biswas* (2) referred to.

SECOND APPEAL by Nalini Bhusan Gupta and others, the plaintiffs.

This appeal arose out of a suit for arrears of rent on the basis of a kabuliat, dated the 23rd June 1875. The Courts below decreed the suit in part only, rejecting the claim mentioned under the head of *Dak* and *Bhet* expenses as constituting an *abwab* within the meaning of section 74 of the Bengal Tenancy Act. The plaintiffs, thereupon, appealed to the High Court.

*Appeal from Appellate Decree, No. 1864 of 1921, against the decree of Srish Chandra Banerjee, Subordinate Judge of Backarganj, dated June 23, 1921, modifying the decree of Pratap Chandra Sen Gupta, Munsif of Bhola, dated April 24, 1920.

(1) (1912) 16 C. L. J. 296.

(2) (1917) I. L. R. 45 Calc. 259 ; 21 C. W. N. 959.

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An extract from the kabuliat, dated 10th Ashar 1282 B. S., June 23, 1875, is given below :—

Cultivator Jabbar Ali, son of Sadak Ali deceased, inhabitant of Char Ilisa, station Doulatkhan, district Backarganj.

Description.	Total land.	Rate per kani.	(Mokra) amount (of rent).
Gujastha ...	0-4-11-1 as per details.	...	...
Culturable paddy land ...	0-4-7-0	Rs. 6-0-0	Rs. 26-1-7-1-4
Homestead land	0-0-4-1	,, 8-0-0	,, 1-11-2-1-8
	0-4-11-1	...	,, 27-12-9-12
Improvement of *Dak* and *Bhet* expenses, etc.			,, 5-3-2-1-8
			,, 33-0-0-0

INSTALMENTS.

Kist Baisak Rs. 3, kist Jaista Rs. 4, kist Ashar Rs. 4, kist Sraban Rs. 4, kist Bhadra Rs. 4, kist Aswin Rs. 3, kist Kartick Rs. 3, kist Agrahayan Rs. 3, kist Pous Rs. 3, kist Magh Rs. 2.

Rent Rs. 33 according to above instalments I shall pay to your estate and receive dakhilas for same. In case of default in payment of any instalment I shall pay interest at the rate of 1 anna per rupee per mensem. I shall act according to the laws that are or will hereafter be in force regarding payment of rent. In future if there are any measurements by your estate, whatever rents are assessed, more or less, I shall pay without any objection. If any marriages or other auspicious ceremonies take place I shall pay *raj dhuti* and *selami* according to the practice prevailing in the mouza.

Babu Gunada Charan Sen (with him *Babu Suresh Chandra Talukdar*), for the appellants. The amount in dispute is included in the rent fixed; it is distributed over several *kists*. The principle to be followed in such cases is to be found in the case of *Bejoy Singh Dudhuria* v. *Krishna Behary Biswas* (1); the amount

(1) (1917) I. L. R. 45 Calc. 259; 21 C. W. N. 959.

claimed does not constitute an *abwab* within the meaning of section 74 of the Bengal Tenancy Act: *Radha Charan Roy Chowdhury* v. *Golak Chandra Ghose* (1), *Radha Prosad Singh* v. *Balkower Koeri* (2), *Kumar Kalanand Singh* v. *Eastern Mortgage Agency Ld., Co.*, (3).

Babu Prabodh Chandra Kar, for the respondents. The total land is mentioned in the kabuliat as well as the rate of rent per *kani* of land, the imposition of an additional amount for *Dak* and *Bhet* is, therefore, illegal under section 74 of the Bengal Tenancy Act, and cannot be recovered; the cases cited by the appellants are distinguishable; as in those cases the disputed amount was an integral part of the rent fixed for the land: *Srikanta Prosad Hazari* v. *Irshad Ali Sarkar* (4), *Mathura Prosad* v. *Tota Singh* (5) and other cases referred to.

Babu Gunada Charan Sen, in reply.

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 this question depends upon the construction to be put 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

(1) (1904) I. L. R. 31 Calc. 834.
(2) (1890) I. L. R. 17 Calc. 726.
(3) (1913) 18 C.L.J. 83.
(4) (1894) 16 C. L. J. 225.
(5) (1912) 16 C. L. J. 296.

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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* (1). 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

(1) (1917) I. L. R. 45 Calc. 259 ; 21 C. W. N. 959.

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. *Tota Singh* (1), 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 this 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* (2). The real question is what was the intention of the parties when they

(1) (1912) 16 C. L. J. 296.

(2) (1917) I. L. R. 45 Calc. 259; 21 C. W. N. 959.

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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 not 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 *kani*. 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.

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. 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* under section 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, be ascertained from the following cases: *Chidam Mahton* v. *Tilakdhari Singh* (1), *Radha Prosad Singh* v. *Balkower Koeri* (2), *Srikanta Prosad Hazari*

(1) (1885) I. L. R. 11 Calc. 175. (2) (1890) I. L. R. 17 Calc. 726.

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v. *Irshad Ali Sarkar* (1), *Kalanand Singh* v. *Eastern Mortgage Agency Company* (2) and *Bejoy Singh Dudhuria* v. *Krishna Behary Biswas* (3). 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* (4). 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 des- "cribed 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 (3) that "if the items other than the rent proper are consoli- "dated with it, and appear from the construction of "the lease to have been included in and treated "as part of 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

(1) (1894) 16 C. L. J. 225.

(2) (1913) 18 C. L. J. 83.

(3) (1917) I. L. R. 45 Calc. 259; 21 C. W. N. 959.

(4) (1890) I. L R. 17 Calc. 726.

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 sums. 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 is 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

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supported by the provision which is found in the kabuliat that if any marriages or other auspicious ceremonies take place the tenant shall pay *raj dhuti* 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.

A. S. M. A. *Appeal allowed.*

CIVIL RULE.

Before Greaves and Panton JJ.

1924

Feb. 5.

BALDEO MISSER

v.

DEPUTY INSPECTOR-GENERAL OF POLICE, C. I. D., BENGAL.*

Sanction—Legality of sanction granted after 1st September 1923—Criminal Procedure Code (Act V of 1898), s. 195, as amended by Act XVIII of 1923.

Sanction granted under s. 195 of the Criminal Procedure Code, after the 1st September 1923, when Act XVIII of 1923, amending the section and abolishing sanctions, came into force, is illegal; and no Court can take cognizance thereof.

The High Court declined to treat the sanction as a "complaint" either under s. 195 (*1*) (*b*) or s. 476, or to remand the case with a direction that the lower Court should consider whether, on the facts, it should make a "complaint" under s. 476.

THE facts of the case were as follows. On the 3rd January 1922 one Harendra Nath Mitter brought a

* Civil Revisions Nos. 33 and 34 of 1923 (under sections 195 and 476, Criminal Procedure Code) against the order of M. Rahman, Judge, Calcutta Small Cause Court, dated Oct. 4, 1923.