APPELLATE CIVIL.

Before Mukerji and Cammiade JJ.

JOGESH CHANDRA ROY

v.

SHARFUDDIN.*

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Feb. 9.

Rent—Khazana—Asil—Abwab—Mathat—Parabi—Selami—Tehwari—Goats annually deliverable by tenant—Regulation VIII of 1793, ss 54, 55, 61—Regulation V of 1812, s. 3—Act X of 1859, s 10—Act VIII (B.C.) of 1869, s. 11—Act XVI of 1874, s. 1—Bengal Tenancy Act (VIII of 1885), s. 74.

Where the intention of the parties as stated in the *kabuliat*, was that the total rental of a *jote* would be Rs. 106-1-6 made up of Rs. 97-8 annas in cash, two he-goats (deliverable at the time of the Dussera Puja) or their price Rs. 2-8 annas and Rs. 6-1-6 as cesses.

Held, that the annual rental was Rs. 100 and cesses Rs. 6-1-6 as mentioned in the *kabuliyat*.

Chaltan Mahton v. *Tilukdhari Singh* (1) and (2), referred to.

There is nothing in the law prohibiting a stipulation that two he-goats are to be delivered as part of the consideration (*i.e.*, rent) for the use and occupation of the land.

Real *abwabs* are payments or deliveries, sometimes fixed and customary and sometimes arbitrary and uncertain, which were *not agreed upon between the parties as consideration* for the use and occupation of the land.

SECOND APPEAL by Jogesh Chandra Roy, the plaintiff.

The plaintiff obtained a *kabuliat* from the defendants which contained the following clause:—"The rent will run at the rate of Rs. 72 for the 6 drones of land situate within the *kathi* at the rate of

*Appeal from Appellate Decree No. 499 of 1925, against the decree of H. C. Stork, District Judge of Chittagong, dated Sep. 24, 1924, affirming the decree of Gyanendra Mohan Howladar, offg. Munsif of Satkina, dated May 17, 1923.

(1) (1885) I. L. R. 11 Calc. 175. (2) (1889) I. L. R. 17 Calc. 131.

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Rs. 12 per drone and the rent of 3 drones 3 kanis of land situate outside the *kathi* is assessed at Rs. 25-8 annas at the rate of Rs. 8 per drone. We shall be bound to deliver two he-goats at the time of the Dussera Puja in default we shall pay Rs. 2-8 annas as price thereof." In a suit for recovery of arrears of rent at Rs. 100 per year both the trial Court and the Appeal Court dismissed plaintiff's claim to the price of the two he-goats as an *abwab*. The learned District Judge observed in his judgment on appeal as follows :—

"The appellant claims at Rs. 100 and the suit has been decreed at "Rs. 97-8 annas. The difference is the price mentioned in the lease as the "value of two he-goats deliverable by the tenant annually at the Dussera "Puja. It is obvious from innumerable rulings that the solution of the "matter lies in the interpretation of the intention of the contracting "parties. If the issue under dispute is obviously intended as a part of the "consideration for the lease it is clearly recoverable by suit. If it is an "issue over and above the amount intended for such consideration, even "though it does not partake of the nature of an oppressive imposition, it "is nevertheless of the nature of the *abwab* and is not recoverable. I do "not subscribe to the view of the learned Munsif that the record of the "last settlement, in that this is Noabad land, has the force of a decree. The "point in issue here is whether a registered potta or a record-of-rights is "to prevail and the record-of-rights can not raise more than a rebuttable "presumption. I think, however, that such presumption is not rebutted in "this case. The record-of-rights gives the rent as Rs. 97-8 annas. Had "the total 'consideration for the lease' been Rs. 100 *plus* two he-goats, or "its equivalent in cash it would surely have been so recorded, and for "this reason I regard the value of the two he goats as beyond such 'con-"sideration' in the intention of the parties themselves and therefore of "the nature of an *abwab* and not recoverable. The appeal fails in this "issue."

Thereupon the plaintiff preferred this appeal to the High Court.

Dr. Jadu Nath Kanjilal and *Babu Nripendra Chandra Das*, for the appellant.

Babu Narendra Kumar Das, for the respondent.

Cur. adv. vult.

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MUKERJI J. The substantial question in controversy in this appeal is whether Rs. 2-8 annas mentioned in the respondent's Kabuliat as the price of two he-goats, which are annually deliverable at the time of the Dussera Puja, is an *abwab*.

The relevant provisions of the statute are the following:—Section 54 of Regulation VIII of 1793 laid down that all existing abwabs should be consolidated with the *asal* jama into one specific sum: section 55 prohibited the imposition of any new *abwab* or *mathat* upon the raiyats upon any pretence whatever upon pain of a penalty of three times the amount imposed for the entire period of the imposition; and section 61 enacted that in the event of any claim being preferred by proprietors of estates . . . . on engagements wherein the consolidation of *asil, abwab*, etc., shall appear not to have been effected they are to be non-suited with costs. Section 3 of Regulation V of 1812 which altered some of the provisions of Regulation VIII of 1793 declared that nothing therein contained should be construed as sanctioning or legalizing the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathat* or any other denomination. By Act X of 1859, section 10, and Act VIII (B.C.) of 1869, section 11, exactions beyond the rent specified in the *patta* subject the landlord to damages not exceeding double the amount of such taxation. Section 61 of Regulation VIII of 1793 and section 3 of Regulation V of 1812 were repealed by section 1 of Act XVI of 1874. Section 74 of Act VIII of 1885 says, "All impositions upon tenants under the denomination of *abwab mathat* or other like appellations in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void." It should be remembered that this Act repeals sections

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54 and 55 of Regulation VIII of 1793 (*vide* Schedule I), without enacting any provision about the consolidation of rent of the whole with the *asil* into one entire sum. The position then, apart from authorities, is that now in all cases about illegal cesses, the question will primarily turn upon the meaning of the words "actual rent" used in section 74.

The authorities bearing upon the point are too numerous and varied and are far from being reconcilable, but it is not impossible to deduce from them one consistent principle which however does not take us beyond the words of section 74 itself.

The law assumed a somewhat settled state under the Full Bench decision of this Court in the case of *Chultan Mahton* v. *Tilukdhari Singh* (1). There were formerly decisions in which the stringent provisions of the Regulations were not strictly given effect to: e. g., *Jitulla Pramanik* v. *Jagadindra Narain Rai* (2) where the demand was of a cess over and above the original rent and the ryot consented and contracted to pay it; *Juggodish Chunder Biswas* v. *Turrikoolah Sircar* (3), which was the case of a *parabi*; *Budhna Orawan Mahtoon* v. *Joggessur Dayal Singh* (4) where the payments were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform and had been paid by the ryot from the beginning, according to local custom; *Nobin Chunder Roy* v. *Gooroo Gobind Mojoomdar* (5), which was the case of *bhika* or payments made over and above the rents due, but paid voluntarily and not exacted; *Serajgunge Jute Co.* v. *Torabdee Akoond* (6) where a *talab beshi* of two annas in the rupee had been paid for many years in

(1) (1885) I. L. R. 11 Calc. 175.
(2) (1874) 22 W. R. 12.
(3) (1875) 24 W. R. 90.
(4) (1875) 24 W. R. 4.
(5) (1875) 25 W. R. 8.
(6) (1876) 25 W. R. 252.

addition to the *asil* jama and had been in course of time incorporated with the *asil* jama and one receipt used to be given for the consolidated amount, it being found that it was paid for the purpose of preventing disputes with the landlord and for securing the ryot's own interest and that the ryot had agreed to make a definite payment in addition to his rent; *Mahomed Faiz Choudhuri* v. *Jamu Ghazi* (1) in which a condition in a lease that a certain sum was to be paid as collection charges was held to be a part of the rent and not an *abwab*, and was capable of enforcement if the condition was certain and definite in its nature and formed part of the consideration of the lease.

In the Full Bench of *Chultan Mahton* v. *Tilukdhari Singh* (2), certain items were claimed as "old usual *abwabs*" and in the Zemindari papers they were described as *abwabs*. The question referred to the Full Bench was: "Whether assuming that the "*abwabs* in question have by the custom of the estate "of which the lands form part been paid by the defen-"dant and his ancestors for a good many years, they "are legally recoverable by the plaintiffs, although "they are not actually proved to have been paid or "payable before the Permanent Settlement?". To answer this question two important questions were considered (*vide* Judgment of Mitter J.) first: Whether the imposition of *abwab* is prohibited and made unlawful by any law in force in this country, because if it is, section 23 of the Contract Act would make the contract to pay the same void; and second: Whether, if there was a contract between the parties for payment of *abwabs*, under the latter part of section 3 of Regulation V of 1812, the contract was enforceable. As regards the first question on reference to Sections 54, 55 and 61 of Regulation VIII of 1793 and section 3 of Regulation

(1) (1882) I. L. R. 8 Calc. 730. (2) (1885) I. L. R. 11 Calc. 175.

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V of 1812, section 10 of Act X of 1859, and section 11 of Bengal Act VIII of 1869, it was held that a contract for the imposition of *abwabs* is unlawful and is not enforceable by law. To decide this question a construction of the latter part of section 3 of Regulation V of 1812 was necessary. This portion is worded thus: "But the Court shall notwithstanding maintain and give effect to the definite clauses of the engagements between the parties, or in other words, enforce payments of *such sum as may have been specifically agreed upon* between them." Mitter J. (Tottenham and Pigott JJ. concurring) held that the words "such sum etc." refer to the amount of the rent specified. On the second question it was held that the *abwab* not having been consolidated with the *asil* jama as required by section 54 of Regulation VIII of 1793, a claim for recovery thereof would be non-suited by section 61 of that Regulation. The case went up to the Judicial Committee *Tilukdhari Singh* v. *Chulhan Mahton* (1). The Judicial Committee held that the High Court was right in holding that the items in questions were *abwabs*, and that, if they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54 of Regulation VIII of 1793, and not being so consolidated they could not be recovered; and, if they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in Section 55 of that Regulation and their imposition would be illegal. In the meantime another case came up before the High Court, viz., the case of *Padmanund Singh Bahadur* v. *Baij Nath Singh* (2). In this case certain items designated *selami* and *tehwari* were claimed in addition to a fixed rent on the basis of a *kabuliat* which created a permanent

(1) (1889) I. L. R. 17 Calc. 131. (2) (1888) I. L. R. 15 Calc. 828.

tenure and in which the tenant had agreed to pay the same. The learned Judges (Tottenham and Ghose JJ.) held that the Full Bench decision in *Chulton Mahton* v. *Tilukdhari Singh* (1), did not mean "to exclude the "operation of Regulation V of 1812, where the Regula- "tion did apply" and the items in question were not illegal cesses within the meaning of the Full Bench decision, not being uncertain and arbitrary in their character but specific sums, which the tenants had agreed to pay to the landlords and the payment of which, no less than the payment of rent itself, formed part of the consideration upon which the tenancy was created, and which are in fact, part of the rent agreed to be paid although not so described, they were recoverable under Regulation V of 1812. There was another Full Bench decision in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (2). There the question was whether certain cesses designated as *sarak*, *batta*, *neg* and *kharach* (without any specification of its nature) were realizable. The findings were that the rental was Rs. 18-10-6, that the difference between this rental and Rs. 22-2 which was claimed was made up of these items, and that they used to be realised and one receipt for the total amount, that is to say, the rent and these items used to be given without any separate specification of them. The argument was that the plaintiff was entitled to recover at the rate of Rs. 22-2 as, though the rent was Rs. 18-10-6 only, the balance was made up of items which were neither uncertain nor arbitrary and which the defendant had agreed to pay as part of the consideration for his holding the land. This argument received support from the case of *Pudmanund Singh* v. *Baijnath Singh* (3), which according to the referring Judges had

(1) (1885) I. L. R. 11 Calc. 175. (2) (1890) I. L. R. 17 Calc. 726, 739.
(3) (1888) I. L. R. 15 Calc. 823.

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put a wrong interpretation upon the Full Bench decision in *Chultan Mahton* v. *Tilukdhari Singh* (1). When the case was heard by the Full Bench Petheram C. J. was of opinion that *Padmanund Singh* v. *Baij Nath Singh* (2), must be held to have been overruled by the decision of the Judicial Committee in *Tilukdhari Singh* v. *Chulhan Mahton* (3), and expressed his opinion as follows:—"By this "judgment I understand the Privy Council, while "affirming that of the High Court, to go beyond it and "to hold that under the Regulations nothing could be "recovered for the occupation of the land, except one "sum, which must include everything which was "payable for such occupation arrived at either by "agreement or by some judicial determination "between the parties, and that any contract, whether "express or implied, to pay anything beyond that "sum, under any name whatever, for or in respect of "the occupation of the land, could not be enforced." O'Kinealy J. (Prinsep and Pigot JJ. agreeing) also observed that it is only one sum being the "ground rent" of the Permanent Settlement which could be recovered. Ghose J. on the other hand interpreted the decision of the Judicial Committee as follows:— "I do not understand that they intended to go any "way beyond what Mr Justice Mitter said in his judg- "ment, and to lay down, as it is said that they did lay "down, that nothing, save and except one sum inclu- "ding every item of payment could be recovered as "payable for the occupation of land; and that an "agreement to pay anything beyond that sum, "although it might be a lawful consideration for the "lease, cannot be enforced. It appears to me that if in "any case, the Court finds that any particular sum,

(1) (1885) I. L. R. 11 Calc. 175. (2) (1888) I. L. R. 15 Calc. 828.
(3) (1889) I. L. R. 17 Calc. 131.

"specified in the lease or agreed to be paid, is a lawful "consideration for the use and occupation of any land, "that is to say that it is really part of the rent "although not described as such, it would be "justified in holding that it is not *abwab* and is "recoverable by the landlord". The learned Judge proceeded to observe with regard to the case of *Padmanund Singh* (1), that although in point of fact on a reconsideration of the matter he was of opinion that *selami* and *tehwari* were *ab initio*, it was not intended in that case to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the rent, and that in that case both the elements were supposed (though wrongly, as it afterwards appeared) to be present *viz.*, first that the items in question were not of an arbitrary or indefinite character, and secondly, that they formed part of the rent agreed to be paid.

The opinion expressed by Petheram C. J. in *Radha Prosad Singh* v. *Bal Kowar Koeri* (2), as to the interpretation to be given to the decision of the Judicial Committee has not been followed in several cases (e.g., *Kumar Kalanand Singh* v. *Eastern Mortgage Agency Co.*, (3), *Assanulla Khan Bahadur* v. *Tirthabashini* (4), *Mathura Prasad* v. *Tota Singh*, (5), *Upendra Lal Gupta* v. *Meheraj Bibi* (6).

Cases of this Court after the aforesaid decisions of the Full Bench and of the Judicial Committee referred to above are many and varied and it would be too tedious to deal with them. Many of them have been referred to and dealt with in detail in the judgments of Sanderson C. J. and N. R. Chatterjea J. in the case of *Bejoy Singh Dudhuria* v. *Krishna Behari*

(1) (1888) I. L. R. 15 Calc. 828.
(2) (1890) I. L. R. 17 Calc. 726, 739.
(3) (1913) 18 C. L. J. 83.
(4) (1895) I. L. R. 22 Calc. 680.
(5) (1912) I. L. R. 40 Calc. 806.
(6) (1916) 21 C. W. N. 108.

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Biswas (1). The numerous cases that were cited at the bar at the hearing of this appeal are all discussed in the judgments in that case. The position has been accurately stated by both the learned Judges in that decision. Sanderson C.J. observed there: "The rule "that has been followed in this Court is that each case "must depend upon the proper construction of the "contract before the Court and if upon a fair interpre-"tation of the contract it can be said 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, *i.e.*, if it is really part of the "rent although not described as such the landlord can "recover it". N R. Chatterjea J. observed thus: "It "is contended that the mere fact that a certain item is "dealt with in the kabuliat in a separate clause or "that it is not included in the instalments of rent "ought not to make any difference in determining "whether the item is or is not rent. But then these "facts have an important bearing upon the question "of intention of the parties to the contract. They "show whether the parties intended to treat a parti-"cular item as part of the rent agreed upon to be "paid or as something different from the rent and "those facts have accordingly been taken into "consideration in all the cases decided since the Full "Bench. The question whether a particular item is "or is not rent, no doubt depends upon the construc-"tion of the lease in each case. But once it is held "that a particular item has not been agreed upon by "the parties as the 'rent' nor described in the lease as "such, the further question whether such sum, "although it may not form part of the consideration "mentioned in the contract, is recoverable or not

(1) (1917) 21 C. W. N. 959.

"must depend upon the law as laid down in the "Regulations and Acts on the point".

With the above observations of the learned Judges I entirely agree. Applying these principles to the kabuliat in the present case there is no doubt whatever that the intention of the parties was that the total rental of the jote would be Rs. 106-1-6 made up of Rs. 97-8 annas in cash, two he-goats or their price Rs. 2-8 annas and Rs. 6-1-6 as cesses. It appears that the *bhet* was deliverable at the time of the Dussera Puja and if not so delivered its price is to be paid at the September kist along with the cash due to be paid at that kist. It also appears that the cesses payable are also calculated on the cash and the price of the *bhet* taken together. There are no indications in the kabuliat which may incline us to take a contrary view.

The Courts below appear to have been in error in the view they have taken. The appeal accordingly is allowed and the decrees of the Court of Appeal below will be varied. The appellants will be allowed a decree taking the annual rental to be Rs. 100 and cesses Rs. 6-1-6 pies as mentioned in the kabuliat. In other respects the decree as passed will stand.

The appellant will be entitled to his costs in this Court.

CAMMIADE J. I entirely agree with what my learned brother has said. An *abwab*, as defined in section 74 of the Bengal Tenancy Act, is whatever is recovered from the tenant in addition to the actual rent; and rent is defined in section 3, subsection (*5*), as whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land

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held by the tenant. In each case it has to be determined whether or not the item called in question as an abwab is covered by the definition of the term rent. To put it in other words, it must be found that that item is part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land provided that such consideration is lawful. The consideration may be wholly monetary or wholly one in kind or it may be partly in money and partly in kind. The Statute does not restrict consideration in kind to grain or other produce of the soil. The consideration may be a cart-load of paddy or a cart-load of monkeys; and in either case it would be perfectly lawful. There is nothing in the law prohibiting a stipulation, such as the one in the present case, that two he-goats are to be delivered as part of the consideration for the use and occupation of the land. The he-goats in such a case do not come within the definition of *abwab*. The payments in money or the deliveries in kind at which the law strikes are such as are not payable or deliverable under the terms of the contract between the landlord and the tenant. Real *abwabs* are payments or deliveries, sometimes fixed and customary and sometimes arbitrary and uncertain, which were not agreed upon between the parties as consideration for the use and occupation of the land. The reports of the various surveys and settlements in Bengal show a large number of levies of various kinds made from the tenants on the occasion of marriages, sradhs, first rice ceremony, sacred thread ceremony, pujas, journeys, etc., performed by the landlords' family or on the occasion of certain ceremonies in the families of the tenants. These are survivals of the times when the relations between landlord and tenant were governed by custom and not by contract, and when

also the landlords, however petty, considered themselves the overlord of their tenants. Mr. Jameson in his report of the Midnapur Settlement operations divides the *abwabs* he found there into three classes:—

i. Those connected with the holding of land and payment of rent.

ii. Miscellaneous collections for various purposes.

iii. Impositions of the nature of fines for breach of caste rules or offences against the social law.

He says this rough division indicates the three capacities in which the zemindar stood in relation to the tenants, and in virtue of which he demanded the payments, namely, as owner of the soil, as feudal overlord to whom special services are due and as "*censor morum*".

The same Settlement Officer has mentioned in his report that in the same district certain *chhars* or remissions of rent were made by the landlords. He found four kinds of remissions, one made to artisans, another to village headmen, a third to bhadralok and a fourth, termed *mamuli*, which was unexplained.

Landlords thought more of the *abwabs* they collected than of what they were legally entitled to collect under the terms of the contract between them and their tenants. The result has been that Settlement Officers throughout Bengal have reported that the vast majority of the tenancies to which the presumption laid down in section 50, sub-section (2), have been applied were not really mokurari tenancies. Mr. J. C. Jack in his report of the Bakarganj settlement has said that tenants preferred abwabs to enhancements of rent, because the latter are permanent additions to the rent, whereas the former, being illegal, could be repudiated in better times.

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Agreements such as the one before us do not belong to the class of arrangements last described.

In some of the cases that have come before this Court, the payments which were found to be *abwabs* had been voluntarily made for a long time and were even fixed in amount; but the amounts levied had never actually formed part of the rent agreed to be paid and had never been treated as such.

There are, however, certain cases in which it has been held that because a certain amount of money was mentioned in the written lease as *khazana*, the stipulation for the delivery of certain movables was not one for rent. The assumption conveyed is that the term *khazana* is equivalent to the term "rent". This can hardly be correct in view of the definition of the term "rent" in the Act. By the word *khazana* is meant what is payable in money. Rent includes also what is deliverable in kind under the terms of the contract.

In the present case, the contract expressly provides for the payment of money and the delivery of two he-goats. The goats are part of the rent. It is perfectly immaterial that no cess is assessed on the value of the goats. That circumstance in no way affects the nature of the stipulation for the delivery of goats.

I, therefore, agree with my learned brother that this appeal must be decreed.

G. S. *Appeal allowed.*