

**PRIVY COUNCIL.**

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KRISHNENDRA NATH SARKAR AND OTHERS  
(DEFENDANTS)

P. C.<sup>c</sup>  
1926

Nov. 19.

v.

KUSUM KAMINI DEBI (PLAINTIFF).

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

*Landlord and Tenant—Enhancement of Rent—Construction of Pottah—  
Absence of Exclusion of Right —“Mukarrari”—Bengal Tenancy Act  
(VIII of 1885) s. 7.*

In 1870 a zamindar created a perpetual heritable tenure, not described as a mukarrari tenure, which provided: “all profits and losses shall be yours, and you shall on no account be entitled to pray for a reduction of rent. You shall abide by the survey and settlement made by me when necessary.” In 1915 the zamindar sued to enhance the rent under the Bengal Tenancy Act, 1885, s. 7.

*Held*, that upon the true construction of the pottah the zamindar was not precluded from obtaining an enhancement.

The word “mukarrari” is usually employed in creating a fixed rent in perpetuity, though the absence of that word is not conclusive if other words in the pottah show that the rent was intended to be fixed in perpetuity.

Decree of the High Court affirmed.

APPEAL (No. 43 of 1925) from a decree of the High Court (May 16, 1923) affirming a decree of the District Judge of Pabna which reversed a decree of the Subordinate Judge of Bogra.

The suit was brought in 1915 by the respondent, a zamindar since deceased, against the appellants, to enhance the rent of a tenure created in favour of the

<sup>c</sup> *Present* : LORD ATKINSON, LORD CARSON AND SIR JOHN WALLIS.

appellants by a jote pottah dated January 5, 1870, granted by the predecessor-in-title of the deceased respondent. The defendants contended that the rent was not liable to enhancement as it was fixed in perpetuity by the pottah.

The trial Judge dismissed the suit but his decision was reversed by the District Judge, whose judgment was affirmed by the High Court (Chatterjea and Pearson JJ.).

The suit and the present appeal depended solely upon the construction of the pottah, the material terms of which appear in the judgment of the Judicial Committee.

*DeGruyther K. C.* and *E. B. Raikes*, for the appellants.

*Dunne K. C.*, *Parikh* and *Ali Afzal*, for the respondent's representatives.

Reference was made to *Roy Kumar Surkar v. Naya Chatoo Bibi* (1), and to *Shibessouree Debia v. Mothooranath Acharjo* (2) as to perpetuity of tenure not necessarily involving fixity of rent.

The judgment of their Lordships was delivered by LORD CARSON. The suit was brought by the plaintiffs (respondents) as the zamindars and owners of certain lands, against the tenure holders thereof, to enhance the rent of the tenure created in favour of the latter under a jote pottah, dated 5th January, 1870. The question for determination in the appeal is whether the rent of the said tenure was, as the appellants contend, fixed by the pottah in perpetuity or was, as the respondents contend, not fixed in perpetuity, but was liable to enhancement in accordance with the provisions of the Bengal Tenancy Act (VIII of 1885) s. 7, sub-s. (1).

(1) (1904) I. L. R. 31 Calc. 950. (2) (1869) 13 Moo. I. A. 270, 275.

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The said pottah, which was in the Bengali language, was granted by the predecessor of the respondents, and the material part of it upon which the rights of the parties depend is as follows :—

“ This pottah is granted in respect of the above-mentioned mouzah and the aforesaid jotes by fixing the annual rent thereof at Rs. 418-9-15 gundas in the Company’s coin as per details in the schedule, and you also submit a kabuliyat of your own accord. You shall pay the rent year after year according to the kistibundi given in the schedule below. Should you make default in payment of the kists, you shall pay the rents in arrear with interest according to law. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the survey and settlement of rent to be made by me when necessary. If you should make any plea of payment unsupported by dakhilas, the same shall be rejected. You shall not do any improper act, and should you do any, you shall be answerable for it. Should any new tax be imposed by Government, you shall pay the same separately in addition to the rent mentioned in the pottah.”

The plaintiff-respondents also claimed in the suit the imposition of a fair rent for land alleged to be held by the appellants by encroachment in excess of the lands leased under s. 52 of the same Act. As regards this second claim, there was a finding in favour of the appellants by the Subordinate Judge, and the point was abandoned at the hearing of the first appeal. It was not disputed that under the terms of the said pottah the tenure created was a perpetual and hereditary one, having regard to the terms “ you and your sons and grandsons, etc., in succession, will remain in enjoyment and possession,” etc. This however does not in law involve that the rent specified is therefore fixed in perpetuity, and it was contended that upon the true construction of the pottah there was nothing to show that the rent was fixed in perpetuity, and that the plaintiff-respondents were

entitled to sustain their claim for and enhancement of the rent. The whole question therefore turns upon the true construction of the pottah. The Subordinate Judge of Bogra by his judgment, dated the 27th August, 1917, dismissed the plaintiff-respondents' suit with costs, holding on the construction of the pottah that the rent was fixed in perpetuity and was not liable to enhancement. On appeal, however, to the District Judge of Pabna, he, on the 5th April, 1919, delivered judgment and passed a decree setting aside the decree of the Court below, holding on the construction of the pottah that the plaintiff-respondents were not precluded from claiming an enhanced rent, and his judgment was upheld by the High Court of Judicature at Fort William in Bengal by a judgment and decree dated the 16th May, 1923; hence the present appeal.

It appears to be common ground that *prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively.

The learned Subordinate Judge was of opinion that the grant was clearly intended to create—

“an absolute, hereditary and ‘mokurrari’ tenure, inasmuch as it contains the essential words ‘generation to generation,’ which have always been considered to have that effect. The expression ‘the profit or loss is yours’ clearly shuts out the idea of enhancement and indicates ‘to show that the rent is fixed in perpetuity.’”

Apparently the word usually employed in creating a fixed rent in perpetuity is the word “mokurrari,” though no doubt the absence of such word is not conclusive if other words are found in the grant which clearly show that such a rent was intended to be created.

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The learned District Judge, however, took a different view, holding that, taking the pottah as a whole, there was nothing to show that the landlord had precluded himself from claiming an enhancement of rent. This view was maintained by the two Courts of Appellate Jurisdiction of the High Court of Judicature at Fort William who heard the case, the second hearing being on review.

Briefly stated, the learned Judges, in their respective Courts were unable to find in the grant any words which have, as the word "mokurrari" would have, the effect of indicating that the rent was intended to be fixed in perpetuity. On the contrary, they point out that the words following those quoted by the Subordinate Judge, viz., "and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the survey and settlement of rent to be made by me when necessary," indicate that whilst the lessee was precluded from claiming reduction the landlord was specifically maintaining his right to claim enhancement. Their Lordships agree with the opinions expressed by the Judges of the District Court and the High Court respectively, and are of opinion that on the true construction of the pottah there are no terms used from which it can be inferred that the landlord abandoned his right to enhancement, whilst the express provision that the rent would not be reduced seems to negative any such construction. Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: *Watkins and Hunter.*

Solicitors for the respondent's representatives:  
*W. W. Box & Co.*

A. M. T.