APPELLATE CIVIL.

Before Cuming and Mallik JJ.

ABDUL GANI CHAUDHURI
v.
ANGRI BHIKHU.*

1928.
Dec. 18.

Rent—Additional payment of goats and molasses—Abwab—Abatement—Additional rent—Excess area —Cesses—Bengal Tenancy Act (VIII of 1885), s. 52, sub-secs. (3), (4).

Whether a stipulation to pay goats and molasses or other things is an *abwab* or forms part of the rent is really a question of fact to be decided in each particular case.

In each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

Rani Chattra Kumari Devi v. *W. W. Broucke* (1) followed.

The rule which applies to the case of abatement of rent is dealt with in section 52, sub-section 4, of the Bengal Tenancy Act.

But the sub-section, which sets forth the rule to guide a court in determining the amount of *additional* rent, is sub-section 3 and not sub-section 4

Where the landlord had not yet to pay any additional cesses for the additional area for which the additional rent (from the tenant) had beeen assessed, he is not entitled to recover any cesses from the tenants in respect of the additional rent.

SECOND APPEAL by Abdul Gani Chaudhuri and another, plaintiffs.

The suit, out of which this appeal arose, was for recovery of rent of a *taluk* based on an unregistered *kabuliyat*, which stated the rent to be Rs. 713, and which also provided for the payment of 16 goats and two jars of molasses by the tenant. The plaintiffs also claimed additional rent for excess area under section 52 of the Bengal Tenancy Act. The trial court decreed the suit in part and, on appeal, this decree was further modified. But the goats and molasses were not allowed, being *abwabs*, neither was

*Appeal from Appellate Decree, No. 2641 of 1926, against the decree of J. W. Nelson, District Judge of Chittagong, dated May 25, 1926, modifying the decree of Hem Chandra Das Gupta, Subordinate Judge of Chittagong, dated Jan. 21, 1925.

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additional rent for excess area. Thereupon, the plaintiffs preferred a Second Appeal to the High Court.

Mr. Dwarkanath Chakravarti, *Mr. Nurul Huq Chaudhuri* and *Mr. Chandrashekhar Sen*, for the appellants.

Mr. Dhirendralal Kastgir, *Mr. Nagendranath Basu* and *Mr. Sushilchandra Datta*, for the respondents.

CUMING J. In the suit, out of which this appeal has arisen, the plaintiffs sued for recovery of arrears of rent and cesses for the years 1283 and 1284 M. E. and first quarter of 1285 M. E. with damages thereon at 25 per cent. They based their claim on a certain unregistered *kabuliyat*. They also claim additional rent of Rs. 212-14 as. for the period in suit, on the allegation that there had been an increase in the area of the *taluk* to the extent of 6 *drones* 7 *kanis* $6\frac{1}{4}$ *gandas* of land. The defendants contended, among other things, that they were not liable to pay any additional rent for any additional area. The first court decreed the plaintiffs' suit for $2\frac{1}{4}$ years, rent at the rate of Rs. 713 with cesses and with damages at $12\frac{1}{2}$ per cent., but he disallowed the claim for additional rent for additional area. On appeal, the learned District Judge held that the plaintiffs were entitled to additional rent for additional area and that the area on which they were entitled to additional rent was three *drones* odd. He assessed the additional rent for this additional area at Rs. 69 per annum.

The plaintiffs have appealed to this Court and their first point is that, on a proper construction of the *kabuliyat*, it will be found that the excess area is some six *drones* odd and not only three *drones* odd. They would seem to contend that, on a proper construction of the *kabuliyat*, the amount of land settled with the defendants, respondents, was some 21 *drones* and that, as they are now in possession of 28 *drones* odd, the plaintiffs are entitled to additional rent on additional

area, which is the difference between 21 *drones* odd and 28 *drones* odd. This question depends on the construction of the *kabuliyat*, so far as we are concerned. Mr. Chakravarti, who appears for the appellants, would seem to argue, first of all, that what was settled by the terms of the *kabuliyat* with the defendants was only the *hasila* area, which was some 21 *drones* odd. He contends further that if we find, on construing of the *kabuliyat*, that what was settled with the defendants was the *hasila* land 21 *drones* odd together with *khila* land, which was some 3 *drones*, still we ought to hold, on a proper construction of the *kabuliyat*, that the rent of Rs. 713 was assessed not on the total land mentioned in the *kabuliyat*, 24 *drones* odd, but only assessed on cultivable land. I have very carefully considered the terms of the *kabuliyat* and I have no hesitation in coming to the conclusion that what was settled with the defendants was the area of 24 *drones* 10 *kanis* 2 *gandas* and 1 *kara*. If the land settled with the defendants was only the cultivable area of 21 *drones* 10 *kanis* and 3 *karas*, it seems to me, there would be no point in making any mention of the uncultivated lands. The land, of which the *taluk* is comprised, is not described as land within certain boundaries. Had the lands been within certain boundaries, then there might have been some point in mentioning the facts that some were waste and some were culturable and it was the culturable lands only within these boundaries that were settled with the tenants. But there being no mention of the boundaries, there was obviously no point in making any mention of the unculturable lands, if they were not settled with the defendants. I am clearly, therefore, of opinion that what was settled with the defendants was 24 *drones* 10 *kanis* 2 *gandas* and 1 *kara* of land. Mr. Chakravarti would then seem to argue that, even if that were so, the rent was assessed only on the cultivated area. There is nothing whatever in the document to show that the rent was assessed only on the cultivated area. If it were, the document would probably have said so and there

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probably would have been a stipulation in the document that if the *khila* lands came under cultivation additional rent would be assessed upon them. There is, however, no such stipulation in the document. I am, therefore, of opinion that the learned Judge has rightly held that it is only some 3 *drones* odd which are now liable to assessment for additional rent. There is a further point to be taken into consideration in connexion with this question, namely, if only culturable lands were assessable under the *kabuliyat*, there is no evidence, as far as I can see, to show how much is culturable land and how much is *khila* land at the present moment.

Mr. Chakravarti has then argued that the lower courts were wrong in not allowing them a decree for 16 goats and two large jars of molasses, which, according to him, form part of the rent. The defendants, on the other hand, contend that these are *abwabs* and the plaintiffs are not entitled to realise them. Whether a stipulation such as this, to pay goats and molasses or other things, is an *abwab* or forms part of the rent is really a question of fact to be decided in each particular case. In the case of *Rani Chattra Kumari Devi* v. *W. W. Broucke* (1), their Lordships of the Judicial Committee remark " A large number " of cases decided by the Calcutta and Patna High " Courts were referred to in the judgments and cited " at the bar. Their Lordships do not consider it " necessary to refer to them beyond expressing their " agreement in the view that in each case it has to be " ascertained whether the sum claimed is really part " of the rent agreed upon to be paid as consideration " for the lease." If we apply this principle to the present case, I have no hesitation in finding that the goats and molasses do not form any part of the rent. It is quite clear, from a perusal of the document, that the total annual rent is settled to be Rs. 713 and, therefore, it is equally clear that these 16 goats and two big jars of molasses do not form any part of the rent. They cannot, therefore, be recovered by the plaintiffs

(1) (1927) I. L. R. 7 Pat. 134; L. R. 54 I. A. 432.

and they were rightly disallowed by the lower courts.

Mr. Chakravarti then objects to the method, which the learned Judge has adopted, in arriving at what he considered to be fair and equitable rent for this additional land. Mr. Chakravarti would seem to contend that the amount of rent to be assessed on the additional land should bear a proportion to the rent payable on the rest of the land, that is to say, I presume, if the rate of rent of the original land is Rs. 2 *per kani*, the same rate should be adopted in assessing rent for the additional area. The learned advocate in his argument is clearly thinking of the rule which applies to the case of abatement of rent which is dealt with in section 52, sub-section 4 of the Bengal Tenancy Act. But the sub-section which sets forth the rule to guide court in determining the amount of additional rent is sub-section 3 and not sub-section 4. As far as I can see, the learned Judge has followed the rule and principle prescribed in sub-section 3. The rule contained in sub-section 4, I need hardly say, does not apply to a case of assessment of rent on additional area.

The last point argued by the learned advocate for the appellants is that the appellants are entitled to cesses on the additional rent. Incidentally I may point out that this point was not argued in the lower court. Nor, as far as I can see, did they claim cesses on the additional rent. They have not, however, yet, as far as I can ascertain, to pay any additional cesses for this additional area for which the additional rent has been assessed. Clearly, therefore, they are not entitled to recover any cesses from the tenants in respect of the additional rent.

The result is the appeal must fail and is dismissed with costs.

The cross-objection by the respondents is not pressed and is also dismissed with costs.

MALLIK J. I agree.

Appeal dismissed.

G. S.