APPELLATE CIVIL.

Before C. C. Ghose and Pearson JJ.

1930

Dec. 16.

AMBIKACHARAN DAS

v.

BASANTAKUMAR MANDAL.*

Landlord and tenant—Bengal Tenancy—Enhancement of rent—Construction of pâttâ *and* kabuliyat—"Nirdhârita" *rent*—"Mokarrâri", *effect of the absence of—Bengal Tenancy Act (VIII of 1885), s. 7.*

A permanent and heritable tenure of 240 *bighâs* of jungly lands was created by exchange of *pâttâ* and *kabuliyat* (both identical in terms) which, *inter alia*, provided, that the *jamâ* was settled at Rs. 270 per year at the rate of Re. 1-2 per *bighâ*, the tenant agreeing to pay the *nirdhârita* (নির্দ্ধারিত) rent according to the *kists* prevailing in the *parganâ* and that the tenant would pay additional rent for any excess area that might be found upon proper survey by the landlord at the aforesaid rate and would also execute separate *kabuliyat* for the excess land. In a suit by the landlord for the enhancement of the rent of the aforesaid tenure, under section 7 of the Bengal Tenancy Act,

held that, upon the true construction of the *pâttâ* and *kabuliyat* in suit (taking into consideration the circumstances of the case and the terms of the tenancy), the tenure was at fixed rent and that the landlord was precluded from obtaining an enhancement of rent.

There is no presumption that a permanent lease must at the same time be *mokarrâri*. The omission of the word "*mokarrâri*" in the lease may, however, be made up by the cumulative effect of the use of other words in it indicating the intention of the parties to create a permanent lease at a fixed rent.

Golam Rahaman Mistri v. *Gurudas Kundu Chaudhuri* (1) followed.

Krishnendra Nath Sarkar v. *Kusum Kamini Debi* (2) distinguished.

APPEAL FROM APPELLATE DECREE by the plaintiffs, Ambikacharan Das and others.

The facts sufficiently appear from the judgment and the headnote.

Hemendrachandra Sen (with him *Shrishchandra Datta*) for the appellants. Rent is liable to enhancement unless the landlord precludes himself by contract not to claim any enhancement. See

*Appeal from Appellate Decree, No. 62 of 1929, against the decree of W. McC. Sharpe, Special Judge of Khulna, dated Sep. 5, 1928, reversing the decree of Pralhadranjan Das Gupta, Assistant Settlement Officer of Khulna, dated Sep. 28, 1927.

(1) (1922) 38 C. L. J. 350.

(2) (1926) I. L. R. 54 Calc. 166; L. R. 54 I. A. 48.

Krishnendra Nath Sarkar v. *Kusum Kamini Debi* (1). There is no such express contract in the *pâttâ* and the *kabuliyat* in suit. The stipulation for payment of additional rent for the excess area at the original rate mentioned in the documents does not make the tenancy *mokarrâri*. See the cases of *Surja Prosad Sukul* v. *Midnapur Zamindari Company, Ld.* (2) and *Bhairab Chandra Das* v. *Midnapur Zamindari Co., Ltd.* (3). The words নির্দ্ধারিত খাজনা mean the rent settled. They do not mean that the rent has been fixed for ever. The interpretation of the word নির্দ্ধারিত in the case of *Golam Rahaman Mistri* v. *Gurudas Kundu Chaudhuri* (4) was not correct. In the two cases relied on in that decision the tenures were *mokarrâri*.

Sharatchandra Ray Chaudhuri (with him *Sateendranath Mukherji*) for the respondents. The provision in the *pâttâ* and the *kabuliyat* that the tenant will have to pay rent separately for the excess area at the rate stipulated in the lease shows that the rent is fixed. The word নির্দ্ধারিত shows that the rent is fixed. See *Golam Rahaman Mistri* v. *Gurudas Kundu Chaudhuri* (4). I also rely upon the decision in the case of *Nabendra Kishore Roy* v. *Choudhury Mian* (5).

Hemendrachandra Sen, in reply.

GHOSE J. This appeal must be dismissed and for the following reasons. It arises out of a suit for enhancement of rent in respect of a tenure, the incidents of which are governed by a *pâttâ* and a *kabuliyat*, covering 240 *bighâs*, of which the *jamâ* was settled at Rs. 270, at the rate of Re. 1-2 per *bighâ*. The point for our decision is what is the effect of the terms used in the two documents. The *pâttâ* and *kabuliyat* are in identical terms. The landlord states that although the tenure in question is a permanent and heritable one, there are no words in

(1) (1926) I. L. R. 54 Calc. 166; L. R. 54 I. A. 48.
(2) (1908) 38 C. L. J. 369.
(3) (1923) 38 C. L. J. 372.
(4) (1922) 38 C. L. J. 350.
(5) (1929) 52 C. L. J. 583.

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the *kabuliyat* or *pâttâ*, which could be construed for the purpose of holding that the rent was fixed in perpetuity and could not be enhanced.

Now, it appears to be clear from the documents that the land in question was, at the inception, full of jungle. That is a circumstance which must be borne in mind for the purpose of determining the point which has now arisen. It follows that the tenant must have been exposed to considerable worry, trouble and expense in bringing the land under cultivation and in consideration of this circumstance it is reasonable to conclude that the tenant would not have been content with anything less than an assurance that the rent which he was going to pay would not be enhanced. Of course, the circumstance that the land was full of jungle is not, by itself, conclusive, but it is a circumstance which has to be taken into consideration along with the rest of the words used in the *kabuliyat*. In the second place, as is indeed admitted by the landlord, the tenure is a permanent and heritable one. The words used in the *kabuliyat* are that it is to be held from generation to generation. Now, is the tenant right in saying that the land was to be held from generation to generation at a fixed rate mentioned in the documents, or is the landlord right in saying that, although the rent was ascertained at the time when the tenancy commenced, there was and there is no such fixed rent as is contended for by the tenant and that the landlord's right to claim enhancement, under the provisions of section 7 of the Bengal Tenancy Act, has not, in any way, been trenched upon? Then again, in connection with this question, reliance is placed by the tenant upon the expression *nirdhârita*, which occurs in several places in the *pâttâ* and *kabuliyat*. In the context, wherein this expression occurs, the tenant argues that the intention was that, after the rent had been ascertained, at the time of the inception of the tenancy, it was to remain fixed so long as the tenant remained in occupation of the land. In this connection, reliance is placed upon the judgment of Mr. Justice Mookerjee

in the case of *Golam Rahaman Mistri* v. *Gurudas Kundu Chaudhuri* (1). Now, although Mr. Justice Mookerjee's judgment, on the meaning of the expression *nirdhârita*, has been criticised with great vigour by the learned advocate for the appellant, we are by no means convinced that the criticism is sound or that Mr. Justice Mookerjee made a mistake in construing the word in the case referred to above. The tenant, however, places very strong reliance upon other circumstances referred to in the *kabuliyat*. In this document it is stated that, in case it was found by measurement that there was any excess in the area demised to the tenant, the rent to be assessed, in respect of such excess area, should be "at the aforesaid "rate," that is the rate of Re. 1-2 per *bighâ* mentioned in the *kabuliyat* itself. The tenant argues that the significance of this statement must not be overlooked. It cannot be, according to the tenant, that the rent for the excess area, should there be any such, was to be assessed at the rate mentioned in the *kabuliyat* and that the rent in respect of the area originally demised should not be treated as a fixed one but could be enhanced from time to time at the instance of the landlord. Now, the circumstance, referred to above, has, in the events which have happened, a special significance. This question has been lately before us and, in our opinion, the tenant can very rightly argue that the clause, as regards additional rent, at the original rate, for excess area, lends considerable support to the view that the intention of the parties was to fix the rent in perpetuity. A contract, very similar to this, was considered by this Court in the case of *Chandicharan Law* v. *Azizernessa* (2). The learned Judges observed: "The word *mokarrâri* "has not been used in the document and there is no "express provision in the document that rent shall not "be enhanced. But there is some indication in the "document to show that the parties did not intend "that there should be an enhancement of rent. The

(1) (1922) 38 C. L. J. 350.

(2) (1922) S. A. Nos. 1886, 1887, *etc.*, of 1919, decided by Chatterjea and Panton JJ. on 11th Jan.

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"*kabuliyat* provides that if there was an increase in "the land on measurement, the tenant would have to "pay rent separately for the excess area at the rate "stipulated in the *kabuliyat*. That shows that the "rent was a fixed one, because it could not have been "intended that the tenant would pay for the excess "area at the rate stipulated in the *kabuliyat* and at "the same time would have to pay at an enhanced rate "for the original area mentioned in the *kabuliyat*." This observation applies with very great force to this case. As already referred to, the lease is a permanent one, and, though there is no presumption that a permanent lease must at the same time be *mokarrâri*, it does not require any great straining of language to hold that, though it does not mention the word *mokarrâri*, the cumulative effect of the words used in the document is such that one may reasonably conclude that the intention of the parties was to create a permanent lease at a fixed rent.

In this state of things, it is impossible, in our opinion, for Mr. Sen to succeed in inducing us to hold that the present case is so distinguishable from the case of *Golam Rahaman Mistri* v. *Gurudas Kundu Chaudhuri* (1), that we ought not to rely on it. In our view, each case must depend upon its own document governing the rights of the parties, and, although we are bound to pay the greatest attention and the greatest respect to any pronouncement of their Lordships of the Judicial Committee, we may be permitted to point out that the words, upon which we have laid emphasis, do not find mention in the case before their Lordships of the Judicial Committee in the case of *Krishnendra Nath Sarkar* v. *Kusum Kamini Debi* (2). That being the state of things, we are constrained to hold that the appeal is without any substance and must be dismissed with costs.

PEARSON J. I agree.

Appeal dismissed.

A. K. D.

(1) (1922) 38 C. L. J. 350.

(2) (1926) I. L. R. 54 Calc. 166; L. R. 54 I. A. 48.