APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

1932

Feb. 18 ;
Mar. 2.

BHABATARAN PAHARI

v.

TRAILOKYANATH BAG.*

Landlord and Tenant—Lease—Meaning of thikâ mokrâ*—Slight increase in rent, effect of—Provision for eviction, effect of—Character of tenancy—Construction.*

The lands demised under the *kabuliyat* in suit contained a *bârhi* with surrounding trees and a tank. The lease was described as *thikâ mokrâ* and in it was provided that, in default of payment of rent, the landlord would be entitled, without obtaining an *istafâ* or relinquishment from the tenant, to evict him and to sue for arrears of rent the tenant or his successors-in-interest. The tenant was given no right to cut down trees or to transfer the lands, by mortgage or sale, without the landlord's consent. The rent was at a fixed rate, but there was evidence of a slight increase.

Held that the word *thikâ* in the context above means "creation of the tenancy" and the word *mokrâ* means that the rent had been fixed in perpetuity.

Held, also, that a slight increase in the rent would not by itself destroy the permanent character of the tenancy.

Prionath Ghose v. *Surendra Nath Das* (1) followed.

Held, further, that the provision for eviction and the provisions relating to cutting down of trees, digging tanks and transfers by way of sale or mortgage do not militate against the permanent character of the tenancy, in the absence of a clause for re-entry.

Rishikesh Law v. *Satish Chandra Pal* (2) and *Nabendra Kishore Roy* v. *Choudhury Mian* (3) referred to.

SECOND APPEAL by the plaintiffs.

The facts are sufficiently set out in the judgment.

Saratchandra Basak (with him *Ksheerodenarayan Bhuiya*) for the appellant. *Thikâ mokrâ* means temporary tenancy on conditions agreed upon. *Nabendra Kishore Roy* v. *Choudhury Mian* (3).

*Appeal from Appellate Decree, No. 1656 of 1930, against the decree of Prabodhchandra Ray, First Subordinate Judge of Midnapur, dated 22nd Feb. 1930, affirming the decree of Rameshchandra Sen Gupta, Third Munsif, Tamluk, dated Aug. 24, 1928.

(1) (1922) 26 C. W. N. 657. (2) (1921) 35 C. L. J. 90.
(3) (1929) 52 C. L. J. 583.

This tenancy was created before the Transfer of Property Act and in those days all tenancies were non-transferable.

Ramaprasad Mukherji for the respondent. *Thikâ mokrâ*, in Midnapur, means a permanent lease: *Rishikesh Law* v. *Satish Chandra Pal* (1). *Nabendra Kishore Roy* v. *Choudhury Mian* (2), was a case from Noakhali and in that the word *mokrâ* was not in the body of the lease. So that decison does not apply to this case.

In this lease, the rent has been stated as "*sthiradare*" which shows it was fixed for ever. The meaning of *thikâ* given in Wilson's Glossary is "creation of a tenancy." And I say *mokrâ* in Midnapur means "*mokarrâri.*"

A clause for eviction does not necessarily make a tenancy non-permanent, there must be a clause for re-entry. *Megh Lal Pandey* v. *Rajkumar Thakur* (3).

The clause prohibiting transfers is not binding.

The right to dig tanks or to cut trees in a *mokarrâri* lease is of modern origin, so prohibition against that in this lease does not affect the question of permanency.

The words "*san san*" in this lease are similar to "*har sâl*" and indicates a permanent tenancy. *Mahomed Janu Mia* v. *Majubali Choudhuri* (4).

The lease also contains liability for rent in heirs and successors.

Bhuiya, in reply. In the case of *Rishikesh Law* v. *Satish Chandra Pal* (1), the grant was from generation to generation and, therefore, that is distinguishable. *Nabendra Kishore Roy* v. *Choudhury Mian* (2) is directly on the point.

GHOSE J. The question involved in this appeal is what is the true meaning of a certain *kabuliyat*

(1) (1921) 35 C. L. J. 90, 91.
(2) (1929) 52 C. L. J. 583.
(3) (1906) I. L. R. 34 Calc. 358.
(4) (1922) 27 C. W. N. 328, 335.

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which is in evidence in this case and which is marked Exhibit 1.

The matter arises in this way. One Akshay Jana, the grandfather of defendant No. 2, executed a *kabuliyat* sometime in 1877 in favour of his landlord, the plaintiff No. 1's father, in respect of the lands in suit. From the *kabuliyat* itself, it is apparent that the lands in question had been held by Akshay Jana, as tenant under the plaintiff No. 1's father, for some considerable time prior to 1877. The terms of the tenancy were, in 1877, reduced into writing and the *kabuliyat* was in fact not the origin of the tenancy but a confirmatory document.

It appears that the defendant No. 2 was, in 1327 B. S., in possession of the said lands. By a *kabâlâ* executed sometime in that year, he conveyed the lands to defendant No. 1 and gave up possession. It is said that he removed his house and went to live elsewhere. The plaintiffs' contention in this suit is that, inasmuch as the lands formed a non-transferable occupancy holding, the defendant No. 1 did not and could not acquire any rights whatsoever under the said *kabâlâ* and that, there having been an abandonment of the holding by the tenant, the plaintiffs are entitled to recover *khâs* possession.

The court of first instance examined the terms of the *kabuliyat* and came to the conclusion that the tenancy in question was of a permanent character and it, accordingly, dismissed the plaintiffs' suit. An appeal was taken by the plaintiffs to the learned Subordinate Judge of Midnapur, who, however, dismissed the appeal. It is against the last mentioned decree that the present appeal has been brought.

The real question is, as indicated above, what is the meaning of the *kabuliyat*, which is the governing document in this case. The *kabuliyat* is in Bengali and has been read out to us. The provisions therein, shortly stated, are as follows. The executant refers at the outset to the circumstance that he had been,

previous to the date of the execution of the document, holding for some considerable time the lands, measuring about 14½ *cottâs*, under an oral demise and had been paying the rents regularly every year in respect thereof. Those lands had then included a *bârhi* (*i.e.*, the tenant's residence) and it is stated that the tenant had been cultivating the lands adjoining thereto. The executant then goes on to state that he, being desirous of having a registered *pâttâ* and *kabuliyat* in respect of the said lands, the *kabuliyat* in question was being executed. A description of the premises demised then follows and it is apparent therefrom that the area was 14½ *cottâs*, that it included the said *bârhi* or residence with surrounding cocoanut, mango, and other trees and a tank. The executant then proceeds to state that in respect of the said lands a yearly fixed rent of Rs. 6 in Company's coin had been agreed upon and that he was obtaining a *pâttâ* or lease *thikâ mokrâ*. It is further stated that the executant would pay year by year into the landlord's office or *sheristâ* the said yearly rent according to certain instalments as specified in the said *kabuliyat* and would obtain duly signed receipts (*dâkhilâs*) from the landlord and that, if any payments were made by him without obtaining such receipts, no credit would be allowed to the tenant in respect of the same. If there was default in payment of any one instalment, the tenant undertook to pay interest thereon at the rate of a half anna per rupee per mensem. If, in the matter of the payment of rent, default was made and difficulties were raised, the landlord would be entitled, without obtaining an *istafâ* or relinquishment from the tenant, to evict the tenant and to let out the lands by settling the same with fresh tenants and to take legal steps, for the recovery of the arrears of rent as might be due with interest thereon as also expenses incurred in court against the tenant or, in the event of his death against his successor-in-interest; and to that, no objection by the

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tenant or his successor-in-interest would be valid. It is also stated in the *kabuliyat* that, without the landlord's consent, trees could not be cut down or new tanks dug and that the tenant would not be able to transfer the lands by sale or mortgage and that, if such sale or mortgage took place, the same would not be valid and binding on the landlord and that the landlord would be entitled in such event to recover damages with interest thereon from the tenant or his successor-in-interest and if any new taxes or charges on lands were imposed by the State, the same would have to be paid separately by the tenant. Lastly, there was a provision by which the tenant undertook to preserve the boundaries as of old.

These being the provisions in the *kabuliyat*, the defendant No. 1 relied on the words *thikâ mokrâ* and contends, on the authority of the case of *Rishikesh Law* v. *Satish Chandra Pal* (1), that the word *thikâ* was used to indicate the creation of a tenancy and the word *mokrâ* was in reality the word *mokarrâri* indicating that the rent had been fixed in perpetuity and that, on a true construction of the *kabuliyat*, it should be held that the tenancy was of a permanent nature, the right of succession being expressly recognised. On the other hand, it has been contended by the plaintiffs that the record-of-rights does not show that the defendant No. 2 had any permanent rights and that the words *thikâ mokrâ*—by themselves—did not constitute a permanent tenancy [see *Nabendra Kishore Roy* v. *Choudhury Mian* (2)] and further that the provisions in the *kabuliyat*, taken as a whole, did not indicate that the intention was to create a permanent tenancy.

Now, it seems to me that there is not and there cannot be much doubt as regards the meaning of the word *thikâ*. *Thikâ*, in the context in which it appears, clearly indicates the creation of a tenancy. Then comes the question as to what is the meaning of the word *mokrâ*; does it mean *mokarrâri* for the purpose

(1) (1921) 35 C. L. J. 90.

(2) (1929) 52 C. L. J. 583.

of indicating that the rent was fixed in perpetuity or does it mean anything else having regard to the rest of the document? In my view, in the context in which it appears and being not unmindful of the provisions in the *kabuliyat* taken as a whole, the import of this word is that the rent had been fixed in perpetuity. It is not shown from the document as to what had been the rent prior to the date thereof, but there cannot be any doubt, in my opinion, that the bargain was that the tenant was to pay a fixed rent of Rs. 6 per year from and after the date of the document. I am aware that the present rental is Rs. 6-3 but it is not explained how and when the rental in question came to be enhanced from Rs. 6 to Rs. 6-3 per year. In any event, this slight increase in the rent would not by itself destroy the permanent character of the tenancy, if, as a matter of fact, it was of that character. See *Prionath Ghose* v. *Surendra Nath Das* (1). Let us then examine the other provisions in the *kabuliyat*. As far as I can make out, the clear intention of the parties was that the tenant was to be allowed to remain undisturbed in enjoyment of his *bârhi* or residence and of the lands in question on payment of the said fixed rent. It is also clear from the internal evidence afforded by the *kabuliyat* itself that a right of succession or heritability was being conferred on the lessee. The fact that there is provision for the eviction of the tenant on default of payment of rent cannot be held to militate against the permanent character of the tenancy, nor do, in my opinion, the other provisions in the lease relating to the cutting down of trees or digging of new tanks and the prohibition against sale or mortgage affect in any way the permanent character of the tenancy. It is well known that these last provisions were usually inserted in documents of this description as matters of routine and I am not prepared to attach any very great importance to these provisions on the facts of this case, in the absence of a clause for re-entry.

(1) (1922) 26 C. W. N. 657.

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On all these considerations, I am of opinion that the provisions in Exhibit I are consistent with the idea that a permanent tenancy had been created thereby and that, in the circumstances, the execution of the *kabâlâ*, exhibit A, and the transfer by defendant No. 2 did not give the plaintiffs any cause of action. I am, therefore, of opinion that the appeal fails and must be dismissed with costs.

RANKIN C. J. I agree.

Appeal dismissed.

S. M.