APPELLATE CIVIL.

Before R. C. Mitter J.

MAKHAN LAL SAMADDAR

v.

1935

Nov. 29.

KHAGENDRA NATH CHAKRABARTI.*

Rent—Rate of rent—Compromise, Effect of, in rent cases—Decree on compromise—Bengal Tenancy Act (VIII of 1885), ss. 29, 147A.

Even where a *bona fide* dispute as to rate of rent is settled by compromise, there may still be scope for the application of the provisions of s. 29 of the Bengal Tenancy Act.

Where the dispute as to amount of rent is settled by an agreement between the landlord and the tenant, if the consent decree is passed by overlooking the provisions of s. 147A of the Bengal Tenancy Act, the decree is not void but voidable and has to be avoided.

Eshahaque Mia v. *Dula Mia Patwari* (1) followed.

In the case of a compromise dealing with various matters extraneous to the suit, on which the parties may come to an agreement, the whole of the petition of compromise and not a part thereof is to be recorded, *i.e.*, the petition of compromise must be introduced either by way of recital in the decree or be made an annexure to the decree but the decree itself must be confined to the subject-matter of the suit.

Hemanta Kumari Debi v. *Midnapur Zamindari Company* (2) followed.

Where there was no controversy as between the tenants and the under-tenants, who were the tenants' co-defendants, a clause in the petition of compromise, which dealt with the question as to what rent was to be paid thereafter by the under-tenants, was clearly beyond the scope of the suit, and the agreement must be controlled by s. 29 of the Bengal Tenancy Act.

The plain words of s. 29 cannot be modified by introducing an exception in the case of an agreement to settle *bona fide* disputes between the landlord and the tenant as to the rate of rent, where the landlord and tenant proceed upon the basis that the rent is to be enhanced.

*Appeal from Appellate Decree, No. 1836 of 1933, against the decree of Phaneendra Nath Mitra, Subordinate Judge of Khulna, dated May 22, 1933, modifying the decree of Pratul Chandra Ray, Second Munsif of Khulna, dated June 18, 1931.

(1) (1930) 34 C. W. N. 887.

(2) (1919) I. L. R. 47 Cal. 485; L. R. 46 I. A. 240.

Shco Sahoy Panday v. *Ram Rachia Roy* (1) followed.

An agreement embodied in a *kabuliyat*, to pay a certain amount of rent agreed upon by the parties in settlement of a *bona fide* dispute regarding the rate of rent and to avoid further litigation as to the amount or character of rent, is not an agreement in violation of the terms of s. 29 of the Bengal Tenancy Act.

Nath Singh v. *Damri Singh* (2); *Kedar Nath Hazra* v. *Manindra Chandra Nandi* (3) and *Bata Mondal* v. *Manindra Chandra Nandi* (4) followed.

SECOND APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Sreesh Chandra Datta for the appellant.

Hemendra Chandra Sen for the respondent.

R. C. MITTER J. This appeal is on behalf of the plaintiff Makhan Lal Samaddar against the judgment and decree of the Subordinate Judge of Khulna dated May 22, 1933. The question involved in the appeal is as to the rate of rent payable by the defendants to the plaintiff.

The plaintiff, before the year 1924, purchased a *gânti* tenure in execution of a rent decree. It is said that, thereafter, he served a notice under s. 167 of the Bengal Tenancy Act on the *dar-gântidârs*, who may conveniently be called the Bachars, and on the predecessors-in-interest of the defendants before me, who were under-tenants of the Bachars. Thereafter Makhan instituted a title suit (No. 16 of 1924) against the Bachars and the present defendants and others in the Court of the Subordinate Judge at Khulna. The basis of his claim was that the defendants of that suit were trespassers. He accordingly claimed recovery of *khâs* possession and *wâsilât*. The rights of the parties were not adjudicated upon by the Court, as on May 11, 1925, a petition of compromise was filed signed by the plaintiff and some of the defendants.

(1) (1891) I. L. R. 18 Cal. 333.
(2) (1900) I. L. R. 28 Cal. 90.
(3) (1909) 11 C. L. J. 106.
(4) (1914) 19 C. W. N. 321.

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The defendants in the present suit were defendants Nos. 5 and 6 in that suit. The material terms of the compromise are these:—defendant No. 2, one of the *dâr-gântidârs*, was accepted as such by the plaintiff, but he stipulated to pay rent at an enhanced rate to the plaintiff, *viz.*, at the rate of Rs. 3 *per bighâ*. Para. 8 is relevant for the purpose of the present suit. It is stated that, as the rent of defendant No. 2 is being increased, defendants Nos. 5 and 6, the present respondents and defendants Nos. 9 and 10 (we have no concern with them) would pay to defendant No. 2 an enhanced rent, *viz.*, Rs. 3-6 *per bighâ*. It is found that the previous rent of the holding, which defendants Nos. 5 and 6 held under the Bachars with two other persons, Jogendra and Nagendra, who ought to have been made parties to the aforesaid title suit, was at the rate of Rs. 2-6-3 *per bighâ*, *i.e.*, the total rent of the holding was Rs. 44-13-7½. As a result of the compromise, the rent went up to Rs. 60-12 *per* year, and the enhancement admittedly was more than annas two in the rupee. This compromise was recorded and a compromise decree was passed on May 26, 1935. The terms of the decree are these:—

> The suit is decreed in terms of compromise against defendants 1 to 11 and 16 and dismissed against the remaining defendants.

The *solenâmâ* filed formed a part of the decree.

Later on, the plaintiff purchased the interest of the Bachars, and he became the immediate landlord of the defendants before me. On the basis of the said decree in title suit No. 16 of 1924, the plaintiff instituted the present suit and wanted to recover rent at the rate of Rs. 60-12 *per* year. The defence is (*i*) that the suit is not maintainable inasmuch as the heirs of Jogendra and Nagendra have not been impleaded in the suit, and (*ii*) that the plaintiff can get a decree for rent only at the rate of Rs. 44-13-7½p. *per* year.

The last mentioned defence, which raises a very important quesion of law, is based on the provisions of s. 29 of the Bengal Tenancy Act. The defendants

say that, inasmuch as the agreement, appearing in para. 8 of the petition of compromise filed in the suit of 1924, contravenes the provisions of s. 29 of the Bengal Tenancy Act, the plaintiff is not entitled to claim the enhanced rent of Rs. 60-12-0 *per* year. This defence was given effect to by the Courts below. The said Courts held that s. 29 is a bar to the plaintiff's claim and that he is entitled to get rent at the rate of Rs. 44-13a.-7½p. On a further finding which is not necessary to consider in this appeal, the tenants were held entitled to claim abatement of rent on account of diminution in area and the rent was fixed at Rs. 36-13 *per* year. On this basis the plaintiff has been given a decree.

The plaintiff has preferred an appeal to this Court and he has contended that the conclusion of the Courts below, that s. 29 is a bar to his claim, is erroneous.

Mr. Sen, who appears on behalf of the respondents supports the judgments of the Courts below and he raises a further point that, even if the Courts below have decided this point erroneously, the plaintiff cannot maintain his suit on the basis of the agreement in title suit No. 16 of 1924, inasmuch as all the tenants were not parties to it and the heirs of Nagendra and Jogendra were not made parties to this suit. It will not be necessary to consider this point, if my decision is in his favour on the other point.

The main ground, on which the appellant raises his contention, is that his suit is based on a compromise decree and until that decree is set aside he is entitled to claim rent as provided for in the compromise decree. He further says that, where a *bona fide* dispute is settled by a compromise, there is no scope for the application of the provisions of s. 29 of the Bengal Tenancy Act. The argument advanced by the learned advocate for the appellant has to be taken in two parts. First of all he says that, if a *bona fide* dispute between a landlord and a tenant is settled by an agreement, that agreement is not touched by s. 29 of the Bengal Tenancy Act, even if the

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agreement is not recorded in a decree. As for instance, if there is a dispute as to the rate of rent between the landlord and tenant and the dispute is settled out of Court and a *kabuliyat* only is given by the tenant undertaking to pay rent at a certain rate, a suit can be successfully brought on the *kabuliyat* by the landlord. The *second* branch of his argument is that, where the dispute is settled by an agreement between the landlord and tenant, and if that agreement is embodied in a decree the landlord stands on a better footing, for, he says, that the rights of the parties are to be regulated by the consent decree, till the consent decree is set aside. If the consent decree is passed by overlooking the provisions of s. 147A of the Bengal Tenancy Act, the decree is not a void decree but it is to be avoided, and for that purpose, he draws my attention to some of the cases decided on this point. Some of these cases have no doubt laid down that such a decree is not void but it must be avoided. I may mention in this connection the case of *Eshahaque Mia* v. *Dula Mia Patwari* (1).

I do agree in this contention of the learned advocate for the appellant; but the question is what was the decree, which was passed or could have been passed in suit No. 16 of 1924. A petition of compromise may deal with various matters extraneous to the suit, on which the parties may agree. In such a case the correct procedure had been pointed out by Lord Buckmaster in the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Company* (2). No doubt the question raised there was as to whether the provisions of s. 49 of the Registration Act affected the petition of compromise filed in a suit between the Rani and Robert Watson and Company, but the observations of Lord Buckmaster at p. 246 of the report lay down the principle in clear terms. He says that in such a case the whole of the petition of compromise and not a part thereof is to be recorded, that is to say, the petition of compromise must be introduced either by way of recital in the decree or

(1) (1930) 34 C. W. N. 887.

(2) (1919) I. L. R. 47 Cal. 485; L. R. 46 I. A. 240.

be made an annexure to the decree, but the decree itself *must be confined* to the subject matter of the suit. If that be so, having regard to the scope of suit No. 16 of 1924, cl. 8 of the petition of compromise, which dealt with the question as to what rent was to be paid thereafter by the under-tenants of the Bachars to the Bachars, was clearly beyond the scope of the title suit of 1924, inasmuch as there was no controversy between the Bachars and their under-tenants, who were their co-defendants in that suit, on any matter whatsoever; cl. 8 of the petition of compromise ought not to have been made the decree of the Court, nor, in my judgment, has it been so made athough the decree is loosely drawn up. It no doubt might have been annexed as a schedule to the decree. It has no force beyond that of an agreement between the Bachars and their under-tenants. Clause 8 and other clauses, which went beyond the scope of the suit, would not have the force of a decree of the Court in the sense that the rights conferred thereby could be enforced in execution. Having regard to this view I am clearly of opinion that the contention urged by Mr. Datta, that his client's claim ought to have been decreed in full till the said consent decree is avoided by appropriate proceeding, cannot be given effect to on the facts of this case. Having regard to the observations made above, cl. 8 of the petition of compromise can only be regarded as an agreement between the Bachars and defendants Nos.5 and 6 in that suit. It is an agreement and has not got a greater force than that of an agreement.

The next question is whether s. 29 of the Bengal Tenancy Act affects the said agreement. There has been in the past controversy as to whether the plain words of s. 29 can be modified by introducing an exception in the case of an agreement to settle *bona fide* disputes between the landlord and tenant as to the rate of rent. If I am aware, the question was raised for the first time before Sir Comer

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Petheram, Chief Justice, and Mr. Justice C. M. Ghose in the case of *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1) and the matter was fully argued for the landlord by Mr. Woodroffe. There the facts were these: the landlord instituted a suit against the tenant in the year 1886. The landlord claimed *bhâoli* rent, *i.e.*, produce rent. The defence was that the tenancy was held at *nagdi* rent, *i.e.*, cash rent. The pleadings of the parties in the suit of 1886 did not require the adjudication as to what was the amount of cash rent annually payable. Mr. Tweedie, the learned District Judge, held that the rent was cash rent; but he went out of his way, as was pointed by the learned Chief Justice, in making an observation that the amount of cash rent was Rs. 153-1a.-6p. a year. After the suit of 1886 the landlord and the tenant put their heads together and agreed on the amount of the cash rent. On the facts of the case, as it was pointed out by Sir Comer Petheram, there was scope for a further suit between them for the determination of the amount of the cash rent annually payable. The landlord and tenant did not, however, take any recourse to further litigation. With a view to avoid further litigation the tenant executed a *kabuliyat* in favour of the landlord by which he undertook to pay cash rent at a certain rate, which was more than annas two in the rupee over the sum of Rs. 153-1-6. A suit was instituted by the landlord to recover rent on the basis of the said *kabuliyat* and the defence was that, inasmuch as the enhancement was at the rate of more than annas two in the rupee, s. 29 of the Bengal Tenancy Act affected the *kabuliyat* and the landlord was not entitled to get rent at more than the pre-existing rent, Rs. 153-1-6. This defence of the tenant was given effect to by the lower Courts. The landlord appealed to this Court. At p. 338 of the report Sir Comer Petheram said:—

> It is I think apparent that the arrangement of May 10, 1885 (date of the *kabuliyat*) was come to not as an enhancement of an existing rent, but as a settlement of a dispute as to the amount and character of the rent, and is not within the provisions of s. 29 at all.

(1) (1891) I. L. R. 18 Cal. 333.

Sheo Sahoy Panday's case (1) was followed in the case of *Nath Singh* v. *Damri Singh* (2). In that case some ambiguities in the judgment pronounced in the case of *Sheo Sahoy Panday* (1) were removed and the principle, that was laid down, was this, that an agreement embodied in a *kabuliyat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bona fide* dispute regarding the rate of rent and to avoid further litigation, is not an agreement in violation of the terms of s. 29 of the Bengal Tenancy Act.

In the case of *Kedar Nath Hazra* v. *Manindra Chandra Nandi* (3) the correctness of the aforesaid decisions was sought to be challenged on the ground that those decisions introduced into s. 29 certain words, which were not there. It was argued that s. 29 controls all agreements between a landlord and tenant for enhancement and there is nothing in the section, that that section would not apply if the agreement has been arrived at as a result of a settlement of a *bona fide* dispute. But this contention was not given effect to.

The matter was fully argued in the case of *Bata Mondal* v. *Manindra Chandra Nandi* (4). Mookerjee J. examined in detail the scheme of this part of the Bengal Tenancy Act beginning from s. 27. He pointed out that s. 29 dealt with the validity of a contract for enhancement of rent and that there could not be any question for enhancement of rent unless both the parties to the contract agreed upon one point, *viz.*, that there was to be an enhancement. It has been further pointed out that there can be a common intention to enhance rent if (i) there is no dispute as to the existing rent and (ii) there can be an intention to enhance rent, even if there is some dispute as to the existing rent, *e.g.*, the landlord says that the existing rent is Rs. 5 a year and the tenant says

(1) (1891) I. L. R. 18 Cal. 333.
(2) (1900) I. L. R. 28 Cal. 90.
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Rs.4: still if he agrees to pay Rs. 8 there is an intention to enhance rent, although there is no agreement between the landlord and tenant as to what the existing rate of rent precisely is; in fact there was a dispute between them on the point. Cases falling within the second class may give rise to difficulties, but so far as cases falling within the first class, I do not find any difficulty. The agreement must be controlled by s. 29.

In the present case it is admitted that the defendants, who were the under-tenants of the Bachars, had to pay before the year 1924 as rent Rs. 44-13-7½ a year. There was no dispute between them and the Bachars as to what was the rent payable. In the suit of 1924 there was no dispute also between the Bachars and defendants Nos. 5 and 6 in that suit as to the amount of rent payable. It is only because the Bachars had to pay to the plaintiff, as the purchaser of the *gânti* tenure, rent at the rate of Rs. 3 *per bighâ*, that the defendants Nos. 5 and 6 and the other under-tenants agreed to pay enhanced rent to the Bachars at the rate of Rs. 3-6. In fact this is expressly stated in para. 8 of the petition of compromise. Here, as Mookerjee J. pointed out, there was an intention to enhance rent both on the part of the Bachars and on the part of defendants Nos. 5 and 6 in that suit and there was an agreement between them as to the amount of enhancement.

On these facts I am clearly of opinion that s. 29 of the Bengal Tenancy Act hits the matter and the decision of the Courts below is correct. In this view of the matter it is not necessary for me to consider the further points raised by Mr. Sen appearing for the defendants.

The result is that I maintain the decrees of the Courts below and dismiss the appeal with costs.

Appeal dismissed.

G. S.