APPELLATE CIVIL.

Before Edgley J.

1936

Aug. 11, 12.

MANAGER, MURSHIDABAD ESTATE

v.

HEERA BEWA *

Landlord and Tenant—Occupancy râiyat—*Rent*—Falkar, *if recoverable by the landlord—Bengal Tenancy Act (VIII of 1885), ss. 23A, 178, cl.* (h).

Falkar or the right to get the fruits of the trees growing on the land held by an occupancy *râiyat* is lawfully recoverable by the landlord if it is a part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land settled at the inception of the tenancy and levied on the trees standing on the holding at the time of such settlement.

Upendra Lal Gupta v. *Meheraj Bibi* (1); *Bijoy Singh Dudhuria* v. *Krishna Behari Biswas* (2); *Chattra Kumari Devi* v. *W. W. Broucke* (3); *Abdul Gani Chaudhuri* v. *Angri Bhikhu* (4) and *Jogesh Chandra Roy* v. *Sharfuddin* (5) referred to.

By assessing the rent payable to him by imposing *falkar* as one of its component items in respect of trees standing on the land at the inception of the tenancy the landlord does nothing to interfere with the rights of his tenant under ss. 23A and 178(*h*) of the Bengal Tenancy Act.

SECOND APPEAL by the plaintiff.

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

Bijan Kumar Mukherjea, with him *Suresh Chandra Mukherji*, for the appellant.

Ramaprasad Mookerjee and *Mohit Kumar Chatterji* for the respondents.

Beereshwar Chatterji for Deputy Registrar on behalf of the minor respondents.

*Appeals from Appellate Decrees, Nos. 473 to 553 of 1934, against the decrees of Bama Charan Chakrabarti, First Subordinate Judge of Midnapore, dated Sep. 16, 1933, affirming the decrees of Shailendra Nath Chatterji, Munsif of Danton, dated Feb. 28, 1933.

(1) (1916) 21 C. W. N. 108.
(2) (1917) I. L. R. 45 Cal. 259.
(3) (1927) I. L. R. 7 Pat. 134; L. R. 54 I. A. 432.
(4) (1928) I. L. R. 56 Cal. 919.
(5) (1927) I. L. R. 54 Cal. 799.

1936

Manager, Murshidabad Estate v. *Heera Bewa.*

EDGLEY J. In the suits out of which these appeals arise the plaintiff sued the defendants for arrears of rent. It was the plaintiff's case that, at the inception of the tenancies, *falkar* was assessed as part of the rent for the demised land. The case for the defendants appears to have been that the *falkar* in question did not form part of the rent of the holdings in suit but was realised by the plaintiff as an *âbwâb* against the will of the defendants.

The learned Munsif dismissed the plaintiff's claim on the ground that there was no contract for the payment of *falkar* between the parties at the time of the inception of the tenancies. The finding of the learned Munsif was, however, reversed on appeal by the learned Subordinate Judge whose findings were: (i) that the defendants had paid the *falkar* just as regularly as rent since the inception of the tenancies; (ii) that the *falkar* claimed had been in existence from the time of the inception of the tenancies; and (iii) that these tenancies came into existence within the last fifty years. The lower appellate Court, however, held that, inasmuch as the defendants had *râiyati* rights in their holdings, the landlord was not entitled to recover *falkar*, having regard to the provisions of ss. 23A and 178(*h*) of the Bengal Tenancy Act.

When this case came before this Court on appeal on May 25, 1936, having regard to the fact that the judgment of the learned Subordinate Judge contained an inadequate discussion of the evidence in the case, I remanded the case to the lower appellate Court for a finding upon the following issue:—

> Was the *falkar* claimed a term of the tenancies at the time of their inception and has the landlord proved that he has realised *falkar* as rent from the tenants, since the inception of the tenancies in question ?

The matter has been further considered by Babu Jogendra Narayan Ray Chaudhuri, Subordinate Judge of Midnapore, who, after a very careful and exhaustive consideration of the evidence, has found

1936

Manager, Murshidabad Estate v. *Heera Bewa.*

Edgley J.

that the *falkar* claimed by the plaintiff was a term of the tenancies at the time of their inception, except in the case of a tenancy in suit No. 804 and he also found that the plaintiff had realised *falkar* as rent from all the defendants, except in a case of the tenancies covered by Suits Nos. 804, 770 and 778.

The most important point for decision in connection with these appeals is whether or not *falkar* forms part of the rent of the demised land. With regard to this point the position taken by the respondents is that the *falkar* in question is in the nature of an *âbwâb*, that it was not one of the incidents of the tenancies at the time of their inception, and that, during recent years, the plaintiff has been realising *falkar* from the defendants against their will.

It seems to be clear on the authorities that, if *falkar* was part of the consideration for the use and occupation of the land at the time of the inception of the tenancies, it must be regarded as part of the rent. With regard to this point it was pointed out by Chatterjea and Sheepshanks JJ. in the case of *Upendra Lal Gupta* v. *Meheraj Bibi* (1) that—

> The question whether any particular item is or is not an *âbwâb* must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

Further, in the case of *Bijoy Singh Dudhuria* v. *Krishna Behari Biswas* (2), Sanderson C. J. made the following observations:—

> It seems, therefore, that the rule which has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court, and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i.e.*, if it is really part of the rent, although not described as such, the landlord can recover it.

These and other cases were cited before the Judicial Committee of the Privy Council in the case of

(1) (1916) 21 C. W. N. 108. (2) (1917) I. L. R. 45 Cal. 259, 271.

1936

Manager, Murshidabad Estate. v. *Heera Bewa.*

Edgley J.

Chattra Kumari Devi v. *W. W. Broucke* (1) and on this point Lord Sinha said—

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.

It would appear, therefore, that the views of this Court with reference to this question have been generally accepted by the Judicial Committee of the Privy Council and the principle laid down by the Privy Council was followed by this Court in the case of *Abdul Gani Chaudhuri* v. *Angri Bhikhu* (2).

The distinction between an *âbwâb* and rent was very clearly drawn by Cammiade J. in the case of *Jogesh Chandra Roy* v. *Sharfuddin* (3). In discussing this matter his Lordship said—

Rent is defined .....as whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. In each case it has to be determined whether or not the item called in question as an *âbwâb* is covered by the definition of the term "rent". To put it in other words, it must be found that that item is part of the consideration agreed to be paid or delivered by the tenant for the use and occupation of the land provided that such consideration is lawful. The consideration may be wholly monetary or wholly one in kind or it may be partly in money and partly in kind.

His Lordship went on to say—

Real *âbwâbs* are payments or deliveries, sometimes fixed and customary and sometimes arbitrary and uncertain, which were not agreed upon between the parties as consideration for the use and occupation of the land.

From the findings of the lower appellate Court after remand it is now clear that the disputed tenancies were created in 1305 or 1306 and that—

The *falkar* claimed by the plaintiff in respect of all tenancies in dispute save and except the tenancy in suit No. 804, in which appeal No. 67 has arisen, was a term of those tenancies at the time of their inception. He has realised *falkar* as rent from all the defendants barring those in suits Nos. 804, 770 and 778 which have given rise to appeals Nos. 67, 52 and 56, respectively.

(1) (1927) I. L. R. 7 Pat. 134 (139); L. R. 54 I. A. 432 (436).
(2) (1928) I. L. R. 56 Cal. 919.
(3) (1927) I. L. R. 54 Cal. 799, 809

These findings are based on a very careful consideration of the evidence. In my view, there were ample materials on the record to justify the learned Subordinate Judge in arriving at these findings and I have no hesitation in accepting them. I, therefore, hold that *falkar* forms part of the rent of the demised land except in the case of the lands covered by suits Nos. 804, 770 and 778.

It is, however, urged by the learned advocate for the respondents that, in any view of the case, the *falkar* claimed cannot be recovered by the appellant in view of the provisions of ss. 23A and 178(*h*) of the Bengal Tenancy Act. With regard to this point, it is not disputed that the respondents are occupancy *râiyats*. Under s. 23A of the Bengal Tenancy Act, it is provided that, subject to the provisions of s. 23 of the Act, an occupancy *râiyat* is entitled to enjoy the produce of trees on his land, to fell them and to utilise and dispose of the timber of such trees; and it is further provided by s. 178(*h*) of the Act that nothing in any contract between the landlord and tenant made before or after the passing of the Act shall take away or limit the rights of occupancy *râiyats* in trees on their holdings as provided in s. 23A.

In this connection, it is admitted by the learned advocate for the appellant that, as the law now stands, subject to the provisions of s. 23 of the Bengal Tenancy Act, even if the assessment at the rate of nine pies per tree on each holding formed part of the original rent at the time of the inception of the tenancies, the tenants would be at liberty to fell these trees and would thereafter be entitled to a remission of *falkar* in respect of the trees so felled. He also admits that the landlords would not be entitled to levy *falkar* in respect of any trees planted by the tenants after their induction. This being the case, the advantage to the landlord of imposing *falkar* as

1936

Manager, Murshidabad Estate v. *Heera Bewa.*

Edgley J.

a portion of the rent would often be nugatory and unsatisfactory. At the same time, in my view, if the landlord so desires, there is nothing in the law to prevent him from levying *falkar* on the trees standing on the holding at the inception of the tenancy as part of the consideration for the use and occupation of the demised land and this is what appears to have happened with reference to the holding with which we are now concerned. By doing so, the landlord has merely placed himself to some extent in the hands of his tenants who, provided that they do not materially impair the value of the land or render it unfit for the purpose of the tenancy, are entitled to fell the trees on which the *falkar* rent has been assessed and thus avoid the payment of this item of the rent. By assessing the rent payable to him by imposing *falkar* as one of its component items, the landlord does nothing to interfere with the rights of his tenants under ss. 23A and 178(*h*) of the Bengal Tenancy Act and, if he chooses to do this, the law entitles him to levy *falkar* as rent in respect of any trees with regard to which the assessment was originally made.

With regard to this point, however, it is contended by the learned advocate for the respondents that the plaint is vague and there is nothing to show that the trees, in respect of which *falkar* is now claimed, were those on which this item of rent was originally assessed. It is, however, clear that except in the case of three holdings, the landlord has shown that the payment of *falkar* as part of the rent was one of the terms of the tenants' leases at the time of the inception of the tenancies and that, ever since the holdings in suit were demised to the tenants, he has been collecting *falkar* from them and their predecessors as part of the rent. He has also been able to show that *falkar* has been realised from the tenants not as an *âbwâb* but as part of the consideration for the use and occupation of the land.

1936

Manager, Murshidabad Estate
v.
Heera Bewa.

Edgley J.

If the tenants had wished to raise a defence to the effect that the trees in respect of which the landlord sought to recover *falkar* were not on their holdings at the time of the inception of their tenancies or had been planted by them, they would have been at liberty to do so but this was no part of their case. On the other hand, they appear to have admitted that *falkar* had actually been paid by them for many years, their contention being that they had paid *falkar* as an *âbwâb* and against their will. Further, it is not now open to them to make a grievance of any vagueness in the plaintiff's pleadings, because, had they so desired, it would have been open to them to apply for further and better particulars under O. VI, r. 5, of the Code of Civil Procedure. This they failed to do.

In view, therefore, of the facts which have been clearly established by the plaintiff and the state of the pleadings and also, having regard to the provisions of ss. 103 and 106 of the Indian Evidence Act, I think the onus clearly lay upon the defendants to prove that they were entitled to any reduction of the *falkar* rent by reason of the fact that any of the trees on which the assessment had originally been made had ceased to exist or that any of the trees in respect of which it was sought to recover *falkar* had been planted by the tenants themselves. The onus which lay upon them with regard to this point they have not discharged.

The learned advocate for the appellant, having regard to the findings of the lower appellate Court, does not wish to press his clients' claims in the appeals arising from suits Nos. 804, 770 and 778. With regard to the other suits, in view of the considerations mentioned above, I am of opinion that the plaintiff has succeeded in establishing his case. The appeals arising from those suits will, therefore, be allowed with five sets of costs in all the Courts, and the costs against the minor respondents will be paid out of the minors' estates. With regard to the appeals Nos. 473,

1936

Manager, Murshidabad Estate v. *Heera Bewa.*

Edgley J.

477 and 488 arising from suits Nos. 804, 770 and 778, these appeals will be dismissed with costs in the case of appeal No. 477. There will be no order for costs as regards appeals Nos. 473 and 488.

The learned advocate for the respondents to-day asked for leave to file an appeal under s. 15 of the Letters Patent in appeals Nos. 478 and 479. This application is rejected.

Appeals dismissed.

A. A.