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SEN, J.

tenant nor is there any proof of the fact that he was put forward as the representative of the other tenants. The question of representation was fully gone into in the court of first instance and that Court came to the conclusion that there was absolutely no evidence on the side of the defendants on either of the two points, namely, whether Hiraman's name appeared as the sole recorded tenant in the sherista of the maliks or whether he was put forward by the plaintiffs as their representative. In view of these findings it is impossible to proceed upon the solitary statement of one of the plaintiffs' witnesses which could not possibly be conclusive on the point.

The appeal must be dismissed with costs.

ALLANSON, J.—I agree.

Appeal dismissed.

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Oct., 18.

RANI CHATTRA KUMARI DEVI

v.

W. W. BROUCKE.*

Bengal Tenancy Act (VIII of 1885), section 74—Recoverable Rent—Actual Rent—"Malguzari"—Abwabs—Specified additional Payments.

A patta of villages stated that they were let

"at a consilidated jama of Rs. 15,581, being the malguzari, road and embankment cesses, dues to priests (mahal uprohiti), and expenses of obtaining acquittance receipts (farag karach), etc."

A schedule gave for each village the amounts under each of the above and other specified heads, the total being described as "annual rent" (jama eksala). The execution clauses of the patta and of the corresponding kabuliat referred to the Rs. 15,581 as the jama.

*Present: Viscount Dunedin, Lord Shaw, Lord Sinha and Sir Lancelot Sanderson.

Held, that the description "malguzari" was not to be regarded as equivalent to the "actual rent" which by section 74 of the Bengal Tenancy Act, 1885, alone was recoverable, and that the section did not preclude the recovery of any part of the sum specified as the consolidated jama; nor could the tenant evade liability as to an item because the raiyats had not paid it to him as formerly they had to the landlord.

In determining whether a landlord is precluded by section 74 from recovering it is to be ascertained in each case whether the whole sum claimed is really part of the rent agreed upon to be paid as consideration for the lease. The object of the section, and of the similar enactments which preceded it, was to prevent exactions from tenants beyond the rent specified in their patta, where there was one, and if there was no written engagement, beyond what was actually payable, whether by verbal agreement or by virtue of custom.

Tilukhdari Singh v. *Chulhan Mahton* (1), distinguished.

Decree of the High Court reversed.

Appeal (no. 2 of 1926), from a decree of the High Court, (January 5, 1925), modifying a decree of the Subordinate Judge of Muzaffarpur, (July 20, 1920).

The main question upon the appeal was whether any, and if so what, portion of the sum claimed as rent under a patta and kabuliyat, dated May 22, 1911, was irrecoverable having regard to section 74 of the Bengal Tenancy Act (VIII of 1885).

The facts, the material terms, and the terms of section 74, appear from the judgment of the Judicial Committee.

The Subordinate Judge held that the whole of the payments specified in the lease as rent were recoverable.

The High Court (Dawson Miller, C. J., and Foster, J.), held that under section 74 of the Bengal Tenancy Act, 1885, and the decisions thereon, the plaintiff was entitled to recover only the amount specified in the patta as "malguzari." The appeal is reported at I. L. R. 4 Pat. 404.

(1) (1889) I. L. R. 17 Cal. 13; L. R. 16 I. A. 152.

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RANI CHATTRA KUMARI DEVI v. W. W. BROUCKE.

Sir George Lowndes, *K. C.*, and *E. B. Raikes*, for the appellant.

DeGruyther, *K. C.*, and *Dube*, for the respondent.

Reference was made to *Tilukhdari Singh* v. *Chulhan Mahton* (1), *Pudmanund Singh* v. *Baij Nath Singh* (2), *Radha Prosad Singh* v. *Bal Konwar Koeri* (3), *Radha Charan Roy Chowdhry* v. *Gorak Chandra Ghose* (4), (upon which the appellant particularly relied), *Mathura Prasad* v. *Tota Singh* (5), *Upendra Lal Gupta* v. *Meheraj Bibi* (6), and *Bijoy Singha Dudhuria* v. *Krishna Behari Biswas* (7).

October 1.—The judgment of their Lordships was delivered by—

LORD SINHA.—The question in this case turns on the construction of a lease, dated the 22nd May, 1911, of 36 villages of the Ramnagar Raj in the province of Behar and Orissa, granted by the Rajah to a Mr. Broucke.

The material part of the lease is stated in the judgment of the Chief Justice of Patna as follows :—

"I have let out 16 annas of the following 36 villages as per boundaries given below.................... (at a consolidated annual Jama of Rs. 15,581-5-0, being the Malguzari, road and embankment cesses, dues of priests (Mahal Uprohiti) and expenses for obtaining acquittance receipts (Farag Karach), etc., in addition to 515 maunds of paddy specified below payable annually at a uniform rate under a Thika Patta, the term whereof is given below and on receipt of a Kabuliyat to Mr. W. J. Broucke".

At the end of the document is a schedule giving a list of the 36 mauzas and stating in the case of each mauza the total annual "jama" and details of how it is made up. One instance will suffice. The first

(1) (1889) I. L. R. 17 Cal. 131; L. R. 16 I. A. 152.

(2) (1888) I. L. R. 15 Cal. 828.

(3) (1890) I. L. R. 17 Cal. 726.

(4) (1904) I. L. R. 31 Cal. 834.

(5) (1912) I. L. R. 40 Cal. 806.

(6) (1916) 21 Cal. W. N. 108.

(7) (1917) I. L. R. 45 Cal. 259.

mauza is Thath Mitia. The particulars thereunder show first of all that the term is for 15 years from 1319 to 1333 F. Then follows a list of payments in respect of that mauza as follows:—

	Rs.	a.	p.
Malguzari	673	2	0
Road cess	40	8	0
Embankment cess	10	2	0
Costs of acquittance	24	4	0
Dasahara and Chait Nawmi Farmaish ...	12	0	0
Tika, Bheti, Guru Bheti	5	0	0
Batchhapi, Jangla-isim-navisi	7	0	0
Katiari	4	0	0
Dewani Dastur	24	14	0
Mahal Uprohiti	5	0	0
Total	805	14	0

Paddy 35 maunds.

The total of Rs. 805-14-0 thus arrived at is then treated as the Jama Eksala (annual rent), and is divided into four kists of Rs. 201-7-6 payable in Asin, Pous, Chait and Jeyth.

The word "malguzari," translated as *rent* in the High Court record, ordinarily means *revenue*, and is so rendered in Wilson's Glossary.

The Chief Justice of Patna was of opinion that the last eight items of the list above had been collected as abwabs from the raiyats long before the lease was executed and were regarded as having the sanction of custom, and he held (Foster, J., concurring) that on a proper construction of the lease Broucke undertook to pay them as abwabs under the different denominations as set out in the said schedule and as indicated in the body of the lease, and not as part of the *rent*, which the Chief Justice took to be the meaning of "malguzari" (the first item). In that view the High Court held that, under section 74 of the Bengal Tenancy Act,

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the lessor was not entitled to recover the amounts covered by the items 3 to 10 of the list, as being abwabs in addition to the rent payable under the lease.

Section 74 of the Bengal Tenancy Act, 1885, enacts that

"all *impositions* upon *tenants* under the denomination of abwab, mathat or other like appellations in addition to the *actual rent* shall be illegal, and all stipulations and reservations for the payment of such shall be void."

That section has a long legislative history behind it from 1791 to 1885, which was referred to at the Bar, but to which it is unnecessary to refer further than to state that the object of the whole series of enactments from the Regulations of 1791 to Act VIII of 1885 was to prevent exactions from tenants beyond the rent specified in their patta, when there was one, and if there was no written engagement, beyond what was the rent actually payable, whether by verbal agreement or by virtue of custom.

There being a written engagement or lease in this case (the patta and kabuliyat) the only question is whether the *actual* rent payable by Broucke as tenant to the Rajah as his landlord is what that lease calls the "consolidated *annual* jama" of Rs. 15,581-5-0 *plus* 515 maunds of paddy, as the Subordinate Judge held, or only a portion thereof, as the High Court held.

Their Lordships are unable to endorse the view taken by the High Court.

Malguzari, which is the first of the items composing the total yearly jama for each village, cannot be rendered as *rent*, much less as *actual rent*; nor is there any evidence to show that the amount of the malguzari was the *actual rent*, as distinguished from abwabs, paid by the cultivating raiyats of the village. The only distinction apparent on the face of the lease is between *cash rent* and *produce rent*. So far as the former is concerned, it is impossible to take the

first item as being actual rent and the rest as abwabs when they are all included in the total, which is expressly stated to be the annual rental payable in four equal kists, or instalments, specified in figures. It is also to be noticed that the execution-clause of the patta, signed by the Rajah, is as follows:—

"Executed this Jika-Patta for a term of 15 years in respect of 34 villages and of 17 years in respect of 2 villages in all 36 villages at an annual jama of Rs. 15,581-5-0 and 515 maunds of fine paddy to be realised from year to year."

Similarly the execution-clause of the kabuliat signed by Broucke is as follows:—

"Kabuliat given by me on jama rupees fifteen thousand and five hundred and eighty-one and five aunas only."

Their Lordships agree with the Subordinate Judge that Broucke was bound under his engagement to pay the rent mentioned therein as the annual rental, and cannot evade this liability because the raiyats may not or do not pay him what they used to pay the Rajah. The question as to what each raiyat was or is liable to pay as his *rent* is not before their Lordships, and they do not express any opinion upon it.

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.

The case of *Tilukdari Singh* v. *Chulhan Mahton* (1), decided by this Board, was also referred to. In that case there was an old tenancy without any written contract. But the money claimed was described in the

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plaint itself as old usual abwabs, and the zamindar's books of account produced in the case showed that on the face of those documents the payments made by the tenant were distinguished as (*1*) rent and (*2*) abwabs, i.e., so much for rent, and so much for abwabs. The latter were claimed on the ground that they were payable by custom and had been, in fact, paid for a long time without objection. It was held that long use or custom could not validate abwabs as an addition to the rent.

A somewhat novel argument was advanced on behalf of the respondent, viz., that the words *actual rent* in section 74 of the Bengal Tenancy Act were equivalent to the assal jama of the old Regulations, and that any stipulation to pay a rent which, in fact, exceeded what was the assal jama would be illegal to the extent of such excess. This would raise an issue of fact as to what was the assal jama of the 36 villages—the subject-matter of the lease. No such issue was raised in the Courts of India, and, indeed, in no reported case does any such question appear ever to have been raised.

Their Lordships would moreover point out that the words *actual rent* in section 74 cannot be taken to mean either a *fair and equitable rent* or rent at *customary or pergana* rates.

In their Lordships' opinion Broucke's *actual* rent under his lease is the sum of Rs. 15,581-5-0 in cash and 515 maunds of fine paddy, as found by the first Court, and their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be reversed and the judgment of the Subordinate Judge restored, with costs of this appeal and of both Courts in India.

Solicitors for appellant: *Watkins and Hunter.*

Solicitors for respondent: *W. W. Box and Co.*