

v. *Kalka Prasad*<sup>(1)</sup> which were explained and distinguished, that the article of the Limitation Act applicable to a claim based on the personal covenant to recover the balance due to the mortgagee after the sale of the mortgaged property is article 116 which provides a period of six years from the due date and not article 66 or 67. Any attempt to distinguish the present case from the Full Bench decision fails of any success. It is obvious that on the mortgage deed as it stands the dispossession is as much a cause of action in a registered deed giving rise to limitation under article 116 as the cause of action of failure to pay on the due date set out in the first part of the document. Reference may also be made to the decision in *Maung Yan Kwin v. Maung Po Ka*<sup>(2)</sup> with which I would respectfully concur.

In these circumstances, this appeal must be dismissed with the modification that the decree against appellant no. 2 will not be a personal decree but will be restricted to the property of the joint family which is in or may come to his hand. The respondents are entitled to their costs.

DHAVLE, J.—I agree.

*Appeal dismissed.*

### FULL BENCH.

*Before Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*

NAWABZADA SYED MOINUDDIN MIRZA

v.

SURENDRA KUMAR ROY.\*

*Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 67 and 179—permanent mukarravi lease in a permanently settled area—absence of specific provision for payment of*

\* Appeal from Original Decree no. 12 of 1930, from a decision of Babu Krishna Sahai, Subordinate Judge of Purnea, dated the 29th July, 1929.

(1) (1884) I. L. R. 7 All. 502, P. C.

(2) (1924) I. L. R. 3 Ran. 60.

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*interest on overdue instalments of rent—landlord, whether entitled to interest—section 179, scope and significance of—general law governing relationship of landlord and tenant, what is—section 67, applicability of.*

Section 179 of the Bengal Tenancy Act, 1885, lays down :—

“ Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant.”

*Held*, that the section only permits landlords and tenants, in the case of a creation of a permanent tenure in a permanently settled area, to contract out of the Act and that whereas the general law created by the Bengal Tenancy Act as applicable to the relationship of landlord and tenant will apply to a permanent mukarrari lease, the parties are at liberty to make a specific provision for the elimination of such terms as may be imposed by the Act as they may select to eliminate.

*Matangini Debi v. Mokurura Bibi*(1) and *Mohunt Ajeb Bhurthi v. Ram Narain Singh*(2), followed.

Where there was no specific provision in a permanent mukarrari lease in a permanently-settled area for the payment of interest on the overdue instalments of rent.

*Held*, (i) that the general law governing the relationship of landlord and tenant was that laid down in the Bengal Tenancy Act ;

(ii) that, therefore, in the absence of any express or implied contract to the contrary, the landlord was clearly entitled to the benefit of the general law, as embodied in section 67 of the Act, with regard to the payment of interest on arrears of rent.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

*Sir Sultan Ahmed* (with him *A. H. Fakhruddin*), for the appellant: In the deed creating the permanent mukarrari lease there is no provision for the

(1) (1901) I. L. R. 29 Cal. 674, F. B.

(2) (1914) 23 Ind. Cas. 108.

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payment of interest on overdue instalments of rent. The application of section 67 of the Bengal Tenancy Act is, therefore, excluded by reason of the provision of section 179 of the Act—*Raja Kristo Das Law v. Kalimuddin Bhuiya*(<sup>1</sup>). The absence of a specific provision in the deed implies an agreement between the parties that interest will not be chargeable. That being so, the contract between the parties will exclude the operation of the special provision of section 67 which does not control section 179—*Matangini Debi v. Mokurura Bibi*(<sup>2</sup>).

*Sushil Madhab Mullick* (with him *N. C. Ghosh*), for the respondent: Section 179 only enables the parties to create a permanent mukarrari lease on terms which may contravene the provision of section 67. If there are no terms *to the contrary*, the provision of section 67, which is the general law applicable to the relationship of landlord and tenant, will apply. The landlord can be deprived of the benefit of section 67 only in cases where the parties have contracted out of the Act under section 179—*Mahunt Ajeb Bharthi v. Ram Narain Singh*(<sup>3</sup>). I am also supported in my contention by the decision in *Kanai Laul Goswami v. Rajendra Laul Goswami*(<sup>4</sup>). The decision in *Matangini Debi v. Mokurura Bibi*(<sup>2</sup>) also supports my interpretation of section 179. That was a case in which there was an express term in the kabuliyat for the payment of rent at a certain rate.

*Sir Sultan Ahmad*, in reply: In *Mahunt Ajeb Bharthi v. Ram Narain Singh*(<sup>3</sup>) Teunon, J. made it clear that the provision of section 67 would apply “in the absence of any express or implied contract to the contrary”.

S. A. K.

(1) (1919) 55 Ind. Cas. 507.

(2) (1901) I. L. R. 29 Cal. 674, F. B

(3) (1914) 23 Ind. Cas. 108.

(4) (1904) S. A. 370 of 1902 (Cal.) unreported.

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COURTNEY TERRELL, C.J.—This is a first appeal from a decision of the Subordinate Judge of Purnea in a suit for the recovery of rent for the years 1332, 1333 and 1334 together with interest at the rate of  $12\frac{1}{2}$  per cent. per annum as provided by section 67 of the Bengal Tenancy Act.

No question arises as to the liability of the defendants to pay the amount of the rent agreed upon. The substantial dispute is as to the amount of Rs. 6,000 which has been computed as interest at the rate of  $12\frac{1}{2}$  per cent. per annum on the instalments of rent in arrear. A reference is made to the terms of the lease by which the tenancy was created and it is pointed out that the lease is one for a permanent mukarrari tenure. That is not disputed. Accordingly it is said that the situation is governed by section 179 of the Bengal Tenancy Act. Reference is made to the terms of the document in which there is no specific provision for interest being payable upon kists in arrear. Section 179 of the Bengal Tenancy Act is as follows :—

“ Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant.”

It is contended that the proper construction of this section is that when a lease is found conferring a permanent tenure in a permanently-settled area the terms of the lease must be looked at without reference to the Act and that whereas the general law in the case of overdue debts is that unless specific provision is made for the payment of interest no interest is recoverable, therefore under the terms of a tenancy of this kind the tenancy making no specific provision for payment of interest is equivalent to a contract that no interest shall be payable upon overdue instalments, and, being construed by the ordinary law standing by itself and without reference to the Bengal Tenancy Act, that interest is not recoverable. On the other hand the contention is put forward, and

I think rightly put forward, that the true construction of section 179 is that it is a permission to landlords and tenants, in the case of a creation of a permanent tenure in a permanently-settled area, to contract out of the Act and that whereas the general law created by the Bengal Tenancy Act as applicable to the relationship of landlord and tenant will apply to a permanent mukarrari lease, the parties are at liberty to make a specific provision for the elimination of such terms as may be imposed by the Act as they may select to eliminate. In my opinion this view of the construction of the Act is right. That this construction has been followed is clear and two cases have been cited to us as examples of the application of that construction.

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C. J.

In the case of *Matangini Debi v. Mokurura Bibi*<sup>(1)</sup> the Full Bench of the Calcutta High Court took this view. In that case the plaintiffs sued the defendants for arrears of rent due on a permanent tenure. The kabuliyat itself under which the tenancy was created provided for an express rate of Rs. 3/2 per cent. per month. The learned Munsif nevertheless awarded interest at 12 per cent. as laid down in section 67 of the Bengal Tenancy Act. The learned District Judge on appeal from the decision of the Munsif awarded interest at the stipulated rate holding that it was open to the parties to make an express contract on their own account and apart from the Act. The view of the majority of the High Court was that whereas section 67 of the Bengal Tenancy Act applied to the general law governing the relationship of landlord and tenant, section 179 was a particular and specific arrangement enabling the parties to contract out of the Act, and the plaintiff was entitled only to the interest specified in the kabuliyat. That is an instance of the case where there had been a specific contract on the part of the parties and that overrode the general provisions of the law.

(1) (1901) I. L. R. 29 Cal. 674, F. B.

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In the case of *Mohunt Ajeb Bharthi v. Ram Narain Singh*<sup>(1)</sup> there was an absence of any specific contract for the payment of interest. In that case instead of applying section 67 of the Bengal Tenancy Act section 68 had been applied which allows in lieu of interest on overdue amounts a certain sum as damages. The District Judge had disallowed the claim for damages. The contention of the tenant, who was the respondent to the appeal to the learned Judges of the High Court, was that the intention of the parties as conveyed by the terms of the lease was that no interest should be payable and also that under the terms of section 179 of the Bengal Tenancy Act neither section 67 nor section 68 applied, the lease being of a permanent mukarrari nature. The learned Judge in that case used these words in deciding the case:

“ In the absence of any express or implied contract to the contrary, I am of opinion that the landlord is clearly entitled to the benefit of the general law with regard to the payment of interest on arrears of rent, that is to say, he is entitled to the benefit of sections 67 and 68 of the Bengal Tenancy Act.”

The general law there was treated as the law laid down for the governing of the relationship of landlord and tenant as provided by the Bengal Tenancy Act and there were no express terms in the tenancy agreement which removed the general terms provided by the Act.

Another case was cited to us which has not been reported but which was shown to us; a certified copy was produced of the judgment of a Bench of the High Court of Calcutta. The reference to the case is Second Appeal no. 370 of 1902,\* decided on the 20th July, 1904. In that case the learned District Judge had awarded under section 68 a sum for damages and the contract contained no clause providing for the payment of interest and the award of

(1) (1914) 23 Ind. Cas. 108.

\* *Kanai Lal Goswami v. Rajender Lal Goswami*—Unreported.

damages was supported by two of the learned Judges of the Calcutta High Court.

In my opinion it is clear that the proper construction of section 179 of the Bengal Tenancy Act is that the parties have a right to contract out of the Act. I must admit that at first I was strongly attracted to the argument advanced by Sir Sultan Ahmad in opening the appeal that when once it was found that the lease related to a permanently-settled area the terms of the contract both express and implied under the general law and quite apart from all other terms of the Bengal Tenancy Act governed the situation and that, therefore, no reference could be made to any of the terms of the Bengal Tenancy Act. I am, however, convinced that the view which really led to the reference of this case to the Full Bench was erroneous.

I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

JAMES, J.—I agree.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Courtney Terrell, C.J. and Kulwant Sahay, J.*

TULSI AHIR

*v.*

RAM DAS SAHU.\*

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*Bengal Tenancy Act, 1885 (Act VIII of 1885), section 60—rent suit by usufructuary mortgagee—mortgagee's name recorded in Collector's land register—co-sharers impleaded as pro forma defendants—claim against pro forma defendants to*

\* Appeal from Appellate Decree nos. 180 to 184 of 1931, against a decision of R. B. Beevor, Esq., I.C.S., District Judge of Saran, dated the 20th September, 1930, reversing a decision of Babu Bhagwan Prasad, Additional Munsif of Sewan, dated the 19th December, 1929.

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