

Under these circumstances I hold that the defendant is liable for the loss of these four bales. There has been no question as to the value of the bales; judgment will accordingly be for the plaintiff for Rs. 2,381-11 with interest at 6 per cent. from the 4th February 1901 until date of action and costs on scale No. 2.

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[960] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Mitra.

RAJ KUMAR SARKAR v. NAYA CHATOO BIBI.*

[15th July, 1904.]

Jungleburi lease—Kabuliat—Raiyat—Heritable interest—Occupancy rights—Rent, enhancement of—Bengal Tenancy Act (VIII of 1885) ss. 18 and 30—Status of such raiyat.

E held 50 bighas of land for more than 12 years under a *jungleburi* lease which provided for a progressive rate of rent and did not expressly provide that the interest of *E* was to be heritable or perpetual.

It did not expressly exclude enhancement on any ground, but expressly provided for enhancement on the ground of increase in the productiveness of the soil effected at the expense of the landlord.

Held that the interest created by the lease was not one covered by s. 18 of the Bengal Tenancy Act, and that *E* was not a raiyat holding at fixed rates.

Held (per Rampini, J.) that *E* was a raiyat with occupancy rights.

SECOND APPEAL by plaintiffs Raj Kumar Sarkar and others.

This appeal arose out of an action brought by the plaintiffs to recover possession of one-half of 50 bighas of land, which was originally the holding of one Ekabbar. These 50 bighas of land were situated within a *Shamilat* taluq, which formerly belonged to three persons, Gopinath Sarkar, Umacharan Sarkar and Chunder Kumar Sarkar. The plaintiffs subsequently acquired the rights of Gopinath and Umacharan, whilst defendants Nos. 30^a to 38 were in possession of the share of Chunder Kumar by virtue of a *Durmowasi* right. The allegations of the plaintiffs were that under a *kabuliat*, dated 30th Asar 1278 B. S. (13th July 1871) Ekabbar, the father of defendant No. 20 and predecessor in title of defendant Nos. 25 to 29, held 50 bighas of land under the said Gopinath, Umacharan and Chunder Kumar at a rent of Rs. 37-8; and that Ekabbar had no transferable interest therein; that [961] in execution of a mortgage-decree the right, title and interest of defendants Nos. 25 to 29 in the holding having been sold, defendants Nos. 1 and 2 purchased the same on the 20th September 1898, and thereafter the defendants Nos. 25 to 29 abandoned the land and went away; that the defendants Nos. 25 to 29 had no transferable interest in the land and therefore defendants Nos. 1 and 2 acquired no title at all; that the plaintiffs on attempting to take possession of the said land were opposed by the defendants Nos. 1 and 2 and also by defendants Nos. 3 to 24, who set up a title under them; that the co-sharers not having joined in the suit they were made defendants, and hence the suit was brought for recovery of possession of 8-anna share which belonged to

* Appeal from Appellate Decree No. 59 of 1902, against the decree of Jadu Nath Ghose, Additional Subordinate Judge of Khulna, dated the 7th October 1901, affirming the decree of Rajendra Lall Sadhu, Munsif of Bagirhat, dated the 30th March 1901.

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them (the plaintiffs). The defendants, *inter alia*, pleaded that Ekabbar's interest was that of a tenure-holder and as such transferable. In the alternative they also pleaded that the holding was a raiyati holding transferable by local custom and usage.

The material portion of the kabuliati was as follows:—

That I having applied to you for a lease (jama patta) in respect of 50 bighas of waste land situate in the village Ataikati within the following boundaries * * * extending to such a distance as will make up the 50 bighas, under the purchased mourasi ijara under the 8-anna share of the taluk belonging to you, Gopi Nath, and Chunder Kumar Sarkar and under the 8-anna share of the taluk belonging to you, Umacharan Sarkar, in kismat Pataikati appertaining to the said purgunnah and you having executed a jama patta in my favour, I do execute this kabuliati in the following terms, viz., that you will grant and I shall obtain the said jama free of rent for a term of four years, and on the expiration of the period for which it shall be held rent-free, I shall pay in the year 1282 a rent of Rs. 25 (rupees twenty-five) at the rate of 8 annas per bigha, in the year 1283, a rent of Rs. 31-4 (rupees thirty-one annas four) at the rate of 10 annas per bigha, and in the year 1284 and in every (subsequent) year a rent of Rs. 37-8 annas (rupees thirty-seven annas eight), at the full rate of annas 12 (twelve) per bigha, and I shall not be competent to raise any objection on the ground of inundation, drought, failure of crops (etc.). If I do so such objection shall not be entertained. I shall take possession of, and bring under cultivation (abad pattan) the aforesaid land as per boundaries, and shall continue to enjoy the profits thereof upon payment of the rent. * * * Whatever increase in the productivity of the soil you may effect, and whatever measurement and jamabandi you may make, I shall abide by the same. If I bring under cultivation lands in excess of what is comprised within the aforesaid boundaries, I shall pay rent in respect thereof at the said rate under the settlement you will grant me and I shall obtain, at the rate of 2 annas rasad per bigha on account of the remuneration for my labours in bringing the land under cultivation. * * *

[962] The Court of First Instance having found that Ekabbar was a raiyat holding a rate of rent fixed in perpetuity and as such his interest was a transferable one, dismissed the plaintiff's suit. On appeal to the Subordinate Judge the decision of the Court below was affirmed.

Babu *Busunt Coomar Bose* for the appellant. The lease provides for enhancement of rent for increase in the productiveness of the soil caused by the landlord's improvement. This shows that the rate is variable. [MITRA, J. Why should the rate vary?] If the productiveness causes an increase in the rent, the increase will be added to the rent and the whole will become the rent payable for the lands, and therefore there must be an increase in the rate, otherwise the added amount will become an abwab and so not recoverable. The Courts below have held that Ekabbar's sons were not tenure-holders, and, if the rate is liable to increase, they were not raiyats holding at fixed rates, they were therefore occupancy raiyats. (MITRA, J. Not necessarily.) Then if they be not occupancy raiyats, they were non-occupancy raiyats and their position becomes worse. Further, the lease is not a permanent lease, and thereupon the rate is not fixed for ever.

Moulvi *Shamsul Huda* and Babu *Amarendra Nath Chatterjee* for the respondent. The lease is a *jungleburi* one and contains no provisions for enhancement of rent; the tenant merely agreed to carry out whatever improvements the landlord would effect, and his holding was a raiyati holding at a fixed rate.

RAMPINI, J. This is an appeal against a decree of the Subordinate Judge of Khulna, dated the 7th October 1901.

The suit out of which this appeal arises was brought by the plaintiffs to obtain possession of a half share in 50 *bighas* of land, which were let some time ago to one Ekabbar under a *jungleburi* lease.

The principal defendants Nos. 1 and 2 have purchased this land at

an auction sale ; and the plaintiffs now seek to eject them on the ground that the tenancy of Ekabbar was not of a transferable nature.

[963] The defendants Nos. 1 and 2, on the other hand, contended in the Lower Court that the interest of Ekabbar was that of a tenure-holder, and as such was transferable ; or, if not, that it was a *raiyati* holding at fixed rates of rent, to which the provisions of section 18 of the Bengal Tenancy Act are applicable.

Both the Courts below have found that the interest of Ekabbar in the land was not that of a tenure-holder, but that of a *raiyat* holding at fixed rates.

The plaintiffs appeal to this Court and contend that on the terms of the *kabuliat* executed by Ekabbar, his interest in the land was not that of a *raiyat* holding at fixed rates ; and particular stress is laid upon a passage in the *kabuliat*, which runs as follows :

“জমির শক্তি বৃদ্ধি ও জরিপ জমাবন্দি যাহা করিবেন তাহা আমলে আনিব।”

and which has been translated by the Subordinate Judge thus :—“ Whatever increase in the production of the soil you may effect, and whatever measurement and *jamabandi* you may make, I shall abide by the same.”

That means to say, that if there is an increase in the productiveness of the soil at the expense of the landlord or in consequence of improvements made by him, the lessee is to pay at a higher rate ; and if on measurement the area of the land should appear to be greater than that mentioned in the *kabuliat*, a greater amount of rent is to be paid at the same rate as that mentioned in the *kabuliat*.

The learned pleader for the appellants contends that the clause in the lease shows that the interest of Ekabbar was not that of a *raiyat* holding at fixed rates ; and we think that this contention must prevail.

The *kabuliat*, which is undoubtedly a *jungleburi kabuliat*, provides for a progressive rate of rent up to the year 1234, when rent at the full rate of 12 annas per *bigha* was to be paid, and rent at this rate was to be paid in every subsequent year. The *kabuliat* does not expressly provide that the interest of Ekabbar was to be heritable or perpetual. It does not expressly exclude enhancement on any ground, and expressly provides for enhancement on the ground of increase in the productiveness of the soil, effected at the expense of the landlord. This would seem, having regard to the provisions of section 30, clause (c) of the Bengal Tenancy Act, to be the meaning of the *kabuliat*. [964] Now as both the Lower Courts have held that Ekabbar was not a tenure-holder, and as we have come to the conclusion that he was not a *raiyat* holding at fixed rates, in my opinion he must be a *raiyat* with occupancy rights. But however this may be, it is clear that the Subordinate Judge's finding that Ekabbar was a *raiyat* holding at fixed rates is incorrect.

We therefore decree this appeal and remand the case to the Court of First Instance for decision of the other questions, which arise in it.

The costs will abide the result.

MITRA, J. I agree with my learned brother that this case should be remanded for enquiry into the matters indicated by him. But I do not agree with him that the interest created by the lease is a right of occupancy or is governed by the provisions regarding enhancement of rent of occupancy *raiyats*. The parties must be regulated by the terms of the contract. It is not a case of the creation of a right by statute as rights of occupancy are ordinarily considered to be.

The contract in this case does not state in express terms that the

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interest created is permanent, neither does it say anything about transferability. The matter, therefore, is open for consideration whether the holding is transferable; and I use the word "holding" because both the Lower Courts have held that the interest created by the lease is not a tenure. The Lower Appellate Court should in my opinion have considered the question whether, having regard to the terms of the contract between the parties and any other matters that might have been brought forward with regard to the incidents of similar holdings in the neighbourhood, the holding was transferable or not. If it holds that it was transferable irrespective of the question whether the right created by the lease is an occupancy right or not, the suit should be dismissed; but, if it finds otherwise, the suit should be decreed.

I agree with my learned brother that the interest created by the lease is not one covered by section 18 of the Bengal Tenancy Act.

Appeal allowed; Case remanded.

31 C. 965.

[965] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

ABDUL AZIZ MOLLA v. EBRAHIM MOLLA.*

[9th June, 1904.]

Suit—Civil Procedure Code (Act XIV of 1882), s. 378—Withdrawal of suit—Costs, a condition precedent to bringing a fresh suit—Rules of the Supreme Court, 1888, Order 26—Statement contrary to proprietary interest—Evidence Act (I of 1872), s. 32 cl. 3—Landlord, payment of.

Where a suit has been withdrawn under s. 378 of the Civil Procedure Code with liberty to bring a fresh suit on payment of costs, a subsequent suit in respect of the same cause of action is not *ab initio* void, if the costs are not paid before its institution.

Subsequent payment of costs cures the irregularity.

A statement by a landlord, who is dead, that there was a tenant on the land is a statement against his proprietary interest and admissible under cl. 3, s. 32 of the Evidence Act (I of 1872).

[Ref. 14 C. L. J. 105=15 C. W. N. 998=10 I. C. 6; 19 C. L. J. 529=23 I. C. 210; 44 I. C. 79=3 Pat. L. J. 68; 36 I. C. 1003; 15 C. L. J. 7=17 C. W. N. 108=13 I. C. 120; 64 I. C. 788. Dist. 33 Mad. 258.]

SECOND APPEAL by defendants Abdul Aziz Molla and others, minors by their mother and guardian Autoonnessa.

This appeal arose out of an action brought by the plaintiffs to recover joint possession of certain lands on declaration of title thereto. The allegation of the plaintiffs was that Moniruddi Mollah, predecessor of the plaintiffs as also of the defendants, acquired *jamai* right in respect of the disputed land from one Alimuddi, father of the defendants Nos. 14-15; that the said Moniruddi Mollah was in possession of the said lands for more than 12 years, and on his death in 1302 B.S. they and the defendants inherited the property and were in possession of the same; that they were dispossessed by the defendants on the 15th Bhadra 1306 B.S. (31st August 1899) by taking away cocoanuts from the trees on the land. The defendants pleaded that the land in suit was divided into two

* Appeal from Appellate Decree No. 1780 of 1902 against the decree of Jadunath Ghose, Subordinate Judge, of 26th May 1902, reversing the decree of Sarat Chandra Sen, Munsif of Narail, dated the 27th January 1902.