

1902
DEC. 8.

30 C. 213 (=7 C. W. N. 203).

[213] APPELLATE CIVIL.

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RAJ NARAIN MITTER *v.* PANNA CHAND SINGH.*

[8th December, 1902.]

30 C. 213=7
G. W. N. 203. *Arrears of rent, suit for—Interest, rate of, specified in darpatni lease—Sale—Purchaser—Darpatni lease.*

An auction-purchaser of a *darpatni* tenure is bound by the stipulation contained in the *darpatni* lease as to the payment of interest on arrears of rent, such a stipulation, where there is nothing unusual in it, being part of the ordinary incidents of a tenure.

Alim v. Satis Chandra Chaturdharin (1) and *Kali Nath Sen v. Trailokhya Nath Roy* (2) distinguished.

The landlord, decree-holder, is debarred from claiming an amount not mentioned in the sale proclamation.

Semble—Whether a stipulation in the lease to pay a certain sum of money in default of the lessee's supplying the landlord with certain articles is an ordinary incident of a *darpatni* tenure.

[*Appr.* 32 Cal. 258 (F. B.); *Ref.* 7 C. L. J. 24; 3 I. C. 234; 40 Cal. 806; 62 I. C. 60; *Fol.* 15 Bom. L. R. 49=18 I. C. 411=37 Bom. 376.]

THE plaintiffs, Raj Narain Mitter and others, appealed to the High Court.

This appeal arose out of a suit for arrears of rent against the auction-purchaser of a *darpatni* tenure. The allegation of the plaintiffs was that on the 27th Bhadra 1286 (B. S.), one Bhairab Chunder Maiti executed a registered *kabuliat* in the names of plaintiff No. 1 and his brother, and obtained a *darpatni* settlement of *talug Hetamchak* for an annual *jama* of Rs. 1,009. It had been stipulated that the rent would be paid every year in two instalments. It was also agreed that, if the rent was not paid according to the instalment, then the interest at the rate of Rs. 2-8 per month would run on the said amount. It had further been stipulated that two maunds of sugarcane molasses, which the *darpatnidar* used to get every year from the tenants, should be paid [214] by the *darpatnidar*, failing which he shall pay Rs. 10 in cash, the value thereof. On the death of the aforesaid Bhairab Chunder Maiti, his heir did not pay the *jama* according to the stipulation mentioned in the *kabuliat*. The vendors of plaintiff's Nos. 1 and 2 jointly obtained a rent-decree and sold the *darpatni* mehal in arrear, which was purchased by the defendant on the 26th November 1896, and he obtained possession through the Court. The defendant did not abide by the terms of the aforesaid *kabuliat* and allowed arrears to accrue, and hence the suit. The defendant pleaded that he was not liable to pay the price of the molasses and interest at the rate claimed by the plaintiffs, and that the claim in respect of certain years was barred by limitation. The Court of first instance overruled the objections of the defendant and decreed the plaintiffs' suit. On appeal to the learned District Judge of Hooghly, the decision of the first Court was reversed.

Babu *Shib Chunder Palit* for the appellants.

Babu *Saroda Churn Mitter* and Babu *Hemendra Nath Sen* for the respondent.

* Appeal from Appellate Decree No. 884 of 1900, against the decree of H. B. H. Coxe, Esq., District Judge of Hooghly, dated the 26th February 1900, modifying the decree of Babu Mohim Chunder Ghose, Subordinate Judge, dated the 19th of August 1899.

(1) (1896) I. L. R. 24 Cal. 87.

(2) (1899) I. L. R. 26 Cal. 315.

BANERJEE AND GEIDT, JJ. In this appeal, which arises out of a suit for arrears of rent against the auction-purchaser of a *darpatni* tenure, two questions arise for consideration—*first*, whether the auction-purchaser is bound by the clause in the *darpatni* lease stipulating for payment of interest on the arrears of rent at the rate of Rs. 30 per cent. per annum, and, *secondly*, whether the auction-purchaser is bound by the clause in the *darpatni* lease stipulating for payment of Rs. 10 annually in the event of default in supplying the landlord with a certain quantity of molasses.

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The first Court answered these two questions in favour of the plaintiffs, but the Lower Appellate Court has answered them adversely to the plaintiffs. Hence this second appeal by the plaintiffs.

With regard to the first question, the learned Judge in the Court of Appeal below observes:—"It certainly seems to me that it would be most unjust to allow the plaintiffs to demand this exorbitant rate of interest from the defendant after making no mention of it in the advertisement in which everything material [216] for the purchaser to know in order to judge of the value of the property must be entered." In other words, the learned Judge was of opinion that as the rate of interest claimed is exorbitant and as no mention of it was made in the sale proclamation, the plaintiffs cannot claim it.

The learned vakeel for the appellants contends that this view is wrong in law, and that the auction-purchaser is bound by the stipulation contained in the *darpatni* lease as to the payment of interest on arrears of rent, such a stipulation being part of the ordinary incidents of a tenure.

We are of opinion that this contention is correct.

It is argued on the other side that the judgment of the Court of Appeal below is not only right so far as it goes, but that the view of the learned Judge below can also be supported on another ground, namely, that the stipulation for payment of interest on arrears of rent, if it is of an unusual character, does not form part of the incidents of a tenure. It is also argued for the respondent that upon a sale of an under-tenure for arrears, a new tenancy is created as between the decree-holder and the auction-purchaser, the incidents of which may not necessarily be those of the original under-tenure.

We are unable to accept these arguments as sound. We think that a stipulation for payment of interest upon arrears is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and that, as a rule, it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation. Nor can it be said that the rate of interest in this case is of itself a thing so unusual in the stipulation as to take it out of the operation of the above rule.

As to the ground upon which the learned Judge has based his decision, we do not think that the landlord, decree-holder, was under any obligation to specify the rate of interest in the proclamation of sale. There is nothing in the Bengal Tenancy Act or the Code of Civil Procedure, section 287, throwing that obligation upon him. In the sale proclamation the rent decree is referred to; and the decree reciting the claim shows that a large amount was claimed as interest and was allowed, though the rate of interest is not specifically mentioned.

[216] Nor can it be said that the sale of the tenancy involves any new contract between the auction-purchaser and the landlord. At the date

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of the sale what is sold is the original under-tenure, and it therefore carries with it all its incidents. Certain cases were cited by the learned vakeel for the respondent in support of his contention. With regard to the first of these, namely, that of *Alim v. Satis Chandra Chaturdhurin* (1), we would observe that it is distinguishable from the present case in more respects than one. In the first place, that was a case of a *raiyyati* holding in respect of which a contract for payment of interest on arrears of rent is controlled by section 178 of the Bengal Tenancy Act, and not of a permanent tenure in respect of which such a contract is not so controlled (see section 179 of the Act), and, in the next place, the document creating the tenancy in that case was one for a term of seven years, which had expired, and the contention of the claimant for interest was that as there was a holding-over, the terms of the original *kabuliat* should attach to the same, and this contention the Court refused to accept. The next case cited was the case of *Kali Nath Sen v. Trailokhya Nath Roy* (2): that also was a case of a *raiyyati* holding and not of an *under-tenure*, and the stipulation for interest in that case was held to be not only of an unusual but of an unconscionable nature. As for the view taken in that case by one member of the Bench, that upon a sale of a holding for arrears of rent a new tenancy should be deemed to be created, that was the opinion of a single Judge, and, with all respect for his opinion, we cannot concur in it.

The claim for interest at the rate stipulated in the *kabuliat* ought therefore in our opinion to be allowed; and the decree of the lower appellate Court, so far as it disallowed that claim, must be set aside.

Upon the second question, however, we are unable to give effect to the appellants' contention. The rent mentioned in the sale proclamation is Rs. 1,009 and not Rs. 1,019, as it would have been, if the Rs. 10 in dispute had been included in the rent. This is no case of an omission to state what was not necessary, but is a case of positive statement of the [217] rent, which it was necessary for the decree-holder to state in the sale proclamation, and that being so we think that the Judge below is right in holding that the decree-holder is now debarred from asking for more. There is, moreover, an obvious reason why this part of the plaintiffs' claim was not included in the rent. The stipulation in the *darpatni* lease for the payment of the sum of the Rs. 10 is a peculiar one. It is nowhere stipulated for as being part of the rent. It is not included in either of the two instalments in which the rent is specified to be paid in the lease. It is a mere undertaking on the part of the lessee to pay this sum in default of delivery to the landlord of a certain quantity of molasses, which the landlord had been hitherto receiving from the *raiyyats* in the mehal. It is very doubtful therefore, whether a stipulation like this should be considered as an ordinary incident of a *darpatni* tenure. It may well be held to have been a personal covenant by the lessee, by whom the *darpatni* was taken.

We therefore affirm that part of the judgment of the lower appellate Court, which disallows this claim for Rs. 10.

The result is that the decree of the lower appellate Court will be modified by allowing the plaintiffs' claim for interest at Rs. 30 per cent. per annum on the arrears of rent, the amount of rent being held to be Rs. 1,009.

The parties will pay and recover costs in proportion.

Decree modified.

(1) (1895) I. L. R. 24 Cal. 37.

(2) (1899) I. L. R. 26 Cal. 315.