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FULL BENCH.

32 C. 386=9 C. W. N. 249 =1 C. L. J. 1.

I think the Legislature only intended that the occupancy right, which is an incident of the tenancy under Chapter V of the Tenancy Act, should cease to exist. If it was intended that the tenancy should come to an end, I think the Act would have said so and would not have been limited in terms of the cesser of the occupancy right only.

BRETT, J. I agree with my Lord the Chief Justice in the answer which he proposes to give to this reference. I accept the reasons given by the learned Judges in the case of *Jawadul Huq* v. *Ram Das Saha* (1) in support of the view which we take, and I have nothing to add to the reasons which they have given for their opinion as expressed in that judgment.

Appeal dismissed.

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32 C. 395 (=1 C. L. J. 10=9 C W. N. 265.)

[395] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Harington and Mr. Justice Brett.

BIPIN BEHARI MANDAL *v.* KRISHNADHAN GHOSE.*

[23rd January, 1905.]

Landlord and tenant—Enhancement of rent—Bengal Tenancy Act (VIII of 1885), s. 29, cl. (b), proviso (1)—Average rate of rent—Registered kabuliat.

Proviso (i) to s. 29 of the Bengal Tenancy Act (VIII of 1885) does not control clause (b) of that section. The landlord of an occupancy raiyat cannot, therefore, recover rent at the rate at which it has been paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed, if such rate exceeds by more than two annas in the rupee the rent previously paid by the raiyat.

Mothura Mohun Lahiri v. *Mati Sarkar* (2), so far as it decides to the contrary, was wrongly decided.

The rate contemplated by proviso (i) is not the average rate.

APPEAL by the defendant, Bipin Behari Mandal.

The respondent instituted this suit in the Court of the Munsif at Kandi for recovering from the appellant rent at the rate of Rs. 31 per annum on the basis of a registered *kabuliat*. The Munsif decreed the suit at the *kabuliat* rate. On appeal before the District Judge the following two issues, amongst others, were raised :—

(*i*) Did the *kabuliat* contravene the provisions of s. 29 of the Bengal Tenancy Act?

(*ii*) Had the tenant paid rent at the rate of Rs. 31 per annum for a continuous period of three years preceding the period for which rent was claimed?

The rent formerly paid by the defendant was Rs. 24-13-9 and the *kabuliat* rendered him liable to pay at the rate of [396] Rs. 31 per annum. The District Judge, therefore, refused to enforce the *kabuliat* as it contravened the provisions of s. 29 of the Bengal Tenancy Act, the rent being enhanced by it by more than two annas in the rupee, but he gave the plaintiff a decree for rent at the rate of Rs. 30-3-1½ p., on the ground that that was the average rate of rent paid by the tenant continuously for not less than three years before the period for which the rent was claimed.

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* Reference to Full Bench in Appeal from Appellate Decree, No. 1768 of 1902.

(1) (1896) I. L. R. 24 Cal. 143. (2) (1898) I. L. R. 25 Cal. 781.

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32 C. 395=1 C. L. J. 10= 9 C. W. N. 285.

The tenant (defendant) thereupon preferred an appeal to the High Court.

The second appeal came on for hearing before RAMPINI AND PARGITER JJ., and their Lordships referred for decision by a Full Bench, the two questions mentioned in their Order of Reference, which was as follows :—

"The plaintiff in this suit sues for rent due on a *kabuliat*. The District Judge has refused to enforce the *kabuliat*, as it contravenes the provisions of section 29, Act VIII of 1885, the rent being enhanced by it by more than 2 annas in the rupee. The rent formerly paid by the defendant was Rs. 24-13-9. The *kabuliat* renders him liable to pay rent at the rate of Rs. 31 per annum.

The Judge has, however, given the plaintiff a decree for rent at the rate of Rs. 30 3-1½ on the ground that this is the rate of rent paid by the tenant continuously for not less than three years before the period for which rent is claimed.

The defendant appeals. The plaintiff cross-appeals. The plaintiff in his cross-appeal contends (i) that the area of the holding has increased; and (ii) that the holding has been divided. The first of these pleas raises a question of fact which has been decided against the plaintiff, by the lower Appellate Court. We are bound by its finding as regards the second plea. For the reasons assigned by the Judge, the defendant would not seem to be disentitled to the benefit of section 29 of the Bengal Tenancy Act owing to the holding having been divided. We dismiss the cross-appeal.

The defendant's contention in appeal is that the rate of rent decreed by the lower Court also contravenes the provisions of clause (*b*) of section 29 of the Act, and that proviso (1) to the section only provides that notwithstanding that a contract is not in writing and registered, a landlord may recover rent at the rate paid for not less than three years before the period for which rent is claimed; (2) that the rate of Rs. 30-3-1½, as decreed by the Judge, is not a rate of rent paid but an average rent found by the Judge by means of arithmetical calculation.

The first of these pleas seems to us to be correct and in our opinion should prevail. The proviso (1) to Section 29, as contended by the appellant does not nullify the effect of clause (*b*) of the section, or entitle the landlord to recover rent at the rate paid by the tenant for three years before the period for which [397] rent is sued, if it exceeds the former rent by more than 2 annas in the rupee.

But the respondent relies on the case of *Mothura Mohun Lahiri* v. *Mati Sarkar* (1). In this case it has been said. "There is one other matter which arises in this appeal and that is with reference to the admission of the defendant in his deposition as to the rent he has been paying for some years, *i.e.*, for more than three years. He admits this rent to be Rs. 50 and having regard to proviso (1) of section 29 as also the provisions of section 27 of the Act, we think there is no reason why the plaintiff should not, at any rate, (*i.e.*, failing the *kabuliat*) recover rent at the rate of Rs. 50 as admitted by the defendant." It is pointed out that the rate decreed in this suit exceeded the former rent by more than 2 annas in the rupee. The former rent was Rs. 39-3. The rent decreed was Rs. 50 per annum. This would appear to contravene the provisions of section 29, clause (*b*). The case is therefore in point. But it would appear to us that the learned Judges, who decided this case, have overlooked the provisions of clause (*b*) of section 29, and the fact that the proviso (1) to the section only provides that nothing in clause (*a*) shall prevent the landlord from recovering rent at the rate paid for three years.

We therefore consider it necessary to refer this case to a Full Bench.

The questions we would refer for its decision are :—

(i) Was the case of *Mothura Mohun Lahiri* v. *Mati Sarkar* (1) so far as it decides that the rent at the rate paid for the three years immediately preceding the period for which rent is sued, even though it exceeds the former rent by more than 2 annas in the rupee, rightly decided ?

(ii) Was the lower Court in the circumstances of this case, justified in giving the plaintiff a decree at the rate of Rs. 30-3-1½ in contravention of the provisions of clause (*b*), section 29 of the Bengal Tenancy Act."

(1) (1898) I. L. R. 25 Cal. 781.

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Babu *Hemendra Nath Sen*, for the appellant. The agreement to pay rent at an enhanced rate was void because the enhancement was more than two annas in the rupee and the suit should have been dismissed: *Kristodhone Ghose* v. *Brojo Gobindo Roy* (1). The lower Court having found that the terms of the *kabuliat* were in contravention of the provisions of s. 29 of the Tenancy Act, was wrong in holding that the operation of that section was saved because the landlord had been realizing on an average at the enhanced rate for a period of four years previous to the period of claim. There is no provision in the law for calculating the rate of rent by striking an average. Proviso (1) relates to clause (*a*) only and not to clause (*b*) of s. 29 of the Tenancy Act. The words "nothing in clause (*a*)" in proviso (1) makes it clear. The **[398]** case of *Mothura Mohun Lahiri* v. *Mati Sarkar* (2) in so far as it decides that the rent at the rate paid for three years continuously preceding the period for which rent is claimed even though it exceeds the former rent by more than two annas in the rupee is recoverable has not been correctly decided.

Babu *Nilmadhab Bose* (Babu *Prosanna Gopal Roy* with him), for the respondent. *Mothura Mohun Lahiri* v. *Mati Sarkar* (2) has been correctly decided. The provisos to s. 29 should be read in the light of s. 27 of the Act. They refer to the section as a whole and not to cl. (*a*) only.

MACLEAN C.J., I am doubtful, whether the plaintiff, on the facts of this case, has brought his case within the terms of proviso (1), section 29 of the Bengal Tenancy Act. When we look at the judgment of the learned District Judge at page 8 of the Paper Book, and ascertain how he arrived at the rent of Rs. 30 odd, viz., by striking an average for four years of the rents of the four preceding years, I entertain very grave doubt whether the result can be said to have been the rate of rent actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed. But assuming in the plaintiff's favour that the case does fall within the proviso, I am of opinion that that proviso does not control sub-section (*b*) of section 29. The proviso clearly applies only to clause (*a*), and it is difficult to see how it can be said to apply to clause (*b*). This particular point was not necessary, apparently, for the decision of the case of *Mothura Mohun Lahiri* v. *Mati Sarkar* (2). But if it were, speaking with every deference to the Judges, who decided that case, I do not think that sufficient effect was given to the clear language of sub-section (*b*) of section 29. In the result then it is sufficient to say, in answer to the second question referred, that in the circumstances of the case, the lower Court was not justified in giving the plaintiff a decree at the rate of Rs. 30 odd as **[399]** it was in contravention of the provisions of clause (*b*), section 29 of the Bengal Tenancy Act. The appeal will accordingly be allowed with all costs in this Court and in the Courts below.

GHOSE J. I agree with my Lord in the answer which he proposes to give to the reference before this Full Bench. There is, however, one word which I should desire to say with reference to the judgment in the case of *Mothura Mohun Lahiri* v. *Mati Sarkar* (2) to which I was a party. In that case the question was raised, at what rate was the plaintiff entitled to recover rent. The plaintiff adduced in support of his case a *kabuliat* covenanting to pay a certain rent. That *kabuliat*, however, failed, because it was in contravention of the provisions of section 29 of the Bengal Tenancy Act. But the defendant admitted in his own deposition in the case that he had been paying for some years at the rate of Rs. 50, which

(1) (1897) I. L. R. 24 Cal. 895. (2) (1898) I. L. R. 25 Cal. 781.

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was a lower rate than the rate mentioned in the *kabuliat*; and we held, having regard to the proviso (1) to section 29, that the plaintiff was entitled to recover rent at the rate admitted by the defendant, because that must be taken to be fair and equitable under section 27 of the Act. Had it not been for the admission of the defendant, I do not think we would have given the plaintiff a decree in the suit, at the rate of Rs. 50 per year. However that may be, as has been pointed out by the learned Chief Justice, it was not necessary in that case to refer to the provisions of section 29, or rather of the proviso (1) to that section in deciding that case. I am, however, bound to say that, upon further consideration, I think the argument that has been submitted to us by the appellant's vakil in this case is correct. I, therefore, feel no hesitation in resiling from the view I expressed with reference to the proviso (1) to section 29 in the case of *Mothura Mohun Lahiri* v. *Mati Sarkar*. (1)

RAMPINI, J. I agree with the judgment of my Lord the Chief Justice. The learned District Judge has in this case made [400] two mistakes. In the first place, he has given the plaintiff a decree at an average rate which he was not justified in giving. In the second place, the decree that he has given contravenes the provisions of clause (*b*) of section 29 of the Bengal Tenancy Act. The proviso to that section only does away with the necessity of the contract being in writing and registered, but it does not abrogate the terms of clause (*b*) which lays down that the rent must not be enhanced so as to exceed by more than two annas in the rupee, the rent previously payable by the raiyat. For these reasons, I would answer both the questions referred to this Bench in the negative.

HARINGTON, J. I agree in the judgment which has been delivered by the Chief Justice.

BRETT, J. I agree with my Lord the Chief Justice, and would answer the questions referred to us in the manner suggested by him.

Appeal allowed.

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32 C. 401 (=9 C. W. N. 281.)

[401] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Harington.

JOHN SMIDT *v.* F. REDDAWAY & CO.*

[18th January, 1905.]

Trade-name—Secondary signification— Name indicating manufacturer—True description of article—Tendency to deceive—Injunction.

The words "Camel Hair Belting" had acquired a special or secondary signification in the Indian market, meaning that the belting so called was belting of the plaintiffs' exclusive manufacture; the defendants began to sell belting made of camel hair, designating it as camel hair belting without clearly distinguishing it from the belting of the plaintiffs so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavouring thus to pass off their goods as the plaintiff's:—

Held, that the plaintiffs were entitled to an injunction restraining the defendants from using the words "Camel Hair" as descriptive of, or in connection with, the belting made, sold, or offered for sale by them and not manufactured by the plaintiffs without clearly distinguishing such belting from the plaintiff's belting.

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* Appeal from Original Civil No. 27 of 1904, in Suit No. 412 of 1903.

(1) (1898) I. L. R. 25 Cal. 781.