

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

KRISTODHONE GHOSE (PLAINTIFF) *v.* BROJO GOBINDO ROY
(DEFENDANT.)*

1897
March 26.

Landlord and Tenant—Suit for enhancement of rent—Bengal Tenancy Act (VIII of 1885), section 29—Enhancement of rent by contract by more than two-annas in the rupee—Void Agreement—Contract Act (IX of 1872), sections 23 and 24.

A contract under section 29 of the Bengal Tenancy Act, to pay an enhanced rent by more than two-annas in the rupee, is void.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Sir *Griffith Evans* and *Babu Jasoda Nundan Pramanick* for the appellant.

Babu Nil Madhub Bose and *Babu Lal Mohan Ganguly* for the respondent.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

MACLEAN, C. J., (BANERJEE, J., concurring).—This appeal raises a very short point. The plaintiff is a zemindar, the defendant is his tenant. By the *kabuliat* the defendant agreed to pay the plaintiff an enhanced rent of Rs. 12-12-10. This enhancement exceeds, by more than two-annas in the rupee, the rent previously paid by the tenant. By section 28 of the Bengal Tenancy Act, it is provided that “where an occupancy *raiyat* pays his rent in money, his rent shall not be enhanced except as provided by this Act.” By section 29 the money rent may be enhanced by contract, and by sub-section (b) it must not be enhanced so as to exceed, by more than two-annas in the rupee, the rent previously payable by the *raiyat*. The plaintiff is suing the defendant for the enhanced rent; the latter says the

* Appeal from Appellate Decree No. 868 of 1895, against the decree of F. B. Taylor, Esq., District Judge of Moorshidabad, dated the 18th of March 1895, modifying the decree of *Babu Kapali Prasanna Mukerjee*, Munsif of Kandi, dated the 28th of December 1894.

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agreement contravenes the provisions of the Bengal Tenancy Act, and having regard to sections 23 and 24 of the Contract Act (Act IX of 1872) the agreement is void. I think he is right. But the appellant contends that the contract is severable, and that the good part can be severed from the bad, and a decree given for the good part, that is for so much of the enhanced rent as does not exceed the two-annas in the rupee. I am unable to accept this view. The object of the Bengal Tenancy Act is, I take it, protection of the *raiyat*. If the appellant's contention be sound, the landlord could enter into an agreement for an enhanced rent far beyond the statutory limit, run the risk of the *raiyat* subsequently disputing it, and if he did, then ask the Court to give him an enhancement only within the statutory limit. To adopt this view would, in my opinion, be very injurious to the *raiyat*. Here the contract is to pay the enhanced rent; the contract, *quâ* the payment of the enhanced rent, does not consist of two parts. How is the Court in this case to sever the illegal from the legal part of the contract? If it cannot do so the contract is void. If the appellant's argument be well founded, it would have the consequence I have indicated; he, in effect, is asking us to make a new contract for the parties. This view is consonant with those expressed in *Pickering v. Ilfracombe Railway Company* (1) and *Baker v. Hedgecock* (2). As Mr. Justice Chitty said in the latter case, "the Court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void." This view is in accord with that expressed by Mr. Justice Rampini in the unreported case of *Monmohun Sarikar v. Anath Mondol* (3) which has been referred to.

In my opinion the District Judge was right in holding that the agreement was void under the sections I have referred to, of the Contract Act and of the Bengal Tenancy Act. In this view it becomes immaterial to go into the question which rested upon the effect of sections 67 and 178 of the Bengal Tenancy Act. The appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

(1) L. R., 3 Com. Pleas., 235 (250).

(2) L. R., 39 Ch. Div., 520.

(3) Appeal from Appellate Decree No. 365 of 1894.