APPELLATE CIVIL.

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

1904
April 22, 25.

RADHA CHARAN RAY CHOWDHRY
v.
GOLAK CHANDRA GHOSE.*

Illegal cess—Abwab—Rent—Collection charges—Lease, consideration for.

A fixed amount mentioned in a lease as payable annually for collection charges, in addition to rent, the total being described as the *jama* and forming the consideration for the lease, is not to be regarded as an *abwab*, but is in reality a part of the rent and recoverable as such.

Mahomed Fayez Chowdhry v. *Jamoo Gazee*(1) referred to; *Chultan Mahton* v. *Talukdari Singh*(2) and *Radha Prosad Singh* v. *Balkowar Koeri*(3) distinguished.

SECOND APPEAL by the plaintiff, Radha Charan Ray Chowdhry.

The plaintiff sued the defendants, who are owners of *howla* Siddhessur Nag within the plaintiff's taluk, for arrears of rent and cesses with interest for the period from 1303 to 1306 B. S., amounting to Rs. 1,228-7-9. The rent claimed was Rs. 205 annually, under the terms of a registered *kabuliyat* dated the 31st August 1880, the portion of which relating to the rent payable runs as follows:—

	Rs.	A.
"The *jama* of *howla* Siddhessur Nag in possession of Jagat Chandra Ghose, Mohan Chandra Ghose and Golak Chandra Ghose, according to *dowl* ...	166	12
Mocurari akhrajat samil khozna (fixed costs blended with rent)	38	4
Total ...	205	0

* Appeal from Appellate Decree No. 398 of 1902, against the decree of Jogendra Nath Mitter, Subordinate Judge of Barisal, dated the 5th October 1901, modifying the decree of Gopal Chandra Banerjee, Munsif of Barisal, dated the 22nd December 1900.

(1) (1882) I. L. R. 8 Calc. 730. (2) (1885) I. L. R. 11 Calc. 175.
(3) (1890) I. L. R. 17 Calc. 726.

Detail of kistbundi.

		Rs.			Rs.
Kist	Baisak ...	5	Kist	Kartic ...	10
,,	Jaista ...	5	,,	Agrahayan ...	25
,,	Ashar ...	5	,,	Pous ...	50
,,	Sraban ...	10	,,	Magh ...	30
,,	Bhadra ...	20	,,	Falgun ...	25
,,	Aswin ...	5	,,	Chaitra ...	15
				Total ...	205

"Total two hundred and five rupees rent (খাজনা) shall be paid without any objection by us according to the instalments mentioned herein. If we fail to make such payment, you shall according to the law in force or what law shall be passed hereafter realise from us the aforesaid *jama* with interest on the defaulted *kists*. * * * Without the order of the *hujur*, neither you nor your heirs will have the power to demand anything over and above the aforesaid *jama* of Rs. 205."

The defendants, Golak Chandra Ghose and others, contended that the annual rent was Rs. 166-12 and not Rs. 205 and that the *akhrajat* (costs) was an *abwab* or illegal cess which the plaintiff was not entitled to recover, and pleaded certain payments.

The Munsif allowed some of the payments pleaded. On the question of *abwab*, he held that the *akhrajat* must be treated not as *abwab*, but as part of the rent, and he accordingly held that the annual rent recoverable was Rs. 205. The suit was decreed accordingly.

On appeal by the defendants, the Subordinate Judge held that on the face of the *kabuliyat* the *akhrajat*, though fixed, was not consolidated with the rent; and as the *howlah* was created after the Permanent Settlement of 1793, the *akhrajat*, which meant expenses or *kharach*, was clearly an *abwab* or illegal cess,

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and, although embodied in the contract, was not legally recoverable. He modified the decree accordingly.

Dr. Asutosh Mukerjee (*Babu Chandra Kant Sen* with him), for the appellant, contended that, under the terms of the *kabuliyat*, the *akhrajat*, or collection charges, being *blended* with the rent and forming a part of the consideration for the lease, it must be treated, not as *abwab*, but as part of the rent. See *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*(1) and *Assanulla Khan Bahadur* v. *Tirthabashini*(2).

Babu Chandra Kant Ghose, for the respondents, relied upon the Full Bench case of *Radha Prosad Singh* v. *Balkowar Koeri*(3) and contended that the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*(1) was virtually overruled by the Full Bench case of *Chultan Mahton* v. *Tilukdari Singh*(4), which was affirmed by the Privy Council in *Tilukdari Singh* v. *Chultan Mahton*(5).

MACLEAN C.J. The question which we have to decide in this case is whether the sum of Rs. 38-4 mentioned in the lease executed between the parties, which, I understand, was executed so far back as the year 1860, is to be regarded as an *abwab*. According to the translation with which we have been furnished, the said sum of Rs. 38-4 represents "the fixed collection charges blended with rent." To my mind, each of these cases depends upon its own particular circumstances, and we must look at the contract to see whether the payment which the tenant agrees to make is, in reality, part of the rent as opposed to what is known as an *abwab*.

Let us for a moment consider what is the true construction of the lease itself and whether, upon such construction, the whole sum of Rs. 205 was or was not agreed between the parties as the rent for the land taken by the lessee and the true consideration for the granting of the lease. The lease purports to be a *tahut kistbundi* in favour of one Mathura Nath Ray, the father

(1) (1882) I. L. R. 8 Calc. 730.
(2) (1895) I. L. R. 22 Calc. 680.
(3) (1890) I. L. R. 17 Calc. 726.
(4) (1885) I. L. R. 11 Calc. 175.
(5) (1889) I. L. R. 17 Calc. 131 L. R. 16 I. A. 152.

of the plaintiff, for rent payable in respect of the tenure in suit, and describes the *jama* as follows:—

	Rs.	A.
"The *jama* of *Howla* Sildhessur Nag in the possession of Jagat Chandra Ghose and others according to *dowl*	166	12
Moeurari Akhrajat Samil Khazna ...	38	4
Total ...	205	0"

If the translation placed before us be correct, the rent together with the fixed collection charges blended with rent gives a total of Rs. 205, which, to my mind, represents what was intended to be regarded as the rent, and this view is supported by the details of the *kistbundi*, which deals not with the *kists* to be paid in respect of Rs. 166-12 only as rent, but in respect of the entire sum of Rs. 205. The total of Rs. 205 is subsequently spoken of as the *rent*, and there is a stipulation to realize the aforesaid *jama* with interest, and not to make any objection to the payment of the said *jama* and, later on, the jama is described as the "aforesaid *jama* of Rs. 205." It seems to me that, upon the proper construction of the document, we must take this sum of Rs. 38-4, described as collection charges, as forming part of the consideration for the lease, and as forming, in fact, part of the rent. If that be so, it is not an *abwab* and is a part of the rent. In point of fact the predecessors in title of the present defendants raised no objection to the payment of the Rs. 205 as rent. We understand that this amount has been paid for a large number of years without objection by the predecessor of the defendants and as rent. This, however, does not prevent the present respondents from raising the question, though the payment for a long series of years, at any rate, indicates that their predecessors did not regard the claim as an illegal one. The Full Bench case of *Radha Prosad Singh* v. *Balkowar Koeri*(1), on which so much reliance has been placed by the respondents' vakil, is quite different from the present case. One has

(1) (1890) I. L. R. 17 Calc. 726.

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only to look to the nature of the payments in that case to appreciate that it has no application to the present circumstances. So far as authority goes, the present case would seem rather to fall within the ruling of this Court in the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*(1). At any rate I can see nothing in the Full Bench case, which prevents us from taking, in the present case, the view I have indicated. It is said that the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*(1) has been overruled by the Full Bench decision of *Chultun Mahton* v. *Tilukdari Singh*(2), but I can find nothing in the latter case to support that contention. For these reasons I think that the decision of the first Court was correct and that that decision must be restored and the order of the Lower Appellate Court reversed with costs.

Appeal decreed.

M. N. R.

(1) (1882) I. L. R. 8 Calc. 730. (2) (1885) I. L. R. 11 Calc. 175.