

the Judicial Commissioner should be discharged, and the decrees of the District Judge restored, but without costs. That in suit No. 6 of 1904 the decree of the Judicial Commissioner should be varied by omitting the words "and pounds."

Their Lordships do not think fit to make any order as to costs.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitor for the Secretary of State for India in Council: *The Solicitor, India Office.*

J. V. W.

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## APPELLATE CIVIL

*Before Justice Sir Richard Hurlington and Justice Sir Asutosh Mukherjee.*

SARAT CHANDRA GHOSE

v.

SHYAM CHAND SINGH ROY.\*

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Jan. 11

*Lease—Oral agreement to lease—Petition of compromise—Matters extraneous to the suit in which the petition of compromise was filed—Specific performance—Abwab.*

By a petition of compromise, which was filed in a previous suit between the parties concerning certain lands, the plaintiffs undertook to recognise the defendant as their tenant in respect of lands not included in that suit, and they further gave up their claim of *selami* for the recognition, on the defendant agreeing to pay an additional sum to what was payable by the original tenant. Upon a suit brought by the plaintiffs for recovery of arrears of rent on the basis of this compromise, defence was that the petition of compromise was not admissible in evidence for want of registration :

\* Appeal from Appellate Decree, No. 1372 of 1910, against the decree of Surendra Nath Mitter, Subordinate Judge of Hooghly, dated Feb. 5, 1910, modifying the decree of Sarada Prasad Dutt, Munsif of Serampur, dated July 29, 1909.

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*Held*, that although the petition of compromise in so far as it related to properties which were not the subject-matter of the suit in which the decree was made, was not operative to affect such properties, it was admissible in evidence as indicating the existence of an oral agreement to grant a lease, which was specifically enforceable; and the position of the parties was the same, as if a proper document had been executed and registered; and that, therefore, the plaintiff was entitled to a decree.

*Birbhaiya Rath v. Kalpataru Panda* (1) and *Gurdeo Singh v. Chandrikah Singh* (2) referred to.

The principle of *Walsh v. Lonsdale* (3) applied.

*Held*, further, that the sum agreed to be paid by the defendant being in consideration of the land occupied by him, and also in view of the remission of the *selami*, was not an *abwab*.

APPEAL on behalf of the plaintiffs, Sarat Chandra Ghose and others.

This appeal arose out of an action brought by the plaintiffs to recover arrears of rent from the defendant. It appeared that the plaintiffs previously brought a suit against the defendant in respect of certain lands which did not include the lands for which rent was claimed; and in that suit a petition of compromise was filed by which the plaintiffs undertook to recognise the defendant as their tenant, although they considered that the defendant had purchased only a non-transferable occupancy holding. On the defendant agreeing to pay an additional sum of Re. 1 a year over and above Rs. 5 which was payable by the original tenant, they further agreed to give up their claim for *selami*. The defendant not having paid rent at this rate, the plaintiffs brought the present suit on the basis of the compromise.

Defence was, that the petition of compromise was not admissible in evidence for want of registration, that the rent claimed was not recoverable inasmuch as it contravened provisions of section 29 of the Bengal Tenancy Act, and that it was an *abwab*.

(1) (1905) 1 C. L. J. 388      (2) (1907) I. L. R. 36 Cal. 193.

(3) (1882) 21 Ch. D. 9.

The court of first instance gave effect to the objection raised by the defendant, and decreed the plaintiffs' suit at the rate of Rs. 5 per annum with cesses and costs. An appeal being preferred by the plaintiffs, it was dismissed by the Subordinate Judge. Against this decision the plaintiffs appealed to the High Court.

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*Babu Jogesh Chandra Roy (Babu Surendra Nath Ghosal* with him), for the appellants. The petition of compromise in order to be admissible in evidence does not require registration. It is binding on the parties, although it related to matters extraneous to the suit in which this petition of compromise was filed. It is an agreement to lease, and can be specifically enforced. The case of *Gurdeo Singh v. Chandrikah Singh* (1) is distinguishable. The petition of compromise shows that the old tenant held the holding at a yearly rent of 5 rupees; in consideration of the fact that the plaintiffs gave up their claims for *selami* and recognised the defendant as a tenant, the defendant agreed to pay an additional rent of one rupee. This contract is binding on the parties and is enforceable. The additional rent agreed to be paid by the defendant is not in contravention of section 29 of the Bengal Tenancy Act, nor is it an *abwab*.

*Babu Surendra Chandra Sen*, for the respondent. The petition of compromise is not admissible in evidence, as it is not duly registered; an agricultural lease may no doubt be created by word of mouth, but when it has been reduced into writing it requires to be registered; the compromise, so far as it related to matters beyond the subject-matter of the suit, is only admissible if registered; the settlement of rent is one of the terms of a lease, and therefore the petition of compromise required registration. Moreover, it would appear from

(1) (1907) I. L. R. 36 Cal. 193.

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the plaint as well as the former realisation of rent that rupees five was considered as rent, and rupee one was considered as in excess of rent; the petition of compromise also shows that rupees five was the former rent and was retained as the rent of the *jama* when the defendant was recognised as a tenant. So the sum of rupee one is an *abwab*. Even if it is conceded that in recognising the defendant as a tenant the rent was increased from rupees five to rupees six, the enhancement should be considered as contravening the provisions of section 29 of the Bengal Tenancy Act; no new tenancy was created, but the old one was recognised as a transferable one and the transfer was considered to be valid, and the transferee was accepted as a tenant in his capacity as a transferee and not as a new tenant.

HARINGTON AND MOOKERJEE JJ. This is an appeal on behalf of the plaintiffs in an action for rent. The sole point in controversy between the parties is, whether rent is payable at the rate of Rs. 6 a year as alleged by the plaintiffs, or Rs. 5 a year as alleged by the defendant.

The defendant purchased the holding in 1895 from the original tenant. In 1906, in the course of another litigation between the present parties, which did not include the property now in dispute, a petition of compromise was filed. By that compromise the plaintiffs undertook to recognise the defendant as their tenant, although in their view he had purchased a non-transferable occupancy holding. The plaintiffs further gave up their claim to payment of *selami* for the recognition; but it was mutually agreed that in addition to Rs. 5, which was the rent payable by the original tenant, the defendant should pay an additional sum of Re. 1 a year. The plaintiffs now seek to recover rent

from the defendant on this footing. His answer is threefold: *first*, that the petition of compromise is not admissible in evidence, because it was not duly registered; *secondly*, that, if it is admissible in evidence, the additional sum agreed to be paid by him is in the nature of enhanced rent in contravention of the provisions of section 29 of the Bengal Tenancy Act; and, *thirdly*, that the agreement is, in any view, for payment of an *abwab*. In our opinion, none of these contentions can possibly prevail.

In so far as the first point is concerned, it may be conceded that, as laid down in the cases of *Birbhadra Rath v. Kalpataru Panda* (1) and *Gurdeo Singh v. Chandrikah Singh* (2), a consent decree, in so far as it relates to properties which are not the subject-matter of the suit in which the decree is made, is not operative to affect such properties. Consequently the plaintiffs can rely only upon the petition of compromise. From this point of view it has been argued that, treated as a lease, the petition of compromise was compulsorily registrable under clause (d) of section 17 of the Indian Registration Act. But this objection must be overruled on the ground that the petition is admissible as indicating the existence of an oral agreement to grant the lease. That oral agreement plainly is still specifically enforceable. Consequently, the position of the parties is the same as if the proper document had been executed and registered. In support of this view, we need only refer to the cases of *Bibi Jawahir Kumari v. Chatterput Singh* (3) and *Singheeram Poddar v. Bhagbat Chander Nundi* (4) where the principle laid down by Sir George Jessel in the case of *Walsh v. Lonsdale*(5) was applied.

(1) (1905) 1 C. L. J. 388.

(3) (1905) 2 C. L. J. 343.

(2) (1907) I. L. R. 36 Calc. 193.

(4) (1910) 11 C. L. J. 543.

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Consequently, we must proceed on the assumption that the defendant was recognised as a tenant, and that he undertook to pay Rs. 6 a year to the plaintiffs in consideration of the land claimed by him by purchase.

The second question which requires consideration is, whether this agreement was in contravention of the provisions of section 29 of the Bengal Tenancy Act. The learned vakil for the respondent has contended that this was an agreement by which his money-rent as an occupancy raiyat was enhanced by contract to the extent of more than two annas in the rupee. This argument is obviously fallacious. The answer is that the land in question was non-transferable, and therefore the defendant was not an occupancy raiyat. Consequently, there was no rent payable by him which was enhanced.

The third question is whether the sum agreed to be paid is an *abwab*. This argument is ingenious, but clearly unsound. The sum was agreed to be paid in consideration of the land occupied by the defendant, and also in view of the remission of the *selami* which would otherwise have been payable. It cannot consequently be deemed in any sense an illegal cess.

The result is that this appeal is allowed, and the decree of the Court below varied. A decree will be made in favour of the plaintiffs at the rate of Rs. 6. The appellants are entitled to their costs both here and in the Court of Appeal below.

S. C. G.

*Appeal allowed.*