APPELLATE CIVIL.

Before Mookerjee and Holmwood JJ.

1912

Aug. 1.

MATHURA PRASAD

v.

TOTA SINGH.*

Abwab—Illegal cess—Rent—Bengal Tenancy Act (VIII of 1885), s. 74—Regulation VIII of 1793, ss. 54 and 55—Contract.

If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void.

Under a lease of certain lands the yearly rent was specified as assessed at a certain rate, and at the end of the lease, in a clause entirely distinct from the one wherein the rent was assessed, a provision was made for the delivery of husk, which was not expressly or by implication made part of the rent. The plaintiffs brought a suit for arrears of rent on the basis of this lease, claiming a deduction of a certain sum of money for uncultur-able lands, and seeking to recover arrears of rent besides husk. They further claimed cesses upon the amount stated to be rent, and not upon the amount claimed as price of the husk:

Held, that the sum claimed as the value of the husk did not form part of the consolidated rent, but was an independent item falling within the description of an imposition in addition to the actual rent.

Sonnum Sookul v. *Shaikh Elahee Buksh* (1), *Raj Narain Mitra* v. *Panna Chand Singh* (2), *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (3), *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (4), *Sreekanta Prasad* v. *Irshad Ali Sircar* (5) approved.

* Appeal, from Appellate Decree, No. 2357 of 1908, against the decree of J. C. Twidell, District Judge of Bhagalpore, dated July 20, 1908, modifying the decree of Lalit Kumar Bose, Subordinate Judge of Bhagalpore, dated April 6, 1908.

(1) (1876) 7 W. R. 453.
(2) (1902) 7 C. W. N. 203.
(3) (1907) 12 C. W. N. 175.
(4) (1899) I. L. R. 26 Calc. 611.
(5) (1894) 16 C. L. J. 225.

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Radha Charan Ray Chowdhry v. *Golak Chandra Ghose* (1), distinguished.

Tilukhdari Singh v. *Chulhan Mahton* (2), *Radha Prosad Singh v. Bal Kowar Koeri* (3), referred to.

SECOND APPEAL by Mathura Prasad and others, the plaintiffs.

This was a suit brought by one Mathura Prasad, subsequently represented by his heir and legal representative, Krishna Prasad, and others against Tota Singh and others for recovery of Rs. 1,356-4 on account of arrears of rent with cesses and damages and the price of *bhusa* (husk of wheat and gram) for the years 1311 to 1314 F. S. in respect of 69 bighas of land. Under a lease, dated the 18th September 1877, the defendants held in *jote* 77 bighas 14 cottahs and 13 dhurs of land at an annual rent of Rs. 3-4 per bigha, and it was agreed to pay the plaintiffs the sum of Rs. 252-6-7 as rent for this land in the month of of *Baisak* of each year together with Rs. 7 as cesses thereon, and, in the event of default of such payment, to pay interest at the rate of 2 per cent. *per mensem*. It was further agreed to supply annually four cart-loads of husk to the plaintiffs, and in default to pay the price thereof at the rate of Rs. 5 per cart-load. In their plaint the plaintiffs claimed the annual rent of Rs. 231-4, inclusive of cesses, in respect of only 69 bighas of land, after allowing a deduction of 8 bighas 14 cottahs and 13 dhurs of the land specified in the lease, on account of ditches, road, temple and garden. They further claimed an annual charge of Rs. 40 for non-delivery of the four cart-loads of husk at the market rate, and damages at the rate of 25 per cent. and in their prayer they asked for the payment of the sum of Rs. 1,356-4, the amount of rent with cesses and

(1) (1904) I. L. R. 31 Calc. 834. (2) (1889) I. L. R. 17 Calc. 131.
(3) (1890) I. L. R. 17 Calc. 726.

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damages and the price of the husk. Some of the co-sharers of the plaintiffs, who did not join in bringing the suit, were made defendants 2nd party, and the claim for their share was given up. The Court of first instance decreed the suit, but, on appeal, this decree was set aside only with respect to the value of the husk and the damages claimed thereon. The plaintiffs, thereupon, appealed to the High Court.

Babu Jogesh Chandra Dey, for the appellants. My submission is that the husk was an integral part of the rent, being blended with it and, therefore, not an *abwab*. I rely on the case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose*(1). There the collection charges were payable annually. So was the husk in the present case. See also the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (2).

Babu Khetra Mohan Sen, for the respondents. On the construction of the lease the annual rent was fixed at the rate of Rs. 3-4 per bigha for the 77 bighas 14 cottahs and 13 dhurs of land. Nowhere has it been stated that the rent was partly *nakdi* (payable in cash) and partly *bhowli* (payable in kind). In the lease a distinction was made between the delivery of the husk and the payment of yearly rent, inasmuch as it is stated therein that on failure to pay the yearly rent, interest was payable at the rate of two *per cent. per mensem*. Therefore, the husk did not form an integral part of the rent. The case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (1) is distinguishable; for there the collection charges were made part and parcel of the rent. Furthermore, the road-cess was calculated on the rent alone. The husk was not taken into account in assessing the road-cess, and throughout the plaintiffs' entire claim, as set up

(1) (1904) I. L. R. 31 Calc. 834. (2) (1882) I. L. R. 8 Calc. 730.

in the plaint, a distinction has been drawn between rent and husk, separating them as two distinct charges.

Babu Jogesh Chandra Dey, in reply. The rent and husk go together. There is nothing to distinguish the one from the other. My submission is that the non-calculation of the road-cess on the price of the husk is not sufficient to make the latter an *abwab*. Unlike other cases, husk is a by-product and not a manufactured article and can be realised as rent.

MOOKERJEE AND HOLMWOOD JJ. This is an appeal on behalf of the plaintiff in a suit for recovery of arrears of rent. The sole question in controversy is whether an annual sum of Rs. 40 claimed by the plaintiff falls within the description of an illegal imposition within the meaning of section 74 of the Bengal Tenancy Act. The defendants hold under a lease dated the 18th September 1877. In this instrument, the area of the land is stated to be 77 bighas 14 cottahs and 13 dhurs whereon rent is assessed at the rate of Rs. 3-4 a year per bigha; the total rent is stated to be Rs. 252-6-7 to be paid in one instalment in the month of Baisak, and, in the event of default of payment, to carry interest at the rate of two per cent. per month. In the concluding portion of the lease, it is further stated that the tenant would deliver annually four cart-loads of husk of wheat and gram, and that if he failed to deliver the husk according to the terms of the contract, he would pay for the price thereof at the rate of Rs. 5 per cart-load. The plaintiff claimed in the Court below the price of the four cart-loads of husk at the present market rate, namely, Rs. 10 per cart-load. The defendant resisted the claim on the ground that this was an imposition in addition to the actual rent, within the meaning of section 74 of the Bengal Tenancy Act and that, consequently, the

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stipulation for the payment thereof was void. The Court of first instance negatived the contention of the defendant. Upon appeal, the District Judge has taken the contrary view, on the authority of the decision in *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (1). On the present appeal by the plaintiff, it has been argued that the amount claimed is part of the rent, and is not an illegal cess within the meaning of section 74 of the Bengal Tenancy Act. After careful consideration of the arguments addressed to us on both sides, we are of opinion that the appeal ought not to succeed.

The answer to the question, whether the sum claimed by the plaintiff is, or is not, an illegal cess, must depend upon the construction of the contract before the Court. If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void. In the case before us, throughout the lease, the yearly rent is described as Rs. 252-6, assessed, as already stated, at the rate of Rs. 3-4 a bigha, upon the area demised. It is only at the end of the lease, in a clause entirely distinct from the one wherein the rent is assessed, that provision is made for delivery of the husk, valued at Rs. 5 per cart-load. But this additional sum of Rs. 20 is not, expressly or by implicaton, made part of the rent. Under section 54 of Regulation VIII of 1793, which was in force at the time when this contract was made, in order that an amount of this description might not be deemed an *abwab*, it was essential that it should be consolidated with the *asal jama* into one specified sum; and under section 55 the imposition of a new

(1) (1899) I. L. R. 26 Calc. 611.

abwab under any pretence whatever was strictly prohibited. Tested in the light of these principles, the contention of the appellant entirely fails. We may add that the view we take is supported by a series of decisions of this Court. One of the earliest cases in point is *Sonnum Sookul* v. *Shaikh Elahee Buksh* (1), where there was an agreement to deliver a prescribed quantity of molasses on every maund manufactured on the premises; it was held that the article agreed to be delivered was over and above the regular money rent paid for the land, and consequently fell within the description of *abwab*. In the case of *Raj Narain Mitra* v. *Panna Chand Singh* (2), the tenant had agreed to pay Rs. 10 annually in lieu of molasses; it was held that this amount could not be recovered, because it was neither stipulated for as part of the rent, nor included in either of the instalments in which the rent was specified to be paid. In the case of *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (3), the tenant had agreed to deliver two goats at the time of the *Saradya Puja*, or to pay three rupees as the price thereof. This obviously was a case of *abwab*, because it could not possibly be suggested that the goats formed an integral part of the rent. In the case of *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (4), the tenant had agreed in addition to a cash payment, to deliver jack fruit, bamboos and fish. This agreement was contained in a clause different from the one in which the rent was assessed, and the Court held that the imposition was an *abwab*. In this case, there was the additional feature, which does not exist in the present litigation, that, whereas the rent was payable quarterly, the value of the articles deliverable was payable

(1) (1867) 7 W. R. 453.
(2) (1902) 7 C. W. N. 203.
(3) (1907) 12 C. W. N. 175.
(4) (1899) I. L. R. 26 Calc. 611.

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only annually. The decisions mentioned thus all clearly tend to negative the contention of the appellant. Much reliance, however, has been placed in support of the appeal upon the case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (1). But that case is clearly distinguishable. There the amount sought to be recovered as collection charge was not only expressly made part of the rent and consolidated therewith, but the aggregate amount was distributed into various instalments expressly stated to be payable as instalments of rent. In the case before us, even if there were, upon the terms of the contract, any doubt as to the true nature of the sum sought to be recovered, that doubt would be completely removed upon an examination of the plaint. In the fourth paragraph of the plaint, the plaintiff allows a deduction of Rs. 28-6 for unculturable land and seeks to recover arrears at an annual rate of Rs. 231, besides the husk; in the sixth paragraph, he asks for the principal amount of rent with cesses thereon, and the price of the husk. These two paragraphs plainly indicate that, in the opinion of the plaintiff, at any rate, the price of the husk claimed is not an integral part of the rent. The matter, however, is placed beyond all doubt when we find that the plaintiff claims cesses only upon the amount stated to be rent, and not upon the amount claimed as price of husk. If the latter amount had borne the character of rent, the plaintiff would have been entitled to claim cesses thereon, and what is more, he would have been liable to pay to the State cesses on the basis of the rent thus realised. In our opinion, the terms of the contract, as also the interpretation put thereon by the plaintiff himself, leave no room for serious controversy that the sum claimed as the value of the husk

(1) (1904) I. R. L. 31 Calc. 834.

does not form part of the consolidated rent, but is an independent item falling within the description of an imposition in addition to the actual rent, though it may not have been specifically described in the contract, or claimed in the plaint under the denomination of *abwab*, as was done in some of the cases in the books. *Tilukhdari Singh* v. *Chulhan Mahton* (1), *Radha Prosad Singh* v. *Bal Kowar Koeri* (2). The view we take is amply supported by the decision in *Sreekanta Prasad* v. *Irshad Ali Sircar* (3), which has many features in common with the case now before us.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. The cross objection filed on behalf of the respondent is not pressed, and is, consequently, dismissed without costs.

O. M. *Appeal dismissed*

(1) (1889) I. L. R. 17 Calc. 131. (2) (1890) I. L. R. 17 Calc. 726.
(3) (1894) 16 C. L. J. 225.