

# CALCUTTA HIGH COURT

Kali Kishen Tagore

Vs

Golam Ali

(Field, C.J. Macpherson ,J.)

19.03.1886

## JUDGMENT

### **Field, J.**

1. who after setting out the facts continued.--The first point pressed upon us in appeal is that no notice was necessary, because the defendant being entitled merely to kursa-jama had set up a larger interest in himself, viz., a permanent malguzari jama, had repudiated the true position of his landlord, and might therefore be ejected at once without notice. In support of this contention the case of Vivian v. Moat L.R. 16 Ch. D. 730 was relied upon. In that case the tenant defendant had disputed his landlord's right to raise the rent. FRY, J., said: "Every landlord, in the ordinary sense of the word, has in popular Janguage a right to raise the rent," and he considered that the denial of the landlord's right to raise the rent being a suggestion that the landlord was not an ordinary landlord of the estate, but either a lord of the manor or an owner of some other right which gave him a title to a customary rent merely, was in fact a renunciation or disclaimer of the landlord's title. We think that the ground of this decision rests mainly upon the relation of landlord and tenant, as it exists in England, where such relation depends upon contract, and that the principle of this case is not applicable to this country, where a different state of things prevails. In this country there are numerous tenures the rent of which cannot be raised, and the denial of the landlord's right to raise the rent is not necessarily a renunciation or disclaimer of his title as landlord.

2. The next question argued before us is concerned with the reasonableness of the notice. Whether a notice is or is not reasonable is a question of fact, and therefore ordinarily the decision of this question is not open to second appeal. But if the finding of the Court below is based upon no evidence, or upon reasons, all of which are untenable, no doubt the propriety of such finding might be questioned upon second appeal. The Judge in the Court of First Instance thought the notice unreasonable, because it did not expire at the end of the year, and further, because it was not a six months notice which he thought would under the circumstances be a reasonable notice.

The first ground is absolutely untenable. There is no law in this country which requires a notice to quit in a case of this kind to expire at the end of the year. The second ground is also bad, because there is no law which requires a six months notice to be given. What the Judge ought to have found was, not what notice would have been reasonable, but whether the notice actually given in this case was or was not reasonable. If the Judge in the lower Appellate Court had merely adopted the reasons given by the Subordinate Judge, it might fairly be contended that his finding was open to question in second appeal. We think, however, that although he has adopted the Subordinate Judge's finding, he has not adopted his reasons, but has exercised his own judgment upon the evidence in the case. He says at page 31: "The defendant urges that this notice is unreasonable, and the Subordinate Judge holds that it is so. So far I quite agree with the Subordinate Judge." Here he agrees in what the Subordinate Judge holds, but he does not express his concurrence in the reasons given by the Subordinate Judge for his finding; and from his observations at page 33 it appears that he did not concur in the view taken by the Subordinate Judge that there should be a six months' notice. At page 32 the District Judge says: "Under any circumstances it was utterly unreasonable to ask defendant to give up in a month and twenty-four days land which he had held for so long, and which with the permission of plaintiff's agents he had covered with buildings." We think that this is a finding of fact that the notice of one month and twenty-four days given to the defendant was not a reasonable notice. The District Judge then proceeds to give his reasons, and it has been pressed upon us that in giving these reasons he has omitted to consider many facts and circumstances in the case which should have weighed with him in forming his opinion upon the question which he had to decide. It may be quite possible that the Judge has not dealt with this question as fully and satisfactorily as could be wished; but nevertheless we are of opinion that we cannot enter upon an examination of the evidence upon second appeal, and that we are precluded from interfering with the finding of fact arrived at by the Judge.

3. The next question with which we have to deal resolves itself into two present, was the District Judge right in thinking that no declaratory decree could according to law be made in this case; and, secondly, was he justified in interfering with the exercise of discretion by the Court of First Instance in making such a decree.

4. As to the first point we think that the Judge was in error in holding that a declaratory decree could not, according to law, be made in the present case. In the two cases in *Nilmony Singh v. Rally Churn Bhattacharjee*<sup>1</sup> and *Kathama Natchiar v. Dora Singa Tevar*<sup>2</sup> their Lordships of the Privy Council deal with the provisions of Section 15 of Act VIII of 1859. This section has been repealed, and the provisions of the present law, Section 42 of the Specific Relief Act, are materially different, The provisions of Section 42 are as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying,

or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Now, what the plaintiff asks in this case is that the defendant's declaration as to having a permanent malguzari jama be set aside. We must not in this country tie up parties too strictly to the language of their pleadings, and we must look, not at the language merely, but at the substance of the thing. The plaintiff admits that the defendant has a kursajama but he denies that the defendant has the much larger interest asserted by him, viz., a permanent malguzari jama. In other words, he alleges that the interest which is vested in himself is the whole proprietary right less a kursajama belonging to the defendant, and that it is not a much smaller interest, viz., the proprietary right less a permanent protected tenure, that is, a permanent malguzari jama. Let us now see what the pleadings were. In the sixth paragraph of his written statement the defendant alleged that for more than twelve years before the service of the notice, he and his predecessor had been possessing and enjoying the disputed lands in right of a permanent fixed malguzari jama, and exercising the aforesaid permanent mylgurzan right over the same; and in the nineteenth paragraph he alleged as follows: "From before the Decennial Settlement, from the time of the plaintiff's predecessors, I have been from the time of my forefathers enjoying and possessing the disputed lands together with some other lands of mouzah Ghatakhal and Turbhunaia at a rent formerly of Sicca Rs. 7-124-1-2 kag, and then of Company's Rs. 8-4-6 pie as permanent mokurrari transferable malguzari jama held and possessed from generation to generation, first by clearing the jungles and preparing gardens on the same, and then by settling tenants here and there from time to time, and preparing gardens and excavating tanks, &c, on the same. My right of occupancy is of course involved in that superior right of mine." The Subordinate Judge fixed among other issues the following, namely, the tenth, "whether or not the disputed land is the permanent right alleged by the defendant in the nineteenth paragraph of his written statement," and the fifteenth, "whether or not the defendant has a right of occupancy in the land. "Finding these two issues against the defendant, he made a declaration that the defendant has no permanent or protected holding in the land, not even a right of occupancy; that he is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit expiring at the end of the year. Now, there can be no doubt that this declaration is too wide, and that so far as regards the statement that the defendant is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit, expiring at the end of the year, it should not have been made. But it is contended that the plaintiff is entitled to a declaration upon the finding upon the tenth and fifteenth issues, that the defendant is not entitled to such a permanent right as that alleged in the nineteenth paragraph of his written statement, and that he has not a right of occupancy in the land. It appears to us that as a matter of law such a declaration can be made under the provisions of Section 42 of the Specific Relief Act. This view is in conformity with the case of Rajundw Kishwar Sing v.

Sheopursun Misser 10 Moore's I.A. 438 see the remarks of their Lordships of the Privy Council at pages 449 and 450. This case, it is to be observed, was decided before Section 15 of Act VIII of 1859 was enacted. Then the case of *Bissesuri Dabeea v. Baroda Kant Roy Chowdry*<sup>3</sup> decided after the passing of the Specific Relief Act, though not exactly in point, lends a certain support to the view which we take. It has been contended that, inasmuch as the plaintiff sued for ejectment, and the declaration which he asks for is merely ancillary to this ejectment, the declaration should not be made. This is no doubt a good argument, as regards that portion of the declaration made by the Court of Kist Instance, which we have above intimated, cannot be sustained. It has also some force as regards the portion of the declaration, based on the finding upon the fifteenth issue; and as regards this issue we may further observe that the plaintiff has not asked that it be declared that the defendant has not a right of occupancy. It appears to us that the whole of the pleadings fairly construed show that the plaintiff sought two things: first, to have it declared that the defendant had not a permanent malguzari tenure, or, in other words, that the interest in him, the plaintiff, was the whole zamindari interest less a kursajama; and secondly, to have the defendant evicted from this kursajama upon service of notice to quit. We think that these two things are separate, and that the plaintiff may well have the declaration which he asks for, even though in consequence of his failure to prove a reasonable notice he is unable to proceed to the ejectment of the defendant. Having regard to the proviso of Section 42, it may be observed that in respect of the interest as to which the plaintiff seeks a declaratory decree no further relief is possible, and that the further relief which would have been possible, if a proper notice had been served, is sought no? in respect of the interest which the plaintiff claims to have and which in substance he asks to have declared, but in respect of the interest -which he admits the defendant to have, viz., a kursajama. We think, therefore, that under the present law, Section 42 of the Specific Relief Act, (and see the illustrations to this section), such a decree as that which is now asked can be made. Then it is said that the plaintiff seeks merely to set aside an allegation. There can be no doubt that a declaratory decree ought not to be made to set aside a mere allegation; but in the present case the defendant's conduct amounts to something more. In the previous case, No. 23 of 1878, he set up this permanent malguzari jama and he produced documentary evidence to prove it. He is found to have since been exercising rights in the land inconsistent with a kursajama interest, though consistent with the permanent malguzari jama which he alleges, and in the present case he has repeated this allegation of a permanent malguzari jama, and has again brought forward documentary evidence to prove it (a large portion of which evidence has been found to be forged).

5. The next question with which we are concerned is that of discretion. The Judge in the court of First Instance in the exercise of his discretion made a declaratory decree. The District Judge set aside the decree, because in his view it cannot be made under the present law, and then at the end of his judgment he says: "Finally I must remark with special advertence to *Nilmony Singh v.*

*Rally Churn Bhattacharjee*<sup>4</sup> that the granting of a declaratory decree is discretionary with the Court, and that even if there was no rule of law against making the declaration asked for by the plaintiff, this is not a case in which such relief should be granted." Now if the second portion of this sentence be construed as referring to the case of Nilmony Singh v. Kally Churn Bhattacharjee L.R. 2 I.A. 83 : 14 B.L.R. 382(Supra) the reasons which may be assumed to have influenced the Judge have no existence, because that case was governed by Section 15 of Act VIII of 1859, which has no application in the present case, and the Lords of the Privy Council, after expressing their opinion at the bottom of page 85 that that was not a case in which, in the proper exercise of discretion, a declaration of title should be made, proceeded to state what the facts were; that the real object of the suit was to obtain a general declaration against a number of persons holding different rights. The facts of the present case are not analogous, and, therefore, the same reasons do not apply. If, on the other hand, the second part of the sentence above quoted is to be construed as having no reference to the case of Nilmony Singh v. Kally Churn Bhattacharjee L.R. 2 I.A. 83 : 14 B.L.R. 382(supra) then the Judge reverses the exercise of discretion by the Court of First Instance without assigning any reason for so doing, and such a judgment cannot stand. In the case of Sreenarain Mitter v. Kishen Soondery Dasse 11 B.L.R. 171 at p. 190, their Lordships of the Privy Council said: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary to the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." The Lords of the Privy Council heard that case as a second appeal, and putting themselves in the position of the High Court hearing a second appeal they made it a ground of their decision, that it would not be exercising a sound discretion, even if it could be done, to make the declaratory decree asked. In the case now before us the Judge has exercised no judgment, he has given no reasons for interfering with the exercise of discretion by the Court of First Instance.

6. We must, therefore, set aside his reversal of the Subordinate Judge's exercise of discretion as to the granting of a declaratory decree and the case must go back in order that the Judge, in the Court below, may determine the question of fact raised by the tenth issue. If this issue is found against the defendants and in favour of the plaintiff, the plaintiff will be entitled to a decree declaring that the defendant has not the rights put in issue thereby. T. A, P. Case remanded.

Cases Referred.

1L.R. 2 I.A. 83 : 14 B.L.R. 382

2L.E. 2 I.A. 169 : 15 B.L.R. 83

3I.L.R. 10 Cal. 1076

4L.R. 2 I.A. 83 : 14 B.L.R. 382