CALCUTTA HIGH COURT

Durga Prasad Singh

Vs

Rajendra Narain Bagchi

(Doss and Richardson, JJ.)

26.08.1909

JUDGMENT

Doss, J.

1. These two appeals arise out of an action to recover arrears of rent due under a maurasi mokurari lease dated the 18th Agrahayan 1301, corresponding to the 3rd December 1894, of underground coal in Mouza Dubari belonging to the plaintiff. The arrears claimed are for the years 1307 to 1312 at the rate of Rs. 2,800 per annum, together with interest for overdue instalments. The defence raised by the defendants is that at their solicitation the predecessors in interest of the plaintiff by a sanad or letter dated the 22nd Agrahayan 1305, corresponding to the 7th December 1898, addressed by the latter to defendant No. 1, reduced the rate of rent from Rs. 7 per bigha reserved in the maurasi mokurari lease to Rs. 5 per bigha, and fixed the annual rental at Rs. 2,000 in lieu of Rs. 2,800, and accepted the reduced rent for the years 1305 and 1306; they further pleaded that in pursuance of the terms of the lease the plaintiff had put them in possession of a certain defined area as being the area demised; that they carried on their mining operations within that area and expended large capital; that thereafter the plaintiff, in the year 1902, brought a suit, being No. 41 of that year, against them, wherein it had been finally decided by this Court on appeal that under the lease they are not entitled to any lands beyond the thak boundaries of the Mouza on the north, west and south; that the effect of this decision has been to reduce the extent of the area demised under the lease from 400 bighas to 274 bighas 4 cottahs; that they are only liable to pay rent on this latter area at the rate of Rs. 5 per bigha, i.e., at the rate of Rs. 1,371 annually; that they are entitled to a refund of the bonus, rent and interest; that they duly tendered the rent payable by them, but that the plaintiff refused to accept the same; that, consequently, they are not liable to pay any interest; and, lastly, that they duly paid the cesses directly into the Collectorate. The sanad or letter, dated the 7th December 1898, was not registered, and hence the question whether the defendants were entitled to claim reduction of rent depended upon the further question whether that letter was admissible in evidence. The Court below has answered the question in the affirmative; and has held that the defendants are only liable to pay rent at the rate of Rs. 5 per bigha on the 400 bighas demised under the lease, or in other words, at the rate of

Rs. 2,000 per annum. As regards the other question, whether the defendants are in possession of 274 bighas or more, the Court below has held that the defendants are in possession of 346 and odd bighas excepting a small quantity, namely, 1,600 square feet, and that there being a provision in the lease against any enhancement or abatement of rent, the defendants were not entitled, to an abatement of the rent of Rs. 2,000 per annum; and, lastly, that the defendants are not liable to pay cesses or interest as claimed. The Court below accordingly decreed the suit in part and dismissed it as to the rest of the claim.

2. From this judgment and decree both parties have appealed to this Court, each of them challenging the adverse findings of the Court below. The plaintiff has preferred appeal No. 291 of 1907, and the defendants have preferred appeal No. 318 of 1907. In appeal No. 291 of 1907 the cardinal questions for consideration are, first, whether the letter, dated the 7th December 1898, is admissible in evidence without registration; and, secondly, supposing that it is admissible, whether it is founded on good consideration, so as to be enforceable. The letter is addressed to defendant No. 1 and is in these terms: "That you are in possession and enjoyment of 400 bighas of land in Mouza Dabaru in Pergunnah Jharria, and have previously taken mokurari settlement of the same, at an annual rental of Rs. 2,800. But being unable to bear the annual rent of Rs. 2,800, you have filed an application before me for fixing the mokurari rent for the 400 bighas at Rs. 2,000 by reducing the rate to Rs. 5 per bigha, on the ground that on most part of the said coal lands there is no coal fit for use, and the coal that exists in the remaining land is not saleable as steam coal. Your prayer being considered reasonable, the mokurari rent for the said coal is fixed at the rate of Rs. 5 per bigha per annum, i.e., at Rs. 2,000 per annum for the said 400 bighas with effect from the 1st Baisak 1305 B.S." The letter goes on to state that the rents are payable in three instalments, namely, in the month of Sraban, Agrahayan and Chaitra, that interest on overdue instalments is to be paid at the rate of 2 per cent, per mensem, and in the event of three consecutive instalments being unpaid, the concession as to rate of the rent shall cease and the terms of the original lease would revive.

3. On behalf of the appellant it has been contended that this letter is a non-testamentary instrument which purports to limit in future a vested interest of the value of Rs. 100 and upwards in immoveable property, and that its registration is therefore compulsory under Section 17, Clause (6) of the Registration Act, III of 1877; and that not being so registered it cannot, under Section 49 of that Act, be accepted as evidence of any transaction affecting any such property. I think this contention is well-founded.

4. Besides a definition of the reduced rental, the document contains a recital of the area of land demised under the lease, the nature of the interest granted by the lease, and the instalments in which the rents were payable. In other words, all the essential elements of a lease are contained in it. I think, therefore, the case is close upon the case of *Biraj Mohinee Dasee v. Kedarnath Karmahar*[1] where a petition of compromise filed in a criminal proceeding, and containing the essential elements of a lease, was held, for want of registration, inadmissible in a suit for rent

based upon it. But even if it be treated merely as? an agreement for reduction of the rent, it is in effect an agreement purporting to limit an interest in immoveable property. It has been held that a covenant by a lessor for an abatement of rent is within the Statute of Frauds, for the agreement is for a release of a part of the rent [see Dart on Vendors and Purchasers, 7th Edn., pages 219-220], and therefore affects an interest in land: see O'*Connor v. Spaight*[2]. It has been held in Ex parte Hall (1879) 10 Ch. D. 615 that an agreement to charge future rent is a contract charging an interest in land, and therefore falls within the purview of the Statute of Frauds.

5. That an agreement which affects the incidents of the tenure created by a lease, or in other words, which forms a part of the terms of the holding under the lease, is not admissible without registration, follows clearly from the ratio decidendi of the judgment of their Lordships of the Privy Council in *Subramanian Chettiar v. Arunachalam Chettiar*[3] In that case the lessee, under a reversionary lease, executed on the 4th July 1895, but which was to come into operation in 1912, after the expiry of some leases affecting the same property then subsisting, verbally agreed, in consideration of the lessor granting him the lease to pay to the latter the sum of Rs. 500 a month for a period of ten years from July 1895. This arrangement was put in writing in the form of a letter addressed by the lessor to the lessee. Their Lordships, after quoting the provisions of Section 92 of the Evidence Act, Section 17 of the Registration Act (III of 1877), and Sections 105 and 107 of the Transfer of Property Act, thus observed: "The agreement for the payment of Rs. 500 a month for ten years from July 1895 is in no way inconsistent with the lease of the 4th of that month. Its provisions form no part of the terms of the holding under the lease; their effect will be exhausted some years before the lease takes effect. The payment bargained for is no charge on the property; it, is not rent, nor recoverable as rent, but a mere personal obligation collateral to the lease. Their Lordships are of opinion that the agreement was not affected by Section 92 of the Evidence Act, and that there is nothing in the Registration Act, or in the Transfer of Property Act, which required that it should be registered as part of the lease. In the course of the argument before their Lordships, Lord Davey said--" it (i.e., the agreement) had nothing to do with the incidents of the tenure. It did not affect the incidents of the tenure in any way." It is quite manifest, from the reasons I have just quoted, that if the agreement varied or affected any of the terms of the holding under the lease, or in other words, any of the incidents of the tenure, and above all, if it varied the rent, it would, in their Lordships' opinion, attract the provisions of the Registration Act and the Transfer of Property Act. An application of the same principle to the case of a mortgage is illustrated in the case of *Tika Ram v. The Deputy Commissioner of Bara Banki*[4] where the mortgagor had by a separate unregistered rukka or written promise agreed to pay to the mortgagee interest at a higher rate than that stipulated for in the mortgage. Their Lordships of the Privy Council held that this unregistered document, which could not affect the property, could not control the original mortgage, so as to fetter the equity of redemption arising under it. If it were open to the parties to alter any of the terms or incidents of a lease by an unregistered instrument, it seems to me that the result would be that they would be capable of altering every one of the terms of the lease by separate unregistered documents, so that all the incidents of the original lease would vanish, and the rights of the parties and the

incidents of the lease would be regulated entirely by unregistered documents. This inevitable consequence has been very forcibly emphasized by Bramwell B with reference to the analogous provision in the Statute of Frauds in *Sanderson v. Graves*[5] where he said--"unless a note in writing is necessary in every case of alteration, it is required in none, so that in the name of alteration, something wholly different might be established."

6. Much reliance has been placed by the respondent upon the cases of Satyesh *Chunder Sircar v. Dhunpul Singh*[6] and *Beni Madhub Goraini v. Lal Moti Dassi*[7] In the first case the defendant in a suit to recover arrears of rent pleaded that he was entitled to a reduction of the rent on the basis of an unregistered agreement with the plaintiff. This agreement, however, was admitted in the plaint in a previous suit against the same defendant. The learned Judges held that as the agreement was proved by the written admission of the plaintiff, it was not necessary for the defendant to use the unregistered agreement in support of his case; but they clearly intimated that if the defendants' plea had rested solely on this unregistered agreement it would have failed, the document being inadmissible for want of registration.

7. In the second case, oral evidence was held to be admissible, not for the purpose of varying the rents specified in the kabuliat, but for the purpose of showing that the agreement embodied in the kabuliat was never intended to be acted upon or enforced. That is wholly different from what is sought to be done here.

8. On the second point, I am of opinion that the agreement for reduction of rent is not enforcible, inasmuch as it was made without consideration. The defendant No. 1 admits in his depositions in the present suit, as well as in the previous suit, that the plaintiff's predecessor in title granted the reduction of rent out of favour. The mere fact that rent for the years 1305 and 1306 has been received at the reduced rate does not bind the plaintiff to accept rent at that rate in future. The transaction amounts to no more than an indulgence on the part of the lessor, which might be put an end to at any time: see *Crowley v. Vitty*[8] Fitzgerald v. Lord Portarlington (1835) 1 Jones (Irish) 431, where rent at the reduced rate had been reduced for three years, and yet the agreement was held not binding as being wholly without consideration: *Morgan v. Rainsford*[9] *Radha Raman Chowdry v. Bhowani Prasad Bhowmik*[10]

9. With regard to the liability of the defendants to pay the cesses, I am unable to agree with the Court below. In the lease the defendants expressly covenanted to pay, besides the fixed rental, the road and public works cesses and other taxes and cesses payable by them. Consequently, they are bound to pay the cesses to the plaintiff, unless they can show that they have already paid them to the Collector. They have adduced no evidence whatever in support of their bare statement. The Court below is not right in assuming that they are paying the cesses to the Collector.

10. The question as to whether there was proper tender or not of the rents for the years in suit cannot properly be determined until the claim of the defendants for an abatement of the annual

rent on the ground of diminished area is decided. This, however, forms the subject-matter of the other appeal to which I must now turn.

11. The questions involved in this appeal are, first, what is the true extent of the subject-matter of the demise created by the mokurari-maurasi kabuliat, dated the 3rd December 1894; secondly if the answer to this question be in favour of the defendants, whether they are entitled to an abatement of rent.

12. Upon the first question, the contention of the defendants is that they are entitled to the coal underneath the full quantity of 400 bighas of land specified in the lease. The contention of the plaintiff, on the other hand, is that the defendants are entitled to the coal underneath such quantity of land only as is contained within the boundaries described in the schedule to the lease.

13. The solution of this controversy between the parties depends on the true construction of the words of the kabuliat. The material words of that document are as follows: "I having applied to get from you a settlement of the rights of cutting, raising and selling, etc., the coal underneath the 400 bighas of land described in the Schedule below within Mouza Dobari, Pergunnah Jherria, recorded in Towji No. 8 of the Collectorate of the District Manbhum, and which is within the zemindari owned and possessed by you in ancestral right, and you having granted my application, I hereby execute in your favour a mokurari permanent maurasi kabuliat for 400 bighas of land as per boundary below within the said Mouza, and which, (that is, the said 400 bighas) after having been marked out by you, I shall enclose by putting up masonry pillars at my own cost, in consideration of your taking from me Rs. 8,400 as salami and fixing an annual mokurari rental of Rs. 2,800 for the rights in coal under the said 400 bighas of land; and I agree that year after year and according to the instalments I shall pay to you into your zemindari cutchery every year in three instalments a fixed rental, and also the road and public work cesses and other taxes and cesses payable by me according to law that may be imposed in future by Government, namely, in Sraban of each year Rs. 900 and in Chaitra Rs. 1,000 out of the rental fixed; and after taking dakhilas for the same, according to the usage in vogue in your serishta, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 bighas by cutting, raising and selling the same after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignments of the same according to pleasure. The rental fixed shall never, on any account, be varied. I shall surround the boundaries of the settled lands by erecting masonry pillars, which I shall keep in regular repairs at my cost." The schedule of the boundaries is thus stated--" on the south, boundary line of Mouza Fatehpur as per thak; on the west, boundary line of Mouza Jheria Khas as per thak; on the east, border of the 100 bighas of land settled with Gopal Krishna Roy and others and the Chutkari Jore (streamlet); on the north, boundary line of Mouza Bherakata as per thak and the Chutkari Jore (streamlet)."

14. "Right in the coal underneath the 400 bighas of land within these boundaries." The kabuliat

also recites that it is executed on receipt of a corresponding patta from the lessor. This pitta, however, has not been produced and nothing turns upon it.

15. It is admitted on behalf of the plaintiff that the lease in respect of the 100 bighas of land in favour of Gopal Krishna Roy and others, the border of which land was mentioned as forming part of the eastern boundary of the demised land was, as a matter of fact, not executed until some time afterwards. In the year 1895 an officer of the plaintiff demarcated on his behalf on the spot an area as being the 400 bighas purported to be demised under the lease, and it was thereupon enclosed by the defendants by pillars; but this area, as will be seen later, was on actual measurement held in September 1902 found to consist of 346 bighas 4 cottahs 4 chittaks. On the 26th April 1902 the plaintiff brought a suit, being No. 41 of 1902, in the Court of the Subordinate Judge of Manbhum against the present defendants for a declaration that the latter had overstepped the western boundary line mentioned in their lease, and were in wrongful possession by cutting coal underneath the lands comprised within the boundaries specified in the third schedule of the plaint in that suit, and for a perpetual injunction restraining them from cutting and raising coal from the disputed land and also for substantial damages. The area of the disputed land was found by the Civil Court Amin to be 50 bighas 18 cottahs. The ground upon which the plaintiff asserted that the defendants had transgressed the boundary line was that the boundaries of the land demised to the defendants on the north, west and the south were the boundary lines of the border mouzas according to the respective survey maps, and not according to the thak maps of those mouzas.

16. Both the Court of first instance and this Court on appeal held that, upon the proper construction of the description of the boundaries in the lease, the contention of the plaintiff was untenable, and that the boundaries on the north, west and south were the boundaries of the border mouzas according to the thak maps of those mouzas. The result of that decision was that the defendants were held to have unlawfully dug out coal from underneath 1,600 square feet of land situated outside the thak boundary on the west; but under the decree made in that suit they were simply restrained by an injunction from overstepping the thak boundary line, and the rest of the plaintiff's claim was dismissed.

17. A Civil Court Amin was appointed in that suit to measure the lands then in dispute, and to relay on the spot the survey and thak maps of mouza Dobari, the mouza situated on the west of the demised land. He showed in his map the respective position of the thak and survey lines of that mouza. The defendants pointed out to him the situation and extent of the land of which they had obtained possession in 1895 according to the demarcation made by the plaintiff's officer. The position of this land was also delineated in his map, and its extent was found to be 346 bighas 4 cottahs. The western limit of this land, which was pointed out by the defendants as being then in their possession, is considerably to the west of the eastern thak boundary line of mouza Dobari, and similarly the northern limit of the lands then pointed out to the Amin is much further to the north of the northern thak boundary line of mouza Dobari.

18. It is evident, therefore, that in consequence of the decision in the last-mentioned suit the area of the land now in the possession of the defendants is much less than 346 bighas 4 cottahs. I find myself unable to agree with the learned Subordinate Judge that the defendants are in possession of 346 bighas 4 cottahs. True, there are doubtless certain passages in the judgments of the Court of first instance and this Court which may lead to that inference; but I think these passages proceeded upon a misapprehension of the report and the map of the Civil Court Amin. The precise area of which the defendants were then in possession was not at all the subject of consideration in that case. The Civil Court Amin who measured the land in the previous suit has been examined by the defendants in the present suit. He proves that the area of the land within the boundaries, finally determined in the previous suit as the boundaries of the demised premises, is 275 bighas 3 cottahs 10 chittaks. The plaintiff has adduced no counter-evidence on this point.

19. Consequently the result is that the quantity specifically stated in the lease is 400 bighas, whereas the area contained within the boundaries mentioned therein is 275 bighas odd only.

20. Returning now to the question of the true construction of the subject-matter of this lease, the primary

Canon

of interpretation of a deed or grant, where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably, is that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity: see *Llewellyn v. Earl of Jersey*[11] *Jack v. Mc Intyre*[12] *Cowen v. Truefitt, Ltd*[13]. *McIver v. Walker (1819) 4 Wheaton U.S. 444.* On the other hand there is a supplementary canon equally well established, though instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: see *Herrick v. Sixby (1867) L.R. I P.C. 436(Supra), Davis v. Sheperd*[14] *Mellor v. Walmesley*[15] *Horne v. Struben*[16] *Newsom v. Pryorr's Lessee*[17] *and Ainsa v. U.S*[18].

21. These two canons are in fact illustrations of, and may be summed up in, a more general principle that where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter: *Newsom v. Pryorr's Lessee*[19] This, again, is not a rule of law and hence inflexible in its character, but a mere rule of construction, which serves as a safe and almost infallible guide in determining the intention of the parties, which is the touchstone of true interpretation. Indeed, it is all-controlling and predominates over all the elements of description of the subject-matter.

22. The present case, when carefully analysed, presents features so peculiar that neither of the

two canons I have just indicated enable us to solve the difficulty. Here the two elements--the boundaries and the quantity--are equally certain and exactly defined. The boundaries are as precise and definite as the quantity is specific and exact. But there is a gross divergency between the quantity specified and the quantity found to be included within the defined boundaries. In a case of this kind, preference ought to be given to that element of the description of the subject-matter which is most consistent with the intentions of the parties, to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties: see *Lord v. Commissioners for City of Sydney*[20] *White v. Luning (1876) 93 U.S. 514(Supra), Crogham v. Nelson*[21] *Holmes v. Trout*[22] We have, therefore, to ascertain upon a proper and reasonable construction of the language of the lease, what the dominant idea and real intention of the parties was in regard to the extent of its subject-matter. It is quite clear that, so far as the situation of the land demised is concerned, apart from any question as to its true extent, it is land situated in mouza Dobari and within the thak boundaries of that mouza, because the description of the boundaries shows that it is circumscribed on three sides by the thak boundaries of the border mouzas, and on one side by a physical boundary, which again is situated inside that mouza. It is equally clear that the demise, prima facie, is of the coal underneath the 400 bighas of land, which 400 bighas are described in the schedule appended to the lease, and not of the coal underneath the lands described in that schedule, followed by an approximate statement of the area contained therein. This is merely an element to be taken into consideration in construing the lease and is by no means conclusive. Then follows a very important clause, and that is, that the situation of the 400 bighas is to be marked out by the lessor on the ground, and it is to be then enclosed by the lessee by means of masonry pillars erected at his own expense. It is manifest, therefore, that the lessor reserved to himself the right of marking out the 400 bighas demised under the lease, and that it was after such demarcation, and not until then, that the lessee was to go into possession of the land. This clause negatives the idea that the lessee was to find out for himself the land within the boundaries defined in the schedule and take possession of such land, and necessarily points to the inference that the description of the boundaries was a subordinate element in the estimation of the parties. The rent reserved is Rs. 2,800, which is exactly seven times the number of bighas mentioned in the lease, i.e., at the rate of Rs. 7 a bigha, and the salami or premium is Rs. 8,400, which is exactly 21 times the same number of bighas, i.e., at the rate of Rs. 21 per bigha. That the rental was to be fixed at the rate of Rs. 7 per bigha per annum, and the premium at three times that rate, is corroborated by the language of the receipt executedon the 14th Agrahayan 1301, corresponding to the 29th November 1894, that is, four days before the date of execution of the lease by the plaintiff's predecessor in favour of the defendant No. 1, whereby the former acknowledged receipt of a sum of Rs. 7,000 as payment in advance on account of premium. A statement contained in a contemporaneous document undoubtedly furnishes a legitimate aid to construction: see the observations of Sir George Jessel, M.R., in *Smith v. ChadwicK*[23] *and Anderson's case* [24]*The case of Leggott v. Barrett*[25] does not touch the point.

23. The next clause which has an important bearing upon the construction of this lease is the one

which provides that the rental so fixed "shall never on any account be varied." If the intention of the parties was that the coal below the land comprised within the specified boundaries should be demised, the exact area whereof was at the time indeterminate, and hence unknown to both parties, it is only reasonable to expect that they would, for the purpose of safeguarding their respective interests, take particular care to insert in the lease a clause to the effect that, in case the area included within the boundaries be found on actual measurement to exceed 400 bighas, the lessee would be liable to pay an increased rental in proportion to the increased area, and conversely in case the area be found on actual measurement to be less, there would be a corresponding reduction in the rental. And it is for this reason that a clause of this sort is so generally common in perpetual leases in this country whenever the land demised is included within definite boundaries, but the rental is fixed on some approximate area ascertained by guess and is calculated at a certain rate per bigha. The absence of such a clause, and the fixity of the rent in perpetuity, raises a strong inference that the area demised was the specific quantity of 400 bighas, and not any undefined area unknown to the parties at the time of the lease. The following clause towards the end of the document, namely:" You are not liable to me for the return of the above amount of salami (premium), or for any other matter," also tends in the same direction.

24. Having regard generally to the whole tenor of the lease, and the above-mentioned clauses in particular, it is difficult to resist the conclusion that the parties were dealing with something clear, definite and certain, and regulating their rights on that basis, and not on the basis of an uncertain, variable element such as the area, even if included within definite boundaries, would necessarily be.

25. Moreover, the wording of the prayer and of the schedule of boundaries in the plaint filed by the plaintiff in the previous suit No. 41 of 1902 also leads to the same conclusion.

26. This brings me to the consideration of the second question, namely, whether, if the first question be decided in favour of the defendants, they are entitled to reduction of rent in proportion to the area now in their possession. Now, though there is no express covenant to that effect in the lease, nevertheless the parties having adjusted the annual rental on the basis of the specific area of 400 bighas, and the plaintiff having failed to put the defendants in possession of that specific area, I am of opinion that the defendants are entitled to a proportionate reduction of rent. I have already stated in dealing with the first question that the plaintiff expressly assumed the obligation of marking out the position of the 400 bighas as a condition precedent to the entry of the defendants on the land. This obligation, coupled with the adjustment of the rent on the basis of the specific area, necessarily implies an undertaking" on the part of the plaintiff that, in case he fails to place the defendants in possession of the entire quantity of 400 bighas, he shall have no right to claim the full rent, but only such rent as may be chargeable for the area over which he may be able to put the defendants in possession.

27. The essential facts in the case of *Imambandi Begum v. Kamleswari Pershad*[26] are somewhat

similar to the facts of the present case, and the decision of their Lordships of the Privy Council in that case seems to me to be conclusive on the present question. In that case, both the lessors and the lessee bond fide believed that the lessors had a much larger share than they really owned. The demised share formed part of a larger share, in respect of which a separate account had been opened in the Collector's register. This latter share was soon after sold for arrears of revenue payable in respect of it. The lessee brought a suit against the purchaser at the revenue sale for possession of the share in respect of which he had taken a mokurari lease. The lessee ultimately succeeded in taking possession, though of a much smaller share. He then sued the purchaser at the revenue sale, who stood in the shoes of his lessors, for mesne profits. The purchaser pleaded that he was entitled to set off the full rent payable under the mokurari lease. Their Lordships of the Privy Council held that "though this was not a case of eviction of the lessee by the lessor, for the lessee had not been put in possession by his lessors, yet the lessee was in a similar position to having been evicted from that part, and there is the same equity for apportionment as in a case of eviction." The true legal theory on which this equity rests is fully expounded in the leading case of *Paget v. Marshall*[27] In that case there was fundamental error as to the identity of the subject-matter of the lease on the part of the lessee, if not on the part of the lessor too. Bacon V.C. held that this error prevented the formation of a true contract, but gave the lessee the option to affirm the lease as had been really intended to be offered by the lessor, and further held that the lessee was entitled under similar circumstances, if not in that particular case, to a proportionate reduction of rent for the diminution in the area of the subject-matter of the lease. In the cases of *Harris v. Pepperell*[27] *and Garrard v. Frankel*[28] the lessee, defendant, was allowed the option of accepting a rectification of the lease in lieu of rescission. The present case is much stronger, inasmuch as there was fundamental error on the part of both the lessor and the lessee as to the existence of the subject-matter of the lease. Both of them thought that there existed 400 bighas plus 100 bighas to be leased to Gopal Krishna Roy within the specifically defined boundaries. As a matter of fact, however, there was a much less area within those boundaries. This fundamental error prevented the formation of a valid contract, but the parties are relegated to the original position as if the original offer was still open; and the defendant has the option to affirm the original transaction with a proportionate abatement of rent. As in my opinion the defendant is entitled to abatement of rent, it follows, from what I have said before, that the question of tender does not arise, and that consequently the plaintiff is not entitled to claim interest.

28. The result is that the appeal of the plaintiff, appeal No. 291 of 1907, partially succeeds, i.e., in so far only as regards the claim for rent at the rate of Rs. 7 per bigha, and that for road cess and public works cess; quoad ultra, the appeal fails.

29. The appeal of the defendant, appeal No. 318 of 1907, also partially succeeds, i.e., in so far as regards the claim for abatement of rent and non-liability for interest.

30. The decree of the Court below will be modified in accordance with the foregoing observations. Each party will bear his own costs both in this Court and the Court below.

Richardson, J.

31. In regard to appeal No. 291, I concur in the opinion of my learned brother.

32. As to appeal No. 318, in which the defendants are the appellants, it has now been found that the contract between the parties is contained in the lease dated the 3rd December 1894, and the controversy turns on the true construction of that document, a question of some difficulty. The lease appears to be a demise of land within specified boundaries. The parties thought that the area comprised with in those boundaries was 400 bighas. It turns out apparently to be a little more than 275 bighas. If there were nothing more than this the defendants would have to pay the rent reserved, notwithstanding the difference between the estimated area and the actual area. There is no mistake in the sense that the parties have said in the lease something which they did not at the time intend to say. The mistake or misapprehension related to the subject-matter of the lease, and if the parties were merely dealing with an estimated area, it would be proper to suppose that they took the risk of the area turning out greater or smaller But the question does not rest there. There can be no DOUBT that the salami was calculated at the rate of Rs. 21 a bigha and the rent at the rate of Rs. 7 a bigha. Moreover, the lessor covenanted to point out the 400 bighas within the specified boundaries. I thought at first that the salami and rent might be considered to be calculated at the rate stated per estimated bigha, and that the covenant to point out the 400 bighas should be construed as a covenant to point out the area estimated to comprise 400 bighas. On further consideration, however, I have come, not without hesitation, to the conclusion that the lease is capable of a construction more favourable to the defend ants, and that the lessor promised to point out an actual area of 400 bighas within the boundaries specified. In this, of course, he has failed, it being physically impossible for him to do what he promised. The result appears to be that the defendants are entitled in defence to plead that the plaintiffs have not carried out the whole of their part of the contract and to claim, as a matter of legal right, compensation on that ground. In that view, although I have not much sympathy with the defendants, who have behaved throughout in a most unbusiness-like way, I agree in the orders which my learned brother proposes to make.

Cases Referred.

1(1908) I.L.R. 35 Calc. 1010
2(1804) 1. Schedule & Lef. 305, 306
3(1902) I.L.R. 25 Mad. 603; L.R. 29 I.A. 138
4(1899) I.L.R. 26 Calc. 707; L.R. 26 I.A. 97
5(1875) L.R. 10 Ex. 234
6(1896) I.L.R. 24 Calc. 20
7(1898) 6 C.W.N. 242
8(1852) 7 Ex. 319; 86 R.R. 664
9(1845) 8 Irish Eq. 299
10(1901) 6 C.W.N. 60

11(1843) 11 M. & W. 183; 63 R.R. 569
12(1845) 12 CL. and Fin. 151
13[1898] 2 Ch. 551; [1899] 2 Ch. 309
14(1866) L.R. 1 Ch. App. 410
15[1905] 2 Ch. 164
16[1902] A.C. 454
17(1822) 7 Wheat. U.S. 7
18 (1895) 161 U.S. 208, 229
19(1822) 7 Wheat. U.S. 7
20(1859) 12 Moo. P.C. 473, 496
21(1845) 3 How. U.S. 187
22(1833) 7 Pet. U.S. 171
23(1882) 20 Ch. D. 27, 62, 63
24(1877) 7 Ch. D. 75, 99
25(1880) 15 Ch. D. 306
26(1894) I.L.R. 21 Calc. 1005
27(1884) 28 Ch. D. 255
28(1867) 5 Eq. 1
28(1862) 30 Beav 445