CALCUTTA HIGH COURT

Abhoya Charan Sen

Vs.

Hem Chandra Pal

(Mitter, J.)

05.03.1929

JUDGMENT

Mitter, J.

1. This is an appeal by the plaintiffs from a decision of the second Additional District Judge of Dacca dated 4th October 1926 reversing the decision of the Subordinate Judge, 4th Court, of the same place dated 11th December 1924.

2. The suit out of which this appeal arises was brought for recovery of rent with cesses and damages after apportionment in respect of a shikmi taluk more fully described hereafter. The rent sued for was for the years 1323 to 1326 B. S. The plaintiff's case, as stated in the plaint, is this. The previous proprietors of touzi, No. 315 of the Dacca Collectorate, having defaulted in the payment of the Government revenue, the mehal was sold and purchased by one Prosonna Coomar Sea in the year 1287 B.S. Prosonna Coomar took possession of the property in due course and thereafter created two tenures by registered pattas one in favor of Nand Coomar Dutt on 21st Baisakh 1289 B.S. and the other in favor of Srish Chandra Das in the year 1290 B.S. Within this Zemindari, there had previously been in existence a tenure in respect of which the present suit has been instituted which was Sikmi taluk of the name of Jagabandhu, Raj Chunder and Raj Coomar Pal and which carried, according to the arrangement between the proprietor and the tenure holders, a rent of ₹ 415/- per annum. The main defense of defendants 1 to 6 who along with others are the holders of this tenure is that the plaintiffs are not entitled to get any rent as they (defendants) have been dispossessed from a portion of the demised premises. Their case is that they were dispossessed from about 60 bighas of land by Prosonna Goomar Sen who had leased out the identical chuks which are covered by these 60 bighas to Nanda Kumar Dutt and Srish Ghunder Das as stated above. The Court of first instance gave a partial decree to the plaintiffs. On appeal, the lower appellate Court has dismissed the suit in its entirety.

3. The findings of fact on which the lower appellate Court has rested its decision may be briefly summarized as follows. They are (1) that there can be no doubt on the facte on the record that Prosonna Coomar Sen dispossessed the tenure-holders and that he took khas possession of some of the lands of the taluk in question and settled them with Nanda Coomar Dutt and Srish Chunder Das; (2) that there is no dispute that the thak chuks Nos. 42, 43 and 90 which are included in the sikmi patta Ex. A (4) were included in the pattas granted by Prosanna to Nanda

and Srish and (3) that Prosonna's conduct was wholly mala fide and that he deliberately dispossessed the Sikmidars from a considerable portion of the taluk. On these findings, the lower appellate Court came to the conclusion that the defendants were justly entitled to a suspension of the entire rent till they are restored to possession of the dispossessed lands since they had been wrongly and deliberately dispossessed by Prosonna from those lands. The consequences of the act of Prosonna in Subletting the tenure to Nanda and Srish will affect the plaintiffs who stand in the shoes of Prosonna, they having purchased Prosonna's interest in the zemindary on 2nd Agharayan 1304 B.S., by a deed of sale. In this view as has already been stated, the plaintiffs' suit was dismissed by the lower appellate Court.

4. A second appeal has been taken to this Court on behalf of the plaintiffs and the main argument addressed before us by their learned advocate has been that the lower appellate Court is clearly in error in not allowing apportionment of the rent as the defendants have been dispossessed on the findings from a very small quantity of about 60 bighas of land out of a very large area of 2,500 odd bighas and that, in equity, the plaintiffs are entitled to get a proportionate rent or the area which is still in the possession of the defendants-that is, the entire area covered by the patta Ex. A(4) less the 60 bighas from which they have been dispossessed. There is no question that, in the present case, the rental is a lump rental and it cannot be said that the rent is not chargeable on evey bit of land covered by the lease. In these circumstances, the respondents contend that the decision of the lower appellate Court is right having regard to the principle of the decisions which have been almost uniform in this Court, namely, that where the rental is a lump rental and there is dispossession from a portion of the demised premises-however small that portion may be, such dispossession is to be regarded as an eviction of the tenant from the entire premises and, therefore, there should be a total suspension of rent. The respondents have further relied on the recent pronouncement of their Lordships of the Judicial Committee of the Privy Council in the case of *Katyayani Debi v. Udai Kumar Das*[1], The appellants, on the other hand, have relied on certain observations made in a recent decision of this Court where it was said that their Lordships of the Judicial Committee did not intend to lay down the broad proposition that there should be suspension of rent in every case where there was dispossession of the tenant from the demised premises if the rental was a lump rental. It becomes necessary, therefore, to examine the two contentions carefully.

5. It appears to ma that the weight of authority is on the side of the contention raised on behalf of the respondents. So far back as the year 1869 in the case of *Gopanand v. Lala Govind*[2] Sir Barnes Peacock, C.J., referred to the following statement of the law in this behalf in Bacon's Abridgment, Title Rent (M):

> Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry and it seems to be the bettor opinion and the settled law at this day that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the law he ought to protect and defend.

[1] AIR 1925 PC 97
[2] 12 W.R. 109

6. This principle was followed uniformly till the decision of the case of *Dhunpat Singh v. Mahommad Kazim*[3] In that case, it was stated by the learned Judges that the principle to be gathered from the earlier cases was that, even if the landlord dispossessed the tenant from a portion of the demised premises, there should be no apportionment of the rent -the whole rent being equally chargeable on every part of the land demised. This principle was given a further extension in the case of *Hurro Kumari Choudhurani v. Purna Chandra*[4] where Sir Francis Maclean, C.J., and Banerjee, J., applied the principle to a case where the tenure was held under a lease which reserved the rent at a certain rate per bigha. The learned Chief Justice thought this conclusion was justified on the principle laid down in the. English and Indian cases referred to in the case of *Dhunpat Singh v. Mahommad Kazim*[5] This decision was followed by Asutosh Mookerjee and Carnduff, JJ., in the case of *Surendra Nath Guha v. Kali* [6]*Kanta* It must be said, however, in view of the decision in U in which their Lordships of the Judicial Committee said that the principle could not be extended to a case where the rent was paid at so much per bigha that this decision of Maclean, C.J., and Bannerjee, J., in the case reported in *Hurro Kumari Choudhurani v. Purna Chandra*[7] cannot now be regarded as good law. For the first time, it appears to me that a. dissenting note was struck in the case of *Annoda Prosad v. Mathura Nath*[8] in which Chitty, J., questioned as to how far the technicalities to be found in the English law should be allowed to affect the relationship of landlord and tenant in this country. Even after this decision, the course of authority has been in favour of the view that there should be an entire suspension of rent in case of dispossession by landlord from the demised premises held under a lump rent. In 1919 the case of *Manindra Chandra Nundy v. Narendra Chunder Lahiri*[9] Fletcher, J., with whom Cuming, J., concurred held, following the decision in *Neale v. Mackenzie*[10] that "where the landlord having let out a portion of a land to an earlier lessee lets it out again to a subsequent lessee and fails to deliver to the subsequent lessee possession of the entire land leased to him, the entire rent is suspended."

7. Fletcher, J., pointed out in that case that the decision in *Neale v. Mackenzie*[11] had always been considered as good law; with reference to the argument that the decisions of the English Courts should not be applied to the system of law in this country, the learned Judge said this:

> But the rule that rent is suspended on a account of the dispossession of the tenant by the landlord from a portion of the holding has been recognized in a number of cases in this Court and, in my opinion, it is not open to question now.

8. It was in this state of the authorities that the matter came up for consideration before their Lordships of the Judicial Committee in the case of *Katyayani Debi v. Udai Kumar Das*, to which reference has already been made and Lord Salvesen in delivering the judgment of their Lordships said:

> The doctrine of suspension of payment of rent where the tenant has not been put in possession of part of the subject leased has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject.

[3][1897] 24 Cal. 296
[4][1901] 28 Cal. 188
[5][1897] 24 Cal. 296
[6]14 C.W.N. 207
[7][1901] 28 Cal. 188
[8]13 C.W.N. 702
[9][1919] 46 Cal. 956
[10]1 M. & W. 747
[11]1 M.W. 747

9. It seems to me that these observations recognize the rule laid down by the Indian decisions that where the rent is fixed in a lump there would be suspension of rent on the ground of dispossession of the tenant by the landlord from a part of the demised premises. In the case of *Sushil Kumar Biswas v. Rajani Cant*[12], Bepin Behari Ghose, J., and Roy, J., expressed the opinion that these observations of their Lordships of the Judicial Committee were no authority for the proposition that there should not be any apportionment in every case of dispossession by the landlord of the tenant from a part of the demised premises where the rent was a lump rental. With great respect to these learned Judges, I should say that it is difficult to read the decision of the Judicial Committee in the way these learned Judges seem to have read it. It appears to me that there would be no point in their Lordships of the Judicial Committee referring to the law in this behalf unless they intended to lay down that that was a view from which they did not dissent, even if they did not actually prove the rule. Thus it seems to me that the Privy Council was really laying down the rule that there is to be a distinction between the two classes of cases and that, in the case of lump rental, the rule of suspensions should be applied and, in the case where the rent is so much per bigha, the rule has no application. It is to be noticed also that the observations made by B. B. Ghose and Roy, JJ., in the case reported in *Sushil Kumar Biswas v. Rajani Kant, AIR 1927 Calcautta 737 : (1928) ILR 55 Cal 689(Supra)*, were not necessary for the decision of that case ; for, in that case, the rental was a rental of so much per bigha and the observations made therein are obiter dicta and cannot prevail against the concurrent decisions in a large number of cases beginning with the case decided by Peacock, C.J., in 1869. It is also to be noticed that, in an earlier case, Bepin Behari Ghose, J., said this:

> It is true that the rule of suspension of rent on account of eviction by the landlord of the tenant from a portion of the demised premises has been adopted in this Court in a series of cases and it is too late to question the adoption of that rule in our Court now ; see *Biseswar Sarkar v. Kali Churn Ash*[13] observations difficult to reconcile with the obiter dicta of the learned Judge in 31 Calcutta Weekly Notes 990. The later authorities to which reference may be made are the decisions of Page and Mallik, JJ., in the ease of *Dhirendra Nath Roy v. Bhabatarini Debi*[14], where the learned Judges were in favour of the view of total suspension of rent in cases of dispossession from part of tenancies carrying lump rentals and of Greaves' and Cuming, JJ., in the case of *Suresh Chunder v. Mathura Nath*[15], where the same view was adopted. Reference may also be made in this connexion to an unreported judgment of this Court in appeal from Appellate Decree No. 2361 of 1927 which was delivered by me sitting: singly on a review of the authorities and in which I came to the conclusion that the decisions of their Lordships of the Judicial Committee of the Privy Council in the case of *Katyayani Debi v. Udai Kumar Das*[16], laid down the rule of suspension of rent in cases of lump rentals. This decision of mine alluded to above which was given on 10th September 1928 was appealed from under the, Letters Patent and it has been affirmed the appeal having been summarily dismissed by C.C. Ghose and Mallik, JJ., on 8th January 1929. It appears, therefore, on a review of the cases to which reference has just been made that the learned Additional District Judge has taken the correct view of the law in this behalf.

[12] AIR 1927 Cal 737: (1928) ILR 55 Cal 689
[13] A.I.R. 1926 Cal. 908
[14] AIR 1929 Cal 395
[15] AIR 1925 Cal 1187 : 90 Ind. Cas. 47

[16] AIR 1925 PC 97

10. It has been argued, however, on behalf of the appellants that the facts in the present case do not give rise to the legal inference that there has been such dispossession by the landlords as to attract the operation of this rigid rule. It is said that Prosanna was a revenue purchaser and that, as he had not in his possession the sikmi patta, it cannot be presumed that the subsequent settlement of some chucks with Nanda and Srish was done with the deliberate intention of depriving the defendants of certain lands of their tenancy. The answer, as given by the learned District Judge, is that it was quite easy for Prosanna to discover after his purchase at the revenue sale what lands were covered by the patta which was granted to the defendants. It is also a significant fact in this case which has been found by both the Courts below that no rent has ever been realized by the plaintiffs from the defendants. The Subordinate Judge at p. 3 line 40 of the printed paper-book in this case states that no rent was ever realized by the plaintiffs from the defendants after their purchase.

11. It has been next argued on behalf of the appellants that the rule of law indicated above seems to operate harshly on the plaintiffs in this case for, while the defendants are in possession of a large tract of land and are making profits out of it, it is sheer injustice that the plaintiffs should be deprived of rent in respect of the portion which is in the possession of the defendants. In these cases, the rule which is followed is that the landlord must secure to the tenant quiet enjoyment of every part of the demised premises. It does not matter in the least that the area from which the tenant has been dispossessed is a small area. The law does not encourage a landlord to dispossess the tenant from land in respect of which he has been granted a lease by letting it out again to a third person after the original demise had been effected. It may operate harshly in individual cases. But it is always desirable to follow a definite rule rather than to be guided by considerations of hardship in individual oases. As is pointed out in another connexion by Lord Birkenhead in *Rutherford v. Richardson*[17] that it is undoubtedly true that it is even better that some slight degree of injustice should **be** done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule. Once you begin to deviate from the rule on the ground that the area from which dispossession by the landlord has taken place is a small area you will not know where to stop. In the absence of any equity to apportionment the rigid rule has always been adhered to. The true principle which should guide us in cases of this kind is that laid down by the learned Chief Justice in a case to the decision in which I was also a party. The learned Chief Justice said:

> But the doctrine of suspension of rent depends solely on this that the rent due is an entire rent in respect of the land demised. If therefore the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is an entire sum *Sajjad Ahmad v. Trailohhya*[18]*,*

12. In this view, I am of opinion that the decision of the lower appellate Court is right and that it must be affirmed.

13. In final reply, the learned advocate for the plaintiffs appellants raised the point that

[17][1923] A.C. 1

[18] AIR 1928 Cal 479 : (1928)ILR 55 Cal 464

whatever our decision might be with regard to the recovery of rent, it ought not to affect the right of the plaintiffs to recover cesses from the defendants. This point was not raised in either of the Courts below ; nor was it raised in the opening of the case before us ; and it would not be right at this stage to allow this large question to be raised in reply. We, therefore, do not allow the point to be raised.

14. The result is that the appeal fails and must be dismissed with costs.

Jack, J.

15. I agree.
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