Privy Council Appeal No. 51 of 1941
Bengal Appeal No. 8 of 1939

Ram Lal Dutt Sarkar – – – – – – *Appellant*

v.

Dhirendra Nath Roy and others – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1942

Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This appeal is brought by special leave from a decree dated 29th March 1938 passed by the High Court at Calcutta on second appeal. The respondents have not appeared before the Board and Mr. Wallach for the appellant has carefully discharged his duty to see that all relevant matters are placed before their Lordships. The decree under appeal reversed the decrees of the Additional District Judge and Subordinate Judge at Faridpur dated respectively the 17th April 1935 and the 6th February 1933.

The suit was begun on 15th April 1931. It was a suit for three years' rent of a permanent tenure which had been granted by the predecessors of the plaintiffs and of certain *pro forma* defendants to one Srinath Sarkar by a patta dated 8th July 1875 and for which a kabulyat had been executed by Srinath on 22nd May 1877. He was engaged on zemindari management in the service of the plaintiffs' predecessors who granted him the patta. He died childless in 1890 and his widow Patambari Dassee succeeded him as tenureholder. She died on the 3rd March 1930 whereupon the appellant and his two brothers succeeded as her husband's reversioners. They were not originally made parties to the suit but were added on their own application. The appellant has since acquired his brothers' interests. His defence to the suit is that part of the lands comprised in the patta of 1875 were demised at a lump sum rent, and that, as the plaintiffs or their predecessors some time in the 'eighties of last century dispossessed Srinath of portion of these lands measuring some 37 acres and worth about Rs.56 per annum, no part of that rent is payable by him: his right being to a suspension of the entire rent until the lands in question are restored to him. The trial Court and the lower Appellate Court sustained his defence and dismissed the claim for rent. The High Court on second appeal remanded the case for calculation of the proper abatement of rent to be allowed to the appellant. His main grievance is that the learned Judges of the High Court have contrary to sections 100 and 101 of the Code of Civil Procedure set aside the lower Appellate Court's finding of fact that the plaintiffs' predecessors gave possession of the 37 acres to Srinath and thereafter dispossessed him.

The grantors of the tenure were certain persons called Rai—members of a family who owned the zemindari of a place in Jessore district called Narail and who are referred to as the Narail Babus. Of these certain members owning a one-sixth interest were not parties to the patta of 1875 but the other members demised thereby the remaining five-sixths share in a mouza called Orakandi said to have an area of 1,464 bighas after deduction of certain revenue-free lands and village pathways. For 822 bighas then in the occupation of raiyats the rent reserved was Rs.957.14.8. For a further 4 bighas 13 cottahs—a small cultivated area held in *khas*—the rent was to be Rs.4.11.0 at R.1 per bigha. For a further area of 635 bighas which included *patit* or waste land rent was fixed at Rs.317.15.9; but it was to remain *rasad* (in abeyance): payment being made at R.1 per bigha for such area as was found to be tilled in 1876 and at eight annas for the further areas found tilled in later years. The claim for rent in the present suit does not include any of this *rasad* rent but is for Rs.770.1.4 the plaintiffs' proportion of the sum of Rs.962.9.8—that is 957.14.8 plus 4.11.0—together with certain cesses. The sum of Rs.962.9.8 is called in the patta the *talabi jama* or demandable rent. As to Rs.957.14.8 it appears to their Lordships to be a lump sum rent in respect of a five-sixths share in 822 bighas 19 cottahs 6 chittahs.

In 1906 or 1907 in the course of the survey and settlement then being carried out the lands of khatians 1 to 17 inclusive were entered as in the occupation of raiyats paying rent to the Narail Babus, including the plaintiffs. Of these the lands of eight khatians—3, 4, 6, 11, 13, 14, 15, and 17—are claimed by the appellant to be part of the 822 bighas which were settled at a lump sum rent. These lands amount in area to some 37 acres and their rentals to about Rs.56. Much time was devoted at the trial to the plaintiffs' contention that these lands are not part of the 822 bighas but lands belonging to Ratnadanga Bil and Patiladanga Bil—marshy areas which according to the plaintiffs were outside the mouza of Orakandi referred to in the patta of 1875 A further contention of the plaintiffs was that some lands held by tenants under them were *chhit* or detached lands of another mouza called Aruakandi.

But it has been held by the trial Court and by the lower Appellate Court that mouza Orakandi included these two bils and that the 37 acres now in question were part of the raiyati area of 1875 (1282 B.S.)—part that is of the 822 bighas which bore the lump sum rent of Rs.957.14.8. This must now be accepted.

The trial Judge found that the raiyats on these lands had been paying rent to the plaintiffs since at least 1293 B.S. or 1886 A.D. But since the plaintiffs produced no papers to show that they had collected these rents between 1875 and 1886 he concluded that Srinath had been given possession and then ousted. He stressed for this purpose a passage in the kabulyat executed by Srinath in 1877 wherein Srinath on the recital that he had applied for settlement of the mouza Orakandi and that for 1,464 bighas a sum of Rs.1,280 had been fixed as jama—divided into Rs.317 rasad and 962.9.8 demandable—says: "I on taking a settlement and receiving a patta which was executed on 25th Ashar. 1282 B.S. and was registered on 28th September 1875 am in possession in mofussil."

The learned Additional District Judge expresses agreement with the trial Court in several passages of his judgment which are concerned with the question whether the 37 acres now in question were part of the original area of 822 acres mentioned in the patta. He agrees that they did not fall outside Orakandi and he rejects the theory of *chhits* of Aruakandi He says:

> The learned lower Court discussed the entire evidence as well as the kabuliyats with due care. I agree with his view that the lease comprised 5/6th of the mouza Orakandi (save the rent-free, etc.) that is of the whole block composed of Orakandi, Ratandanga beel and Patildanga beel. Patambari was in possession of the whole of the block, except the scattered parcels. The theory of *chita* lands has been fully discussed by the learned lower Court. I do not think it necessary to repeat the reasonings given by the lower Court in its judgment regarding this theory. It is unnecessary to discuss further. I have carefully considered the entire evidence on the record and I agree with the views

taken by the lower Court regarding khatians Nos. 1-17 and I hold that the lands of these khatians are covered by the kabuliat Ex. o(1) executed by Srinath Sarkar in 1284 B.S. (=1877-78), and that the plaintiffs dispossessed the defendants and their predecessors of those lands. The appeal of the plaintiffs therefore fails. Issue No. 2 is decided accordingly against plaintiffs.

Issue No. 2 was in these terms:—

> Was there dispossession of any portion of the tenancy by the landlords? Are the landlords in possession of any portion of the tenure? If so whether there should be a suspension or abatement of rent?

Ghose J. in the High Court says: "It has been found by both the Courts below that the landlords did not make over possession of the whole of the demised land to the lessees but kept a portion to themselves. . . . These lands were part of the mouza which was leased to Srinath Sarkar but they were not made over to Srinath. Srinath however paid the rent without any objection for the dispossesion of a part." Again "We find that here there was in effect no dispossession but an original failure of making over possession and this failure was acquiesced in for 55 years by the original lessee and his widow. . . ." Bartley J. held that the doctrine of suspension of rent "cannot be applied rigidly in this country and that it should properly be regarded as a rule of justice equity and good conscience."

A main difficulty in the case is to ascertain with what degree of accuracy the word "dispossession" is employed. Strictly used it could only apply to Srinath himself. It is no one's case that his widow or reversioners were ever in possession of these 37 acres. Since findings of fact by the lower Appellate Court are to be treated as final they should at least be clear and specific—not ambiguous or inferential. A general approval given to the views of the trial Court will not necessarily incorporate all its findings in detail—especially if accompanied by language which casts doubt on a particular point. Ghose J. seems to have misinterpreted the findings of the trial Court and thus disabled himself from appreciating correctly the findings of the lower Appellate Court. But their Lordships are not prepared to hold that the High Court was obliged to consider that the Additional District Judge had found as a fact that Srinath had been put into possession and then ousted. If the learned Additional District Judge had dealt with the question specifically, examining the contents of the kabulyats from this particular angle no ambiguity could well have arisen. But the specific expression of his finding is "that the plaintiffs dispossessed the defendants and their predecessors of those lands." This is a singularly unconvincing way of stating a finding that Srinath was put in possession and was dispossessed but a phrase natural enough if all that be meant is that the defendants and their predecessors were kept out of possession. The reference to the second issue only increases the uncertainty; and while there are indications in other parts of the judgment that the learned Judge may have agreed that Srinath was dispossessed in the strictest sense of the term their Lordships see no such statement as can be taken to remove the ambiguity in the crucial passage. If it is in law of importance to the rights of the parties to decide whether the defendants have proved that Srinath was ever in possession of the 37 acres their Lordships think that the High Court was entitled to decide that question upon the evidence before it.

The documents, the oral evidence and the view taken of them by the trial Judge are made clear in his able judgment. The exhibited kabulyats of 1883-4 and 1890-1 and the mention made of these eight tenancies in the plaintiffs' books of 1886 led him to conclude that "these eight raiyats were holding these lands at the date of the lease" of 1875. But "no papers have been produced to show that the landlords never gave up collecting these rents and did so between 1282 (1875-6) to 1293 (1886-7); so that my conclusion in view of the admission of possession in the kabulyat [that is, of 1284 (1877-8)] is that the landlords dispossessed the lessee from his share in these lands, and kept his widow Patambari out of possession of it and are in possession of it to this day." Their Lordships think that the High Court was right in not accepting this

result as proved by the evidence. The recital of possession in the kabulyat of 1877 is in the vaguest and most general terms and if taken correctly refers not only to the raiyati area but to the whole area of 1,464 bighas which included a large quantity of waste lands including watery waste of the two bils. As the burden of proving eviction by the Narail Babus is heavy on the appellant it seems unreasonable to hold that the defendants' predecessor was in receipt of rent from the eight tenancies merely because at this distance of time the plaintiffs have not proved that they continued to collect it—it being plain that in 1886 they were treating the tenancies as old ones. The purport and effect of the 1883 kabulyat exhibit 4 (2) is that the jama was not a new one but the old jama recorded in the name of Bhuban Mohan Mandal *mudafat* Dilaram Nai. The recital in exhibit 4 (1890) of the auction purchase of 1885 is of a tenancy standing in the name of the judgment debtor *mudafat* Majumdar Bairagi. So too with the kabulyat of 1891 exhibit 4 (4). These kabulyats may not truly represent the facts but what they purport to show is not that an old tenancy had come to an end in 1875 or 1877, that rent had been paid to a new landlord, and that now the tenants were to begin to hold anew from the Narail Babus but that the old tenancy had continued. There is indeed no solid ground for holding that Srinath ever realised rent from these eight holdings. While no explanation is made out for his not having possession of khatians 1 to 17—about 43 acres in all—weight must be given to the fact that there is no trace of complaint by Srinath and that the whole rent demandable under the patta of 1875 was paid by him until his death in 1890 and by his widow till 1930. He was in the service of the Narail Babus till his death as manager of one pargannah and apparently deputy manager at their headquarters.

This case must, their Lordships think, be regarded as one in which possession of the 37 acres was not given to the lessee and was not insisted on by him.

The next question is whether after more than 50 years it is open to the appellant on these facts to claim that no part of the rent of Rs.957.14.8 is payable until the lands of the eight khatians are restored. Bartley J. appears to have thought that it had become impossible for the plaintiffs to restore these lands but this is not a matter which has been proved or enquired into. It is not clear that it would *prima facie* be a proper matter for enquiry. It may or may not be that the effect of the lower Appellate Court's decision is to give the appellant some 785 acres free of rent in perpetuity.

Not long after the High Court had taken the place of the Sudder Dewani Adalat it is found applying to agrarian tenancies in Bengal principles applicable by the English common law to lands let at an entire rent—broadly speaking, that an eviction of the tenant from a part of the lands by title paramount gives rise to an apportionment, but eviction by the landlord from a part entails a suspension of the entire rent. Sir Barnes Peacock's judgment in *Gopanund Jha* v. *Lalla Gobind Pershad* (1869) 12 W.R. 109 began this line of decisions with a quotation from the article Rent in Bacon's Abridgement—doubtless the seventh edition of 1832. The case was apparently one of eviction of the lessee from a part of the land demised by title paramount but the lessor had also taken the ryots' rents for two years claiming that the lease was not binding. So far as the meagre report shows, the law as to eviction from a part by the lessor was not in point. But thereafter such English decisions as *Morrison* v. *Chadwick* (1849) 7 C.B. 266 and *Upton* v. *Townend* (1855) 17 C.B. 30 came to be followed in Bengal from time to time and there has been considerable repetition of doctrine to the effect that the rent issues out of every parcel of the land demised and that a landlord cannot apportion his own wrong. The English case law is to be seen in full flood in such cases as *Dhunput Singh* v. *Mahomed Kasim Ispahain* (1896) 1 L.R. 24 C. 296, *Harro Kumari Chowdhrani* v. *Turna Chandra Sarbogya* (1900) I.L.R. 28 C. 188—both cases of eviction by the lessor and the latter a case where the rent reserved was at a certain rate per bigha. " Eviction " has been extended to include receipt of rent by the lessor from an undertenant—notwithstanding that payment to the lessor

is no defence whatever to the latter against a claim for rent by the lessee. The necessity of suspension has also been affirmed, following *Neale* v. *Mackenzie* (1836) 1 M. & W. 747, *Holgate* v. *Kay* (1844) 1 Car. & K. 341, *Watson* v. *Waud* (1853) 8 Ex. 335, and other English decisions, when the lessee has been unable owing to the lessor's default to obtain possession of some part of the premises demised. So far the only rule laid down by the Board has been the negative proposition that " 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. It has no application to a case where the stipulated rent is so much per acre or bigha." *Katyayani Debi* v. *Udoy Kumar Das* (1924) L.R. 52 I.A. 160, 166. The applicability of the English rules was strongly challenged in the Tagore lectures of 1895 [see Land Law of Bengal by Saroda Charan Mitra a Judge of the High Court from 1904-1908] and at the present time decisions in Bengal disclose a state of considerable perplexity and difference of opinion as to the application of these doctrines: some distinguishing between cases of eviction and cases of failure to deliver possession: some expressing the view that though it must work injustice in some cases the refusal to permit apportionment of rent helps to protect tenants and should be maintained as a dependable rule: others holding with Bartley J. in the present case that no such rigid rule can be applied as justice equity and good conscience in the conditions of Bengal. It will suffice here to refer to *Dwijendra Nath Ray Chaudhury* v. *Aftabuddi Sardar* (1916) 21 C.W.N. 492, *Mahim Chandra Banikya* v. *Sheik Karamali* (1928) 33 C.W.N. 501, *Abhoya Charan Sen* v. *Hem Chandra Pal* (1929) 33 C.W.N. 715, *Sakhisona Dasi* v. *Prankrishna Das* (1932) 37 C.W.N. 301, *Maharaja Jagadish Nath Roy Bahadur* v. *Surendra Prosad Lahiri* (1935) 40 C.W.N. 166. The observations of the Board in *Katyayani's* case (*supra*) have only added to the perplexity since they have in some cases been wrongly taken to lay down that if the rent is a lump sum rent then in all cases of failure to give possession of any part there must be a suspension of the entire rent. They were intended only as showing that on its facts that case raised no question of suspension even if the course of discussions in Bengal be taken as correct, a question upon which there was no need to embark.

For all purposes of this appeal the rent in the present case was a lump sum and the lessors failed to give possession to the lessee of the 37 acres. The Board is therefore—for the first time as it would seem—required to consider whether in such a case suspension of the entire rent must *prima facie* ensue, or whether it is discretionary, or whether there is no such rule applicable to cases of failure to deliver possession.

Since 1772 no Court has had authority to apply to the districts of Bengal rules devised upon other principles than justice equity and good conscience. The doctrine of suspension of rent is not the less to be regarded because it has been drawn from the common law, but this origin will not serve by itself for a justification. In 1869, when Sir Barnes Peacock in *Gopanund's* case (*supra*) cited Bacon's Abridgement (*sub voce* Rent) he was citing an authority which showed how the doctrine that an entire rent could ever be apportioned had been admitted only with great difficulty. That it could not be apportioned after a severance of the reversion was seen in 1832 to be a conception " too narrow and absurd to govern men's property long," but it was considered as settled, though not until after some hesitation, that if eviction from any part had been effected by the lessor apportionment should be refused; though if it had been by title paramount the entirety of the rent would present no obstacle to apportionment. The reason given is " that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend." Technical distinctions between forms of action—between the action for rent brought against the lessee on his personal covenant and an action against an assignee of the term brought in debt or upon a " contract real " (cf. *Stevenson* v. *Lambard* (1802) 2 East 575)

have never been noticed in Bengal. As a matter of broad general principle the law of India no longer proceeds upon the notion that where a contract is for an entire sum there is a necessity of reason which prevents a party from recovering anything where his full obligations under a special contract have not been discharged. Since 1872, under section 70 of the Indian Contract Act, the mere fact that the party has done work which has been accepted, or supplied goods which have been taken, entitles him to compensation subject if need be to any claim for damages. It is not supposed that a contrary rule is needed to encourage people to keep their bargains. No one objects that the work done or goods supplied cannot of themselves raise an equity in favour of one who has broken his contract.

If then the matter is in a sense one of policy and of general policy, it must be noted that tenancies in Bengal are of different kinds but in very many cases are permanent and at fixed rates (*mourasi mukarari* or *istemrari*). Not infrequently they cover large tracts including jungle, watery wastes, *char* lands, lands which have become silted up, lands which have been washed away by rivers and reformed. The effect of the rains upon rivers and the boundaries of estates, the absence of boundary marks and pillars, the difficulty of relaying maps upon the site, the scarcity of reliable old maps and the recent origin of survey and settlement operations—these too are matters which give a special edge of unreason to any general doctrine that suspension of the entire rent is the consequence of a failure to give possession of any part however small. At various times, before 1885 when the Bengal Tenancy Act was passed, the raiyat was doubtless in very special need of the protection of the law, but this can hardly be thought to apply to the modern tenure-holder as a class and relief by specific performance, by damages, by abatement of rent is not unobtainable from the Courts and need not be inadequate.

In these circumstances their Lordships think it impossible to require the Courts in Bengal as a matter of justice, equity and good conscience to follow such English cases as *Neale* v. *Mackenzie* (*supra*). The English context of English decisions must be borne in mind—the social system, the character of the countryside, the well settled boundaries, the limited term of leases. It is not matter for surprise that learned Judges in Bengal have from time to time rejected the doctrine that suspension of rent should follow from a failure to deliver possession of any part of the land demised. Their Lordships are not of opinion that this can be justified as a " dependable rule " to be adhered to notwithstanding hard cases. Where the failure to give possession of a part is due to defect in the lessor's title it seems almost absurd that the rule should be any different from that which applies to eviction by title paramount. Nor do their Lordships think that the rule of suspension should be retained for cases in which the lessor does not show that he was unable to give possession of the part withheld. The purely accidental or aleatory character of the penalty with which the lessor is visited prevents it from being the medium or the object of a judicial discretion in such cases; which afford no reason why a scientific and careful attempt to adjust the rights of the parties should discard the ordinary forms of relief—damages, apportionment, specific performance, the right to avoid the lease as the case may require—for a method which proceeds by giving one party to the transaction a windfall, or a right to retain and use another party's property without making payment therefor. Moreover, the right of a tenant to obtain possession of all that has been demised arises at the commencement of the lease and any legal theory which permits such claim to be raised after fifty years as a claim to pay no rent at all stands condemned.

As the case before the Board has been held to be a case not of eviction by the lessors but of their failure to give possession, their Lordships in this *ex parte* appeal confine themselves to the law applicable to the latter class of cases. To that class they think that the doctrine of suspension of rent should not be applied in Bengal. Whether it should be applied at all to cases of eviction of the lessee by the lessor from a part of the

land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule—these questions will call for careful review when they are presented by the facts of a particular case. Their Lordships must guard themselves from being supposed to assume that had Srinath been ousted from any portion of the lands in 1886 it would be open to his successors to set up for the first time in 1931 that the entire rent must be suspended.

They will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to the costs of the appeal.

(23669) Wt. 8026—151 160 1/43 D.L. G. 338

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DELIVERED BY SIR GEORGE RANKIN

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1943