

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Ganesh Bakhsh, v. Thakur Harihar Bakhsh, from the Court of the Judicial Commissioner of Oudh; delivered the 23rd March 1904.*

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Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The Respondent, Thakur Harihar Bakhsh, is the talukdar of Sarora in Oudh, and the Appellant, Thakur Ganesh Bakhsh, is an under-proprietor on the same estate. The questions raised by the present Appeal are, whether the Appellant is liable to pay rent jointly with one Gadadhar Bakhsh Singh, or each of them is liable separately for his own share only, and whether he is liable to pay interest on arrears of rent, and, if so, at what rate. The Counsel for the Appellant, however, admitted that the first question was *res judicata*, and the only question left for the decision of their Lordships is as to the interest.

In the year 1863 litigation took place in the Court of the Settlement Officer at Sitapur between Ganga Bakhsh, the father of the Respondent, and the then talukdar on the one side, and Bisheshar Bakhsh, his first cousin, and Uman Pershad, his paternal uncle, on the other. The claim is stated to have been for recovery of

possession of certain villages in possession of the latter parties, and the provision for them of maintenance in cash. A compromise was effected by an agreement dated the 4th May 1864 on the basis of Bisheshar Bakhsh and Uman Pershad each taking one-fourth of the estate and paying to Ganga Bakhsh half of the Government revenue with the addition of 10 per cent. talukdari dues on the present Government revenue, or which might be fixed from time to time. The Settlement Officer made a decree dated the 6th May 1864 according to the terms of the agreement, and directed the parties to file a statement showing how they proposed to allot the undivided villages. This was done and the Settlement Officer made his final decree on the 14th December 1864.

Bisheshar Bakhsh died childless in November 1865, and on the death of his widow Uman Pershad succeeded, after litigation, to Bisheshar's share of the under-proprietary estate. On the death of Uman Pershad the under-proprietary estate again became divided between his sons Jang Bahadur and the Appellant, and on the death of the former he was succeeded by his son Gadadhar Bakhsh. A partition was effected between the Appellant and Gadadhar Bakhsh, and they obtained separate possession of the villages allotted to them. Thenceforward the Appellant and Gadadhar Bakhsh maintained that they were no longer jointly liable for the whole rent of the under-proprietary estate, but only for their separate shares. The Respondent, on the other hand, insisted on holding them jointly liable for the whole. The under-proprietors tendered their shares of the rent and their tenders were refused, and suits for the rent were brought by the Respondent against the Appellant and Gadadhar in 1896 and again in 1898.

In the suit of 1896 the Deputy Commissioner by his Judgment dated the 8th April 1896 decided that the Appellant and Gadadhar Bakhsh were jointly liable for the rent, but that the talukdar was not entitled to interest on the arrears. This Judgment seems to have been affirmed on appeal, but Mr. Ross stated that the Judgment, though printed in the record, was not put in evidence. It is, however, immaterial because the Judgment relied on as *res judicata* on the joint liability is that of the Deputy Commissioner.

In the suit of 1898, Mr Chamier, the Second Additional Judicial Commissioner, by his Judgment dated 27th June 1898, decided on appeal from the District Judge that the deed of compromise of the 4th May 1864 was a contract to pay the rent, and that the Respondent was entitled to recover interest by way of damages for the breach of that contract.

The present suit was also one for payment of rent under similar circumstances. The Deputy Commissioner by his Judgment dated the 11th August 1898 held that the Respondent was entitled to interest following Mr. Chamier's Judgment in the previous case, and that the question of the joint liability of the Defendants was *res judicata*. The Decree founded on this Judgment, which was dated the 18th August 1898, was, on the 19th August 1899, affirmed on appeal by the present Appellant alone on the same grounds.

The Judgment of the 27th June 1898 was not, and probably could not have been, given in evidence by the Respondent as an estoppel against the Appellant, or in bar of the present suit. Their Lordships, therefore, are not precluded from deciding the question of interest on its merits.

In the argument before their Lordships the liability to interest was maintained by the

Respondent as well on the Interest Act of 1839 (Act XXXII. of 1839) as on Section 73 of the Indian Contract Act. 1872, and on the other hand it was contended that under Section 141 of the Oudh Rent Act of 1886 (Act XXII. of 1886) no interest was payable on arrears of rent by the under-proprietor, and the decision of this Board in *Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan* (23 Ind. Ap. 45) was relied on.

By Section 141 of the Act of 1886 it is provided that when an arrear of rent remains due from any tenant, he shall be liable to pay interest on the arrear at the rate of 1 per cent. *per mensem*. And it was decided by this Board that an under-proprietor is not a tenant within the meaning of that Section. But there is nothing in the Act or in the decision referred to which excludes any liability for payment of interest which the under-proprietor might be under apart from the Act.

With regard to the Contract Act, their Lordships observe that neither of the present litigants was party to the deed of compromise, nor have they, in fact, made any contract with each other. The whole of the proceedings in the suit of 1863 are not before their Lordships, but the suit is said to have been "decided on 6th April 1864," and the compromise which was subsequently come to may have been executed for settling details in order to carry into effect the previous decision of the Settlement Officer. But, however this may be, it appears to their Lordships that the terms of the Agreement were carried into effect by the subsequent decree, and the agreement was, in fact, merged in the decree. In other words, the obligation of the Appellant to pay the rent is derived from the status of under-proprietor, which was established by the decree, and not from the previous agreement, which furnished the materials upon which the decree is based.

Their Lordships are therefore of opinion that this is not a suit for breach of contract within the meaning of Section 73 of the Indian Contract Act.

In order to avail himself of the provisions of the Interest Act of 1839 the Respondent must show that the rent was payable by the Appellant "by virtue of some written instrument "at a certain time." Neither the deed of compromise nor the decree prescribed any time for the payment of the rent or contained any terms from which the time could be ascertained. But it was said that the Court should incorporate in, or read into, one or other of these instruments the provision contained in Section 12 of the Oudh Rent Act 1886, that, unless otherwise agreed, the rent payable to the proprietor by the under-proprietor shall be held to become due one month before the date fixed for the payment of the revenue on account of the village in which the land is situate. It would be a novel proceeding to read into an agreement a section in an Act subsequently passed. Nor would it help the Respondent in the present case. The Interest Act was passed for the purpose of extending to India the provisions of the English Act (3 & 4 Will. IV., c. 42), and the words above quoted are the same as those in the English Act. The English decisions on that Act may therefore be referred to as a guide in construing the Indian Act. In *Duncombe v. The Brighton Club and Norfolk Hotel Company* (L. R. 10 Q. B. 371) it was decided in the Queen's Bench (*dissentiente* Blackburn, J.) that the actual day for payment need not be fixed in the instrument if the basis of the calculation which was to make it certain was to be found in the instrument itself. In *The London, Chatham, and Dover Railway Company v. The South Eastern Railway Company* (1892, 1 Ch. 120) it was pointed out that this decision

was inconsistent with a previous decision of the Exchequer Chamber in *Merchant Shipping Company v. Armitage* (L. R. 9 Q. B. 99) which appears to have been overlooked by the learned Judges. In that case it was held that it was necessary that the actual day for payment should be fixed by the written instrument, and that was the view expressed by Blackburn J. in the case in 10 Q. B. Their Lordships have not to say which of these two decisions they prefer, for either of them is fatal to the argument of the Respondent.

Their Lordships are therefore of opinion that interest is not payable on the arrears of rent found due from the Appellant and Gadadhar Bakhsh Singh, and they will humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh dated the 19th August 1899 be discharged, and instead thereof it be ordered that the decree of the Deputy Commissioner of the 18th August 1898, as subsequently amended, be varied by omitting the direction therein contained for payment of interest on the sum thereby found due from the Appellant and Gadadhar Bakhsh Singh and that with this variation the decree be affirmed. As the Appellant has failed on one point and succeeded on the other one, their Lordships will further advise His Majesty that there should be no costs of the Appeal to the Court of the Judicial Commissioner. And there will be no costs of this Appeal.

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