

RAMA SHANKAR SINGH & ANR.

v.

MST. SHYAMLATA DEVI AND ORS.

October 10, 1968

[S. M. SIKRI AND R. S. BACHAWAT, JJ.]

Indian Contract Act (9 of 1872), s. 43—Liability to pay rent—If joint.

Bihar Tenancy Act, ss. 67(1), 184 and 193—Limitation—Plea not taken in written statement—Arrears of rent—Rate of interest.

The plaintiffs defendants 5 to 7 and the ancestor of defendants 8 to 13 leased the forest rights in their villages to defendants 1 and 2 at an annual rental. The deed mentioned the share of each lessee and the annual rent for the purpose of indicating what amount would be contributed by each of them towards the rent jointly payable by them. It was stated in the lease that the entire lease would be terminable on default of payment of rent for two consecutive years and the lessee shall pay interest at Re. 1 per cent in case of default, and that the lessors either separately or jointly shall realise the amount according to their choice. Defendant 3 was a transferee of a portion of lessees' interest from defendant 1. The plaintiff-lessors filed a suit in September 1954 claiming a decree of their share of rent for 1356 to 1360 Fasli and interest thereon. The plea that suit was barred by limitation was not taken in the written statement. Defendant 2 died and his heirs were substituted as defendants 2 and 2(a). The trial court decreed the suit. On appeal, the High Court held that (i) the defendants 1 to 3 were liable to pay the amount of the annual rent up to the extent of their respective shares; (ii) as the lease deed granted a lease of forest rights, the suit was governed by Art. 2(b)(1) of Schedule III of the Bihar Tenancy Act, 1885 and consequently the suit in respect of rent for 1356 and 1357 Faslis was barred by limitation; and (iii) in view of s. 67 of the Bihar Tenancy Act the plaintiffs could claim at the rate of 6½% per annum only.

In appeal, this Court,

HELD : The defendants 1 to 3 were jointly and severally liable to pay the plaintiff's share of the rent for 1358, 1359 and 1360 Faslis and simple interest thereon at 6½% per annum up to date.

(i) The deed mentioned the share of each lessee and the annual rent for the purpose of indicating what amount would be contributed by each of them towards the rent jointly payable by them. The joint liability of the lessees was clearly indicated by the provision that the entire lease would be terminable on default on payment of rent for two consecutive years. Having regard to s. 43 of the Indian Contract Act, 1872 defendants 1 and 2 were jointly and severally liable to pay the rent, and the liability of defendant 3 stood on the same footing. [362 H—363B]

(ii) Under s. 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation is not pleaded. The respondent was rightly allowed to raise the

A point of limitation though the plea was not taken in the written statement. [363 C]

B The lease-deed granted a lease in respect of forest rights only. It gave the lessees the right to cut and appropriate trees of certain types and the fruits and flowers of certain fruit bearing trees. The right to open roads and to construct buildings were incidental to the right to enjoy a forest produce. The suit was for recovery of rent in respect of forest produce and having regard to s. 193 of the Bihar Tenancy Act was governed by Art. 2(b)(1) of the Schedule III therefore. The special period of limitation applied though the claim for arrears of rent was claimed on a registered document. [363 D—F]

The suit in respect of rent for 1356 and 1357 was barred by limitation.

C *Abdullullah v. Asraf Ali*, 7 C.L.J. 152, *Bande Ali Fakir v. Amud Sarkar*, 10 C.W.N. 415 and *Mackenzie v. Haji Syed Muhammad Ali Khan*, I.L.R. 19 Cal. 1, approved.

D (iii) Interest was payable at the rate of 6½% per annum only. By s. 193 of the Bihar Tenancy Act all the provisions of the Act applied to the suit. Section 67(1) provides that arrears of rent shall bear simple interest at the rate of 6½% per annum. The section overrides the contractual stipulation that the interest be payable at 1% per annum. [363 F—G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 23 of 1966.

E Appeal from the judgment and decree dated May 11, 1962 of the Patna High Court in Appeal from Original Decree No. 169 of 1958.

U. P. Singh, for the appellants.

Sarjoo Prasad and *R. C. Prasad*, for respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

F **Bachawat J.** The plaintiffs, defendants 5 to 7 and the ancestor of defendants 8 to 13 were the sixteen anna proprietors of certain villages in district Shahbad. By a registered deed dated October 3, 1944 they leased the forest rights in the villages to the defendants 1 and 2 for a period of 9 years ending Bhado 30, 1360 Fasli corresponding to September 2, 1953 at an annual
G rent of Rs. 16,000. The plaintiffs had 6 annas share in the proprietary rights in the villages and Rs. 6,000 was fixed as their share of the annual rent. The defendant No. 3 was a transferee of a portion of a lessees' interest from defendant 1. On September 3, 1954 the plaintiffs instituted a suit claiming a decree
H against defendants 1 and 2 for Rs. 36,405 on account of their share of the rent for 1356 to 1360 Faslis and interest thereon at 1% per annum. During the pendency of the suit, defendant 2 died and his heirs were substituted as defendants 2 and 2(a). The Trial Court decreed the suit on contest against defendants 2 and

2(a) and *ex-parte* against defendants 1 and 3 with future interest and costs. On appeal, the High Court held that (1) as defendant 2 had only 4 anna share in the lessees' interest as mentioned in the lease deed and as he had acquired another one anna share in the lessees' interest subsequently, defendants 2 and 2(a) were liable to pay only 5 annas share in the annual rent, that is to say, Rs. 1,875 per annum and defendants 1 and 3 were liable to pay the balance rent; (2) as the lease deed granted a lease of forest rights, the suit was governed by Art. 2(b)(i) of Schedule III of the Bihar Tenancy Act, 1885 and consequently the suit in respect of rent for 1356 and 1357 Faslis was barred by limitation, and (3) in view of sec. 67 of the Bihar Tenancy Act the plaintiffs could claim interest at the rate of $6\frac{1}{4}\%$ per annum only. Accordingly the High Court allowed the appeal in part and passed a decree against defendants 2 and 2(a) for 5 annas share of the rent for 1358 to 1360 Faslis and a separate decree against defendants 1 and 3 for the balance rent for those years with interest at $6\frac{1}{4}\%$ per annum. The plaintiffs have filed the present appeal after obtaining a certificate from the High Court. The appellants challenge the correctness of all the findings of the High Court.

Clause 3 of the lease deed provided :

"that the lessees shall pay an annual Zama of Rs. 16,000 in respect of the thika property on 1st Kuar of every year. If for any reason, the rent for two consecutive years shall fall into arrears in that case the lessors shall be competent to enter into khas possession and occupation of the thika property and to this the lessees shall have no objection and in case of making default the lessees shall pay an interest at the rate of Re. 1 per cent till the date of payment. The lessors either separately or jointly shall realise (the amount) to the extent of their respective shares according to their choice by instituting in court with interest thereon mentioned above from the persons and properties of the lessees."

At the end of the lease it was stated that defendant 1 had twelve anna share in the lessees' interest and his share of the rent was Rs. 12000. It was also stated that defendant 2 had 4 anna share in the lessees' interest and his share of the rent was Rs. 4000. Clause 3 of the deed clearly shows that the lessees were jointly liable to pay the annual rent of Rs. 16000. The deed mentioned the share of each lessee and the annual rent for the purpose of indicating what amount would be contributed by each of them towards the rent jointly payable by them. The joint liability of the lessees is clearly indicated by the provision that entire lease

A would be terminable on default of payment of rent for two consecutive years. Having regard to sec. 43 of the Indian Contract Act, 1872 defendants 1 and 2 were jointly and severally liable to pay the rent. It was not disputed before the High Court that the liability of defendant 3 stood on the same footing. The High Court was in error in holding that defendant 2 was liable to pay only 5 anna share in the rent.

B The High Court was right in allowing the defendant to raise the point of limitation, though the plea was not taken in the written statement. Under s. 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation has not been pleaded. Learned C Counsel for the appellants could not tell us what further evidence his clients could adduce on this point. In the circumstances, the absence of the plea of limitation in the written statement did not cause the appellants any prejudice.

D On a careful reading of the lease deed, we are satisfied that it granted a lease in respect of forest rights only. It gave the lessees the right to cut and appropriate trees of certain types and the fruits and flowers of certain fruit bearing trees. The right to open roads and to construct buildings were incidental to the right to enjoy the forest produce. The suit is for recovery of rent in respect of forest produce and having regard to sec. 193 of the Bihar Tenancy Act is governed by Art. 2(b)(i) of the Schedule III thereto. This view is supported by the decisions of the Calcutta E High Court in *Abdulullah v. Asraf Ali*(¹) and *Bande Ali Fakir v. Amud Sarkar*(²). The special period of limitation applies though the claim for arrears of rent is founded on a registered instrument, (see *Mackenzie v. Haji Syed Muhammad Ali Khan*.⁽³⁾) The High Court was right in holding that the suit in respect of rent for Fasli years 1356 and 1357 was barred by limitation.

F Having regard to sec. 193 all the provisions of the Act applied to a suit. Section 67(1) provides that arrears of rent shall bear simple interest at the rate of 6¼% per annum. The section overrides the contractual stipulation that the interest would be payable at 1% per annum. The High Court was right in holding that interest was payable at the rate of 6¼% per annum only.

G In the result, the appeal is allowed in part and it is declared that defendants 1, 2, 2(a) and 3 are jointly and severally liable to pay to the plaintiffs Rs. 6000 per annum on account of the plaintiffs' share of rent for Fasli years 1358, 1359 and 1360 and simple interest thereon at the rate of 6¼% per annum upto date. We direct that a decree be drawn up accordingly. The decree H will carry future interest on the principal sum at the rate of 6%

(1) 7 C.L.J. 152.

(3) I.L.R. 19 Cr. 1.

(2) 19C.W.N. 415.

per annum. The aforesaid defendants will pay to the plaintiffs proportionate costs of the suit in the Trial Court. The parties will bear their own costs of the appeal in the High Court and in this Court. This decree will be without prejudice to the payments, if any, made by the defendants to the plaintiffs after the institution of the suit.

A

Y.P.

Appeal partly allowed.

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