Privy Council Appeal No. 52 *of* 1937
Bengal Appeal No. 40 *of* 1936

Prahladrai Chooreewalla - - - - - - - - *Appellant*

v.

The Commissioners for the Port of Calcutta - - - *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 1ST DECEMBER, 1938.

Present at the Hearing :

LORD MACMILLAN
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by* LORD PORTER.]

The respondents in this case are the owners of certain plots of land at Grierson Road, Howrah. Before September, 1932, one Gobardhan Das Deora (hereinafter called Deora) was tenant of the plots on which certain structures had been erected. A draft lease had been sent to him but it was never executed. Deora failed to pay the rent for the land and a large amount became due from him to the respondents. It was accordingly arranged between Deora and the appellant that the appellant should purchase the structures, and between the respondents, Deora and the appellant, that the appellant should become tenant of the land and certain further land at an agreed rent. The terms of the arrangement will be found in a letter from the respondents to the appellant's solicitors dated the 21st September, 1932.

It was part of the terms agreed between Deora and the appellant that the appellant should take over and pay Deora for the structures on the land. This provision was duly carried out and from the sum so received Deora discharged the rent which was in arrear. The appellant then took possession of the land and a certificate of possession was signed by him and by a representative of the respondents on the 12th September, 1932, from which it appears that the appellant went into possession on that date under an agreement for a yearly lease beginning on the 1st October, 1932. The respondents, however, seem to have thought that the lease was to operate from the 1st September, 1932, and on the 24th October, 1932, a draft lease was sent to the appellant's solicitors. This lease was never returned. The appellant nevertheless remained in possession and for a time paid the stipulated rent, but by the 13th June, 1933, a considerable sum remained unpaid, and a suit for its recovery

was pending. In these circumstances a discussion took place between the respondents and the appellant's agents and letters purporting to embody its result were exchanged between them. These letters must be set out in full as their legal effect is in dispute between the parties.

" Messrs. Talbot & Co.,
Tower House, Chowringhee Square,
Calcutta.

DEAR SIRS,

With reference to your letter No. WSV/1963, dated 20th June, 1933, and your Mr. Basil's conversation with the Assistant Secretary to-day, I beg to confirm the following arrangements in regard to the land at Grierson Road, Howrah, leased to Babu Pralhadroy Churiwalla:—

1. That Babu Prohladroy Churiwalla will pay up before 1st July, 1933

	Rs.	as.	p.
Rent for five months from February to June, 1933	5,822	8	0
Cost of the suit instituted against him ...	340	8	0
	6,162	8	0

2. That Babu Prohladroy Churiwalla will hand over vacant possession of a portion of the land on the 1st July, 1933.

3. That Babu Prohladroy Churiwalla will be treated as a monthly tenant after the 1st July, 1933, in respect of the land retained by him from that date. This tenancy will be terminable by either party on 15 days' notice expiring with the end of a calendar month.

Yours faithfully,
(Sd.) S. L. Das,
Offg. Secretary."

On the 28th June, 1933, Messrs. Talbot & Co. replied as follows:—

" The Offg. Secretary,
Calcutta Port Commissioners,
Calcutta.

DEAR SIR,

re: Land in Grierson Road, Howrah.

We thank you for your letter No. 39921 of yesterday's date and, as arranged with you over the telephone to-day, have pleasure in sending you herewith our cheque for Rs.5,822 8. 0. being the amount of rent paid over to us by Babu Prohladrai Churiwalla for the months of February, March, April, May and June, 1933.

As regards the cost of the suit Mr. Churiwalla has requested us to find out whether there is any possibility of saving the stamp-fee by withdrawing the case and in such event he is prepared to pay your out-of-pocket expenses not exceeding Rs.340. On hearing from (you) we shall take up the matter with him.

The terms of the settlement are that Mr. Churiwalla will give up whatever vacant portion of the land he can and remain as ordinary tenant from the 1st of July, 1933, and subject to the termination by giving you fifteen days' notice in writing.

Kindly let us have your stamped receipt for the cheque sent herewith.

Encl. Yours faithfully,

SAB/J. Talbot & Co."

After this exchange of letters and payment of the amount mentioned, the appellant gave up a portion of the land and continued to pay rent upon the portion retained by him up to the end of April, 1934.

Thereafter he failed to pay the rent due and on the 12th January, 1935, the Deputy Chairman of the Commissioners wrote giving him notice that his tenancy would terminate on the 31st day of January, 1935, and requiring him to give up possession on the 1st of February.

Copies of this notice were (1) sent by registered post apparently addressed to 2, Grierson Road, (2) handed to Deora for transmission to the appellant, (3) affixed upon the structures erected upon the land.

The appellant refused to give up possession on the ground that he was not a monthly tenant or subject to 15 days' notice and that, even if he were, his tenancy began either on the 12th September or the 1st October and, therefore, a valid 15 days' notice should end on the 12th or 1st of the month and not on the 31st. He further denied that the notice had ever been served on him personally, denied that Deora was his agent to receive the notice and alleged that no facts had been shown justifying service by affixing the notice on the land.

The appellant's case upon the question of tenancy was that the document of the 12th September, 1932, *prima facie* showed a yearly tenancy but that owing to the provisions of the Registration Act of 1908, section 17, he could not use that document as proof of its terms, though he might use is as an admission by the respondents for the subsidiary purpose of proving the date at which he took possession.

If then he could not prove a yearly tenancy by agreement, the terms of his tenancy were, he maintained, to be ascertained by reference to section 106 of the Transfer of Property Act by which it is enacted that:—

> "In the absence of a contract or local law or usage to the contrary a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy, and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee by 15 days' notice expiring with the end of a month of the tenancy.".

It was not proved, said the appellant, that the lease was for other than agricultural or manufacturing purposes and, therefore, it was not proved that 15 days' notice was sufficient.

Their Lordships will assume without deciding that the onus was on the respondents to prove a use for other than agricultural or manufacturing purposes and that the evidence does not establish such a use. The section, however, only applies in the absence of a contract to the contrary and in their Lordships' opinion the letters of the 27th and 28th June, 1933, do constitute a contract to the contrary.

If the matter rested upon the terms of the letter written by the respondents, the appellant would plainly have agreed to become a monthly tenant as from the 1st July, 1933. But

it is said that the appellant's letter is not an acceptance but a counter-offer differing from the first in two respects, viz.: (1) in using the term "ordinary" and not "monthly" tenant, and (2) in permitting the tenant only and not the landlord also to give 15 days' notice.

Reading the two letters together, their Lordships are of opinion that the second is upon its true construction an acceptance of the first.

Unless there was some indication to the contrary, the term "ordinary tenant" would in Calcutta mean monthly tenant, even though there were no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy. That meaning, in their Lordships' view, is not altered because the letter of the 28th June goes on to provide for 15 days' notice by the lessee without mention of notice by the lessor. Such a provision might naturally be made by a tenant to safeguard his right to terminate the tenancy in 15 days, leaving the landlords' right to be governed by the ordinary rule. The mere omission of such a provision in the landlords' favour does not even by implication prevent the landlord from relying upon his ordinary rights.

Nor does any difficulty arise with regard to the commencement of the tenancy—each letter stipulates the 1st of the month.

The appellant, however, maintains that even if a notice were given in good time and ending on the proper day yet it had not been proved that that notice was duly served on him. The provisions as to notice are contained in section 106 of the Transfer of Property Act and are as follows:—

> "Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

Their Lordships agree that in that section, sending by post must mean sending by post to the tenant's proper address, and they do not think it proved that the letter containing the notice was sent to the appellant's proper address. Nor do they think that Deora was the appellant's agent to receive the letter or that it has been proved that tender or delivery was not practicable so as to entitle the respondents to effect service by affixing the notice to the property. On the contrary, in their view both the Courts in India were right in deciding that service was not only practicable but had been duly effected by the delivery of the notice to the appellant himself.

The evidence is that of the peon Sadeque Khan, witness No. 1 for the respondents. He testified that he knew the appellant and that the letter was addressed to and taken by him to 3, Chandmari Road (which is admittedly the appellant's address), and there handed to the appellant. A receipt which he said he saw signed by the appellant and received from him was also produced. It is true that in fact the letter was addressed to 2, Grierson Road, and that

the witness said in cross-examination that he came to know the appellant when the letter was delivered to and the receipt signed by him.

But the witness might readily forget the exact address of the letter and yet remember delivering it and receiving the receipt, and though he may have first seen the appellant on that occasion, the evidence gives no reason to suppose nor any indication that his knowledge of the appellant ended as well as began on that occasion.

The Subordinate Judge saw the witness and accepted his evidence and the Appellate Court came to the same conclusion as the Court below.

Their Lordships do not think that these findings of fact are materially weakened because the Subordinate Judge was under the mistaken impression that another witness on behalf of the respondents knew and recognised the appellant's signature or because the Appellate Court said the evidence was uncontradicted. In truth it was uncontradicted—the appellant himself did not attend the hearing or deny that he had received the notice and signed the receipt and the mere statement of Deora that the signature was not the appellant's—an opinion in which he may well have been mistaken—is not a contradiction of the positive evidence of the peon that he saw the appellant append his signature.

A suggestion that as by section 35 of the Calcutta Port Act the respondents could only create a lease "in meeting," so they could only determine it "in meeting" was not seriously argued before the Board and is plainly untenable.

But the appellant maintained that in calculating the amount due from him to the respondents for rent a sum of Rs.3,000 should be deducted. That sum he undoubtedly paid to the respondents before the 24th October, 1932. He asserted that the payment was rent in advance.

The learned Subordinate Judge and the Appellate Court have held it was security for the payment of rent and there is oral and written evidence to that effect.

No claim to this sum has been made by way of set-off or counter-claim nor any Court fee paid for that purpose. In these circumstances the Subordinate Judge held that that issue could not be raised in the action before him. Their Lordships see no reason to differ from this decision.

As in the opinion of the Board all the points taken by the appellant fail, they will humbly advise His Majesty that the appeal be dismissed with costs.

(13868—3A) Wt. 8268—30 190 12/38 P. St. G. 38

In the Privy Council

PRAHLADRAI CHOOREEWALLA

v.

THE COMMISSIONERS FOR THE PORT OF CALCUTTA

DELIVERED BY LORD PORTER

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1938