

Privy Council Appeal No. 45 of 1940

Allahabad Appeal No. 4 of 1937

Bishnath Singh and others - - - - - *Appellants*

v.

Balwant Rao Naik Kalia and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 5TH AUGUST, 1942

Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

The appellants are the persons now entitled to the interest of the lessee under a perpetual lease dated 18th December, 1875, granted by the respondents' predecessor, who was the zamindar, in respect of the entire village of Bhatoli in the district of Mirzapur. The registered kabulyat is in evidence. It describes the lease as a "theka" and the lessee as "thekadar" and provides that the thekadar shall pay annually a rent of Rs.111 to the lessor and the Government revenue and cesses—Rs.235—to the Government. The rent is expressed to be payable by equal instalments of Rs.27.12.0 on the 15th November, 15th January, 1st May and 15th June, in each year—dates which are identical or almost identical with those fixed for the "kists" of Government revenue. There was a forfeiture clause in the following terms:

"(4) I shall pay the Government revenue with cesses, etc. instalment after instalment, obtain receipts signed by the presiding officer and keep the same with me. If I fail to pay any instalment, and the proprietor of the mahal has to pay it, the latter will be authorised to pay it himself, and immediately get the *theka* cancelled and enter in possession of the entire leased mauza and settle it in any way he likes."

The thekadars having made default in respect of substantial sums of revenue in 1927, a suit against them was brought in 1928 by the zamindars to forfeit the lease. It was finally disposed of on the 10th July, 1930, by the High Court at Allahabad by whose decree relief against forfeiture was allowed on the condition that Rs.1821 were paid into Court not later than 10th October, 1930.

The learned judges in their judgment gave to the thekadars "a clear intimation that they should not anticipate any further concession to be made to them at any future time if they made default." On the date of that judgment, 10th July, 1930, the May and June revenue kists of 1930 (Fasli 1337) had not been paid and it is not now disputed that after the 9th June, 1930, the lessees were in default as regards the May instalment of revenue, and that there was a breach of covenant under

the lease in respect thereof. But the Assistant Collector who tried this case at first instance was of opinion that there could be no default in respect of the June kist unless it remained unpaid up to the 30th September—an event which did not happen.

On the 27th August, 1930, a warrant of arrest was issued against Murat Narayan Singh, one of the thekadars, but when service was attempted on the 29th August and 1st September, he was not found at home and service was not effected. On the 16th September, a certificate was issued by the Collector of Mirzapur to the Collector of Benares in whose district the zamindars reside requiring him to recover from Ram Chandra Naik Kaliya, one of the proprietors, the sum of Rs.167.9.0, being the amount of both May and June kists, together with Rs.1.8.0 for process fee. This sum was accordingly paid by this proprietor on the next day. In respect of the May kist the right to forfeit the lease of 18th December, 1875, was thus complete on the 17th September, 1930, according to its terms.

On the 19th September the lessees in respect of the same two kists sent to the tahsil of Mirzapur a money order for Rs.168.1.0 which was received there on the 23rd September, and a receipt issued for it on that date.

On the 16th November, 1930, the suit which is now before the Board was brought by the zamindars against the thekadars for ejection on the basis of a forfeiture of the lease by reason of non-payment of the May and June kists. The Assistant Collector dismissed the suit holding that there was no breach by the defendants as contemplated in the lease—as regards the June kist because it was not overdue till 30th September, and as regards the May kist because the plaintiffs though they paid it themselves on 16th September did not do so before the 9th June. Confining themselves to the May kist their Lordships are of opinion that there is no ground for the view that the condition of forfeiture stipulated by the lease requires that the lessees should have paid before the 9th June. This defence has not indeed been included among the appellants' reasons in their case nor has it been supported in argument. Nothing whatever turns upon the unserved warrant of 27th August. Nor is it necessary to determine the date at which default was made in respect of the June kist, though it is somewhat disconcerting to find that a warrant of arrest and a certificate under the Rent Recovery Act of 1890 were issued in respect of an instalment as to which an Assistant Collector has held that there was no default.

In the High Court the learned judges rightly considered that the lessees had incurred a forfeiture and rightly rejected an argument that the High Court's judgment in the previous case bound them to hold that they could grant relief against the forfeiture. Without deciding whether the case comes under the Transfer of Property Act or the Agra Tenancy Act the learned judges say "If the case is governed by the present Tenancy Act then under section 205 the relief can be granted only in case of non-payment of rent. We do not see how the forfeiture which has occurred can be prevented." On this view their decree of 14th October, 1936, directed that the thekadars be ejected.

Before the Board the appellants have maintained that the Agra Tenancy Act (U.P. Act III of 1926) applies to this case and their Lordships will assume that this is so. The relevant provisions of the Act are as follows:

3—(3) When used with reference to a thekadar rent means the amount payable by the thekadar to his lessor under the terms of the theka.

"Section 84.—(1) A tenant, not being a permanent tenure holder, or a fixed rate tenant, shall be liable to ejection from his holding on the suit of the landholder—

(a) on the ground of any act or omission detrimental to the land in that holding, or inconsistent with the purpose for which it was let;

(b) on the ground that he or any person holding from him has broken a condition, not inconsistent with the provisions of this Act, on breach of which he is by special contract with his landholder liable to be ejected:

Section 85.—(1) A decree for ejectment under section 84 may direct the ejectment of the tenant either from the holding or from such portion thereof as the court, having regard to all the circumstances of the case, may direct.

(2) Such decree may further direct that if the tenant repairs the damage, or pays such compensation as the court thinks fit within one month from the date of the decree, or such further time as the court may, for reasons to be recorded, allow, the decree shall not be executed except in respect of costs.

Section 204.—No thekadar shall be ejected otherwise than in accordance with the provisions of this Act.

Section 205.—(1) A thekadar shall be liable to ejectment on one or more of the following grounds namely:—

(a) on the ground that a decree against him for arrears of rent remains unsatisfied;

(b) on the ground of any act or omission prejudicial to the rights of the landlord or inconsistent with the purpose of the theka;

(c) on the ground that he, or any such sub-thekadar under him, has broken a condition, on breach of which he is by the terms of his theka liable to be ejected.

(2) Notwithstanding anything in clauses (b) and (c) of subsection (1) no thekadar shall be ejected for non-payment of rent otherwise than in accordance with clause (a) of that subsection.

Section 209.—The provisions of section 85 with regard to a tenant found liable to ejectment on a ground specified in clauses (a) and (b) of section 84 shall apply in the case of a thekadar found liable to ejectment on a ground specified in clause (b) or (c) of section 205."

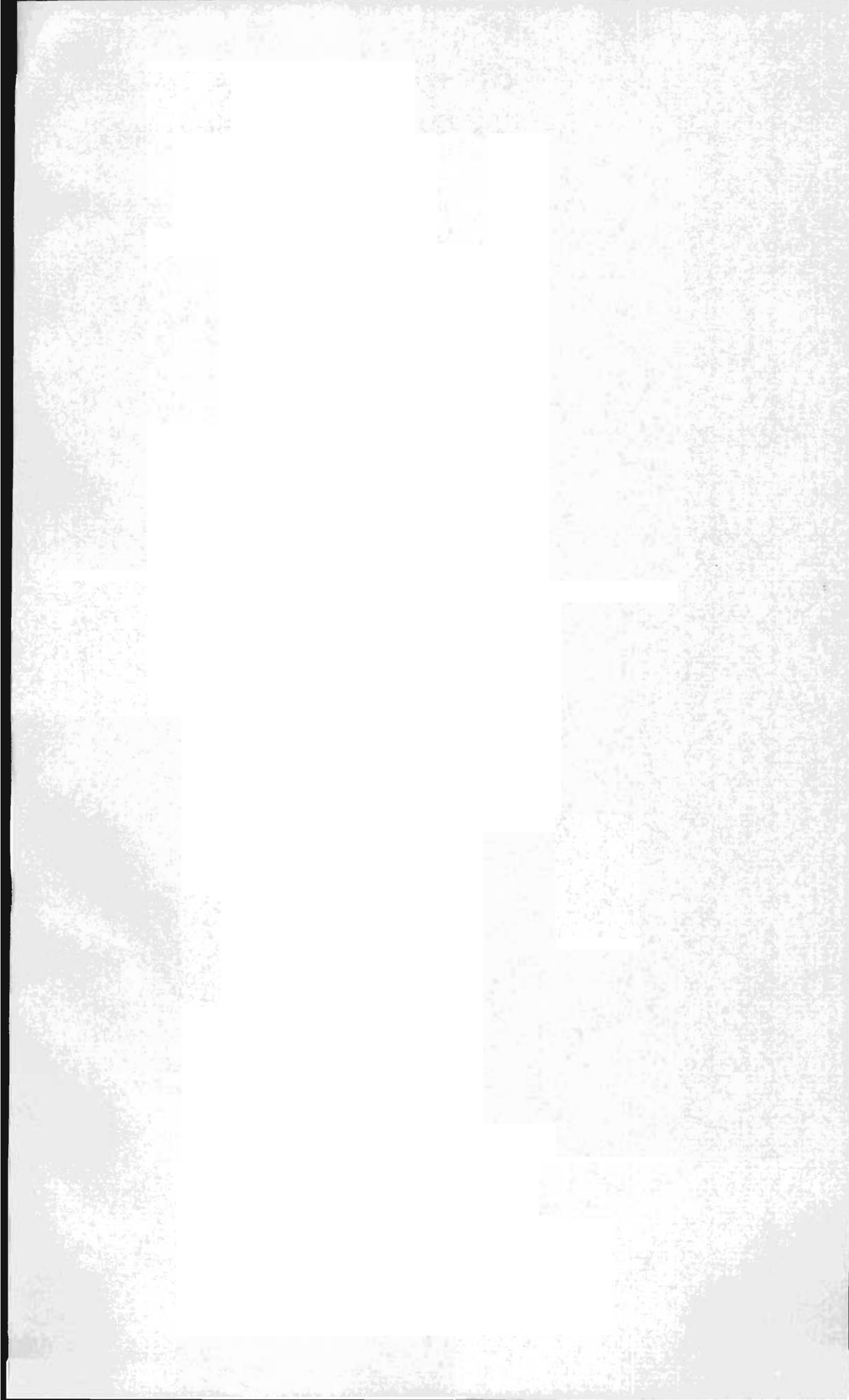
It was at one time contended for the appellants that non-payment of revenue is for the present purpose non-payment of rent, but the definition of rent given in section 3 shows that in the case of a thekadar this proposition cannot be accepted for the purpose of construing the Act, and the contention was not persisted in.

In view of section 209 the High Court would not appear to be correct in saying that under section 205 of the Act relief could be granted only in case of non-payment of rent. The present case would seem to come under clause (c) of section 205 and to attract the operation of subsection 2 of section 85. In the circumstances therein mentioned the decree for ejectment may direct that if the tenant pays such compensation as the Court thinks fit within one month from the date of the decree, the decree shall not be executed except in respect of costs. Assuming that this provision as to compensation is not restricted to cases of damage done to the land—a question upon which some doubt might perhaps be raised—their Lordships think that the compensation referred to must be compensation for the breach of condition which is the ground of the forfeiture. The sub-section gives the Court a limited discretion by no means amounting to a full or general authority to relieve against a forfeiture by imposing such terms as to the Court may seem fit. Under the Act, therefore, their Lordships are restricted to an enquiry as to the amount of compensation due to the zamindars by reason that they had to pay the May instalment of revenue which the thekadars should have paid in time. If upon terms of such compensation being paid by the thekadars it would be fair to set aside the forfeiture, such an order might be made. But such a process, taken as a whole, seems highly convenient to a persistently defaulting lessee while it might put the lessor to the very risks and inconvenience which the forfeiture clause was designed to obviate.

Their Lordships have enquired of learned counsel for the appellants about the present state of this matter. To exercise a discretion in the appellants' favour they would require to be informed whether the thekadars are still in possession, whether the rent and revenue are fully paid, whether since the High Court's judgment of 14th October, 1936, the revenue has been paid punctually, and if not what defaults have been made, for what periods of time and whether the proprietors have had to pay any part of the revenue themselves. But they are told by learned counsel that he has no instructions upon these points. They cannot but express some surprise at this omission, which is all the more remarkable if the appellants have been careful to meet their obligations punctually since the date of the breach complained of. As the appellants' previous irregularity had been the subject of a pointed warning by the High Court in 1930, their Lordships are not prepared to make any assumptions in their favour upon essential matters; especially as it would appear from the evidence of the tahsil clerk the wasilbaqi-navis that an arrear of revenue for Fasli 1338 was the subject of a summons. The only recourse left to the appellants is to ask that even at this late stage the appeal should be adjourned for the substantial time which would be required to obtain instructions from India. Such an order cannot readily be made in a mere spirit of enquiry and in the absence of any ground for supposing that the appellants can claim to show that they have discharged their obligations with regularity during such time as they have had possession.

Upon a review of this position and having regard to the history of the matter, their Lordships do not think it right that further delay should be incurred in the disposal of this appeal. They are not prepared to exercise in the appellants' favour the limited discretion conferred upon the Courts of India by section 85 of the Agra Tenancy Act. In their view the respondents must be allowed to insist upon the condition stipulated in the lease of 18th December, 1875, and this appeal must be dismissed.

They will humbly advise His Majesty accordingly. The appellants will pay the respondents' costs of the appeal.



In the Privy Council

BISHNATH SINGH AND OTHERS

v.

BALWANT RAO NAIK KALIA
AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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