

1922  
 RABINDRA  
 CHANDRA  
 CHATTERJEE,  
*In re.*  
 MOOKERJEE  
 J.

As regards the second alternative, it has been contended that there is a reasonable apprehension of miscarriage of justice in the mind of the petitioner. I am not able to adopt this view and I cannot overlook that the ultimate order, if any, can be passed by this Court and this Court alone on the materials supplied by the Subordinate Court.

I hold accordingly, that the Rule must be discharged.

S. M.

*Rule discharged.* <sup>ing</sup> <sub>with</sub>

### LETTERS PATENT APPEAL.

*Before Mookerjee and Cuming JJ.*

1922

MIDNAPUR ZAMINDARY COMPANY, LTD.

Feb. 9.

v.

SRIDHAR MAHATA.\*

*Second Appeal—Order of Settlement Officer settling rent whether open to Second Appeal—Bengal Tenancy Act (VIII of 1885), ss. 105 A (1), 109 A (3).—Excess area—Scope of s. 7.*

*Held* (confirming the view of Walmsley J.), that where decision of the Special Judge involved a determination of two fundamental questions in connexion with the tenancy held by the defendants, *viz.*, the extent of area and the liability to enhancement, the decision was not a decision merely settling rent within the meaning of s. 109, cl. (3) and the second appeal was consequently competent.

*Jnanada Sundari Chowdhurani v. Amudi Sarkar* (1) followed.

Where the landlord seeks to have the rent of a tenure-holder enhanced under s. 7, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding

\* Letters Patent Appeal No. 76 of 1920, in Appeal from Appellate Decree No. 1585 of 1919.

similar tenure in the vicinity. It is only when this has been answered in the negative, that the rent can be enhanced up to such limit as the Court thinks fair and equitable.

SECOND APPEAL by the tenant defendants to this Court was heard by Walmsley J. (sitting singly) who set aside the decision of the Special Judge and restored that of the Settlement Officer on the ground that as the plaintiff landlords did not refer to the provisions of s. 7 of the Bengal Tenancy Act either in their plaint or in the proceedings before the Settlement Officer, they were not entitled to raise that contention for the first time in the Appellate Court before the Special Judge and get the benefit thereof.

Hence this appeal by the plaintiffs under clause 15 of the Letters Patent.

*Babu Prabodh Kumar Das*, for the appellants.

*Babu Mahesh Chandra Banerjee* (for *Babu Pramatha Nath Bandopadhyay*), for the respondent.

MOOKERJEE AND CUMING JJ. This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a proceeding under section 105 of the Bengal Tenancy Act.

The appellants who were the landlords instituted these proceedings against the respondent, their tenant, with a view to have fair and equitable rent settled in respect of the tenure held by him. The case as presented to the Settlement Officer was that the defendant was in occupation of an area in excess of what he paid rent for and was consequently liable to have his rent increased.\* Two issues were raised to cover this point: namely, first, does the defendant hold any area in excess of what he is paying rent for? and, secondly, what should be the fair rate of rent for

1922

MIDNAPUR  
ZAMINDARY  
COMPANY,  
LTD.  
v  
SRIDHAR  
MAHATA.

1922  
 MIDNAPUR  
 ZAMINDARY  
 COMPANY,  
 LTD.  
 v.  
 SRIDHAR  
 MAHATA.

assessment of the excess area, if any? The Settlement Officer came to the conclusion that the defendant held an excess area of 5.95 acres, and that the rate of rent should be fixed at 2 annas 6 pies per big, which was the average rate fixed upon the original area. The consequence was that the rent was increased by Rs. 5-10-6 pies. The landlords appealed against this decision and argued before the Special Judge that they were entitled to have the rent enhanced under section 7. The Special Judge acceded to their contention and held that the rent payable by the defendant should be fixed at Rs. 139. The tenant thereupon preferred a Second Appeal to this Court. A preliminary objection was taken to the competence of the appeal on the ground that the decision of the Special Judge was a decision settling a rent within the meaning of sub-section (2) of section 109A and was consequently not liable to be challenged by way of an appeal to this Court. Mr. Justice Walmsley overruled this contention, and held that the decision of the Special Judge had been founded on a basis never put forward before the Settlement Officer. He accordingly allowed the appeal, set aside the decision of the Special Judge and restored the decree of the Settlement Officer.

On the present appeal it has been contended that the appeal heard by Mr. Justice Walmsley was incompetent. We are of opinion that there is no foundation for this contention and that it is opposed to the decision of the Full Bench in the case of *Jnanada Sundari Chowdhurani v. Amudi Sarkar* (1). The principle applicable to cases of this character was explained in that decision. "If in any proceeding under section 105 questions under section 105A have been investigated and determined, the order of the

(1) (1916) I. L. R. 43 Cal. 603.

“Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of section 105A, and consequently of section 106. Such a decision is not one merely settling a rent within the meaning of section 109A and is consequently liable to be challenged by way of Second Appeal to the High Court.” In the case before us, the decision of the Special Judge is founded on two essential facts, namely, first, that the defendant held an area in excess of the original area of the tenancy and was consequently liable to have the rent assessed on such excess area: and, secondly, that the tenure held by the defendant was of such a description that its rent was liable to be enhanced. Consequently, the decision of the Special Judge involves a determination of two fundamental questions in connection with the tenancy held by the defendant, namely, the extent of area and the liability to enhancement. There can be no room for argument that a decision of this character was not a decision merely settling rent within the meaning of section 109A, and the appeal was consequently competent.

As regards the merits, we entirely agree with the view taken by Mr. Justice Walmsley. The record does not disclose the faintest trace of a contention in the Court of first instance that the defendant was liable to have his rent enhanced under section 7. The argument which was advanced for the first time before the Special Judge, should not have been entertained by him for decision on the materials available on the record. Section 7 provides that the rent of a tenureholder, when it is liable to enhancement, may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity. It is only

1922

MIDNAPUR  
ZAMINDARY  
COMPANY,  
LTD.v.  
SRIDHAR  
MAHATA.

1922  
MIDNAPUR  
ZAMINDARY  
COMPANY,  
LTD.  
v.  
SRIDHAR  
MAHATA.

where no such customary rate exists, that it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable. The section then proceeds to lay down a rule for the ascertainment of the fair and equitable rent. Consequently where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenure in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. None of these matters had been investigated in the Court of first instance for the reasons that the question was not raised in that Court. In these circumstances, Mr. Justice Walmsley properly allowed the appeal and restored the decree of the primary Court.

The result is that the judgment of Mr. Justice Walmsley is affirmed and this appeal is dismissed with costs.

S. M. M.

*Appeal dismissed.*