LETTERS PATENT APPEAL.

Before Mookerjee, Newbould and Pearson JJ.

MOHINI KANTA SAHA CHAUDHURI

v.

MANINDRA CHANDRA NEOGY.*

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Jan 9.

Landlord and Tenant—Presumption of uniform payment of rent for 20 years—Presumption if destroyed by non-payment of rent for some years—Bengal Tenancy Act (VIII of 1885), s. 50 (2).

A tenant is entitled to the benefit of the presumption under sub-section (2) of section 50, if he proves that he and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. The tenant is not required to establish actual payment of rent at a uniform rate during the twenty years.

Ahmed Ali v. *Golam Gifar* (1), *Sham Churn Koondoo* v. *Dwarkanath Kubeeraj* (2) and *Kshirod Gobinda Choudhury* v. *Gour Gopal Dass* (3) followed.

Grant v. *Har Sahay Singh* (4) applied.

Rajnarain Roy Chowdry v. *Mrs. Olivia Atkins* (5), *Mahmooda Bebee* v. *Hareedhun Khuleefa* (6), *Prem Sahoo* v. *Nyamut Ali* (7), *Sham Lal Ghose* v. *Boistab Churn Mozoomdar* (8) and *Ramjadoo Gangoly* v. *Luckhee Narain Mundul* (9) explained.

LETTERS PATENT APPEAL by the plaintiff landlords, Mohini Kanta Saha Chaudhuri and others, against the judgment of Teunon J. who differed with Huda J.

* Letters Patent Appeals Nos. 54, 55, 56 and 57 of 1920, in Appeal from Appellate Decrees Nos. 500, 578, 579 of 1918 and 580 of 1920.

(1) (1869) 3 B. L. R. App. 40 ; 11 W. R. 432.
(2) (1873) 19 W. R. 100.
(3) (1917) 27 C. L. J. 281.
(4) (1913) 19 C. W. N. 117.
(5) (1864) 1 W. R. 45.
(6) (1866) 5 W. R. Act X 12.
(7) (1866) 6 W. R. Act X 89.
(8) (1867) 7 W. R. 407.
(9) (1867) 8 W. R. 488.

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The dissentient judgments of Teunon and Shamsul-Huda JJ. were as follows :—

TEUNON J. These four appeals arise out of proceedings under section 105 of the Bengal Tenancy Act. These proceedings were at the instance of the landlords who sought enhancement of rent mainly on the ground of prevailing rate. On appeal to this Court the learned Special Judge has held that the tenants are entitled to the presumption arising under section 50 (2) of the Act and that the landlords have failed to rebut that presumption.

The landlords appeal. It appears that in 1305 the original estate in which the plaintiffs were interested was partitioned by the revenue authorities, and *inter alia* twelve separate estates, of which the plaintiffs became sole proprietors, were created. For the purposes of partition, holdings were measured, lands classified, and rates assessed in accordance with that classification.

The rental values, thus arrived at, far exceeded the pre-existing rents and the attempt on the part of the landlords to realise rent at these enhanced rates has been resisted by the tenants.

The findings of fact arrived at by the learned Special Judge are as follows :—Prior to the partition (about 17 years before suit) the rents of these tenants were lump rents, not arrived at by assessing rates on different classes of land. The rents existing for years prior to the partition have been proved by admitted rent receipts and by oral evidence. The holdings are very old and the evidence discloses no change in the rent at any time prior to the partition. Since the partition where there has been any realisation it has been at the old rates and not at the new rates demanded by the landlord. Where there has been no realisation, this has been due to the landlord's demand for enhanced rents and reluctance or refusal to receive the old rents, or acknowledge the same.

On these findings of fact the learned special Judge has held that in the 20 years preceding suit (instituted August, 1905) there has been no change in the rents at which the tenants have held.

He has further observed that if there were a prevailing rate such rate had not been proved by the evidence adduced in the present case.

On appeal it has been contended before us in effect that the presumption under section 50(2) of the Bengal Tenancy Act can arise only when by production of receipts or otherwise the tenant has proved actual payment at an unvaried rate if not in each of the 20 years preceding suit, then in so many of those years as to lead reasonably to the inference that in rent paid there had been no change throughout the period.

But this is to confound rent actually paid with rent payable. In this case the rent payable and paid in respect of each holding now in question

at the beginning of the 20 years' period has been proved. Mere demand on the part of the landlord for an enhanced rent and refusal to receive or acknowledge the rent does not enable him to deprive the tenant of benefit of the provisions of section 50. The rent at which a tenancy is held continues until a change has actually been effected. Such change can be effected only by consent or by proceedings in Court. Here consent has been negatived and no proceedings in Court were taken until the suits out of which these appeals have arisen were instituted

The observation that the prevailing rate, if any, has not been proved is based on the absence of a majority of *kabuliyats* relied on by the landlords. It appears that since the partition, the landlords have succeeded in obtaining from tenants some 700 *kabuliyats*. In the present case the landlords exhibited some 200 or more *kabuliyats* and prayed that from these 200 or more the prevailing rent should be ascertained. To *kabuliyats* exhibited in other cases and not in this case they declined to permit reference, and in case of holdings where no *kabuliyats* had been executed did not put before the Court any evidence other than the realisation papers which were discredited by the Special Judge. In the present appeal, it may be observed, we are informed by both parties, there are no *kabuliyats*. The Special Judge's findings that in the cases with which we are now concerned, the tenants have held at rents which have not been changed for the 20 years' preceding suit, and that the presumption thus arising has not been rebutted, in my opinion, should be affirmed and these appeals dismissed with costs.

HUDA J. In the record-of-rights in these cases the tenants are entered as ordinary occupancy *raiyats*. They, however, allege in opposition to the record that they are *raiyats* holding at fixed rent. The onus is on them to show that the entry in the record is incorrect and they rely on the provisions of section 50 of the Bengal Tenancy Act in support of their claim. They have not proved that they have held at a rent or rate of rent which has not been changed from the time of the permanent settlement. Under the circumstances the rent *prima facie* is liable to be increased, but it is argued on behalf of the tenants that they have shown that about 17 years ago they paid a certain rent and that there is nothing to show that rent has since been altered. This contention has prevailed in the Court below. In my opinion the presumption under sub-section (*2*) of section 50 can only arise when the tenant proves affirmatively that he has held as a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceedings. As I read these words, they seem to me to place on the tenant the burden of proving either that he has actually paid rent at a uniform rate for 20 years or that, if not actually paid, there has been at any rate an agreement between him and his landlord

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that he should hold at the old rate. Where holding at uniform rate since the time of the permanent settlement has not been proved, the landlord has a right to demand an increase in the rate if he has good grounds for making such a demand and, in any case, to refuse to receive rent at the old rate in order to prevent the presumption under sub-section (2) of section 50 arising against him. This is what the land'ords have done in this case and I think they are well within their rights in doing so.

Upon this view of the case I think the decision of the issue arising under section 105A regarding the incidents of the tenancy and its liability to pay enhanced rent has been wrongly decided and to this extent I would modify the decree of the Court below. In other respects I would affirm the decree under appeal.

TEUNON AND HUDA JJ. Having regard to the difference of opinion that has arisen in these cases, under the provisions of section 98 of the Code of Civil Procedure, the appeals are now dismissed with costs.

Dr. Dwarkanath Mitra (with *Babu Kalikinkar Chakrabarti*), for the appellants. Non-payment of rent for several years may in some cases amount to a proof of variation of rent: *Rajnarain Roy Chowdry* v. *Atkins* (1), *Mahmooda Bebee* v. *Hareedhun Khuleefa* (2), *Prem Sahoo* v. *Nyamut Ali* (3), *Shaw Lal Ghose* v. *Boistab Churn Mozoomdar* (4), *Ramjadoo Gangoly* v. *Luckhee Narain Mundul* (5). There are two cases against me: *Ahmed Ali* v. *Golam Gafar* (6) and *Sham Churn Koondoo* v. *Dwarkanath Kubeeraj* (7). The law is unsettled. There should be a reference to Full Bench.

There is some difference between the former law as contained in Act X of 1859 and Act VIII (B. C.) of 1869 and the present law. The present law is more restricted in scope.

The question is whether the tenant has sufficiently rebutted the presumption of the record-of-rights by merely proving non-payment of rent.

(1) (1864) 1 W. R. 45 C. R.
(2) (1866) 5 W. R. Act X. 12.
(3) (1866) 6 W. R. Act X. 89.
(4) (1867) 7 W. R. 407
(5) (1867) 8 W. R. 428.
(6) (1869) 3 B. L. R. App. 40; 11 W. R. 432.
(7) (1873) 19 W. R. 100.

Babu Amarendranath Basu (with him *Babu Kshiteeshchandra Chakrabarti*), for the respondents. The latest case on the point is in my favour: *Kshirod Gobinda Choudhury* v. *Gour Gopal Dass* (1).

Babu Ramendramohan Majumdar (for *Babu Birajmohan Majumdar*), for the Deputy Registrar on behalf of the minor respondents.

Babu Kalikinkar Chakrabarti, in reply.

MOOKERJEE J. This is an appeal under clause 15 of the Letters Patent from a judgment of this Court in an appeal preferred under section 109A of the Bengal Tenancy Act in the course of a proceeding under section 105.

It appears that in 1915, a record-of-rights was prepared which contained an entry to the effect that the defendant-respondents were occupancy *raiyats*. The landlords appellants thereupon instituted the present proceeding for enhancement of rent on the ground that the prevailing rate was higher than that paid by the tenants. The tenants resisted the claim on the ground that they held at a rent or rate of rent which was fixed in perpetuity and that their rent was consequently not liable to enhancement. The Settlement Officer gave effect to the contention of the landlords and allowed the claim for enhancement. Upon appeal, the Special Judge upheld the defence and dismissed the claim for enhancement. On appeal to this Court, Mr. Justice Teunon held that the judgment of the Special Judge was not liable to be challenged in second appeal as erroneous in law. Mr. Justice Huda, on the other hand, came to the conclusion that the view of the Special Judge was based upon an erroneous construction of section 50 of the Bengal Tenancy Act. The result was that the decision of the

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Special Judge stood affirmed. On the present appeal, it has been contended on behalf of the landlords that the decision of Mr. Justice Teunon in affirmance of the decision of the Special Judge is based upon an erroneous interpretation of sub-section (*2*) of section 50.

Sub-section (*1*) of section 50 provides that where a *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be enhanced except on ground of alteration in the area of the tenancy or holding. In the present case, there is no direct evidence that the *raiyats* held at a rent or rate of rent which had not been changed from the time of the Permanent Settlement. They are consequently compelled to have recourse to the presumption specified in sub-section (*2*) of section 50, which provides as follows :—"If it is proved in any suit or other proceed-"ing under this Act that a *raiyat* and his predecessors "in-interest have held at a rent or rate of rent which has "not been changed during the 20 years immediately "before the institution of the suit or proceeding, it "shall be presumed, unless the contrary is shown, "that they have held at that rent or rate of rent from "the time of the Permanent Settlement." Consequently, the *raiyats* have to establish in this case that they and their predecessors-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. The landlords have argued that the *raiyats* have failed to establish the affirmative of this proposition, because it is conceded that no rent has in fact been paid by them to their landlords since 1898, in other words, during the seventeen years immediately preceding the institution of the suit. The substance of the contention of the landlords

is that the tenant is entitled to the benefit of the presumption under sub-section (*2*) of section 50, only if he proves actual payment at an unvaried rate, if not in each of the 20 years preceding the suit, at least in so many of them as to lead to the inference that there has been no change in the rent paid throughout the period of twenty years. We are of opinion that this contention cannot be accepted in view of the plain language of sub-section (*2*) of section 50. The tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rate; he has to establish that he and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. This involves a real distinction; for a person may hold as a tenant, even though he does not actually pay the rent agreed upon to his landlord. As was pointed out by Mr. Justice Dwarka Nath Mitter in *Ahmed Ali* v. *Golam Gafar* (1), there may be cases in which a *raiyat* might not have paid his rents for many years prior to the institution of the suit for enhancement; but if there has been no change in the rent payable by him he is not to be deprived of the presumption which the law has expressly laid down for his benefit; the payment at a uniform rate is one mode of showing that the tenure was held at a uniform rate; but what is only a particular mode of proceeding to the solution of a question ought not to be confounded with the question itself. It has not been, and in our opinion, cannot be maintained that omission to pay rent on behalf of the tenant or refusal to receive rent on the part of the landlord causes a cessation of the tenancy. The present proceeding is, indeed, based on the assumption that the defendants hold as tenants and that their

(1) (1869) 3 B. L. R. App. 40; 11 W. R. 432.

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rent is liable to be enhanced. The question consequently arises, what is the rent or rate of rent at which they have held during the 20 years immediately before the institution of the suit or proceeding. There is evidence to show that rent was paid at a certain rate in 1897. There is, further, evidence to show that the rent had been paid at the same rate for very many years earlier, and it has been stated to us that in one case the oldest receipt produced dates back to 1845. There is thus evidence which justifies the finding of the Special Judge that rent was paid at a certain rate which was uniform from 1845 to 1897. There has been no actual payment of rent since then. Does this justify the inference that there has been a change in the rent or rate of rent which was in operation in 1897? The answer manifestly must be in the negative. The rent could have been altered either by mutual agreement or by a decree of Court. There was an attempt on the part of the landlords to enhance the rent, but the tenants did not accede to the demand. Consequently there is no room for the hypothesis that the rent might have been altered by agreement of parties. Admittedly there has been no proceeding in Court for alteration of the rent before the date of the institution of the present suit. We must consequently hold that the rent which was in operation in 1897 was in operation from 1897 up to 1915; in other words, that the rent at which the *raiyats* have held during the twenty years immediately before the institution of the suit or proceeding has been at a uniform rate. This attracts the operation of the presumption mentioned in sub-section (2) of section 50. The view we take is supported by the decisions in *Ahmed Ali* v. *Golam Gafar* (1), *Sham Churn Koondoo* v. *Dwarkanath*

(1) (1869) 3 B. L. R. App. 40; 11 W. R. 432.

Kubeeraj (1), *Kshirod Gobinda Choudhury* v. *Gour Gopal Dass* (2) and *Grant* v. *Har Sahay Singh* (3), although there may be inaccurate expressions in *Rajnarain Roy Chowdry* v. *Atkins* (4), *Mahmooda Bebee* v. *Hareedhun Khuleefa* (5), *Prem Sahoo* v. *Nyamut Ali* (6), *Sham Lal Ghose* v. *Boistab Churn Mozoomdar* (7) and *Ramjadoo Gangoly* v. *Luckhee Narain Mundul* (8), which may at first sight lend apparent support to a contrary position. Our conclusion is that the view taken by Mr. Justice Teunon is correct, and that the appeal must consequently be dismissed with costs.

This judgment will govern the other Appeals (Letters Patent Appeals Nos. 55, 56 and 57 of 1920).

NEWBOULD J. I agree.

PEARSON J. I agree.

Appeal dismissed.

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(1) (1873) 19 W. R. 100.
(2) (1917) 27 C. L. J. 281.
(3) (1913) 19 C. W. N. 117.
(4) (1864) 1 W. R. 45.
(5) (1866) 5 W. R. Act X. 12.
(6) (1866) 6 W. R. Act X. 89.
(7) (1867) 7 W. R. 407.
(8) (1867) 8 W. R 488.