APPELLATE CIVIL.

Before Rankin and Buckland JJ.

MANINDRA CHANDRA NANDI 1923

v. *March 29.*

KAULAT SHAIK AND LAGNU MANDAL*.

Rent—Bengal Tenancy Act (VIII of 1885) s. 52—Additional rent for excess land—Onus of proving land in excess of area originally let—"Area for which rent has been previously paid," meaning of.

On the mere proof that a tenant's rent has been calculated at some date in the past on the supposition that his holding is of a certain size, a contract cannot be inferred that he is liable at any time to re-assessment upon the actual area.

When a letting upon the basis of a measurement is proved, the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specific boundaries, but in the absence of such proof the mere production of dakhilas, mentioning areas and rates of rent of different classes of land, does not suffice to throw any onus on the tenant.

Gouri Pattra v. *H. R. Reily* (1) followed.

Akbar Ali v. *Hera Bibi* (2) and other cases on the subject reviewed and explained.

SECOND APPEALS by Maharaja Sir Manindra Chandra Nandi, the plaintiff.

The plaintiff instituted two suits against two tenants for recovering arrears of rent at an enhanced rate on the allegation that the tenant-defendants had taken possession of additional land in excess of their holdings and were paying rents below the prevailing rates. It was alleged by the plaintiff that the tenants

* Appeals from Appellate Decrees, Nos. 2325 and 2420 of 1920, against the decrees of Satish Chandra Bose, Additional Subordinate Judge of Maldah, dated June 12, 1920, affirming the decree of Kiran Chandra Mitra, Munsif of that place, dated Aug. 15, 1919.

(1) (1892) I. L. R. 20 Calc. 579. (2) (1912) 16 C. L. J. 182.

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of the mahal had, at one time, agreed to get their lands measured for assessment of proper rent and that under the provisions of section 91 of the Bengal Tenancy Act (VIII of 1885) such measurement had been made and settlement given to most of the tenants on the basis of it; that the defendants, however, had refused taking such settlement and the plaintiff had therefore to bring the present suits. All these allegations were denied by the defendants; the Court of first instance as well as the lower Appellate Court disallowed the claim for enhancement but passed a decree for arrears of rent at the admitted rate; the plaintiff then appealed to the High Court.

Babu Dwarkanath Chakravarti (with him *Babu Hemendra Nath Sen*, *Babu Ram Charan Mitra*, *Babu Ram Chandra Mazumdar* and *Babu Sirat Kumar Mitra*), for the appellant. The plaintiff was entitled to increased rent: the dakhilas and the karchas mention the areas and the rates of rent: the defendants had agreed to pay enhanced rent for excess land. Moreover, the land has been improved into a better class and the plaintiff is entitled to share in the profits.

No one appeared for the respondents.

RANKIN J. These two second appeals (2325 and 2420 of 1920) arise out of two suits for increased rent (1484 and 1495 of 1918) brought by the Maharaja of Kasimbazar against Kaulat Sheikh and Lagnu Mandal respectively. The plaintiff claimed additional rent for excess area and also enhancement of rent on the ground that the rate of rent hitherto paid was lower than the rates prevailing in the locality. The Munsiff of Malda disallowed both claims and appeals to the Additional Subordinate Judge of Rajshahi have been dismissed by him with costs.

In Kaulat's case the tenancy has hitherto stood as comprising an area of 1 bigha 8 cottahs 8 chittaks bearing a jama of 14 annas 9 pies. The plaintiff claimed that this should be found to be a tenancy of 2 bighas 1 cottah bearing a jama of Rs. 2-12-7½.

In Lagnu's case the tenancy has hitherto stood as of 10 bighas 15 cottahs bearing a jama of Rs. 15-6. The plaintiff claimed that this should be 13 bighas 15 cottahs 1 chittak at a jama of Rs. 26-12-9.

The plaintiff's case is that the whole of Kaulat's land is now mulberry land and the whole of Lagnu's land is now orchard. That the land originally settled with Kaulat was partly mulberry land but chiefly paddy land and that of Lagnu was mulberry land. The plaint sets forth the "prevailing rates" per bigha as these: paddy 14 annas, mulberry Rs. 1-5-9, and orchard Rs. 1-15-2.

The plaintiff's claim is for the years 1322-4 in each case. The first ground of claim was that the tenants had agreed to his demand in or about 1321. Apart from proof, with or without the aid of a custom, of a term in the original contract of tenancy that the tenant should hold at a rent varying from time to time according to the quality or user of the lands, this ground of claim is in the present case quite untenable and the findings of the Courts below are in no way incorrect. I see no proof of *bonâ fide* dispute and the compromise thereof as affording consideration for an agreement as to excess area or as justifying an enhancement of rent contrary to section 29. The landlord claims by agreement to have got all he can possibly claim.

The question of the original conditions of the tenancy arises also when the plaintiff's claim to alteration of rent for excess area is considered under sec. 52. The difficulty here is the plentiful lack of evidence.

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Save that the holdings were not in existence in 1266 the only evidence which is of use to the plaintiffs is the mention of the areas in the karchas on the back of the dakhilas. In Kaulat's case there seem to be eight of such endorsements the earliest being 1311. In Langu's case there seem to be three only the earliest being 1320. The details are as follows :—

Kaulat's case.

Mulberry land—7½ cottahs, rate per bigha Rs. 1-5-9, total Rs. 0-8-3.

Crop-bearing land—1 bigha 1 cottah, rate per bigha Rs. 0-6-0, total Rs. 0-6-6. Total rent Rs. 0-14-9.

Lagnu's case.

Mulberry land—10 bighas 15 cottahs, rate per bigha Rs. 1-4-7, total Rs. 15-6-0.

These are short particulars written on the back of rent receipts; nothing more. The question is how much can be distilled from them and in answering that question they cannot be treated as though they were the vital words in the operative part of a written instrument of tenancy.

There is no evidence that the lands were originally settled, or at any time re-settled, after any measurement. There is no evidence that the tenants have overstepped any previous boundaries. There is no evidence that any waste lands lay adjacent to these lands. There is no written instrument creating or re-affirming either tenancy; no mention anywhere of boundaries or that the land was within certain boundaries.

The learned Subordinate Judge has dismissed the plaintiff's claim by reason of the insufficiency of his own evidence. He has not dealt with or relied upon any evidence for the defence as to this matter. The

question, therefore, is whether on the face of the dakhilas he was bound to infer such conditions of tenancy as would entitle the plaintiff to succeed; and if not whether he has properly applied the law in considering the problem.

The respondents, who seem to be small cultivators, have not appeared to contest these appeals but we have had the great advantage of an argument by Babu Dwarkanath Chakravarty on behalf of the appellant.

The Courts below have been led to their conclusions by a consideration of *Gouri Pattra's* case (1). This case has often been followed and so far as I know has never been dissented from in this Court. The facts as they appeared to Prinsep and Beverley JJ, were these: Areas were specified in rent receipts and zemindari papers. There was no proof that the lands had ever been measured until recent proceedings under Chapter X had resulted in a measurement. The holdings were very old holdings. There was no trace of any sort of description by boundaries. There was a custom under which remissions of rent had been granted for fallow land. I cannot find from the report that the rent receipts showed the total rent as worked out by applying a certain rate to the area given: otherwise Gouri Pattra's case and the cases now under consideration appear to me to be alike in all material respects. The decision was that the landlord has to prove that there is an excess: that he does not prove this unless he proves what area of land was originally let. This involves proof of the terms of the original settlement and whether it was by any and if so by what process of measurement. The statement of area in a dakhila does not prove measurement: it does not prove that the land originally let was in fact so many

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bighas: it does not prove or disprove that the subject-matter of the contract was a definite or ascertainable tract of land.

Surja Kanta v. *Baneswar* (1) repeats that the landlord must prove "for what quantity of land the defendant is paying rent". *Rajendra Lal* v. *Chunder Bhusan* (2) is a decision addressed to the question of the *terminus a quo*. It holds that the landlord must prove the area of the tenure at its inception—not the area of the land at some intermediate stage after fluvial action may have lessened it but the area with reference to which the rent had been assessed or adjusted.

Leaving aside the case of *Ralan Lal Biswas* v. *Jadu Halsana* (3) where there was a finding that the tenant was holding the same lands without any variation in the boundaries, the case of *Rajkumar* v. *Ram Lal Singh* (4) reaffirmed the principle that even if it is proved that the original rent was settled with reference to a quantity of land let out as distinct from the case of a consolidated rent for land within specified boundaries—even then, the landlord must first prove what the original area was and with reference to what standard that area was determined. For this purpose a statement of areas in zemindari papers and rent receipts was held insufficient. In *Lakhi Narain* v. *Sri Ram Chandra* (5) we come across a case where the landlord was able to prove measurement at the inception of the tenancy according to a known standard and that the rent was assessed thereon. The kabuliyats mentioned the area as well as the rent. I do not gather that they mentioned any boundaries. In these circumstances (I understand the decision to lay down) the onus was on the tenant to show that the rent was

(1) (1896) I. L. R. 24 Calc. 251, 255. (3) (1905) 10 C. W. N. 46.
(2) (1901) 6 C. W. N. 318. (4) (1907) 5 C. L. J. 538, 541.
(5) (1911) 15 C. W. N. 921.

a consolidated rent for an area within specified boundaries: otherwise excess area was completely proved. This case does not affirm that there is a presumption against the rent being a consolidated rent apart from the circumstances proved in that case. Indeed the two cases previously cited (10 C. W. N. 46, 5 C. L. J. 538) seem to show that there is no initial presumption either way.

In *Akbar Ali* v *Hira Bibi* (1) it was proved that in 1301 the lands had been measured and that the rents had then been adjusted at the old rates according to that measurement. Some years later upon a remeasurement it was found that the measurement of 1301 had been very badly done and had much understated the areas. It was held in second appeal that the finding that in 1301 the rents had been adjusted according to that measurement excluded the thoery that the parties intended to settle such and such a piece of land be the area what it may. The case was, therefore, held to be such that "the area for which rent has been previously paid" was less than the area actually occupied at the time of the claim, though the area actually occupied was the same throughout.

This decision was not apparently intended as narrowing the rule in *Gouri Paltra's* case (2). Nevertheless it marks a certain change in the current of authority. In *Akbar Ali's* case (1) the tenants were clearly intended to go on occupying their holdings as they stood in 1301. For these holdings the rent was miscalculated because the area was undermeasured. The phrase of Banerjee, J., in *Rajendra* v. *Chander* (3) by which he paraphrases the words of section 52 is cited but apparently without reference to its real intention. "The area with reference to which the rent previously

(1) (1912) 16 C. L. J. 182. (2) (1892) I. L. R. 20 Calc. 579.

(3) (1901) 6 C. W. N. 318.

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"paid has been assessed or adjusted" meant the area of the tenure as originally created as distinct from the area of any intermediate year in which the size of the holding may have been lessened by fluvial action. The whole point of *Gouri Puttra's* case (1) was that a rent receipt might very well show that, upon a rough estimate that the land was of such and such a size, a rent of so much may have been imposed and accepted, but unless there was a measurement and an assessment on the basis of measurement there was no presumption that the land was not an ascertained tract of a size differing from the area stated. The statute says "the area for which rent has been previously "paid". I think it quite possible that it means that. *Prima facie* section 52 would seem to be concerned with cases of alteration of area, not miscalculation of area; nor is it easy to suppose that it intended to provide an exceptional form of relief against mutual mistake. I find it difficult to think of the tenant in *Akbar Ali's* case (2) saying or meaning "I will "take so many bighas be the actual piece of land what "it may", though there is no difficulty in seeing that the rents were readjusted according to the measurement. What the bargain was is this "Now at last we "both know what the extent of my land is: we agree "to it and we agree that for it I shall pay you so much "per bigha being 10 rupees." Still there was a measurement and an intention to pay according to actual area.

Now *Akbar Ali's* case (2) was followed by *Dhrupad Chandra* v. *Hari Nath* (3). The facts were in dispute but as found they were these: There had been a measurement to which the tenants were parties in 1227 and a chitta of that year recorded them. It

(1) (1892) I. L. R. 20 Calc. 579. (2) (1912) 16 C. L. J. 182.
(3) (1918) 22 C. W. N.

was invariably consulted whenever a transfer took place. A rent roll was prepared from it in 1305 giving the area and annual rent. The area as there recorded gave exact and minute quantities running to karas and krantis. The area at the time of suit was in excess. There was thus proof of actual measurement and it was held that the burden lay upon the tenant to prove that the rent was a consolidated one for an area within specified boundaries. In saying quite correctly that it was not for the landlord to prove how the excess area came to be held, the Subordinate Judge made a remark that it must be due either to encroachment or to erroneous or fraudulent measurement on the previous occasion. The case seems to have raised no new question of law and no question whatever as to the correct presumption in the absence of any proof of measurement. But Richardson J. states two ways as open to a landlord, generally speaking, to prove a increase in "the area for which "rent has been previously paid". The first is the simple case where he proves that the tenant has overstepped original boundaries. The second is by proving that the rent was fixed at a rate per unit of area and that "in fact and substance the agreement "was that the tenant should pay at that rate for all the "land of which he was put in possession according to "its true area" and by further proving that the existing rent is less than the rent payable under such agreement. This is the reasoning upon which the learned vakil for the appellants chiefly insists in the present cases. Now a landlord who can prove such a contract is entitled to additional rent by virtue of his contract and without the aid of any statutory provision. No doubt a landlord anxious to bring jungle and waste lands into cultivation may well make such a contract. It accords well with primitive notions of

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rent as a share of the produce. There have been times when cultivating tenants were hard to get. Moreover, I do not doubt that many holdings now hemmed in by land-grabbing neighbours were originally taken on some such terms. Still these are the very conditions with reference to which the very old holdings in *Gouri Pattra's* case (1) were considered. When all is said, it can hardly be true throughout Bengal today that on the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size a contract can be inferred that he is liable at any time to re-assessment upon the actual area. This is to read the Act into the contract: not to apply the Act to the contract. How far such a view may take us is I think well illustrated by the Patna case *Maharaja Kesho Prasad* v. *Tribhuan* (2). "The jamabandi of 1272 if it recites a certain rent for a certain area at a certain rate per bigha is evidence of a contract and the learned Judge must take that evidence into consideration with the other evidence in the case and determine whether the tenancy was created on a consolidated rental. The landlord may ask the Judge to find on the strength of the jamabandi that the original contract was that the rent would vary with the area. If upon a consideration of the evidence adduced by the landlord the Judge declines to believe this and he finds that notwithstanding the jamabandi and the rent-receipts the tenant has succeeded in showing that the original jama was a consolidated one then the landlord cannot succeed. And again "In my opinion it is not incumbent upon the landlord to prove that there was an actual measurement or that there has been a practice of measurement". Now whatever may

(1) (1892) I. L. R. 20 Calc. 579. (2) (1917) 2 P. L. J. 276.

be thought of the decision in *Akbar Ali's case* (1) it is clear that nothing was then inferred in the absence of proof of measurement. Measurement was proved in the cases of *Lakshi Narain* (2) and of *Dhrupad Chandra* (3). Chatterjea J. in the Full Bench case of *Nilmani Kar* v. *Sati Prosad Garga* (4) both at the beginning and the end of his judgment seems to me to re-affirm the law of *Gouri Pattra's* case (5). I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has *primâ facie* to show that the rent was a consolidated rent for all the land within specific boundaries but that in the absence of such proof the mere production of such dakhilas as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving if he can, a contract of the nature indicated in *Dhrupad Chandra's* case (3) but entries of area and rate in dakhilas or jamabandis do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence.

The remaining question is as to whether the plaintiff is entitled to enhancement of rent. The only case made as to this rests upon the allegations that the tenant Kaulat has converted or improved paddy land into mulberry land and that Lagnu's mulberry land has been made orchard. The plaintiff appears to have

(1) (1912) 16 C. L. J. 182.
(2) (1911) 15 C. W. N. 921.
(3) (1918) 22 C. W. N. 827.
(4) (1920) I. L. R. 48 Calc. 536.
(5) (1892) I. L. R. 20 Calc. 579.

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claimed for the higher class of land at the prevailing rate therefor in each case. The learned Subordinate Judge has held it to be inequitable to grant enhancement as all the cost and labour of the improvements had been borne by the tenants. No doubt as an abstract and universal proposition applicable to all cases and in all circumstances there is room here for qualification or for criticism. A tenant may, for example, have been so overpaid for his labour by its result that part of the latter should be attributed after a certain time to the land whereon he laboured. I see no ground for thinking that in these cases the learned Judge was called upon by the evidence before him to deal with any sensible case made by the landlord to that effect. For all that appears, the suggestion of such a theory now is quite *in nubibus*. It is to be presumed that the Courts below are well aware that enhancement of rent is equitable or inequitable in all the circumstances of each case and the fact that as in duty bound they indicate the general considerations that weigh with them, in no way warrants the conclusion that their discretion was not properly exercised upon the facts before them.

In my judgment these appeals fail and should be dismissed.

BUCKLAND J. I agree.

A. S. M. A. *Appeals dismissed.*