APPELLATE CIVIL.

Before Mallik J.

1932

Aug. 10, 11.

SHASHANKAKUMAR BASAK

v.

HITLAL SHAHA.*

Bengal Tenancy—Enhancement of rent for excess area, suit for—Standard of measurement at inception of tenancy—Presumption (rebuttable) of continuance—Bengal Tenancy Act (VIII of 1885), s. 30.

In a suit for enhancement of rent on the ground of increase in area the ordinary presumption of law is that the standard of measurement has not varied since the first letting out of the land unless anything to the contrary is proved.

Birendra Kishore Manikya v. *Bhola Mia Majumdar* (1) followed.

Hemendrachandra Sen and *Banbihari Mukherji* for the appellants.

Poornachandra Chatterji for the respondents.

MALLIK J. This appeal arises out of a suit for enhancement of rent of a holding on two grounds, on the ground of excess of area and also on the ground of rise in prices. The plaintiffs claimed enhancement of rent on the ground of rise in prices at the rate of six annas in the rupee and their case was that, when the land was let out, the area mentioned in the *kabuliyat* was 34 *bighâs* only, whereas on actual measurement it has been found to be 42 *bighâs* and 17 *cottâs* and the plaintiffs were, therefore, entitled to an additional rent on the excess area of 8 *bighâs* and 17 *cottâs*, there having been a stipulation in the *kabuliyat* that the tenant would be liable to enhancement if the area of the holding would be

*Appeal from Appellate Decree, No. 1052 of 1930, against the decree of Madhusoodan Ray, Addl. Subordinate Judge at Asansol, dated Nov. 29, 1929, modifying the decree of Atulchandra Ganguli, Munsif of Asansol, dated April 11, 1928.

(1) (1926) 97 Ind. Cas. 385.

found on actual measurement to be more than 34 *bighâs*. In the plaint, it was also stated that, at the time when the land was let out, the standard of measurement was 80 cubits to a *bighâ* and 18 inches to a cubit. The plaintiffs' claim was resisted by the defendants on the allegation, amongst others, that, at the time of the settlement, the area was given *dâk surat*, which I take it, means something like guess. The court of first instance found in favour of the plaintiffs on the question of excess area and gave to the plaintiffs an enhancement of rent on the ground of additional area. It gave to the plaintiffs also an enhancement of rent on the ground of rise in prices at the rate of 2 annas 9 pies in the rupee, having taken, for comparison purposes, two decennial periods, one of 1916 to 1925 and the other of 1906 to 1915, the first period, *viz.*, 1916 to 1925 being the period immediately preceding the institution of the suit. Against this decision of the trial judge there was an appeal preferred by the defendants and the plaintiffs also filed a cross-objection. The appellate court disallowed the plaintiffs' claim for enhancement of rent on the ground of additional area and it disallowed also the plaintiffs' cross-objection keeping the first court's decree for enhancement on the ground of rise in prices at the rate of 2 annas 9 pies in the rupee intact. The plaintiffs have come up to this Court in Second Appeal.

I do not think the order of the lower appellate court, by which it refused to give any enhancement of rent on the ground of additional area, can be maintained. It is no doubt true that the landlord, before he can get an enhancement on the ground of additional area, must show that the present area is in excess of the area at the time of inception of the tenancy. In the present case, it is an undeniable fact that the present area of the holding has been found to be 42 *bighâs* and 17 *cottâs*, when measured by the standard measurement of 80 cubits to a *bighâ* and 18 inches to a cubit. The learned Subordinate Judge

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refused this enhancement to the plaintiffs on the ground that there was no evidence to show what had been the standard of measurement at the time when the tenancy was created. But, as has been held in a decision of this Court in *Birendra Kishore Manikya* v. *Bhola Mia Majumdar* (1), the presumption must be that the standard of measurement, at the time of letting out, was the same as it is now, unless anything to the contrary is proved. In the present case, there was an allegation, from the very beginning, that the standard of measurement, at the time of letting out the tenancy was 80 cubits to a *bighâ* and 18 inches to a cubit, and although there was a denial, in the written statement, to the effect that the standard of measurement was not as alleged in the plaint, there was no proof in the case to the contrary that the standard was not what had been alleged in the plaint. That being so, on the strength of the decision in the case of *Birendra Kishore Manikya* v. *Bhola Mia Majumdar* (1), it must be presumed that the same standard continued, or in other words the standard of measurement at the time when the land was actually measured and found to be 42 *bighâs* and 17 *cottâs* in area was the same as it had been at the time of letting out the land. The case of *Birendra Kishore Manikya* v. *Bhola Mia Majumdar* (1) appears to have been cited before the learned Subordinate Judge. The learned Subordinate Judge, no doubt, in his judgment, says that that case had no application to the present case, but he made no attempt to distinguish the one from the other.

On behalf of the appellants it was said that the plaintiffs were entitled to an enhancement at a rate higher than what has been allowed to them. The contention is that the courts below did not exercise proper discretion when they accepted for the purpose of comparison the two decennial periods, 1916 to 1925 and 1906 to 1915. It was said that to accept the

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decennial period of 1906 to 1915 for the purpose of comparison was not equitable. The learned advocate for the appellants, however, could not satisfy me as to why it was not equitable. No doubt it is true that, if another decennial period, *e.g.*, 1887 to 1896, would have been accepted for comparison purposes, the plaintiffs might have been entitled to something more than 2 annas 9 pies in the rupee. But, for the purposes of equity, the plaintiffs landlords are not the only person to be taken into consideration. The interest of the tenants also ought to be borne in mind when considering the question of equity as between the tenant and the landlord. I would not, therefore, interfere with that part of the decree of the lower appellate court, by which the plaintiffs have been allowed an enhancement on the ground of rise in prices at the rate of 2 annas 9 pies only.

The result, therefore, is that the plaintiffs will get an enhancement on the ground of excess area as claimed by them and also on the ground of rise in prices at the rate of 2 annas 9 pies in the rupee, or, in other words, the decree of the court of first instance is *affirmed*.

There will be no order as to costs.

Appeal allowed; decree varied.

A. K. D.