APPELLATE CIVIL.

Before Guha and M. C. Ghose JJ.

1932

May 18, 24.

JAGATKISHORE ACHARJYA CHAUDHURI

v.

KAMARUDDIN.*

Landlord and Tenant—Additional rent for excess area, when allowable—Bengal Tenancy Act (VIII of 1885), s. 52.

The landlord is entitled to additional rent for excess land, only when he shows what the quantity of land was at the inception of the tenancy or last assessment or adjustment of rent, that the rent was settled with reference to area, that no consolidated rent for the entire area let out was settled and that the quantity of land at the time of suit was in excess of that let out. If there was no measurement at any time or area fixed by estimate which was accepted by the tenant, the rate per unit of measurement mentioned in the landlord's papers standing by itself is of no avail to the landlord if the area was never ascertained on proper measurement or estimate and accepted by the tenant.

Manindra Chandra Nandi v. *Kaulat Shaik* (1) and *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (2) followed.

Durga Priya Choudhuri v. *Nazra Gain* (3) referred to and explained.

Sib Sahai Lal v. *Bijai Chand Mahtab* (4) discussed and dissented from.

SECOND APPEAL by the plaintiff landlord.

The relevant facts have been stated in the judgment.

Dwarkanath Chakrabarti, *Saratchandra Basak*, *Kalikinkar Chakrabarti* and *Pareshchandra Mitra* for the appellants.

Nasim Ali and *Birajmohan Majumdar* for the respondents.

Cur. adv. vult.

*Appeals from Appellate Decrees, Nos. 246 to 302 of 1929, against the decrees of A. Henderson, District Judge of Mymensingh, dated Sept. 3, 1928, modifying the decrees of Abinashchandra Ghosh Hazra, First Munsif of Bajitpur, dated April 17, 1926.

(1) (1923) I. L. R. 50 Calc. 957.
(2) (1907) 5 C. L. J. 538.
(3) (1920) 25 C. W. N. 204.
(4) (1925) I. L. R. 5 Pat. 157.

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GUHA J. These appeals have arisen out of suits for realisation of arrears of rent, brought by Raja Jagatkishore Acharjya Chaudhuri. The claim was made by the plaintiff in the suits for additional rent for excess area in the possession of the tenant-defendants in the suits, on the basis of areas recorded in the last cadastral survey, under Chapter X of the Bengal Tenancy Act. The plaintiff also claimed enhancement of rent on the ground of a rise in the average prices of staple food crops, as also on the ground that the productive powers of the land held by the tenants have been increased by fluvial action.

The points raised for determination in the suits, on the averments made in the pleadings of the parties, so far as the main controversy between the parties was concerned, were the following:

Are the defendants holding any land for which they do not pay rent and are they liable to pay additional rent for the same? What was the standard of measurement when the lands in suit were settled?

What amount of increase, if any, is the plaintiff entitled to recover under section 30 (*b*) of the Bengal Tenancy Act?

Has there been any increase in the productive power of the lands due to fluvial action? If so, to what increase of rent is the plaintiff entitled therefor?

The Munsif of Bajitpur gave his decision, allowing the plaintiff's claim in the suits, in a modified form. There were decrees passed for arrears of rent at 12 annas 6 pies per *kâni* of ·65 acre per *kâni*, as per area ascertained in the settlement operations. The plaintiff was also allowed enhancement of rent at the rate of 8 annas in the rupee, from 1333 B.S. It is to be noticed that the decision and decrees passed by the Munsif were based on the findings arrived at by him that the unit of linear measure was to be taken to be 24½ inches a cubit (*hâth*) and not 18 inches, as asserted by the plaintiff; and that the plaintiff was not entitled to any additional rent for excess area as contemplated by section 52 of the Bengal Tenancy Act. The enhancement of rent under section 32 was allowed by the Munsif, after comparison of prices as contemplated by that section,

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and after negativing the contention of the defendants that the lands comprised in the tenancies could not bear enhancements for reasons stated by them. On appeal, the District Judge of Mymensingh has affirmed the decision of the trial court, so far as the plaintiff's claim for additional rent for excess land was concerned, but has reduced the enhancement allowed by the trial court to 4 annas in the rupee. It may be mentioned that the learned District Judge accepted the plaintiff's case that the standard cubit prevailing in the *pargana* was one of 18 inches; but observed that whether a cubit of that length was actually used in working out the present areas was quite a different matter. The plaintiff has appealed to this Court.

The main question in controversy between the parties centred round the plaintiff's assertion that, in the year 1891, there was a compromise arrived at as between the landlord and the tenants, by which rents were fixed at a certain rate per *kâni*; so, if the plaintiff could show that any tenant-defendant was in possession of more lands than he was paying rent for, the plaintiff was entitled to get additional rent for excess area, in view of the provisions of section 52 of the Bengal Tenancy Act. Reference is necessary in this connection to the findings arrived at by the learned District Judge, bearing upon this part of the plaintiff's case. The learned judge has, in the first place, mentioned that the plaintiff has really made no attempt to prove that there has been any actual increase: no evidence was given to show that any of the defendants had obtained lands by encroachment or otherwise, and has then found that no actual increase had been proved. The defendants knew that areas were entered in the plaintiff's papers, but they did not accept any measurement with reference to which the areas were stated. The lower appellate court accepted the defendants' case that no actual measurement was made at the time when the compromise was effected in the year 1891, which was a compromise of a dispute in regard to existing rent,

and not merely one relating to the rate per *kâni*, and that the tenants never agreed that they would be liable to pay additional rents for the same land as the result of any future measurement. The cadastral survey measurements showed increase in areas, but did not necessarily show that the tenants were in possession of any land in addition to the land shown in plaintiff's papers, the identical land appearing to be greater in quantity on account of proper measurement. If there was no measurement at any time, or if there was no measurement which was accepted by the defendants, the rate per *kâni*, mentioned in the plaintiff's papers, standing by itself, could not be of any avail to the plaintiff, if the area was never ascertained on proper measurement, and accepted by the defendants. The learned District Judge has observed:

> Mere rate tells you nothing: in order to find out what the rent is, it is also necessary to know the area.

In this view of the case, resting upon definite findings of fact arrived at by the court of appeal below, the plaintiff cannot, upon the plain reading of section 52 of the Bengal Tenancy Act, succeed in his claim for additional rent for excess area, as made in the suits. The conclusion, thus arrived at, is amply supported by the authority of decisions of this Court. In the case of *Gocool Chunder Law* v. *Jamal Biswas* (1), the learned Chief Justice Sir George Rankin, has restated the settled rule of this Court, that where there was nothing to show when a tenancy was created, whether there was any measurement of the lands comprised in the tenancy either at the first, any intermediate or the last assessment or adjustment of rent, it was necessary for the landlord to base his claim upon some measurement, on the basis of which rent was assessed or adjusted. In view of some comment made on a previous decision of the learned Chief Justice in the case of *Manindra Chandra Nandi* v. *Kaulat Shaik* (2) by the learned Judges of the

(1) (1927) I. L. R. 55 Calc. 680. (2) (1923) I. L. R. 50 Calc. 957.

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Patna High Court in the case of *Sib Sahai Lal* v. *Bijai Chand Mahtab* (1), it is necessary to examine the decision of this Court in the case of *Durga Priya Choudhuri* v. *Nazra Gain* (2), which, according to the learned Judges of the Patna High Court, laid down a rule different from the one which was taken to be the settled rule in this Court in *Manindra Chandra Nandi's* case (3) referred to above. In *Durga Priya Choudhuri's* case (2), Mookerjee A. C. J., in delivering his judgment, referred to his own decision in *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (4), laying down the rule that the landlord was entitled to additional rent for excess land, only when he showed what the quantity of land was at the inception of the tenancy, that the rent was settled with reference to area, that no consolidated rent for the entire area let out was settled, and that the quantity of land at the time of suit was in excess of that originally let out. The learned Judge in remanding the case to the lower court gave this direction, among others, that it was to be considered whether the rent was assessed on *an area fixed by estimate* or determined by measurement. The learned Judges of the Patna High Court considered that the mention of an area fixed by estimate, in the judgment of Mookerjee A. C. J., made the statement of the learned Chief Justice, Sir George Rankin, as to the settled rule of this Court, inaccurate. It is somewhat difficult to appreciate the observation of the learned Judges of the Patna High Court in this behalf, in view of the fact that Mookerjee A. C. J. had not departed from the view already expressed by him in *Rajkumar's* case (4), noticed above, and also because the expression "an area fixed by estimate" does not militate against the view taken by this Court in *Manindra Chandra Nandi's* case (3). The area fixed by estimate must be such as has been accepted by the tenant, which might very well take place of an

(1) (1925) I. L. R. 5 Pat. 157.
(2) (1920) 25 C. W. N. 204.
(3) (1923) I. L. R. 50 Calc. 957.
(4) (1907) 5 C. L. J. 538.

area on the basis of or determined by measurement, and approved by the tenant, as mentioned in all the decisions of this Court, bearing upon the question. It may be noticed in this connection that Mallik A. C. J., who delivered the judgment of the Patna High Court in *Sib Sahai Lal's* case (1), has specifically mentioned that "in determining the area demised, the "parties may either resort to measurement or they may "agree to accept an assumed figure," so that there was no difference made by that Court between an area ascertained by measurement and an estimated area accepted by parties concerned. It is difficult, therefore, to appreciate how the comment of Mallik A. C. J., in *Sib Sahai Lal's* case (1) as to the settled rule of this Court, obviously indicating that Mookerjee A. C. J. laid down a different rule in *Durga Priya Choudhuri's* case (2), was justifiable.

In the cases before us, no evidence was given by the plaintiff to show that there was any excess land, no attempt was made to prove that the defendants had got possession of any additional lands. If there was no actual measurement in the year 1891 or thereabouts, when the last assessment or adjustment of rent was made; if the areas mentioned in the plaintiff's papers were not based on measurement; and if the tenants never agreed that they would be liable to pay additional rent for the same land as the result of any future measurement, as has been found by the court of appeal below, and to which findings reference has been made above, the plaintiff could not succeed in his claim for additional rent for excess lands as made in the suits.

On the question of enhancement of rent, as claimed by the plaintiff in the suit, it has been urged before us that the learned District Judge having found that, upon a comparison of prices of two decennial periods, the plaintiff was entitled to an enhancement of about 8 annas in the rupee, he was in error in reducing the enhancement to 4 annas in the rupee. It was contended that the discretion exercised by the trial

(1) (1925) I. L. R. 5 Pat. 157. (2) (1920) 25 C. W. N. 204.

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court in the matter of enhancement should not have been interfered by the court of appeal below. In view of the provisions contained in section 35 of the Bengal Tenancy Act, the facts and circumstances in each case have to be taken into consideration in determining the limit of enhancement, so that it may not be unfair or inequitable to the parties concerned. The learned judge in the lower appellate court, after taking all the facts and circumstances into consideration, has come to the conclusion that although, on a comparison of prices of staple food crops, the increase in rent might be taken to be at the rate of about 8 annas in the rupee, a rate of 4 annas would be fair to the landlord and the tenants. The discretion so exercised in the matter of enhancement of rent should not be interfered with in Second Appeal; and it would not be right to say that discretion in the matter of enhancement of rent, on the ground of its being fair and equitable, could be exercised by the trial court only and that it was not open to the final court of facts to use its own discretion, based upon facts and circumstances of the case before it.

In the result, the appeals are dismissed with costs. We allow one hearing fee in the appeals in which Mr. Nasim Ali has appeared for the respondents: the hearing fee is assessed at 3 gold mohurs. The costs for the appearance of the Deputy Registrar as guardian of the minor respondents in some of these appeals have already been paid by the appellant.

M. C. Ghose J. I agree.

Appeals dismissed.

A. A.