APPELLATE CIVIL.

Before Mallik and M. C. Ghose JJ.

HAREHARE SINGHA CHAUDHURI

v.

SARADINDUNARAYAN RAY.*

1934

March 9, 12, 14.

Bengal Tenancy—Presumption—Dâkhilâs—*Fixity of rent—Proof—Record-of-rights to the contrary—Bengal Tenancy Act (VIII of 1885), ss. 50, 115.*

Where section 115 of the Bengal Tenancy Act precludes the presumption that might arise in favour of the tenant under section 50 of the Bengal Tenancy Act, it cannot be said to preclude also other proofs of fixity of rent, *e.g., dâkhilâs*, where the tenant has alleged such fixity.

SECOND APPEAL by the defendant.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Praphullachandra Chakravarti for the appellant.

Gopendranath Das for the respondents.

Cur. adv. vult.

MALLIK J. This appeal arises out of an application made by the landlord under section 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent. The plaintiff's claim was resisted by the tenant-defendant on the allegation that the holding in question was a *mokarrari* one and that the rent was not liable to any enhancement and in support of this allegation the defendant filed a number of *dâkhilâs*, the earliest of which was of the year 1248, B. S., and the latest of 1335, B. S. On the strength of these *dâkhilâs* the tenant claimed the

*Appeal from Appellate Decree, No. 196 of 1932, against the decree of A. F. M. Rahman, Special Judge of Murshidabad, dated Aug. 20, 1931, affirming the decree of Phaneendrakumar Banerji, Asst. Settlement Officer of Kandi, dated Nov. 21, 1930.

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presumption under section 50 of the Bengal Tenancy Act. The Assistant Settlement Officer, as also the Special Judge, refused to consider these *dâkhilâs*, holding that section 115 of the Bengal Tenancy Act operated as a bar and the courts below, in that view of the matter, gave an increase of two annas and three pies in the rupee to the plaintiff-landlord. The defendant-tenant is the appellant before us.

The order of refusal of the courts below to consider the *dâkhilâs* filed by the tenant-defendant cannot, in my judgment, be sustained. It is true that in the year 1907 there was a petty settlement of an area of land, within which the holding in question lies, under the provisions of Chapter X of the Bengal Tenancy Act, and it is true also that there was a finally published record-of-rights prepared in that petty settlement. Under those circumstances, section 115 of the Bengal Tenancy Act no doubt precluded the presumption that might arise in favour of the defendant under section 50 of the Bengal Tenancy Act. But section 115 cannot be said to preclude also other proofs of fixity of rent and it was the case of the tenant-defendant that the rent of the holding was fixed. That being so, the lower appellate court, in my opinion, was not justified in refusing to consider the *dâkhilâs* that were filed by the tenant-defendant.

There were two courses open to us. One was to remand the case to the court below for the consideration of the *dâkhilâs* filed by the defendant and on a consideration thereof come to a decision on the point whether the rent of the holding was fixed or not and the other course was to consider the *dâkhilâs* ourselves and to come to our own decision on the point. In view of the fact that the suit had been instituted so long ago as 1929, it was the second course which commended itself to us, and we have given full consideration to the *dâkhilâs*, which were produced in the case. Now the question is whether from the *dâkhilâs* that had been produced in this case, one can come to the conclusion that the rent of

the holding in question is fixed. After giving our best consideration to these *dâkhilâs*, we have been unable to come to the conclusion that the rent was fixed. According to the case of the defence, there had been a number of *jamâs* with fixed rents until the year 1316, B. S., when there was an amalgamation of ten component *jamâs*—and there was another amalgamation of twelve component *jamâs* in the year 1335. Out of these component *jamâs* there are only three of them—one of Rs. 2-12 as., another of Rs. 2-10-8 ps. and the third of 8 annas and 6 pies, in respect of which there had been filed five to ten *dâkhilâs*, showing the same amount of rent. No doubt the earliest *dâkhilâs* for two of these *jamâs* are of the year 1248 and for the third of the year 1285. But it would, in my opinion, be a very violent inference to draw merely from the fact that there were five, seven or ten *dâkhilâs* extending over a period of nearly 80 years, that for this long period of time the rents of these *jamâs* had all along been the same. There is besides the fact that, when in the year 1316, these small *jamâs* were amalgamated with others, some of which were very much bigger than them, these three *jamâs* practically lost their identity with the result that they altogether ceased to exist. In this view of the matter, we are unable to hold that the *dâkhilâs* filed by the defendants were of any help to them in establishing that the holding in question was one of fixed rent and, as the plaintiff-landlord had the entry in the record-of-rights in his favour, the presumption in his favour cannot but be held not to have been rebutted in the case.

For the reasons recorded above, the appeal, in my judgment, must be dismissed and it is, accordingly, dismissed with costs—the hearing-fee being assessed at one gold mohur.

M. C. GHOSE J. I agree.

Appeal dismissed.

G. S.