APPELLATE CIVIL.

Before Mitter and Biswas JJ.

SRISH CHANDRA NANDI

v.

MIDNAPORE ZEMINDARI COMPANY LIMITED.*

1937

Nov. 24, 25, 26; *Dec.* 9.

Lease—Lease of âsli *and* diârâ *lands at consolidated rent—Settlement of fair rent for* diârâ *lands by revenue authorities—Settlement of rent, if affects lease—Liability of tenant—Splitting up of contract—Bengal Tenancy Act (VIII of 1885), ss. 104, 191.*

Where a *zemindâr* grants a *mokarrâri* lease in respect of lands comprising his *âsli* and *diârâ* lands accreted to his estate at a consolidated rental, the liability of the tenant under the lease is not affected when the revenue authorities settle the fair rent of the *diârâ* portion only payable by the tenant under s. 104 of the Bengal Tenancy Act and Government settles the *diârâ* lands as a temporarily settled estate with the said *zemindâri*.

Pria Nath Das v. *Ramtaran Chatterjee* (1) and *Prafulla Nath Tagore* v. *Tweedie* (2) referred to.

When the contract is for one tenancy bearing a consolidated rent covering both lands of the permanent settled estate and *diârâ* lands, the contract cannot be split up at the instance of the revenue-officer.

Section 191 of the Bengal Tenancy Act contemplates that a lease may be superseded only where the area comprised in the tenure or holding to which the contract relates is situate wholly in an estate not subject to subsisting permanent settlement.

APPEALS FROM APPELLATE DECREES preferred by the landlord.

The facts of the case and arguments in the appeal are sufficiently set out in the judgment.

Bejay Kumar Bhattacharjya for *Bireswar Bagchi* and *Jyotish Chandra Datta* for the appellant.

*Appeals from Appellate Decrees, Nos. 211 and 212 of 1936, against the decrees of G. B. Synge, District Judge of Murshidabad, dated Sept. 17, 1935, affirming the decrees of Nagendra Chandra Ganguli, First Munsif of Berhampore, dated April 30, 1935.

(1) (1903) I. L. R. 30 Cal. 811; L. R. 30 I.A. 159
(2) (1921) 35 C. L. J. 14.

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U. N. Sen Gupta and *Manmatha Nath Das Gupta* for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows :—

These two appeals arise out of two rent suits, namely, Nos. 39 and 2475 of 1934. Both of them have been dismissed by the Courts below, and the plaintiff has accordingly preferred these two appeals.

The first suit was filed by Maharaja Srish Chandra Nandi as *shebâit* of *Thâkur* Sree Sree Lakshmee Narayan Deb and the second in his personal capacity.

The idol is the proprietor of *touzi* No. 560 of the Murshidabad Collectorate. Under the idol, Robert Watson & Co. held a *gar-mokarrâri* tenure of an area of 1,321 *bighâs* of land at an annual rent of Rs. 551. The interest of Robert Watson & Co. has devolved upon the defendants respondents. The said tenure was converted into a *mokarrâri* one in the year 1319 B. S.; *selâmi* was paid and the rent was fixed at Rs. 641-3 in perpetuity. On April 11, 1913, the late Maharaja Manindra Chandra Nandi, the father of Maharaja Srish Chandra, who was then the *shebâit*, executed the *mokarrâri pâttâ* in favour of the defendants respondents, and the latter executed the corresponding *kabuliyat*. In these documents it is recited that 951 *bighâs* 16 *cottâs* odd of the demised area was then in the river bed, and a covenant was made that if the tenant was unable to possess the said area or any part of it on reformation owing to the defect of title of the landlord, the landlord would either give to the tenant an equal quantity of land from other parts of his estate or allow proportionate abatement of rent.

Shortly after the execution of the *pâttâ* and *kabuliyat* the submerged lands appeared above water and became fit for cultivation. *Diârâ* proceedings were started by the Government as also proceedings

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under part II of Chap. X of the Bengal Tenancy Act. These proceedings were completed in the year 1916. The southernmost part comprising an area of about 573 *bighâs* was found by the revenue officers to be the lands of *touzi* No. 560, and the middle portion comprising an area of about 366 *bighâs* was found to be part of the old river bed. This portion with other accretions was formed into a separate estate, No. 2504, and as it was alluvial accretion to the lands of *touzi* No. 560, a temporary settlement was offered to the proprietor of the latter estate, *e.g.*, the idol represented by Maharaja Manindra Chandra Nandi. The latter accepted the offer, and though the settlement ought to have been made with him as *shebâit*, the actual settlement for a term of five years and at a revenue of Rs. 125 was made with him in his personal capacity with effect from April, 1921. It is for this that the second rent suit has been brought by Maharaja Srish Chandra in his personal capacity as heir of his father, but it was conceded by the plaintiff in the lower Courts that the temporary settlement of estate No. 2504 was really taken by the late Maharaja in his capacity as *shebâit* and the second rent-suit ought therefore to be treated as having been brought by Maharaja Srish Chandra in his capacity of *shebâit*. In the proceedings under part II of Chap. X of the Bengal Tenancy, the defendants respondents were recorded in the record-of-rights to be in possession of the aforesaid area of 366 odd *bighâs* as tenants, and the fair rent payable by the said defendants respondents was settled under s. 104 of the Bengal Tenancy Act at Rs. 151-5. The remaining portion of the newly formed land about 380 *bighâs* in area, the northernmost portion, was found to be reformations *in situ* of the lands of a *khâs mehâl* called Jhowbona belonging to Government and the Government took possession thereof as part of its *khâs mehâl* estate.

The net result of these proceedings was that out of the 951 *bighâs* of land which was under water at the date of the *mokarrâri pâttâ*, only about 573 *bighâs*

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were found to appertain to *touzi* No. 560, and the defendants got possession thereof and are in peaceful possession. An area of 366 *bighâs* odd was found to be outside *touzi* No. 560, but as the proprietor of *touzi* No. 560 got temporary settlement thereof from the Government, the defendants also got possession of the same and are in peaceful possession. But they could not get possession of the remaining area of about 380 *bighâs* which was found to be part of Jhowbona and that by reason of the defect of title of the grantor of the *mokarrâri pâttâ*.

The defendants thereupon demanded of Maharaja Manindra Chandra Nandi the fulfilment of his covenant. He was asked either to give land in lieu of the said 380 *bighâs* out of other portions of his estate or to give proportionate abatement of rent. After some correspondence Maharaja Manindra Chandra Nandi agreed in 1924 to give a proportionate abatement of rent amounting to Rs. 184-15 on the said area of 380 *bighâs* odd land. The rent for the areas in possession of the defendants after the said abatement became accordingly Rs. 456-4. Rent at that rate was paid and accepted from 1331 to 1339-B. S. and in the *dâkhilâs* granted to the defendants the said rent is shown as due in respect of *one tenancy* consisting of lands of *both touzis* Nos. 560 and 2504.

The first revenue settlement of estate No. 2504 expired in March 1926, and thereafter up to March 1928, yearly settlements were made by the Government with Maharaja Nandi at the same revenue of Rs. 125. In 1928-29 the condition of the property having improved, revenue was assessed at Rs. 1,038-13 and summary settlements were made with him till March, 1933, the revenue payable being the said sum of Rs. 1,038-13. In 1927-28 the Government thought of a survey and settlement afresh under part II of Chap. X of the Bengal Tenancy and a revenue settlement for a term of years. In the proceedings under s. 104 of the Bengal Tenancy Act, the rent payable

by the defendants in respect of the area within *touzi* No. 2504 in their possession was assessed at Rs. 285-4 in place of the former figure Rs. 151-5. The record-of-rights was made final in 1932, and the Maharaja then engaged with the Government for a term of ten years agreeing to pay an annual revenue of Rs. 1,085.

In the first of the aforesaid rent suits, the plaintiff claimed at the rate of Rs. 641-3 and cess at the rate of Rs. 25-8-3 per year. The total sum payable is shown in the plaint thus :—

	Rs.	a.	p.
Rent for 1337 to Poush *kist* of 1340	2,404	7	6
Cess for the said period ..	95	11	0
Total ..	2,500	2	6

He gave credit for the payments made by the defendants as follows :—

	Rs.	a.	p.
Towards rent	1,259	4	3
Cess	95	11	0
Total ..	1,354	15	3

He accordingly laid his claim at Rs. 1,145-3-3 plus damages Rs. 286-4-9 = total Rs. 1,431-8-0.

The lands of the tenancy were described by reference to those settlement *dâgs* in the possession of the defendants and which had been included in *touzi* No. 560. In the second suit the claim was laid as follows :—

	Rs.	a.	p.
Rent for 1337 to 1339 at the rate of Rs. 151-5	453	15	0
Cess for 1337 to 1339 at the rate of Rs. 4-11-9	14	3	3
Rent for 1340 at the rate of Rs. 285-4 up to Pous *kist*	178	4	0
Cess for the said period	5	10	6
Total ..	652	0	9

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He gave credit for the sum of Rs. 451-10-6, Rs. 431-12-9 being for rent and Rs. 19-13-9 for cess. The description of the tenancy is also by reference to those settlement *dâgs* in the possession of the defendants and included in *touzi* No. 2504. The first suit proceeds upon the basis that the tenancy described therein is covered by the *mokarrâri pâttâ* of 1913, and the second suit on the basis that the lands mentioned in the schedule of the plaint in that suit are outside the said *pâttâ* and the claim is laid on the basis of the rent settled by the revenue officers under s. 104 of the Bengal Tenancy Act. It has, however, been found by both the Courts below that the lands of both the suits are covered by the said *pâttâ* and these reformed lands together with remaining 380 *bighâs* included in Jhowbona are portions of the 951 *bighâs* which were at the date of the *pâttâ* in the river bed.

The defendants maintain that the division of the lands in their possession into two tenancies made by the plaintiff in his plaints is imaginary and that the said lands form parts of one tenancy for which the rent payable was Rs. 456-4 per year after they had been allowed abatement in 1924 by the late Maharaja. They further pleaded that they had paid according to the said rate and nothing was therefore due. The Courts below have found that the late Maharaja agreed in 1924 to grant an abatement of Rs. 184-15-0 per year on account of the fact that the defendants could not take possession of 380 *bighâs* of land in which he had no title and that the payments made by the defendants were sufficient to wipe off the arrears of rent, taking the rate to be Rs. 456-4 per year.

Mr. Bhattacharjya, the learned advocate for the appellant, accepts the finding, as he is bound to do in Second Appeal, that in 1924 the late Maharaja agreed to take the total sum of Rs. 456-4 as the yearly rent. He says that the agreement of that year must be construed to be an agreement of the following nature, namely, that the Maharaja agreed to take

Rs. 151-5 per year in respect of the *diârâ* lands, that being the fair rent settled by the revenue authorities under s. 104 of the Bengal Tenancy Act, as payable by the defendants, and the balance of Rs. 304-15 for the lands of *touzi* No. 560. On this hypothesis, he argues that, when in 1931-32 the rent of the *diârâ* lands was again settled under s. 104 of the Bengal Tenancy Act at Rs. 285-4, his client became entitled to rent at the rate of Rs. 304-15 + Rs. 285-4 = Rs. 590-3 per year. He says that for 1340 his client is, accordingly, entitled to claim at this rate. This is his first contention. It comes to this that the agreement of 1924 was binding on his client only during the currency of the revenue settlement of the *diârâ* lands made with him by the revenue authorities on the footing that the rent payable by the defendants for the *diârâ* lands was Rs. 151-5 per year.

His second contention is that assuming that the Maharaja agreed in 1924 to take a consolidated rent of Rs. 456-4 for the *âsli* and the *diârâ* lands, that agreement was only of binding effect till the second proceedings under part II of Chap. X of the Bengal Tenancy Act, which were made final in 1932, and that thereafter the said agreement became void, with the result that the plaintiff is entitled to fall back upon the *mokarrâri pâttâ* of 1913 and claim rent for the *âsli* land at the *pâttâ* rate, *i.e.*, proportionate rent for 573 *bighâs* in terms of the *pâttâ*, and to claim for the *diârâ* lands the rent settled under s. 104 of the Tenancy Act, *i.e.*, at the rate of Rs. 285-4. In support of both these contentions he relies upon s. 191 of the Bengal Tenancy Act as also on ss. 104 and 104J.

On the findings arrived at by the Courts below, which are supported by lettters written by the late Maharaja, we cannot take the agreement of 1924 to be of the nature suggested by Mr. Bhattacharjya. By the said agreement the late Maharaja did not fix rent of the *âsli* lands at Rs. 304-15 and of the *diârâ* land at Rs. 151-5. He had granted in 1913 a

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mokarrâri lease of 1,321 *bighâs* at a rent of Rs. 641-3. When the lands appeared above water and he could not, on account of his defect of title, give the defendant possession of about 380 *bighâs*, he reduced the rent from Rs. 641-3 to Rs. 456-4 in terms of his covenant in the *pâttâ*.

The position therefore is this :—

When a *zemindâr* grants a *mokarrâri* lease in respect of lands comprising his *âsli* lands and *diârâ* lands accreted to his estate at a consolidated rental, is his contract affected when the revenue officers settle the rent payable by the said tenant of the *diârâ* portion under s. 104 of the Bengal Tenancy Act and Government settles the *diâra* lands as a temporarily settled estate with the said *zemindâri*? This question, so far as we are aware has not been decided in any of the reported cases.

In *Pria Nath Das* v. *Ramtaran Chatterjee* (1) the fair rent for the *diârâ chak* was settled under s. 10 of Act VIII of 1879 and a temporary land-revenue settlement was concluded in 1882 with the proprietor of the adjoining permanently settled estate, who had included the lands of the said *chak* along with some of his *âsli mouzâs* in a *gânti* tenure at a fixed rent created in favour of the defendants. His representative sued the defendant for rent not at the rate proportionate to that mentioned in the *gânti pâttâ*, but at the rent settled by the revenue authorities under s. 10 of Act VIII of 1879. In the last mentioned Act, however, there was no provision corresponding to s. 191 of the Bengal Tenancy Act. Lord Robertson held that the contract between the parties was still binding, the temporary land-revenue settlement of the *diârâ chak* having been made with the grantor of the *gânti pâttâ*, and the plaintiff was his representative in interest. He also held that if the land revenue settlement had been made with a

(1) (1903) I. L. R. 30 Cal. 811; L. R. 30 I. A. 159.

stranger and that stranger had sued for rent, the position would have been otherwise, on the principle that want of privity of contract between the plaintiff and the defendant in that case would have put the *gânti pâttâ* out of the way. The case of *Khiroda Kanta Roy* v. *Akhoy Kumar Chatterjee* (1) which was for rent of the self-same *chak* for a later period merely gives effect to the second proposition laid down by Lord Robertson. The temporary revenue-settlement having expired, the Government concluded another revenue settlement with the persons who were regarded as strangers to the adjoining permanently settled estate. Before this revenue settlement with the plaintiffs of that suit, proceedings under Part II of Chap. X of the Bengal Tenancy Act had been taken and the rent payable by the defendants for the *chak* in question settled under s. 104 of the Act at Rs. 1,967. This Court held that the plaintiffs were not the representatives of the proprietors of the permanently settled estate who had granted the *gânti pâttâ*, but were strangers. In the case of *Muktakeshi Dasi* v. *Srinath Das* (2), a temporary settled estate was created in 1903 in respect of *diârâ* lands. In that case, it does not appear from the report that rent payable by the tenant was settled under s. 104 of the Tenancy Act, and the contract by which the lands had been let out by the plaintiffs' predecessor to the defendant's predecessors was dated February 19, 1884, *i.e.*, before the passing of the Bengal Tenancy Act of 1885. The effect of s. 192 of the old Act, which, according to case law, only affected contracts made after the passing of the Bengal Tenancy Act (VIII of 1885), was not therefore considered, and this Court following *Pria Nath Das* v. *Ramtaran Chatterjee* (*supra*) held that the contract was binding in respect of two-thirds share in respect of which the plaintiff was the representative of the grantor. In the case of *Secretary of State for India in Council* v. *Midnapore Zemindari Co., Ltd.* (3) which has been reversed by

(1) [1917] A. I. R. (Cal.) 599. (2) (1914) 19 C. L. J. 614.
(3) Unreported case F. A. 305 to 312 and 328 to 333 of 1927.

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the Judicial Committee of the Privy Council (1) on another point, Mr. Justice Mukerji laid down that notwithstanding proceedings under Chap. X, part II of the Bengal Tenancy Act, the contract between the parties was binding where the land revenue settlement of the *diârâ* lands had been concluded with the grantor of the tenancy or his representative, but these observations do not cover the case before us, as the contract in that case had been entered into before 1885, *i.e.*, before the passing of the Bengal Tenancy Act (VIII of 1885). In the case of *Prafulla Nath Tagore* v. *Tweedie* (2) the *âsli* lands together with some lands which were later on found to be *diârâ* were settled by the proprietor of the permanently-settled estate with the defendant in 1860 at a fixed rent. They took temporarily revenue settlement from Government of the *diârâ* land. Before the revenue settlement, rent payable by the defendant was settled under s. 104 of the Bengal Tenancy Act. As the contract was made before 1885, this Court held that it could not be given a go-by under s. 192, but at p. 18 of the report, Chatterjea J. expressed the opinion that 104J did not conclude the matter in favour of the plaintiff who claimed rent for the *diârâ* land at the rate fixed under s. 104.

No doubt the settlement of rent under s. 104 is conclusive, *i.e.*, the rent-roll is conclusive after final publication of the record, if no proceedings under s. 104H are taken. Under s. 191 also a landlord, or a tenant, or the revenue-officer on his own motion can alter the rent fixed by contract entered into after the passing of the Bengal Tenancy Act, where the contract relates to land not included in a permanently settled estate, but none of the said parties can, in our judgment, create a new contract between the parties only to strike at it. When the contract is for one tenancy bearing a consolidated rent covering both lands of the permanently settled estate and *diârâ*

(1) I. L. R. [1937] 2 Cal. 769; L. R. 64 I. A. 281.
(2) (1921) 35 C. L. J. 14.

lands, the contract cannot be split up, whether at the instance of the revenue officer or of the landlord alone or of the tenant alone, and made into two. That would be creating a new contract between the parties, *i.e.*, substituting two tenancies in the place of one. This can only be done by the mutual consent of the landlord and tenant. The contract in the case before us is for payment of Rs. 456-4 a year for *both* the *âsli* and *diârâ* lands. Such a contract is not hit by s. 191 and the defendants are only bound to pay the consolidated rent of Rs. 456-4 per year. Section 191 contemplates that a lease or contract (provided it is made after the passing of the Bengal Tenancy Act) may be superseded as therein stated, only where the area comprised in the tenure or holding to which the contract relates is situate wholly in an estate not subject to a subsisting permanent settlement. On the findings of the Courts below, this is not the case here. As for the entry in the record-of-rights being conclusive under s. 104 and 104J, we do not think that the entry that Rs. 285-4 is payable for the *diârâ* lands only, that is, that these lands form a *tenancy by itself* at that rent, can be regarded as conclusive, the preponderance of judicial opinion being in favour of the view that only the entry regarding rent and not other entries in the record, where proceedings under part II of Chap. X have been taken, is conclusive. It is accordingly open to the defendants in this case, to show that they hold *one* tenancy comprising a bigger area at a rental of Rs. 456-4 per year.

We are consequently of opinion that the appeals should be dismissed with costs and we order accordingly.

Appeals dismissed.

G. K. D.