APPELLATE CIVIL,

Before S. K. Ghose and Patterson JJ.

PRASANNA DEB RAIKAT

1938

July 6, 7, 8,12*

V.

GAJENDRA MOHAN BHOTJMIK.*

Landlord and Tenant—Rent of intermediate tenure—Enhancement on ground not given in notice—Land used for non-agricultural purposes—Jurisdiction of revenue Court—Bengal Rent Act (X of 1859), s. 13.

Where enhancement of rent Is claimed by the landlord under Act X of 1859 in the case of an intermediate tenure on the ground of its being fair and equitable, although the Act itself does not prescribe any specific grounds, for such enhancement, it is always subject to the condition that the rent is not more than what is paid by similar tenures in the *pargand* or neighbourhood.

The decisions in *Grish Ghunder Ohose* v. *Ramtunoo Biswas* (1) ; *Dhunput' Singh* v. *Gooman Singh (2)* and *Dyarani* v. *Bhobindur Naraen* (3) are not confined to the specific provision in s. 51 of Reg. VIII of 1793 but are based on broader and more general principles.

Brojo Soondur Mitter Mojoomdar v. *Kalee Kishore Ghowdhry* (4) and; *Nilmoney Singh* v. *Ram Ghuckerbntty* (5) referred to.

In a matter governed by Act X of 1859 it is wrong to base an assessment on the analogy of the Bengal Tenancy Act of 1885.

Prasanna Deb Raikat v. *Sabitri Sundari Dasi* (6) dissented from.

Promoda Nath Roy v. *Asiruddin Mandal* (7) and *Harendra Kumar Roy Chowdhury* v. *Hara Kishore Pal* (8) distinguished.

The landlord cannot get a decree for enhancement of rent under Act X of 1859 on a ground which is not stated in the notice under s. 13 of the Act as a ground of enhancement.

Where a *jote* has not been found to have been originally agricultural[1] and is not agricultural at the time of the suit, the revenue Court has no jurisdiction to try the suit for enhancement of rent under the Bengal Rent Act (X of 1859).

Durga Sundari Dasi v. *Umdatannissa* (9) referred to.

♦Appeals from Appellate Decrees, Nos. 1094, 1362 and 1363 of 1936,. against the decrees of J. Younie, District Judge of Darjeeling, reversing; the decrees of D. N. Sen, Deputy Collector of Siliguri, dated Nov. 1, 1934.

(1) (1869) 12W.R. 449.
(2) (1867) 11M.I.A. 433.
(3) (1806) 1 Mac. Sel. Rep. 184 Ind. Dec. 6 (O. S.) 137.
(4) (1867) 8 W. R. 496,
(5) (1874)21 W. R. 439.
(6) (1935) S. A. 2133 and 2134 of 1933, decided on Aug. 22
(7) (1911) 15 *G.W.* N.*896.*
(8) (1920) 26 *C.* W. ST. 389.
(9) (1872) 9 B. L. R. 101.

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Appeals from Appellate Decrees preferred by defendants and plaintiff respectively.

Xhe facts of the case were briefly as follows :—

The plaintiff brought three suits, in the Court of the Deputy Collector for recovery of enhanced rent in respect of three *jotes* in the District of Darjeeling measuring 72*85, 42-78 and 22-74 acres, respectively with cess and compensation on the grounds : (?') that the price of food-stuffs had increased, (*ii)* that the productive powers of the soil had increased, *(Hi)* that the rents were below the rates, prevailing in the vicinity and *(iv)* that the rents were inadequate, having regard to the income derived by the defendants from the *jotes* in suit. The case for the defendants *inter alia* was that the tenancies being homestead lands the suits were not triable by the Court of a Deputy Collector, that the *jotes* were *kayemi mourasi mokarrari* tenancies, that notices as required by s. 13 of Act X of 1859 were not duly served and that the grounds for enhanced rentals were not true. The Deputy Collector held that the *jotes* in question having been previously advertised for sale as tenures under the Rent Act and no evidence having been adduced by the defendants to show the purpose and origin of the tenancy, the Court of the Deputy Collector had jurisdiction to try the suit. The Court further held that the *jotes* were not *mokarrari,* that enhancement could not on the facts of the case be claimed under any of the four grounds given in the plaint except ground No. *(iv), viz.,* that the rents paid by the defendants were inadequate having regard to the income derived by them from the *jotes.* The Court therefore allowed enhancement at the rate of 40 per cent, of the total assets to the tenure-holder inclusive of the collection charges and 60 per cent, to the plaintiff landlord. On appeal the District Judge held, with regard to the *jote* with an area of 72-85 acres that being situate in the heart of the town of Siliguri and being occupied by shops and houses, it was not an agricultural tenure and as such

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not liable to enhancement under Act X of 1859 and the Deputy Collector had no jurisdiction to entertain the suit. With regard to the other two suits the District Judge held that the *jotes* were mainly} agricultural in character, that Act X of 1S59 was applicable to them and that the Deputy Collector had jurisdiction to entertain the suits. He, however, held that an enhanced rent at the rate of 50 per cent, of the total assets was recoverable by the landlord.

The defendants in the two suits and the plaintiff in the first suit thereupon appealed to the High Court.

Atul Chandra Gupta and *Jitendra Kumar Sen Gupta* for the appellants in S.A. 1362 and 1363 of 1936 and for respondents in S.A 1094 of 1936. Plaintiff is not entitled to get a decree for rent at an enhanced rate on the ground on which it has been allowed by the lower appellate Court, which are grounds under the Bengal Tenancy Act. The Bengal Rent Act (X of 1859), by which the suits are governed, does not prescribe any specific grounds for enhancement of rent of intermediate tenures, although it recognises the landlord's right in that behalf. If, therefore, the enhancement is claimed on the ground of being fair and equitable, it must be subject to the condition that it is not more than what is paid by similar tenures in the *par g and* or neighbourhood, but *pargand* rate has not been proved in this case. Enhancement cannot be allowed with reference to assets alone. *Grish Chunder Ghose* v. *Ramtunoo Biswas* (1); *Dhunput Singh* v. *Gooman Singh* (2) and *Dyaram* v. *Bhobindur Naraen* (3). It has been found that the lands are not used for agricultural purposes. The provisions of Act X of 1859 have, therefore, no application to the suits and the Deputy Collector had no jurisdiction to try them.

(1) **(1869)** 12 W. R. 449. (2) (1867) 11 M. I. A. 483.
(3) **(1806)** 1 Mac. Sel. **Rep. 184** j Ind. Deo. **6** (O. S.) 137,

1938 In the matter of *Brohmo Moyee Bewail* (1); *Doorga PramnnaDeb Soonduree Dossee* v. *Omdadoonissa* (2); *Muddun mvkat Mohun Biswas* v. *Stalkart* (3) and *Durga Sundari Dasi GajmdmMoMn* v *jj mdatannissa* (4). The notice of enhancement BhmtMh. is also bad as the grounds on which it is claimed is not clearly and specifically stated therein.

*Sarat Clumdra Basal** and *Rajendra Bhusan Bahsi* for the respondent in S.A. 1362 and 1363 of 1936 and appellant in S.A. 1094 of 1936. The cases cited as restricting the enhancement to *pargand* rates are cases under s. 51 of Bengal Regulation VIII of 1793 which does not apply to a district like Jalpaiguri or Darjeeling which come under Act XIV of 1874. The landlord's right to recover enhanced rent is therefore not subject to any restriction that are laid down in those cases. If the land was) originally of an agricultural character of which there is no denial by the tenant defendants, it does not lose that character simply because buildings are subsequently erected. *Promoda Nath Roy v. A siruddin Mandal* (5), and *Harendra Kumar Roy. Chowdliury* v. *Hara Kishore Pal* (6). So the Deputy Collector had jurisdiction to try the suits. Lastly, no specific objection asi to defect of notice was taken by the defendants and it cannot be raised here.

Cur. adv. vult.

S. K. Ghose J. These three appeals arise out of three suits instituted by the landlord for enhancement of rent of three tenancies after serving notice under s. 13 of Act X of 1859 and for realisation of arrears of rent at the enhanced rate.

In Suit No. 43, which has given rise to Second Appeal No. 1094, the tenancy is *jote* Mohan Bhog which comprised 72-85 acres, held at a rental of Rs. 16-4 per year. In the notice the landlord claimed

(1) (1870) 14 W.R. 252.
(2) (1872) 17 W. R. 151.
(3) (1872) 17 W. R. 441.
(4) (1872) 9 B. L. R. 101,
(5) (1911) 15 C. W. N. 896.
(6) (1920) 26 C. W. 1ST. 389.

at an enhanced rate at Rs. 979-11-4. The Deputy ^38
Collector, before whom the suit was instituted decreed *Prasanna Deb*
the suit at Rs. 537-12. Both parties appealed to the
District Judge. The District Judge dismissed the *Ga j™dra Moh<m*
suit holding that the lands are not agricultural and (*Bhoumik.*
Act X of 1859 does not apply. Against that decision *K'Gh08e*
the plaintiff landlord has filed Second Appeal
No. 1094 of 1936.

In Suit No. 44, which has given rise to Second Appeal No. 1362, the tenancy, which is described as Nipur Bigha, comprises 47 -7 acres held at a rental of Rs. 22-8. In the notice the enhanced rent claimed is Rs. 717-7. The Deputy Collector decreed the suit at Rs. 131-4-7. Both parties appealed. The learned District Judge allowed the appeal of the tenant-partially and reduced the enhancement to Rs. 109-6-6. Against that decision the tenant defendants have filed Second Appeal No. 1362 of 1936.

In Suit No. 45 the tenancy i& described as *jote* H. G-. York or Babu Ranga Das and comprises an area of 22-74 acres held at an annual rental of Rs. 5-10. In the notice the enhanced rent claimed is Rs. 84. The Deputy Collector decreed the suit at Rs. 66-6-7. Both parties appealed. The District Judge reduced the enhanced rent to Rs. 55-5-6. Against that decision the tenant defendants filed Second Appeal No. 1363 of 1936. In the tenant's, appeals S.A. 1362 and 1363 of 1936 the first contention of the appellants is that the plaintiffs are not entitled to get a decree for rent at an enhanced rate on the ground stated in the judgment of the Court of appeal below. The suits are under Act X of 1859,. not under the Bengal Tenancy Act: therefore to justify enhancement one must look to the law as prevalent under the former Act and not to that under subsequent conditions. Now Act X recognizes that an under-tenure is liable to enhancement of rent, but it does not prescribe any specific grounds for such enhancement, as it does in the case of a *rdmfut* by s. 17. So it has been held that in the case of a

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middleman the grounds of enhancement must be those for which he was liable prior to the passing of the Act, and if the enhancement is claimed on the ground being fair and equitable, that has always been subject to the condition that the rent is not more than what is paid by similar tenures m the *pargana* or neighbourhood: *Grish Chvnder Ghose* v. *Ramtunoo Biswas* (1). That case derives authority from the Privy Council decision in *Dhunput Singh* v. *Gooman Singh* (2). The latter in its turn refers to *Dyaram* v. *Bhobindur Naraen* (3) and the note of Sir Wm. McNaughten at the foot of it which show that where the suit is against an intermediate tenant the enhancement ought to be made according to the *pargana* rate of the rents payable not by *rdiyats* bui by the holders of similar tenures. It seems to me that these decisions are not confined to the specific provision in s. 51 of Reg. VIIT of 1793, but are based on broader and more general principles. Regulation VIII is the only statutory provision bearing on the subject prior to Act X. Section 51 of the Regulation does not expressly mention ‘‘*pargana* rate[55] as a condition. In order to prevent undue exaction from *zemindars,* it lays down that rents of dependant *talukddrs* will not be enhancible except on four grounds, one of which is “the conditions under which “the *tdlukddr* holds his tenure’[5]. The principle that the *tdlukddr* is not liable to pay more than the *pargand* rate for similar tenures comes under this class, which indeed does not lay down a new rule for the first time. *Brojo Soondur Witter Mojoomdar* v. *Kalee Kishore Chowdhry* (4); *Nilmoney Singh* v. *Ram C huckerbutty* (5). Dr. Basak for the respondent landlord has pointed out that Reg. VIII does not apply to a district like Jalpaiguri or Darjeeling which comes under the Scheduled Districts Act XIV of 1874. But this really makes no difference. If tenure-holders had the privilege of not being liable to pay

(1) (1869) 12 W. R. 449.

(3) (1806) 1 Mac. *SA.* Rop. 184 ; Ind. Doc. 6 (O. S.) 137.

<2) (1867) 11 M. I. A. 433.

(4) (1867) 8 W. R. 496.

(5) (1874)21 W.R. 439.

more than the customary rate, they did not lose that privilege in the scheduled districts by the Act of 1874. The principle of justice, equity and good conscience was made a statutory principle by s. 37 of the Civil Courts Act, XII of 1857, which enacts that the Courts will apply that principle where there is no other law for the time being in force. If it be contended that the principle of "fair and equitable "rate" has always existed, no case has been shown to us in which the Court has given a decree *on that* ground without considering the question of customary rate. In this connexion attention has been drawn to the remarks of Mr. Sarada Charan Mitra in his Land-Law of Bengal, 2nd Ed., pp. 185 and 186. The learned author, after referring to Reg. VIII of 1793 and Act X of 1859, points out:—

> Suits for enhancement of rent of such tenures generally failed for want of evidence as to customary or *pargand* rates ; and, in many cases, the Courts simply granted decrees declaring the liability of the tenure to enhancement without being able to grant consequential relief.

This would not happen if "fair and equitable "rate,[55] with reference to assets, which is the only ground of enhancement in the present case, was a ready solution. So the learned author points out:—

> it was, therefore, thought necessary to lay down definite rules *in* the Bengal Tenancy Act.

But it is noteworthy that s. 7 of the Bengal Tenancy Act makes "customary rate" (subject to contract) the first condition and "fair and equitable "rate" the second condition "only where no such "customary rate exists". I must, therefore, with great respect, differ from the view of law taken by our learned brother M. C. Ghose J. in *Prasanna Deb Raikat* v. *Sabitri Sundari Dasi* (1), arising out of cognate matters. I think that in a matter governed by Act X of 1859 it is wrong to base an assessment on the analogy of the Bengal Tenancy Act of 1885, however recent the case may be/ Moreover, in the

(1) (1935) S'. *A.* **2133 and 2134 of 1933,** *decided on Aug. 22.*

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present case, even on the analogy of s. 7 of the Bengal Tenancy Act, the decision of the District, Judge is open to objection. The notice and also the plaint cite customary rate as a ground, but the plaintiffs did not choose to give any evidence on the point and there is no finding that no such customary rate exists. Therefore the plaintiffs are not entitled to a "fair "and equitable rate'[5] on the basis of assets which has been made the sole ground of enhancement.

The decision is further defective in that the aforesaid ground is not stated as one of the grounds of enhancement in the notice which was served on the defendants. In the plaint the grounds are stated to be four in number and these are all traversed in the written statement. These four grounds are :—

(*i*) That the price of food-stuffs has increased, *(ii)* that the production powers of the soils had increased, (m) that tho existing rents were below the rates of rent prevailing for similar lands in the vicinity and *(iv)* that the rents paid were inadequate having regard to the income derived fej/- the defendants from the *jot.es* in suit.

The notice under s. 13 of Act Xstates as follows:—

At present the price of crops having increased and the productive powers of the soil having increased and the rate of your rent being very small in comparison with the income of the said *jo/.e,* according to tho rate of rent of similar lands in the neighbourhood, I am entitled to claim enhancement of rent from you.

What is stated as a fourth ground in the plaint is really one of the two conditions of the third ground in the notice. The other condition which is the third ground in the plaint has not been proved. On this reasoning also plaintiffs will not be entitled to a decree for enhancement. The authorities already cited show that the tenant is entitled to notice showing all the valid grounds of enhancement. Mr. Gupta for the appellant has pointed out that on the vital question of customary rate the notice does not specify that tenure and not *raiyati* holding is the basis of calculation. The first two grounds are not grounds

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applicable to a tenure at all: *Mohima Chinder Dey* v. *Gooroo Dass Sein* (1); *Kalinath Chowdhry* v. *Humi Bibi* (2); *Gobind Kumar Chowdhry* v. *Haro Chandra Nag* (3). It is contended that no specific objection was raised in the written statement, but defect of notice was pleaded in para. 6 of the written statement and the point was raised before the District Judge. I think appellants are entitled to succeed on this point also.

The result is that Second Appeals Nos. 1362 and 1363 of 1936 are allowed. The decrees for enhanced rates of rent are set aside. The suits will be decreed at the admitted rates. The tenants will get their costs in all the Courts.

Let self-contained decrees be prepared in these appeals.

I now take up the landlord's Second Appeal No. 1094 of 1936. The same points arise in this appeal and, in view of the decision on those points in favour of the tenant defendants they are entitled to the same order as in the other two appeals. But there is a special point which has been decided by the learned Judge in their favour and that is that the whole suit is liable to be dismissed, because the lands are not agricultural and, therefore, Act X of 1859 has no application.

The first Court took a different view, but on the matter being raised before the District Judge he had additional evidence taken and he has come *to* the finding that in *jote* Mohan Bhog, barring a strip of 3 acres of paddy land, which is disputed, the plaintiffs alleging that it appertains to *jote* Mohan Bhog and the defendants alleging that it belonged to Babu Ranga Das *jote,* the rest of *jote* Mohan Bhog is used for residential purposes, the land being occupied by shops and houses. So the learned Judge has held that this *jote* is not agricultural in character. In this

(1) (1867) 7 W. B. 280. (2) (I860) 7 B. L.R. (App.)47f.n.
(3) (1870) 4 B. I*. R. (App.) 61.

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view the learned Judge has held that the provisions of Act X of 1859 has no application. He has relied for authority on *In the matter of Brohmo Moyee* (1); *Doorga Soonduree Dossee* v. *Omdadoonis* (2); *Mud dun Mohun Biswas* v. *Stalkart* (3) and *Durga Sundari Dasi* v. *Vmdatannissa* (4)> The view of Dwarka Nath Mitter J. in two of these cases was to the effect that Act X of 1859 applies so long as the rent is sought to be derived from the land, and not from the building. That view was not accepted by the senior Judges nor by the Court of appeal. Dr. Basak for the landlord appellants has contended that if the land was originally of an agricultural character it does not lose that character simply because buildings are subsequently erected. The question directly arose in the case of *Doovga Soonduree Dossee* v. *Omdadoonissa* (2) and Glover J. dealt with the point thus :—

> It is contended for the special appellant that the land was originally let as an ordinary *rdyati* tenure, and that the suit is for rent of the land and not for the rent of the houses. I do not know that this makes any difference,, and no attempt has been made to distinguish between the two kinds of rent. I understand Act X of 1859 as referring to land in the state it is in when the suit is brought, and there have been many decisions of this Court to the effect that the provisions of the Act can only apply to land which is at the time used for agricultural or horticultural purposes, and if land, orginally leased out as an ordinary agricultural tenure, becomes afterwards covered with buildings in consequence of a town or *bdzdr* growing up round about it, I apprehend that, under the rulings of this Court, it loses its agricultural character, and cannot form the subject of an enhancement suit under the rent law..... . It seems to me, therefore, that we ought in this case to follow the long current of decisions which hold that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859.

This view was accepted by the Court of appeal in the case of *Durga Sundari Dasi* v. *U mdatannissa* (4). The later cases *Promoda Nath Roy* v. *A siruddin Mmdal* (5) and *Harendra Kumar Roy Chowdhry*\ v. *Ham Kishore Pal* (6), to which Dr. Basak referred, were cases under the Bengal Tenancy Act. There is

(1) (1870) 14 W. R. 252.
(2) (1872) 17 W. R. 151.
(3) (1872) 17 W. R. 441.
(4) (1872) 9 B. L. R. 101.
(5) (1911) 15 C. W, N. 896.
(0) (1920) 26 C. W. N. 389.

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this further difference, that in the present case there is no finding that the nature of the original tenancy was agricultural. Moreover, the question in the present case is whether the revenue Court had jurisdiction to try the suit when at the time *of* the suit the land was being actually used for a non-agricultural purpose. As I have said already, *jote* Mohan Bhog has not been found to have been originally agricultural, nor was it agricultural at the time of the suit. Therefore, the learned Judge was right in holding that the revenue Court had no jurisdiction to try the suit as under Act X of 1859. The suit was, therefore, rightly dismissed.

The result is that appeal No. 1094 of 1936 fails and is dismissed with costs.

Patterson J. I agree,

Appeals in S.A. 1362 and 1363 of 1936 allowed; S.A. 1094 of 1936 dismissed.