APPELLATE CIVIL.

Before Khundkar J.

ABDUL WAHED

v.

NAGENDRA CHANDRA LAHIRI.*

1940

June 10, 11.

Fixity of rent—*Presumption—Rebuttal of presumption—Variation of rent—Evidence—Admissibility of* jamâwâsilbâki *paper—Corroboration—Record-of-rights, Entry in—Indian Evidence Act (I of 1872), ss. 32, 34—Bengal Tenancy Act (VIII of 1885), ss. 50(2), 103B(5), 106.*

A certain holding was described as a *jamâ* in the record-of-rights. The tenants filed a suit against the landlords for a declaration that the holding was *mokarari* and asked for the correction of the record-of-rights accordingly under s. 106 of the Bengal Tenancy Act. The plaintiffs, producing certain *dâkhilâs*, contended that they had been paying rent uniformly for twenty years and relied upon the presumption under s. 50(2) of the Bengal Tenancy Act. The landlords contended that there had been variation of rent and produced a *jamâwâsilbâki* paper of 1850 in their support. They relied on the presumption of correctness of the record-of-rights under s. 103B, sub-s. (5). The plaintiffs objected to the admission of the *jamâwâsilbâki* paper and contended that, in any event, under s. 34 of the Indian Evidence Act, such paper was not sufficient evidence without corroboration, to charge them with liability.

Held : (*i*) that as the *jamâwâsilbâki* paper was admissible under s. 32 of the Indian Evidence Act, there was no need for corroboration as contemplated by s. 34 of the Act;

Aktowli v. *Tarak Nath Ghose* (1) distinguished;

Dukha Mandal v. *Grant* (2) and *Habibullah* v. *Umed Ali* (3) followed;

Gopeswar Sen v. *Bejoy Chand Mahatab* (4) discussed;

(*ii*) that, though the variation of rent was not considerable, as there had been a real change having regard to its proportion to the total rent, the presumption of fixity of rent under s. 50 (2) of the Bengal Tenancy Act was rebutted;

*Appeal from Appellate Decree, No. 1034 of 1938, against the decree of R. L. Chakrabarti, Special Judge of Rangpur, dated Jan. 19, 1938, affirming the decree of R. C. Basu, Asst. Settlement Officer, Gaibandha, dated Aug. 11, 1937.

(1) (1912) 17 C.W.N. 774.
(2) (1912) 16 C. L. J. 24.
(3) (1919) I.L.R. 47 Cal. 266.
(4) (1928) I.L.R. 55 Cal. 1167.

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Munsoor Ali v. *Bunoo Singh* (1) and *Alimuddin Mollah* v. *K. S. Bonerjee* (2) dissented from;

Dearish v. *Dwijadas Chakrabarty* (3) followed;

Jogendra Krishna Banerjee v. *Provash Chandra Laskar* (4) explained;

(*iii*) that the presumption of the correctness of the entry in the record-of-rights under s. 103B(5) of the Bengal Tenancy Act was available even against a person who challenges the correctness under s. 106 of the Act and the onus lies on him to prove to the contrary.

Promode Chandra Roy Choudhury v. *Binayakdas Acharjya Choudhury* (5) followed.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

Relevant facts of the case and arguments in the appeal are sufficiently stated in the judgment.

Chandra Sekhar Sen, *Abul Quasem*, *Syed Farhat Ali* and *Amadchandra Sen* for the appellants.

Surajit Chandra Lahiri and *Benoy Krishna Mukherji* for the respondents.

KHUNDKAR J. This appeal, in which the plaintiffs are the appellants, arises out of a suit for a declaration that *khatiyân* No. 1319 of *mouzâ* Gabindapur is a *mokarari* holding and for correction accordingly of the finally published record-of-rights. The holding in question was recorded as a *jamâ* of Rs. 3-9-9. The plaintiffs appellants were the tenants and there were three sets of landlords-defendants, namely, defendants Nos. 1 to 3, who were co-sharers in the superior interest to the extent of 12 annas; defendants Nos. 4 to 7, who were co-sharers in that interest to the extent of 2 annas, and defendants Nos. 8 to 11, represented in the suit by the Court of Wards, who were co-sharers in the proprietary right to the extent of 2 as.

At the hearing of the suit, the third set of defendants did not appear to contest the plaintiffs' claim. The defence, however, was that rent was

(1) (1867) 7 W.R. (C.R.) 282.
(2) (1924) 29 C.W.N. 500.
(3) (1926) 44 C.L.J. 103.
(4) (1933) 57 C.L.J. 500.
(5) (1922) 27 C.W.N. 548.

enhancible and that the entry in the record-of-rights was correct. The defendants relied upon the presumption of the correctness of the record-of-rights, which arises under s. 103B, sub-s. (*5*). The plaintiffs, on the other hand, strenuously contended that they were entitled to the presumption under s. 50, sub-s. (*2*) of the Bengal Tenancy Act. In support of this contention they produced certain *dâkhilâs* which have been referred to in the judgment of the learned Munsif. These *dâkhilâs* had been granted either by the 12 annas co-sharer landlords, *i.e.*, defendants Nos. 1 to 3, or the 2 annas co-sharer landlords, namely, defendants Nos. 4 to 7, and no rent receipts granted by the remaining 2 annas co-sharer landlords, *i.e.*, defendants Nos. 8 to 11 were filed. It would appear from the judgment of the learned trial Court that the earliest of the rent receipts relied upon by the plaintiffs appellants was a receipt for the year, 1308 B. S., Ex. 2/C. The rent receipts filed by the plaintiffs stated that the total rent recoverable from them by all the landlords in respect of the entire *jamâ* was Rs. 3-6. But it appears also from the judgment of the learned Munsif, and this fact is admitted, that at some time after the fixing of the rent at Rs. 3-6 the tenants obtained a proportionate abatement of the rent on account of the acquisition of some land by the Government, and this resulted in the *jamâ* being reduced to Rs. 3-3-9 pies, which as stated, is the figure appearing in the finally published record-of-rights.

The plaintiffs' case was that they had been paying rent at a uniform rate for more than twenty years, as the *dâkhilâs* show. The defendants contended that the original *jamâ* was Rs. 3-1 anna 2 *qandâs* 3 *karhâs, siccâ*, that in the year 1257 B. S., *i.e.*, in the year 1850 A. D., there was a variation of rent as well as a conversion from the *siccâ* rupee into Company's coin. In support of this contention the defendants relied on a *jamâwâsilbâki* paper of that year.

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Both the Courts below have accepted the evidence of this paper and have held that, if the plaintiffs were entitled to invoke the presumption under s. 50 of the Bengal Tenancy Act, that presumption has been rebutted.

On behalf of the appellants, Mr. Sen has taken up four broad points, which Mr. Lahiri on behalf of the respondents has, in my judgment, successfully answered. As in the argument of both the learned advocates a number of decisions have been cited, a brief resume of these arguments should be set out. Mr. Sen's first point was that the *jamâwâsilbâki* papers were not admissible under s. 34 of the Indian Evidence Act, there being no evidence that these papers were properly kept, and in this connection he has gone on to argue that, even if these papers were admissible, they are not by themselves sufficient to charge the plaintiffs with liability under s. 34 of the Indian Evidence Act.

That section is as follows:—

> Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Mr. Sen's contention is that the section requires that evidence of the kind referred to therein be corroborated. He submits that the *jamâwâsilbâki* paper is the only evidence to show that the rent of Rs. 3-1 anna 2 *gandâs* 3 *karhâs* was converted into a rent of Rs. 3-6, and that there is no other evidence to show that the realisation of rent previous to 1850 was at the rate of Rs. 3-1 anna 2 *gandâs* 3 *karhâs*. In support of this contention he has relied upon the following cases:—

In *Gajjo Koer* v. *Syad Aalay Ahmed* (1), there appears the following observation:—

> The *jamâbandi* papers may be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of accounts under Act II of

(1) (1870) 6 B.L.R. (App.) 62.

1855. These papers were admittedly prepared by the *zemindâr's* own agent in the absence of the *râiyats*; and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court accepting every fact recited therein as true against *râiyats*, no *râiyats* in this country would be safe.

In *Aktowli* v. *Tarak Nath Ghose* (1), the headnote sets out the facts in the following terms:—

In an application under s. 105 of the Bengal Tenancy Act for settlement of fair and equitable rent, the landlord filed certain collection papers for showing variation of rent from time to time. The collection papers were produced by an officer of the landlord who deposed that they were in his custody. There was no evidence as to who wrote those papers, nor as to who collected the rent. There was neither any evidence to show when and by whom the entries in the collection papers were made.

At the end of p. 333 of the report, there occurs the sentence:—

We, therefore, hold that in the case before us the *jamâbandi* papers were improperly received in evidence.

Mr. Lahiri, on behalf of the respondents, draws attention, however, to the remainder of the report and particularly to what follows immediately after the sentence just quoted:—

The question next arises, what course should be adopted in this view of the matter. On behalf of the appellants it has been strenuously contended that the *jamâbandi* papers should be excluded and that the claim for assessment should be dismissed. After anxious consideration, we have arrived at the conclusion that this course should not be pursued. The objection urged in this Court does not appear to have been taken in this precise form in the Court of first instance; and it has been forcibly argued on behalf of the respondent that, if the objection had been taken, evidence of the description contemplated by s. 34 might have been adduced to make the entries admissible under s. 32 of the Indian Evidence Act. It was pointed out in the case of *Rampyarabai* v. *Balaji Shridhar* (2), that if a statement is admissible under s. 32, corroboration would not be needed in terms of s. 34. This view was accepted by this Court in the case of *Dukha Mandal* v. *Grant* (3), and is in accordance with the opinion expressed by Norman J. so far back as 1867 in the case of *Kheero Monee Dossia* v. *Beejoy Gobind Bural* (4).

It might here be pointed out that the *jamâwâsil-bâki* paper in the present case was actually admitted, not under s. 34 of the Indian Evidence Act, but under s. 32 of the Act, as would appear from the judgment of the Court of first instance. The

(1) (1912) 17 C.W.N. 774.
(2) (1904) I. L. R. 28 Bom. 294.
(3) (1912) 16 C. L. J. 24.
(4) (1867) 7 W. R. (C. R.) 533.

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language of the two sections differs materially. The provision under consideration here is contained in sub-s. (2) of s. 32 which is as follows:—

When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him or the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

A reference to the first part of s. 32 shows that such statement is a relevant fact. It is quite clear from the language of s. 32 that such statement would be admissible and would not necessarily require to be corroborated by other evidence. Mr. Lahiri has drawn my attention to the case of *Gopeswar Sen* v. *Bejoy Chand Mahatab* (1), in which most of the earlier authorities were reviewed. The headnote of that report runs as follows:—

It is not that books of accounts are not admissible under s. 34 of the Indian Evidence Act, unless corroborated. They are admissible; only, they are not sufficient by themselves to charge a person with liability.

Rebutting the presumption under s. 50 of the Bengal Tenancy Act is not, in itself, to charge a tenant with any liability. Books of accounts admitted under s. 34 of the Evidence Act may therefore be used to rebut such presumption without any corroboration.

In the report at p. 582 reference is made amongst others to the following cases:—

Habibullah v. *Umed Ali* (2), in which it would seem to have been held that if *talabbâki* papers were admissible under s. 32 (2) it was unnecessary to consider whether they were relevant under s. 34. *Dukha Mandal* v. *Grant* (3), in which it would appear to have been held that, if the entries were admissible either under s. 32 or s. 34, no corroborating evidence was necessary and that they could be used to show variation in the rent.

(1) (1928) I.L.R. 55 Cal. 1167; 32 C.W. N. 580.

(2) (1919) I.L.R. 47 Cal. 266.

(3) (1912) 16 C. L. J. 24.

Mr. Sen has placed strong reliance upon a passage in the judgment of Mukerji J. in *Gopeswar Sen* v. *Bejoy Chand Mahatab* (*supra*), which is as follows:—

> The evidentiary value of such entries, when they are sought to be used against the tenant, has got to be carefully appraised, the entries themselves being scrutinized with care and the circumstances under which they were made being carefully considered. The occasions on which they have, without corroboration, been implicitly relied on against the tenants are few and far between. The reason why they find this disfavour is that they are made behind the back of the tenants and they place the tenants entirely at the mercy of the *zemindâr* or his agents. When, however, there is nothing to suggest that they were made with a motive and all the circumstances point to their having been made in the ordinary course of business, the chances of their accuracy and of the transactions to which they relate being true are considerably enhanced. It depends, therefore, on all the circumstances of any particular case whether, used for a purpose such as the present, they would require corroboration or not for their acceptance.

Now the last portion of this observation actually assists the case for the respondents. The *jamâwâsilbâki* paper came into existence in the year 1850. The appellants admit that the increased rates stated therein, *i.e.*, Rs. 3-6 is correct. The *bona fides* of the *jamâwâsilbâki* paper has not, therefore, been seriously challenged, and it follows that there could have been no motive for concocting it.

Now, as regards the argument that the *jamâwâsilbâki* paper is the only evidence to show an increase in the rate of the *jamâ*, it is contended by Mr. Lahiri that the presumption of correctness of the entry in the record-of-rights under s. 103B, sub-s. (*4*) of the Bengal Tenancy Act is also evidence. Mr. Sen has argued that such a presumption would not be available against any person who has himself challenged the correctness of the entry under s. 106 of the Bengal Tenancy Act. Such a contention cannot be accepted. Section 106 of the Bengal Tenancy Act relates to the proceedings to be taken after the final publication of the record-of-rights, when the presumption has already arisen. Section 103B, sub-s. (*5*) says:—

> Every entry in a record-of-rights finally published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

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In *Promode Chandra Roy Choudhury* v. *Binayakdas Acharjya Choudhury* (1), the rent of a tenure had been recorded as fixed in the record-of-rights. In a suit under s. 106, Bengal Tenancy Act, for correction of the entry, the landlords alleged that the rent was enhancible and produced quinquennial registers prepared under Regulation XXVIII of 1793, and the tenants contended that the rent had remained unvaried for over twenty years and filed some road-cess returns. It was held *inter alia* that, to start with, there was a presumption in favour of the tenants from an entry under s. 103, Bengal Tenancy Act. Therefore the onus of proof rested entirely on the landlords to negative the effect of the said presumption.

Mr. Sen's next contention was that the enhanced rent of Rs. 3-6, which the appellants, indeed, have always admitted, was not a variation of the original rent in any sense of the term, but was the result of the conversion of *siccâ* rupee, in which the rent was originally paid, into Company's coin. While taking this point, Mr. Sen also submitted that the *jamâ-wâsilbâki* paper was a document lacking any certitude, because the entries therein cannot be said to be very clear and definite. Now, I have seen a translation made by Mr. Lahiri of this paper. There are several columns in it, but I need make reference only to some of those columns. The first column is headed *gujastâ jamâ*, which means the last rent, and the figures therein are Rs. 3-1 anna 2 *gandâs* 12 *karhâs*. A subsequent column is headed *ijâfa bitang*, which I think, has been correctly translated as details of increase. In this column there appear the figures 1 anna 8 *gandâs* 4 *karhâs*. A later column is headed *bâki jamâ*, which, I think may be translated as rent due or in arrears, and here the figures are Rs. 3-2 annas 11 *gandâs*. Then there occurs a column, which is of great importance. The words at the head of this

(1) (1922) 27 C. W. N. 548.

column are *kat company* and I think it is reasonably clear that this relates to the conversion of the rent of Rs. 3-2 annas 11 *gandâs*, from *siccâ* into Company's coin. The figures in that column are Rs. 3-6 annas. I am satisfied from an examination of this document that it shows not merely a conversion, but a real enhancement of rent by the sum of 1 anna 8 *gandâs* 4 *karhas*.

Mr. Sen's next contention was that the variation in the rent is too slight to destroy the presumption under s. 50 of the Bengal Tenancy Act, and in this connection he has cited the following cases:—In *Mansoor Ali* v. *Bunoo Singh* (1), it was held that a variation of one anna is not sufficient to destroy the uniformity required by s. 4, Act X of 1859. In *Alimuddin Mollah* v. *K. S. Bonnerjee* (2), Suhrawardy and Cuming JJ. held upon the authority of *Tara Kumar Ghose* v. *Arun Chandra Singh* (3), that a slight variation, even though not explained, would not operate to deprive the tenants of the benefit of the presumption under s. 50 of the Bengal Tenancy Act.

With great respect to the learned Judges, who laid down that proposition, I do not think this is any longer the law. I am indebted to Mr. Lahiri for citing the case of *Dearish* v. *Dwijadas Chakrabarty* (4), which was a Letters Patent Appeal from the decision of B. B. Ghose J. and was disposed of by Cuming and Mukerji JJ. In this decision the earlier cases, including those to which reference have been made above, were all considered. Mukerji J. delivering the judgment to the Court expressed the matter in the following words:—

> It is true that in some of these earlier cases, if not in all, there were small variations in the rent and even though they were not explained such variations were not considered sufficient to deprive the tenant of the benefit of the presumption. But on looking into these cases, it would appear that no proposition of universal application was laid down in any of them. Indeed

(1) (1867) 7 W. R. (C. R.) 282.
(2) (1924) 29 C. W. N. 500.
(3) (1922) 36 C.L.J. 389.
(4) (1926) 44 C.L.J. 103, 107.

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no such proposition could possibly have been laid down; for, it may be that a very small addition to the rent may sometimes be made so that the tenant may not be actually harassed and at the same time that he may not afterwards set up a plea to the effect that his rent has never been altered. The relevant question is whether there has been really a change or variation and not whether the same was in respect of a substantial amount; and the amount of the variation is only one of the elements to be considered in determining that question. In order to decide the question it will also have to be considered whether the tenant submitted to it.

This decision has been followed to the best of my knowledge in all subsequent cases of this Court upon the point.

In *Jogendra Krishna Banerji* v. *Provash Chandra Laskar* (1), it was indeed held, on the facts, that, as no variation of rent or a new settlement had been proved, the presumption under s. 50 of the Bengal Tenancy Act was not rebutted. Nevertheless a reference was made to the case just referred to and at p. 502 of the report, there appears this sentence :—

As has been pointed out in the decision of this Court in the case of *Dearish* v. *Dwijadas* (2), a change in the rent or the rate of rent may not be a susbtantial one; but it may all the same be a change as contemplated by section 50(2) of the Bengal Tenancy Act.

There is still a later decision of a single Judge of this Court in *Arjed Ali* v. *Sarba Shona Dasee* (3), in which Mitter J. has made the following observation :—

There have been some cases in this Court which say that in order that the presumption under s. 50(1) may be rebutted, there must not only be a real variation, that is to say, not only a mere variation on paper but a substantial one. If the decisions had been all one way, inspite of my own views, I would be bound to give effect to those decisions and make the Rules absolute. But the decisions are not uniform. In my judgment the correct principle has been laid down by Cuming and Mukerji JJ. in a Letters Patent Appeal in *Dearish* v. *Dwijadas Chakrabarty* (2) where the decision of B. B. Ghose J. was affirmed.

I can only say that the view expressed by Mitter J. is one with which I respectfully agree.

Whatever may be the law on the subject, the extent of the variation in the rent in the present case

(1) (1933) 57 C. L. J. 500. (2) (1926) 44 C. L. J. 103.
(3) I.L.R. [1937] 1 Cal. 278, 280.

cannot, in my judgment, be described as unsubstantial. As already stated, the original rent was Rs. 3-1 anna 2 *gandâs* 12 *karhâs* and the enhancement was by a sum of 1 anna 8 *gandâs* 4 *karhâs*. Certainly this is not a considerable enhancement. But, regard being had to the rental of the *jamâ* itself, the proportion which the amount of the enhancement bears to *jamâ* is a matter which cannot be brushed aside. Actually the proportion is approximately 5 pies in the rupee.

Mr. Sen's last point was that, in so far as the third set of defendants, *i.e.*, defendants Nos. 8 to 11, who are co-sharers of the proprietary interest to the extent of 2 annas, did not appear to contest the plaintiffs' claim, the Courts below were wrong in assuming that there may have been some variation in the rent separately collected by the said proprietors. In this connection, Mr. Sen contends that what we are concerned with is the rate of the entire *jamâ*, and that rate is stated correctly in the rent receipts granted by defendants Nos. 1 to 3 and by defendants Nos. 4 to 7. I think the answer to this contention is fairly obvious. It is not disputed that the rate of rent stated in the rent receipts granted by the contesting defendants is that which appears in the record-of-rights, and which was before the acquisition of the appellants' lands by the Government, Rs. 3-6 annas. Now if this rate of Rs. 3-6 is accepted—and it is quite clear that it has been accepted both by the appellants and by the respondents, there can be no doubt, for the reasons already stated, that it represents a variation of rent as shown in the *jamâwâsilbâki* paper, and not a mere increase due to conversion of the *siccâ* rupee into the coin of the East India Company. Again, I do not think the Courts below have really acted upon any assumption that there may have been a variation in the rent separately collected on behalf of defendants Nos. 8 to 11. In the suit out of which this appeal has arisen the onus was on the plaintiffs to show what

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was the actual rate at which rent was being paid to all the co-sharer landlords. They must have had the rent receipts granted by the non-contesting defendants Nos. 8 to 11, and they certainly had an opportunity of producing them. This they have not done. In my judgment, all Mr. Sen's contentions, ably and carefully put forward though they were, must fail.

The appeal is dismissed with costs. Hearing fee is assessed at two gold mohurs.

Appeal dismissed.

G. K. D.