APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

BISSESSURI DEBI CHOWDHRAIN (DEFENDANT) *v.* HEM CHUNDER CHOWDHRY (PLAINTIFF).* 1886 *August* 6.

Enhancement of Rent—Dependant taluk—Bengal Regulation VIII of 1793, *ss.* 48—52—*Bengal Regulation XLIV of* 1793, *ss.* 2—5.

A purchaser of a zemindari at a public sale may, by virtue of his ordinary right as *zemindar*, enhance the rent of a dependant taluk from time to time under the provisions of Bengal Regulation VIII of 1793, and is not barred from so doing by the provisions of s. 5 of Bengal Regulation XLIV of 1793.

The words "for the same period as the term of their own engagements with Government" in s 48 of Bengal Regulation VIII of 1793, refer to the period of the decennial settlement and do not mean "in perpetuity"—*Doorga Soondree* v. *Chundernath Bhadooree* (1), dissented from.

In an enhancement suit of the nature indicated above, the rate of rent to be fixed as payable by the under-tenure-holder must ordinarily be fixed with reference to the rents paid by ryots within the tenure itself and not with reference to those paid by ryots in the neighbourhood outside the limits of the tenure.

IN the suit out of which this appeal arose, the plaintiff was the proprietor of four annas share of Pergunnah Pukhuria Jainshye. Under a butwara the said four annas share at the date of suit constituted two different estates, No. 5513 and No. 4806.

It was alleged by the plaintiff that the said four annas share had been sold for arrears of Government revenue and purchased by the Government; that in course of time one Bhoirubendro Narain Roy became the representative of the Government, and that the plaintiff's ancestor had purchased two annas of the said share from him and obtained a putni settlement of the other two annas; and that he subsequently purchased at an auction sale the zemindari right in the last-mentioned two annas.

* Appeals from Appellate Decrees Nos. 309 and 331 of 1886, against the decrees of J. F. Stevens, Esq., Judge of Mymensingh, dated the 10th of November 1885, affirming the decrees of Baboo Parbati Kumar Mitter, Subordinate Judge of that District, dated the 30th of March 1885.

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The defendant was the owner of a dependant taluk within the aforesaid pergunnah, and paid the rent thereof in proportion to four annas to the plaintiff.

This suit was brought to enhance the rent of the four annas share of the said taluk after service of notice under s. 51 of Regulation VIII of 1793.

The grounds upon which the enhancement was sought were thus stated in the plaint:

"The rates at which the defendant has been paying rent are lower than those paid in this pergunnah by similar class of talukdars with the defendant for similar mehals and for similar lands. The rent of the said mehal has undergone variation as has been stated above. The productive powers of the lands of the said mehals have increased, and a greater portion of the area has been brought under cultivation, without the care, labour and agency of the defendant; and a new chur, by the name of Nowdanga, has appeared in the front of Jamalpur, and all these have tended to render the aforesaid mehals capable of bearing an enhanced rent; such being the case, the defendant is in every way bound to pay a higher rent.

"That having regard to the *stith jama* of the mehals in defendant's possession at the rates paid in the pergunnah and the neighbourhood by similar class of talukdars as the defendant, the rent of the four annas share of the defendant's alleged aforesaid taluk comes to Rs. 703-2-2, as shown in the subjoined Schedule No. 1, and deducting therefrom Rs. 105-7-6 on account of allowance to the defendant for her alleged talukdari interest and collection charges at 15 per cent., there remains a balance of Rs. 597-10-8, to which should be added Rs. 18-10-10 on account of road and public works cesses, irrespective of the mehals within the Municipality. The plaintiff is, therefore, annually entitled to a total rent of Rs. 616-5-6 from the defendant."

It was further stated in the plaint that a previous suit for enhancement of rent was brought by the plaintiff's predecessor in title against the defendant's predecessor in title. That the aforesaid suit was decreed on the 25th July 1851, the defendant's plea of the rent of the taluk having been fixed in perpetuity being found to be untenable.

In accordance with that decree a *jureep hustbood* having been made, the annual rent was fixed at Rs. 375-1.

For the purpose of this report it is only necessary to notice the following points raised in the defence to the suit, as they alone were material in the view of the case taken by the High Court:—

1*st*.—That the rent of the taluk having been fixed in accordance with the enhancement decree of 1851, it could not be further raised.

2*nd*.—The rent of the taluk having been fixed originally in perpetuity, it was not *now* (*i.e.*, after the first enhancement decree) liable to enhancement.

3*rd*.—That the increased rent demanded was excessively high.

As regards the first two objections the Court of first instance was of opinion (*a*) that as the taluk had been once enhanced in 1851, it was not protected from enhancement under s. 16 of the Rent Act; (*b*) that the contention that a dependant taluk once enhanced cannot be enhanced a second time was unfounded; and (*c*) that the decree dated the 25th July 1851, had not the effect of fixing the rent of the taluk in perpetuity. With reference to (*b*) and (*c*) the Court of first instance discussed the cases of *Doorga Soondree* v. *Chundernath Bhadooree* (1), *Mohiny Mohun Roy* v. *Ichamoyee Dassea* (2), and *Bunchanund* v. *Hurgopal Bhadery* (3), cited before it, and came to the conclusion that they did not support the contention put forward in the defence.

For fixing the rent of the taluk the Court of first instance issued a commission to a Sub-Deputy Collector, who, after taking evidence regarding the rates paid by the ryots in the adjacent places outside the limits of the taluk in respect of lands of similar description, prepared a rent-roll of it. The Court accepted the report of the Commissioner and deducting 20 per cent. on account of collection charges and the talukdari profits from the gross assets fixed by the Commissioner in the way mentioned above, decreed the suit, assessing the annual rent at Rs. 440-11.

The defendant appealed against this decree, and urged amongst others the following points:—

(1) S. D. A., 1852, p. 642. (2) I. L. R., 4 Calc., 612.
(3) 1 Sel. Rep., 192.

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(1). That the rent of the tenure having been already once enhanced since the permanent settlement, could not be enhanced a second time.

(2). That the rates ascertained should have been those of the villages comprised in the tenure itself, and not those of adjacent villages.

The District Judge who heard the appeal concurred with the first Court substantially for the reasons given by it in deciding the first point against the appellant.

With reference to the second point he said :—

"It was found impossible to determine the rent of the tenure in question by comparison with the rents of other similar tenures. It is assumed in objection 5 (para. 2 above mentioned) that no attempt has been made to ascertain what are the rates actually paid by the ryots in the tenure, and that the rent payable by the appellant has been calculated on fancy rates which in fact are not prevalent within the tenure. This does not, however, appear to be the case. As I understand it, both parties had full opportunity of producing to the lower Court whatever evidence they thought proper as to the rates current within the tenure, and the lower Court took all such evidence as was adduced before it; but that evidence was checked by the Sub-Deputy Collector's inquiries as to the rates of adjacent villages. I do not think that there was anything to object to in this."

The District Judge then dismissed the appeal upholding the decree of the lower Court.

In the present second appeal to the High Court, these same two points were again urged on behalf of the defendant appellant.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerji*, and Baboo *Girish Chunder Chowdhry*, for the appellant.

Mr. *Woodroffe*, Baboo *Guru Dass Banerji*, Baboo *Jogesh Chunder Roy*, and Baboo *Kishori Lall Sircar*, for the respondent.

The judgment of the High Court (MITTER and GRANT, JJ.) sufficiently states, for the purpose of this report, the nature of the

arguments and the authorities relied on, and was as follows (after setting out the facts stated above):—

With reference to the first point it has been urged (*a*) that in 1851 the plaintiff's predecessor in title having obtained a decree for enhancement under section 5 Regulation XLIV of 1793 by virtue of his auction-purchase right, it would be contrary to the intention of the Legislature, as expressed in that Regulation, to allow the plaintiff to raise the rent again; (*b*) that under the provisions of Regulation VIII of 1793, it was intended that a zemindar should have the power of enhancing the rent of a dependant taluk where he establishes such right under section 51 of the said Regulation, once for all, and that he has no right to enhance the rent a second time; (*c*) that supposing the contention (*b*) is untenable, a zemindar seeking to enhance the rent of a dependant taluk a second time, on the ground that he is entitled to enhance the rent by the special custom of the district, cannot succeed by proving the existence of such custom generally, but must establish that the custom upon which he relies enables him to enhance the rent *a second time*.

In support of (*a*), the case of *Mohiny Mohun Roy* v. *Ichamoyee Dassea* (1) has been cited. Although this case supports the contention, still it does not help the appellant, because the plaintiff is seeking in this case to enhance the rent of the taluk, not by virtue of his right of an auction-purchaser, but by virtue of his ordinary right of a zemindar to enhance the rent of an under-tenure from time to time. In the case cited, the plaintiff's claim for enhancement under this ordinary right was disallowed, because the defendant established that her tenure was a *mokurari istemrari* one. In the present case the defendant has failed to prove this fact, and in the previous suit, which resulted in the decree of 1851, the contention that the taluk was *mokurari istemrari* was negatived. Although therefore the contention (*a*) is good, it has no effect upon this appeal.

In support of (*b*), the case of *Doorga Soondree* v. *Chundernath Bhadooree* (2) has been cited. There are some observations in this judgment which support the contention. The question

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for decision, however, was the true construction of a decree of 1806, by which the rent of the dependant taluk in question in that case had been previously enhanced. The lower Court held that the decree of 1806 fixed the rent in perpetuity. The Sudder Court in upholding that construction says:—

"The proprietor, from whom the plaintiff purchased, sued, in the case decided in 1806, to have the talukdari rent fixed, *according to clause* 1, *section* 51, *Regulation VIII* of 1793, at Rs. 4,581 per annum, and the rents for back years realized for him at that rate. The mention of the section in question carries with it the intention of permanency in regard to the jama then demanded: for that section had application solely to persons of the class of 'dependant talukdars.' Now the principle of settlement with dependant talukdars prescribed by the law, section 48, Regulation VIII of 1793, was that the zemindars were to settle with them 'for the same period as the term of their own engagements with Government,' that is, *in perpetuity*, after the decennial settlement made with the zemindars had been extended to a permanent settlement. Different provisions are made in sections 48 to 51 for regulating the rate of rent to be paid by dependant talukdars, but the rate, as once adjusted upon those rules, was to be settled as the jama of the zemindari. It is only as to the 'remaining lands' of the zemindaries, that is, all *but* the lands of dependant talukdars, that section 52 of the Regulation goes on to say that the zemindars are entitled to lease them, 'under the prescribed restrictions, in whatever manner they may think proper.'"

With deference to the learned Judges who decided that case, it seems to us that the words "for the same period as the term of their own engagements with Government" in the above extract have been erroneously held to mean "*in perpetuity*." The Regulation VIII of 1793 was a re-enactment with certain modifications of the Regulation which was passed on the 23rd November 1791 (see Preamble) embodying the principles on which a *decennial* settlement of the revenue had been made in Bengal on the 18th September 1789. In 1791 this decennial settlement had not been made permanent. The "period" mentioned in the above extract, *i.e.* in section 48 of Regulation VIII

of 1793, therefore means the period of the decennial settlement, *i.e.* ten years. That this is the right construction appears to be clear from the provisions of section 2 Regulation XLIV of 1793 which was passed on the same date on which Regulation VIII of 1793 was passed. Section 2 Regulation XLIV of 1793 says: "No zemindars, independent talukdars, or other actual proprietors of land, nor any person on their behalf, shall dispose of a dependant taluk to be held at the same or at any jama, or fix at any amount the jama of an existing dependant taluk for a term exceeding ten years, &c. &c." It provides therefore that no proprietor shall fix at any amount the jama of an *existing* dependant-taluk for a term exceeding ten years. This provision and the provision in section 48 of Regulation VIII of 1793 would be contradictory to one another, if we construe the words "for the same period" in the latter as meaning *in perpetuity*.

Even if the words "the same period" in section 48 Regulation VIII of 1793, mean "*in perpetuity*," it does not provide that the rent of the taluk is to be *fixed in perpetuity*. On the other hand, section 48 itself and the three following sections contain provisions which show that there may be dependant taluks with variable rents.

We have not been referred to any provision in the Regulations which either expressly or impliedly shows that the rent of a dependant taluk once enhanced cannot be enhanced again. On the other hand the provisions of sections 48 to 51 indicate that the burden of proof being thrown upon the zemindar, the question of enhancibility of a dependant taluk would depend upon the terms of the contract under which it has been created. The right given to a zemindar to enhance the rent of a dependant taluk under s. 51, by the proof of the special custom of the district entitling him to do so is, in our opinion, also referable to the terms of the contract. Because whenever such custom is established, it would be presumed, unless the contrary appeared, that the parties contracted with reference to it, *i.e.*, having regard to the custom the parties intended that enhancibility of the rent would be one of the incidents of the tenure. We are, therefore, unable to accept the contention (*b*) as valid.

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The contention (*c*) is in our opinion equally untenable. If the enhancibility of the tenure be established by proof of the special custom of the district as one of the incidents of the tenure, it would be for the tenant to establish, on the other hand, that that incident is in any way qualified. We are, therefore, of opinion that the lower Courts are right in deciding that the defendant's tenure is liable to enhancement.

But the contention of the appellant regarding the assessment of the rent is in our opinion valid. The assessment should be fixed with reference to the rates of the villages comprised in the tenure, *i.e.*, it should be fixed upon the existing assets of the taluk. Ordinarily this is the principle upon which the new rent should be fixed. But there may be cases where the talukdar, by making improvident grants of leases at fixed rents, may have reduced the assets of the mehal so as to render the application of this principle unjust to the zemindar. But that case was not set up in the plaint here.

The District Judge also accepts this contention as good; but he thinks that the lower Court acted in accordance with it. In his opinion the lower Court referred to the evidence of the neighbouring rates in order to check the evidence regarding the rates paid by the ryots of the villages comprised in the tenure. But in this respect the District Judge has fallen into an error. The Court of first instance, as it appears from its judgment, fixed the rent with reference to the neighbouring rates only. It accepted the report of the Sub-Deputy Collector, and it has been shown to us that that report wholly proceeded upon the rents paid by the ryots in the neighbourhood outside the limits of the taluk.

We are, therefore, of opinion that the enhanced rent has been fixed on a wrong principle. It should be fixed upon the existing assets of the taluk allowing to the talukdar the deduction that has been allowed by the lower Courts. We set aside the decree of the lower Courts only as regards the rent fixed by it, and remand the case to the Court of first instance to assess the rent again upon the existing assets of the taluk. We leave it to the discretion of that Court to decide whether it should allow the parties to adduce fresh evidence or not. Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*