Before Mr. Justice Prinsep and Mr. Justice Beverley.

GOURI PATTRA (DEFENDANT No. 156) *v.* H. R. REILY, AND IN HIS PLACE LALA BUN BEHARY KAPUR, MANAGER, BURDWAN RAJ ESTATE (PLAINTIFF).* 1892 *May* 30.

Bengal Tenancy Act (VIII of 1885), ss. 38, 52, sub. s. 2, cl. (c), Chap. X, s. 101, sub. s. 2, cl. (a), s. 104, sub. s. 2—Ancient holdings—Additional rent for excess lands—Onus of proving lands in excess of area originally let—Permanent deterioration—Liability to additional rent—Duty of settlement officer.

Section 104, sub-section 2 of the Bengal Tenancy Act is subject to the provisions of section 52 of the Act.

The mere fact that on a measurement made by a zemindar under the authority of Government given under Chapter X of the Bengal Tenancy Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent receipts, does not necessarily prove that he is entitled to additional rent for the excess areas.

Where settlements or holdings are of very old date and lands are let out by areas ascertained without any accurate survey, but as contained within certain recognised boundaries, for instance, by reference to other holdings, it is incumbent upon the zemindar seeking enchancement of rent very many years after the original settlement, to show that the lands held by the ryots are in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the settlement was made on the basis of measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other other cause he had hitherto lost.

A liberal interpretation should be put upon the word "permanently" in section 38, sub-section 1, clause (*a*), and the word construed with reference to existing conditions. It cannot be said that a deterioration is not permanent, only because by the application of capital and skill it might be removed.

In determining the liability to additional rent, the settlement officer is by section 52, sub-section 2, clause (*c*) bound to consider the length of

* Appeal from Appellate Decree No. 560 of 1891, against the decree of J. Pratt, Esq., Judge of Midnapore, dated the 29th of December 1890, reversing the decree of Baboo D. L. Roy, Settlement Officer of Sujamoota, dated the 14th of April 1890.

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time during which the tenancy has lasted without dispute as to rent or area.

Although only an occupancy ryot can bring a suit under section 38, the principles laid down in that section ought to be taken into consideration in all proceedings for settlement of rent, whatever be the status of the ryot.

THIS appeal arose out of an application under section 104, clause 2 of the Bengal Tenancy Act, 1885.

The Court of Wards under section 101, sub-section 2, clause (*a*) of the Bengal Tenancy Act obtained an order from Government directing proceedings under Chapter X of that Act in respect of an estate in the southern part of the district of Midnapore appertaining to the Burdwan Raj estate. As the results of these proceedings it *primâ facie* appeared that the lands held by the ryots were in excess of the areas specified in their rent receipts and in the zemindari papers. Accordingly an application was made under section 104, sub-section 2, to the Settlement Officer to settle a fair and equitable rent in respect of such lands as were in excess of those for which the ryots were paying rent. The ryots in their petition stated that their lands had been held in *jote* since the time of their respective ancestors, that they had always been in possession and enjoyment of the lands within their present boundaries, that they had never cultivated any land in excess thereof, and that they had never exceeded those boundaries. They further stated that recently the quality of the lands had seriously deteriorated, and contended that on a fresh settlement they were entitled to a reduction of rent. They also prayed for exclusion of *abwabs* from their rents. The Settlement Officer dealt with the cases of all the ryots in one judgment. He found that there was a custom prevalent under which, according to a certain scale, remissions had invariably been granted on account of fallow land, and that the rents were variable according to this scale both by the custom and as part of the contract between the landlord and the tenants, that the holdings of the ryots had never actually been measured, and that the areas had been entered in the zemindari papers not according to any actual measurement, but by guess work. With regard to the question whether the land had permanently deteriorated within the meaning of section 38, sub-section 1, clause (*a*) of the Bengal Tenancy Act, and the tenants were in consequence

entitled to a reduction of rent, the Settlement Officer found that deterioration in the quality of the soil of the holdings had been admitted by the landlord's witnesses, and the causes were "stated to be the silting up of the draining *khal* and the Kalinga river, and the bad state of the protective ridges which" were "by custom or contract repaired at the cost of the landlord:" that the deterioration had lasted for seven years, had been uniform and was likely to continue unless the drainage *khals* were "thoroughly cleansed of the silt of years at a vast expense," and he came to the conclusion that the deterioration was permanent within the meaning of the section. Accordingly the Settlement Officer fixed certain rates of rent to be paid by the ryots.

On appeal the Special Judge held that no custom of remission of rent on account of fallow land had been proved. He held the tenants were liable to pay increased rent for the excess lands found by measurement to be in their possession. He disallowed their claim for reduction of rent on account of deterioration of the soil, on the ground that only occupancy ryots could put forward a claim under section 38, and the deterioration could not be said to be permanent, as it could be removed. Accordingly the Judge directed the Settlement Officer "to revise the *jamabandi* record of rights and all other papers" in accordance with his directions. One of the tenants, Gouri Pattra, appealed to the High Court.

Baboo *Mohini Mohun Roy* and Baboo *Madhabanunda Bysak* for the appellant.

Mr. *Evans* and Baboo *Ram Charan Mitter* for the respondent.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The minor Maharaja of Burdwan, whose estates are under the Court of Wards, has, under section 101, sub-section 2 (*a*) of the Bengal Tenancy Act, obtained an order from Government directing proceedings under Chapter X of that Act in respect of an estate in the southern part of the district of Midnapore.

The result of this measurement having *primâ facie* shown that the lands held by the ryots are in excess of the areas specified in their rent receipts and the zemindari papers, an application was made under section 104, sub-section 2, to the Settlement Officer to

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settle a fair and equitable rent in respect of such lands as are in excess of those for which they were paying rent.

The tenants—and there are 159 of them in the case now in appeal before us—represented that their lands had been held in jote since the time of their respective ancestors, that they had always been in possession and enjoyment of the lands within their present boundaries, that they had never cultivated any land in excess thereof, and that they had never exceeded those boundaries. They also represented that recently the quality of those lands had seriously deteriorated, so that in a fresh settlement they were entitled to an abatement of rent.

The Settlement Officer dealt with the cases of all these ryots in one judgment. He found, first of all, that there was a custom prevalent under which remissions had invariably been granted on account of fallow lands. In the next place he found that it had not been shown that the holdings of these tenants had ever been measured. In fact, so far as we can learn from his judgment, he seems to have found that there was nothing to show the circumstances under which the holdings or tenures were originally created. He found on the landlord's collection papers and on the ryots' rent receipts that it did not appear that the areas of the several holdings were ever actually measured, and he consequently held that these areas were entered in these papers by "guess work," that the zemindar did not prove what the holdings originally were, or that they contained only the areas entered in his collection papers and in the ryots' rent receipts. The Settlement Officer next proceeded to consider the plea for abatement urged by the tenants, that is, whether the quality of the lands had deteriorated. He found that the deterioration had been practically admitted by the landlord. He says:—"He (the landlord) could not deny that. In sheer despair he files a petition to say that this Court has no power to reduce rents under section 38," and he disallowed this objection. The Settlement Officer accordingly fixed certain rates of rent to be paid by the tenants.

On appeal, the Special Judge has held that no custom of remission of rent on account of fallow lands was proved. As this matter has not been discussed before us in appeal, it is unnecessary for us to express any opinion on the ground on which the Judge

has arrived at this conclusion. The Judge has next found that the tenants were liable to pay increased rent on the excess lands found by measurement to be in their possession, and he has also found that the rent is payable at Rs. 2-4 a bigha. He disallowed the claim made by the tenants on account of deterioration of the quality of the lands held by them. He has apparently admitted that the fertility of the lands has been considerably impaired by deposits of sand and inundations, in consequence on the one hand of silting up of tidal *khals* which have not been excavated for some years past, and on the other from defective protection by embankments. But he considers that these evils are not irremediable, and that consequently any deterioration resulting therefrom cannot be regarded as permanent. The Judge has also commented on the fact that one of the witnesses says that in years of deficient rain there are bumper crops, and he says that he has ascertained from the Civil Court ameen that this was what happened in the past year. He has accordingly rejected the claim for abatement of rent. He has given certain other directions on minor points, and directed the Settlement Officer to revise the *jamabandi* in accordance with the instructions contained in his judgment.

Two points have been raised before us in second appeal; first, whether the plaintiff, zemindar, is entitled to any enhancement of rent from the tenants on account of an increase in the areas of the lands held by them; and, next, whether the tenants are entitled to claim abatement of rent in consequence of deterioration in the fertility of their lands from causes already stated.

Now, a tenant is by the Bengal Tenancy Act, section 52, sub-section 1, clause (*a*), declared to be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which, having previously belonged to the tenure or holding, was lost by diluvion or otherwise without any reduction of the rent being made. (This exception does not apply to the present case.) In order, therefore, to establish the liability of the tenants, it is necessary for the zemindar to prove that the lands held by them are in excess of the areas for which rent has been previously paid.

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Sub-section 2 declares that in determining this area, the Court shall, if so required by any party to the suit (and this, we understand, has been required by the ryot defendants in the present case), have regard to the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or holding; next, the length of time during which the tenancy has lasted without dispute as to rent or area; and, lastly, the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit. Section 104, sub-section 2, under which the zemindar in this case claims the settlement of a fair and equitable rent in respect of lands held by the tenants in excess of those for which they now pay rent is, in our opinion, subject to section 52 and its provisions just described. The question would therefore be, what are the lands for which the tenants are now paying rent? and next, are their lands held by them in excess of such lands? To determine the first point, it would become necessary to have regard to the circumstances set out in section 52, sub-section 2, of the Bengal Tenancy Act. The mere fact that on a measurement made by a zemindar under the authority of Government given under Chapter X of the Bengal Tenancy Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent receipts, would not necessarily prove that he is entitled to additional rent for the excess areas. There is no evidence that at any previous time there has been a measurement of any of these lands, and it is admitted that all the holdings are of very old date. In our experience, too, in such instances lands were let out by areas ascertained as the Settlement Officer has found by "guess work;" that is to say, without any accurate survey but as contained within certain recognized boundaries, either by reference to other holdings, and it constantly happens in the case of lands such as those in this case that even this description is wanting. Settlements made in such a manner would seem to show that the object of the zemindars was to settle ryots on the lands and to have them brought under cultivation rather than to be particular in the description of the lands let. In such a case it would be incumbent upon the zemindar who

seeks an enhancement of rent, or, as he would term it, a settlement of rent, on excess lands very many years after the original settlement of the royts to show that the lands held by the tenants fall within that description; that is to say, that they are in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other reason he had hitherto lost. On the finding of the Settlement Officer that it is not proved that the areas of the several holdings were ever measured according to any actual measurement, but that they were entered in the zemindari papers by guess work, it would be impossible merely on those entries to find that the areas were accurately stated, so as to define the exact extent of each holding, and render the tenants liable to additional rent for any lands in excees of those areas. The Judge has disposed of this part of the case by stating that the supposition that the measurements were originally made by guess is *primâ facie* unreasonable. We cannot accept this opinion. It is for the zemindar who seeks for a settlement of these lands to show that they are in excess of those for which rents are being paid, and to do this, it is for him to show what those lands are, what were the terms of the original settlement, and whether it was by any, and if so, by what, process of measurement. At the highest, he would be entitled to additional rents only by an application of the same process. As we understand the object of Chapter X of the Bengal Tenancy Act, it is to enable landlords and tenants to know exactly their relative positions towards one another, and not to disturb previously existing relations, unless it can be shown that they have terminated. The zemindar in this case is bound to show how the areas in the last settlement with the ryots were ascertained, and that the ryots are now in possession of excess lands and consequently liable to pay additional rent therefor.

Other points have been overlooked; for instance, in determining the liability to additional rent, the Settlement Officer, is by section 52, bound to consider the length of time during which the tenancy

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has lasted without dispute as to rent or area [section 52, sub-section 2, clause (*c*)]. None of these important conditions seem to have been present to the mind of the Judge, while many of them were overlooked by the Settlement Officer. We cannot therefore think that the rights of the parties in this important matter have been properly determined.

Next, as to the objection in regard to the deterioration of the fertility of the lands.

We are of opinion that the Judge has fallen into several errors of law. No doubt it is only an occupancy ryot who is authorised by the Act to bring a suit under section 38, but the principles laid down in that section ought clearly to be taken into consideration in all proceedings for the settlement of rent, whatever the status of the ryots. Again, we think the Judge is wrong in the interpretation he has put on the word "permanent." He seems to think that a deterioration ought not to be held to be permanent if by the application of capital and skill the cause of deterioration might be removed. We are of opinion that a more liberal interpretation must be put on the word, and that it must be construed with reference to existing conditions.

No doubt there may not be any deterioration of so serious a character as to permanently affect the land irrespective of any outlay of capital; but the facts admitted by the plaintiff in this case show clearly that under existing conditions the deterioration must form a serious element of consideration in properly determining any rates of rent to be payable by the tenants. And it is for the Settlement Officer to consider, as regards the old rent payable, whether the tenants are entitled to claim any abatement on this ground. It will be for the Settlement Officer first of all to find whether the zemindar has proved his right under section 52, to obtain additional rent on the excess areas, and if this be found in favour of the zemindar, it will then be for the Settlement Officer to determine what are fair and equitable rates of rent on such lands. The case must be returned to the Settlement Officer in order that he may proceed in accordance with the instructions and frame a record of rights; a settlement should be made accordingly.

Appeal allowed and case remanded.

C. D. P.