contention. That was a case in which it was sought to make the purchasers of mortgaged properties personally liable for the mortgage debt. The Judicial Committee, in a very short judgment, said as follows, "Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption, who, their Lordships understand are defendants Nos. 2 to 11, of whom only five are respondents here. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant fails". The position occupied by the respondent is in no way different from the position which a purchaser of the equity of redemption occupies. The utmost that can be said in favour of the appellants is that they had a charge upon the tenure in the hands of the respondent. The respondent was the purchaser of the tenure which was already subject to a charge in favour of the appellants. He is in the same position as the purchaser of an equity of redemption, and, in my opinion, no personal liability was incurred by him by such purchase.

In my opinion the decision of the learned Subordinate Judge is right and must be affirmed. I would dismiss this appeal with costs.

ROSS, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller C. J. and Adami, J.

BISHUN PRAGASH NARAYAN SINGH

v.

ACHAIB DUSADH.*

1922.

March. 27.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 52(1) (*a*)—*Additional rent, whether landlord entitled to, when*

* Letters Patent Appeal No. 24 of 1921.

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area of holding at inception of tenancy unknown—area and rent entered in previous Record-of-Rights and area shewn to be increased in later Record-of-Rights.

Section 52(1)(*a*) of the Bengal Tenancy Act, 1885, does not limit the tenant's liability to pay additional rent to cases where the area is in excess of that comprised in the settlement at its inception. The landlord is entitled to additional rent in all cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid.

Therefore, where there was nothing to shew when the tenancy was created or how the rent was assessed or whether there was any measurement of the holding at its inception, but the Record-of-Rights published in 1898 shewed that the holding comprised a certain area for which a certain rent was paid, and the Record-of-Rights published in 1917 shewed that the area of the holding for which rent has been paid had increased, *held* that the landlord was entitled to additional rent on the difference between in the areas of the holding as shewn in the two Records-of-Rights.

Gouri Pattra v. *H. R. Reilly*(1), *Rajendra Lal Goswami* v *Chunder Bhusan Goswami*(2), *Rajkumar Pratab Sahay* v. *Ram Lal Singh*(3) and *Ratan Lal Biswas* v. *Jadu Halsuna*(4), distinguished

Durga Priya Chowdhuri v. *Nazra Gain*(5) and *Akbur Ali Mian* v. *Mussammat Hira Bib*(6), referred to.

The facts of the case material to this report are stated in the judgment appealed from, which was as follows :—

The question in this apeal is whether the appellants are liable to pay additional rent under section 52 (1) (*a*) of the Bengal Tenancy Act. The Assistant Settlement Officer has found that the plaintiff has failed to prove either the actual encroachments or that there was a practice of settlement of land by measurement in the estate of the plaintiff and how the measure adopted for the purpose compared with the present survey measure. He, therefore, dismissed the claim in respect of all the tenants except the present appellants against whom he passed a decree on the ground that they were holding lands according to the recent survey measurement in excess of the lands measured in their names at the previous settlement. The learned District Judge upheld this decree.

(1) (1893) I. L. R. 20 Cal. 579.
(2) (1901-02) 6 Cal. W. N. 318.
(3) (1907) 5 Cal. L. J. 538.
(4) (1905-06) 10 Cal. W. N. 46.
(5) (1920-21) 25 Cal. W. N. 205.
(6) (1912) 16 Cal. L. J. 182.

Now the law has been consistent from the decision in *Gouri Pattra* v. *H. R. Reilly*(1) downwards, that the landlords must prove that the lands in respect of which an additional rent is claimed are lands held in excess of those for which rent was paid and that in order to prove such excess the quantity included in the tenancy at its inception must be determined. The same view has been taken in *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami*(2) and in *Rajkumar Pratab Shaya* v. *Ram Lal Singh*(3). The criterion, therefore, is the area of the holding at the inception of the tenancy and not an intermediate measurement such as has been adopted in this case.

It was argued, however, on behalf of the respondent that the cases referred to above cannot be considered to be authorities where there have been two survey measurements, inasmuch as the former survey measurement provides a scientific standard by which the present may be tested and therefore it is no longer necessary to prove the area at the inception of the tenancy. Now, admittedly there is no authority in support of this view and I can see no justification in principle for such an argument. What the plaintiff has to prove is that the tenants whom he seeks to assess with additional rent are holding more lands now than they held in the original settlement and the fact that they have been found to hold more lands than they held in some intermediate period does not tend in any degree to establish what the plaintiff has to prove.

The only other argument on behalf of the respondent was that this point now raised was not taken before the learned District Judge. It may be that the matter has been argued in a different manner in his Court, but that the point is essentially the same, would appear from the judgment of the District Judge itself.

The result is that this apeal must be decreed in part to the extent that the decree of the Lower Courts will be modified by dismissing the claim under section 52(1)(*a*) of the Bengal Tenancy Act.

The plaintiff appealed under Clause 10 of the Letters Patent.

Sultan Ahmed (with him *Harnarayan Prasad*), for the appellant.

Muhammad Tahir, for the respondents.

DAWSON MILLER, C. J.—This is an appeal under the Letters Patent from the decision of a single Judge of the Court overruling the decision of the Special Judge who had affirmed that of the Assistant Settlement Officer.

The appellant took proceedings under section 105 of the Bengal Tenancy Act as landlord against a large

(1) (1893) I. L. R. 20 Cal. 579. (2) (1901-02) 6 Cal. W. N. 318.
(3) (1907) 5 Cal. L. J. 338.

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number of tenants claiming in some cases enhancement of rent under section 30 of the Act and in other cases additional rent under section 52(*a*).

The present appeal is concerned only with the claims under the latter section in respect of land held by the tenants in excess of the area for which rent had been previously paid by them. In certain cases it was found that the tenants had been in occupation of their holdings since before the Survey and Settlement operations of 1898 and paying rent therefor to the landlord, and that the settlement and record-of-rights finally published in March 1917 showed that although the rent remained the same, the area of their holdings was in excess of that for which they had been paying rent according to the previous settlement. The Assistant Settlement Officer before whom the case came held that in the cases mentioned the landlord was entitled to an additional fair rent for the excess areas after making an allowance of 5 *per cent.* for probable difference in area extraction. An appeal by the tenants to the Special Judge was dismissed. On second appeal to this Court the case came before Mr. Justice Ross who took the view that in all such cases, in order to prove that the lands in respect of which an additional rent is claimed are in excess of the area for which rent was previously paid, the landlord must show that the area included in the tenancy at its inception was less than that subsequently shown by measurement to be in occupation of the tenant. It followed from this, in his view, that although the tenants' holdings were proved by scientific measurement at the previous survey and settlement operations, made some twenty years earlier, to have been less than that for which they were still paying the same rent as shown by the subsequent survey, the landlord could not recover any additional rent in respect of the excess area. For this finding he relied upon the decisions in the following cases: *Gouri Pattra* v. *H. R. Reilly* (1), *Rajendra Lal Goswami* v.

(1) (1893) I. L. R. 20 Cal. 579.

Chunder Bhusan Goswami (1), and *Rajkumar Pratab Sahay* v. *Ram Lal Singh* (2).

With great respect to the learned Judge, I am unable to concur in the view taken by him. On referring to section 52(*a*) of the Bengal Tenancy Act it does not appear that the tenant's liability to pay additional rent is limited to cases where the area is in excess of that comprised in the settlement at its inception, but merely to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him. The section provides as follows:

> "52. (*1*) Every tenant shall—
>
> (*a*) 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".

The exception in the latter part of this section does not apply to the present case. By clause (*b*) of the section the tenant is entitled to a reduction of rent in similar circumstances where the measurement shows a deficiency in the area of his tenure or holding as compared with the area for which rent has been previously paid by him. And in the case of some of the tenants the Assistant Settlement Officer allowed such reductions but we are not concerned with them in the present appeal.

Where no previous measurement has been made upon a scientific basis from which the actual area of the land held by the tenant can be accurately determined and compared with the area proved to be held at the date of the claim, no doubt the landlord is confronted with a more serious problem in proving an excess of area, and generally speaking he could only discharge the burden of proof in the case supposed by showing that the area of the tenure or holding at its inception was less than that subsequently shown by proper

(1) (1901-02) 6 Cal. W. N. 318. (2) (1907) 5 Cal. L. J. 538.

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measurement to be in occupation of the tenant. Consequently it was held in *Gouri Pattra* v. *Reilly* in 1893 (1), that the mere fact that a measurement made under Chapter X of the Bengal Tenancy Act, 1885, showed the tenants to be in occupation of lands in excess of the areas shown in the *zamindari* papers and rent receipts did not necessarily prove that the landlord was entitled to an additional rent. It is important to bear in mind that in that case it was found that at no previous time had there been a measurement of the lands in suit, and that the actual areas let out were originally ascertained by guess work without any accurate survey, and it was the areas so arrived at that were entered in the landlord's papers. The Court thought it would be impossible in these circumstances to find that the areas were accurately stated in the landlord's papers. They added that it was for the *zamindar* to show that the lands were in excess of those for which rents were being paid and that to do this it was for him to show what those lands are and what were the terms of the original settlement and what was the process of measurement, if any, adopted. This has been relied on for the proposition that in all cases, even if there has been an intermediate settlement, the landlord must go back to the inception of the tenancy and prove what area was then settled. I do not think the decision can be held to support this view. In dealing with the object of Chapter X of the Bengal Tenancy Act, the judgment states that it is to enable the landlords and tenants to know their relative positions towards one another and not to disturb previously existing relations unless it can be shown that they have terminated, and added, "The *zamindar* in this case is bound to show how the areas in the last settlement with the *raiyats* were ascertained and that the *raiyats* are now in possession of excess lands and consequently liable to pay additional rent therefor". The settlement and record-of-rights defines the relationship between landlord and tenant in various respects including the area of the holdings for which rent is paid and is presumed to represent

(1) (1893) I. L. R. 20 Cal. 579.

what is the relationship between them until the contrary is proved. The Settlement in 1898 was made in the presence of both parties and accepted without objection as representing the area for which rent is paid. The effect of such a settlement would be to throw the onus upon the party questioning it, in this case the tenant, to show that it did not accurately represent the true state of affairs. In the present case therefore, it must be presumed that the Settlement of 1898 was correct and the initial onus cast upon the landlord is discharged. The subsequent Settlement shows an area arrived at by the same process of measurement to be in excess of that for which rent has been previously paid.

The later decisions which have been referred to are based upon the decision in *Gouri Pattra's* case and do not carry the matter any further in so far as the general principle is concerned. In none of them was there an intermediate Settlement by which the area could be definitely ascertained. *Rajendra Lal Goswami* v. *Chandra Bhusan Goswami* (1) was complicated by the fact that the excess claimed by the landlord was alleged by the tenant to be due to the addition of land previously belonging to the tenure but lost by diluvion, which is not the case here. In Raj *Kumar Pratab Sahay* v. *Ram Lal Singh* (2) there was no intermediate Settlement and therefore the original settlement had to be proved before it could be shown that the lands were in excess of those for which rent was previously paid. In the later case of *Durga Priya Chowdhuri* v. *Nazra Gain* (3) it was definitely held that it is not in all cases necessary for the landlord to prove the area of the holding at the time of the inception of the tenancy. It is sufficient for the landlord to establish that since the inception of the tenancy rent has been assessed on the basis of a certain area and that the tenant is in possession of lands not included in that area and on which no rent was assessed.

(1) (1901-02) 6 Cal. W. N. 318. (2) (1907) 5 Cal. L. J. 538.
(3) (1920-21) 25 Cal. W. N. 205.

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In the present case the previous survey and settlement *khatian* were produced and proved, and from these it appears on comparison with the recent survey, in which the method of measurement was the same, that the tenants are holding lands in excess of those for which they were paying the same rent since 1893. The only point which appears to have been urged by the tenants on appeal to the Special Judge was that the survey measurements must have been inaccurate, an argument which did not commend itself to the Special Judge. In this respect, I concur with his view. On the facts proved, I think, the appellant has satisfied the burden of proof required by section 52 of the Act, and is entitled to the additional rents such as may be just and equitable upon the excess areas found by the Assistant Settlement Officer. The appeal is allowed. The decree of Ross, J., is set aside and that of the Assistant Settlement Officer restored. The appellant is entitled to his costs here and before Ross, J.

ADAMI, J.—The appellant in applications under section 105 read with section 52(1)(*a*) of the Bengal Tenancy Act claimed additional rent in respect of lands in the holdings of the respondents, his tenants in village Hiramni, which, according to his allegation, were shown by the measurement entered in the record-of-rights to be in excess of the area for which rent had been previously paid by them. He asserted in the application that at the inception of the tenancies the area of the holdings had been determined by measurement with a pole of ten cubits.

The Assistant Settlement Officer decided that the appellant had failed to prove either actual encroachment or that there was a practice of settlement of land by measurement in the estate, and, if there was such a practice, how the measure adopted for the purpose compared with the present survey measure. He found, however, that the respondents had held the tenancies from the time of the previous settlement, the record-of-rights of which was finally published in 1898, and that there had been no alteration of rent since that year,

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and held that the appellant landlord was entitled to additional rent for any excess area found on comparison of the survey area of 1898 with the area shown in the record-of-rights published in 1917. Therefore, after making an allowance of 5 *per cent.* for probable difference in the area extraction of the same field by different persons at different times, he assessed a fair rent in respect of the excess area so found; and granted the applications to that extent.

The Special Judge, on appeal by the present respondents, upheld the decision of the Assistant Settlement Officer, finding that at each survey the area was determined by a scientific process and that the comparison gave sufficient evidence of an excess.

On second appeal the learned Judge of this Court has disagreed with the Lower Courts and has held, basing his decision on *Gouri Pattra* v. *H. R. Reilly* (1), *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami*(2) and *Raj Kumar Pratab Sahay* v. *Ram Lal Singh* (3), that in order to show that the lands in respect of which an additional rent is claimed are lands held in excess of those for which rent was paid, the landlord must prove an excess over the quantity of land included in the tenancy at its inception, and that the criterion is the area of the holding at the inception of the tenancy and not any intermediate measurement. The learned Judge refused to accept the argument that the present case should be differentiated from the cases on which he relied because in the present case there were two survey measurements in both of which the same scientific standard was employed, as he found that there is no authority to support the view, and no justification in principle to support the argument.

Now section 52(*1*)(*a*) is perfectly clear in its terms; it provides that.

"Every tenant shall 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",

(1) (1893) I. L. R. 20 Cal. 579. (2) (1901-02) 6 Cal. W. N. 318.
(3) (1907) 5 Cal. L. J. 538.

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and sub-section (2) runs,

"In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

(a) the origin and conditions of the tenancy, for instance whether the rent was a consolidated rent for the entire tenure or holding.

(d) 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".

In the case of *Gouri Pattra* v. *H. R. Reilly* (1), the landlord sought to prove the area for which rent had been previously paid by the tenants by entries of area in his *zamindari* papers and in rent receipts. There was no evidence in that case that there had been any measurement of the lands according to any actual standard and it was found that the areas shown in the *zamindari* papers were arrived at by guess work. The Court rightly held that the areas shown in the papers could not be accepted. The judgment shows that it was assumed that the tenants had required the Assistant Settlement Officer to have regard to the points mentioned in sub-section (2). In the absence of other evidence of measurement the Court decided that it was for the landlord to show what were the terms of the original settlement and whether it was by any, and if so by what process of measurement.

In the case of *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2), the landlord sought to base the comparison on the area shown in the Revenue Survey papers of 1854. The learned Judges appear to have considered that sub-section (2) of section 52 was mandatory, whether the tenants required the Court to have regard to the origin of the tenancy or not, and held that the landlord must show that the alleged excess is really an excess over the area of the tenure as originally created. They state, "We think the language of sub-section (2), clause (a), by referring to the origin and conditions of the tenancy as some of the circumstances which the Court is required to have regard to shows that the expression 'the area for

(1) (1869)

(2) (1907) 5 Cal. L. J. 538.

which rent has been previously paid ' must be understood to mean the area with reference to which the rent previously paid had been assessed or adjusted ".

The decision in *Raj Kumar Pratab Sahay* v. *Ram Lal Singh* (1) followed that in *Gouri Pattra* v. *H. R. Reilly* (2), as did the decision in *Ratan Lal Biswas* v. *Ladu Halsuna* (3), but in both of these cases the landlord sought to base the comparison on entries in *zamindari* papers and receipts; no scientific previous measurement was shown.

The above cases are authorities for the principle that where there is no good evidence of scientific measurement, assessment or adjustment since the inception of the tenancy, the landlord will have to prove what was the area at the origin of the tenancy, or that the lands originally settled were defined by boundaries which have been encroached upon, or that rent was settled at a certain rent *per bigha.*

In *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (4) and in *Akbur Ali Mian* v. *Mussammat Hira Bibi* (5) it has been held that the words "the area for which rent has been previously paid" in section 52 mean "the area with reference to which the rent previously paid has been assessed or adjusted ", and in the case of *Durga Priya Choudhuri* v. *Nazra Gain* (6), where the District Judge had held that it was necessary for the plaintiff to prove the area of the holding at the time of the inception of the tenancy, Sir Asutosh Mukherjee, Acting Chief Justice, held that the view taken by the District Judge was erroneous and that it was sufficient for the landlord to prove that, since the creation of the tenancy, rent had been assessed, that when rent was last assessed the assessment was on the basis of a certain area and that the defendants were in possession of land on which no rent was assessed at the time.

(1) (1907) 5 Cal. L. J. 533.
(2) (1883) I. L. R. 20 Cal. 579.
(3) (1905-06) 10 Cal. W. N. 46.
(4) (1901-02) 6 Cal. W. N 318.
(5) (1912) 16 Cal. L. J. 182.
(6) (1920-21) 25 Cal. W. N. 204.

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Now in the present case there is nothing to show when the tenancies were created, or how rent was assessed, whether the rent was a consolidated rent, or was assessed at a certain rate *per bigha*, or whether there was any measurement of the holdings at the inception. We have the evidence, however, of the record-of-rights published in 1898 that a certain rent was then being paid for a holding of a certain area. During the preparation of the record-of-rights the holding was measured scientifically and the area shown in the record was the result of the measurement; the settlement proceedings were carried on publicly and the parties may be presumed to have been present and to have had every opportunity of objecting. The rent payable by the tenants was ascertained and recorded, and it must be presumed that the tenants accepted that rent as the rent payable for the area as recorded. They did not come forward and prove that the area recorded was less than the area of the holding at its inception. The entry shows that the rent entered there was either the rent for the area which the tenants had been paying previous to 1898, or was the rent assessed or adjusted after dispute during the settlement proceedings between the parties as to the amount payable. In my opinion the area shown in the record-of-rights was the area with reference to which the rent previously paid by the respondents was assessed or adjusted. The respondents continued to pay the same rent for nearly twenty years and at the end of that time, in the settlement of 1917, it was found after scientific measurement by the same standard that the area of the holding for which that rent was being paid had increased. I am of opinion that according to the clear wording of section 52(*1*)(*a*), the landlord was entitled to additional rent for the land in the holdings which was not covered by the area entered in the record-of-rights of 1898.

I would therefore allow the appeal with costs and set aside the decree now appealed against.

Appeal allowed.