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it requires to be set right by the Legislature. This province used to be governed formerly by the rules and practice obtaining in the Calcutta High Court, and the practice has been followed by this Court ever since in the matter with which we are at present concerned. The Taxing Judge (Roe, J.) in 1917 gave effect to the Calcutta view and held that the fee chargeable was one under Article 11 of Schedule II of the Court-Fees Act. I, as a Taxing Judge, am not prepared to go against the view of my predecessor-in-office. Whatever trouble there might have arisen in the interpretation due to section 144 not being expressly included in the Government notification, it is, I think, amply obviated by the reason given by me above. In a matter of this kind the decision of a Taxing Judge such as that of Roe, J., should be the rule of the Court and it should not be disturbed by his successor in office.

I, therefore, hold that the court-fee paid is sufficient.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay J.J.

MAHARAJA BAHADUR KESHO PRASAD SINGH

v.

TRILOKE NATH TEWARI *

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Nov., 26.
Dec., 3, 18.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 150—*Rent suit—plea that plaintiff is not entitled to amount claimed—amount admitted not paid into Court.*

In a suit for rent under the Bengal Tenancy Act, 1885, where the defendant admits that money is due from him to the plaintiff on account of rent, section 150 of the Act is a bar to the Court taking cognizance of a plea that the amount claimed is in excess of the amount due unless the defendant

* Appeal from Appellate Decree nos. 325 and 326 of 1922 from a decision of J. F. W. James, Esq., I.C.S., District Judge of Arrah, dated the 25th January, 1922, affirming the decision of B. Phanindra Lal Sen, Subordinate Judge, Arrah, dated the 9th May, 1921.

pays into Court the amount so admitted to be due; and this is so irrespective of the question whether the burden of proof lies on the plaintiff or not.

Banarsi Prasad v. *Makhan Rai*(1), dissented from.

Appeals by the plaintiff.

These were two appeals by the plaintiff against the decision of the District Judge of Shahabad, confirming the decision of the Subordinate Judge. The suits were for arrears of rent for the years 1324 to 1327, *Fasli*, in respect of two holding in *diara* land. The rents were claimed on the basis of two *pattas*. It appeared from the plaint that the two *pattas* which were dated the 27th, *Baisakh*, 1308, related to two areas of 149 *bighas*, 18 *kathas*, 8 *dhurs* and 72 *bighas*, 8 *kathas*, 15 *dhurs*, respectively. In the first *patta*, relating to the 149 *bighas* odd, there were two rates of rent, one at Rs. 5-3-6 *per bigha* and the other at Rs. 2 *per bigha*, making a total of Rs. 525-2-6 for the entire area of 149 *bighas* odd. In the second *patta* which related to the 72 *bighas* and odd there was only one rate of Rs. 7-2-0 *per bigha*, making a total of Rs. 516-2-0 for the entire area. The claim was for the total amounts shown in the two *pattas* as the rent of the entire holdings. The defendants in their written statement pleaded that the plaintiff was entitled to realize rent only for the areas actually cultivated in the years in suit and not for the entire area mentioned in the *pattas*. They further stated that they had tendered rent every year to the *amla* of the plaintiff for the areas actually cultivated by them, but that the amounts were not received, and, therefore, payments were not made. The Subordinate Judge held that the plaintiff was entitled to rent only for the areas actually cultivated in the years in suit. He further held that the plaintiff had failed to prove that any area in excess of that admitted by the defendants was actually cultivated in the years in suit and he accordingly made a decree at the rate given in the

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pattas for the areas admitted by the defendants to have been cultivated by them. Against the decree of the Subordinate Judge the plaintiff went in appeal before the District Judge. The District Judge agreed with the Subordinate Judge on both the points and dismissed the appeal. A new point was taken in appeal before the District Judge which was not taken before the Subordinate Judge, namely, that under section 150 of the Bengal Tenancy Act the Subordinate Judge had no power to entertain the defendants' plea that a less amount was due than was claimed by the plaintiff until the amount admitted to be due was paid into Court. The District Judge over-ruled this objection on the authority of the decision of a Division Bench of the Calcutta High Court in the case of *Banarsi Prasad* v. *Makhan Rai* (1).

Against the decrees of the District Judge the plaintiff preferred the present second appeals, and the points taken by the learned Vakil for the appellant were: first, that the learned District Judge was wrong in proceeding upon the admission of the defendant as regards the area actually under cultivation in the years in suit; and, secondly, that having regard to the provisions of section 150 of the Bengal Tenancy Act the Court below ought to have refused to take cognizance of the plea set up by the defendants. Section 150 provides as follows:

"150. When a defendant admits that money is due from him to the plaintiff on account of rent, but pleads that the amount claimed is in excess of the amount due, the Court shall refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due.

Lachmi Narain Sinha and *N. N. Sinha*, for the appellant.

Sambhu Saran, for the respondents.

Cur. adv. vult.

Dec., 18. KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): As regards the first

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point, I am of opinion that the learned District Judge was right in holding that the plaintiff had failed to prove that the defendants had actually cultivated any land in excess of the areas admitted by them. That the defendants were liable to pay rent on the areas actually under cultivation and not the total amount stated in the *pattas* was not in dispute, as, in fact, it could not be disputed having regard to the decision in the previous rent suits between the parties. As regards the areas actually cultivated, the learned District Judge has considered the evidence adduced by the plaintiff, and has held that the measurement papers produced by him cannot be relied upon inasmuch as the plaintiff's own papers indicate that the measurements were not correct. Under the circumstances the only course open was to accept the areas admitted by the defendants.

As regards the second point, the learned District Judge has held that the plea raised by the defendant was not a simple plea of exemption from liability to pay rent by reason of diluvion so that in the absence of evidence on the defendants' side the plaintiff would have been at once entitled to a decree for the full amount which he claimed. He proceeds to observe that in the peculiar circumstances under which rent has been found to be payable for these holdings, the burden of proof originally lay upon the plaintiff to show that the area claimed by him to have been cultivated actually had been cultivated in the years in suit. He relied on the decision of the Calcutta High Court in the case of *Banarsi Prasad* v. *Makhan Rai* (1). That decision no doubt supports the view taken by the learned Judge. It has been held in that case that section 150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him, in other words where it is a plea of confession and avoidance, and that the section does not apply to a case where the rate of rent is in dispute.

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Bannerji, J., in dealing with this point observed as follows: "In my opinion section 150 of the Bengal Tenancy Act is limited in its operation to those cases where the plea of the tenant is of a nature such that the burden of proving it rests upon the tenant, and in the absence of evidence on his side, the plaintiff would be entitled to a decree for the full amount; as for instance where the plea is in the nature of a plea of payment or a plea of exemption from liability to pay rent by reason of diluvion or by reason of partial eviction or for any other similar reason. Where, however, the plea is of a nature such that the real question involved in it must remain to be determined by the Court notwithstanding that the defendant's plea is disregarded I am of opinion that the section was not intended to apply to such a case." The learned Judge felt it difficult upon the plain wording of the section to put the interpretation which he wanted to put upon them; but he was of opinion that the interpretation put by him was the only reasonable view of the meaning of the language of the section and the intention of the legislature, and that that was the only view upon which the provisions contained in the section could work without leading to any anomaly. Pargiter, J., agreed with Bannerji, J., and he was also of opinion that the construction placed upon the section by Bannerji, J., was the true construction. With very great respect to the learned Judges, I am unable upon a plain reading of the language of the section to place that interpretation upon it. In order to place that interpretation it would be necessary to read into the section words which do not occur there. It would be necessary to read into the section words to the effect that the Court shall refuse to take cognizance of the plea only in cases where the burden of proof lies on the defendant, whereas the section is couched in general language and prohibits the Court from taking cognizance of the plea that the amount claimed is in excess of the amount due unless the defendant pays into the Court the amount which he admits to be due. No doubt the section is not happily

worded and it may lead to an anomaly; but we are concerned here with the plain language of the section, and I find no ambiguity in the words used and I am of opinion that irrespective of the question as to whether the burden of proof lies on the plaintiff or not, in cases where the defendant admits that money is due from him to the plaintiff on account of rent his plea that the amount claimed is in excess of the amount due cannot be taken cognizance of by the Court unless the defendant pays into Court the amount so admitted to be due. If it is open to us to speculate as to the intention of the Legislature, it might as well be said that the intention was to enable landlords to realize the amount admittedly due without any further trouble. The landlords have to pay the Government revenue and other demands whether they realize their rents from the tenants or not and the intention of the Legislature might have been to see that no harassment was caused to them and the Courts should compel the defaulting tenants to pay the admittedly unpaid rents without delay. It can hardly be said that the Legislature presumed that a tenant would raise a plea of payment dishonestly, the presumption on the other hand would be that honest pleas would be taken. I am therefore unable to agree with the learned Judge in the view he has taken of section 150 of the Bengal Tenancy Act in the present case.

The question, however, remains as to whether the decree of the District Judge should be set aside on the ground that the plea of the defendant ought not to have been taken cognizance of. Now, it appears that evidence has been gone into and upon the evidence it has been found as a fact by both the Courts below that the defendant is not liable to pay rent for the entire area covered by the two *pattas*. Under the circumstances it would be manifestly unjust to make a decree in favour of the plaintiff for the entire amount claimed by him. At the most, the plaintiff can only insist on a remand so that the Court may ask the defendant to pay the amount admittedly due before

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taking cognizance of his plea. It was the duty of the Court to refuse to take cognizance of the plea when it found that the defendant had admitted that money was due, and if it had done so, it is fair to presume that the defendant would have paid in the admitted amount. We are informed by the learned Vakil for the defendant-respondents that after the decree of the lower appellate Court, they deposited in Court the entire amount decreed and he has produced the *chalans* of such deposit. Under the circumstances I am of opinion that no useful purpose will be served by making a remand with a direction to give the defendants an opportunity to make the deposits and then to try the case over again in the event of such deposit being made. The defect in the procedure adopted in the trial of the suits by reason of overlooking the provisions of section 150 of the Bengal Tenancy Act has not to my mind affected the decision of the case on the merits or the jurisdiction of the Court, and under section 99 of the Code of Civil Procedure such defect does not make it compulsory for us to reverse the decision of the Courts below. I would, therefore, dismiss both the appeals, but having regard to the circumstances of the case I would make no order as to costs in these appeals.

MULLICK, J.—I agree. The point decided in *Banarsi Prasad's* case (1), namely, whether a plea that the rate of rent claimed was in excess of that payable attracts the application of section 150, Bengal Tenancy Act, does not arise here. On the contrary there are observations in that case which assist the appellant here and which in my opinion favour the view that section 150 applies where the tenant pleads that he has cultivated a lesser area than that in respect of which rent is claimed. In every such case whether the tenant appears or not the onus of proving the claim is on the landlord. Section 150 is designed not to relieve him of that burden but to give both parties a

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chance of avoiding further litigation. In many cases a landlord will give up a substantial part of his claim if the tenant makes a fair offer accompanied with cash. The section is really not penal for the dishonest tenant may always evade it by pleading an absurdly low amount; it is intended to benefit the honest tenant and the honest landlord.

Appeals dismissed.

REVISIONAL CRIMINAL.

Before Bucknill and Ross, J.J.

MADARAN KASSAB

v.

KING-EMPEROR.*

1924.

Dec., 18.

Bihar and Orissa Municipal Act, 1922 (*Bihar and Orissa Act VII of* 1922), *section* 259—*Commissioners, refusal by, to renew license—failure to give reason, whether makes refusal illegal—Municipality, right of Commissioners to fix limits of.*

Inasmuch as the provisions of section 259, sub-section (2), of the Bihar and Orissa Municipal Act, 1922, themselves supply the only reason for which refusals of certain licenses can be made the omission on the part of the commissioners to give the only reason which they could give for the refusal to renew a license cannot be regarded as making such refusal illegal.

The municipal commissioners have the right to fix the whole area of the municipality as the local limits within which any buisness or trade which they consider offensive or dangerous shall not be established or maintained without a license.

Syed Mokram Ali v. *The Cuttack Municipality*(1), followed.

* Criminal Revision no. 558 of 1924, from an order of P. C. Maulik, Esq., Subdivisional Magistrate of Dhanbad, dated the 30th of June, 1924, a petition against which was rejected by the judgment of J. W. Houlton, Esq., Additional District Magistrate of Dhanbad, dated the 22nd of July, 1924.

(1) (1912-13) 17 Cal. W. N. 531.