APPELLATE CIVIL.

Before Mullick, A.C.J. and Kulwant Sahay, J.

SIB SAHAI LAL

v.

SIR BIJAI CHAND MAHTAB.*

1925.

July, 6, 7, 8, 22.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 52, *scope of—area of land demised, when is essence of the contract—landlord's papers, whether admissible for ascertaining area and rental.*

Where a tenancy is created, not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental, the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent.

Section 52, Bengal Tenancy Act, 1885, comes into operation where, in determining the area, the parties either resort to measurement or agree to accept an assumed figure; and for the purposes of the section it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid.

Statements of area in the landlord's papers, whether after measurement or not, are evidence for the purpose of ascertaining what the area is for which the rent shown in the jamabandi is being paid.

Maharaja Kesho Prasad Singh v. *Tribhuan* (1), *Durga Priya Choudhuri* v. *Nazra Gain* (2) and *Lal Sheo Kumar Lal* v. *Ramphal Das* (3), followed.

Manindra Chandra Nandi v. *Kulat Sheikh* (4), dissented.

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* Appeal from Appellate Decrees nos. 915, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470 and 1471 of 1924, from a decision of B. Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 26th April, 1924, affirming the decision of B. Charu Chandra Coari, Munsif of Madhipura, dated the 4th June, 1923.

(1) (1917) 2 Pat. L. J. 276.
(2) (1920-21) 25 Cal. W. N. 204.
(3) (1920) 58 Ind. Cas. 959.
(4) (1923-24) 28 Cal. W. N. 264.

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The material facts were as follows:—

The plaintiff brought 47 suits against different tenants for arrears of rent for the years 1327, 1328 and 1329 FS. He also at the same time claimed additional rent for excess area under section 52 of the Bengal Tenancy Act alleging that by a measurement made in the course of partition proceedings in 1910 and 1911 it was found that the area in the possession of the tenants was in excess of the area for which rent had been previously paid. He also claimed an enhancement under 30(*b*) on the ground that there had been a rise in the average local prices of staple food crops. He also claimed enhancement under section 30(*d*) on the ground that the lands had been improved by the fluvial action of the river Kosi.

Three suits were comprised and one was decreed ex parte. In the remaining 43 cases the Munsif diallowed the pray for enhancement under section 30(*d*) but he allowed in a modified form the prayer for enhancement under section 30(*b*). He also allowed the claim under section 52. He made decrees against the tenants in accordance with these findings.

Thereupon the tenants in 35 cases appealed to the District Judge. The appeals were heard by the Subordinate Judge whose decision was as follows:

(*a*) The Subordinate Judge affirmed the Munsif's decree for enhancement on the ground of a rise in the price of food grains.

(*b*) He affirmed the Munsif's finding that the quality of the land had not been shown to have improved and his decree dismissing the claim under section 30(*d*), Bengal Tenancy Act.

(*c*) He affirmed the Munsif's finding that the standard of measurement was a lagga of $6\frac{1}{2}$ cubits.

(*d*) Disagreeing with the Munsif he found that the tenancies which, according to the evidence, had existed for a period of 700 years, were not created

after measurement, and he modified the Munsif's decree and allowed an enhancement under section 52 only in some of the cases.

In some of the cases the plaintiff appealed to the High Court and in the remainder the appellants were the defendants.

The following is section 52 of the Bengal Tenancy Act, referred to in the judgment:—

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; and

(b) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

(2) 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;

(b) whether the tenant has been allowed to hold additional land in consideration of an addition to his total rent or otherwise with the knowledge and consent of the landlord;

(c) the length of time during which the tenancy has lasted without dispute as to rent or area; and

(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.

(3) In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description and with similar advantages in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure, and shall not in any case fix any rent which, under the circumstances of the case, is unfair or inequitable.

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(4) The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding.

(5) When in a suit under this section the landlord or tenant is unable to indicate any particular land as held in excess the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area.

(6) When in a suit under this section the landlord or tenant proves that, at the time the measurement on which the claim is based was made, there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situate, a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any patta or kabuliyat, or (where there is an entry of area in a counterfoil receipt corresponding to the entry in the rent roll) in any rent roll relating to it has been entered to such patta kabuliyat or rent roll after measurement.

S. M. Mullick and *S. N. Palit*, for the tenants.

Sultan Ahmed, with him *S. C. Mazumdar*, for the landlord.

MULLICK, A. C. J. (after stating the facts as set out above, proceeded as follows): As the learned Subordinate Judge's judgment seems somewhat obscure at first sight it is necessary to examine it with reference to the pleadings and the judgment of the trial court. Now in the plaint the plaintiff distinctly makes the case that the mauzas from time immemorial have been settled with tenants after proper measurement with a lagga of $6\frac{1}{2}$ cubits and that the measurements were entered in the rent roll kept by the zamindar and in the receipts granted to the raiyats and that in accordance with the said practice the defendants used to take settlement of specified areas at specified rates per bigha. The plaintiff then alleges that from about 1305 to 1313 the lands were inundated by the river Kosi and that in 1314 the defendants encroached upon the khas lands of the plaintiff and that in 1316 a Cadastral Survey was made and it was found that the defendants were holding lands in excess of the

area originally settled with them. At the trial the plaintiff produced the jamabandis for the years 1314 F.S., 1315 and 1316, also some karchas and counterfoil rent receipts. From the Munsif's judgment it would appear that the jamabandis show the area, the rate per bigha and the total rental. The karchas show the area and the rental. The counterfoil rent receipts contain the same particulars and on the back of them appear the thumb impressions of the raiyats.

At the trial one of the issues (no. 14) was

"Is there any system of measurement prevalent in the village where the plaint lands are situate?"

This was answered by the Munsif in the affirmative. The Munsif appears to have held not only that the standard of measurement was $6\frac{1}{2}$ cubits but also that there was a practice of measurement in the mauza such as is referred to in clause (6) of section 52 of Bengal Tenancy Act. That clause provides that if such a practice is established then the Court may presume that the area specified in a patta, kabuliyat or rent roll has been entered in such patta, kabuliyat or rent roll after measurement and the Munsif gave effect to this presumption and found that the areas shown in the jamabandis and the other papers were entered after measurement.

The Subordinate Judge accepts the Munsif's finding as to the length of the standard of measurement but does not find that there was any measurement before entering the areas in the papers.

But in the course of the trial the plaintiff appears to have made an alternative case. He contended that even if his allegation of measurement was not accepted and it was held that the jamabandi and other papers referred to an assumed area, still he was entitled to additional rent upon the difference between the present area and such assumed area.

The learned Munsif accepted this alternative contention although it did not arise upon his findings.

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The Subordinate Judge took a middle course and he held that the areas entered in the papers were in fact assumed areas and where the differences between the present area and the assumed area was small he declined to decree enhancement. He thought that it was quite possible that in these cases the area was under-estimated and that the area of the holding at the time of its origin was the same as that fixed by the partition proceedings. He appears to have founded his decision upon the principle of mutual mistake.

But where the difference was large the Subordinate Judge held that the raiyat must have encroached upon the zamindar's land. The learned Judge found that the encroachment took place not upon the zamindar's khas lands of which he had none in the neighbourhood but upon the lands of other raiyats paying rent to him. But as the law is that encroachments, whether upon the landlord's khas lands or upon those of third parties must always enure to the benefit of the landlord, the learned Subordinate Judge held that in these cases the difference between the present area and that shown in the landlord's papers constituted an excess upon which the raiyat was liable to pay additional rent.

The Subordinate Judge accordingly dismissed 17 of the appeals.

In the remaining 18 appeals he disallowed the prayer for enhancement under section 52 while maintaining the enhancement under section 30(*b*).

We have now before us 33 second appeals.

In 18 the landlord appeals against the Subordinate Judge's decrees disallowing enhancement under section 52.

In 15 appeals the tenants appeal against the Subordinate Judge's decrees allowing enhancement under section 52.

It is urged that the Subordinate Judge's finding is that as the plaintiff has failed to show what was

the area of the holdings at the time of their origin he is not entitled now to claim rent on any excess area and that the operative part of the judgment is inconsistent with the findings.

In my opinion the findings, when properly understood, justify the decree and it is desirable first to consider the scope of section 52. Now excess area may be acquired by a tenant (*a*) by encroachment on waste or unoccupied land of the same estate belonging to his landlord; (*b*) by alluvion, or (*c*) by encroachment on the lands of a third person. The tenancy may be created by reference to boundaries. In such a case the operative part of the contract lies in the enumeration of the boundaries and any reference to area is merely descriptive and does not affect the identity of the subject-matter of the grant.

Next, a tenancy may be created by the grant of a block of land described otherwise than by reference to boundaries. Here again any incorrect assertion as to the area will be merely false description and will not affect the liability for the rent reserved. In either of these two cases the rental may be either a lump sum without reference to rates or a lump sum based upon a rate or rates per unit of measurement.

The third case arises when a tenant squats upon the land of the zamindar and there is an implied contract of tenancy to pay fair and equitable rent upon all the land in his possession at any time. Strictly speaking section 52 is not necessary to fix liability for excess area under such a contract. The liability for excess area arises upon the contract itself.

The fourth case arises when the contract is made, not with reference to any boundaries or a specific block otherwise identifiable, but for a certain area at a certain rental. In such a case the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent. In determining the area demised the parties may either resort to measurement or they

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may agree to accept an assumed figure. In either case section 52 operates. In the cases before us there is no finding that the original grant was for land within any specified boundaries or comprised in a specified block. The Subordinate Judge finds that there was no measurement before the grant and I think he intends to find that the settlement was for an assumed area. He does find that there was no rate per bigha; but that question is not material. The sole question is whether the rent reserved in 1314 was for an area less than the present area.

For the purposes of section 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid The onus is then shifted on to the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. In other words, the tenant has to show that the area last in his possession was less than the true area for which he was then paying rent. As I read the learned Subordinate Judge's findings I think he holds that the landlord's papers show that in 1314 and the subsequent years the tenants were paying the rents noted against their names for areas assumed by both parties to be correct and that they would be liable to pay additional rent: (*1*) if the jamabandis of 1314 recorded a new contract, or (*2*) if the assumed areas were in accord with the state of affairs at the origin of the tenancies.

As the case of neither party was that there was a new contract of tenancy the only question for decision that remained was what was the area at the origin? For this purpose the learned Judge accepted the jamabandi papers as evidence but he declined to give that weight to them that the Munsif gave and he held that in some of the cases they were inaccurate. The Munsif held that as there was a practice of measurement in the mauza the jamabandis must be taken to be accurate and conclusive as to the area of the

holdings at their origin. The Subordinate Judge declined to accept the oral evidence upon this point and he drew attention to the fact that the papers previous to 1314 had not been produced and he thought that the areas shown in the jamabandi of 1314 might well be the area of the holdings at the time of their origin in those cases where the excess discovered in 1316 was only slight. On this point the learned Government Advocate on behalf of the landlord attacks the learned judge's finding on the ground that he did not consider the whole evidence in the case. It is pointed out that no reference is made to the fact that the tenants placed their thumb impressions upon the counterfoil rent receipts and that there is no discussion of the evidence of some of the witnesses who prove the measurements. As the Subordinate Judge had the whole evidence before him his finding in favour of the tenants with reference to these cases is ,I think, conclusive.

Therefore the Second Appeals nos. 1454 to 1471 of 1924 preferred by the landlord must be dismissed with costs. I do not think there is any ground for the suggestion that the learned Judge was labouring under the impression that the landlord must prove measurement in 1314. It is clear that he did not consider that necessary. And as to the onus which rested upon the tenants to show that the present area is not in excess of the original area, though it is not quite clear whether the Subordinate Judge has correctly placed the burden, the learned Judge has come to a finding on the evidence on both sides and the question of the burden of proof becomes academical.

In regard to the cases in which the difference is large, the learned Subordinate Judge takes the view that the jamabandi of 1914 is approximately correct and the large difference shows that the excess is real. The position taken by the learned Subordinate Judge is perhaps not very logical but he was entitled to find in which cases the jamabandi area was not the original area and his finding is conclusive.

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Therefore the Second Appeals nos. 915 and 963 to 976 which have been preferred by the tenants are dismissed with costs.

Before concluding it is necessary to refer to *Manindra Chandra Nandi* v. *Kaulat Sheikh*(1). In this case the landlord produced jamabandis and rent receipts showing the area in certain years and he claimed additional rent on excess area found in the possession of the raiyat in a subsequent year. Their Lordship of the Calcutta High Court held that the claim could not be allowed, but in affirming the decision of the lower appellate Court, which was conclusive as a finding of fact, their Lordships reviewed the previous law on the subject in Bengal and made certain observations upon which, though obiter, considerable stress has been laid by the learned Vakil for the tenant appellants before us. The material passage of the leading judgment runs as follows:—

"I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has prima facie to show that the rent was a consolidated rent for all the land within specific boundaries, but that in the absence of such proof the mere production of such dakhilas as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving, if he can, a contract of the nature indicated in *Dhrupad Chandra's case*(2) but entries of area and rate in dakhilas or jamabandis do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence".

(1) (1923-24) 28 Cal. W. N. 264. (2) (1917-18) 22 Cal. W. N. 827.

The learned Judges appear to have been disinclined to accept the view taken in this Court in *Maharaja Keshav Prashad Singh* v. *Tribhuan* (1) where it was held that statements of area in the landlord's papers whether after measurement or not were evidence for the purpose of ascertaining what the area was for which the rent shown in the jamabandi was being paid. It would seem that the learned Judges were of the opinion that unless the jamabandis were prepared after measurement no claim for enhancement could be founded upon them. In their view the settled rule of the Calcutta High Court was that an assumed area could never be a foundation for such a claim. It does not appear however that the case of *Durga Priya Choudhuri v. Nazra Gain* (2) was considered by the learned Judges. There Mookerjee, A. C. J., observed that a jamabandi prepared by the landlord though not binding upon the tenant was admissible as evidence that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area; and in remanding the case the learned Chief Justice gave the following directions: "The District Judge will first consider whether since the date of the last assessment of rent, land has been added to the holding by encroachment, accretion or in like manner. If this is answered in the negative, he will consider whether the rent was assessed at a consolidated sum for the entire tract in the possession of the tenant whatever its area might turn out to be, or whether the rent was assessed on an area fixed by estimate or determined by measurement. If the rent was not fixed as a consolidated sum the plaintiff is entitled to additional rent." This view of the law is in accord with that which had been taken in this Court in 1917 in *Maharaja Keshav Prasad Singh's case*(3). It was subsequently affirmed in *Lalla Sheo Kumar Lal* v. *Ramphal Das*(4) and in our opinion the learned

(1) (1917) 2 Pat. L. J. 276.
(2) (1920-21) 25 Cal. W. N. 204.
(3) (1917) 2 Pat. L. J. 276.
(4) (1920) 58 Ind. Cas. 959.

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Subordinate Judge was right in taking the landlord's papers into consideration in ascertaining whether the excess in the cases before him was real or fictitious.

The result is that all the appeals before us are dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

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

1925.

May, 27.

SITA RAM SINGH

v.

KHUB LAL SINGH.*

Evidence Act, 1872 (*Act I of* 1872), *section* 32(3)—*admission, whether can be split up.*

In a suit by the reversioners of the last male holder to recover property which had been mortgaged by the latter's widow and subsequently purchased by the mortgagees in execution of a decree on the mortgage, the trial Court admitted in evidence, under section 32(3) of the Evidence Act, a statement made by the widow in a previous suit (the widow being dead when the present suit was instituted) to the effect that she had contracted the loan from the mortgagees for the performance of her husband's saradh and other necessary expenses. It was contended on behalf of the plaintiffs that the only part of the admission which was contrary to her pecuniary interest was the fact that she took the loan and not the remaining part that she took it for a particular purpose, and that, consequently, the latter part of the statement was inadmissible. *Held*, that the admission could not be split up into two parts and that the whole statement was admissible for the purpose of ascertaining exactly what the nature of the loan was.

Higham v. *Ridgway* (1), referred to.

* Second Appeal no. 814 of 1922, from a decision of B. Lala Damodar Prasad, Subordinate Judge of Patna, dated the 20th July, 1922, confirming a decision of M. Amir Hamza, Munsif of Patna, dated the 16th March, 1921.

(1) (1823) 2 Sm. L. C. 348.