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into a discussion of this question of fact but must be held bound by their own representation. No question, therefore, of the operation of the statute can arise. The plaintiffs are prevented from proving the fact which is indispensable before the matter of the statute can be considered.

COURTNEY TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

It is hardly necessary to add that there would have been no estoppel, if there had been any collusion between the plaintiffs and the defendant, and if it had been established that the former had deliberately misrepresented themselves to be tenure-holders to the knowledge of the latter to defeat the provisions of the Chota Nagpur Tenancy Act.

The appeal should be dismissed and the plaintiff's suit for possession dismissed with costs throughout.

Appeal dismissed.

SPECIAL BENCH.

1936.

March. 23.

Before Courtney Terrell, C.J., Macpherson and Fazl Ali, JJ.

DUKHA LAL CHOUDHURI

v.

MUSAMMAT MANABATI.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 38 *and* 52—*reduction of rent—istamrari mukarrari tenure-holder, whether entitled to abatement of rent—land wholly unfit for cultivation.*

A tenant who holds under an istamrari mukarrari lease is not entitled to claim reduction of rent under section 38 of the Bengal Tenancy Act, 1885, on the ground that his land has permanently deteriorated or has become useless for cultivation.

Where the rights and liabilities of the parties are regulated by contract the terms of which could not be said to have been unfair at the date when the contract was entered

* Letters Patent Appeal no. 14 of 1935, from a decision of the Hon'ble Mr. Justice James, dated the 26th February, 1935, in Second Appeal no. 1236 of 1933.

into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. Therefore, there is no justification for extending the principles underlying section 38 of the Bengal Tenancy Act, 1885, to a tenant holding under an istamrari mukarrari lease.

Sukhraj Rai v. *Ganga Dayal Singh*(1), dissented from.

Sheik Enayutoollah v. *Sheik Elaheebuksh*(2), *Afsurood-deen* v. *Musammat Shoroshee*(3), *Arun Chandra* v. *Shamshul Huq*(4) and *Mathey* v. *Curling*(5), discussed.

Section 52 of the Act is more general than section 38 and is applicable even to a tenant holding under a mukarrari lease, who is undoubtedly entitled to claim abatement under this section if it could be shown that he had lost the whole or portion of the land during the year in suit by diluvion, or some similar cause.

Khetramoni Dasi v. *Jiban Krishna Kundu*(6), relied on.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

The case was first heard by Terrell, C. J., and Khaja Mohamad Noor, J., who referred it to a larger Bench.

On this Reference.

M. N. Pal (with him *Navadip Chandra Ghosh* and *S. K. Ray*), for the appellant:—Parties are bound by the contract whereby rent has been fixed in perpetuity. The principle underlying section 38, Bengal Tenancy Act cannot be extended to the case of a tenure. Under section 179 I was competent to contract that the rent was not liable to be increased

(1) (1921) 6. Pat. L. J. 665.
(2) (1864) W. R. (Act X) 42.
(3) (1863) Marshall's Rep. 558.
(4) (1931) I. L. R. 59 Cal. 155, F. B.
(5) (1922) 2 A. C. 180.
(6) (1920) I. L. R. 48 Cal. 473, P. C.

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and decreased on any account. The contract cannot be affected by the Act unless there is an express prohibition like the one provided for in section 178, in the case of a raiyat. The principle of natural justice and equity cannot override law or the express contract between the parties. The decision in *Sukhraj Rai* v. *Ganga Dayal Singh*(1), in so far as it extends the principles underlying section 38 to the case of a tenure, cannot be supported. Section 52 of the Act cannot apply unless there is deficiency in the area held by the tenant.

Manohar Lal (with him *N. C.* Roy), for the resdendents:—The proper construction of section 179 of the Bengal Tenancy Act is that if the parties have not contracted out of the statute, the general law will apply: *Nawabzada Syed Moinuddin Mirza* v. *Sourendra Kumar Roy*(2), *Krishendra Nath Sarkar* v. *Kusum Kumari Debi*(3). The right to abatement of rent in the case of diluvion is based on the principle of natural justice and equity.

Unless there is a special contract to the contrary the tenant cannot be deprived of that right. [Refers to *Dwijendra Nath Biswas* v. *Jitendra Nath Roy*(4).]

In *Khetramoni Dasi* v. *Jiban Krishna*(5) the tenant was held entitled to abatement of rent under section 52, inspite of a contract that the rent will not be reduced.

[Reliance was placed on *Sheik Enayutoollah*(6) and *Afsarooddeen* v. *Musammat Shoroshee*(7).]

The principle underlying section 38 of the Act applies to all tenants irrespective of their status and is not confined to occupancy raiyats only: *Sukhraj*

(1) (1921) 6 Pat. L. J. 665.
(2) (1933) I. L. R. 13 Pat. 231, F. B.
(3) (1926) L. R. 54 I. A. 48.
(4) (1927) 32 Cal. W. N. 295.
(5) (1920) I. L. R. 48 Cal. 473, P. C.
(6) (1864) W. R. (Act X) 42.
(7) (1863) Marshall's Rep. 558.

Rai v. *Ganga Dayal Singh*(1), *Rameshwar Mandar* v. *Badri Sahu*(2) and *Raghunandan Prasad Singh* v. *Lalit Mohan*(3).

M. N. Pal, in reply: I adopt as a part of my argument the passage in Sen's Book on Bengal Tenancy Act, Appendix XIV, page 216 (1929 Edition). The scheme of the Act makes a distinction between agricultural raiyats and middle men (tenure-holders). The protection afforded to agriculturists by the Act cannot be extended to more advanced persons or higher class of tenants, to wit, tenure-holders whom the legislature has left to be regulated by their own contract. The observations of Sir Barnes Peacock in the case of *Sheik Enayatollah*(4), which has been followed in later cases, may be right as he was dealing with the case of an actual cultivator.

In the case of permanent deterioration or destruction the defendant may be entitled to an abatement of the whole rent as in those circumstances the lease would be deemed to be off. But in the event of partial or temporary deterioration, the tenant is not entitled to a partial or any abatement of rent.

[Reliance was placed on *Arun Chandra* v. *Shamshul Huq*(5), *Mathey* v. *Curling*(6) and *O'brien Donaghey* v. *George Weatherdon*(7).]

FAZL ALI, J.—This is an appeal under the Letters Patent from the decision of a Judge of this Court in a second appeal arising out of a suit for arrears of rent in respect of an istamrari mukarrari tenure held by the defendants.

(1) (1921) 6 Pat. L. J. 665.
(2) (1929) 11 Pat. L. T. 470.
(3) (1934) 15 Pat. L. T. 784.
(4) (1864) W. R. (Act X) 42.
(5) (1931) I. L. R. 59 Cal. 155, F. B.
(6) (1922) 2 A. C. 180.
(7) (1910) 7 Ind. Cas. 201.

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The only substantial point which was raised in defence is set out in paragraph 4 of the written statement which runs as follows:

"The entire mokarrari property aforesaid was from before the years in suit subject to diluvion and was full of sand and jungle and was quite unfit for cultivation on account of overflow of the river Kosi. Hence the plaintiff is not at all entitled to get rent for the years in suit, rather this defendant is entitled to an 'abatement of rent'."

The learned Munsif before whom the suit had been instituted deputed a commissioner to make a local investigation and report whether the land in suit was fit for cultivation during the years in suit. When the commissioner went to the spot he found that out of 107 bighas odd of land comprised in the tenure 81 bighas odd were covered with jungle, 21 bighas had certain crops and the remaining 4 bighas odd were cultivated but bore no crops at the time. After a minute observation of the condition of the land the commissioner came to the conclusion that no portion of the land could have been fit for cultivation during the years in suit and the learned Munsif relying on his report which was supported by the oral evidence of the defendant held that the plaintiff was not entitled to recover any rent for the period in suit. When the case went up in appeal the learned District Judge accepted the finding of the Munsif that the lands were not fit for cultivation but he assessed a nominal rent of four annas a bigha upon the land on the basis that some profit could be made by the defendants even out of the jungle lands for the purpose of grazing cattle and for this the tenants should be required to pay rent. From the decision of the learned Judge the plaintiff appealed to the High Court claiming his full mukarrari rent, while the defendants preferred a cross-objection claiming complete abatement of rent. The appeal was heard by Mr. Justice James who reversed the decision of the District Judge and restored the judgment of the Munsif. The plaintiff has now preferred this appeal under the Letters Patent.

It is no longer disputed that the land was in fact wholly unfit for cultivation and was not cultivated

during the years in suit; it is also conceded that if the defendants had been occupancy raiyats they would, on the findings arrived at by the courts below, be entitled to claim reduction of rent under section 38 of the Bengal Tenancy Act. It is, however, strongly contended that a tenant holding under an istamrari mukarrari lease cannot avail himself of the benefit of section 38. The courts below have rejected this contention and held that the principle underlying section 38 is applicable to all tenancies and for this view they have relied upon the decision of a Divisional Bench of this Court in *Sukhraj Rai* v. *Ganga Dayal Singh*(1) which again appears to be based on the decisions of Sir Barnes Peacock in the cases of *Sheik Enayutoollah*(2) and *Afsurooddeen* v. *Musammat Shoroshee Bala Debi*(3). As one of the contentions on behalf of the appellant was that Sir Barnes Peacock has stated the law in too wide terms it becomes necessary to examine the question in some detail.

In *Enayutoollah's* case(2) the tenant who was sued claimed reduction on the ground (*1*) that part of his land had been washed away and (*2*) that part of it had been so covered with sand as to have been rendered wholly useless. A question then arose as to whether there was anything in the original lease by which the tenant had been inducted on the land, to prevent them claiming reduction. Sir Barnes Peacock, C.J. and Shambhoo Nath Pandit, J. remanded the case for a determination of the terms of the lease but in so remanding it held that if either of the two allegations made by the tenant was proved he was entitled to claim reduction of rent. In the judgment in that case which was delivered by Sir Barnes Peacock he referred to the following passage in Bacon's Abridgment, 7th edition, Volume II, page 63:—

"In this place we are to consider whether the tenant shall pay the whole rent though part of the

(1) (1921) 6 Pat. L. J. 665.
(2) (1864) W. R. (Act X) 42.
(3) (1863) Marshall's Rep. 558.

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thing demised be lost, and of no profit to him, or though the use of the whole be for some time intercepted, or taken away without his default; and here it seems extremely reasonable that, if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant without his default, wants the enjoyment of part of the thing, which was the consideration of his paying the rent; nor has the lessee reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered".

Sir Barnes Peacock then proceeded to observe:—

"We think that that rule is founded on the principles of natural justice and equity, that, if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement".

Again in the case of *Afsurooddeen*(1) the learned Chief Justice observed:—

"If a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of land rented, and, independently of section 18, Act X of 1859, we are of opinion that, according to the ordinary rules of law, if a talookdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent if a portion only be washed away. According to English law, a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent".

I think that properly speaking the observations of Sir Barnes Peacock should be discussed under two

(1) (1863) Marshall's Rep. 558.

heads because in his opinion a tenant is entitled to claim abatement of rent (*1*) in the case of diluvion and (*2*) where the land is so covered with sand as to be unfit for cultivation.

Now, whatever may be the state of the law in England it has always been held in this country that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated. This principle has now received statutory recognition and is embodied in section 52 of the Bengal Tenancy Act. The observations of Sir Barnes Peacock, therefore, in so far as they related to the right of a tenant to claim abatement in case of diluvion were fully justified and there is nothing in the passage quoted by him from Bacon's Abridgment or in the observations made by him in *Afsurooddeen's* case(1) which was purely a case of diluvion to which exception need now be taken. But in *Enayutoollah's* case(2) Sir Barnes Peacock, dealing with the contention of the tenant that a part of his land had been rendered useless on account of deposit of sand, said—

"With regard to the land alleged to have been covered by sand the Judge of the first Court will have to enquire if that portion was covered by sand and thereby deteriorated or rendered wholly useless; because if the land has been deteriorated or rendered wholly useless by the act of God the tenant would be entitled to an abatement provided that there was no stipulation to the contrary in the kabuliyat."

It is the view of law which is suggested in this passage that does not seem to be quite in consonance with the English authorities as will appear from the following observation made by Lord Atkinson in *Mathey* v. *Curling*(3):—

"I cannot find any case in which the rent reserved by a lease was apportioned simply

(1) (1863) Marshall's Rep. 558.
(2) (1864) W. R. (Act X) 42.
(3) (1922) 2 A. C. 180, 232.

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because the lessee was deprived of the use and enjoyment of a portion of the demised premises, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such a result ".

FAZL ALI, J.

The matter seems to have been discussed at length in *Arun Chandra Singha* v. *Shamsul Huq*(1) where Rankin, C.J., referring to the passage which I have already quoted from Sir Barnes Peacock's judgment, said—

" In this sentence the learned Chief Justice would seem to have outstripped the English law and left it far behind ".

It may be stated here that in 1864 when *Enayutoollah's* case(2) was decided the Act which was then in force was Act X of 1859. The only section of that Act which is relevant to the present discussion is section 18 which ran as follows :—

" Every ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the ryot, or if the quantity of land held by the ryot has been proved by measurement to be less than the quantity for which rent has been previously paid by him."

The provisions of that section have since been split up and re-enacted in two separate sections, these being sections 38 and 52 of the Bengal Tenancy Act. Section 38 provides for cases where the soil of the holding has without the fault of the raiyat become permanently deteriorated by deposit of sand or other specific causes, sudden or gradual. Section 52 deals with cases where the whole or part of the tenant's land is lost to him by reason of diluvion or other similar causes. The point which is to be borne in mind is that while section 52 is general and applies to all classes of tenants, section 38 has been made applicable only to an occupancy tenant. I think from this it may be pertinently argued that if the Legislature intended that the principle underlying section 38 should be

(1) (1931) I. L. R. 59 Cal. 155, F. B.
(2) (1864) W. R. (Act X) 42.

applicable to all classes of tenants, it would not have confined it merely to occupancy tenants and the section might have been drafted in general terms as section 52 has been drafted. Thus if we are to decide the present case merely upon the express provisions of the Statute, there can be no warrant for holding that a tenant who holds under an istamrari mukarrari lease is entitled to claim reduction of rent on the ground that his land has permanently deteriorated or has become useless for cultivation. But it is said that the right of such a tenant is based upon the principle of natural justice and equity. In my opinion, however, the obvious answer to this argument is that the principle of natural justice which is invoked on behalf of the tenant must be one which does equal justice to the landlord. In the case of an occupancy tenant the landlord is entitled to claim an enhanced rent under certain conditions which are specified in section 30 of the Bengal Tenancy Act and the tenant has a corresponding right to claim reduction where his land becomes permanently deteriorated. In a case, however, where the rent has been permanently fixed by contract it is obvious that the landlord cannot claim any enhancement, if the productivity of the land is increased. Is it then just to hold that such a tenant is entitled to claim reduction where the productive capacity of the land has decreased? It appears to me that where the rights and liabilities of the parties are regulated by contract the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. In my opinion, therefore, there is no justification for extending the principles underlying section 38 of the Bengal Tenancy Act to a tenant holding under an istamrari mukarrari lease and if *Sukhraj's* case(1) was intended to lay down that the principle can be

(1) (1921) 6 Pat. L. J. 665.

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extended to such a case, I respectfully dissent from such view. Indeed in the course of the elaborate arguments which were addressed to us in this case neither party was able to cite any decision in which the principle underlying section 38 was held to be applicable to a tenant holding his lands under an istamrari mukarrari patta.

The next question which is to be considered is whether the defendant can claim abatement under section 52 of the Bengal Tenancy Act. As I have already stated, section 52 of the Bengal Tenancy Act is more general than section 38 and is applicable even to a tenant holding under a mukarrari lease. This should be clear upon reading the section itself but if any authority is required for the view it is to be found in the decision of the Judicial Committee of the Privy Council in the case of *Khetramoni Dasi* v. *Jiban Krishna Kundu*(1). In that case certain tenants who held lands in Sundarbans under a permanent mukarrari lease claimed reduction of the agreed rent under section 52 on the ground that a part of the land leased to them had been washed away. The landlords denied their right to a reduction relying on the terms of the lease which as they contended precluded the tenants from denying their obligation to pay the full rent fixed by the lease on the ground of flood or diluvion. One of the contentions which was raised on behalf of the landlord before the Judicial Committee was that under section 179 of the Bengal Tenancy Act the tenant could contract himself out of the benefit conferred upon him under section 52, but it was held that the lands not being situated in a permanently settled area, section 179 did not apply and the tenants were entitled to claim reduction of rent under section 52.

Now section 52 provides that a tenant shall 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. This

(1) (1920) I. L. R. 48 Cal. 473, P. C.

section, as is clear from its language, is applicable only when there is found to be any deficiency in the area of the holding or tenure from whatever cause, though it will be found as a matter of experience that many of the cases in which abatement of rent is allowed under this section are cases of diluvion. Thus the defendant would have been undoubtedly entitled to claim abatement under this section if it could be ascertained that he had lost the whole or portion of the land during the years in suit by diluvion or some similar cause. It appears to me, however, that neither the parties to this litigation nor the courts below which had to deal with the facts of the case attached much importance to the question of diluvion because it was assumed that in view of the decision in *Sukhraj's* case(1) the tenant was entitled the relief he claimed apart from the question of actual diluvion, on the ground that the lands were unfit for cultivation during the years in suit. This is clear from the terms in which the writ was issued by the trial Court to the commissioner as well as from the discussion of the case to be found in the judgments of the first two courts. That the defendant probably intended to set up a case of diluvion may be inferred from what they stated in paragraph 4 of the written statement which I have already quoted and I think that there must also be something in the record to show that the land had in fact been subject to diluvion, for Mr. Justice James in narrating the facts of the case said—

"It appears that a few years ago the land of the tenure was submerged by the westward movement of the Kosi river and that the land has only recently reformed".

and again he observed

"the tenure-holder was entitled to abatement of rent until the effect of the submersion of his land had passed away".

It is true that when the commissioner held his local investigation, he did not find the land actually under water, but he held the investigation in the year 1339 Fasli and we must remember that the suit was for the rent of the years 1335 to 1338 Fasli and whatever may have been the condition of the land in the

(1) (1921) 6 Pat. L. J. 665.

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year immediately preceding the visit of the commissioner, there is nothing in the judgments of the courts below to show what was the condition of the land during the earlier years for which the suit had been brought. Unfortunately the question whether in point of fact the lands in question or any portion of it had diluviated during any of the years in suit cannot be properly investigated in this Court, because the appeal to this Court (which is the third court of appeal) was confined only to questions of law and the learned Advocates for the parties did not address us on the facts or the evidence adduced by the parties. In these circumstances I think that the case should be remanded to the court below for the determination of the question whether the defendant is entitled to any relief under section 52 of the Bengal Tenancy Act. If the court below comes to the conclusion that the whole or any portion of the lands forming the tenure had diluviated in any of the years in suit causing thereby a deficiency in the area of the tenure, the defendants will be allowed proportionate abatement of rent; but no abatement will be granted if the defendants fail to establish that there was any deficiency in the areas due to diluvion. I think that in the circumstances of the case the defendants should be allowed to adduce such relevant evidence as they may desire to adduce to prove the actual condition of the land during the years in suit, because, as I have already stated, the trial court appears to have proceeded on the erroneous assumption that in order to establish their claim for exemption from rent it was enough for the defendants to prove that the land was not fit for cultivation during the years in suit and the case of actual diluvion need not have been proved. If the defendants wish to adduce any evidence, the plaintiff will also be entitled to adduce rebutting evidence. If the parties should desire to adduce any additional evidence it would be open to the learned District Judge to remit the case to the trial court for recording such evidence.

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In my opinion, therefore, the appeal should be allowed, the judgments of the courts below set aside and the case sent back to the District Judge to be disposed of according to law in the light of the observations made above. Costs will abide the result.

COURTNEY TERRELL, C.J.—I agree.

FAZL ALI, J.

MACPHERSON, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

1936.

March, 20, 23.

Before Agarwala and Rowland, JJ.

JOTI LAL SAH

v.

SHEODHAYAN PRASAD SAH.*

Mortgage—redemption suit—previous suit for redemption, when bars a second suit—Transfer of Property Act (Act IV of 1882), section 60—Code of Civil Procedure, 1908 (Act V of 1908), sections 11, 47 and Order XXXIV, rules 7 and 8—res judicata.

The plaintiff brought suits for declaration of his right of redemption and the defendants pleaded (*i*) that inasmuch as the predecessor in interest of the plaintiffs had brought suits for similar relief and did not make payment under the decrees their right to redeem had been extinguished, (*ii*) that the suits were barred by res judicata, (*iii*) that section 47 of the Code of Civil Procedure was a bar to the maintainability of the suits. It was also urged that the equity of redemption had during the pendency of the suits vested in another person and hence the plaintiff could not continue the suit.

* Appeals from Appellate Decrees nos. 232, 233 and 234 of 1933, from a decision of Babu Ananta Nath Banerjee, Subordinate Judge of Chapra, dated the 9th August, 1932, affirming a decision of Babu Damodar Prasad, Munsif of Chapra, dated the 14th August, 1931.