that the decree shall be a personal one and not form any part of the mortgage decree granted to the plaintiff.

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30 C. 794=7 C. W. N. 609.

The result then is that, subject to the modification indicated above, the decree of the Court below will be affirmed and this appeal dismissed with costs.

Appeal dismissed.

30 C. 801 (=7 C. W. N. 810.)

[801] APPELLATE CIVIL.

DINENDRA NARAIN ROY *v.* TITURAM MUKERJEE.*
[12th June, 1903.]

Compensation—Apportionment of compensation money—Landlord and Tenant—Land Acquisition Acts (I of 1894 and XVIII of 1885)—Rent fixed in perpetuity—Bengal Tenancy Act (VIII of 1885) s. 50, sub-s. (2).

In apportioning compensation money, awarded under the Land Acquisition Act, between the landlord and the tenure-holder, the Court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values. Where the rent is fixed in perpetuity the landlord is not entitled to more than the capitalized value of his rent.

Gordon Stuart and Co. v. *Maharajah Mohatab Chunder Bahadoor* (1), *Raye Kissory Dassee* v. *Nilcant Day* (2), *Godadhar Dass* v. *Dhunput Sing* (3), *Dunne* v. *Nobo Krishna Mookerjee* (4), *Rajah Khetter Kristo Mitter* v. *Kumar Dinendra Narain Roy* (5) and *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundar Dasi* (6) considered.

[Foll. 5 C. L. J. 662 ; Ref. 13 C. L. J. 415=10 I. C. 163 ; 5 C. L. J. 48 N. ; 40 Cal. 64 ; 36 Mad. 395 ; 16 C. L. J. 209=17 I. C. 168 ; Rel. on ; 20 I. C. 263.]

APPEAL by claimant No. 1, Kumar Dinendra Narain Roy.

This appeal arose out of a land acquisition case in which compensation to the amount of Rs. 20,057 odd was awarded by Government for a plot of land acquired in the suburbs of Calcutta for the purpose of constructing a public street. The land acquired consisted of three holdings, Nos. 119, 119A and 119B, within the Government estate, Panchannagram.

The first claimant, Kumar Dinendra Narain Roy, was the superior tenant under Government. The second claimant was a tenant under the first, and claimed to possess a permanent, heritable and transferable tenure at a fixed rental. The third claimant held under a lease from the second claimant ; the lease was [802] given to one Aprokash Mookerjee and others, and they conveyed their rights to the Roller Mills Co., who built a large flour mill on the aforesaid holdings, but the plot of land acquired had not been built upon. The land acquired was partly *busti* and partly tank, and was occupied by some temporary tenants.

The first claimant denied the permanent right as claimed by the second claimant, and asserted that the latter was only a tenant-at-will.

The Court below found that the second claimant was a permanent tenure-holder, and that his rent was fixed. It held that the value of the landlord's (claimant No. 1) interest was the capitalized value of the

* Appeal from Original Decree No. 309 of 1900, against the decree of F. E. Pargiter, District Judge of 24-Perganas, dated Aug. 21, 1900.

(1) (1863) 1 Marsh. 490.
(2) (1873) 20 W. R. 370.
(3) (1881) I. L. R. 7 Cal. 585.
(4) (1889) I. L. R. 17 Cal. 144.
(5) (1897) 3 C. W N. 202.
(6) (1900) I. L. R. 28 Cal. 146.

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30 C. 801=7 C. W. N. 810.

quit rent which he received in respect of the land acquired, and apportioned the compensation money according to that principle amongst the claimants. Against this decision the landlord, Kumar Dinendra Narain Roy, appealed to the High Court.

The Offg. Advocate-General (Mr. *L. P. Pugh*), (Dr. *Ashutosh Mookerjee*, Babu *Hari Charan Sarkhel* and Babu *Beraj Mohan Mazumdar* with him) for the appellant. I submit that the Judge in the Court below has proceeded on an entirely erroneous principle. He finds on the facts that the second claimant has a permanent interest, and that the rent of the latter is not enhancible. Assuming that the findings are correct, I say that it is not correct to describe the landlord as a mere rent-receiver. It may often be that the rent of a tenure is not enhancible; but will it be right to say that the landlord has no right whatsoever, in the case of compulsory acquisition of lands forming the tenure, save and except to receive compensation calculated at so many years' purchase of the rent received by him? The true principle would be to ascertain the value of the interest of each holder of a tenure and give him a sum equivalent to the purchase money of such interest : see the cases of *Sreenath Mookerjee* v. *Maharajah Mahatap Chand Bahadoor* (1) and *Gordon Stuart and Co.* v. *Maharajah Mahatab Chunder Bahadoor* (2). Here the lands are in the suburbs of Calcutta, where the value is, of course, a great deal higher than that in the Moffasil. The case [803] of *Rajah Khetter Kristo Mitter* v. *Kumar Dinendra Narain Roy* (3) does not stand in my way, for I am quite willing to accept compensation calculated on the principle stated therein. Can it be said that the learned Judge has assessed compensation payable to the zemindar on the principle stated in that case? I submit not. The case of *Raye Kissory Dassee* v. *Nilcant Day* (4) has not been approved of in the later cases: see the cases of *Godadhar Dass* v. *Dhunput Sing* (5), *A. M. Dunne* v. *Nobo Krishna Mookerjee* (6) and *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundari Dasi* (7).

Dr. *Ashutosh Mookerjee* (following the Advocate-General) contended that the presumption under section 50 of the Bengal Tenancy Act apply only to the proceedings under that Act, and not to proceedings under the Land Acquisition Act, or any other Act.

Mr. *O'Kinealy* (Babu *Hara Kumar Mitter* with him) for the tenant, claimant No. 2. I submit on the findings of the Court below, which have not been challenged in the present appeal, no case has been made out for the interference of this Court. The question resolves into this: What are the rights of the zemindar? Has he any right beyond that of a receiver of rents? Beyond the right to receive a particular sum of money as rent, what does he lose by reason of the acquisition of his land? Applying, therefore, the test laid down in the case of *Shama Prosunno Bose Mozumdar* v. *Brakoda Sundary Dasi* (7), we can easily get at the money-value of the landlord's interest. The case of *Godadhar Dass* v. *Dhunput Sing* (5), on which reliance has been placed by the other side, is distinguishable from the present case. There the zemindar was not a party, and that considerably alters the aspect of the case. Beyond the

(1) (1860) 16 S. D. A. 326.
(2) (1863) 1 Marsh. 490.
(3) (1897) 3 C. W. N. 202.
(4) (1873) 2 W. R. 370.
(5) (1881) I. L. R. 7 Cal. 585.
(6) (1889) I. L. R. 17 Cal. 144.
(7) (1900) I. L. R. 28 Cal. 146.

right to receive a certain rent, there are no special circumstances in this case, such as the chance of an enhancement of rent, upon which any money value can be put. The zemindar is, therefore, not entitled to receive anything more than what the Court below has given him.

[804] Babu *Umakali Mookerjee* (Babu *Debendra Nath Ghose*, Babu *Satis Chunder Ghose* and Babu *Charoo Chunder Ghose* with him) for the third claimant, supported Mr. *O'Kinealy's* argument.

The *Offg. Advocate-General* in reply.

MACLEAN, C. J. The question which arises upon this appeal is as to the apportionment of the compensation money awarded for the acquisition of certain lands under the Land Acquisition Act as between the zemindar on the one hand and the respondents to this appeal on the other, who claim to be the owners of a permanent tenure, heritable and transferable, and with a rental fixed in perpetuity in the land in question. The question debated before us is as to the principle upon which the apportionment ought to be made.

The case was gone into very fully before the District Judge of the 24-Perganas who, in an extremely careful judgment, has dealt with the whole matter and with a variety of questions which have not been raised before us upon appeal.

Two questions only have been argued before us : (1) whether the Court below was right as to the principle upon which it apportioned the compensation money between the zemindar and the tenure-holders, and (2) whether the rental can be properly regarded as fixed in perpetuity. It will be convenient to deal with the latter point first.

I am in accord with the argument of the appellant that sub-section (2) of section 50 of the Bengal Tenancy Act does not apply to the present case : it only applies to a suit or proceeding under that particular statute. But that does not dispose of the matter. In my opinion, upon the evidence adduced in the case for the present respondents, there was sufficient ground to justify the Court in presuming that the rate of rent had not been changed from the time of the permanent settlement. Without going in detail into that evidence, which is summed up by the learned District Judge in paragraph 35 of his judgment, I think, having regard to the documents in the case and to the fact that the same rental which is mentioned in the deed of 1799 has been paid without alteration for a period of nearly one hundred years, the Court would be justified in drawing the inference that the same rent existed at the date of the permanent settlement, and that the [805] rate of rent had not since been changed. We may take it then for the purpose of the present decision that the rental was one fixed in perpetuity.

I now come to the main question discussed on the appeal. The learned Judge has held that the zemindar is only entitled to such a capitalized sum as represents some twenty years' purchase of the rent which he was receiving under the lease,—a very small sum, some Rs. 3-8-1, which rent so capitalized,—the number of years' purchase has not been contested,—gives a capital sum of Rs. 70-1-8. Add the statutory allowance to it, and we get a total of Rs. 80-9-11. In point of fact, for the reasons given in paragraph 52 of the judgment, the landlord has been given a much larger sum, *viz.*, Rs. 273-13-9. But he is not satisfied : he contends that he is entitled to more than the mere capitalized value of his rent ; that he is entitled to something for the chances on the lease coming to an end or being forfeited. This contention has not been

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30 C. 801=7 C. W. N. 810.

disregarded by the Court below ; for in paragraph 41 of the judgment, it deals with the suggestion. So far as I understand, no evidence was adduced to show what would be the monetary value of any such chance, and it would, I think, be extremely difficult to appreciate it. If the rent were enhancible, he would be entitled to something for that chance of enhancement ; but that again would be difficult to estimate by a money value. But in addition to all this the landlord claims not only the capitalized value of his rent, but, after the tenure-holder has been compensated for any loss he may have sustained, to have the balance of the compensation money divided equally between himself and his tenant, and he contends that the proposition is supported by ample authority of this Court. I will deal with the cases in a moment. It seems to me all important with a view to apportioning the compensation money between the zemindar on the one hand and the tenure-holder on the other, to ascertain what the real interest of each party is in the property, and what is the interest each party parts with. In the present case, if the lease be permanent and at a fixed rent, as we must take it to be, what are the respective interests of the zemindar and of the tenure-holder? Subject to those chances to which I have referred, and which are scarcely appreciable by a money payment, the **[806]** interest of the landlord cannot be put higher than the fixed rent he receives ; for which, as he loses it, he is entitled to be compensated at so many years' purchase. The real beneficial owner in the case before us is the tenure-holder, and not the landlord ; the property is virtually his, subject to the payment of the small rent I have mentioned.

I will not deal with the various authorities. Our attention has not been directed to any case dealing with this subject in the other High Courts in India, nor am I personally aware of any which throws any light on the matter.

In the case of *Gordon Stuart and Co.* v. *Maharajah Mohatab Chunder Bahadoor* (1), it was held that : "where lands are taken compulsorily, the principle upon which the amount of compensation is divisible amongst the zemindar and the holder of several subordinate tenures is by ascertaining the value of the interest of each holder of a tenure, and to give him a sum equivalent to the purchase money of such interest." There is nothing in that decision to support the suggestion that the compensation money ought to be divided between the zemindar and the tenant, as is the present contention of the appellants.

The next case is that of *Raye Kissory Dassee* v. *Nilcant Day* (2), where it was held that " where land held in *putni* is taken by Government for public purposes, the proper mode of settling the rights of the parties interested is to give the putnidar an abatement of his rent in proportion to the quantity of the land which has been taken from him, and to compensate the zemindar for the loss of rent which he sustains. Accordingly the compensation awarded was held to have been very fairly distributed, where the zemindar received a little more than sixteen years' purchase of the rent abated and the *putnidar* received the remainder." I see no suggestion there of dividing the compensation money between the landlord and the tenant. Chief Justice Couch was a party to that decision, and he says :—

"The compensation ought to be apportioned between the parties according to the value of the interest which each of them parts with.

(1) (1863) 1 Marsh. 490. (2) (1873) 20 W. R. 370.

The zemindar has a right to the fixed rent, and the loss he sustains is of so much of his rent. Any other possible [807] injury, such as the chance of the *putnidar* throwing up the land and its being diminished in value by what has been taken by Government and still remaining, as it did, liable to pay the same revenue is, we think, not appreciable, and cannot be taken into account. If there is no abatement of the rent, and the *putnidar* continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar ought to receive compensation. He would be in the same position as before, except with reference, as we have said, to the possibility of a loss which is scarcely appreciable. But the proper mode of settling the rights of the parties is to give to the *putnidar* an abatement of his rent in proportion to the quantity of land which has been taken from him. It is not fair that he should be liable to pay the same rent when a part of the land has been taken away. The decision of the Judge that the plaintiff is entitled to an abatement of the rent is correct, and is in accordance with the principle laid down in the case of *Maharajah of Burdwan* (1). This being so, the zemindar ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The *putnidar's* getting an abatement of his rent is to be taken into account as partly the way in which he is compensated for the loss of the land."

The next case is one which, I think, has created the difficulty—a decision of Chief Justice Garth and Mr. Justice McDonell in *Godadhar Dass* v. *Dhunput Singh* (2). That case is treated by the appellant as an authority for the proposition that as between the zemindar and the *putnidar* the former is entitled to as much of the compensation money as the latter ; and the head note of that case certainly supports that view, as also certain observations of the learned Chief Justice, which tend directly in the same direction. But it can scarcely be regarded as an authority as the zemindar was not a party to the case, and the contest was between the *putnidar* and the *dar-putnidar*. It cannot be put higher than an *obiter dictum*. The language upon which so much reliance is placed is at page 589, where the learned Chief Justice says :—

" As regards the zemindar, it is a mistake to suppose that his interest in the land is confined entirely to the rent which he [808] receives from the *putnidar*. He is the owner of it under the Government ; and in the event of the *putni* coming to an end by sale, forfeiture or otherwise, the property would revert to the zemindar, who might deal with it as he pleased in its improved state ; and although in some cases, and possibly in this, the chances of the *putni* coming to an end may be more or less remote, there is no doubt that in all cases the zemindar is entitled to some compensation (small though it be) for the loss of his rights. At any rate he would generally be entitled to receive at least as much as the *putnidar* to whom, in this instance, the whole compensation has been awarded."

It is upon the latter sentence that so much stress is laid by the present appellant. If the chances to which the learned Judge refers are susceptible of a money appreciation, they ought to be taken into account, but in the present case no evidence was apparently forthcoming on the point.

(1) (1860) S. D. A. 328.

(2) (1881) I. L. R. 7 Cal. 585.

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I now pass on to the case of *A. M. Dunne* v. *Nobo Krishna Mukerjee* (1). There the question is not discussed in the judgment. The Court only held that the money should be apportioned as was done in an unreported case (appeal from Original Decree No. 311 of 1886), which is referred to in the note at page 147 of the report, which again seems to have followed another case, where the decree was made by consent. Neither the case before Sir Richard Garth or that before Sir Comer Petheram can, under the circumstances, be regarded as conclusive decision on the point.

The next case was that of *Rajah Khethro Kristo Mitter* v. *Kumar Dinendra Narain Roy* (2) decided in May 1897, where the Court said : " It occurred to me during the course of the argument, that the proper course would have been to ascertain, *first*, what was the value of the landlord's interest, and *secondly*, what was the value of the tenant's interest, and having found the money value of these two interests, to apportion and divide the money accordingly. But I understand that in this country it is almost impossible to take that course ; it is almost impossible to say what is the value of the interest, that is, the precise money value of the lessee's interest on the one hand, and on the other what is the precise money value of the landlord's interest. That being [809] so the Courts have adopted what perhaps I may call a rough-and-ready way of settling the matter,"—and the Court, though apparently with some misgiving, followed the case of *Dunne* v. *Nobo Krishna Mukerjee* (1), that which I have just commented upon.

The matter was again discussed in the case of *Shama Prosunno Bose Mazumdar* v. *Brakoda Sundari Dasi* (3) and there the Court, after referring to the case I have last cited, said :—

" The principle upon which the compensation money in cases of this class ought to be apportioned as between the landlord and tenant is as follows :—First, the Court must ascertain the amount of rent payable to the landlord and capitalize that rent at so many years' purchase, the number of years' purchase depending upon the particular circumstances of each particular case. The landlord is at the outset entitled to that capitalized value, but I think he is entitled to something more. There is, or in many cases may be, the chance of an enhancement of the then existing rent ; he is entitled in my opnion to have the value of this chance of enhancement assessed, and to have a money-value put upon it and to take that money-value out of the compensation awarded. It may in some, perhaps in many, cases be somewhat difficult to arrive at the true capitalized value to the landlord of this chance of enhancement, but it will be for the landlord who sets up such a claim to make it out, and show what the true value is. I do not think the landlord can be entitled to anything more, nor have I heard it suggested that he can be."

In the present case we regard the rent as fixed in perpetuity, and no question of the chance of enhancement arises. The case (4) before Chief Justice Couch was apparently not cited in the case (3) I have just mentioned ; but it seems that the view there taken by the Court is in conformity with that held by that learned Judge in the case I have quoted from. Upon this review of the authorties I do not think that the appellant has substantiated that as between the zemindar and the

(1) (1889) I. L. R. 17 Cal. 144.
(2) (1897) 3 C. W. N. 202.
(3) (1900) I. L. R. 28 Cal. 146.
(4) (1873) 20 W. R. 370.

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tenure-holder, after providing for the capitalized value of the rent due to the zemindar, the compensation money ought to be divided between himself and the tenant. I cannot see upon what principle such a result [810] can properly be arrived at. I think the Court ought to proceed on the principle of ascertaining what is the value of the interest of the zemindar on the one hand with which he has parted, and that of the tenant on the other, and to apportion the compensation money between them in accordance with those values. In my opinion the decision of the Court below upon this point was right, and the appeal must be dismissed with costs—two separate sets, one to each respondent.

As regards the suggestion made by Mr. O'Kinealy that the lower Court was wrong in making no order as to costs, I do not think we can interfere, as that has not been made the subject of any cross-objection.

GEIDT, J. I concur.

Appeal dismissed.

30. C. 811 (=7 C. W. N. 601=30 I. A. 159.)

[811] PRIVY COUNCIL.

PRIA NATH DAS v. RAMTARAN CHATTERJEE.*
[26th March and 6th May, 1903.]

[*On appeal from the High Court at Fort William in Bengal.*]

Resumption—Rent, suit for—Co-owner not joined as party—Land resumed by Government and resettled with heirs of former proprietor—Assessment with separate rent after resumption—Bengal Act VIII of 1879, s 10—Suit for rent as fixed at settlement.

A chuck forming part of a permanent *ganti* tenure, of which a pottah was granted in 1867 by the zemindar to the defendant at an annual rent of Rs. 2,300, was resumed by the Government, and in 1884 granted on a temporary settlement to the heirs of the zemindar, who was then dead, the rent being fixed at Rs. 850 a year. One of the heirs sold his share in the chuck to the plaintiff, and his share in the *ganti* tenure to another purchaser; but the defendant continued to pay the whole of the rent under the pottah of 1867 as before. That pottah contained a clause for the proportionate abatement if any part of the land was resumed. In a suit by the plaintiff suing alone for the rent of the chuck at the rate fixed in the settlement of 1884, the defendant denied his liability or any engagement to a pay rent to the plaintiff. The High Court held that the suit was not maintainable on the ground that the purchaser of the share of the *ganti* tenure from the heir who parted with it had not been joined as a party :—

Held, that the resumption by Government did not disturb the possession either of the zemindar's heirs or of the defendant, and the rights of the latter were not abrogated by the settlement of 1884 so long as the zemindar or his heirs were in a position to let him have the land. The claim of the defendant for freedom from liability to the plaintiff in no way conflicted with s. 10 of Bengal Act VIII of 1879, which was plainly intended to fix for the future the liability of such under-tenants as might enter into possession, and under the circumstances did not interfere with the contractual rights of the subordinate holder. It was because the liability of the defendant was not under the settlement, but for a lump sum under the contract of 1867, that all the owners of the land for which the lump sum was the rent, were necessary parties in any action for the rent of the chuck in suit. Had the settlement, created a liability against the defendant to pay Rs. 850 as rent to the plaintiff, the latter would not have required the concurrence of the owner of another and different chuck to enable him to maintain the suit.

[Ref. 19 C. L. J. 614=26. I. C. 215; 18 C. W. N. 967=19 C. L. J. 308 ; 33 I. C. 420.]

* *Present* : Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.