(1908) 04 CAL CK 0002

Calcutta High Court

Case No: Appeal from Order No. 49 of 1907

Pundit Lachmi Narayan		APPELLANT
	Vs	
Sheikh Mazhar Hassan		RESPONDENT

Date of Decision: April 23, 1908

Judgement

1. The Plaintiff-Appellant obtained, on the 29th July 1902, a decree against the Defendant-Respondent for recovery of possession of 69 bighas and 15 cattahs of land in Mahal Tier as malik''s zerait or proprietor''s private land with mesne profits. The claim for mesne profits covered from the 16th February 1898 to the date of the institution of the suit, i.e., the 30th January, 1901 and from the date of the institution of the suit to the date of delivery of possession, namely, the 31st May 1901. The decree directed that mesne profits should be ascertained in the execution proceedings. The land was not only malik''s zerait but it was alleged to have been in the khas or direct possession of the Defendant himself and the decree directed delivery of khas possession by dispossessing the Defendant. The Defendant appealed to this Court from the decree of the lower Court. On the 10th March 1905, this Court affirmed the decree of the lower Court. Possession, however, had, in the meantime, been taken, as we have said, on the 31st May 1904. There is no dispute as to the amount of mesne profits for the years 1305 to 1307, F.S. The Plaintiff''s claim for these years was based on rentals which were realisable from raiyatt to whom he had let out the land, but he alleged that the leases to the raiyats expired with the year 1307 F.S. and he was entitled to khas possession from 1308 F.S.; and that, therefore, he was entitled to damages from 1308 to Bysack 1311 F.S., the measure of which should be the actual price of the produce less the necessary costs of cultivation. On the application of the Plaintiff, the lower Court appointed a Commissioner to ascertain the amount of mesne profits by means of an investigation at the spot, and the Commissioner found, after an elaborate investigation, that the total amount of mesne profits calculated on the basis of rent for the earlier period and on the basis of produce for the later period, with interest at 12 per cent. per annum, would be Rs. 1-2805-6-5. The Defendant, however,

contended that mesne profits should be assessed on the basis of rental for the entire period. On a rental-basis, the amount with interest was found to be Rs. 3,192-12.6 and that is the amount which lower Court has allowed with costs and subsequent interest at 6 per cent, per annum.

2.The appeal of the Plaintiff and the cross-appeal of the Defendant have reopened the entire case before us, but it is not necessary to dwell upon the slender argument in support of the cross-appeal. The main contentions raised before us are based on the rival principles of calculation for the years 1308 to 1311 F.S., namely, whether the mesne profits should be calculated on the rental or produce basis ?

3.The dispute as to the facts bearing on the question of principle of assessment relates to the mode of enjoyment by the Defendant during the later period. The Plaintiff attempted to make out by evidence that the Defendant was, throughout the period, in khas possession, cultivating the land, and reaping ordinary country crops; while the Defendant asserted that, during the years 1308 and 1309 F.S., he cultivated the lands with indigo for his Trikalpore factory and that he was a loser by such cultivation as the price of indigo went down owing to a well known cause, and that, during the last two years, be let out the land to raiyats on money rent. The lower Court has held that the Defendant and his witnesses have given the facts correctly. It has found that the Defendant did cultivate the lands with indigo in 1308 and 1309 F.S. and was a loser by that cultivation, and that, in the following years, he let out the lands on money rent. The Commissioner, however, had come to a different conclusion. The oral evidence adduced before the Commissioner was highly conflicting because the witnesses of each party supported its own case. The Commissioner himself hesitated as to the weight to be attached to such conflicting testimony but the scales, in his estimate, turned in favour of the Plaintiff on account of a statement, or detailed account of produce, filed by the Defendant himself with his petition of objection. That statement, however, was not a part of the petition and it does not contain any direct or unequivocal admission that the lands were sown with ordinary crops during 1308 and 1309 We therefore are not disposed to place much reliance on this statement. On the other hand, the land had been used for a long series of years for indigo cultivation. It was so used from 1291 to 1297 and again from 1298 to 1304 periods during which the Trikalpore factory held it on lease with the rest of the lands of Mahal Tier. The factory did not stop work during 1308 and 1309. The Defend-ant sold indigo in those years through the Calcutta indigo-brokers, Messrs. Thomas & Co. The discovery of synthetic indigo dye in Europe could not, in the years previous to 1308, lead to any necessary inference of a permanent decline in the price of Bengal indigo, and it is more probable that the Defendant used the land for indigo cultivation for supplying his factory with materials for manufacturing indigo. The evidence to show that the indigo despatched by the Defendaut to the market of Messrs. Thomas & Co., was partly indigo from the land in suit is no doubt not very complete, but the probabilities are in favour of the view that the Defendant did not allow the land to go out of indigo

cultivation as long as he bad occupation of it and as long as he continued to work for the factory at Trikalpore. The land was, in fact, indigo land for mearly twenty years. The Plaintiff is now in possession of the village and it is easy for him to produce a number of raiyats to support his case whereas the Defendant labours under the disadvantage which dispossession always brings with it. Weighing, therefore, the entire evidence, we come to the same conclusion as the lower Court with respect to the years 1308 and 1309. The Defendant was undoubtedly a loser by his indigo cultivation in these years.

4.The finding of the lower Court as to the next period, i.e., 1310 and 1311, is not equally sound. The evidence is as conflicting as that adduced with regard to the previous period. The Defendaut admittedly bad ceased to cultivate and manufacture indigo and a decree for possession had already been passed against him In favour of the Plaintiff. There was no reason why, unlike other indigo planters, he would give up khas possession. The probabilities are against hi case of letting out the land on money rent. The lower Court has not analysed this evidence on this point and we are disposed to agree with the Commissioner in his estimate of the oral evidence. No leases or kabuliyat have been produced to support the Defendant''s case of occupation by tenants. The tenants examined do not even produce their rent receipts. In our opinion, therefore, the Defendant was in khas possession during the years 1310 and 1311 and himself used the land for the cultivation of ordinary country crops.

5. But in the view of the law that we are disposed to take, it makes no difference whether the Defendant cultivated the land with indigo in 1308 and 1309 and raised other crops during the last two years, when the land was in khas cultivation, or whether money rent was obtained therefrom during the second period. The land is ztrait or proprietor''s private land. It must have been used as such before 1291, F.S., when the Trikalpore factory took a lease of it. We must assume that it was cultivated by the proprietor himself for raising ordinary country crops. From 1291 to 1304, F.S. it was cultivated by the lease-holders themselves and was not treated as raiyati land. The cultivation with indigo in 1305 to 1309, F.S., is not inconsistant with the same inference. Moreover, the Plaintiff has been in direct occupation, since he took possession in execution of his decree and he too has been cultivating the land with ordinary crops. The character of the land and its use for a long series of years, including the use since 1311, F.S., can lead to one conclusion only, that the Plaintiff if he had been in possession would have used the land for cultivating it himself with ordinary food crops. He is not an indigo-planter and would not have cultivated indigo. It is undoubtedly more profitable to cultivate ones own land than allow raiyats to be in occupation on payment of customary rent. The fact that the Plaintiff gave leases to tenants for three years from 1305 t) 1307, F.S., during the time of dispossession by the Defendant, cannot weaken the inference that the Plaintiff, if he had been in possession would have used the land as sir or zerait by cultivating it himself. The intention of the Plaintiff must be presumed. He is the potential

cultivator according to the principle expounded in the case of Ijatullah Bhuyan v. Chandra Mohan Banerjee 12 C.W.N. 285 : s.c. 7 C.L.J. 197 (1907). If the Defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of land by letting it to tenants and was satisfied with a comparatively small Income, the Plaintiff ought not to be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser. Surja Pershad v. Reid 6 C.W.N. 409 (1902) and Lalji Sahay v. Walker 6 C.W.N. 732 (1902) relied on by the lower Court do not lay down a different rule. The character of the possession before trespass by the Defendant should be ascertained to arrive at the true measure of damages, because such possession is a fair Index of intention as to the mode of occupation if there were no trespass. Gopal Chandra v. Bhoobnn Mohan ILR 30 Cal. 536 (1903), lays down the same principle of ascertaining the intention of the true owner and the potential position be occupies. In Ijatullah v. Chandra Mohan 12 C.W.N. 285: s.c. 7 C.L.J. 197 (1907), we held that as regards wait land, mesne profits should be assessed on the basis of produce and not on the basis of rent. The present is a parallel case and we see no reason to lay down a different rule. We are, therefore, of opinion, that the principle of assessment of damages adopted by the lower Court is erroneous. It should not have assessed damages on a rental basis.

6. The next question is one of fact, what is the amount payable by the Defendant to the Plaintiff for the years 1308 to 1311, F.S., damages being calculated on the basis of produce ? The judgment of the lower Court has not discussed this question, and we do not get any assistance from it. The parties adduced no evidence in Court, and we have to fall back on the report of the Commissioner and the evidence given before him. We may note that the parties have not expressed any desire to adduce further evidence.

7. The difficulty of ascertaining mesne profits on the basis of produce is always great. The elements of uncertainty, the unknown quantities, are many. The gross produce must first be ascertained and then its market value. The exact quantity of grain which a piece of land has produced in any particular year is a matter of primary importance but evidence of a precise and reliable character is generally wanting. To discover the average of a number of years is a still more complex problem, specially in India where cultivation is greatly dependent on meteorological phenomena and not so much on science as in other countries. The price of the produce is also a varying factor--the oscillations in this respect being attributable to the law of demand and supply, to the distance from markets or trade centres and to other possible causes, though, as regards any particular locality, the variations may be ascertainable without much difficulty until new means of transit come into existence.

8. But it is not sufficient to ascertain merely the gross produce or its money value. The net produce is the true measure of damages. From the gross produce all the expenses of cultivation must be deducted to find the net produce. A certain sum must also be deducted on account of the application of capital and labour, and the cost of superintendence must have a certain pecuniary value. The true measure of damages must be net produce obtained by deducting the cost of raising the produce from the market value of the production. We should, also, take into consideration the risks of the agriculturist and his bare means of subsistence.

9. If all these items are to be matters for calculation in ascertaining mesne profits on produce-basis, the resultant profit differs very little from competition, or rack rent. Assuming complete freedom of competition, the rent paid by a ten-ant-at-will would practically coincide with the whole net produce of any given piece of land.

10. If the rent were customary, and not competitive, it would not be a practical test for ascertaining the net produce. In India, custom generally controls rent, and competition rent, defined by writers on political economy, is the exception. In Thakurani Dosee v. Bisheshar Mookerjee (5), the majority of the Judges accepted the theory of a customary rent as prevailing in India. They held that the customary of pergana rate should be the true basis of ascertainment of rent in India. The theory adopted in India is "all that is not comprehended in the wages of labour and profit of the raiyats'' stock is not the landholders'' rent."

11. Nevertheless the question arises whether the rent actually paid by a tenant-at-will for occupation of zerait land under a recent settlement may not be the best and easiest means of discovering the net produce. In Thakuranee Dasi v. Bisheswar Mukerjee 3 W.R. (Act X) 29 : S.C. B.L.R. (F.B.) 202 (1865) the Court had to consider the case of occupany raiyats who, in the majority of cases, had acquired the status of khudkasht raiyats and were entitled to hold land at customary rates. The causes of aberration from true competition rents are many and undefinable, but in modern times, competition must, even in India, influence rent when there are no statutory or customary rights in operation. A raiyat holding at fixed rate or an occupancy raiyat or even a non-occupancy raiyat created by the Bengal Tenancy Act may, in certain sense, become a co-proprietor of the soil, but a tenant at-will or a tenant whose occupation may be terminated at the end of any agricultural year can hardly be said to possess an interest in land. There is nothing to bar a proprietor from letting out his private land at the highest available competition rent, and we may assume that when he does allow a tenant to occupy it, he stipulates for the payment of competition rent (and not customary rent) although that may not strictly be the net produce of land. A margin of profit to the tenant for his subsistence must be conceded in the fixing of his rent, as it is undeniable that the customary rents paid by most of the raiyats in a village must keep down the rents of zerait lands also.
12. In the present case, the Plaintiff himself let out the land at Rs. 5 a bigha and this is some evidence as to what the ordinary rate is and it might be taken to be the

competition rate of rents practically equivalent to the net produce of land. The Plaintiff, however, was then out of possession. If a proprietor, who has been in direct possession of his private laud and knows what average net produce it yields, leases it to a tenant, reserving the right, as he has a right by law, to re-enter at the end of the agricultural year, we may fairly assume that the rent is a rack-rent and equivalent as nearly as may be, to net produce. If the proprietor was not in direct possession before such a lease, and had no special knowledge of the net produce, an allowance may be made in his favour. An allowance may, also, be made for the reactionary effect which the prevalence of customary rent has on rent which would otherwise be the full competition rent. That is to say, the pecuniary loss arising from the effect of the prevailing rate paid by khudkasht raiyats may be added so as to arrive at true competition rent or net produce. In the present case, we have the fact of letting at Rs. 5 a bigha and the further fact that the Plaintiff valued the land at Rs. 80 a bigha in the plaint thus assuming the profit per bigha at Rs. 4, the ordinary market price being 20 years'' purchase.

13. Although, theoretically, there should be an exact coincidence between com petition rent and the value of net produce, the divergence in the present case will be very great, if the conclusions arrived at in the Commissioner''s report be correct. There ought not to be such a divergence, if, as we have held, the rent paid was not customary. The figures given by the Commissioner as to quantities of produce and the cost of production appear to us to be inaccurate. They are, respectively, overestimated and under-estimated. It is in evidence and is an undeniable fact that the zerait lauds in Tier were assessed in the leases to the Trikalpore Factory at Rs. 4 per bigha as rent and the Plaintiff consequently valued each bigha at Rs. 80. We have no doubt, therefore, that the figures showing the net produce as given in the Commissioner''s report are highly exaggerated and we cannot accept them.

14. How then are we to assess the mesne profits? We do not think it desirable to send the case back. The parties already incurred heavy costs in the investigation and the case itself has been long pending. We do not also expect that any further evidence of a reliable character would be available, if we were to remand the case for another enquiry by the lower Court. Materials for determining the net produce, or what would be the true competition rent, must inevitably be meagre or unsatisfactory. We do not therefore think any useful purpose would be served by a remand. We think it desirable to come to our own conclusions on the materials in record.

15. Thirty-three and a third per cent, appears to us to be a fair margin for the risk and profit reserved to the tenants who took leases from the Plaintiff from 1305 to 1307 at Rs. 5 per bigha. We do not think the Plaintiff settled the zerait land by giving up more than 331/3 per centum out of the net produce. He might have conceded less, but the Defendant is a wrong-doer and every presumption should be made against him. As it is, the result, we arrive at, is less than one-half of that calculated

with so much wealth of detail by the Commissioner, the ratio being 2/5th.

16. We are, therefore, of opinion that the basis of the award made by the Court below should be increased by one-third and the decree modified accordingly. The rate of interest at 12 per cent, per mensem will stand. As regards costs, the Defendants should pay the entire cost of the investigation by the Commissioner and of the trial by the lower Court. We make no order as to costs of this Court.