(1943) 02 CAL CK 0001

Calcutta High Court

Case No: None

Midnapore Zemindary Co. Ltd.		APPELLANT
	Vs	
Kumar Chandra Singh Dudhuria and Others		RESPONDENT

Date of Decision: Feb. 11, 1943

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 52

Citation: AIR 1943 Cal 544

Hon'ble Judges: Mitter, J; Khundkar, J

Bench: Full Bench

Judgement

Mitter, J.

Perganah Goas, bearing touzi No. 523 of the Murshidabad Collectorate, is a permanently settled estate. It consists of 12 main divisions, called huddas. Each hudda had many sub-divisions consisting of groups of villages called Tarafs. Raja Debi Singh was the proprietor of the said estate just after the permanent settlement. Raja Udmant Singh, Raja Debi Singh''s nephew got by inheritance 8 annas 3 gundas odd share in the said estate. At a partition effected in 1830 with his cosharers he got six out of the aforesaid 12 huddas exclusively to his share. Hudda Ikuri was one of those six huddas. Kumar Ram Chandra Bahadur succeeded him and continued to be the proprietor of those six huddas till 1850 when he sold the same to John Watson Laidly and James Dalrymple. At about the revenue survey, the navigable river Ganges, also called Padma, flowed through Pergunah Goas. The portion of the said pergunah to the east of the river fell within the district of Rajshahi and the western portion within the district of Murshidabad. The revenue survey operations were completed on the Rajshahi side in 1847-1848 and on the Murshidabad side in 1852-1853, and revenue survey maps were prepared at those two periods respectively. A comparison of the two sets of revenue I survey maps would show that in between 1847-1848 and 1852-53 the river had shifted its course

to some extent at the relevant locality. After the revenue survey of 1852-53 the river changed its course considerably. In 1867-68 Government made a Diara Survey. As a result of that survey it was found that a large area which was in the bed of river as it was at the time of the revenue survey of 1852-53 had become firm land and a large area which was firm land at that time had submerged in the bed of the then flowing river. The land which according to the opinion of the Diara authorities had formed since the said revenue survey of 1852-53 was made into a separate estate, No. 512 of the Murshidabad Collectorate, and was settled permanently with the proprietors of touzi No. 523, John Watson Laidly and James Dalrymple on 16th August 1870 at an annual revenue of Rs. 3177-10-0. The said proprietors also got an abatement of revenue to the extent of Rs. 4030 for the lands of touzi No. 523 which had then submerged in the bed of the flowing river. On 27th June 1893, the suecessors-in-interest of John Watson Laidly and James Dalrymple sold their interest in both the estates, touzi Nos. 523 and 512, to Rai Bodh Singh Dudhoria and Rai Bisshen Chand Dudhoria, the ancestors of the plaintiffs to this suit.

2. Hudda Ikuri comprised many Tarafs Of those, Taraf Ikuri, Taraf Udayhagore, Taraf Godagiri and Taraf Nakra are material to the suit. On 8th June 1814, Raja Udmant Singh granted a mukarari mourasi settlement by the potta EX. R of a village called Diara Atarpara alias Chak Mathuranath appertaining to Taraf Udaynagore to Mathuranath Sarkar. Defendants 4 to 7 are at present the Mukarari mourasidars. The Midnapore Zemindary Co., Ltd. (hereafter called the company) is in possession of this village in darmukarari mourasi right. The company is defendant 1 in the suit. On 8th June 1836 Kumar Ram Chand Bahadur settled in patni taluk by the potta Ex. S the rest of Taraf Udaynagore and five villages of Taraf Ikuri, called Hat Jelangi, to one Radha Ballav Mukherjee. This patni taluk is now vested in the company.

3. On 28th June 1841, Kumar Ram Chand Bahadur settled in patni taluk by two separate pottas Taraf Godagari to two ladies, Labangamunjuri Dassya and Radhamani Dassya. Each of the pottas comprised an undivided eight annas share in the said Taraf. One of the patni pottas is on the record, Ex. Q, but it is admitted by all the parties that the terms of the other potta were the same. The successor-in-interest of Labangamanjuri and Radhamani are defendants 2 and 3, and 4 to 7 respectively. On 11th May 1865 Labangamanjuri''s successors granted a darpatni (Ex. L) to Robert Watson and on 4th December 1893, Radhamani''s successors granted a darpatni (Ex. M) to Robert Watson and Co Ltd. Both these darpatnis have now vested in the company. On 5th November 1865 John Watson Laidly and James Dalrymple settled in patni taluk Taraf Nakra and the rest of Taraf Ikuri, except Hat Jelangi which had already been settled in patni by Ex. S in 1836, to Robert Watson & Co. by the potta Ex. M-2. This patni has also vested in the company. The t position now is that the plaintiffs, the Dudhorias, are the sole proprietors, among others, of Tarafs Ikuri, Udaynagore, Godagari and Nakra, in their right as zemindars of touzi No. 523. They are also the proprietors of touzi No. 512. The company is the patnidar of Tarafs Udaynagore (except Chak Mathuranath) of Tarafs

Ikuri and Nakra. It is the darmukarimourasidar of Chak Mathuranath under defendants 4 to 7, and darpatnidar of Taraf Gadagari under the patnidars, defendants 2 to 7.

4. The case of the plaintiffs as made in the plaint is that the lands in suit appertain to touzi No. 512, the said estate, created in 1870, comprising the lands which had been added to touzi No. 523 by alluvial formation from the bed of the navigable river Padma, and to the said lands the company or the other defendants, defendants 2 to 7, have no right, as their predecessors-in-interest had waived their rights to the lands that had accreted to their respective tenures at the time of the creation of touzi No. 512, and that since then the zemindars are in possession adversely to the tenure holders. On this basis they claim khas possession and mesne profits. Alternatively, they claim fair and g equitable rent. Four written statements were filed, one by the company, one by the common manager of the estate of defendants 4 to 7 and the other two by defendants 2 and 3, respectively. They are substantially of the same nature. The material defence is as follows : (1) the lands comprised in touzi No. 512 are really the lands of touzi No. 523 reformed in situ. Hence the lands in suit had been demised by the three patni pottas and the mukurari mourasi pota; (2) the zemindars had always treated these lands as included in the patnis and the mukurari mourasi; (3) the plaintiffs are estopped from ^ saying that the lands in suit do not appertain to touzi No. 523, even if as a fact the lands of touzi No. 512 were different from the lands of touzi No. 523; (4) the plaintiffs'' claim as made in the plant is barred by waiver and acquiescence.

5. On these grounds they urged that the plaintiffs'' claim for khas possession or for fair and equitable rent is not entertainable. The learned Subordinate Judge has overruled all the above contentions. His findings are (1) that except for a small portion, the lands of touzi No. 512 are not reformations in situ of the lands of touzi No. 523. but are lands which had been gained from the public domain and had accreted to the lands of touzi No. 523; (2) that 1974 acres out of the lands appertaining the touzi No. 512 had accreted to the lauds of the three patnis and of the mukurari mourasi; (3) that the defendants cannot by reason of their pleadings claim the same as accretions to their patnis; (i) but that they had acquired in the said area tenancy interest under the plaintiffs by reason of adverse possession; (5) that the tenancy interest so acquired is not of a permanent character; (6) that there is no substance in the defence of estoppel, waiver and acquiescence; (7) that the plaintiffs'' claim to assess additional rent is not barred by limitation and (8) that their claim to assess rent on the lands that had accreted to Taraf Godagari is barred by res judicata. On these findings, he has dismissed the plaintiffs'' claim for khas possession, but has decreed their claim for additional rent for all the accreted lands falling within touzi No. 312, except for the lands which had accreted to Taraf Godagari. He left the determination of the amount of additional rent to later proceedings. Defendant 1, the company, has preferred this appeal. There are cross-objections by the plaintiffs respondents.

6. The learned advocate appearing for the appellant does not raise before us the broad question, as raised in the lower Court, to the effect that the lands of touzi No. 512 are but reformation in situ of the lands of touzi No. 523. He says that for the purpose of this appeal and this appeal only, we are to proceed on the finding of the learned Subordinate Judge that the river Padma was not at the time of the Decennial Settlement entirely outside Pergunah Goas, and that the bed of the said river as flowing then had not been assessed to revenue and included in the permanently settled estate touzi No. 523. After making these concessions and after abandon, ing the defence of estoppel, he raises the following points only : (1) That out of the aforesaid area of 1974 acres, which the learned Subordinate Judge has found to be accreted lands, 1198 acres are really so, the rest namely, 775 acres are the lands of touzi No. 523 which has reformed in situ; (2) that the defendants have patni interest in all the accretions by the terms of the several patni pottas and that without the liability of paying additional rent over and above the rents reserved in those pottas; (3) that, in any event, the accreted lands ought to be treated as accretions to the patnis by reason of the provision of Bengal Regulation, 11 of 1825; (4) that in that case the plaintiffs can impose additional rent for those lands only under the provisions of Section 52, Ben. Ten. Act. They cannot, however, succeed on that basis on the materials now on the record, as they have failed to establish the necessary requirements of that section and (5) the right to assess additional rent had been waived by the conduct of the plaintiffs and their predecessors-in-interest.

7. The second and fourth points were not urged in the lower Court by the defendants but we have allowed the learned advocate for the appellant to argue them. Our reason for entertaining the fourth point is that it arises in the form in which it has been argued by the learned advocate for the j appellant only after the amendment of the Bengal Tenancy Act in 1939, an amendment which was made after the judgment of the lower Court, and our reason for entertaining the second point is that it depends mainly upon the construction of the several patni pottas.

8. (1) As it is admitted before us by the appellant''s advocate that the bed of the flowing river Padma, as it was at the time of the Decennial Settlement of 1789-90, had not been included in the assets of the permanently settled estate No. 523, it is necessary to find where that river was at that time for any land formed since then out of that bed would not be the lands of touzi No. 523, but would either be Government property or accretion to touzi No. 523, according to the manner of formation. On the case made, the first hypothesis has to be excluded and those lands are to be treated as accretions to touzi No. 523. In the Diara proceedings of 1867-68, lands gained from the bed of the river Padma as shown in the Revenue Survey Map of 1852 53, plus a strip of land, which was really outside that bed but was taken by mistake by the Diara authorities to be a part of that bed was; assessed to revenue and formed into touzi No. 512 and was settled permanently with John Watson Laidly and James Dalrymple, the then proprietors of touzi No. 523. The foundation of those Diara proceedings was that the river bed had not been included

in touzi No. 523 at the Decennial Settlement of 1789-90 which was made permanent in 1793. That assumed that the site of the river in 1789-90 was where it was at the time of the Revenue Survey in 1852-53. The learned Subordinate Judge has also proceeded on that basis namely that the site of the river as at the time of the Revenue Survey was the site where it flowed in 1789-90. The appellants, however, rely upon Mr. Cole brooke''s map for the purpose of locating the position of the river Ganges at the time of the Decennial Settlement. The relevant portion of that map has been relaid by the Commissioner on his map. The accuracy of the relay work was challenged in the lower Court. That Court considered the matter in its order No. 146, dated 3rd February 1938, and accepted the Commissioner''s work as correct. Before us the parties have accepted the position that Colebrooke''s map can be relaid with reasonable accuracy and that the Commissioner has relaid it on his map with such accuracy. That portion of the map where the river is shown flowing due south and then in a south-easterly direction is the portion material to the suit. Mr. Colebrooke made the survey in 1796-97. From his map it appears that in the northern "part of the relevant portion there was no appreciable change in the course of the river from 1791 to 1796-97, but, in the southern part, there were frequent changes in that brief interval of time. In that part of his map he has shown the main channels of the river as it flowed in the years 1764, 1794, 1795 and 1796-97. That portion of his map shows that up to 1764 the main channel was just to the east of the block of land marked as "part of the Island of Nipara." By 1794 the river had moved westwards and in 1794 the main channel was just to the west of that block of land. The river then moved back eastwards, the main channel up to May 1795 being a little to the east of the channel of 1764 and in 1796-97, the year of his survey, the river had moved further east. From these facts the learned advocate for the appellant asks us to infer, as he had asked the learned Subordinate Judge, that in 1789-1790 the main channel was where it was in 1794. The learned Subordinate Judge refused to draw that inference on the ground that Colebrooke''s map shows that the river was shifting its course in that locality every year between 1794 and 1796-1797. We cannot agree with the learned Subordinate Judge. In Haradas Achajya v. Secretray of State AIR 1917 P.C. 86, where position of the same erractic river, Ganges, at the time of the decennial settlement was in question, Lord Buckmaster made the following observations:

There remains the question of what part of this land is to be assigned to the bed of the river, which is the property of the Government. It is a question of great difficulty. Rennel''s map is midoubtedly, both owing to its difference in scale to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey Was made, a map which it is hard to incorporate into the survey of 1859. And, again, the variability of the river renders reliance upon it difficult. As has already been said, their Lordships are not, however, prepared to dispossess the appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary. They think upon the

whole that the right course to follow is that taken by the surveyor of experience to whom this matter was referred by the Subordinate Judge, namely to adopt the position of the river as shown in Kennel''s map and to adapt that map as far as possible to the conditions now known to exist.

9. The Judicial Committee of the Privy Council, being alive to the fact that the river Ganges rested uneasily on its bed, took the position of that river in 1789-1790, the year of the decennial settlement, to be the same as in 1764, the year when Major Rennel surveyed that part of the river. We think these observations apply with greater force to the case before us, because we are asked to hold that the position of the river was where it was shown to be only four years later. We therefore hold that only the lands appearing on the side of the channels of 1794 were not included in the permanently settled estate, Pergunah Goas, Touzi No. 523, but what was outside those channels was a part of that permanently settled estate. We do not think that the company is estopped by the judgment passed in Title Suit No. 21 of 1921 (Ex. IT (2)) from saying that the river at the decennial settlement was at any place different from where it was at the time of the revenue survey. (After discussing evidence on points 1 to 3 raised in appeal his Lordship remanded the case for further inquiry on the points and proceeded.) Under the second proviso to Section 4 Clause (1) of Regn. 11 of 1825, as it was originally enacted, additional rent on land gained by a subordinate tenure from the public domain by accession could be imposed by the superior landlord only if the right to additional rent was given to the superior landlord by established usage or by the terms of the engagement with the subordinate tenure-holder. That proviso of the Regulation was, however, repealed by Section 2(1), Ben. Ten. Act, as enacted in 1885, The effect of that repeal and the enactment of Section 52, Ben. Ten. Act, was considered in Baidyanath Roy v. Nadalal Guha AIR 1915 Cal. 106. It was held that by reason of Clause (5) of Section 4 of Regn. 11, which was not repealed, the right and obligation of the parties in respect of a claim to additional rent for lands accreted to a tenure must be determined according to the general principles of equity and justice, and that for the purpose of finding out those general principles of equity and justice recourse may be had to the provisions of Section 52, Ben. Ten. Act. We agree with that decision. Section 52, Ben. Ten. Act, would not in terms apply to such a case but would be a guide.

10. At the time when judgment was pronounced by the lower Court in the case which is before us in appeal Section 52, Ben. Ten. Act, was in a different form. The proviso to Section 52, Sub-section (1), Clause (a) as well as other provisions were introduced by Bengal Act, 13 of 1939. The effect of the phrase "in excess of the area for which rent had been previously paid" occurring in Section 52, Sub-section (1), Clause (a) before the amendment of 1939 has been considered in a number of cases. The first important case on the point is Gouri Patra v. Reily 20 Cal. 579. It was said in that case that where the superior landlord claims additional rent two questions have to be determined. It must be first determined what was the area for which rent was being paid. To determine that question the provision of Sub-section

(2) of Section 52 would be very much relevant. The second question would be : "Are the lands held by the tenant in excess of such lands." To discharge that burden, which is on the superior landlord, he must prove that there has been either, (i) some encroachment by the tenant or (ii) some alluvial increment or (iii) that the previous settlement was made on the basis of a measurement and the rates of rent was applied to the area then determined, while on a fresh measurement made by the same length of measure the area is greater. Sub-section (6) which was added after Gouri Patra''s case Gouri Patra v. Reily 20 Cal. 579 raises a presumption in favour of the landlord in the circumstances mentioned therein in the third case noticed above. Sub-section (5) which was also added after Gouri Patra''s case Gouri Patra v. Reily 20 Cal. 579 has not, however, the effect of modifying that part of the decision in Gouri Patra v. Reily 20 Cal. 579 which we have summarised above: Raj Kumar Pratap Sahay v. Ramlal Singh 5 C.L.J. 538. If the original letting was not with reference to area at all but was a letting at a consolidated rent for lands within specific boundaries - that is to say - either a block of land within boundaries specified or a village or group of villages by name, which comes to the same thing, no additional rent can be imposed unless the landlord proves that the tenant is possessing lands outside those boundaries a has either overstepped the boundaries or is possessing alluvial accretion which had been added since the original letting or the last adjustment of rent, as the case may be.

11. It is unnecessary for us to refer to other reported decisions, which are many in number. Two of such decisions are Dhrupad Chandra Koley v. Hari Nath Singh AIR 1919 Cal. 1091 and Manindar Chandra Nandi Vs. Kaulat Shaik and Another, which contain a useful review of the important cases beginning from Gouri Patra''s case Gouri Patra v. Reily 20 Cal. 579. Apart from the proviso to Section 52, Sub-section (1), Clause (a), which was introduced by the amending Act 13 of 1939 the position is clear. As the plaintiffs have established that a portion of the lands in suit is alluvial accretion, they are entitled to additional rent for the same u/s 52, Tenancy Act, as it stood before 1939. The exact quantity of alluvial accretion has not been determined, but will have to be determined, if we hold that the plaintiffs are still entitled to succeed in spite of that proviso. The questions therefore to be considered now are two in number: (1) whether that proviso applies seeing that it came into force after the institution of the suit and after the judgment of the lower Court, and (2) what is the effect of that proviso.

12. In dealing with the first point, we will assume that the said proviso requires the landlord to prove more than what he was required to do before it was enacted in order to get additional rent for alluvial accretions to the tenure. In that view the said proviso would prejudicially impair his right to impose additional rent. On general principles, unless the Legislature had provided otherwise, the proviso would not have had retrospective effect or would not have governed pending actions and we would have no right on the ground of the said proviso, to disturb the decision of the Court, if it was correctly arrived at on the law as it stood on the date '' of that

decision: In re Joseph Suche & Co., Ltd. (1876) 1 Ch. D. 48; Bir Bikram Kishore Manikya Bahadur Vs. Rajjab Ali and Others, and Sripati Chandra De and Others Vs. Kailash Chandra Jana, . The question therefore narrows down to the point as to whether the Legislature has expressed itself otherwise. In our opinion, it has, and the relevant provision is in the last part of Section 3, Sub-section (1), Clause (a) of Act 13 of 1939. This suit though instituted in the year 1930 was still pending by reason of the appeal before us at the date when the said Act came into force. The rules framed by the Local Government (''conditions prescribed'') under that section are embodied in Revenue Department Notification No. 6349 L.B., dated 24th June 1940, and have been published in Part 1 of the Calcutta Gazette of 27th June 1940. Those rules are rules of procedure only. We accordingly hold that the appellant is entitled to 6 rely upon the said proviso. This view is in accordance with the view expressed in Nur Ahmed and Others Vs. Rasik Chandra Mohajan and Others, .

13. The next question concerns the interpretation of the proviso. The learned Advocate for the appellant submits that whereas before that proviso was introduced into the statute the landlord was entitled to additional rent as soon as he proved alluvial accretion to the tenure, he is not so entitled after the proviso had been inserted by merely proving that there has been alluvial accretion, and even by precisely locating the accretion. He says that the landlord must prove further what the area was at the time of letting or at the time of the last adjustment of rent, and that the area of the land of the tenure including the accreted portion possessed by the tenant at the date of the suit must be measured. If, on a comparison of the two areas there is an excess, then and then only the landlord would be entitled to : additional rent, otherwise not. His contention comes to this that even if the landlord proves accretion in one part but there had been diluvion in another part of the tenancy and the area diluviated be either equal to or more than the area accreted the landlord''s suit for additional rent must be dismissed. If this contention be accepted, the case would have to be remanded for further inquiry. We cannot however accept this interpretation.

14. In the earlier part of our judgment, we have referred to some leading cases on Section 52 as it was before 1939. The cases were of two types: (1) Where the tenant had not over stepped the boundaries of the demised premises, or where there had been no alluvial accretion, and (2) Where he had either over stepped the boundaries or where lands had been added to his tenancy by fluvial action. In the first class of cases, of which Gouri Patra v. Reily 20 Cal. 579 and Manindar Chandra Nandi Vs. Kaulat Shaik and Another, are types, it was laid t down that the landlord cannot succeed 1 by merely proving that area in the possession of the tenant at the date of his suit is more than the area as stated in the lease or t in the collection papers of the landlord. He must prove that by measurement by the same standard of measure there had in fact, and in reality been an increase. The learned advocate for the respondent argues that the proviso applies to cases falling within the first class and not to cases falling within the second class. For supporting his argument

he draws our attention to the "objects and reasons" given for the bill which was subsequently enacted as Act 13 of 1939. The bill as introduced is published at p. 9 of Part 4A of the Calcutta Gazette of 2nd February 1989. In the "objects and reasons" which appear at p. 10 it is definitely stated that

it is not intended that a landlord should be debarred from obtaining additional rent for additional area which in fact exists owing to gradual encroachment on his khamar land or on neighbouring plots,

and that the bill if enacted into law

will not debar the case where additional area has been gained through alluvial action or the drying up of swampy ground contiguous to a tenure or holding.

He further argues that "the objects and reag sons" stated by the member moving a bill can be referred to and be used for construing the Act. For supporting this proposition he refers us to the decision of the Federal Court in AIR 1939 1 (Federal Court) where for the purpose of construing the words used in item 48 of List 2 of Schedule 7, Government of India Act, 1935, the White Paper and the report of the Joint Select Committee were referred to as historical facts, and Gwayer C.J. observed that their relation to the Constitution Act (the Government of India Act 1935) was a matter of common knowledge to which the Court was entitled to refer. Whatever may be the effect of that passage, and we do not understand it in the same way as the learned advocate for the respondents does, we are bound to follow the principles laid down by the Judicial Committee in Krishna Ayyangar v. Nallaperumal Pillai AIR 1920 P.C. 56. of the report Viscount Finlay observed thus:

The question is, what does the explanation mean? No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

15. We accordingly exclude from our consideration the "objects and reasons" of the Bill as stated by the member moving the Bill. On the matter of construction, however, we do not agree with the contention of the learned Advocate appearing for the appellant. In our judgment, the proviso has added nothing more to what had been laid down by judicial decisions in the first class of cases referred to above. For the purpose of settling possible doubts and controversies on the question the Legislature has given effect to what had been laid down in those decisions. This contention does not lead to any hardship for if in the second class of cases there had been diluvion in other parts of the holding of tenure, the tenant has his remedy provided for in Clause (b) of Sub-section (1) of Section 52. In a case where a parcel of land defined by boundaries or otherwise, as in the case before us, either without the area being mentioned in the lease or the area being only approximately stated has been demised, the excess is still proved when the landlord proves that lands outside the said defined parcel is in possession of his tenant. We accordingly overrule this point urged by the appellant Company.

16. Although the point of waiver was formulated by the appellant''s Advocate at his opening and pursued for some time it was ultimately given up. We do not further think that there are sufficient materials on the record to support it. Waiver is the abandonment by conduct of a known right. It is an implied agreement not to exercise legal rights. The fact that the landlord had not chosen to claim additional rent for so many years cannot in the circumstances of this case amount to waiver of his right to additional rent. The lands were char lands and the river was frequently changing its course. The statement in the application of Rai Bodh Singh Dhudhuria and Rai Bishen Chand Dhuduria of 5th May 1904, to the Deputy Collector (Additional paper book of Appeal No. 95 of 1934) and the cess returns Ex. CC and Ex. CC1 filed by them on 6th September 1904, and 5th March 1907 (p. 780 of Part 2, vol. 2 and p. 428 of part 2, vol. 1 of the said paper book) militates against the case of waiver. We overrule this point also.

17. The learned Advocate for the respondents, in urging the cross objections has challenged the learned Subordinate Judge''s finding on res judicata. We have already stated in the first part of our judgment that in 1841 two patni taluks, each in respect of an undivided half share of Taraf Godagari, had been granted to Labangamanjuri Dassya and Radhamoni Dassya respectively by the then proprietor of touzi No. 523, namely, Kumar Ramchand Bahadur, and that in May 1865, Robert Watson had acquired the patni of Labangamanjuri, the other patni, namely, that of Radhamoni, being acquired by Robert Watson and Co., Ltd. in 1893. The proprietary interest in touzi No. 523 had been acquired by John Watson Laidly and James Dalrymple in 1850 and continued to be held by them and their legal representatives till 1893 when the plaintiffs'' ancestors acquired the same. Up to 1893 they were also proprietors of touzi No. 512., In the year 1878 or so John Watson Laidly and James Dalrymple instituted a suit against the patnidar Gour Gobinda Sarkar, who was successor-in-interest of Radhamoni Dassya. In the suit they claimed additional rent for the area appertaining to touzi No. 512 that had accreted to the said patni. That suit was dismissed by all the Courts. The judgments of the trial Court, of the first appellate Court and of the High Court are respectively Exs. TT9, TT8 and TT6. They are printed at pp. 170, 173 and 177 of Part 2, Vol. 1 of the paper book of Appeal No. 95 of 1939. The decision of the High Court in that, suit is res judicata between the plaintiffs as successors-in-interest of John Watson Laidly and James Dalrymple, and the defendants 4 to 7 as the successors-in-interest of Gour Gobinda Sarkar. But we fail to see how that decision operates as res judicata against the plaintiffs and in favour of defendants 2 and 3 the successors-in-interest of Labangamanjuri. Their predecessors-in-interest were not parties to that suit. We, therefore, set aside the finding of the learned Subordinate Judge to that extent. The plaintiffs would not be entitled to get additional rent in respect of half share of the lands of touzi No. 512 which have accreted to Taraf Godagari, but would be entitled to additional rent in respect of the other half share of those lands which belong to defendants 2 and 3 as patnidars.

18. A further question has been raised by the respondents'' Advocate as to the period of time for which arrears of additional rent is to be decreed. He says that his clients would not only be entitled to a decree for three years immediately preceding the suit but for the period during which the suit was pending and for a further period of three years after the decree. In support of his contention he relies upon Order 20, Rule 12, Civil P.C. We cannot accept his contention, The decree would be for three years only and up to the institution of the suit together with interest.

19. That is the prayer in the plaint. There is no prayer for the period of the suit and thereafter. Moreover, we cannot give effect to the contention of the learned Advocate for the respondent that his clients are entitled to get a decree for arrears of rent during the pendency of the suit and for a further period of three years, as we cannot accept his contention as to the applicability of Order 20 Rule 12, Civil P.C., to a suit for assessment and recovery of additional rent. In our judgment the terms of Clause (c) of Sub-rule (1) of that rule make it clear that that rule contemplates an enquiry into mesne profits only, for the enquiry is limited to one of three periods of time, which is the shortest. The period of three years mentioned there is only an alternative to the other two periods mentioned therein, each of which contemplates cessor of possession by the defendant, which cannot occur in a case for assessment of rent in respect of lands added to a tenure, as in the case before us, for the possession of the company and of defendants 2 to 7 cannot be disturbed as a result of the decree as they would be entitled to continue in possession as patnidars and mukarari mourasidars in respect of the lands of touzi No. 512 which had accreted to the asli lands of their patnis and mukarari mourasi and for which additional rent would have to be assessed and paid. The result is that the appeal and the cross-objections are allowed in part to the extent indicated above and the case is remanded to the lower Court for carrying out the directions contained in our judgment. That Court would assess additional rent separately in respect of each of the two patnis in respect of which we have held that the plaintiffs have right to additional rent for lands accreted to them, namely, of the patni created on 8th April 1836, in favour of Radhaballav Mukherjee and the patni created on 28th June 1841 in favour of Labangamunjuri Dassi. He is also to assess additional rent in respect of the lands that had accreted to the mukarari mourasi tenure Chak Mathuranath. The decrees for arrears of rent in respect of those two patnis would be against the company and defendants 2 and 3 respectively and the decree for arrears of rent in respect of Chak Mathuranath would be against defendants 4 to 7. The appellant company would get from the plaintiffs-respondents the costs of Part 1 of the paper-book of Appeal No. 95 of 1939, the costs of one-tenth of the court-fee paid on the memorandum of appeal and e the costs of service of the notices of the appeal on them, the plaintiffs respondents. The parties would themselves bear the other costs of the appeal. The order for costs as made by the lower Court would stand. The costs after remand would be in the discretion of the lower Court.

Khundkar, J.

20. I agree, but desire to add a few words about the fourth point raised by the learned advocate for the appellants. His fourth argument was that if the plaintiffs have the right to impose additional rent on lands which are accretions to the patnis, they can do so only in conformity with Section 52, Bengal Tenancy Act, but that they have failed in this suit to satisfy the requirements of that section. We have to refer to Regn. 11 of 1825, Section 4, Clause (1) which is as follows:

When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Crown by a zamindar or other superior landlord, or as a subordinate tenure by any description of under-tenant whatever:

Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to the Crown of any assessment for the public revenue to which it may be liable under the provisions of Regn. 2 of 1819, or of any other Regulation in force.

21. Proviso 2 to the above clause was in these terms:

Nor, if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khudfeasht raiyat, holding a mourasi istamrari tenure at a fixed rate of rent per bigha, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.

22. This proviso was repealed by Section 2(1), Bengal Tenancy Act, 1885 (Act 8 of 1885). In Baidyanath Roy v. Nadalal Guha AIR 1915 Cal. 106 it was held that proviso 2 to Clause (1) of Section 4 of Regn. 11 of 1825 was omitted because provision was made in Section 52, Bengal Tenancy Act, for the ascertainment of additional rent for additional land in the occupation of the tenant. It was further held that though the terms of Section 52 were not directly applicable in that case, the Court was bound under Clause (5) of Section 4 of the Regulation to be guided by the best evidence obtainable of established local usage, and failing such evidence, by general principles of equity and justice. As I read this decision, Section 52, Bengal Tenancy Act, may be looked at for guidance.

23. Section 52, Sub-section (1), Clause (a) has been considered in a number of cases, to some of which reference has been made in the judgment delivered by my learned brother and they fall, according to their facts, into the classes indicated by him. A few of these cases may be briefly noted. In Gouri Patra v. Reily 20 Cal. 579, it was held that the mere fact that on a measurement made by the zemindar, it is found

that the tenants generally are in possession of lands in excess of the areas entered in his zemidari papers and their rent receipts, would not necessarily prove that he is entitled to additional rent for the excess area. It is incumbent on the zemindar who seeks an enhancement of rent on excess lands very many years after the original settlement to show that the lands held by the tenants are in excess of the lands originally let to them in consequence of some encroachment of some alluvial increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other reason he had hitherto lost.

24. In Lakhi Narain v. Sri Ram Chandra 15 C.W.N. 921 it was held that where the landlord proved that lands were once measured according to a known standard, that the rent was assessed on that measurement that the area as well as the rent payable was entered in the kabulyats and that the area of the lands measured by the same standard is in excess of the original area, the landlord was entitled to claim additional rent, unless it is established that the rent payable was a consolidated rent for lands within specified boundaries irrespective of the precise quantity. It was also held that where it is specifically shown that the area of the land was ascertained by measurement and rent assessed on such measurement, the mere fact that boundaries of the land are mentioned in the kabulyat does not exclude the operation of Section 52, Bengal Tenancy Act. In Akbar Ali v. Hira Bibi 16 C.L.J. 182 it was held following earlier cases that the words "the area for which rent has been previously paid" in Section 52, Bengal Tenancy Act, mean the area with reference to which the rent previously paid has been assessed or adjusted. It was further held that the question whether the landlord is entitled to claim from a tenant (additional rent on the ground that the area which he was in occupation of, was found on fresh measurement to be larger than that for which rent had been previously paid would depend on the intention of the parties applicable to the tenancy before the final measurement:
If the landlord originally intended to let, and the tenant intended to take such and such piece of land or such and such a holding, be the number of bighas in it what they may, the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent. If however he intended to let and the tenant intended to take so many bighas, be the actual piece of land what it may, the landlord would be entitled to additional rent when the tenant was proved to hold more bighas than were originally let to him.

25. In Baidyanath Roy v. Nadalal Guha AIR 1915 Cal. 106 already noticed above, it was laid down that the holder of a rent free holding though entitled to all lands forming accretions thereto, was not entitled to hold the same rent free. In Dhrupad Chandra Koley v. Hari Nath Singh AIR 1919 Cal. 1091 it was laid down that the

burden of proving an increase in "the area for which rent has been previously paid" is on the landlord, and that speaking generally he may discharge the burden in two ways: (1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him, for instance, land obtained by encroachment of alluvial increment. (2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable "under such agreement. Manindar Chandra Nandi Vs. Kaulat Shaik and Another, was a case in which there was no evidence that the lands were settled or re-settled with the tenants after any measurement, and no evidence that the tenants had overstepped their previous boundaries, and no mention that the land was within certain boundaries; the only evidence on which the landlord relied was the mention of the areas in the karchas on the back of the dakhilas, and the landlord alleged that the area in the occupation of the tenants as found upon measurement was in excess of the area there stated. It was held that, inasmuch as the landlord had failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved, he had failed to establish the fact of excess area. Upon a review of most of the earlier cases, Rankin J. in this decision stated the rule regarding the burden of proof in these words:

I take it to be a settled rule of this Court that when a letting on the basis of 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 would not suffice to throw any onus on the tenant.

26. On a consideration of the principles laid down in the decisions of this Court, it may be taken that in the present case the landlord respondent would be entitled to an increase of rent for any increase in area which has been established to be due to alluvial accretion, but he would have to show the exact extent of the lands so added. This, in my judgment, is the position u/s 52(1)(a), Bengal Tenancy Act, as it stood prior to 1939. By Bengal Act 13 of 1939 a proviso was added to Section 52(1)(a). The amended provision reads:

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.

(Section 2 (1), Act 13 of 1939) Provided that no Court shall decree any addition of rent under this clause unless it is satisfied that there has in fact been an increase in

the actual area of the tenure or holding since the rent previously paid was settled.

27. We have to consider two questions : Firstly, Does the proviso apply Secondly, does the proviso require the landlord to prove anything more than he was obliged to prove under the section itself as it stood before the proviso was added. In connexion with the first question, it is to be noted that the proviso did not come into operation until after judgment had been delivered in the case with which we are dealing. It is contended that the proviso has retrospective effect, or at any rate that it governs a pending suit. Now, we are bound to hold that the present suit was a pending suit on 27th August 1939, when Act 13 of 1939 came into force because this appeal was pending on that date. Section 3(1) of Act 13 of 1939 in so far as it is relevant enacts that the provisions of Section 52, Bengal Tenancy Act, 1885, as amended by this Act shall apply, subject to such conditions as may be prescribed, to all suits under Clause (a) of Sub-section (1) of that section which are pending on the said date. Certain conditions have been prescribed by the local Government in the form of rules contained in Revenue Department Notification No. 6349 L.R., dated 24th June 1940, which were published in the Calcutta Gazette, Part I of 27th June 1940, but these are rules of procedure only and nothing in the present discussion turns upon them. It must therefore be held, as it was held in Nur Ahmed and Others Vs. Rasik Chandra Mohajan and Others, , that the matter under consideration is governed by the provisions of the amending Act (Bengal Act 13 of 1939).

28. We next have to consider the second question and this involves the construction, of the proviso to Section 52, Sub-section (1), Bengal Tenancy Act, introduced by Act 13 of 1939. If I have understood the contention urged on behalf of the appellant, it is this : The words "an increase in the actual area of the tenure or holding since the rent previously paid was settled" in the new proviso, mean a nett total increase in all the area of the lands held by the tenant under his settlement. In other words, if there has been loss of area by diluvion in one part of the tenure or holding and such loss counterbalances a gain by alluvion in another part, with the result that a measurement of the entire tenure or holding reveals no increase in the total area held by the tenant, the landlord would not be entitled to succeed in his claim for additional rent. I do not think this can be the meaning of the language of the proviso. Such a reading would render redundant Clause (b) of sub-section (1) of Section 52 which gives a tenant the right to claim 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 had been previously paid by him. If when a landlord has proved that there has been an accretion by alluvion to the tenure originally granted, the tenant wishes to establish a loss due to diluvion in another part of the tenure of an equal or a greater area, for which loss no reduction of rent was granted, the tenant may prove his claim in a suit for relief under Clause (b) of Sub-section (1). It cannot, in my judgment, be reasonably said, that the proviso was enacted for the purpose of repeating the rule already embodied in Clause (b) of Sub-section (1).

29. It was further sought to be argued on behalf of the appellant, that the words "an increase in the actual area" contained in the proviso, do not mean and include any and every accretion by alluvion because such accretions by the terms of Section 4, Clause 1 of Regulation 11 of 1825, become themselves a part of the tenure. Now it is clear from the decisions, of this Court u/s 52, Bengal Tenancy Act, that the "area for which rent has been paid" means the area as settled or supposed to be settled by the contract of tenancy. To say that "actual area" in the proviso does not mean the same thing, would be to make the proviso add something not contemplated by the section. It cannot be the area which by another statute (Regulation 11 of 1825) is to be regarded as "an increment to the tenure." The purpose of Section 4 clause 1 of Regulation 11 of 1825 was to declare the title to the accretion of the per-son to whose land or estate the increment was annexed. The question of the liability of the holder of the tenure or estate to pay an increase of rent for such increment was dealt with not in this clause but in the second proviso to this clause, which, be it repeated, was repealed by Section 2(1), Bengal Tenancy Act of 1885 (Act 8 of 1885). In place of the repealed proviso, we have Section 52, Bengal Tenancy Act, and we are also bound under el. 5 of Section 4 of the Regulation to be guided by general principles of equity and justice. The words "an increment to the tenure" occurring in Section 4 Clause 1 of Regulation 11 of 1825, cannot therefore be considered as throwing any light upon the meaning of the words "the actual area of the tenure or holding" in the new proviso to Section 52(1)(a), Bengal Tenancy Act.

30. I am in entire agreement with my learned brother, that the proviso introduced by the Act of 1939, really adds nothing to what has been laid down by the decisions of this Court. It merely gives legislative sanction to the rule as to proof which is to be gathered from those decisions, and lays no additional burden on the landlord beyond that which under the principles enunciated in the cases decided by this Court, he is already under. As in our judgment, the respondent has already established the fact of accretion by alluvion to the lands held under him, he will be entitled to an increase of rent provided he can now show by the requisite evidence "that there has in fact been an increase in the actual area of the tenure or holding since the rent previously paid was settled" and we are remanding the case to the learned Subordinate Judge for this purpose. In regard to the statement of Objects and Reasons of the Bill which became Act 13 of 1939, I would merely say that our construction of the new proviso being what it is, it is quite unnecessary to refer to that statement. I agree with my learned brother that it would not be permissible for us to consider it for the purpose of interpreting Act 13 of 1339. The case in AIR 1939 1 (Federal Court) is not in my opinion an authority for the proposition that Statements of Objects and Reasions in a Bill may as a rule be referred to for such a purpose.