**(1868) 01 CAL CK 0004**

**Calcutta High Court**

**Case No:** Special Appeal No. 76 of 1867

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| Messes R. Watson and Co. | APPELLANT |
| Vs | |
| Pulin Behari Sen | RESPONDENT |

**Date of Decision:** Jan. 31, 1868

**Judgement**

Sir Barnes Peacock, Kt., C.J.

The question which is submitted for the opinion of this Bench is whether, when a landlord sues for enhancement on the ground that the productiveness of the land has increased, the onus is oil the plaintiff to proof that the productiveness was increased otherwise than by the agency or at the expense of the ryot, or on the defendant to prove that the productiveness was the result of his agency, or to show what was the cause of it. Mr. Rochfort has contended that it would be sufficient for the plaintiff to allege that there had been an increase in productiveness. But that, I apprehend, would not be a sufficient ground for enhancement. The title of the plaintiff to enhance depends upon the fact that the productiveness has increased otherwise than by the agency or at the expense of the ryot. We cannot suppose that Messrs. R. Watson and Co. gave notice that they intended to enhance the rent, or came into Court to enforce their power to enhance, and made a declaration that the statement in their plaint was correct, that the productiveness had increased otherwise than by the agency of the ryot, without knowing the facts upon which they grounded their notice, their assertion in the plaint, and their verification of it. If they did so, they did that which they ought not to have done, and therefore we must suppose that, when they gave a notice to enhance, and claimed the enhancement by their plaint, they knew upon what ground they alleged that the productiveness had increased otherwise than by the agency of the ryot.

2. Mr. Rochfort also referred to the defendant''s statement as what he called a confession and avoidance. What a defendant says, either orally or by a written statement, is not a plea in confession and avoidance. I asked Mr. Allan whether there was a written statement put in, or whether what the defendant stated was stated verbally in Court. But I do not think it makes any difference in point of law

whether the statement is made by defendant verbally or in writing. Suppose a defendant comes into Court, and the Court asks him:--"What do you say to the plaintiff''s claim?" and he says:--"I admit that the productiveness has increased, but not otherwise than by my agency." Such an admission must be taken altogether. So it is in the case of a written statement. A written statement put in by a defendant is not a plea by way of confession and avoidance; it is a statement of the grounds of his defence, and he must verify the statement. It is like an answer in Chancery. If you read a man''s answer, you must take the whole admission together See Baikanthanath Kamar Vs. Chandra Mohan Chowdhry . Taking the whole admission together in this case, the defendant says that "the productiveness has increased, but not otherwise than by my agency;" and the plaintiff then has to prove his case.

3. The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove the title. That was laid down by the Privy Council in the case of Khajah Mohamed Gouhur Ali Khan vs. Ashrufoonisa and . They say that the plaintiffs "have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the illegitimacy of the appellant; and they must give sufficient general evidence to throw upon him the onus of proving his legitimacy." In Strike, the rule is thus laid down at p. 588, 4th Edition:--"It is to be carefully remarked that, although, as a general rule, the law neither presumes liability or discharge from liability, nor any fact or state of things essential to such liability or discharge, not established by competent means, the law does not in absence of proof of a negative, where it is material to a right, assume the affirmative to be true; it is, on the contrary, frequently essential to the establishment of right to prove the negative of facts."

4. The plaintiff alleged the right to enhance on the ground that the productiveness had increased otherwise than by the agency of the ryot. I am of opinion, therefore, that the onus lay on plaintiff to prove the ground of his right to enhance, namely, that the productiveness of the land had increased otherwise than by the agency of the ryot.

5. The case will be remanded to be determined upon the evidence as it stands. The appellant will have the costs of this appeal.

6. We see that the suit was brought in the name of Messrs. R. Watson and Co. This Court has determined in a case in which Messrs. R. Watson and Co. were parties, that the names of the persons composing the firm must be given in the same manner as every firm is bound to give the names of its members. In future the Judges are not to receive plaints at the suit of Messrs. R. Watson and Co. or any other firm, but should in all cases require the names of the parties constituting the firm to be stated,

Seton-Karr, J.

7. I am of the same opinion. Two main points were urged on behalf of the zemindar with the view of casting the onus on the ryot. Mr. Rochfort''s argument was that, when the fact of a positive increase was either admitted or proved, this fact alone would entitle the zemindar to the benefit of the increase, unless the defendant could prove the special plea of avoidance. But this argument, though at first sight it may appear to deserve some consideration, seems to me to have been completely disposed of by the remarks of the learned Chief Justice, to the effect that, if you take the admission of a defendant at all, you are bound to take it altogether, and to its whole extent.

8. The other main argument dwelt upon by Mr. Allan, was to the effect that, in this case, the onus ought to be shifted according as the means] of facility of proof resides with one party or the other; and that in suits for enhancement, it is much more easy for the ryot to prove the special circumstances under which either the value of the produce or the productive powers of the land have increased, than it would be for the zemindar; that it is fairer, in short, to require the ryot to prove his case with regard to his particular plots, which he is necessarily familiar with, from constant supervision and inspection, than to require the zemindar to prove his case with regard to the lands of scores of ryots scattered probably over several villages, of which he or his agent can have but a partial knowledge. But there is nothing unreasonable in requiring the zemindar to prove his case. He has his gomasta or his local agents. He can call the defendant himself into Court and examine him, and he can summon other ryots to prove facts which must be widely known; and he ought to have no difficulty in proving that the increase has resulted from additional productiveness in the soil, arising out of fertilizing deposits, or from increased facilities for disposing of the produce arising out of the construction of protecting embankments, or the introduction of railways, or the rise of new markets, or the generally increased facilities of communication which are caused by the construction of ordinary metalled roads. Consequently, there is nothing which, in my opinion, should exempt the zemindar in this case from the ordinary liability which attaches to all plaintiffs.

9. The case of Nobeen Kishen Bose v. Shofatoollah 1 W.R., 24 was never properly argued. No one appeared for the respondents; and it appears to have been assumed that, on the mere fact of increase being proved or admitted, the onus was necessarily shifted to the shoulders of the ryot. The two other cases, as far as the facts can be gathered from the reports, appear to me to favor the contention of the appellant in this case. But on general grounds, and looking to the purely legal question of the onus of proof, I am quite prepared to hold that, in such a case, it is justly laid on the party seeking to enhance.

Phear, J.

10. This is a suit to recover rent at an enhanced rate. The party claiming this must have given notice, under s. 13, Act X of 1859, of his intention to claim an enhanced

rent, and the ground upon which that claim is based; and under s. 17, if the claim be made upon the ground of increase of the productive powers of the land, or of the value of the produce, it must include this further condition also, namely, that these have been increased otherwise than by the agency or at the expense of the ryot. Consequently, it is the basis of the plaintiffs claim in this suit that either the value of the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot.

11. It is admitted by the plaintiff''s counsel that ordinarily the rule of law is that the plaintiff must prove that which is the foundation of his right. But it is said that, in this particular case, the burden of proof is shifted from the plaintiff to the defendant for this single reason, that it is easier for the ryot to prove his exception, than it is for the plaintiff to prove that the exception does not exist. To me it is somewhat novel to hear this enunciated as a rule of law, although I am familiar with the phrase that where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit, the burden of proof must be there also. But that has a special meaning, and applies to a very limited class of cases, the class of cases to which I alluded during the argument. I do not know if any case of that kind is to be found in this country, because they entirely depend upon the provisions of statute law. But the principle does not go further than those peculiar cases. Alderson, B., in Elkin v. Janson 13 M. & W., 655, at p. 662, even qualified its applicability in regard to these; and it appears by the quotation which I made from a judgment delivered by Lord Denman in Doe v. Whitehead 8 A. & E., 571 that, according to English rules, the place of the knowledge does not affect the situation of the burden of proof. His words are:--"The proof may be difficult where the matter is peculiarly within the defendant''s knowledge; but that does not vary the rule of law."

12. I have thought it necessary to make these remarks, although I fully concur in the judgment which has been delivered by my Lord, for the reason that this is not the first time I have heard that principle attempted to be used which Mr. Allan has endeavoured to use today, and therefore I think it desirable to say, as far as I am concerned, that it appears to me an erroneous application, if it has been here attempted to be made. For these reasons I concur entirely with the Chief Justice, that this is a case in which the plaintiff is bound to prove, not only that the value of produce and the productive powers of the land have been increased, but also to go further and prove what is termed a negative, namely, that they have increased otherwise than in consequence of the exertion of the ryot himself.

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[1] See Beng. Act VIII of 1869, s. 18.

[2] See Rojkrishna Mookerjee v. Kali Charan Dobain, 6 B.L.R., App., 122.