(1919) 06 CAL CK 0032

Calcutta High Court

Case No: Appeals from Appellate Decrees Nos. 103 and 46 of 1918

Makbul Ali Chowdury		APPELLANT
	Vs	
Jogesh Chandra Roy		RESPONDENT

Date of Decision: June 13, 1919

Final Decision: Dismissed

Judgement

1. The Plaintiff as landlord sued the Defendants as his tenants in respect of two etmams claiming that the rents of the same are enhanceable and that the existing rent of Rs. 252-12-0 be raised to Rs. 2,151 per annum. The Defendant''s main contentions were that the suit was not maintainable in the form in which it was brought, as enhancement of rent of two etmams could not be claimed in a single suit, that the rent had been settled by the Settlement Officer and was not liable to enhancement during the period of the settlement, that the rents of etmams are permanent and not enhancable and that the amount of increase claimed was unjustifiable. They further claimed that the etmams in question were held by them in occupancy right.

2. The learned Subordinate Judge held that the etmams were tenures and that the rent was enhanceable. As to the rate of enhancement he found that there was no customary rate; he found on the admissions of the Defendants themselves that the collection of rents made by the Defendants from their tenants was Rs. 598 a year and the net profits from the khas lands Rs. 405 and after deducting certain charges for collection and upkeep of the embankments he found the net profit to be Rs. 814 which he considered should be divided equally between the landlords and the tenure-holders. He therefore gave the landlord Plaintiff a decree for an enhanced rent up to Rs. 407 with cesses and allowed him one-fourth of the costs of the suit.

3. The learned District Judge in appeal affirmed the Subordinate Judge''s decree. In Appeal No. 103 of 1918, the tenant Defendants appeal claiming that there should be no enhancement at all, that the suit cannot stand owing to misjoinder and raising other points as will appear below. In Appeal No. 46 of 1918 the Plaintiff also appeals

claiming that the tenure-holders are not entitled to retain half of the net rentals and should not be allowed as their profit more than 15 per cent, of the rent plus their charges for collection. The facts about the tenancies in question which are not disputed in this Court are as follows :--

The lands are in a temporarily settled estate of which when the lands were originally settled Hara Chundra Roy was the proprietor under Government in respect of two-thirds share and Tarini Charan, Sadak Ali and others held the one-third share. The area settled is 33 drones, i.e., over 500 bighas. Both the shares in the lands in suit were let out by the then proprietors under Government to the predecessors of the Defendants, the one-third share by an oral lease and the two-thirds share by a written lease in or about 1864. The rents then fixed were Rs. 73 in respect of the one-third share and Rs. 137-10 in respect of the two-thirds share. Subsequently the proprietary interests in each share fell into the possession of the Plaintiff.

4. In 1895 there was a settlement proceeding and in that proceeding the Settlement Officer settled fair rent for the one-third share at Rs. 113 and in the two-thirds share at Rs. 139-12. He also recorded the two tenancies in separate entries in the khatians as those of settled raiyats.

Appeal No. 103.

5. The points raised before us in appeal by the Defendants are five in number. It is first contended that the suit is not maintainable, as the two etmams, one by written lease in the two-thirds share and one by oral lease in the one-third share are distinct and so there should have been two suits, one in respect of each etmam. In this case however the Plaintiff and Defendants are the landlord and tenants of both the etmams and have the same interests in each. The misjoinder therefore, if any, is merely technical as the claims to rent can be split up in the proportion of two-thirds and one-third. The misjoinder does not therefore affect the merits of the case and so under sec. 99, C.P.C., there is no ground for dismissing the suits m appeal or remanding the case on this ground. The next contention is that the rent having been settled by the settlement Officer under Chap. X of the Bengal Tenancy Act in a temporarily settled estate, the Court cannot during the pendency of the settlement made by Government with the proprietors enhance the rent either under sec. 7 or sec. 30 of the Act. In a temporarily settled estate, it is argued, rent can only be enhanced or varied at the time of the resettlement under the provisions of see. 191 and sec. 192.

6. In support of this contention the learned Pleader for the Appellant referred to the case of Ambika Charan Chuckerbutty v. Joy Chandra Ghose 13 C.W.N. 210 1908 and the case of BaikunthaNath Ghora v. Prosunna Kumar Mohapatra 23 C. W. N. 516 (1918). These two cases however only lay down the rule that it is an unrebut-table presumption that the rent settled under Chap. X in a temporarily settled estate is the proper rent at the time it is settled and that the entries in the rent-roll of such

rent are conclusive evidence of the amount.

7. For the Respondent we are referred to a passage in the judgment of Banerjee, J. in the case of Zamir Mondol. v. Gopi Sundari Dasi I. L. R. 32 Cal. 463n at p. 467n(1900). "It is open to the Civil Court to go behind the Collector''s jamabandi and ascertain the true rate of rent payable. It has been held that a tenant is not bound by the rent recorded in the Collector''s jamabandi: If the tenant is not bound by the record there is no reason why the landlord should be held to be bound by it." In the present case it has not been even pleaded that the settlement-holders under Government when accepting the settlement entered into any engagement not to raise the rents nor do we find any authority for the proposition that a temporary settlement-holder is, by virtue of the terms of sec. 191 and sec. 192, precluded from exercising the ordinary powers of a landlord under sec. 7 and sec. 30. The present rent was settled in 1895 under sec. 104 of the Bengal Tenancy Act and this suit was instituted in September 1916, 20 years after the last proceedings for increasing the rent. Enhancement therefore is not barred either under sec. 9 or sec 37 of the Act. The third point taken is that as in the settlement record-of-rights the Defendants were recorded as settled raiyats, their rent can only be enhanced on the basis of an occupancy raiyat. The Court has wrongly held them to be tenure-holders and proceeded to fix the rent under sec. 7 of the Act. Further, even if sec. 7 applies, there is a customary rate set out in the written lease and so the rent can only be fixed under sec. 7 (2) on this customary rate. The etmams however appear clearly to be tenures and not mere occupancy holdings nor in the written statement of the Defendants is it definitely contended that they are only raiyati holdings.
8. In both shares they are over 100 bighas in area : and the written statement shows the Defendants have since a long period been establishing tenants thereon for cultivation and though part is khas, for the majority of the land they only receive rent from bona fide cultivators who have their residences in the land. The tenancies have all along been described as etmams and etmams are usually tenures. We hold therefore that sec. 7 of the Bengal Tenancy Act applies as to enhancement, finding the etmams to be tenures.

9. As to the contention that the enhancement should only be at a customary rate the lower Court finds that the Plaintiff failed to prove any customary rate. The Appellants urge that the rate set out in the written lease of 1272 is the customary rate. We do not agree with this contention. That was the rate 50 years ago. It is not the rate even on which the tenure is now-held since the last settlement and cannot be the customary rate at the present time. These findings dispose of the appeal as to the one-third share held under the oral agreement.

10. The other two points relate to the two-thirds share only held under the written lease. It is urged that subject to sec. 191 and sec. 192, Bengal Tenancy Act, the written lease in this share created a tenure at fixed rates in perpetuity and that the rate at which the rent should be calculated should be according to the rate fixed in

that lease. As to the claim that the lease created a tenure held at fixed rates we are referred to the cases of Soora Soondaree, Dasi v. Golam Ali 19 W. R. HI (1873), Hara Prosad Rai Choudhury v. Chandi Charan Boiragi ILR 9 Cat. 605 (1883), R Watson d: Co. v. Radha Nath Singh 1.C. L.J. 572 (1905) and Ramdayal Girl v. Midnapur Zemindar Co. 15 C.W.N. 263 (1910). These cases however only lay down that in cases of reclamation leases held for a long period without changes of rate of rent or in which there is a progressive rent for a few years their full rents are not liable to enhancement. In the case of the present lease, there was no progressive rent fixed at its inception, nor is it a reclamation lease; for the lease itself shows that at the time of its inception the major portion of the land was already culturable. The principle therefore of these cases does not apply in the present case.

11. It is urged next the statement in the lease that for default in rent the tenure can be put to sale under Reg. VIII of 1819 and the fact that the only clause as to increase of rent is one which says that the khila lands will be let out as they become culturable at the rate of the cultivated lands show that the tenure is one at fixed rates. But as was pointed out in the case of Upendra Lal Gupta v. Jogesh Chundra Ray 22 C.W.N. 275 (1917), the rent of a tenure is always liable to enhancement unless the landlord has precluded himself by contract or is estopped by law and the mere fact that the parties have agreed that resort may be had to the Putni Regulation to recover arrears of rent cannot mean that the rent is permanently fixed. Our finding therefore is that the two etmams are tenures not held at a fixed rate of rent and rent is liable to be enhanced under the ordinary procedure under sec 7. As no customary rate has been proved we hold that the method adopted by the lower Court in fixing the rental is correct.

12. This appeal will therefore be dismissed with costs except that in drawing up the decree the rent for each tenure will be separately shown in the one-third and two-thirds shares.

Appeal No. 46 of 1918.

13. The only question in this appeal is whether the proportion of the gross rental allowed to the Appellant landlord in respect of these tenures is sufficient. The lower Courts considering the geographical position of the tenure which is near to the Bay of Bengal and needs considerable sums to be spent on it for the maintenance of embankments to keep out salt water has allowed the tenure-holders to retain after certain deductions for collections and repairs half the net rent. The landlord claims that the tenure-holders should only retain 15 per cent of the rent after deducting cost of collection. We have fully considered the arguments addressed us and the findings of the lower Courts and hold that in the circumstances of the tenures the lower Courts in view of the finding of fact have exercised their discretion rightly in making the allowances to the tenure-holders that they have made. We therefore dismiss the appeal with costs.