

(1926) 04 CAL CK 0031
In the Calcutta High Court

Birendra Kishore Manikya Bahadur

APPELLANT

Vs

Durga Sundari Chowdhurani and Others

RESPONDENT

Date of Decision : 19-04-1926

Acts Referred:

Bengal Tenancy Act, 1885 — Section 7

Citation : AIR 1927 Cal 136

Hon'ble Judges : Mukerji, J;Greaves, J

Bench : Full Bench

Judgement

Mukerji, J.—These four appeals arise out of as many applications under S, 105 of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of certain tenures which had been recorded in the finally published Record of Rights as bearing jamas which are enhanceable. The facts shortly stated are these:

Pargana Dandra was held in two shares, viz., the 4-annas share and the 12-annas share. The 4-annas share was owned by one Mahomed Ali Chowdhury. Mahomed Ali Chowdhury was declared a rebel and his estate was confiscated by the Government in February 1793. There were in this estate before the escheat, 45 taluks, a nij taluk and some other lands. After the escheat the nij taluk was divided into 35 tapas. The Collector then made dowl settlement with the talukdars, and in the dowls that were taken only the rents were specified without specification of the area of land comprised in each taluk. For several years Government used to collect the rents by leasing out the zemindari in ijara, but subsequently the dues used to be realized from the talukdars and holders of the tapas. For some time malikana was paid to the heirs of Mahomed Ali Choudhury, but subsequently it was discontinued and it was said that the payment had been made tinder a mistake. In 1824 the tapas were surveyed and assessed at the rate of Rs. 3-6-0 per kani.

2. The 45 taluks were not assessed then and they retained the rents which they used to pay all along. In the meantime 12 annas share of the pargana was partitioned into four separate shares, two of which were subsequently sold for

arrears of revenue in 1835 and were purchased by the Government. From time to time measurements were made of the lands of the taluk, but for one reason or other the jamas of these taluks were not interfered with. Considerable difficulty, however, was experienced in the management of the estate because whenever a dispute arose, as the areas were not specified, confusion was created by the uncertainty as to whether any particular land was included in the 4-annas estate of Mahomed Ali Choudhury or the other two shares out of the 12 annas which had been purchased by the Government or the remaining two shares. In 1845 the Revenue Officers proceeded to measure all the lands of the taluk and the jama was assessed at Rs. 3-15-0 per kani. The talukdars were offered a deduction 1/3 of the jamas so assessed if they would agree to the jamabandi made as aforesaid, but they refused.

3. One of them instituted a suit to set aside his jamabandi. He was successful in the Court of the Munsif. The Government then preferred an appeal to the District Judge who appears to have partly upheld the decree of the Munsif. On a special appeal preferred to the Sader Dewany Adalat the decrees of the Courts below were set aside and the suit was dismissed on the ground that the civil Courts had no jurisdiction in the matter. An appeal was preferred to the Commissioner of Calcutta against the assessment made as aforesaid, but the assessment was upheld on the 6th June 1848. In July 1848 the final jamabandi was prepared and jamas were settled with the talukdars for 80 years from 1845 to 1874. The tapas were assessed again in 1848 and settled similarly as the taluks. Of the lakheraj mahals in the estate some were released; some were left unassessed; and some were resumed; and those that were resumed were assessed : some were assessed at half the rates of the tapas as being of a date prior to 1790 and others on full rates as tapas being of dates subsequent to 1790. In 1869 the estate consisting of the said 4-annas share was permanently settled with one Asima Banu and heir of the aforesaid Mahomed Ali Choudhury and with one Bharat Ghandra Deb who had purchased the interests of his other heirs. From them the plaintiff purchased the zemindari in 1880. Appeals Nos. 444, 475 and 486 relate to three of the taluks, and Appeal No. 479 relates to the lands of a resumed lakheraj tenure.

4. Appeal No. 479 may be disposed of shortly. The Assistant Settlement Officer held that the tenure to which this appeal relates was created after 1790. It was resumed in 1845 and was made into a tape and assessed with full rates as a tapa. The Assistant Settlement Officer held that the rents of the tenure were enhanceable u/s 7 of the Bengal Tenancy Act. He, however, took into consideration the provisions of Clause (a) and (b) of Sub-section 3 of that section and granted an enhancement on that basis. The plaintiff, claiming more, preferred an appeal and though there was no appeal on behalf of the defendants the learned Special Judge dismissed the appeal as well as the original case. This evidently was wrong. The learned vakil for the respondent seeks to justify the order of dismissal of the case as passed by the learned District Judge on the ground that the reasons given by him for dismissing the other cases relating to

tapas apply to this case as well, but this argument cannot be accepted as well founded in the fact of the clear findings of the Assistant Settlement Officer to which I have referred. Appeal No. 479 must accordingly be allowed and the portion of the decree of the lower appellate Court which purports to dismiss the original case must be expunged, the decree passed by the Assistant Settlement Officer being restored and affirmed by this Court. The appellant will be entitled to his costs in this appeal.

5. Appeals Nos. 444, 475 and 486 relate to three of the taluks. The Assistant Settlement Officer held that these taluks originally belonged to the class of independent taluks mentioned in Section 1 of Regulation 1 of 1793 and Section 4 of Regulation 8 of 1793 but that they had lost their character as such, that they are nevertheless taluks which had existed since the Permanent Settlement and, therefore, the provisions of Section 6 of the Bengal Tenancy Act applied to them, and as the requisite proof was wanting the plaintiffs were not entitled to any enhancement. The plaintiffs thereupon appealed with the result that the learned Special Judge held that the taluks were independent taluks, that the rents were not variable and in that view of the matter he dismissed the appeals before him as well as the original cases to which they related. The plaintiffs have preferred these appeals. The first question which arises in these appeals is whether the taluks are independent or dependent taluks. The learned Special Judge was right in holding that the onus of proving that they were independent taluks lay on the defendants the presumption arising from the finally published Record of Rights being in plaintiff's favour.

6. The learned Judge has found and in my opinion rightly found upon the facts set forth and statements contained in various reports made and proceedings taken under the then existing regulations, that the taluks existed from before the Permanent Settlement. He has further held that in the aforesaid papers the taluks are mentioned as decennial taluks and this expression he proceeds to observe under Regulation I of 1793 means independent taluks. This is one of the grounds given by him for arriving at the conclusion that the taluks are independent taluks. In this, however, I am unable to agree with the learned Judge. There is absolutely nothing in the judgments of either of the Courts below to show that the holders of these taluks prior to the confiscation by the Government ever paid their dues direct to Government or that they ever set up any such right. There is nothing to show that they had at the time of the Decennial-Settlement entered into engagements with the Government to pay their revenues direct. I do not see that the expression "decennial taluks" has any recognized meaning according to the regulation to which the learned Judge has referred. The fact that dows were taken from the holders of the taluks after the confiscation did not make the taluks independent if in point of fact at the Decennial Settlement or in pursuance of the regulation relating thereto separate engagements had not been made in respect of them.

7. There are indications in the reports and correspondence of the Revenue

Authorities which are on the record suggesting that perhaps some of the talukdars though not all had dows of the Decennial Settlement but the learned Judge has not found as a fact that any such engagements had been entered into in respect of these taluks to which the appeals relate. On the other hand, we find that the holders never applied to be separated in accordance with the provisions of Section 14 of Regulation 24 of 1801. This omission on their part had this effect under the said provisions that the taluks would on the expiry of the period prescribed therein be considered as dependent taluks not entitled to be separated from the zemindaries to which they may attached though in other respects the rights of the talukdars were not meant to be in any degree affected by the regulation. This, therefore, is not conclusive but, the learned Judge, in my view, was not right in treating this omission as altogether negligible. The other ground upon which the learned Judge has proceeded is this : he is of opinion that on confiscation the zemindari of Mahomed Ali Choudhury merged in the permanent right of the Government and when in 1869 the estate was settled with Asima Banu and Bharat Chandra Deb, a new zemindari was created to which the taluks either as existing from before the Permanent Settlement or as created by fresh assessment in 1840 cannot be said to be dependent. The learned Judge has held that there was merger and in arriving at this conclusion he has relied upon a rule in the Bengal Survey and Settlement Manual, and upon the fact that

had not the proprietary right and the zemindari merged in the permanent title of the Government the zemindari would have been sold and the taluks etc., would have been annulled.

8. It is difficult to see how the rule in the Bengal Survey and Settlement Manual can determine this question of merger and how this one circumstance of the zemindari not having been sold can enable a Court to hold in the affirmative that there was merger. He has attached no significance to the fact that for some time malikana was paid as it was alleged that it had been paid under a mistake. The question whether there was merger or not is a mixed question of law and fact. It has to be determined upon a construction of the order of confiscation the order by which the estate was returned to one of the heirs of Mahomed Ali Choudhury and the representative of the other heirs, the interest which the Government was capable of holding in those days and upon various other matters, the relevant evidence bearing upon which does not appear to have been placed before the Court by either of the parties. On the other hand, there is the undeniable fact that the zemindari bore one touzi number and was treated as one estate all along. The question whether the zemindari had been extinguished by the confiscation, in the estate of the record, therefore, in my opinion, can only be answered by saying that it has not been proved whether there was such extinguishment or not. The result, therefore, in my opinion, is that it has not been established that the zemindari ceased to exist at any time or that the taluks existed before the creation of the zemindari and that the presumption arising in favour of the plaintiffs upon the finally published Record of Rights as to the dependent character of the taluks stands. If the taluks have not been proved to

be independent taluks and the presumption to which I have referred stands, then it follows that the plaintiffs must prove one or other of the conditions mentioned in Clauses (a) and (b) of Section 6 in order to succeed.

9. In the present case there arises no question under Clause (b) and the only question is whether the plaintiffs are entitled to enhance the rent either by local custom or by the conditions under which the tenure is held. It is contended on behalf of the respondents that the learned Special Judge has dealt with the matter and has recorded a finding against the plaintiffs that the rent is not variable. Now the learned Special Judge in one passage of his judgment has observed thus:

If otherwise there was no merger and the Government was only trustee for the rebel then they can be said to have been only dependent taluks with rents which varied.

10. It is difficult to follow what this passage exactly means for it appears to be in conflict with what the learned Judge says later on and which runs in these words:

From 1848 to 1869 they also paid uniform rents and previous to 1848 there having been no ascertainment of definite areas it cannot be properly said that the rents of these taluks varied. If there was any increase it was for excess area.

11. Any way it seems to have been the view of the learned Judge that the variation in the rent was due to alteration in area. For this supposition, however, there is absolutely no foundation. In 1846 the rent was assessed at Rs. 3-15-0 per kani, but there is no indication that this was the rate adopted when the dows were taken or that the rent was assessed then at any particular rate per kani, and on the other hand, the proceedings to which reference has been made in the judgment of the Assistant Settlement Officer plainly indicate that the areas of the taluks were not ascertained at the time. This variation, therefore, cannot be ignored in the way that it has been by the learned Judge. Nor again does the variation altogether lose its effect because, as it has been urged on behalf of the respondents, the variation was submitted to under compulsion. This compulsion is nothing more than this that the Revenue Authorities imposed the jamas and the talukdars had to submit to them in spite of protest. It is, however, not conclusive one way or the other but its bearing and effect on the question which arises under Clause (a) of Section 6 of the Bengal Tenancy Act will have to be duly considered. So also the other facts and circumstances of the case including the fact that the jamas were fixed in 1848 for so many years which would prima facie indicate an intention not to fix the rent in perpetuity. There is some evidence, it is said, in the shape of judicial decisions indicating a custom to enhance the rent of tenures of similar character and description in the locality : if such there is, that also will have to be considered. Upon a consideration of all these matters proper findings will have to be arrived at on the question whether the plaintiffs have succeeded in making out a case under Clause (a) of Section 6 of the Bengal Tenancy Act.

12. In conclusion I must refer to a judgment of another Division Bench of this Court which has dealt with a number of other appeals preferred from the same judgment of the learned Special Judge. These appeals related to other cases u/s 105 which were governed by the same judgments of the Assistant Settlement Officer and of the Judge as are before us in these appeals. That Division Bench appears to have arrived at conclusions different from ours and with the utmost deference to the learned Judges who constituted that Bench we feel that we cannot agree in the view they have taken. We have accordingly given the matter our most anxious consideration as to the course that we should adopt. We have now arrived at the conclusion that the decision of that Bench is not binding on us and for two reasons : firstly, because on the question whether the plaintiffs have succeeded in proving the condition mentioned in Clause (a) of Section 6 of the Tenancy Act which is a question of fact there is no finding of the Special Judge in his judgment and we think we are free to arrive at our own conclusion on it independently of the opinion expressed by the other Division Bench : and secondly because the question of the status of the defendants, which is a question of law, does not appear to have been treated by the learned Judges as such but, on the other hand, the subsidiary question involved therein, viz., whether the zemindari was extinguished or not has been treated by the learned Judges as a question of fact only, a view with which we are unable to concur.

13. The decrees passed by the learned Special Judge must accordingly be set aside and the appeals remitted to his Court so that they may be re-heard as to this part of the case and dealt with and decided in accordance with law. Costs will abide the result. Hearing fee is assessed at one gold mohur in each of the appeals.

Greaves, J.

14. I agree.