

(1925) 03 CAL CK 0003
In the Calcutta High Court

Dukhu Mia and Others

APPELLANT

Vs

Jagdish Nath Roy Bahadui

RESPONDENT

Date of Decision : 17-03-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 30

Citation : AIR 1926 Cal 359

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Full Bench

Judgement

Duval, J.—These two appeals are brought by two tenants against an order of the Additional District Judge of Dinajpur in appeal upholding the respondent landlord's contention that he was entitled to get enhanced rent from these tenants u/s 30, Bengal Tenancy Act, the presumption arising u/s 50 having been rebutted. The landlord's case was that rent was not fixed and that the presumption u/s 50 did not arise as the rent varied at various times since the time of the Permanent Settlement. The Munsif found that the presumption of fixity of rent had not been rebutted as there had been no change in the rate of rent anyhow since 1849 and that jamawasilbaki papers of an earlier date were not conclusive to show that the jamas did not exist back to the time of the Permanent Settlement. The Munsif, therefore, disallowed the claim for enhancement and decreed the rent at the former rent. In appeal the learned Additional District Judge has mainly relied on the jamawasilbaki papers of 1226 as showing that the rate of rent as shown in these papers of all the jamas in the village was Re. 1-0-5 gandas per bigha and admittedly the rate of rent in 1256 (1849) was Re. 1-9-7 per bigha. He, therefore, held that there had been a variation in the rent and for that reason the presumption had been rebutted. Now it has been held that the question generally, whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement is a question of fact and not a question of law. In this connexion I would refer to the case of Alimuddin Mollah and Others Vs. Karim Bux and Others, , a decision to which my learned brother was a party.

2. The main question, therefore, which arises in this appeal and which we have to consider is whether the learned Additional District Judge, in coming to his decision that there has not been uniform rate of rent from the time of the Permanent Settlement has arrived at his finding by taking into consideration evidence which legally is not evidence at all. The main point is as to the jamawasilbaki papers of 1226. As I have remarked they were used in the Court of the Munsif only to show that the jamas at present existing were not contained in them. That, of course, is negative evidence and does not carry us very far; for as it has been remarked both by the Munsif and the Additional District Judge the present jamas might not have existed as they might have been carved out of larger jamas appearing in these papers. The learned District Judge, however, has used the entry of Re. 1-0-5 gandas. which is the rate of every holding in the village as evidence for holding that these jamas, if existing, could not have been held back to the time of the Permanent Settlement at the rate of Re. 1-9-17 gundas. It is urged on behalf of the appellants, however, that these jamawasilbaki papers of 1226 are not admissible as they are not legally proved. Suffice it to say that they came out of the zamindar's record-room. They are obviously papers kept in the ordinary course of business and they are over 100 years old and the only person responsible for any entry in them must, therefore, be by this time dead. The mere fact that no formal evidence was adduced to prove that the man is dead, who must, if alive, be over 120 years old, does not appear to us to be very material. It is well established that jamawasilbaki and jamabandi papers can be admitted in evidence u/s 32(2) of the Indian Evidence Act, but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. In this connexion I would only refer to the cases of *Durga Priya Choudhury v. Hazra* Gain 25 C.W.N. 204 and *Umed Ali v. Habibulla* [1920] 47 Cal. 266. In my opinion, therefore, the learned Additional District Judge had committed no error in accepting a natural presumption that the writer of these papers of 1225 B.S. is dead.

3. It is urged, however, that there is no need in jamawasilbaki papers to set out the rate of rent. The amount of rent is what is to be entered in such papers in the ordinary course of business; the entry of the "nirik" is not an entry made in the ordinary course of business and so the entries are not entries which can be relevant u/s 32. I do not think that we can lay down that certain entries in what is a clear statement as to the state of collection in a certain year are made in course of business and others are not. The zamindar might have had reasons a hundred years ago to have the rate entered and I cannot believe that these papers were made in anticipation of the present or other suit. I cannot hold that the entry as to the rate of rent can be distinguished from other entries in the jamawasilbaki papers as being entries not made in the ordinary course of business. I hold, therefore, that the jamawasilbaki papers have been received in evidence not illegally by the learned Additional District Judge.

4. It is next urged that a new case was made in appeal which should not have been allowed. I see nothing in this contention. The whole record was before the

District Judge and he read the evidence for and against the presumption of fixity of rent and dealt with it as he as a judge of fact was entitled to do. The fact that the learned Judge dealt with the case in a somewhat different way from the Munaif is no reason to hold that the learned Judge acted illegally.

5. It is also urged that, as a matter of fact, the jamawasilbaki papers are not good evidence, assuming that they were received in evidence, because of the register, Ex. H, in which the rate of rent appears to have been recorded as Re. 1-8 sicca which is more or less the sum of Re. 1-9-17 gandas which is the rate existing in 1216. But" the learned District Judge has dealt with the facts of the case and has pointed out that this Ex H is defective and in parts illegible and that in many cases there were two different rates of rent set out in it: one shown by the Collector and the other by another officer. Exhibit H, therefore, as he rightly points out, does not carry us very far.

6. The learned advocate further raises the question as to certain remarks made by the learned District Judge as to the effect of slight variations in rent. It is not necessary for me to discuss this point. The learned Additional District Judge himself has come to the finding of fact that the rent which was in 1226 only Re. 1-0-5 gundas sicca, 30 years later had advanced to Re. 1-9-17 gundas. This is a finding that there was a material, not a slight, variation.

7. Lastly, the learned advocate has stated that certain of the defendants who were tenants on the land were not on the record. It appears that when the case came on for trial there was a petition by the defendants that certain co-owners in the tenancy were not before the Court and so the case could not proceed. But at the trial this objection was waived, and we do not know if there was anything material in this objection: presumably there was not, as it was not pressed, but I may only add if there were any other parties who should have been parties to the suit and who were not parties they would not be bound by the decree.

8. In view of what I have said above I come to the conclusion that the finding of fact at which the learned District Judge has arrived has not been vitiated by any misrepresentation or misunderstanding of the evidence. It rested with him to weigh the evidence and we cannot say that there is any evidence on the record which should not be there.

9. These appeals, therefore, must be dismissed with costs on the findings of fact arrived at by the Court of appeal below.

Suhrawardy, J.

10. I agree.