

(1934) 08 CAL CK 0024
In the Calcutta High Court

Gopi Krishna Saha

APPELLANT

Vs

Surendra Nath Chaudhury and Others

RESPONDENT

Date of Decision : 21-08-1934

Acts Referred:

Letters Patent Act, 1865 — Section 15

Citation : AIR 1935 Cal 210 : 155 Ind. Cas. 154

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—This is an appeal u/s 15, Letters Patent, from a judgment of my learned brother S.K. Ghose, J. The suit in which this appeal arises was brought by the plaintiff who is the appellant before us for additional rent for excess area. The Court of first instance dismissed the suit. The lower appellate Court gave a modified decree to the plaintiff granting additional rent for an excess of 70 bighas odd only. On appeal to this Court, S.K. Ghose, J., has allowed the appeal and has restored the decree of the Munsiff, dismissing the plaintiff's suit. Hence this present appeal u/s 15, Letters Patent.

2. The plaintiff's case is that he has purchased the Putni and Dar Putni rights of mouza Chatiani in the year 1334 B.S. The defendants are said to be the holders of a jote bearing rent of Rs. 34-10-8 per year. The case made by the plaintiff in the plaint further is that this rent was assessed with reference to an area of 78 bighas odd without specific boundaries on a standard of 18 inches to a cubit and that the jama was not a mokrarry jama. It was further stated that according to the finally published record-of-rights, which records were published in 1925, the defendants are possessing an area of 180 bighas, and it is said that the defendants are liable to additional rent for excess area of 102 bighas. On this basis the plaintiff claims a sum of Rs. 126 odd per year. The defence of the defendants, in substance, is that the holding is a mokrarry holding which has been held by them from very ancient times, even from before the permanent settlement of 1719 and that the existing rent is a consolidated rent and was not

with reference to measurement of any particular area. It is further stated that measurement, if any, was made according to a standard of 26 inches per cubit and according to such standard of measurement the area would be 109 bighas odd. It is further said that there was no encroachment on the lands of the zamindar or the patnidars. The burden of proving that the defendants are holding excess land for which they are liable to an additional rant is undoubtedly in the first instance on the landlord.

3. The origin of the tenancy is lost in antiquity, and it is very difficult at this distance of time to give evidence to show as to what was the area which was actually settled with the defendants. It is said on behalf of the plaintiff that there is an admission by the defendants that there was a potta in respect of this tenancy, that, according to the case of the defendants, that potta was stolen and it would be presumed, it is said, that the potta, if produced, would have gone against the defendants. The Subordinate Judge has relied on an admission of defendant 1 in certain previous depositions, wherein it is stated that the settlement of the jote was with reference to area, and it is further stated that the area was 110 bighas measured by the standard of measurement of 26 inches to a cubit. The Subordinate Judge also rested his decision on his view with regard to the standard measurement, which he held to be 18 inches to a cubit which is also the present standard of measurement on the basis of which lands have been surveyed by the Survey Officers in preparing records-of-rights; and on this basis, accepting the original holding to be 109 bighas, as admitted by the defendants, he has granted an enhancement in respect of the excess area, namely, 180 bighas. It was complained before S.K. Ghose, J., that the finding about this standard of measurement was based on no evidence and was therefore liable to be challenged in second appeal. That contention was accepted by S.K. Ghose, J. Before us it has been contended by Dr. Basak who appears for the appellant that the learned Judge of this Court was bound to accept the finding of fact on the question of standard of measurement, arrived at by the lower appellate Court. Undoubtedly, a finding of fact arrived at by a Court of fact is final, if such finding is based on evidence. In the present case the position is this: the plaintiff is entitled to the benefit of the presumption that the present standard of measurement was the standard which obtained at the time of the inception of the tenancy. There are authorities to that effect in the books. Reference may be made to a very early case, namely *Ishan Chandra Mitter v. Ramranjan Chakravarti* (1905) 2 CLJ 125 where Ashutosh Mookerjee, J., stated this (at p 132);

Here the plaintiff alleges that the standard of measurement now prevalent is a cubit of 18 inches, and that this measure was in use when the leases were granted in 1859. The defendant asserts, on the other hand that the standard of measurement prevalent in 1859 was a cubit of 20 inches. Of this he gives no evidence; the District Judge has accordingly held that the measure now in use, was also in use in 1859. It is disputed that whichever measure be adopted, the land within the boundaries would be in excess of the area mentioned as that with

reference to which the rent was fixed at the inception of the tenancy; the only question therefore is as to the quantity of this excess. It is impossible to say that the District Judge has under circumstances just stated erred in holding that the state of things now in existence may be presumed to have existed also in 1859.

4. The same view was also taken by B.B. Ghose, J. and Panton, J., in *Birendra Kishore v, Bhola Mia* 1927 Cal 15. There the learned Judges observed this:

With regard to the question of standard of measurement the presumption must be that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved. As there is no proof to the contrary it must be presumed that the same standard has continued. It is not a case of letting out by a statement of the area, and if the area is found to be in excess of what was let out the landlord is evidently entitled to increase of rent for such increase of area.

5. And in a very recent case, *Mallik, J.*, was inclined to take the same view: see: *Sasanka Kumar Nayak v. Hitlal Sow* 1933 Cal 617. Following these authorities, undoubtedly the plaintiff in this case is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the late when the record-of-rights was finally published, was also the standard of measurement at the inception of the tenancy. But in the present case, that presumption has been rebutted by the evidence which has been afforded by Thuller's Manual of Surveying, 1875 Edition, at p. 402, from which it would appear that on account of the difficulties arising out of the varying standards of measurement, the Government laid down a uniform standard of measure in 1849; and this has been referred to by the Munsif in his judgment at p. 7 of the paper-book. The presumption, which we could carry back beyond 1849 has been rebutted by the evidence in this particular case, that there was no uniform standard of measurement prior to 1849. The cases in which the presumption has been pleaded are all cases after the year 1849. Besides in those cases the Courts had not the evidence which has been placed before them, that the Government had introduced a uniform standard of measurement after 1849 so far as the measures with which the Government had to deal were concerned. We are therefore of opinion that the learned Judge of this Court has rightly stated that there is no proof as to what was the standard of measurement beyond the year 1849. There is no doubt that this tenancy was created nearly half a century before 1849. Therefore the basis on which the lower appellate Court came to the conclusion that the plaintiff had proved that the standard of measurement at the time of the inception of the tenancy was 18 inches to a cubit, as false, and the learned Judge of this Court was right in interfering with that finding which was based on no evidence in the case. In these circumstances we are of opinion that the plaintiff has failed to discharge the burden of proof for establishing the excess, of area for which he claims additional rent. The appeal accordingly fails and it is dismissed with costs.