

(1919) 06 CAL CK 0012
In the Calcutta High Court

Jogesh Chandra Roy

APPELLANT

Vs

Mokbul Ali Chowdhury and Others
 Mokbul Ali
Chowdhury and Others Vs Jogesh Chandra Roy

RESPONDENT

Date of Decision : 13-06-1919

Acts Referred:

Bengal Tenancy Act, 1885 — Section 191, 192, 30, 37, 7
Civil Procedure Code, 1908 (CPC) — Section 99

Citation : 54 Ind. Cas. 850

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

Bench : Division Bench

Judgement

No. 103 of 1918

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.
2. The defendants main contentions were that the suit was not maintainable in the form in which it was brought, as enhance" merit 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 daring the period of the settlement, that the rents of Etmams are permanent and not enhance-able and that the amount of increase claimed was unjustifiable. They further claimed that the Etmams in question were held by them in occupancy right.
3. 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. 5J8 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 landlord 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 1/4 th of the costs of the suit.

4. The learned District Judge in appeal affirmed the Subordinate Judge's decree, in Appeal No. 103 of 1918 the tenants 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:

5. The lands are in a temporarily settled estate, of which when the lands were originally settled Hara Chandra Roy was the proprietor under Government in respect of two-thirds share and Tarani Charan, Sadak Ali and Ors. 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 interest in each share fell into the possession of the plaintiff.

6. 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.

7. 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 lesion 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 interest 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 u/s 99, Civil Procedure Code, there is no ground for dismissing the suits in appeal or remanding the case on this ground. The next contention is that the rent having been settled by the Settlement Officer under Chapter 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 u/s 7 or Section 30 of the Act. In a temporarily settled estate, it is argued, rent can only be enhanced or varied at the time of there-settlement under the provisions of Section 191 and Section 192.

8. In support of this contention the learned Pleader for the appellants referred to the case of Ambica Charan Chakravarti v. Joy Chandra Ghosh 4 Ind. Cas. 470 :

13 C.W.N. 210 and the case of Baikuntha Nath Ghose v. Sodanandn Mohapatra 46 Ind. Cas. 287 : 23 C. W. N. 516. These two cases, however, only lay down the rule that it is an un rebuttable presumption that the rent settled under Chapter 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.

9. For the respondent we are referred to a passage in the judgment of Banerjee, J., in the case of Zamir Mandal v. Gopi Sundri Dasi 32 C. 463 Note.: "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 Section 191 and Section 192, precluded from exercising the ordinary powers of a landlord u/s 7 and Section 30. The present rent was settled in 1895 u/s 101 of the Bengal Tenancy Act and this suit was instituted in September 1915, 20 years after the last proceedings for increasing the rent. Enhancement, therefore, is not barred either u/s 9 or Section 37 of the Act.

10. 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 u/s 7 of the Act. Further, even if Section 7 applies, there is a customary rate set out in the written lease and so the rent can only be fixed u/s 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 rayati holdings.

11. 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 Section 7 of the Bengal Tenancy Act applies as to enhancement, finding the Etmams to be tenures.

12. 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. The findings dispose of the appeal as to the one-third share held under the oral agreement.

13. The other two points relate to the two-thirds share only held under the written lease. It is urged that subject to Section 191 and Section 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 passes of Soora Soonderee Dabea v. Golam Ali 19 W.R. 141; Hum Prasad Roy Chowdhry v. Chundee Charn Boyragee 9 C. 505 : 12 C.L.R. 25.; Robert Watson & Co. v. Radha Nath Singh 1 C.L.J. 572 and Ram Dayal Giri v. Midnapur Zemindary Co. 7 Ind. Cas. 785: 15 C.W.N. 263. These cases, however, only lay down that 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 and then fall rent, 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.

14. It is urged next that the statement in the lease that for default in the payment of rent the tenure can be put to sale under Regulation 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 alterable 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 Upendralal Gupta v. Jogesh Chandra Roy 38 Ind. Cas. 56 : 22 C.W.N. 275 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 Patni 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 u/s 7. As no customary rate has been proved, we hold that the method adopted by the lower Court in fixing the rental is correct.

15. 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.

16. The only question in this appeal is whether the proportion of the gross rental allowed to the appellant landlord in respect of the 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, have 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 to 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 facts,

have exercised their discretion rightly in making the allowances to the tenure-holders that they have made.

17. We, therefore, dismiss the appeal with costs.