

(1911) 05 CAL CK 0017

In the Calcutta High Court

Case No : Appeals from appellate decrees Nos. 1092 to 1204 and 1630 of 1910

Lukhi Narain Serowji and Others

APPELLANT

Vs

Sri Ram Chandra Bhuiya and others

RESPONDENT

Date of Decision : 29-05-1911

Acts Referred:

Citation : (1911) 05 CAL CK 0017

Final Decision : Dismissed

Judgement

1. These appeals are directed against orders made by a Special Judge under Chapter X of the Bengal Tenancy Act in proceedings under sec. 105 for settlement of fair and equitable rent for excess lands. Although the proceedings have been nominally described as framed under sec. 105, questions have been raised and decided which appropriately fall within the purview of sec. 106. Pirthee Chand v. Basarat Ali I. L. R. 37 Cal. 30 (1909). Preliminary objections have been taken on behalf of the landlord Respondent that the appeals are entirely incompetent and that at any rate the Appellants ought to be restricted to the specific question for the consideration of which alone the appeals were admitted under r. 12 of Or. XLI of the Code of 1908. In so far as the objection is taken that no second appeal is admissible in respect of any question properly falling within the scope of sec. 105 of the Bengal Tenancy Act it is obviously well-founded. Indeed the learned Vakil for the Appellants has not argued any question of that description in support of the appeal. But in so far as the objection is taken that the Appellants should be restricted to the one ground for the consideration of which the appeals were admitted, we are of opinion that it ought not to prevail. It is not competent to a Court of Appeal under r. 12 of Or. XLI of the Code to restrict the ground or grounds upon which the appeal admitted under that Rule is to be heard finally; in other words, the restrictive order of this Court made at the time when the cases were heard under r. 11 of Or. XLI was ultra vires. R. 11 provides that " the Appellate Court after sending for the record, if it thinks fit so to do, and after fixing a day for hearing the Appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal

without sending notice of the appeal to the Court against whose decree the appeal is made and without serving notice on the Respondent or his pleader. "R. 12 then provides that" unless the Appellate Court dismisses the appeal under r. 11 it shall fix a day for hearing the appeal." It is worthy of note that a day is to be fixed for hearing the appeal, that is to say, the whole appeal and not any selected ground out of those specified in the memorandum of appeal. Consequently all the grounds taken in the memorandum of appeal by the Appellants are open for consideration at this the final hearing, and we now proceed to examine them.

2. In support of the appeals one ground has been urged which falls within the scope of sec. 166, namely, that the Special Judge has not considered properly all the elements which must be established under sec. 52 of the Bengal Tenancy Act before additional rent can be assessed in respect of the excess lands. Reference has been made to the case of *Ratan Lal Biswas v. Jadu Halsana* 10 C. W. N. 46 (1905) which recognises the principle that in a suit brought by the landlord for increase of rent on account of increase in the area of the holding, if it is found that the tenant is holding land without any variation of the boundaries and the landlord fails to prove what the area was under the original lease of the tenant, and further if there are no materials before the Court for the determination of the question whether the rent is a consolidated rent or not, the landlord is not entitled to any increase of the rent under sec. 52 of the Bengal Tenancy Act. That principle in our opinion has no application to the circumstances of the present cases in which the elements mentioned in cl. (a) of sub-sec. (I) of sec. 52 have been established by the landlord. That clause provides that every tenant shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise, without any reduction of the rent being made." In order to bring the case within this rule, it is necessary for the landlord to prove that there is land held in excess of the area for which rent has been previously paid by the tenant. Consequently the landlord must establish the area for which rent has previously been paid by the tenant; he must next establish the present area held by the tenant; he is then entitled to claim additional rent in regard to the excess area. In this class of cases, the chief difficulty of the landlord is that he is not able to establish the area for which rent has been previously paid by the tenant. In the case to which reference is made as also in the cases of *Gouri Pattra v. H. R. Reily* I. L. R. 20 Cal. 579 (1892) and *Rajendra Lal Goswami v. Chunder Bhusan Goswami* 6 C. W. N. 318 (1901) reliance was placed by the landlord upon recitals in documents like leases and rent receipts to prove the area previously held by the tenant; it was held by the Court that such recitals were by no means conclusive and that at any rate before a comparison could be made between the area previously held and the area at present found to be in occupation of the tenant, it must be shewn that the measurement on the two occasions was made

according to the same standard. In the case before us, however, the landlord is in a position of considerable advantage. He is able to shew that these lands were measured according to a known standard on the previous occasion, that the rent was assessed upon area so determined, and that the area as well as the rent payable were entered in the kabuliyats executed by the tenants. The landlord further shows by measurement according to the previously adopted standard, that the lands now in occupation of the tenants are in excess of the areas entered in the kabuliyats. Obviously, unless it is established that the rent was a consolidated rent for an area within specified boundaries irrespective of its precise quantity, the landlord is entitled to claim additional rent for the excess lands. The landlord has further shewn that there is good ground to explain the increase in the area in most instances, for example, it has been shown that either the tenant had in the neighbourhood-waste land upon which he made encroachment or the measurement on the previous occasion was fraudulent or erroneous. Under the circumstances, the Courts below have correctly held that the elements mentioned in sec. 52 have been established by the landlord [Rajendra Lal v. Chunder Bhusan 6 C. W. N. 318 (1901)2, Surjakant v. Banesar I. L. R. 24 Cal. 251 (1896) and Rajkumar v. Ram Lal 5 C. L. J. 538 (1907)]. But the learned Vakil for the Appellants has contended that as the land is described as lying within certain specified boundaries in the kabuliyats, sec. 52 has no application [Annada v. Mathura 9 C. L. J. 585 : s. c. 13 C. W. N. 702 (1909)]. In our opinion, there is no foundation for this contention. No doubt, in cases where the history of the tenancy is not known and we have no information as to the circumstances under which the area of the land was mentioned in the contract between the parties, it may be contended that the land as lying within certain specified boundaries was intended to be let out, and the description of the area was merely an approximate statement. Here, however, as we have already stated, it is specifically known that the area was ascertained by scientific methods, consequently the only inference which could be legitimately drawn was that the lands measured and described as lying within certain boundaries were let out to the tenants. The contention of the Appellants that the mere mention of the boundaries in the kabuliyats excludes the operation of sec. 52 cannot therefore be sustained. The main ground upon which the appeals have been sought to be supported thus fails.

3. On behalf of the landlord Respondent two cross-objections have been urged. It has been contended in the first place that under sec. 52 the landlord is entitled to additional rent for all lands proved by measurement to be in excess of the area for which rent has been previously paid by the tenant and that consequently the Courts below were not entitled to allow a reduction of 10 per cent, from the area as ascertained by measurement. *Prima facie*, this contention appears to be well-founded, but upon a closer examination it turns out to be unsubstantial. The Special Judge has held in effect that although on a previous occasion the lands were measured the measurement was not absolutely accurate and he has practically made a deduction of 10 per cent, to allow for possible errors in the

measurement. The objection of the tenants to the accuracy of the measurement was considerably strengthened when the landlord expressed his willingness to allow a deduction of 8 per cent. This concession, if it be called a concession, shows that the landlord was not prepared seriously to contest the position taken up by the tenants that the measurement on the previous occasion was not absolutely accurate and reliable. We cannot, therefore, hold that the Courts below have contravened the provisions of sec. 52. The second ground urged in support of the cross-objections is that the landlord has not been allowed any costs in the Court of first instance. In our opinion there is some force in this contention and the landlord ought to have been allowed, at any rate, the costs incurred by him in making the applications under sec. 105 and in serving them upon the tenants. We therefore allow the landlord costs at the rate of Rs. 2 for each tenant unless such costs have already been paid.

4. It is finally agreed between the parties that in so far as the pasture land is concerned, the question will be left open and that nothing that has been held or decided in these proceedings will affect the question of title, possession or user thereof. The appeals are therefore dismissed and the cross-objections allowed in part. There will be no order as to costs in this Court.