
(1938) 07 CAL CK 0003
In the Calcutta High Court

Midnapore Zamindary Co. Ltd.

APPELLANT

Vs

Chandra Singha Dudhuria and Others

RESPONDENT

Date of Decision : 29-07-1938

Acts Referred:

Bengal Alluvion and Diluvion Act, 1847 — Section 5

Citation : AIR 1939 Cal 1

Hon'ble Judges : Nasim Ali, J;Henderson, J

Bench : Full Bench

Judgement

Nasim Ali, J.—These two appeals are by the defendants in two suits between the same parties for recovery of arrears of rent in respect of the same tenancy for two consecutive periods, namely 1328 B.S. to 1331 B.S. and 1332 B.S. to 1335 B.S. The facts which are not in dispute now are these : The plaintiffs are the proprietors of tauzi No. 523 of the Murshidabad Collectorate. The defendants hold a putni taluk comprising some villages appertaining to this tauzi at a rent fixed in perpetuity on the basis of a putni patta (Ex. A) executed by the processors-in-interest of the plaintiffs in favour of the predecessors-in-interest of the defendants on 5th November 1866. Some lands appertaining to the plaintiffs zemindary and the defendants' putni were diluviated by the river Ganges in 1867-68. There was a Diara Survey. The proprietors of the estate received abatement of revenue u/s 5, Bengal Alluvion and Diluvion Act, (Act 9 of 1847) in the year 1871. The putnidars received no abatement. They claimed none. The lands comprised in the tenure in respect of which rent has been claimed in these two suits were formed in the year 1914. Proceedings under Chapter 10, Ben. Ten. Act of 1885, were begun for settlement of land revenue. Draft Record of Rights was prepared and published u/s 103-A(1) of the Act. u/s 104 of the Act, the Revenue Officer settled fair and equitable rent for all classes of tenants including the defendants and prepared a settlement rent roll. The Revenue Officer treated these alluvial lands as accretions to the plaintiffs' estate and the defendants' putni by the recess of Mathbanga, a public navigable river. On 25th May 1920 the Settlement Officer settled Rs. 1028-2-0 a year as rent by the

defendants to the plaintiffs for these lands according to their value disregarding the contractual rent fixed in perpetuity by the putni of 1866. Rs. 847 was assessed as land revenue upon the proprietors on the basis of this rent. The defendants appealed to the Board of Revenue against the assessment made by the Revenue Officer u/s 104-G, Ben. Ten. Act, on the ground that these alluvial lands were reformations in situ of the permanently settled lands included in their putni and. were therefore not liable to pay any additional rent. This appeal was dismissed on 2nd April 1921. The settlement rent roll was then incorporated with the Record of Rights and finally published u/s 103-A(2). The accretions then were formed into a separate estate u/s 1 of Act 31 of 1858 being temporary settled estate No. 3653 of the Nadia Collectorate. The plaintiffs took settlements of this new estate for a period of 15 years from 1921 (1328 B.S.) to 1936 (1343 B.S.).

2. In the year 1922 the defendants brought a title suit in the Civil Court being Suit No. 452 of 1922 in the Court of the Sub-ordinate Judge at Rajshahi for a declaration that these lands were not liable to pay any rent on the same ground as taken by them before the Board of Revenue. On 22nd April 1925 the plaintiffs instituted a suit in the Court of the Subordinate Judge of Nadia being Rent Suit No. 7 of 1925 for recovery of arrears of rents for the years 1328 B.S. to 1331 B.S. at the rate settled by the Revenue Officer. On 22nd April 1929, they instituted another suit in the same Court being Rent Suit No. 9 of 1929 - for recovery of arrears of rents for the years 1332 B.S. to 1335 B.S. at the same rate. On 19th May 1927, Title Suit No. 452 was dismissed by the trial Judge. The defendants preferred an appeal to this Court against this decision. This appeal was dismissed on 30th August 1930. The defendants then preferred an appeal to His Majesty in Council.

3. The two rent suits in the Nadia Court, were beard together and decreed by the Subordinate Judge of Nadia on 25th March 1931 subject to the final decision of the Privy Council appeal in the Rajshahi case. The defendants appealed to this Court against these decrees. On 18th April 1933 the plaintiffs brought another suit being Rent Suit No. 8 of 1933 in the Court of the Subordinate Judge of Nadia for recovery of arrears of rent for the years 1336 to 1339 B.S. in respect of the same tenure. The defendants' appeals to this Court against the decrees in the two previous rent suits were allowed on 2nd April 1935 and the suits were remanded to the trial Judge with the following observation:

Apart from the position that the liability of the defendant company depends on the result of the litigation now in progress before another Court, there was a definite plea raised in the written statement that under the terms of the putni patta the plaintiffs could not claim any rent for the lands in suit. On this plea, not only was there no issue raised in the Court below, but when the suit came up for disposal and on the first and only day of hearing, the Subordinate Judge rejected the patta, when it was tendered in evidence for the defendants, on the finding that it was untimely filed. In the result, the decision ultimately reached was arrived at without consideration either of the issue definitely raised in the written

statement or of the document on which that issue was founded. We are unable to support such a decision and hold, that it must be set aside and the case remanded to the Court below for full and proper consideration. The patta could not have been rejected for the reason given by the learned Judge and ought to have been received. It may be that the result of the Privy Council case will definitely decide the liabilities of the parties to these suits. Should this not be so, the Subordinate Judge will proceed to decide the issue raised with regard to the patta and after due consideration of that document, to pass the judgment in accordance with law.

4. On 11th April 1935 the last rent suit, viz. 8 of 1933, was decreed by the Subordinate-Judge of Nadia, subject to the result of the decision of the Privy Council in the Rajshahi case. The defendants did not appeal against this decree (Ex. 6). The two previous rent suits which went back to the Sub-ordinate Judge of Nadia in pursuance of the order of remand made by this Court on 2nd April 1935 were heard and decreed by him on 17th September 1935. In this judgment the trial Judge formulated the following points for his decision:

- (1) Do the terms of the putni patta in defendants' favour debar the plaintiffs from claiming the rent in each suit?
- (2) Can the suits proceed till the final disposal of the Rajshahi case and pending in the Privy Council?
- (3) What is the jama payable for the rent land?
- (4) Are the alleged arrears due from anybody for the years in suit?
- (5) To what reliefs, if any, are the plaintiffs entitled?

5. He found the first four points in favour of the plaintiffs and decreed the two suits in full. On 22nd April 1935 the defendants filed these two appeals in this Court, against this decision. The appeal before the Privy Council in the Rajshahi case was abandoned during the pendency of these two appeals in this Court. The contention of the defendants in these two appeals is that the plaintiffs are not entitled to recover any rent from them in respect of the disputed lands as they are precluded from doing so by the covenants contained in the putni lease of 1866 (Ex. A).

6. The Subordinate Judge overruled this contention on two grounds : (a) that Section 104-J, Ben. Ben. Act, is a bar to this plea; (b) that the covenants contained in the putni putta do not relate to accretions from public domain and consequently do not attach to the disputed lands. The plaintiffs sought to support the decrees of the Subordinate Judge in this Court on another ground. Their contention is that the decree in the last rent suit (Ex. 6) now precludes the defendants from taking the defence that the putni lease exempted them from payment of additional rent for the disputed lands. The plaintiffs apparently relied on this decree in the trial Court for the purpose of meeting the defendants' objection that the suits should not be heard till the final decision of the Rajshahi

case pending before the Privy Council. The learned Judge also used it for that purpose. The plaintiffs did not file the pleadings in this suit. They did not file judgment on which this decree was based. In order to enable us to appreciate the proper effect of the decree, we allowed the plaintiffs to file the pleadings and the judgment in this Court. They were admitted in evidence with the consent of the defendants.

7. It is clear from the written statement of the defendants in this suit that one of the defences to this suit was that the plaintiffs were not entitled to claim any rent for the lands in view of the terms and conditions of the putni lease of 1866. From the judgment in this suit it appears that the parties did not invoke the opinion of the Court on this point. The point was neither put into issue nor argued before the Judge. The Judge also did not apply his mind, to this defence and did not decide it. The principle of constructive res judicata as laid down in Expl. 4 of Section 11, Civil P.C., does not apply as the point was actually raised. I am therefore of opinion that the decree (Ex. 6) in the last rent suit does not preclude the defendants from taking this defence in the two suits before us.

8. By Section 104-J, Ben. Ten. Act, subject to the result of a suit in the Civil Court u/s 104-H of the Act, all rents settled u/s 104-A to Section 104-F and entered in the Record of Rights finally published u/s 103-A are to be deemed to have been correctly settled and to be fair and equitable rents within the meaning of the Act. The effect of this Section is that neither the landlord nor the tenant can challenge the amount of rent settled u/s 104-A to Section 104-F except by a suit u/s 104-H. From this it necessarily follows that other entries in the Record of Rights so far as they bear upon the amount of rent settled cannot be also challenged except by a suit u/s 104-H. u/s 104-H(1) and (2), any person aggrieved by any entry of a rent settled in a settlement rent roll may institute within six months from the date of final publication a suit in the Civil Court for a declaration that such entry is wrong on the grounds specified in Sub-section (3) of that Section. In such a suit the Secretary of State cannot be made a party unless he is a landlord or a tenant. If in such a suit the plaintiff succeeds in substantiating ground (a) mentioned in that Section, viz. that the land is not liable to the payment of rent, or ground (c), viz. that the relationship of landlord and tenant does not exist, the Civil Court u/s 104-H(4) is to declare that no rent is payable. By Sub-section 5 of the said Section on such declaration the entry shall be deemed to be cancelled. By Sub-section 8 of that Section Civil Courts are precluded from entertaining a suit in respect of the settlement of any rent u/s 104-A to Section 104-F of the Act. The effect of Section 104-H therefore is that the failure to get the entry cancelled by a suit under that Section on the grounds specified therein precludes the Civil Court from entertaining and giving effect to any plea which would have the effect of declaring that the amount of rent was not correctly settled u/s 104-A to Section 104-F.

9. The case of the defendants now in these two suits is that they do not dispute their liability to pay the amount of rent settled to settlement-holders from

Government other than the plaintiffs. Their plea is that they are not bound to pay it to the plaintiffs as the latter are precluded from claiming it from them by the stipulations contained in the putni patta. Plaintiffs in these two suits had either to accept settlement from Government or to refuse. If the plaintiffs had not taken settlement from Government the question of the enforceability of the covenants contained in the putni patta and consequently of the contractual rights of the defendants being affected by the entry would not have arisen. The question of the enforceability of the defendants' right under the putni patta to hold the accretions without payment of any additional rent arose after the plaintiffs took settlement from Government and demanded rent from them on the basis of the entry in the Record of Rights ignoring the terms of the patta. The defendants could thereafter bring a suit for declaration of their rights under the putni patta in the Civil Court. Such a suit is contemplated by the Proviso to Section 111(a) of the Act. There is therefore no reason why they should not be allowed to stand on this right in opposing the plaintiffs' demand for rent in these two suits.

10. The defendants admit that the plaintiffs are now their landlords, but their plea is that the rent settled by the Revenue Officers is not payable to them in view of the term and conditions of the patni lease. Such a plea does not relate to the amount of rent settled. It is true that by Section 104-A(2), the settlement roll prepared is to show not only the amount of rent settled but the name of the landlord and of the tenant whose rent has been settled. But Section 104-H and Section 104-J speak only of the entry about the rent settled. They do not refer to other entries in the rent roll or in the Record of Rights. The entries in the Record of Rights other than the entry relating to amount of rent therefore are not conclusive. In settling rents for tenures u/s 104-A to Section 104-F, the Revenue Officer is required by the Proviso to Section 104-A(1) to have regard to the principles laid down in Sections 6 to 9, 52 and 191 of the Act. Section 6 deals with permanent tenures existing from the time of the permanent settlement. Section 7 deals with tenures the rent of which is liable to enhancement. But that Section lays down that the rent of such tenures is to be enhanced to any contract between the parties. Section 8 simply deals with the power to order gradual enhancement. Section 9 lays down the period for which rent cannot be again enhanced. Section 52 does not touch contractual rights. Section 191 does not empower the Revenue Officer to touch contractual rights acquired before the Act.

11. Section 104(2) read with Section 192 does not empower the Revenue Officer to disregard the terms of contract entered into before the Act. The Revenue Officer therefore in settling rents u/s 104-A to Section 104-F has no power to touch contractual rights acquired before the Act. By Section 104-J, the amount of rent is to be deemed to have been correctly settled within the meaning of the Act. Any rent settled by a Revenue Officer, ignoring such contractual rights cannot be deemed to have been correctly settled under the Act if in settling such rent he abrogates such contractual rights and thereby exceeds, his powers, under the Act. It cannot be presumed that the Revenue Officer in settling rent of the tenancy in question touched or intended to touch the contractual right of the

defendants. If the entry is taken to have such effect it would be void and not binding on the defendants. Section 104-J therefore is no bar to the plea taken by the defendants in these two suits.

12. By Section 103(b) of the Act however entries in the Record of Rights other than the amount of rent settled are to be presumed to be correct until the contrary is shown. The Record of Rights shows that the amount of rent settled is payable by the defendants to the plaintiffs. The case of the defendants is that this entry is wrong as they are not liable to pay the rent to the plaintiffs on account of the terms of the putni patta. In support of their plea the defendants relied upon the following clauses in the putni patta (Ex. A):

Profits and losses in consequence of drought or inundation, death, abandonment, waste, desertion, production or non-production, destruction by insects, deposit of sand, payment or non-payment, possession or dispossession, alluvion (payasthi), diluvion (sikhashi) etc. shall be yours; never on any account whatsoever shall you or your heirs or representatives be competent to claim any reduction of rent, however little, and we or our heirs and representatives shall not, on any account, be entitled to demand any additional rent over and above the fixed rent; if we or you do so, it will be rejected.

13. The words "sikhashi" and payasthi mean disjunction and junction of land by encroachment or recess of a river, that is to say diluvion and alluvion. In the preceding clauses of this patta payasthi has been divided into sikhashir payasthi (re-formation of situ) and laktapayasfchi (accretion) but in the clause under discussion only the general word payasthi (alluvion) has been used. There cannot be any doubt therefore that this word was used to cover all alluvial lands, whether re-formation in situ or accretion. The operative part of the lease shows that only asli lands and some alluvial lands (re-formation in situ as well as accretions) then in existence were demised. The question therefore arises whether by using the general word payasthi in the covenant in question the parties had in their contemplation future accretions.

14. Some of the villages, were admittedly subject to the effect of fluvial action at the time of the putni lease. The lessees before the putni settlement held these riparian villages as well as other inland mouzas under three tenancies which were permanent but the rent payable for them was not fixed in perpetuity. The main object of the putni lease was to have the rent fixed in perpetuity. It is therefore natural that the parties would take into consideration the effect of fluvial actions upon the lands covered by the putni in future and make provisions for future alluvion and diluvion. Such covenants are not uncommon in this province : Baboo Gopal Lal Thakoor v. Kumar Ali (1866) 6 W.R. Act X, Rule 85, Nunda Lal Mukherjee v. Kymuddin Sardar 9 C.W.N. 886 and Gunendra Nath Chowdhury v. Rajendra Kumar Singh (1913) 19 I.C. 924. I therefore hold that the word payasthi in the covenant under discussion includes future accretions. The trial Judge held that the covenant in question does not relate to the disputed lands as they are not covered by the lands demised. But the lessee's right to

hold future accretions as putnidar is a statutory right arising out of his right to hold the asli land on the basis of the putni lease. The zamindars' claim for additional rent for accretions and the putnidars' liability for it are statutory. The putnidars' right to get abatement on account of diluvion and the zamindars' liability to grant such abatement are also statutory. By the covenant in question the parties intended to adjust this mutual right and liability and to fix a consolidated rent for ever. The zamindar promised not to claim additional rent for future accretions in consideration of the promise of the putnidars not to claim abatement of rent for diluvion. The covenants relate to the rent reserved for the lease. It affects the value of the leasehold as well as of the reversion. It therefore runs with the land and the successors-in-title of the covenantees and covenantors are bound by it. The putnidars have all along performed their part of the contract. In spite of the diluvion of a large quantity of land from their patni, they did not claim abatement of rent. They suffered loss. There is not known why they should not have the profits now. There is no reason why the zamindars should not perform their part of the contract now and refrain from claiming any additional rent for these accretions to the defendants' putni. I therefore hold that the stipulations contained in this patta are binding on the plaintiffs and that they are precluded by this contract from claiming any additional rent for these alluvial lands from the defendants in these two suits. The result therefore is that these appeals are allowed. The judgment and decree of the Court below are set aside. The two suits out of which these two appeals arise are dismissed with costs in this Court as well as in the lower Court. There will be one set of hearing fee in the two appeals.

Henderson, J.

15. I have had the advantage of reading the judgment which has just been delivered by my learned brother, and have but little to add. Although the case is a difficult one, I agree with the conclusions reached by him with regard to all the points which have been argued before us. The main point in dispute between the parties is the interpretation of the lease. According to the appellants the clause with regard to alluvion refers to alluvion in the ordinary sense of the term. According to the respondent it is limited to the land demised and it only comes into operation, if there is a re-formation in situ of this land after previous diluvion. An agreement of this kind is extremely common; but this is the first occasion on which I have heard it argued, that the agreement with regard to alluvion is confined to the land demised. It is difficult to see why a tenant would agree to enter into such an agreement; while running the risk of a loss, he could not possibly gain anything out of it. In order to get over this practical difficulty Mr. Mitter argued that at the time of the lease some of the lands demised were actually in the bed of the river. He accordingly contended that the agreement with regard to alluvion was intended to be limited to that land. He based this argument firstly upon the use of the word "river" in the document, and secondly upon the fact that it was discovered in the course of some Diara proceedings taken by the Revenue Officers shortly after the execution of this lease, that in

fact there had been diluvion to a considerable extent. We are asked to say that this diluvion could not possibly have occurred in the interval between the execution of the lease and the action of the Revenue Officers. I am bound to say, that, if it was known to both parties that a considerable portion of the land demised was actually in the bed of the river at the time, I should have expected that such an important fact would be set out in the document in plain terms as was done in the case of the lease which was the subject-matter in *Srish Chandra Nandi Vs. Midnapore Zamindary Co. Ltd.*, which was put before us on behalf of the appellant company.

16. Be that as it may, it is impossible to hold that in the present case a part of the demised land was in the bed of the river at the time. The use of the word "river" is of no assistance at all. It is merely found in the middle of a description of the various kinds of property covered by the lease. Every conceivable kind of term was used and it was obviously the intention of the parties to make it quite clear that every right in the demised land was included in the lease. It was not meant to be a statement of fact that a part of the demised land was in the bed of the river at the time. The second argument is mere speculation. Diluvion is sometimes gradual. On the other hand a river sometimes changes its course completely. It is impossible for us to say whether this diluvion took place after the execution of the lease or before it. In the second place there is nothing to show that the parties were aware of the true position; in fact before the Diara maps were prepared and a comparison became possible, it is highly improbable that they were. It is also to be noticed that the lease was actually executed not in Bengal but in Scotland.

17. But supposing we were to accept this suggestion, the matter is really carried no further. Indeed it is more unlikely than ever that the tenant would be agreeable to make such an agreement : the loss instead of being problematical was actually in existence at the time. I am therefore of opinion that this lease should be interpreted in the ordinary way, and I am quite satisfied that the reference to alluvion denotes accretion. That being so, the plaintiffs are prevented from claiming any additional rent on this account.

18. In addition to the merits of the case, it was contended by the plaintiffs that this particular defence was barred under the provisions of Section 104-J, Ben. Ten. Act, and also by *res judicata*. The contention with regard to *res judicata*, which is based upon the document Ex. 6, was not raised in the lower Court and no issue was framed with regard to it. In fact this exhibit was put in by the plaintiffs for quite another purpose. They used it in opposition to the defence raised by the defendant company in Issue 2. Now, it is very difficult for a question of *res judicata* to be raised successfully in an Appellate Court. The immediate difficulty in the way of the plaintiffs was that the necessary materials were not in the record. They have however been subsequently produced here, and we have been able to consider the point with reference to them. Now, the learned Subordinate Judge in that suit did not, in plain terms, decide that the

defendants are liable to pay rent. In the decree itself, he left the matter open. The defendants raised two defences, (1) that the land in question was re-formation in situ; and (2) the defence with which we are concerned in these suits. The learned Subordinate Judge does not say a single word about either of them. He does not mention the patta or discuss its terms. It is therefore quite clear that he did not decide either of them. He goes on to say:

The defendants' contention in the present rent suit is the basis on which the Title Suit No. 452 of 1922 of the Rajshahi Sub-Judge's Court was brought by the present defendants.... The defendants have preferred appeal to the Privy Council, and that appeal is now pending for decision. It seems to me that neither parties would be prejudiced if this suit be decreed subject to the final decision passed in the said suit by the Privy Council.

19. It seems to be clear that "the learned Subordinate Judge thought that both these defences which had been raised before him were matters which would be decided finally by the Privy Council. I accordingly agree with my learned brother that the defence in the present suit is not barred by *res judicata*. There remains the question of Section 104-J, Ben. Ten. Act. It is not necessary for me to deal with this point in detail, or to repeat what has been said by my learned brother. I am of opinion that the defendants - appellants are correct in their contention on the point. They did dispute their liability to pay rent for this land on the ground that it was re-formation in situ. The matter is now settled against them and they no longer dispute it. They merely say that, although they are liable to pay rent to any other settlement holder, the plaintiffs are precluded by their own lease from realizing it. This is not a matter which is within the scope of Section 104-H at all. In fact the defendants had no grievance of any sort until an attempt to realize this rent was actually made. They had no reason to suppose that the plaintiffs would attempt to evade the terms of the lease.

20. Mr. Bose has contended that the case comes within Clause (d) of Sub-section (3), Section 104-H, Ben. Ten. Act. One matter certainly does, and the fact that the defendants failed to take the necessary action, precluded them from raising the defence in the present suits, that the accreted land is part of the original patni. This has nothing to do with the defence which has been placed before us. I accordingly agree that these appeals must be allowed. After we delivered our judgments in these two appeals on 27th July 1938 but before we signed them, Mr. Bose said that in our judgment we did not deal with this contention that the defence on which the defendants now rely in these two rent suits ought to have been made a ground of attack in the Rajshahi suit brought by them and that the defendants were precluded from taking this defence now by the principles of constructive *res judicata* laid down in Section 2, Expl. 4, Civil P.C. It is true that in the course of his argument Mr. Bose raised this point, but when it was pointed out to him that the claim in the Rajshahi suit as disclosed by the judgments in that suit was based on a different cause of action and that in the absence of the pleadings in that suit it was not possible for us to go into that question, the

matter was not further argued and we thought that the contention was abandoned. Mr. Bose however said that he did not abandon his contention. We therefore heard him again on 29th July 1938.

21. The argument of Mr. Bose was this. The Rajshahi suit was brought by the defendants in these two rent suits for getting a declaration that the entry in the settlement rent roll relating to the amount of rent settled for the accretions to the patni were wrong." They claimed this declaration on the ground that the lands were re-formations in situ of the permanently settled lands of their patni. They ought to have pleaded in that suit that even if the lands were accretions they were not liable to pay any rent in view of the provisions contained in the putni lease of 1866. In the absence of the pleadings in that suit it is very difficult to make out the exact natura of that suit. There is nothing to show that that suit was a suit u/s 104-H. The Secretary of State for India in Council cannot be made a party in a suit under that Section. But he was a party in that suit. That suit when it came on appeal to this Court was treated by the Court as a declaratory suit as contemplated by the Proviso to Section 111-A, Ben. Ten. Act. The patnidars cause of action for declaration that they were not liable to pay any additional rent for the accretions could not be said to have arisen until the proprietors claimed rent from them in violation of the terms of the patni lease. There is nothing to show that before that suit the patnidars' right to hold the accretions without payment of any additional rent under the terms of the patni lease was demised by the proprietors. Further the stipulations in the patni lease are not binding on the Secretary of State. He was not at all interested in the controversy between the proprietors and the patnidars about their contractual rights or the breach thereof. The cause of action against him and the proprietors could not have been the same. If the patnidars wanted to litigate upon their title based on the putni lease the suit would have been bad for multifariousness. It cannot be said therefore that the matter covered by the defence in these two suits ought to have been a ground of attack in the Rajshahi suit. We are therefore unable to give effect to this contention.

Henderson, J.

22. I agree. In my view the present appellants had no cause of action in this matter until an attempt was made by the respondents to realize the rent. The proper method of sustaining this contention was in a defence to a rent suit and not by a declaratory suit.