

(1922) 02 CAL CK 0058
In the Calcutta High Court

Midnapore Zamindary Company, Limited

APPELLANT

Vs

Sridhar Mahata

RESPONDENT

Date of Decision : 09-02-1922

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 105A, 106, 109A, 7

Citation : AIR 1922 Cal 152 : 67 Ind. Cas. 775

Hon'ble Judges : Cuming, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a proceeding u/s 105 of the Bengal Tenancy Act.

2. The appellants who were the landlords instituted these proceedings against the respondent, their tenant, with a view to have fair and equitable rent settled in respect of the tenure held by him. The case as presented to the Settlement Officer was that the defendant was in occupation of an area in excess of what he paid rent for and was consequently liable to have his rent increased. Two issues were raised to cover this point; namely, first does the defendant hold any area in excess of what he is paying rent for? and secondly, "what should be the fair rate of rent for assessment of the excess area, if any?" The Settlement Officer came to the conclusion that the defendant held an excess area of 595 acres, and that the rate of rent, should be fixed at 2 annas 6 pies per bigha which was the average rate fixed upon the original area. The consequence was that the rent was increased by Rs. 5-10-6. The landlords appealed against this decision and argued before the Special Judge that they were entitled to have the rent enhanced u/s 7, The Special Judge acceded to this contention and held that the rent payable by the defendant should be fixed at Rs. 139. The tenant thereupon preferred a second appeal to this Court. A preliminary objection was taken to the competence of the appeal on the ground that the decision of the Special Judge was a decision settling a rent within the meaning of Sub-section (2) of Section 109A. and was consequently not liable to be challenged by way of an appeal to

this Court. Mr. Justice Walmsley overruled this contention, and held that the decision of the Special Judge had been founded on a basis never put forward before the Settlement Officer, He accordingly allowed the appeal, set aside the decision of the Special Judge and restored the decree of the Settlement Officer.

3. On the present appeal it has been contended that the appeal heard by Mr. Justice Walmsley was incompetent. We are of opinion that there is no foundation for this contention and that it is opposed to the decision of the Full Bench in the, case of Jnanada Sundari Chowdhurani v. Abdur Rahman [Amudi Sarkar] 38 Ind. Cas 143, 43 C. 608 : 29 C.W.N. 428 : 23 C.L.J. 281. The principle applicable to cases of this character was explained in that decision: "It in any proceeding u/s 105 questions u/s 105 A. have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of question within the scope of Section 105A and consequently of Section 106, Such a decision is not; one merely rattling a rent within the meaning of Section 109A and is consequently liable to be challenged by way of second appeal to the High Court," In the case before us, the decision of the Special Judge is founded on two essential facts, namely, first, that the defendant held an area in excess of the original area of the tenancy and was consequently liable to have the rent assessed on such excess area; and secondly, that the tenure held by the defendant was of such a description that its rent was liable to be enhanced. Consequently, the decision of the Special Judge involves a determination of two fundamental questions in connection with the tenancy held by the defendant, namely, the extent of area and the liability to enhancement. There can be no room for argument that a decision of this character was not a decision merely settling rent within the meaning of Section 109A and the appeal was consequently competent.

4. As regards the merits, we entirely agree with the view taken by Mr. Justice Walmsley. The record does not disclose the faintest trees of a contention in the Court of first instance that the defendant was liable to have his rent enhanced u/s 7. The argument which was advanced for the first time before the Special Judge, should not have been entertained by him for decision on the materials available on the record. Section 7 provides that the rent of a tenure-holder, when it is liable to enhancement, may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity. It is only where no such customary rate exists, that it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable. The Section then proceeds to lay down a rule for the ascertainment of the fair and equitable rent, Consequently, where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. None of these matters had been investigated

in the Court of first instance for the reason that the question was not raised in that Court. IN these circumstances, Mr. Justice Walmsley properly allowed the appeal and restored the decree of the primary Court.

5. The result is that the judgment of Mr. Justice Walmsley is affirmed and this appeal is dismissed with costs.