

(1920) 08 CAL CK 0029
In the Calcutta High Court

Raja Kristo Das Law and Others

APPELLANT

Vs

Abdul Karim and Others

RESPONDENT

Date of Decision : 05-08-1920

Acts Referred:

Citation : AIR 1921 Cal 220 : 62 Ind. Cas. 474

Hon'ble Judges : Asutosh Mockerjee, Acting C.J.; Ernest Fletcher, J

Bench : Division Bench

Judgement

Mookerjee, Acting C.J.

1. These thirty-one appeals have been preferred by the plaintiffs in as many suits for rent, which were divided into two groups in the Courts below, One group consisted of six suits, which have given rise to Appeals Nos. 513 and 566 to 570. The other group comprised twenty-five suits, which have led up to Appeals Nos 571 to 595. The questions which require decision in the two groups of appeals are different and may be briefly indicated, In the first group of suite, the plaintiffs claimed rent on the basis of written contracts, antecedent to the Bengal Tenancy Act. The defendants claimed abatement of rent on the ground that during the years for which rent was claimed, a considerable portion of the lands of the tenancy had diluviated. In the second group of suits, the plaintiffs claimed rent at increased rates, also on the basis of similar written contracts of tenancy, on the ground that the tenants were in possession of excess lands. It may be added that as there was no express provision in the Rent Acts which preceded the Bengal Tenancy Act, for assessment of rent on additional lands, it was usual to insert in contracts of tenancy provisions for that purpose.

2. As regards the first set of appeals, the grievance of tie landlords is that their claims have not been decreed in full, although as appears from the judgment of the Subordinate Judge, the tenants failed So establish the exact quantity of land which had teen diluviated in the case of each tenancy during each of the years for which rent was claimed. The judgment of the Subordinate Judge seems, at first sight, open to criticism: but on close examination it is plain that be has

adopted the only course open to him, in the circumstances we shall presently explain. The plaintiffs came into Court on the allegation that they were entitled to rent at the annual amounts specified in the contrasts of tenancy for the lands held by the tenants; the quantity of land in the occupation of the tenant in each suit was set out in the plaint. The plaintiffs did not disclose that the lands were situated on the side of a large navigable river and were subject to diluvion. The defendants pleaded that the lands were subject to diluvion and that, during the years for which rent was claimed, considerable portions of the lands had in fact been diluviated. They supported this allegation by evidence which, though generally trustworthy, was not absolutely reliable as to the exact quantity diluviated each year from each holding. The contention of the landlords-appellants is that the burden lay upon the defendants to establish, not merely that there was diluvion, but also the precise quantity of land diluviated each year, and as they had failed to furnish accurate proof in this respect, they were not entitled to abatement of rent. We are of opinion that this contention cannot be sustained.

3. The defendants have established by evidence of a conclusive character that there was diluvion during each of the years in suit and in respect of each of the tenancies. This in fact was not seriously controverted by the plaintiffs. As soon as this was established, the inference became irresistible that the plaintiffs had put forward a claim which was, in part, at least, exaggerated. The appellants have not explained how, under these circumstances, the Court can be compelled to make a decree in their favour for the entire sum claimed by them, although the Court is convinced that the claim is exaggerated. We are of opinion that as soon as the fact of diluvion had been established, it followed that, as there was no express agreement to the contrary, the tenants were entitled to abatement of rent. *Sheith Enayet oollah v. Sheikh Elahee Buksh* W.R. (1864) Act X, 42 and *Salimullah v. Kali Prosonno Parbot* 33 Ind. Cas. 349 : 22 C.L.J. 569 and the burden thereupon shifted to the landlords-plaintiffs to prove the reduced amount of rent justly recoverable by them, which could be done only by proof of the extent of the diluvion. This view is supported by the decisions in *Gopanund Jha v. Lalla Qobind Pershad* 12 W.R. 109 and *Surendra Narain Roy Chowdhury v. Dinanath Basu* 36 Ind. Cas. 33 : 43 C. 554. In the case before us, the plaintiffs have undoubtedly withheld evidence in their possession which would have assisted the Court in the determination of this question. In such circumstances the Subordinate Judge followed the only course open to him, namely, to make a decree in favour of the plaintiffs according to the admission in the written statement of the defendants. The case is analogous to what frequently happens in suits for rent where neither the plaintiff nor the defendant is able to prove the rate of rent respectively alleged by him; the Court thereupon makes a decree in favour of the plaintiff according to the admission of the defendant. We are of opinion that the judgment of the Subordinate Judge is substantially correct and his decree must be affirmed.

4. As regards the second set of appeals, it is plain that there is no ground which

can be successfully urged in view of the stringent provisions of the law which regulates second appeals to this Court. The question in controversy related to the standard of measurement at the inception of the tenancy, which was stated to be the length of the hand of one Mr. Conrjon. The Subordinate Judge has found on the evidence that this unit of measurement was 19 3/4 inches long instead of 18 inches, which is the measure of the standard cubit. This finding cannot possibly be assailed in second appeal; and if it remains untouched, it cannot be disputed, as it was not disputed in the Courts below, that the defendants are not in possession of excess area assessable with additional rent. On this ground, the decrees in the second set of appeals must be affirmed.

5. Our attention, however, has been drawn to the concluding portion of the judgment of the Subordinate Judge, where he has made a declaration that the length of the standard cubit of measurement in Pargnas Bedrabad and Amirabad is 19 3/4 inches. The plaintiffs did not ask for such a declaration in their plaint, nor did the defendants urge that such a declaration should be made in their favour. It is plain that the Subordinate Judge should not have made such a declaration, which must, in consequence, be expunged from the decree.

6. Subject to this variation, the appeals will stand dismissed, with costs wherever the respondent have entered appearance.

Fletcher, J.

7. I agree.