

(1935) 07 CAL CK 0048
In the Calcutta High Court

Saroj Kumar Bose

APPELLANT

Vs

Surjya Kanta Sarkar and Others

RESPONDENT

Date of Decision : 30-07-1935

Acts Referred:

Citation : AIR 1935 Cal 771 : 159 Ind. Cas. 685

Judgement

1. This appeal has arisen out of a suit for realisation of rent and cesses, in which additional rent was claimed for excess area found in the possession of the tenants defendants. The question for consideration in the case is whether the plaintiffs were entitled to get additional rent as claimed by them in the suit. On the facts found in the case, a good portion of the lands in suit was outside the plaintiff's estate bearing Touzi No. 3846, to which the taluk in respect of which rent was claimed in the suit appertained. There is no question that the defendants had encroached on the lands of other adjoining estates; and the Courts below proceeded on the footing that the tenants had acquired title to the same by adverse possession against the rightful owners, the neighbouring proprietors, and further that the tenants held the lands encroached upon as appertaining to the taluk comprised in the estate of which the plaintiff was the proprietor. The question was whether the plaintiff landlord can take advantage of the encroachment by the tenant defendants on the lands of estates to which he has no title, whether the encroachment by the tenant defendant would enure for the benefit of the lessor, so as to entitle him to claim rent in respect of the lands encroached upon and of which the tenant defendants were in possession, as appertaining to the tenancy held by the tenant defendants. Reference in this connexion was made in the judgment of the trial Court to documents showing that the defendants admitted the title of the plaintiff to the lands in suit as appertaining to the tenancy in question appertaining to the plaintiff's estate.

2. The Court of first instance, as well as the learned District Judge, on appeal from the decision of the trial Court, decided the question of liability for payment of additional rent as raised before them, on the basis that if a tenant during his tenancy encroached upon the land of a third party, and held the same with his

own tenure, until the expiration of his tenancy, the tenant was to be considered to have made the encroachment not for his own benefit, but for the benefit of his landlord, so as to entitle the landlord to claim rent for the land encroached upon and held as a part of the tenancy. In the cases decided by this Court, to which reference was made in the judgment of the trial Court, the question of a claim for additional rent was not before the Courts; but it was held that if the tenant has acquired title in regard to lands encroached upon as part of his tenancy, the tenant must be taken to have acquired that title for his landlord and not for himself. In *Gooroo Das Roy v. Issar Chandra Bose* (1874) 22 WR 246, it was held by Markby and Romesh Chunder Mitter, JJ., that in case of lands encroached upon by the tenant, it was to be presumed that they were added to the original tenure. The case was one of encroachment upon khas lands of the landlord; but it was observed that it was the clear rule of English law, and it was a rule which was supported by reason and principle; it was observed further that in India where there was a great deal of waste land and where quantities and boundaries were very ill-defined, there were very strong reasons for the application of the rule. *Nuddyar Chand Shaha v. Meajan* (1884) 10 Cal 820 was a case in which the case of encroachment by a tenant upon the land of a third person was considered, and it was found in that case, that the tenant was in possession of the land encroached upon for upwards of 12 years. The case was one in which the question what the law of this country was with regard to encroachment made by a tenant directly arose for consideration. Garth, C.J. observed that there was no doubt whatever that by the English law, an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of his holding, was, in the absence of strong evidence to the contrary, to be presumed to be made for the benefit of the landlord. The learned Chief Justice went on to state that the rule applied to all land encroached upon, whether the landlord had any interest in it or not: if a tenant during his tenancy encroached upon the land of a third person, and held the land until the expiration of his tenancy, he was to be considered to have made the encroachment not for his own benefit but for the landlord; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself. The rule laid down in the cases referred to above, was adopted in *Prolhad Teor v. Kedar Nath Bose* (1898) 25 Cal 302, by Maclean, C.J. and Banerjee, J., in regard to encroachment upon waste land or land of third parties.

3. On the authority of decisions of Courts to which reference has been made above, with which we are in entire agreement, and on general principles, it appears to us to be clear that if the tenant's possession of encroached lands enables the landlord to acquire a title to the same as against a third party, the landlord's right to get rent from the tenant in respect of lands possessed by him as appurtenant to the tenancy, cannot be disputed. The judgment of our learned brother Roopendra Coomar Mitter dealing with the plaintiff's claim for additional rent for excess area, against which this appeal is directed, proceeds on the basis that if the landlord had the right to impose additional rent, it could only be on the

principle that the encroachment enured for the benefit of the landlord for the moment of the encroachment; and in support of his conclusion reliance was placed by the learned Judge on a passage in Woodfall's Law of Landlord and Tenant, Edn. 23, p. 933. The passage quoted from the text-book is based on the decision of English Courts in certain cases of which *Earl of Lisburne v. Davies* 1 CP 259, *Whitmore v. Humphries* (1872) 7 CP 1, *Kingsmill v. Millard*, 11 Ex 313 and *Andrews v. Hailes* (1853) 2 E & B 349 may be said to be typical. All these cases were referred to by Garth, C.J. in his judgment in *Nuddyar Chand Shaha v. Meajan* (1884) 10 Cal 820, mentioned above, in which the learned Chief Justice held, as already stated, that encroachment by a tenant on the land of a third person, when the land encroached upon was held as a part of the tenancy, was for the benefit of the landlord and for his own benefit. In our judgment, the benefit accruing to the tenant during the term of the tenancy must be taken to be a benefit so far as the tenant was concerned, saddled with the burden of paying additional rent for excess land as provided by law in this country once it is found that the land encroached upon was held as part of the tenancy. It requires to be noticed that we are not able to apply the decision of this Court in *Jatindranath Choudhuri v. Trailakyanath Das*, 1928 Cal 142, mentioned in the judgment of Mitter, J., to the facts of the case before us.

4. On the conclusions we have arrived at, as mentioned above, we are unable to agree with the conclusion arrived at by Mitter, J. and the decision given by him, disentitling the plaintiff on general principles, from claiming additional rent for excess area, as made in the suit. It is significant, however, that in the judgments of neither of the Courts below, is there any finding as to whether the tenant had been in possession of the lands encroached upon for more than 12 years, so as to confer a title to the same on the plaintiff. There is also no definite finding that the lands encroached upon were treated by the tenant defendants as appurtenant to the tenancy held by them under the plaintiff. If the tenant defendants have been in possession of the lands encroached upon by them, as part of the tenancy held by them under the plaintiff, they are in our judgment liable to pay additional rent for excess area as claimed by the plaintiff in the suit. The case must therefore go back for definite findings on the facts mentioned above, on evidence already on record, and on such further evidence as the parties may adduce in support of their respective cases before the Court. In the result the decision and decree passed by Mitter, J. dismissing the claim of the plaintiff-appellant to additional rent for the lands found to be outside Estate No. 3846 are set aside; and the case is remitted to the Court of appeal below, for a fresh decision in the light of the judgment. The plaintiff-appellant is entitled to get his costs in the litigation up to the present stage, including the costs in this appeal, from the defendants respondents. Costs after remand will abide the result. The records are to be returned as soon as possible.