

**(1934) 11 BOM CK 0024**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 516 of 1931**

Vagha Jesing

APPELLANT

Vs

Manilal Bhogilal Desai

RESPONDENT

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**Date of Decision :** 20-11-1934

**Acts Referred:**

Provincial Small Cause Courts Act, 1887 — Section 25

**Citation :** AIR 1935 Bom 262 : (1935) 37 BOMLR 249

**Hon'ble Judges :** Broomfield, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Broomfield, J.—This is a group of appeals and one revision application arising in suits brought by some of the Desai inamdars of the village of Vinzol in the Panch Mahals to recover rent from their tenants for the year 1925-26 at the rate of Re. 1-1-0 per bigha according to the number of bighas in their holdings as ascertained at a survey made in 1923. The trial Court decreed all the suits. On appeal the District Judge held that the claim for the rent of 1925-26 was barred by limitation, but he gave a declaration of the plaintiffs' right to recover at the rate claimed by them. The tenants have presented these appeals.

2. The inam of Vinzol is jointly owned by a number of sharers who manage the village by turns, the rents recovered from the tenants being divided among all the co-sharers. The arrangement which was in force for a long time prior to 1923 was that the tenants paid a lump sum by way of rent based approximately on the number of bighas in their holdings as roughly estimated without actual measurement. In the earliest jalas, that is, lists of tenants and the amounts payable by them, the area of the holdings is not mentioned at all (see exhibit 48 which is for the year 1893 and exhibit 49 which is for the year 1896). There are columns for the name of the tenant and the amount due from him as rent and as local fund. There is no column for the area of the land. In 1898 for the first time apparently (see exhibit 50) the approximate area of the land in bighas is also

shown as well as the amount of rent, the latter being described as at the rate of Re. 1 per bigha, i.e. obviously the approximate bighas shown in the other column. In 1923 a survey was carried out at the instance of some of the co-sharers without the consent and against the will of others of them. These latter object to the plaintiffs' plaint to recover rent on the basis of the survey and desire that the old system be continued. As they refused to be party plaintiffs they have been added as defendants.

3. A preliminary point has been taken on behalf of the appellants that the present plaintiffs being only some out of a number of joint owners of the inam have no right to maintain these suits or to recover rent under a new system against the will of their co-sharers. In support of this proposition reliance is placed on the judgment of this Court in *Vagha Jesang Vs. Jagjivan Amritlal Desai*, . That judgment disposed of some earlier suits by the present plaintiff No. 2 to recover rent on the basis of the survey. He had succeeded in his suits in the trial Court but in revision this Court held that he had no right to recover more than what the tenants admitted to be due according to the old *wahivat*. The judgment of the learned Chief Justice Macleod is a short one and I may set it out in full :-

These are applications entertained u/s 25 of the Provincial Small Cause Courts Act in suits filed by the Desais of the village of Vinzol. The plaintiffs were not entitled to claim the whole of the rent. They are sharers to the extent of fourteen annas and seven and a half pies. The sharer entitled to the balance is not a party to the proceedings. The plaintiffs are claiming their share of what is payable by the tenants, at a higher amount than has been paid in the previous years, on the ground that although the bigha in these cases may be the same, the tenants are liable to pay additional rent for certain excess land in their occupation. It would not, therefore, be, strictly speaking, a suit for enhanced rent, but merely a claim that the tenants should pay the proper rent for the lands they are cultivating, the rate itself being admitted. But since these tenants have been paying certain rents in past years for the land in their occupation, it is not open to one co-sharer to file a suit seeking to recover from the defendants a greater amount of rent than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenants, the principle is the same, that the question must not be at the mercy of one sharer, but, if at all, must be "decided between the tenants and the whole body of sharers entitled to claim rent as landlords.

On these grounds we think the Judge was wrong in entertaining the claim of the plaintiffs who were entitled to only fourteen annas and seven and a half pies share of the increased rent from the defendants. The defendants would still be liable to pay the balance of the rent to the co-sharer, and again they might be harassed by a claim for more rent on some entirely different principle. If higher rents are to be asked for, then they can only be asked for by the whole body of sharers (see *Balkrishna v. Moro* I.L.R (1896) . 21 Bom. 154.

4. The lower Courts have interpreted this decision as meaning no more than that all the co-sharers must be made parties to the suit. In my opinion this is not a correct interpretation of the observations of the learned Chief Justice, and that that was not what he meant is, I think, quite clear if we look at the case of *Balkrishna v. Moro* to which he has expressly referred and at *Balaji Bhikaji Pinge v. Gopal bin Raghu Kuli* I.L.R(1878) 3 Bom. 23, which was followed in the latter case. It was held in *Balaji Bhikaji Pinge v. Gopal bin Raghu Kuli* that one of several tenants-in-common, joint tenants, or coparceners, unless he is acting by consent of the others as manager of an estate, is not at liberty to enhance rent or eject tenants at his pleasure. In the course of the judgment Westropp C. J. referred to previous decisions of this Court in one of which the Courts refused to allow an inamdar to eject a tenant against the consent of the co-inamdar and another in which one of three co-sharers sought to oust a tenant, and it was held that the plaintiff could only sue jointly with his co-sharers. In *Balkrishna v. Mow* the Court went further and held that a co-sharer who is a manager cannot even with the consent of his co-sharers maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent. Even in such a case all the co-sharers must be made parties. These decisions, in my opinion, establish the proposition that where the landlord's rights belong jointly to several persons, a suit like these with which I have to deal can only be brought by all the co-owners suing jointly as plaintiffs. It makes no difference, in my opinion, whether the suit be technically one for enhancement of rent or to recover rent on a new basis of calculation.

5. The learned counsel who appears for the respondents in one of the appeals was prepared to accept this proposition without objection provided there has been any variation in the contract. He freely admitted that in order to effect any variation of the contract between landlord and tenants all co-owners of the landlord's rights must combine. He contended, however, that in the present case there has not really been any variation of the contract. The lower Courts, he says, have merely given effect to what really was the understanding between the parties all the time. I cannot, however, accept this as a reasonable description of what has occurred. It is quite obvious, I think, that the plaintiffs are attempting to substitute a new method of calculation of the rent, and that I take to be a substantial variation of the contract between the parties. This ground of objection is really sufficient to dispose of all these appeals, but I shall discuss as briefly as possible the other matter which has been argued before me.

6. Mr. Jayakar, the learned counsel for the appellants, in second appeal No, 516 of 1931, whose arguments have been adopted by the learned advocate who appears for the other appellants, contended that the present plaintiffs, or even the whole body of co-sharers (for, his argument would really go as far as that) can have no right to vary the old agreement in respect of rent without the consent of the tenants themselves. The lower Courts appear to have spelt out from the evidence as to the previous history of the land a mutual agreement that rent should be paid at Re. 1-1-0 per bigha. Thus the District Judge in paragraph

10 of his judgment referring to certain rent-notes executed by some of the tenants says that the predominant idea in the minds of the contracting parties seems to have been that the tenants should pay rent at the rate of Re. 1-1-0 per bigha for their holdings. He thinks that there was an implied understanding that the calculation by exact measurement of bighas might be substituted for the old approximate calculation. In my opinion it is not possible to draw any such inferences from the evidence which has been produced in the case. As I have mentioned, the earliest documents merely mention a lump sum payable by way of rent. At a later stage we have the area in bighas stated, approximately. At a later stage still, and not apparently till the year 1911 or thereabouts, we find some of the tenants executing rent-notes in which they agree to pay rent at the rate of Re. 1-1-0 per bigha. Before that the rent-notes had been in the form of which exhibit 55 (1) is an example, that is to say, the tenant recited that he would cultivate land measuring so many bighas approximately and that he would pay so many rupees as rent therefor. From the year 1911 they gave rent-notes in another form of which exhibit 58 (24) is an example, that is, the tenant agreed to pay rent at the rate of Re. 1 per bigha " according to the wahivat of the estate." If I understood the argument of Mr. Amin correctly, it was that there was a change in the understanding between the parties dating from 1911 when the kabulayats in the new form were first taken. He appeared to admit that before that date at any rate the precise nature of the agreement was not clear and it could not be said that the tenants had bound themselves to pay at the rate of so much per bigha. After 1911 according to him the terms of the contract were different. It seems to me, however, that the presence of these words "according to the wahivat of the estate" in all these kabulayats is quite inconsistent with the suggestion that any change in the system of calculation of the rent was agreed to by the tenants. Looking at the history of the village as a whole as it appears from the facts stated in the judgments of the lower Courts, I am unable to find any legal evidence of an implied understanding on the part of the tenants that they were liable to pay rent on the basis of the exact area of their land as ascertained by an actual survey.

7. In my opinion this case is governed by the principle laid down in two Calcutta cases referred to in the argument, Gouri Pattra v. Reily I.L.R(1892) Cal. 579 and Manindra Chandra Nandi v. Kaulat Shaik and Lagnu Mandal I.L.R(1923) Cal. 957, the principle, that is to say, that, where the agreement between the parties has been that rent is to be calculated on the basis of an area estimated approximately without actual measurement, the landlord has no right without the consent of the tenants to substitute a different method of calculation whether by actual survey or otherwise. The learned District Judge has referred to the former of these cases and thinks it can be distinguished on the ground that the Court in that case was referring only to holdings described as contained within recognised boundaries which is not the case here. That there was no such qualification of the principle laid down, however, is quite plain from the observations at p. 584 in Gouri Pattra v. Reily and from the discussion of the case in Manindra Chandra

Nandi v. Kaulat Shaik and Lagnu Mandal at p. 961. I may also refer to the observations in the latter judgment at pp. 964 to 966. In the present case, as I have said, it seems to me to be obvious that what the plaintiffs are attempting to do in substance is to substitute calculation of the rent on the basis of an actual survey for the old approximate calculation.

8. There is one piece of evidence in the case to which reference must be made, and that is exhibit 46. This is a rent-note of the year 1923 executed at the time the survey had been proposed by some of the inamdars. It purports to be executed in favour of the whole body of inamdars, but it appears in evidence that only three of them were present, and, as I have said, several of them objected to the introduction of the survey and still object to any change in the method of calculation of rent. It is signed by nine tenants only. Two of these are parties to this litigation, a third is the father of one of the parties, but it has been stated on behalf of the plaintiffs that all these persons who signed were leaders of the tenants and represented the whole body. The executants agreed to pay rent at Re. 1 per bigha from the following year, i.e. 1924, and, as reference is made to the contemplated survey and as it is provided that for the two previous years rent was to be paid according to the old system, it appears that the undertaking was to pay rent on the basis of the survey. The view taken by both the lower Courts is that this agreement, exhibit 46, could not be the basis of a new obligation to pay rent, because there was no consideration for the undertaking of any such new obligation. The learned Judges regarded it merely as evidence of the tenants' consciousness of a liability to pay according to the survey which existed already. If it is necessary that the liability to pay rent on the basis of the survey should be clear aliunde without reference to exhibit 46 at all, then, as I have shown, the alleged liability has not been proved. There is nothing in the evidence, apart from exhibit 46, from which it would be permissible to infer an agreement on the part of the tenants to pay at the survey rates. Moreover, I should not be prepared to regard the undertaking made in exhibit 46 as being itself evidence of an existing liability. The terms of the document, in my opinion, make it reasonably clear that the executants were making a new agreement. On the other hand I am not satisfied that the lower Courts are correct in stating that there was no consideration. The document itself refers to what appears to have been a concession by the landlords as regards the rent for two previous years. Whether it would have been possible for the landlords to recover rent based on the survey for those years or not it is impossible to say. But they might have attempted to do so and the foregoing of any claim in respect of those years might, I think, be regarded as legal consideration for an undertaking to pay rent based on the survey for the future. If I had held, therefore, that the present suits are maintainable at all, I should have felt bound to hold that those tenants who have actually signed exhibit 46 would be liable to pay rent on the basis of the survey in consequence of the undertaking given by them. I should not have been able to hold that any of the tenants other than those who have signed would be bound by the undertaking, because it has not been shown, in my opinion, that

the executants represented the whole body of the tenants so as to make their signatures binding on all of them. But in any case in view of my finding on the first point the question of any tenants being bound by exhibit 46 does not arise.

9. The result is that these appeals and revision application No. 11 of 1932 must be allowed. In addition to the claims for rent there were other claims in respect of tree cess. These are not the subject of appeal and in respect of them the decrees of the lower Court will not be disturbed. The declaration that the inamdars are entitled to charge Re. 1-1-0 per actual bigha from the tenants must be deleted. The appellants and the applicant in revision application No. 11 of 1932 are entitled to their costs in this Court. As regards costs in the lower Court I direct that the plaintiffs pay half the costs of the defendants and pay their own.