

Alimuddin Mollah and ors. Vs. K.S. Banerjee, Official Receiver, High Court

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SooperKanoon Citation : sooperkanoon.com/887886

Court : Kolkata

Decided On : Nov-27-1924

Reported in : 86Ind.Cas.316

Judge : Suhrawardy and ;Cuming, JJ.

Appellant : Alimuddin Mollah and ors.

Respondent : K.S. Banerjee, Official Receiver, High Court

Judgement :

Suhrawardy, J.

1. This appeal by the defendant arises out of an application under Section 105, Bengal Tenancy Act, by the respondent for settlement of fair and equitable rent and relates to khatians Nos. 12,28, 39 and 75. It is necessary to deal with the different khatians separately as the points with reference to them are not the same.

2. As regards khatian No. 12, it is argued, that the learned Special Judge should have raised the presumption of fixity of rent under Section 50(2), Bengal Tenancy Act. With reference to this particular khatian the Assistant Settlement Officer held that the defendant had proved that the rent entered in the Record of Rights is the same as paid by them in 1894 and hence he raised the presumption under Section 50(2), Bengal Tenancy Act, in favour of the tenant. The learned Special Judge in

appeal has differed from the lower Court and refused to raise the presumption from the circumstance pointed out by him. The fact is that the tenant had produced only one dakhila of the year 1894 which shows that the rent paid then was Rs. 38-12 which is the rent entered in the Record of Rights. From this one circumstance he has refused to draw the presumption of fixity of rent and the grounds he assigns are that the tenant himself has not given his evidence in this case (hence no direct proof of payment), that the dakhila was produced by a person who came with a bundle of dakhilas to prove the cases on behalf of all the tenants, that there is no proof of payment in subsequent years at the same rate and that there is no material pointing to the continuance of this rent throughout the intervening period. The learned Judge then observes: 'I should demand from the tenant some more cogent grounds for a belief that for 20 years before the suit he has paid the same rent. He must establish that before the presumption arises in his favour and before any onus is thrown on the appellant (respondent before us). It is not a difficult task to do so by the production of his dakhilas for the last 20 years; I presume that his dakhilas would not support such a state of things.'

3. The first question that has to be considered is whether the question as to whether a presumption should or should not be raised from certain facts is a question of fact or of law. Section 50 of the Bengal Tenancy Act Provides that if it is proved in any suit or proceeding under this Act that either a tenure-holder or a raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or the proceeding, it shall be presumed until the contrary is shown that they have held at that rent or rate of rent from the time of the Permanent Settlement. The section lays down that if the Court finds as a question of fact that the tenant held the land at a uniform rent or rate of rent for at least 20 years before suit, it is the duty of the Court to raise the presumption that the tenant held the land at that rent or rate of rent from the time of the Permanent Settlement. It is, therefore, necessary that the facts which would give rise to the presumption must be established before it can be raised in law; in other words, the Court must believe that the tenant has held the land at a uniform rate for more than 20 years before it should be called upon to raise the presumption. It is undoubtedly a question of fact and a Court of fact is the only competent Court to deal with it. My opinion is that

the question as to whether the tenant has held the land for more than 20 years at a uniform rent is a question of fact and the decision of the Court below thereon is not liable to be challenged in second appeal. Our attention has been drawn to the case of *Paran Chandra Sow v. Kanta Mohan Mullick* : AIR1924 Cal875 .. There the Court of Appeal below had refused to draw the presumption of fixity of rent from three dakhilas produced by the tenant--one dated 1299, the second dated 1311 and the third dated 1313. As the learned Judges held that the tenant had succeeded in proving from the production of the dakhilas that the rent was uniform between the dates of the first and the last dakhilas, they allowed the presumption to be raised under Section 50(2), Bengal Tenancy Act, in favour of the tenant. Whether the question relating to the proof of uniform payment of rent for over 20 years is a question of law or of fact was not raised or decided in that case. That case, therefore, is no authority for the contrary view. I am not prepared even to admit that it is a mixed question of law and fact the fact must be found before the law can be invoked. The view, I take, is supported by the decision in the case of *Satish Chandra Biswas v. Nil Madhub* 73 Ind. Cas. 77 : 37 C.L.J. 598 : (1923), A.I.R. (C) 665. There it appears that the learned Special Judge had insisted upon proof by means of rent receipts that the rent was paid uniformly for 20 years. The tenants in that case gave evidence which was accepted that rent paid from 1891 to 1895 was the same as paid by them from 1904 to 1908. The learned Judges in these circumstances held that the lower Appellate Court was wrong in supposing that the law insisted upon proof of uniform payment of rent by production of rent receipts for 20 consecutive years. They referred to certain authorities and observed that the view taken by the Court below as to the interpretation of the law was incorrect and they sent the case back to that Court for a re-consideration of the matter in view of the rule of law laid down, namely, that it is not necessary to insist upon the production of rent receipts for 20 consecutive years. In sending the case back to the lower Appellate Court they made the following observation: 'It is theoretically possible that in the interval there may have been an enhancement of the rent followed by a reduction, so as to make the rent payable in 1904 identical with that paid in 1895. But it is really for the Court of fact to decide, from all the circumstances of the case, whether the principle of continuity or the principle of discontinuity should be applied.' This decision is an authority for the view that the

question whether the evidence in the case is sufficient to establish uniform payment of rent is a question for the Court of fact to decide. Our attention has also been drawn to the case of *Mohini Kanta Saha Choudhry v. Preo Nath Neogy* 67 Ind. Cas. 381 : 35 C. L. J. 309 : (1922) A.I.R. (C.) 141 : 49 C. 661.. In that case the learned Special Judge had based presumption of fixity of rent under Section 50(2), Bengal Tenancy Act, on certain facts and the learned Judges held that he was justified in raising such presumption. That case, therefore, has no bearing on the question in issue. In my opinion the finding of the Special Judge with reference to khatian No. 12 based as it is on a consideration of the evidence adduced before him and of the facts of which, he as a Court of fact, alone is entitled to take cognizance, is not liable to be assailed in second appeal.

4. With reference to khatian No. 28 it is argued that as there has been a splitting up of the original jama but no increase in the jama, the presumption of fixity of rent should have been raised. The finding arrived at by the learned Special Judge concludes the matter. He has found that this jama came into existence in 1306 and there is nothing in connection with it which effectually shows it to have existed unchanged for 20 years. This is clearly a finding of fact with which we cannot interfere in second appeal.

5. With regard to khatian No. 39, the learned Special Judge has found that it was by mistake entered as 'mokarrari' in place of khatian No. 72. The Assistant Settlement Officer discussed khatian No. 39 along with khatian No. 135 and as I understand his judgment, he found both the khatians bore a consolidated jama of Rs. 31-15-6 as shown by Exs. D182 and D185. In discussing the evidence relating to these khatians, he came to the conclusion that the tenants were not entitled to any presumption in that case. But strangely in his decree he has included khatian No. 39 only in the list of khatians the rent of which he found to be unenhanceable.

6. With regard to khatian No. 75, the learned Vakil for the appellant argues with great force that the variation is slight that the Court ought not to have refused to raise the presumption. On the authority of the case of *Tara Kumar Ghose v. Kumar Arun Chandra Singh* 74 Ind. Cas. 383 : 36 C.L.J. 389 : (1923) A.I.R. (C) 261 and the other cases referred to therein I think that this contention ought to

prevail. It has been held in that case that a slight variation in the rent, even though not explained, does not deprive the tenant of the benefit of the presumption under Section 50, Bengal Tenancy Act. The variation here is from 6 pies to one anna.

7. The jama recorded in the Record of Bights is Rs. 4-6-6. This was the jama found to be in existence in 1321 before which it was Rs. 4-6. The earliest dakhila shows a total rent and cess as Rs. 4-8-0 and the latest as Rs. 4-9-0. If from the jama, indicated by the last mentioned dakhilas the cess of about 2 annas is deducted there is hardly any appreciable difference between the jama as recorded in the Record of Rights and as stated in the dakhilas. The learned Special Judge's attention was not drawn to the law on the subject and it is proper that he should reconsider this matter in the light of the law as laid down by the authorities. I am, therefore, of opinion that the case with reference to this khatian should be sent back to the learned Special judge for a reconsideration of it.

8. The result, therefore, is that the appeal with reference to khatian Nos. 12, 28 and 39 will stand dismissed and that with reference to khatian No. 75 will be allowed and the case sent back to the lower Appellate Court for re-consideration in the light of the above observations. The appellants will pay three-fourths of the costs of the respondent.

Cuming, J.

9. This appeal arises out of certain proceedings under Section 105, Bengal Tenancy Act, for the settlement of fair and equitable rents and relates to four khatians, Nos. 12, 28, 39 and 75. The Assistant Settlement Officer held that the rent of the parcels of land covered by these khatian numbers was liable to enhancement on the ground that they were not held at a fixed rate of rent. This decision was upheld by the Special Judge and the tenants have appealed to this Court. I shall deal with the four khatian numbers separately.

10. Khatian No. 12.--With regard to this plot of land the appellant contends that the Judge has found that in 1887 it was held at the same rate of rent as in 1918 and also that from 1310 to 1320 the rent remained the same rent (what that rate of rent was is not stated or proved) and that on these findings the Court was bound to

have presumed that it had been held at the same rent or rate of rent for 20 years before the date of the suit and hence that the appellants were entitled to the presumption under Section 50, Bengal Tenancy Act, that it had been held at the same rate of rent since the Permanent Settlement and so was not liable to be enhanced. Now the Court had to find before the presumption could be applied that the land had been held at the same rate of rent for 20 years before the date of the suit. That is a finding of fact and this Court in second appeal cannot interfere with a finding of fact. Had the Court come to this finding on no evidence whatever it would have been open to this Court to have interfered.

11. But the Court had certain evidence before it and after considering that evidence it came to the conclusion that the facts that had been proved did not convince it that the land had been held at the same rate, of rent for twenty years. What that evidence was has already been stated. It may well be that this Court if it were a Court of fact might have come to a different conclusion. But it cannot be urged as a point of law that on the facts found, the Court must have come to the conclusion that the tenancy was a permanent one and to have come to any other would give the appellant an appeal on a point of law. A fact is often to be proved or not proved by inference drawn from a number of other facts. A Court may well draw a wrong inference from the facts that are proved. But all the same the inference that it draws is a finding of fact. By no stretch of the imagination could it be said that a Court must hold that because it has been found that the rent was the same in 1918 as it was in 1887 and that for a portion of the time the rent was unchanged although at what rate is not proved, the land had been held for the 20 years preceding the suit at the same rent or rate of rent and that if it does not do so it commits an error of law. I have been referred to the case of *Paran Chandra Sow v. Kanta Mohan Mullick* : AIR1924 Cal875 .

12. In that case there were three dakhilas with a period of twelve years in between each of them and the Special Judge found that this was not sufficient to prove that the tenant had held at the same rate of rent. The learned Judges held that in the absence of anything to show that there was any change in the tenancy or that during these intervening periods there was any alteration in the rent that the Judge should not have held that the appellant was not entitled to the presumption which

arises under Section 50(2), Bengal Tenancy Act, and held that it had been proved in the case that the rent of the holding was not liable to increment. With the utmost respect to the learned Judges it seems to me that this amounts to a finding of fact come to in a second appeal and I am not prepared to follow it. The other authority to which we have been referred is the case of Mohini Kanta Saha Choudhury v. Preo Nath Neogy 67 Ind. Cas. 381 : 35 C. L. J. 309 : (1922) A.I.R. (C.) 141 : 49 C. 661.. The case does not support the contention put forward by the appellant. I think that we are concluded by the finding of fact of the lower Appellate Court and that so far as the land covered by khatian No. 12 is concerned the appeal must be dismissed.

13. Khatian No. 28.--Exactly the same arguments apply to this plot also. The appellant argues that there has been splitting up of the holding and that there had been no increase in the rate of rent. The learned Judge has dealt with the evidence and has held that it has not been proved that the land has been held at the same rate of rent for 20 years. This again is a finding of fact and cannot be challenged in second appeal.

14. Khatian No. 75.--I agree with some hesitation with the order that my learned brother proposes to pass in this case.

15. Khatian No. 39.--I. have nothing to add to what has been said by my learned brother on this part of the case. I, there fore, concur with the order that my learned brother makes on the whole appeal.