Privy Council Appeal No. 11 *of* 1940

Bengal Appeals Nos. 23 *and* 24 *of* 1938

Kumar Chandra Singh Dudhoria and others - - *Appellants*

v

Midnapore Zemindary Company Limited - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1941

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD ROMER
SIR GEORGE RANKIN
SIR SIDNEY ABRAHAMS

[*Delivered by* LORD THANKERTON]

This consolidated appeal arises out of two suits instituted by the appellants, claiming arrears of rent from the respondents for two successive periods of three years in respect of lands belonging to Touzi No. 3653 of the Murshidabad Collectorate. The Subordinate Judge granted two decrees dated the 17th September, 1935, in favour of the appellants, but these were reversed by two decrees of the High Court of Judicature at Fort William in Bengal dated the 27th and 29th July, 1938, from which the appellants now appeal.

The appellants are the proprietors of Touzi No. 523 of the Murshidabad Collectorate and the respondents hold a patni taluk comprising some villages in that estate under a patni patta executed by the appellants' predecessors in interest in favour of the respondents' predecessors on the 5th November, 1866, at a rent fixed in perpetuity of Rs.5,483-5-11 per year.

The estate bearing Touzi No. 3653 consists of alluvial land situated on the bank of the Ganges in an old bed of the river Mathabanga formed prior to 1914. It was treated as an alluvial accretion to Touzi No. 523, and as added land within the meaning of section 6 of the Bengal Alluvion and Diluvion Act, 1847 (Act IX of 1847), and therefore liable to assessment, and under section 1 of the Bengal Alluvial Land Settlement Act, 1858 (Act XXXI of 1858), the Revenue Authorities decided to assess and settle it as a separate estate. Such assessment and settlement took place under section 3 of Regulation 2 of 1819, and the rent of all under-tenants was fixed under the provisions of Chapter X of the Bengal Tenancy Act (Act VIII of 1885). The estate was temporarily settled as Touzi No. 3653 on the 18th July, 1921, with the then owner of Touzi No. 523 for a period of 15 years from the 1st April, 1921, at a revenue of Rs.847. Following the settlement, records of rights in Touzi No. 3653 were published. In that relating to the tenancy the respondent Company was shown as the tenure-holder at a rent of Rs.1028-2-0, which was the rent fixed in the settlement proceedings. The first suit under appeal seeks recovery of the rent so fixed for the three years 1921-22 to 1924-25, and the second suit for the three years 1925-26 to 1928-29.

The respondents' defence, which succeeded before the High Court, is that, in view of the special stipulations in the patni lease, the permanent rent thereby fixed covered the accretion now forming Touzi No. 3653, and that the appellants are not entitled to demand any further rent from them. The appellants maintained that the respondents were precluded from raising such a contention for three alternative reasons, any one of which would be sufficient, if upheld by the Court, so to preclude the respondents, and would render it unnecessary to consider the stipulations in the patni lease.

The first of these contentions is based on the provisions of sections 104H and 104J of the Bengal Tenancy Act, 1885. The other two contentions are based on pleas of *res judicata,* and relate respectively to a title suit, No. 452 of 1922, in the Court of the Subordinate Judge, Rajshahi, filed by the respondents against the appellants' predecessor in title and the Secretary of State, and to a third rent suit filed by the appellants on the 18th April, 1933, for a third period of arrears, vizt., 1929-30 to 1932-33, and would make it unnecessary to consider the stipulations in the patni lease.

In the title suit of 1922, which was occasioned by the settlement of the land in suit as a new Touzi No. 3653, the present respondents asked for declaration that these lands were included in the lands of Touzi No. 523, which had been already assessed; and also in their patni patta, and were not liable to any assessment of rent over and above the patni rent, and that the assessments made of the lands were illegal, *ultra vires* and inoperative. This suit was dismissed by the Subordinate Judge on the 19th May, 1927, after the filing of the two suits under appeal. On the 15th August, 1930, the High Court dismissed an appeal in the title suit of 1922. The respondents thereafter applied for and obtained, on the 26th June, 1933, special leave to appeal to His Majesty in Council, but the appeal was subsequently abandoned towards the end of 1936, as appears from the records of this Office. Until such abandonment there was no final judgment in the title suit of 1922, in respect of which the plea of *res judicata* could arise, and the title suit of 1922 is only referred to in the pleadings by the respondents as a ground for adjournment of the present suits until the final decision of the title suit. The plaint in the title suit of 1922 has not been produced, but it is among the records of this Office. A perusal of the pleadings, the issues and the judgments of the Subordinate Judge and the High Court, which deal with a considerable number of suits appears to yield no definite trace of the present contention of the respondents having been in issue, vizt., the contention that, although the lands in question were added land, and therefore rightly dealt with by the Settlement Officer, they were not, by reason of the special stipulation in their patni patta liable to any further rent. On the other hand, it seems clear that the respondents maintained in the title suit that the lands in question were reformed, and not, added lands, that they had already been included in the assessed area of the permanently settled estate, and were included in their patni, and that it was *ultra vires* of the Revenue Authorities to treat them as added lands liable to new assessment and further rent. This doubtless was why the Secretary of State was impleaded, as it challenged the validity of the proceedings. If the question at issue in the present suits was not in fact in issue in the suit of 1922, a question would arise as to whether it might and ought to have been made a ground of attack in the suit of 1922, in view of Explanation IV in section 11 of the Civil Procedure Code. A question might also be raised as to whether section 11 applies where the former suit has not been finally decided until after a decision in the trial court has been given in the suit in which the plea is taken. In the view that their Lordships take as to the appellants' contention based on the Bengal Tenancy Act it becomes unnecessary to consider this plea of *res judicata,* and their Lordships therefore express no opinion of the questions raised in relation thereto, but they desire to express their dissent from the view stated by the learned Judges of the High Court that " the Patnidars' cause of action for declaration that they were not liable to pay any additional rent for the accretions could not be said to have arisen until the proprietors claimed rent from them in violation of the terms of the Patni lease."

The second plea of *res judicata*, based on the decree of the Subordinate Judge in the third rent suit, is clearly ill-founded, as the decree, which is dated the 11th April, 1935, is not a final degree in its terms, as it is expressed to be " subject to the final decision of the Privy Council in T. Suit No. 452 of 1922 of Rajshahi Sub-Judge's Court." In the opinion of their Lordships, such a decree is not a final decree within the meaning of section 11 of the Civil Procedure Code, and, further, their Lordships are of opinion that the only proper course in such a case is to adjourn the suit, without making any decree, until the final determination of the other suit.

There remains the appellants' contention based on the Bengal Tenancy Act, Chapter X of which relates to " Record of Rights and Settlement of Rents ". Among the particulars to be recorded in the record-of-rights under section 102 are found " (*e*) the rent payable at the time the record-of-rights is being prepared " and " (*f*) the mode in which the rent has been fixed—whether by contract, by order of a Court, or otherwise ", and " (j) if the land is claimed to be held rent free—whether or not rent is actually paid, and, if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and, if so entitled, under what authority." The following are the material provisions with regard to the settlement of rents:—

> " 104. In every case in which a settlement of land-revenue is being, or about to be made, the Revenue-officer shall, after publication of the draft of the record-of-rights under section 103A, sub-section (1)—
>
> (*a*) settle fair and equitable rents for tenants of every class,
>
> * * * * * *
>
> (*c*) prepare a Settlement Rent-roll; "
>
> (Sections 104A to 104F provide for preparation of the Settlement Rent-roll, its publication, objections thereto, and its final revision and incorporation in the record-of-rights published in draft; section 104G provides for a right of appeal to a superior Revenue Authority against any order passed by a Revenue-officer prior to the final publication of the record-of-rights on any objection made under section 104E.)
>
> " 104H.—(1) Any person aggrieved by an entry of rent settled in a Settlement Rent-roll prepared under sections 104A to 104F and incorporated in a record-of-rights finally published under section 103A, or by an omission to settle a rent for entry in such Settlement Rent-roll, may institute a suit in the Civil Court which would have jurisdiction to entertain a suit for the possession of the land to which the entry relates or in respect of which the omission was made.
>
> (2) Such suit must be instituted within six months from the date of the certificate of final publication of the record-of-rights, or, if an appeal has been presented to a Revenue authority under section 104G, then within six months from the date of disposal of such appeal.
>
> (3) Such suit may be instituted on any of the following grounds, and on no others, namely:—
>
> (*a*) that the land is not liable to the payment of rent;
>
> (*b*) that the land, although entered in the record-of-rights as being held rent-free, is liable to the payment of rent;
>
> (*c*) that the relation of landlord and tenant does not exist;

(*d*) that land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy.

* * * * * *

(4) If it appears to the Court that the entry of rent settled is incorrect, it shall in case (*a*) or case (*c*) mentioned in sub-section (3) declare that no rent is payable, and shall in any other case settle a fair rent; . . .

(5) When the Court has declared under sub-section (4) that no rent is payable, the entry to the contrary effect in the record-of-rights shall be deemed to be cancelled.

* * * * * *

(7) Any rent settled by the Court under sub-section (4) shall be deemed to have been duly settled in place of the rent entered in the Settlement Rent-roll.

(8) Save as provided in this section, no suit shall be brought in any Civil Court in respect of the settlement of any rent or the omission to settle any rent under sections 104A to 104F.

(9) When a Civil Court has passed final orders or a decree under this section, it shall notify the same to the Collector of the District.

" 104J. Subject to the provisions of section 104H, all rents settled under sections 104A to 104F and entered in a record of rights finally published under section 103A, or settled under section 104G, shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act.

* * * * * *

" 111A. No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this Chapter or in respect of the framing, publication, signing or attestation of such a record or of any part of it, or, save as provided in section 104H, for the alteration of any entry in such a record of a rent settled under sections 104A to 104F:

Provided that any person who is dissatisfied with any entry in, or omission from, a record-of-rights framed in pursuance of an order made under section 101, sub-section (2), clause (*d*), which concerns a right of which he is in possession, may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877."

It may be noted that the proviso to section 111A would apply in the present case, as section 101, sub-section (2), clause (*d*) relates to an order made " where a settlement of land-revenue is being or is about to be made in respect of the local area, estate or tenure or of the part thereof."

It should be mentioned that, before raising the title suit of 1922, the present respondents had petitioned the Board of Revenue on the 4th June, 1920, protesting against the Diara proceedings on the ground that the lands in question were not added lands, but were reformations *in situ* of lands included within the permanently settled estate Touzi No. 523, but the petitions were disallowed by a resolution of the Board of Revenue dated the 2nd April, 1921. Thereafter the estate bearing Touzi No. 3653 was temporarily settled on the 18th July, 1921, and the record-of-rights was finally published. The respondents did not institute any suit under section 104H within six months of the certificate of final publication, or at any time.

Now that the respondents have abandoned their appeal to His Majesty in Council in the suit of 1922, they are precluded from maintaining that the lands in question were reformations of lands already permanently settled as part of Touzi No. 523, and were not added lands within the meaning of

section 6 of Act IX of 1847. As already stated, the only defence left to the respondents is that by virtue of the special stipulation in the patni patta the permanently fixed rent covers future added lands.

The appellants contend that not only the amount of the rent, but also the liability for rent, was determined in the proceedings for making the Settlement Rent-roll, and that the only method of challenge of the rent so settled was that provided by section 104H. The respondents, on the other hand, maintain that the record-of-rights and the Settlement Rent-roll must be distinguished; that the latter only deals with the settlement of the quantum of a fair and equitable rent, while the former relates to the question of title; that the fair and equitable rent so fixed was conclusive as to its amount, subject to the right of appeal prescribed by section 104H, but that any question of title was only affected by the presumptive value attached to the record-of-rights by section 103B. Alternatively, they maintained that section 111A provided an alternative right of appeal to them. The Subordinate Judge, in his judgment of the 17th September, 1935, was clearly in favour of the appellants on these contentions, but, on appeal, the High Court took a different view.

The view of the learned Judges of the High Court appears to have been that sections 104A to 104J dealt only with the amount of rent and did not authorise the Settlement Officer to deal with the question of liability, and, therefore, that the question of liability for rent was only affected by the presumption of correctness given to entries in the record-of-rights by section 103B of the Act. In particular they held that the Settlement Officer, in settling the rent, was not entitled to " touch contractual rights ". Their Lordships are unable to agree; in their view, either the Settlement Officer was merely fixing a fair and equitable rent in the ideal sense, regardless of the existing contractual rights, or it was his duty to consider and form a decision based on such contractual rights. A perusal of the grounds of appeal specified in section 104H affords complete conviction that the entry of rent settled in the Settlement Rent-roll prepared under sections 104A to 104F included a decision as to liability to the payment of rent, and it will be remembered that rent is defined in section 3 (13) as " whatever is lawfully payable or deliverable in money or kind ". Their Lordships agree with the learned Judges of the High Court that the Settlement Officer is not entitled to disregard—or to alter—contractual rights, but, differing from the learned Judges—they hold that the Officer is bound to regard them and to give effect to his view of them. It follows that the defence now stated by the respondents would properly have formed the subject of a civil suit instituted under section 104H within the period thereby prescribed.

The remaining contention of the respondents is that section 111A provides an alternative remedy to them, even if the remedy provided by section 104H is no longer open. Their Lordships are unable to accept this contention; even if the language of the proviso to section 111A were loose enough to permit of it, their Lordships would not be prepared to cut down the specific provisions of sections 104H and 104J by any such construction; it would render nugatory the period of limitation of action provided by section 104H and the finality provided by section 104J. But, in the opinion of their Lordships, the proviso to section 111A is satisfied, apart from any matter covered by section 104H, by holding it to be applicable to cases where the challenge is, for instance, as to the right of the Settlement Officer to deal with the subjects under sections 104A to 104F; an illustration of such a challenge may be found in the title suit of 1922, in the allegation that the lands were not added lands within section 6 of Act IX of 1847, and that therefore the Settlement Officer was not entitled to treat them as falling under sections 104A to 104F of the Bengal Tenancy Act.

Their Lordships are, accordingly, of opinion that the respondents' liability for the rent in question in these suits was settled by the Settlement Officer in preparing the Settlement Rent-roll, and, the respondents having failed to institute within the prescribed period any suit under section 104H, their liability for the rent must be deemed to have been correctly settled.

by virtue of the provisions of section 104J. This view is sufficient to dispose of the only defence maintained by the respondents, and it is unnecessary to consider any further contentions for the appellants.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment and decrees of the High Court should be set aside, and that the judgment and decrees of the Subordinate Judge should be restored. The respondents will pay the appellants' costs of this appeal and in the High Court.

(16577) Wt. 8194—7 160 1/42 D.L. G. 338

In the Privy Council

KUMAR CHANDRA SINGH DUDHORIA
AND OTHERS

v.

MIDNAPORE ZEMINDARY COMPANY
LIMITED

DELIVERED BY LORD THANKERTON

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