CALCUTTA HIGH COURT

Upendra Lal Gupta

Vs.

Jogesh Chandra Roy

(Mukerji, J.)

27.07.1927

JUDGMENT

Mukerji, J.

1.The facts relating to the litigation which has given rise to this appeal and the circumstances under which the appeal has come up for hearing before us are as follows:

> The plaintiff instituted the suit for ejecting the defendants from a tenure after service of a notice to quit, and in the alternative for enhancement of the rent of the tenure either at the customary rate or up to such limit as the Court thinks fair and equitable. The defense was that the tenure was an etmam, and that it was held as a permanent tenancy at a fixed rate of rent, and that therefore the plaintiffs' claim should be dismissed.

2. The plaintiffs' case was that the tenure was a temporary one bearing a rental of L 12 and was created by a kabu.liyafc in 1212 M.E. (=1851). The trial Court held that the question whether the kabuliyat was genuine or not was barred by re3 judicata, and though it was inclined to hold that it was genuine, it felt constrained to hold otherwise because it had been so found in a previous suit. It held that the tenancy was an etmam which in the part of the district of Chittagaong, to which the suit relates, means a permanent heritable and transferable tenure. The plaintiffs' claim for khas possession was accordingly dismissed1 by that Court and there it ended.

4. On the question of enhancement of rent, the defendants relied upon the presumption contained in Section 50, Ben. Ten. Act, and also the further presumption based on the dictum of the Judicial Committee in the case of *Port Canning Improvement Co. v. Katyani Dasi*[1] which is to the effect that where a tenure is proved to be permanent, heritable and transferable, the presumption of fixity of rent must arise in favour of the tenant.

5. The trial Court gave effect to the latter presumption and dismissed the plaintiffs' claim for enhancement. The District Judge, on appeal by the plaintiffs, appears to have ignored this presumption and was unable to give the defendants the benefit of the presumption under Section 50 as it was not known whether the rent of the tenure created in 1851 by the amalgamation of the two tenures that existed before was any different from the sum

[1] A.I.R. 1919 P.C. 42

total of the rents of the latter. Being of that opinion the District Judge held that the rent of the tenure was liable to enhancement. In that view he set aside the decree of the trial Court and remanded the suit for a fresh decision on framing the relevant issues that would arise in a suit for enhancement of rent under Section 7, Ben. Ten. Act. He suggested the following issues:

> Is there any customary rent payable by persons holding similar tenures in the vicinity?
> If so, what is the customary rent?
> If not, what is the fair and equitable rent?
> What are the gross rents of the tenure-holder?

6. The defendants then preferred the present appeal. It came on for hearing before a Division Bench of this Court. On the 14th June 1926 that Bench made, an order under Order 41, Rule 25, Civil Procedure Code The substance of the order then made was that the Munsif would, on giving the parties opportunity to adduce such further evidence as they might desire, record his findings on the following questions and then resubmit the records to this Court : 1st. : Whether L 12, the rent of the tenure, represented the sunn total of the rent of the holdings amalgamated in 1851, and whether the presumption under Section 50, Ben. Ten. Act, arose in favor of the defendants; 2nd whether the presumption of fixity of rent which arises from the fact that the etmam is a permanent, heritable and transferable tenure has been rebutted; and 3rd what is the customary rate or what is a fair and equitable rent for the tenure? It was indicated in the order that the onus of proving that the presumption mentioned in the second question was on the plaintiff, and that the third question need not be gone into if the Munsif found that the rent is not enhancible.

7. The Munsif in an elaborate judgment has held that the presumption under Section 50 does not arise, but that the other' presumption, namely, as to fixity of rent which arises from the fact of the tenure being permanent, heritable and transferable has not been rebutted. On these findings, there was no necessity for him, under the terms of the remand order, to go into the third question and he has not done so. The appeal has then come up before us for final determination.

8. On these findings of the learned Munsif the appellants contend that there should be an end of the plaintiffs' suit. The respondent, on the other hand, contends that there is no presumption, either in fact or in law, that because a tenure is permanent, heritable and transferable, its rent is fixed; or, in other words, that the remand order made by this Court was misconceived and the enquiry into question of fixity of rent as based on this presumption has been useless. To this contention the appellants rejoined that inasmuch as a Division Bench has-already held, rightly or wrongly, that there is such a presumption, that finding or decision is conclusive as between the parties to the appeal and it cannot be reopened. This position however cannot be seriously maintained in view of a long course of decisions of this Court : *Ganendra Nath v. Surya Kanta*[2] *Hiatunnessa Bibi v. Kailash Chandra*[3] *Hanuman Das v. Gur Sahai*[4] *Offici**al** Assignee of Calcutta v. Bidya Sundari*[5] and *Kamini Kumar v. Durga Charan*[6] An order of remand made under Order 41, Rule 25, Civil Procedure Code, decides nothing, and the reasons that the Court gives for its

[2][1912] 17 C.W.N. 462 [4][1907] 18 C.L.J. 181 [6] A.I.R. 1923 Cal. 521
[3][1905] 16 C.L.J. 259 [5][1919] 3 C.L.J. 428

support are given merely for its own convenience for the purpose of the determination of the appeal under Order 41, Rule 26, Civil Procedure Code, and for helping the lower Court to

proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under Order 41, Rule 25, Civil Procedure Code, and indeed it would fail in its duty if, in deference to those views which, no doubt, are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. It is necessary therefore to consider the respondents' contention on its merits.

9. The presumption, it must be noted, has no foundation in any statute law and indeed seems to be in conflict with general principles, such as are recognized in numerous authoritative decisions. It rests entirely upon a dictum of the Judicial Committee in *Port Canning Land Improvement Corporation v. Katyayani Debi*[7] which runs in these words:

> Ordinarily the two admitted characteristics (meaning, heritability and transferability which were the two admitted characteristics in that case) would create a presumption in favor of the tenant and throw on the plaintiff the onus of showing that the tenure is wanting in the characteristic of fixity of rent.

10. The decision of their Lordships in that -case, however, did not rest on this presumption and on the other hand proceeded inspite of it and throwing the onus on the defendants, the tenants, as is clear from the passages which follows. Though thus obiter, the dictum was treated as laying down a principle well worth acceptance and the order of remand made by this -Court was based on it. A later pronouncement of the Judicial Committee in the case of *Krishnendra Nath Sarkar v. Kusum Kamini Debi*[8], however seems clearly to militate against the correctness of the dictum. No such presumption was relied on in that case though, it should have been if the dictum was correct, and on the other hand the effect of that decision is to hold that unless there is something to indicate that the landlord abandoned his right to enhancement, such right must be taken to exist even in the case of a permanent, heritable and transferable tenure. In the case of *Bhupendra Chandra v. Harihar Chakravarti*[9] it has been pointed out that the dictum was meant to apply to the special circumstances of the case, namely, that the land was let out for purposes of reclamation, that for some years from the commencement of the tenancy no rent was payable, that there was a progressive scale of rent for several periods prescribed thereafter and that there was no provision for any different rent for any period thereafter. It has been pointed out that in view of these special circumstances the last of the series of rents so prescribed was held as being intended to have been fixed in perpetuity. However that may be, the dictum in its broad form in which it is laid down can no longer be treated as authoritative. The appellants seek to justify the correctness of the dictum by reference to the decision of the Privy Council in *Bamasoondery Dassyah v. Radhika Chowdhrain*[10] That decision relates to the rights of a zemindar holding under a perpetual settlement to enhance the rent of his rent-paying lands, and deals with taluks within the meaning of the Section 51 and ryoti and other under-tenures provided for in Section 49, Bengal Regulation 8 of 1793. The decision has very little bearing on the present case.

[7] A.I.R. 1919 P.C
[8] AIR 1927 PC 20 : 1927-25-LW 631
[9] [1920] 24 C.W.N. 874
[10] [1869] 13 M.I.A. 248

11. The plaintiff in the present case is the holder of a Noabad taluk in respect of which the Government stands in the same position as an ordinary zemindar : *Nazir Ahmmad v. Secretary of State* [11]The etmam has not been proved to have existed from the time of the Permanent Settlement so as to attract the operation of Section 6, Ben. Ten. Act. The dictum being out of the

way, the rent must be held to be enhancible and the issues necessarily to be decided in order to deal with the question of enhancement will accordingly have to be gone into.

12. There was one contention advanced on behalf of the appellants at the time when the appeal was heard by the former Division Bench. It relates to the form of the remand which was made by the learned District Judge. This contention was reserved for consideration till now. The respondent concedes that it is not necessary to send the whole case down to the trial Court, but that it will be sufficient if the necessary issues are framed and sent to the trial Court for decision - the procedure that is contemplated by Order 41, Rule 23, Civil Procedure Code This contention must be upheld.

13. We accordingly allow the appeal to this extent that we affirm the decision of the learned District Judge that the rent of the tenure is enhancible and while setting aside the order of remand passed by him in the form in which it has been made, direct that he do lay down the necessary issues, including the three issues already framed by him, and send them to the trial Court for its findings, and on receipt of the findings from that Court, finally dispose of the appeal.

14. We think that in the events that have happened, all the costs in this appeal will be borne by the parties for themselves.

Cuming, J.

15. I agree.

[11] A.I.R. 1922 Cal. 337