CALCUTTA HIGH COURT

Province of Bengal

Vs

Midnapore Zamindari Co. Ltd

(B.K Mukherjea , J.)

06.03.1945

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is on behalf of the Province of Bengal and is directed against a decree of the Subordinate Judge of Nadia, dated 31st July 1940, made in a suit commenced by the plaintiff-respondent under Section 104H, Bengal Tenancy Act. The facts lie within a short compass and may be stated as follows: There is a temporarily settled estate known as Sarkarpara-Naluapara bearing Touzi No. 893 of the Nadia Collectorate. The lands comprised in this estate were once a part of Bhabananda Deara and were resumed under Regn. 2 of 1819 some time in 1828. After resumption, a separate estate was formed which is being held in temporary settlement from time to time, the first settlement being made in the year 1842. At that time, the proprietor of this estate was Raja Ram Chandra Roy of Nashipur, and as the Raja refused to take settlement the estate was settled with Robert Watson & Co., the predecessor-in-interest of the present plaintiff. In 1852, the proprietary right to the estate became vested in J.W. Laidley and James Darlymple, two of the partners of the firm of Robert Watson & Co., and by an indenture of lease, dated 5th November 1866, these two persons leased out in permanent putni right their proprietary right in Touzi N0.893 as well as in the permanently settled lands of Taraf Nakra of Pargana Goas appertaining to eight annas share of Touzi No. 523 of the Murshidabad Collectorate, to Robert Watson & Co., at a fixed consolidated rental of Rs. 5483-5-1 a year. There was a clause in the putni patta by which the lessors purported to convey to the lessee their rights to have periodical settlement of the temporarily settled estate as proprietors. On the basis of this clause, it appears, proprietary settlements of Touzi No. 893 were made with Robert Watson & Co. and then with their successor-in-interest, the present plaintiff, from time to time, and this state of things continued till 1920.

2. In 1920, a fresh revenue settlement was made which came into operation with effect from 1st April 1921, and during these settlement operations it was detected that the Midnapur Zamindari

Co., was merely a tenure-holder and not a proprietor of Touzi NO. 893, and the clause in the patta on the strength of which proprietary settlements were made with them was in no sense binding on the Government. The result was that in the settlement records of 1920, which recorded the rents of all classes of tenants, Raja Bijoy Singh Dudhuria and others, who are represented by defendants 2 to 5 in this suit, were recorded as proprietors of the said touzi and the Midnapur Zamindari Co. was described as a tenure-holder under them. The proprietors however refused to take settlement of Touzi No. 893 which was kept under the direct management of the Government for some time and then a farming settlement was concluded with the Midnapur Zamindari Co. which lasted till 1936. In 1923 the plaintiff Company filed a suit for establishment of their proprietary right to Touzi No. 893. That suit was dismissed by the trial Court and also by the High Court on appeal. An appeal was then taken by the company to the Privy Council, but that appeal was eventually withdrawn. In 1937 fresh survey and settlement proceedings began under Part II, Chap. 10, Ben. Ten. Act, and the Settlement Officer assessed a rent of Rs. 13,379-10-0 under Section 104, Ben. Ten. Act, in respect of the putni held by the plaintiff company under Touzi No. 893. Being aggrieved by this assessment, the plaintiff company took an appeal to the Director of Land Records and contended inter alia that the putni, being created not only in respect of the lands of Touzi NO. 893 but of the permanently settled lands of Touzi No. 523 as well, at a fixed consolidated rent, the rent fixed by the contract was binding both on the zamindars and the revenue officer and the latter had no jurisdiction to settle the rent of the putni ignoring the said contract. The appeal was dismissed by the Director of Land Records on 15th July 1938. Eventually, the Dudhuria zamindars did not accept the new periodical settlement this time either, and the Government took over khas management of the touzi under its powers under Regn. 7 of 1822. The plaintiff filed the present suit on 11th January 1939, making the Province of Bengal and the Dudhuria zamindars parties defendants and praying for declaration that the rent-roll made by the revenue officer in contravention of the contract embodied in the putni lease which was prior to the Bengal Tenancy Act, was unauthorized, illegal and ultra vires and that the plaintiff company was not liable to pay as putnidar the assessed rent of Rs. 13,379-10-0 a year.

3. The suit was contested primarily by the Province of Bengal. The Dudhuria defendants filed a written statement supporting the Province of Bengal but did not take any active part in the proceeding. On behalf of the Province of Bengal a large number of defences were taken. It was contended inter alia that the lands of Touzi No. 893 were not covered by the putni patta of 1866, that the proprietor of a temporarily settled estate was not competent to create a perpetual tenure, and that as in previous settlement proceedings rents of all classes of tenants were enhanced and the plaintiff company who took settlement did not challenge the legality of the proceedings, it was not competent to raise any objection now. It was also averred that the contract, if any, fixing in perpetuity the rent of the lands of temporarily settled estate No. 893 was not binding on the

revenue officer or on the Province of Bengal, that the suit was barred by res judicata and also under Section 104H Clause 3, Ben. Ten. Act, and that the notice under Section 80, Civil P. C., not being a proper or legal notice, the suit was premature and bound to be dismissed on that ground alone. The trial Judge who heard the suit overruled these defences and held inter alia that as the putni lease created by the proprietors in favour of the plaintiff company was anterior to the passing of the Bengal Tenancy Act and the contract was subsisting at the date of the settlement, the settlement authorities had no jurisdiction in view of Section 191, Ben. Ten. Act, to ignore the terms of the lease and fix rents in violation of the same. Thus the putni rent that was assessed under Section 104, Ben. Ten. Act, was illegal and without jurisdiction and was not binding on the plaintiff. The result was that the plaintiff's suit was decreed. It is against this judgment that the Province of Bengal has come up on appeal to this Court.

4. Dr. Basak appearing on behalf of the appellant stated at the outset that he would not dispute the finding of the trial Court that the lands of Touzi NO. 893 were covered by the putni patta of 1866. He conceded further that a proprietor of a temporarily settled estate is competent to create a permanent tenure at a fixed rate of rent, though such tenure could not be described as a putni tenure in the strict sense of the term. The decision of the Court below on the questions of res judicata and estoppel has not been challenged before us and Dr. Basak has confined himself to two points only in support of the appeal. He has contended in the first place that as the suit was commenced by the plaintiff before the expiry of the period of two months next after notice was served on the Province of Bengal under Section 80, Civil P. C., it was premature and was liable to be dismissed on that ground. The other ground put forward is that as in the present case the periodical revenue settlement of Touzi No. 893 was not accepted by the proprietors and the Government has taken khas management under the provision of Regn. 7 of 1822, the stipulation in the putni lease is not binding on the Government, which is in no sense an agent of or successor to the proprietors and consequently the revenue officer had ample jurisdiction to ignore the contract between the zamindar and the putnidar and settle rent in such way as he considered proper. We will consider these two points one after another.

5. So far as the first point is concerned, it appears that notice under Section 80, Civil P. C., was served on the Collector of Nadia on 11th November 1938 and the plaint was filed on 11th January 1939. If in calculating the period of two months under Section 80, Civil P. C., the date on which the notice was served is to be excluded, the suit is admittedly premature and has been brought a day too soon; if on the other hand the date of service is to be included in the computation, the suit was quite in time. The learned. Subordinate Judge is of opinion that the period of two months is to be reckoned inclusive of the date of notice and consequently the suit was not premature. The learned advocates on both sides have referred us to a number of English cases on the point, though these decisions cannot be said to be by any means uniform.

6. The authority which directly supports the contention of the plaintiff is the pronouncement of the English Court in *Castle v. Burditt*[1] which was decided in 1790 A. D. There an action of trespass was brought against some excise officers who were alleged to have wrongfully seized certain goods of the plaintiff, purporting to act under the provision of 23 Geo. III, ch. 70. It was necessary under the statute that one calendar month's notice should be given before an action was brought. The notice was given on 28th April and the writ was sued out on 28th of the following month. The Court held on the authority of Rex v. Adderley [3]that the notice was sufficient, the day on which the notice was served being reckoned as included in the period of one month for which notice was required. In Rex v. Adderley (1780) 2 Doug. 463(Supra), it should be noted, the question was whether the day on which the Sheriff's office expired should be included in the six months after which he could not be called upon to return processes under the provisions of the Statute 20 Geo. II, C. 37, and it was held that it should be included, for the statute was made for the ease of Sheriff's. In *Glassington v. Rawlins*[2] which was decided in 1803 the Court held that the day on which a bankrupt was sent to prison should be included in counting the period of two months for which it is necessary that he should remain in prison for completing the act of bankruptcy. All these cases were referred to by S*ir William Grant in Lester v. Garland*[4] In that case, the testator had bequeathed the residue of his estate upon trust, providing that in case his sister should, within six months next after the testator's death, give security not to marry a certain person, it would be paid to her, otherwise it would go to her children. The testator died on 12th January 1805, and the security was given by his sister on 12th July following. It was held that the security was valid and the six months were to be taken exclusive of the day of the testator's death. It is quite true that Sir William Grant made it clear in his judgment that it was not necessary to lay down a general rule on the point as to whether in computing time from an act or event the day of the act is to be excluded or included; but at the same time the Master of the Rolls observed that it would be more convenient to hold that the day of an act done or event happening should be excluded than that it should be included. "Our law", so runs the judgment, rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive and the act cannot properly be said to have passed until the day is passed.

7. The cases in Rex v. Adderley *(1780) 2 Doug. 463 (Supra)*and Glassington v. Rawlins (1803) 3 East 407 were undoubtedly decided on their own peculiar facts. The first of these decisions laid stress on the policy of the particular statute which was held to have been enacted for the ease of Sheriffs, while the other put a strict interpretation on the penal provisions of bankruptcy law and held that in counting the period of two months' imprisonment the day on which the debtor was sent to prison should be included. The decision in Castle v. Burditt *(1790) 3 T. R. 623 (Supra)*indeed rested on no particular facts of its own. But it proceeded entirely upon the earlier

decision in Rex v. Adderley *(1780) 2 Doug. 463 (Supra)*without any discussion of the principle involved in such cases. Since the decision in Lester v. Garland (1808) 15 Ves. Jun. 248 the trend of authorities in England has been to hold that when time for a particular period is allowed to a party to do an act, the first day is to be reckoned exclusively. Many of these cases were referred to by B. Parke in *Young v. Higgon*[5]. In this case, an action was brought by the plaintiff against a Magistrate for issuing an illegal warrant under which his goods were seized and sold. Under Statute 24 Geo. II, C. 44, Section 1, it was necessary to serve one calendar month's notice on the Magistrate before the action was brought. The notice was served on 26th March 1838 and the writ was sued out on 26th April following. It was held that the action was brought too soon and should be dismissed. Alderson B., who delivered a separate judgment agreeing with B. Parke, observed as follows:

Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given, but the Act of Parliament gives him one month as an intervening period within which he may deliberate whether he will do a certain act, namely, tender amends; and unless you exclude both the first and the last day, you do not give him a whole month for that purpose.

8. Amongst other cases applying the same principle reference may be made to *Blunt v. Heslop*[6] *and Browne v. Black*[7] The law is thus summed up in Halsbury's Laws of England, 2nd Edn., Vol. 32, p. 140:

When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed, has the benefit of the entire period and accordingly in computing it, the day from which it runs as well as the day on which it expires must be excluded.

9. We agree with Mr. Gupta that none of the cases quoted above can be regarded as direct authority in the matter of interpreting the provision of Section 80, Civil P. C. Whether the day on which notice is served under Section 80, Civil P. C., is to be included or excluded for the purpose of computing the period of two months before the expiry of which no suit could be brought, as contemplated by the section, must have to be determined on the wording of the section itself and the obvious purpose which the Legislature had in view in enacting it. Section 80 lays down that no suit shall be instituted against the Crown or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been served in the particular prescribed way on the Crown or the officer concerned. The object of the Legislature in requiring the notice is undoubtedly to afford the Crown or the public officer, as the case may be, an opportunity to reconsider the position and make amends or settle the claim if so advised. The defendant is allowed two months'

time for deliberation and the suit cannot be brought until the expiry of two months next after notice has been served in the way indicated in the section. The word "next" means "immediately following or succeeding." Thus, the period of time is to commence immediately after notice is delivered to or left at the office of the defendant. The notice has to be served at some hour of the day, be it early or late. If the intention of the Legislature is that the defendant should have full two months' time for the purpose of deliberating and deciding the steps that he might be advised to take, it is clear that he cannot have full two months' time if the hours of the day that remain after receipt of notice are not excluded for purposes of computation. If that day is to be included, he necessarily gets less than two months. A day should ordinarily be taken to mean the whole day and not a fraction of a day, and, in these circumstances, we think that the period of two months, as laid down in Section 80, Civil P. C., should be taken as exclusive of the day on which the notice is served. In this view the suit in the present case must be deemed to have been brought a day too soon. The terms of Section 80, Civil P. C., as has been held by the Judicial Committee vide Bhag Chand v. Secretary of State are imperative and admit of no exception or implication, and non-compliance with its provisions is fatal to the plaintiff's suit.

10. Mr. Gupta has argued that the Government was not a necessary party to a suit of this description, and referred to Section 104H(3), Ben. Ten. Act, which says that no suit shall be brought against the Crown unless the Crown is landlord or tenant. But here admittedly the Crown has taken possession of the touzi in consequence of the proprietors' refusing to take settlement of the same. Whether the Province of Bengal holds it on behalf of the proprietors, or in its own capacity as sovereign, might be considered later on. But it cannot be denied that the rent in respect of the putni held by the plaintiff is now payable to the Province of Bengal who occupies the position of a landlord with regard to all subordinate interests under the touzi. A decree against the Dudhurias alone, who have not taken settlement of the touzi for this period, will not be of any benefit to the plaintiff nor would such a decree bind the Province of Bengal if it is dismissed out of this suit. In our opinion, therefore, the suit should be regarded as premature and unsustainable in limine for non-compliance with the provision of Section 80, Civil P. C.

11. In view of our decision on this point, a discussion of the other point raised by Dr. Basak is, strictly speaking, not necessary. But as the point has been fully argued and there is a chance of the case going up to a higher tribunal, it is our duty to record our decision on all points raised in this appeal. Dr. Basak's contention in substance is that though by a contract made before the passing of the Bengal Tenancy Act between the predecessors of defendants 2 to 5 and the plaintiff company, the rent of the putni tenure held by the plaintiff was fixed for ever, that contract might and would have been binding only if defendants 2 to 5 had taken settlement of the touzi for the present period of temporary settlement. As however the proprietors have refused settlement and the estate is under khas management of the Government by virtue of its powers

under Regulation 7 of 1822 and as the Government is in no sense a successor to or representative of the proprietors the stipulation in the lease regarding the fixity of rent is not binding on the Government or on the settlement officer and the latter could settle the rents of all classes of tenants as he deemed proper irrespective of the terms of the putni patta. The point is not free from doubt as we shall presently explain, though it has come up for consideration in some form or other in quite a large number of cases before this Court. It is a matter of frequent occurrence in Bengal that, before any revenue settlement is made in respect of alluvial accretions to a permanently settled estate, the proprietor has granted a permanent mukurrari lease of all lands in his possession including the deara lands of which he is undoubtedly the proprietor but with regard to which the Government has the right to assess fresh revenue. When the deara lands are resumed, the Government for revenue purposes can follow one or other of the courses open to it under Act 31 of 1858, and it can, as it has done in the present case, keep the accreted lands as a separate temporarily settled estate and make periodical settlements from time to time. As the proprietor of the parent estate is in law the proprietor of the accretions also, he has undoubtedly the first right to take settlement. But in case he refuses to accept, the Government has the right of making farming settlement or even a proprietary settlement with other persons, or it can keep the estate under its khas management; and in either case the recusant proprietor is entitled to an allowance which is called malikana.

12. In all districts to which the Bengal Tenancy Act is applicable, the operations for assessment or revision of land revenue in regard to non-permanently settled estates, are preceded by operations under Ch. 10, part 2, Bengal Tenancy Act, and the revenue officer has got to settle the rents payable by all classes of tenants within the temporarily settled estate and to prepare a rent-roll in respect of the same. The rental assets of the touzi being thus determined, the assessment of land revenue is made on the basis of the same. The object of the scheme undoubtedly is that it is only fair to the landlord that the rents payable to him by the subordinate tenants should be authoritatively settled and capable of being realized through Courts of law before any revenue demand could be made on the basis of the same. And it would certainly be unfair if revenue were to be assessed on a certain percentage of assumed rental which the landlord might never realise. Section 104A and the subsequent sections of the Bengal Tenancy Act lay down the procedure that is to be followed by the revenue officer in the matter of settlement of rents and preparation of rent roll. It is open to the parties interested to intervene in the settlement proceedings under Sections 104E and 104G. A person aggrieved by the decision of a revenue officer may institute a suit in a civil Court on any of the grounds mentioned in Section 104H(3), Ben. Ten. Act, and subject to all these provisions the rents settled become conclusive and final and are deemed to be fair and equitable rents under Section 104J, Bengal Tenancy Act.

13. Suppose, as in the case before us, the proprietor of certain deara lands had granted a mokurari

lease of the same to a tenure-holder fixing the rent perpetually for all time to come. The lands are later on formed into a temporarily settled estate and suppose that during a particular revenue settlement of the same the revenue officer in settling rents of all classes of tenants within its boundaries, under Section 104, Ben. Ten. Act, fixes the rent of this tenure at a much higher figure than was reserved by the lease. Is it within the competence of the revenue officer to ignore the contract and settle the rent in violation of its terms, and if he does that what is the remedy of the tenant? One of the earliest pronouncements on this point is that of the Judicial Committee in Prianath Das v. Ram Taran ('03) 30 Cal. 811, same case as Prianath Das v. Ram Taran ('03) 30 Cal. 811; and though it was a case where rents were settled by revenue officers prior to the passing of the Bengal Tenancy Act under the law as it then stood, the principle underlying this decision has been applied to a large number of cases since then where rents have been settled under the provisions of the Bengal Tenancy Act. In this case a chak forming part of a ganti tenure of which a patta was granted in 1867 by the zamindar to the defendant at an annual rental of Rs. 2300 was resumed by the Government and in 1884 was granted on a temporary settlement to the heirs of the zamindar. There was a clause in the patta that in case any portion of the land within it was resumed, the tenant would get proportionate abatement of rent. The plaintiff was a purchaser of the chak from one of the heirs of the zamindar who took settlement of the chak after resumption by the Government. He sued the defendant for rent not at the rate proportionate to that mentioned in the patta but on the basis of the rent settled by the revenue authorities under Section 10 of Act 8 of 1879. It was held by their Lordships of the Judicial Committee that the resumption by Government and settlement of rent by revenue authorities did not disturb the contractual rights of the parties so long as the proprietor himself or his successors were the holders of the touzi. "The settlement proceedings of 1854," so runs the judgment, cannot be held to have abrogated the rights of the respondent under the patta so long as Raja Baroda Kanta Roy and his heirs were themselves in a position to let him have the lands. In fact the resumption by Government did not disturb the position either of the Raja's heirs or of Chatterjee... If it had seemed good to the Government to take the land into their own khas possession or to settle it on to strangers to the contract with the respondent Chatterjee, then the recorded rent would have been the rate of payment by that respondent.

14. Thus the position was that if the proprietor who had granted the lease took settlement of the new touzi, the contractual rights prevailed but not otherwise. As said already, the rents in this case were settled under Section 10 of Act 8 of 1879 and no such provision as that of Section 191 of the present Bengal Tenancy Act was in existence at that time. Section 191, Bengal Tenancy Act, as it stands after the amendment of 1928, is an amalgamation of Sections 191 and 192 of the old Act and it provides inter alia that in case of lands situated in an estate not subject to permanent settlement when an assessment or revision of land revenue is made it would be open to the revenue officer notwithstanding anything in the contract between the parties entered into

after the passing of the Bengal Tenancy Act to fix a fair and equitable rent for all grades of tenants in accordance with the principles laid down in the various sections of the Act. After the passing of the Bengal Tenancy Act, the trend of decisions in this Court was to the effect that Section 192 of the Act (which now forms a part of Section 191) did not empower the revenue officer to fix a rent so as to affect contracts made before the passing of the Act. If the settlement officer had fixed rents in contravention of the terms of any such contract, and if the grantor of the lease himself became the holder of the estate, he was not competent to recover rents in excess of what was reserved by the contract and the tenant could set up his contractual rights by way of defence to a suit instituted by such landlord for recovery of rents as settled by the revenue officer. It was further held that in such cases the tenant could take this defence in spite of the fact that no suit was brought by him challenging the entry of rent in the settlement rent roll, under Section 104H, Ben. Ten. Act. There are a large number of decided authorities on this point and we may refer to some of them by way of illustration. The case in Khirode Kanta v. Akhoy Kumar ('17) 4 A. I. R. 1917 Cal. 599 is one of the earliest of these cases and it related to the self-same chak which was the subject-matter of litigation in Prianath Das v. Ram Taran ('03) 30 Cal. 811. After the period of 20 years' settlement of that chak was over, the Government granted a farming settlement of the chak to the plaintiff Khirode Kanta Roy and others who were not the successors of the original proprietors and rents were settled under Ch. 10, Part 2, Ben. Ten. Act, which had then come into force. The plaintiff sued the defendant for recovery of the rent fixed by the revenue officer and the claim was allowed, it being held that the revenue officer had full jurisdiction to fix a fair and equitable rent. The contention of the defendant that an entry or omission in the record of rights could not override the contractual rights of the parties was overruled on the ground that the plaintiffs being strangers were not parties or privies to the original contract and the defendant could not claim any rights under the same. It is to be noticed that in this case the lease was prior to the Bengal Tenancy Act; yet it was held that the revenue officer was not bound to give effect to its terms and the decision obviously proceeded on the ground that the contract could be enforced only between those who were parties to it, no matter whatever rent was considered fair and equitable by the revenue officer.

15. In Muktakeshi v. Srinath Das ('15) 2 A. I. R. 1915 Cal. 284, the plaintiff was proprietor to the extent of two-thirds share of certain alluvial lands which was resumed by the Government in 1903 and settled with the plaintiff alone. Prior to the resumption the plaintiff along with his co-sharers had granted a lease of these lands to the defendant on a fixed rental and the lease was dated 19th February 1884. On a suit by the plaintiff to recover from the defendant the rent which was fixed by the settlement authorities it was held that with regard to two-thirds share the plaintiff was bound by the terms of the contract, that is to say, was entitled to realise rent only at the rate mentioned in the lease, while with regard to the remaining one-third share, he was in the position of a stranger and was hence entitled to recover rent at the rate fixed by the settlement

authorities. Here also, it will be seen that the contract was prior to the Bengal Tenancy Act and the learned Judges did not say that Section 192 of the Act, prevented the settlement authorities from fixing rents in violation of the terms of the contract. In fact with regard to the one third share the plaintiff was held entitled to recover rent at the rate fixed by the revenue officer and it was only on the ground of privity of contract that he was deemed incapable of doing so with regard to the two-third share.

16. The case in Profulla Nath v. Tweedie ('22) 9 A. I. R. 1922 Cal. 248 is the next case of importance to which reference may be necessary. Here the predecessor of the plaintiff had settled certain asli lands together with some lands which were later on found to be deara to the defendant at a fixed rent. The lease was in 1860 long before the Bengal Tenancy Act was passed. After resumption of the deara lands a temporary revenue settlement was made of the same and the plaintiff himself took settlement. Rent was settled in respect of the defendant's tenure under Section 104, Ben. Ten. Act, and the plaintiff instituted a suit for recovery of the rent thus fixed by the revenue officer. It was held that the plaintiff was bound by the contract and that under Section 192, Ben. Ten. Act, the revenue officer was not authorised to fix a rent which affected the contract entered into before the passing of the Bengal Tenancy Act. Another important point was touched in the judgment of Chatterjea J., namely, whether this question of contractual rights could be raised after the settlement of rent became' final under Section 104J, Ben. Ten. Act. Opinion was expressed that under Section 104J, Ben. Ten. Act, only the entry relating to rent settled was final and not the entries relating to other matters which apparently were taken to include contractual rights of this description. The last proposition was elaborately discussed and reiterated by a Division Bench of this Court in Sarada Prosad v. Prafulla Chandra . In this case, after rents were settled in respect of a tenancy under Section 104, Ben. Ten. Act, the tenant did not move the revenue officer under Section 104E or Section 104G or the civil Court under Section 104H. There were a patta and a kabuliyat between the landlord and the tenant prior to the passing of the Bengal Tenancy Act in which there was a stipulation that subject to certain contingencies regarding increase of revenue by Government the rate of rent was to remain unaltered. It was held that in spite of the fact that the records became final under Section 104J the landlord was not entitled to recover rent beyond the stipulation in the patta and the kabuliyat. The learned Judges it appears, accepted the contention of the appellant that the recording of contractual rights under the kabuliyat was not an entry relating to rent to which alone irrebuttable presumption attached under Section 104J, Ben. Ten. Act, in other words, the kabuliyat rent might not be fair and equitable rent as contemplated in Part 2, Chap. 10, Ben. Ten. Act, and under such circumstances the revenue officer was to fix the rent that he considered proper and mention the kabuliyat rent as only a special incidence of the tenure which would be enforcible only in the special circumstances' if the grantor of the lease happened to accept revenue settlement for the particular period.

17. The very same view was taken by Nasim Ali and Henderson JJ. in Midnapur Zamindary Co. v. Chandra Singh Dudhuria . This case arose out of two rent suits filed by the Dudhuria zamindars against the Midnapur Zamindary Co. for recovery of arrears of rent for two successive periods in respect of a putni which was created in favour of the Zamindary Company by the same document of 1866 to which the putni in the present suit owes its origin. These lands also being alluvial lands were formed into a separate non-permanently settled touzi and rents of all classes of tenants were settled under Part 2, Chap. 10, Ben. Ten. Act. The estate was temporarily settled with the Dudhuria Zamindars and they instituted the rent suits for recovery of rent as fixed by the settlement authorities. The defence was that as the lands were covered by the putni lease of 1866 which fixed a consolidated rental in respect of all lands included in it, the contract was binding between the parties and the defendant was not bound to pay any additional rent. It appears that in this case also the rent fixed by the revenue officer had become final under Section 104J, Ben. Ten. Act, and the defendant did not bring a suit challenging the entry under Section 104H of the Act. The learned Judges of this Court held---and the decision was quite in agreement with existing authorities--that only the entry relating to the amount of rent fixed by the revenue officer became final under Section 104J, Ben. Ten. Act. The question whether the tenant was liable to pay the rent thus fixed, by reason of a previous contract between him and a holder of the estate, was not a matter for determination by the revenue officer who has no power to touch contractual rights acquired before the Act. A suit under Section 104H, Ben. Ten. Act, would be necessary if the tenant had any grievance in respect of the amount of rent fixed by the revenue officer. But, if in spite of the rent fixed being fair and equitable, he asserted that the landlord had no right to realise that rent by reason of the terms of a previous contract, no suit under Section 104H, Ben. Ten. Act, was necessary and so far as that question was concerned, no conclusiveness attached to the entry of rent under Section 104J, Ben. Ten. Act. The result was that the rent suits were dismissed. Against this decision there was an appeal taken to the Judicial Committee by the landlords plaintiffs and the appeal was allowed by their Lordships of the Judicial Committee and the judgment of this Court was set aside: vide Chandra Singh Dudhuria v. Midnapur Zamindary Company ('42) 29 A. I. R. 1942 P. C. 8. It is necessary to examine the judgment of their Lordships, carefully as it has definitely overruled the view taken by a long series of decisions of this Court. The material portion of the judgment bearing on this point runs as follows:

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 afair 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." (Chandra Singh Dudhuria v. Midnapur Zamindary Company ('42) 29 A. I. R. 1942 P. C. 8at page 807.)

18. The propositions of law enunciated by their Lordships may be summarised as follows: (1) It is not correct to say that the settlement officer acting under Sections 104 to 104J, Ben. Ten. Act, can deal only with the amount of rent and not with the question of liability to pay rent and that entry in the final rent roll cannot touch contractual rights; (2) in settling rent under Section 104, Ben. Ten. Act, the revenue officer has got to fix rent not in an ideal sense regardless of contractual rights but it is his duty to consider and form a decision based on such contractual rights; (3) the tenant if he wants to dispute his liability to pay the rent as fixed by the revenue officer has got to bring a suit under Section 104H in respect of the entry of rent against the landlord, within the time allowed by law and if he omits to do that, the rent must be deemed to be correctly settled and, it would not be open to the tenant to set up his contractual rights in a suit brought by the landlord for recovery of the settled rent; (4) the revenue officer is not only not competent to disregard or alter contractual rights, but on the other hand is bound to regard them and give effect to his view of them.

19. The last proposition was undoubtedly laid down with reference to the facts of the case actually before their Lordships. In this case the contract was prior to the passing of the Bengal Tenancy Act. Under Section 191 of the Act the revenue officer in fixing rent is quite competent to disregard contractual obligations created subsequent to the passing of the Act, though undoubtedly he has got to consider an existing contract as a valuable piece of evidence in connexion with the determination of fair and equitable rent. It cannot be imagined that their Lordships overruled the provision of Section 191, Ben. Ten. Act; on the other hand, it seems probable that a reference to that section was considered unnecessary as in the case before their Lordships the contract was one to which Section 191, Ben. Ten. Act, was not attracted. But still another difficulty remains. In the case before the Judicial Committee, the Dudhuria who had taken settlement of the touzi were themselves the grantors of the putni tenure. But what would be

the position if the settlement was made with a stranger? The difficulty is considerably enhanced by reason of this fact that usually settlement of land revenue is made after the record of rights are completed under Part II, Chap. 10, Ben. Ten. Act, and the records have become final under Section 104J of that Act. It cannot be known to the tenant till after the settlement had become, final whether the proprietor who had granted him a lease would accept the settlement or there would be a settlement with a stranger or the Government itself would keep the estate under khas management. Their Lordships have expressly held that the revenue officer had got to determine not merely the amount of rent but the question of liability as well, based on existing contractual rights. He is not permitted, as was held in earlier cases, to fix a rent which he considers to be fair and equitable, and mention the contractual liability of the tenant as a special incident of the tenancy which would be attracted only if the contracting parties themselves came to occupy the position of landlord and tenant during a particular perior of settlement. As it may not be known, at least in the majority of cases at the time when the entry of rent in the settlement roll became final under Section 104J, Ben. Ten. Act, whether the old proprietor or anybody else would accept settlement and as the remedy of the tenant or the aggrieved party is to institute a suit under Section 104H, Ben. Ten. Act, before the records become final, obviously it is not possible for him at that stage to proceed on any assumption that the settlement would be with the contracting party or with some other persons. The rent paid, therefore, must be the same rent irrespective of the question as to who ultimately takes the settlement and the revenue officer, as has been said already, must proceed on the basis of contractual rights.

20. The conclusion thus necessarily follows that except in cases where Section 191, Ben. Ten. Act, applies and to which no reference was made in the judgment of their Lordships if there is a contract between the proprietor and the tenant which according to' the revenue; officer was subsisting at the time of settlement proceedings and which determines the rent in a particular way, the revenue officer is bound to give effect to his own views of the terms of this contract and fix the rent on the basis of the same, and it is immaterial whether the settlement is accepted by the proprietor or by a stranger. This view undoubtedly goes against the trend of previous decisions on this point. It should be noted however that the pronouncement in Prianath Das v. Ram Taran ('03) 30 Cal. 811 upon which all the subsequent cases purported to proceed were decided not under the provisions of Bengal Tenancy Act but under the law as it stood prior to it. Section 10 of Act 8 of 1879 did not contain the elaborate provisions that are now laid down in Part 2, Chap. 10, Bengal Tenancy Act, and there were no provisions in the old Act corresponding to those which are to be found now in Sections 104H and 104J, Bengal Tenancy Act. Any way we are bound by the decision of the Judicial Committee and interpreting the judgment as best as we can, no other conclusion seems possible to us.

21. In this view of the case, the second point argued by Dr. Basak is bound to fail. In the case

before us, the entry in the rent roll has not yet become final under Section 104J and the present suit is one commenced by the plaintiff under Section 104H, Bengal Tenancy Act. The company can therefore raise the question that the revenue officer ought to have proceeded on the basis of the contract which was entered into between the plaintiff and the previous proprietors long before the passing of the Bengal Tenancy Act. It has not been suggested by Dr. Basak that that contract is no longer subsisting or is not binding on the proprietors. No ambiguity in its terms has been pointed out and it is not contended that the rent reserved by it is enhancible and not fixed in perpetuity. Dr. Basak's only argument is that as the Government has taken khas possession of the touzi, the contractual rights of the parties must have ceased to exist. It is perfectly true that the Government is in no sense an agent of the Dudhurias though it was so described in the settlement records, nor it has derived its title from the latter. It has taken possession in exercise of its own rights under the provisions of Regn. 7 of 1882. But the position undoubtedly is that the Province of Bengal occupies the position of a landlord with regard to all subsisting subordinate tenures under the estate. The Province of Bengal was certainly not a party to the patni lease of 1866. But if the settlement officer is bound to give effect to the terms of the lease that question becomes immaterial. We do appreciate that the Government revenue may suffer if the revenue officer is not given authority to fix the rent as he considers fair and proper, simply because it is in excess of what was fixed by a contract long before the passing of the Bengal Tenancy Act. But that is a matter which Legislature alone can deal with and it is a thing to be noted that when the Bengal Tenancy Act was amended in 1928, the Legislature did not think it proper to arm the revenue officer with authority to override pre-act contracts between landlords and tenants. The result therefore is that the appeal is allowed on the first point only and the decision of the Court below reversed. The plaintiff's suit should be considered premature and the plaint should be rejected on that ground. We direct each party to bear his own costs in both the Courts.

Ellis, J.

22. I agree.

Cases Referred.

1(1790) 3 T. R. 623
2(1803) 3 East 407
3(1780) 2 Doug. 463
4(1808) 15 Ves. Jun. 248
5(1840) 6 M. & W. 49
6(1838) 8 Ad. & El. 577
7(1912) 1 K. B. 316