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The instrument specifies the lands in each of the two villages of Ruttonpoora and Keratpur, which the plaintiff engaged to sow with indigo; but while it provided for the substitution of other lands for those contracted for in Keratpur, of which the plaintiff was a proprietor, it is silent as to the substitution of lands for those in Ruttonpoora, of which he was only a tenant.

We think it unnecessary to provide for compensation to the defendant beyond the restoration of the consideration of Rs. 33, or Rs. 2 per bigha for the lands in respect of which we cancel the contract, and this sum the plaintiff has offered to pay.

We reverse the decree of the Subordinate Judge, and restore that of the Munsif. The defendant will pay the plaintiff's costs in this Court and in the lower Appellate Court.

Appeal allowed.

Before Mr. Justice Pontifex and Mr. Justice Field.

GOLAM ALI (DEFENDANT) *v.* KALI KRISHNA THAKUR (PLAINTIFF).

1881 *May* 10.

Suit for Arrears of Rent—Accretions to Parent Tenure—Rate of Rent—Reg. XI of 1825, *s.* 4, *cl.* 1.

In a suit for arrears of rent, it appeared that the defendant had, in 1260 (1853), executed a kabuliat, in which the boundaries of the land were given and the rate of rent fixed, and which provided that the land might be measured after 1261 (1854). In 1281 (1874), a measurement was made, and it was found that some land had accreted; and the plaintiff now sued for rent for the accreted land, at rates varying with its nature and quality.

Held, that the accreted land should be governed by the terms and conditions applicable to the parent tenure, and that the same rent was payable for it as for the land included in the kabuliat.

The meaning of Reg. XI of 1825, s. 4, cl. 1, is, that the incidents of the original tenure attach to the increment.

THIS was a suit for the recovery of arrears of rent for the year 1282 (1876) of a howla held by the defendant in Chur Panchkati, Pargana Edilpore, of which the plaintiff was zemindar. On the 4th Bhadro 1260 (27th August 1853), the defend-

Appeal from Original Decrees, Nos. 219 and 265 of 1879, against the decree of Baboo Promotho Nath Mookerjee, Subordinate Judge of Furridpore, dated the 23rd September 1878.

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ant executed a kabuliat, in which the boundaries of the howla were given, and the quantity of land, after deduction of *rugba*, was stated to be three drones eight kanis, the amount assessed upon which was Rs. 280, at the rate of Rs. 5 per kani. It was stipulated in the kabuliat that the land within the boundaries might be measured after Pous 1261 (December 1854) upon fifteen days' notice to the defendant, and that the rent of the land found in excess of that stated in the kabuliat would be at the rate of Rs. 5 per kani.

Since the execution of the kabuliat, some land had accreted to the howla by the recession of the river on the south and west. In 1281 (1874), the land was measured by the plaintiff, and it was found that the total quantity of land within the boundaries given in the kabuliat, after deduction of *rugba*, was seven drones nine kanis one gunda and one cora. The plaintiff alleged that the defendant was in possession of about twenty drones two kanis of accreted land, and now sued for the recovery of rent at the rate of Rs. 5 per kani for the land within the boundaries, and at rates varying with the nature and quality of the land for the lands without the boundaries. The defendant contended that the quantity of land within the boundaries described in the kabuliat had been understated; that the plaintiff was not entitled to recover any higher rate than that stated in the kabuliat for the accretions; and that the rates demanded for the accretions were neither customary nor fair. The Subordinate Judge found that the accretions ought to be assessed at the pargana rate, but as the plaintiff had failed to prove that rate, he gave him a decree at the same rate for the accretions as that paid for the parent tenure.

Both parties appealed to the High Court.

Mr. *Branson*, Mr. *W. M. Dass*, Baboo *Chunder Madhub Ghose*, and Baboo *Rashbehary Ghose* appeared for the defendant in both appeals.

The *Advocate-General* (The Hon'ble *G. C. Paul*), Baboo *Kali Mohun Dass*, and Baboo *Ram Sikha Ghose* appeared for the plaintiff in both appeals.

The judgments of the Court (PONTIFEX and FIELD, JJ.) were as follows :—

PONTIFEX, J.—I am of opinion that the accretion, which, under Reg. XI of 1825, s. 4, cl. 1, must be considered an increment to the defendant's tenure, should be governed by the terms and conditions applicable to the parent tenure as provided in the kabuliat under which such parent tenure is held.

The defendant having admitted his liability to pay some rent, the question to be decided is, what construction should be placed on the words "*increase* of rent to which *he* may be justly liable" contained in that Regulation.

The use of the word *increase* seems to show that consideration is to be given to the rent reserved on the parent tenure. If rent was assessable without reference to the rent reserved on the parent tenure, then I should have expected it to have been expressed as follows:—"The accretion shall not be exempt from the payment of rent which may justly be assessed upon it."

Supposing a perpetual tenure had been created at a pepper corn rent, without any salami or bonus being taken, the holder of such tenure would, in effect, be an absolute proprietor, so far as the zemindar was concerned, and, as absolute proprietor, would, in my opinion, be as absolutely entitled to any accretion.

Supposing, on the other hand, that a perpetual tenure had been created at a rent less than a rack or fair holding rent, and that a salami was taken on its creation, it might be right, if the circumstances of the lease permitted it, to take such salami into consideration when assessing the rent upon any accretion.

But that is not the present case.

In the kabuliat under which the defendant holds, it seems to me that the cost and trouble of reclamation were intended to be recouped by the tenant's privilege to hold rent-free for two years after the land first came under culture, as to any land taken into cultivation subsequently to the lease; and as to the lands specially referred to in the kabuliat as then under cultivation, by the reservation for the first three years of a

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smaller rent than the final rent of Rs. 5. And apart from evidence to the contrary, I must consider that the final rent of Rs. 5 was at the date of the kabuliat considered as a fair holding or rack-rent after the expenses of reclamation had been recouped.

It may be true that, by reason of general improvement and progress, a fair holding rent at the present day would be more, and perhaps greatly more, than Rs. 5. But there is nothing to show that Rs. 5 was not a fair rent in 1261. And it must be remembered that though the accretion may have formed only lately, the tenant's right to it under the Regulation accrued in 1261; and if it had immediately thereafter come into existence, a perpetual rent as of that date would have been assessed upon it. Why should the zemindar's position be improved and that of the tenant deteriorated, merely according to the date of the accretion coming into existence?

I think, therefore, that the new accretion, or so much of it as has admittedly been in cultivation for a considerable period, should be assessed at the fair holding rent of Rs. 5 as established in 1261.

If the plaintiff's contention was correct, that the rent of the accretion should be assessed at the rate prevailing in the parganas, the defendant would get no greater benefit under the Regulation than a stranger; but, in my opinion, it was intended that he should have all the benefit of his already assured position.

It seems to me that a Court would have extreme difficulty in arriving at any rent intermediate to the pargana rate and the rent reserved on the parent tenure.

If any intermediate rent was now adjudged, the zemindar might, on the same principle, insist at some future time that it would be liable to enhancement. But this would be contrary to the conditions governing the parent tenure. And if the accretion happened to be very large in extent, in comparison with the area of the parent tenure (and in this case the plaintiff claims that it is more than three times as large as the parent tenure), the value of the latter might almost vanish in consequence of the high rate assessed upon its offspring. In other words, the offspring might swallow up its parent.

If, on the other hand, the zemindar could not insist on future enhancement, it is difficult to see on what principle he can now claim a higher rate of rent than that reserved on the parent tenure.

I think, therefore, the accretion should be assessed at the same rate as the parent tenure, and this renders it unnecessary for me to decide within what limits the parent tenure and the accretion respectively lie. But I agree with the Subordinate Judge that the report of the Amin in this case is not reliable, partly for the reasons stated by the Subordinate Judge, and partly because the reasons stated by the Amin for fixing the southern boundary where he places it, seem to me insufficient and inconclusive. I also agree with the Subordinate Judge, that if pargana rates were assessable on the accretion, there is no sufficient evidence of what such rates should be. It may possibly be, that if Government were to assess a higher proportionate revenue on these accretions than is borne by the parent tenure, the plaintiff might have an equity to ask for contribution in that respect from the defendant. But that case has not yet arisen, and we are unable to deal with it, as at present no revenue has been assessed by Government on these accretions. I think that question should be left open till the Government assesses the accretions.

The learned Advocate-General, for the plaintiffs, placed some reliance on the remarks of the Judicial Committee in the former suit between the parties, in which it was decided that the plaintiffs were not entitled to possession of these accretions. Those remarks were as follows:—"The defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of s. 17, Act X of 1859, or liable to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the pargana rate of the rents payable by similar holders."

The observations are somewhat ambiguous, but it is sufficient to say that they were not intended to settle the question, and were made, apparently, without the question having been really argued.

According to our decision, the defendant's appeal fails in its

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main objection to the decision of the Subordinate Judge. And I am also of opinion that it fails with respect to the manner in which the howladari rukha should be calculated, the decision of the Subordinate Judge in this respect being correct.

In only one point is the defendant entitled to succeed in this appeal. The Subordinate Judge says in his judgment,—

"The defendant claims a further deduction of 202 bighas, which have been found by the Amin to be of the description called *helli* and *dhalli;* but as this land would shortly be fit for cultivation, it cannot be exempted from assessment."

But I think that, in accordance with the terms governing the parent tenure, rent would not become payable until two years after the land is taken into cultivation.

We have been informed by the plaintiff's advisers that this has been altered on review; but if it has not, the defendant's appeal will succeed in that respect. In other respects it fails. The plaintiff's appeal fails in all respects. Under the circumstances, I think the parties ought to bear their own costs in this Court.

FIELD, J.—I concur in the judgment which has just been delivered by my learned brother. Upon the essential question to be decided in this case, I desire to make a few observations. That question really is this. At what rate is rent to be assessed on the alluvial increment to an under-tenure? In order to the decision of this question in this particular case, there are three points which it will be well to notice. In the first place, the rent on the original howla is a fixed rent, not capable of enhancement. This has been settled as the result of previous litigation between the same parties. In the second place, the alluvial increment is admittedly liable to assessment of rent; and there is now no contention before us, that the landlord is not entitled to receive additional rent for the additional land added to the under-tenure. In the third place, the under-tenure was created on the 4th Bhadro 1260,—that is, the 19th August 1853, and therefore there is no question of the applicability of s. 51 of the Reg. VIII of 1793, which applies only to talooks or tenures in existence at the time of the Permanent Settlement. The ground being thus cleared by the disposal of

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these preliminary points, the question to be decided further resolves itself into this,—whether the rent on the alluvial increment is to be assessed in proportion to, or upon the same principle as, the rent payable upon the *usli*, or original under-tenure; or is to be assessed according to the rates payable in the vicinity for similar under-tenures or howlas, and without regard to the rent payable upon the *usli*, or original under-tenure. Now the words of Reg. XI of 1825, s. 4, cl. 1, are these:—"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed." What is the meaning of the term 'tenure' in this context? Tenure is usually regarded as a mode of holding property, as, for instance, in the expressions 'tenure by grand serjeanty,' 'copyhold tenure,' 'feudal tenure,' 'tenure in burgage,' 'tenure by cornage,' and it is impossible to disconnect the meaning of the word 'tenure' in any particular context from the ordinary incidents, subject to which the particular tenure is held. Then again the word 'tenure' is used not only of the mode in which property is held, but also of the land itself which forms the subject of the tenure. The very clause of the Regulation which we have to construe in this case, furnishes an example of this double meaning of the term 'tenure,' which is used in the first sense in the passage, "it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed." And in the second sense in the passage, "provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure, &c." Looking at the whole clause of the Regulation, I think the reasonable construction to be put upon the words "land . . . . gained by gradual accession . . . . . shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed," is, that the incidents of the original tenure attach to the increment. We have then immediately after these words a double proviso. The first proviso is concerned with the assessment of Government revenue. As to this, I shall have something to say hereafter. The second proviso is this:—"Nor if annexed to a

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subordinate tenure held under a superior landlord, shall the under-tenant, whether a khoodkusht ryot holding a mourosi istemrari tenure at a fixed rate of rent per bigha, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable." It appears to me, that the words 'payment of any increase of rent' have a certain reference to the rent payable on the original tenure. Then as to the words 'may be justly liable,' it is important to bear in mind that when Reg. XI of 1825 was passed, the Legislature had not laid down any rules for the enhancement of rent, or the assessment of land with rent. We know from State papers of the period of the Permanent Settlement, and the period subsequent thereto, that this was done designedly, as Government wished to avoid the appearance of interfering too much between the newly-created proprietors and the ryots, thinking, moreover, that the relations between them would be gradually settled by contract and by the proof of usages and customs in the Courts of justice. Thus we have in Reg. VII of 1799, s. 15, cl. 8, a provision to the following effect:—"The Courts of justice will determine the rights of every description of landholder and tenant when regularly brought before them, whether the same be ascertainable by written engagements or defined by the laws and Regulations, or depend upon general or local usage which may be proved to have existed from time immemorial." It thus appears to have been the intention of the Legislature to leave these questions of assessment and enhancement of rent to be settled by mutual agreement or local usage. This will, in all probability, explain the fact that the Legislature did not, in cl. 1 of s. 4 of Reg. XI of 1825, lay down any more precise rule for determining the rent to be paid for land forming an alluvial increment to an under-tenure than that contained in the words 'increase of rent to which he may be justly liable.' These words—'justly liable'—appear to me to have a certain reference to the principle upon which the rent may have been assessed upon the original tenure. For example, rent is, in many cases, made pay-

able as a lump sum for a given area. In other cases, it is assessed according to a classification of the land. In the case of a jungle-bori howla, a howla or lease of waste land, which must be reclaimed before it is fit for cultivation, it is usual to let a considerable area of land for a certain lump sum as rent. In the case of land wholly or partly brought under cultivation, it is not unusual to assess the rent with reference to the different classes of land and the different crops which the land is capable of producing. These are well-known usages of the country, and it appears to me, that the words 'justly liable' indicate an intention on the part of the Legislature that the rent payable for the alluvial increment should be settled with reference to the circumstances of each particular case, regard being had to the agreement of the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable to such tenure.

Then as to the proviso which has reference to the assessment of Government revenue, and the argument which has been addressed to us on this point, it may be observed that, when Reg. XI of 1825 was passed, there was a previous Regulation in force, that is Reg. II of 1819, which provided for the assessment of Government revenue upon alluvial increments to estates. Clause 1, s. 3 of that Regulation enacted as follows :—"All lands which, at the period of the Decennial Settlement, were not included within the limits of any pargana, mouza or other division of the estate for which a settlement was concluded with the owners, not being lands for which a distinct settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title of the nature specified in Regs. XIX and XXXVII of 1793, and in the corresponding Regulations subsequently enacted, are and shall be considered liable to assessment in the same manner as other unsettled mehals, and the revenue assessed on all such lands, whether exceeding 100 bighas or otherwise, shall belong to Government." The second clause of the same section further provides, that "the foregoing principles shall be deemed applicable not only to

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tracts of land such as are described to have been brought under cultivation in the Soonderbuns, but to all churs and islands formed since the period of the Decennial Settlement, and generally to all lands gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks." That Regulation, therefore, distinctly laid down the principle that alluvial increments to permanently-settled estates are liable to assessment for Government revenue; but it did not enunciate the principle upon which that Government revenue is to be assessed. That is a matter provided for by the executive orders of Government, or of the Board of Revenue; and it is further a matter over which the Civil Courts have no jurisdiction. It may, however, be assumed, for the purpose of deciding this case, that the revenue to be paid to Government upon the alluvial increment is assessable without reference to the amount of revenue payable upon the original estate. If, then, it may be argued, rent should be assessed on the alluvial increment according to the rate payable upon the *usli*, or original under-tenure; and if this rent should be so small that it will not suffice to meet the Government revenue which the Settlement Officers may assess upon the same alluvial increment regarded as an increment to the revenue-paying estate, is it not unjust to the zemindar that he will thus be forced to hold this addition to his estate at a loss? If this question is asked in the interests of Government, the answer is a very simple one,—*viz.*, that if, by reason of the rent payable on the alluvial increment being less than the Government revenue, the alluvial addition, or the original estate with the alluvial addition (where both are included in a single new engagement with Government), becomes unprofitable to the zemindar, the result will be a Government sale, and the avoidance of the under-tenure as the result thereof, whereupon the unincumbered estate will, in the hands of a purchaser at such sale, presumably yield sufficient to pay the revenue and afford a reasonable profit. But Government is no party to this case, and therefore it is unnecessary to decide this question so far as Government is concerned. Then so far as regards the zemindar,

the case contemplated by the argument has not yet arisen, for it has been admitted at this hearing that Government has not yet assessed any revenue upon the alluvial increment. The fact of Government revenue having been assessed upon the alluvial increment is, therefore, not a necessary element for consideration in the case which we have to decide. But it may be important to point out that the new case, which will arise when revenue is assessed on the alluvial increment, is provided for by an Act of the Bengal Council,—namely, Act VIII of 1879. Under the provisions of s. 7 of this Act, the rent recorded as demandable from an under-tenant in all estates under settlement is to be determined by the Settlement Officer in accordance with certain rules therein prescribed. One of the questions which the Settlement Officer has to determine in order to settle this rent is this, whether the under-tenure is binding as against the Government or not? and upon the decision of this question will depend the amount of rent which is to be recorded as demandable from the under-tenant. Under s. 10 of the same Act, every under-tenant is liable to pay the rent so recorded as demandable from him, unless he can prove in a civil suit that such rent has not been assessed in accordance with the provisions of the Act; and under s. 11, if the Court modifies or sets aside such rent, it is to proceed to determine the rent payable by the under-tenant in accordance with the provisions of the same Act. The direct object of these provisions is to secure a reasonable proportion between the revenue payable by the zemindar to Government and the rent payable by the under-tenants to the zemindar. It will thus appear that it may possibly be open to the parties at any future time, when the Government proceeds to settle the revenue payable upon the alluvial increment, to reopen the question of the rent to be paid in respect of such increment, and to have such rent re-assessed under the provisions of s. 7 of the Beng. Act with advertence to the amount of Government revenue made payable upon such alluvial increment. It appears to have been the intention of this Act to enable the Settlement Officer to readjust the rent of under-tenures when such rent had been previously fixed at an amount insufficient to meet the

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revenue subsequently assessed. Whether the Legislature has used language sufficient to effectuate this intention, and whether this particular under-tenure falls within the operation of the Act, it is no part of our duty on the present occasion to decide. I will only observe that our decision—proceeding as it does upon the present circumstances of the case, *i.e.*, while Government revenue has not been assessed—does not anticipate the assessment of revenue, and does not decide whether or not such assessment will have the effect of making the defendant 'justly liable' for any other or higher rent. With reference to the provisions of the Regulation, and apart from the question of Government revenue, I have myself no doubt that the alluvial increment ought to be assessed with rent on the same principle as rent is, by the contract of the parties, payable upon the original, or *usli*, under-tenure.

Decree modified.

Before Mr. Justice Pontifex and Mr. Justice Field.

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SREE RAM CHOWDHRY (PETITIONER) *v.* DENOBUNDHOO CHOWDHRY (OPPOSITE PARTY).*

Appeal—Award—Order refusing to file Award—Civil Procedure Code (Act X of 1877), ss. 525, 588.

Matters in dispute were referred to arbitration without the intervention of the Court. An award was made, and upon an application under s. 525 of the Civil Procedure Code to file the award, one of the parties showed cause why the award should not be filed, and the Subordinate Judge held the objection to be good.

Held, that no appeal lay.

Baboo *Rashbehary Ghose* for the petitioner.

Baboo *Saroda Churn Mitter* for the opposite party.

The facts of this case sufficiently appear from the judgments of the Court (PONTIFEX and FIELD, JJ.), which were as follows :—

PONTIFEX, J.—The parties before us referred certain matters

* Appeal from Original Order, No. 11 of 1881, against the order of Baboo Menu Lall Chatterjee, Subordinate Judge of Moorshedabad, dated the 30th of August 1880.