# APPELLATE CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice McDonell.*

MOHAMAYA GOOPTA AND OTHERS (PLAINTIFFS) *v.* NILMADHAB RAI (DEFENDANT).* 1885 *March* 31.

*Notice to quit or pay an enhanced rent. Two-fold claim, both for rent and ejectment, not sustainable—Decree for rent and ejectment—Beng. Act VIII of* 1869, *s.* 14.

Where *A*, after notice to his tenants to pay rent at an enhanced rate from the commencement of the ensuing year or quit, brought a suit in which he prayed for a higher rate of rent or ejectment in the alternative, *held*, that in such a suit the plaintiff could not insist upon a two-fold claim for both rent and ejectment, nor obtain a decree for rent for the first quarter and ejectment thereafter.

It is doubtful whether a notice in the alternative form to pay enhanced rent from a certain day or quit is a good notice. *Janoo Mundur* v. *Brijo Singh* (1) doubted.

IN this suit, instituted on the 17th Bhadro 1288 (1st September 1881), the plaintiffs not only claimed rent for the last quarter of 1287 B. S. at the rate of Rs. 14-4 per annum, but on the basis of a notice, calling upon their tenant either to quit the holding or pay rent at the enhanced rate of Rs. 43 per annum from the beginning of the year 1288 B. S., also prayed for enhanced rent for the first quarter of 1288 B. S., and failing that, for *khas* possession of the holding and ejectment of the defendant. The Munsiff found the notice proved and gave the plaintiff a decree at the old rate up to the end of the first quarter of 1288 B. S. On appeal, the District Judge observed: "A reference to the notice will show that it is really a notice to quit the land from the beginning of the year 1288 B. S., and, in the event of the

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, one of the Judges of this Court, dated the 19th of June 1884; in Appeal from Appellate Decree No. 637 of 1883, against the decree of J. G. Charles, Esq., Officiating Judge of Rajshahye, dated the 23rd of January 1883, confirming the decree of Baboo Mohendra Lall Ghoswain, Second Munsiff of Natore, dated the 31st of March 1882.

(1) 22 W. R, 518.

1885

MOHAMAYA GOOPTA v. NILMADHAB RAI.

defendant not complying with this requisition, an exorbitant rent in the form of a penalty is imposed. Paragraph 4 of the plaint prays in the first place for enhanced rent, and failing this prayer being granted, the plaintiff asks for *khas* possession; but the Government Pleader on behalf of the appellant does not press the claim for any more rent than that decreed, but urges that his client is entitled to immediate *khas* possession. Finding as I do on the evidence that a notice of ejectment was duly served on the defendant by registered letter in Pous 1287, I can see no reason why the defendant should be allowed to retain possession as he has been found to be a mere tenant-at-will." The Judge accordingly supplemented the Munsiff's decree by ordering the immediate ejectment of the defendant.

An appeal was preferred by the defendant to the High Court, and the value of the suit being for Rs. 15 the appeal came on before a single Judge. Mr. Justice *Field*, in reversing the decree of the lower Appellate Court, said: "The District Judge assumes in his judgment that the Munsiff had decided that the defendant was a mere tenant-at-will. The Munsiff did not decide this question . . . . . Whether the defendant was a tenant-at-will was not put in issue and tried .

The question of the reasonableness of the notice was not tried, and a notice in the form in which this notice was given, that is to pay a higher rent or quit, is not an absolute notice to quit on which to found a suit for ejectment. I think, therefore, that the decree of the lower Appellate Court, in so far as it directs the immediate ejectment of the defendant, must be set aside."

From that decision the plaintiffs appealed under s. 15 of the Letters Patent.

Baboo *Kishori Lal Sarkar* for the appellants.

Baboo *Kishori Mohun Rai* for the respondent.

The Court (GARTH, C.J., and MCDONELL, J.) delivered the following judgments.

GARTH, C.J.—This was a suit by the plaintiff, who was the defendant's landlord, for a double purpose.

He first claimed rent from the defendant at the rate which the defendant and his father had been paying up to the close of the

year 1287. He then claimed enhanced rent for the first three months of 1288; but, if the Court should be of opinion that he was not entitled to this enhanced rent, he claimed to eject the defendant as from the close of the year 1287.

This latter claim was founded upon a notice to quit, which the plaintiff had served upon the defendant of a somewhat ambiguous character.

The notice was given about three months before the close of the year 1287; it stated that the defendant, who had succeeded his father in the tenancy, had no interest (which meant, we presume, no permanent interest) in the tenure; and it required the defendant to quit the land at the end of the year 1287, or, if he did not quit the land, to hold it at an enhanced *jumma* of Rs. 43.

The defence to the suit was, that the defendant was not a tenant-at-will, but that he held a permanent *mourasi* tenure in the land.

The issues for determination were—

1*st*.—Whether the defendant's tenure was *mourasi*?

2*nd*.—What is the *jumma* of 15 biggahs 13¼ cottahs?

3*rd*.—Was the notice of enhancement served upon the defendant? and

4*th*.—Are the plaintiffs entitled to the enhanced rate claimed?

The Munsiff found that the defendant's was not a *mqurasi* tenure, but he did not go on to ascertain what its real nature was.

He also found that the notice of enhancement was not binding upon the defendant, and, consequently, he gave the plaintiff a decree for the old rent, that is, the rent at which the defendant and his father had held previously to the end of 1287.

From that decree the defendant appealed; and the District Judge held that the plaintiff had a right in this suit to insist upon his two-fold claim—that is to say, the claim for rent and the claim for ejectment. He apparently left confirmed the decree which had been made by the first Court for the rent up to the end of the first three months of 1288; but he says that the plaintiff had a right to avail himself also of the notice to quit, and so to eject the defendant from the expiration of the first three months of 1288. He consequently gave the plaintiff a decree for ejectment as from that time.

1885

MOHAMAYA GOOPTA v. NILMADHAB RAI.

On appeal to this Court, the learned Judge considered that it had not been determined by the first Court whether or not the defendant was a tenant-at-will. This, he says, was an important question; and if the suit could have been maintained for ejectment, he would have thought it necessary to remand the case, in order to have the question determined, whether the defendant was or was not a tenant-at-will. But he found that the notice to quit was not sufficient to entitle the plaintiff to eject the defendant.

The learned Judge says: "The question of the reasonableness of the notice was not tried; and a notice in the form in which this notice was given, that is, to pay a higher rent or to quit, is not an absolute notice to quit on which to found a suit for ejectment. I think, therefore, that the decree of the lower Appellate Court, in so far as it directs immediate ejectment of the defendant, must be set aside, and the appeal decreed with costs."

The effect of that decision was to set aside the decree of the District Judge, in so far as it related to the ejectment, and to confirm it so far as it related to the rent.

It has been contended before us that the learned Judge was wrong; and that the notice was a valid one and meant this: "I insist upon your paying an enhanced rent at the rate of Rs. 43 for the whole tenure from the close of 1287; and, unless you pay that, I give you notice to quit as from the close of 1287."

It is said that there is a case of *Janoo Mundur* v. *Brijo Singh*, reported in 22 W. R., 548, and decided by *Phear* and *Morris*, JJ., which approves of a notice to quit in that form. There the plaintiff, a landlord, sued to obtain an enhanced rent, on the strength of a notice which he had given under ss. 14 and 5 of Beng. Act VIII of 1869; but in that case the defendant was a tenant-at-will, and not an occupancy ryot; and *Phear*, J., in giving judgment, lays down the law thus.

He says: "As has been more than once remarked in this Court, the right of the plaintiff is in accordance with s. 8 to make his own terms with the defendant, or to turn the defendant out of the occupation of the land. He could do this by serving him with a reasonable notice requiring him to quit his occupation at

the end of the year, unless he agreed to pay thenceforward the rates of rent mentioned in the notice: And in the event of such a notice as this being served, if the ryot chooses to continue on in the occupation of the land, he must be taken to have agreed by implication to hold the land at the rate mentioned in the notice. This was the view apparently taken by the Full Bench in the case of *Bokronath Mundul* v. *Binodh Ram Sein* which is reported in 10 W. R., 33."

Now, in the first place, I am not aware of any other case in which this ruling of *Phear*, J., has been approved. It was an extra-judicial opinion, not necessary for the purposes of the case then under consideration; and I think it may well be doubted whether a tenant, after receiving such an alternative notice, and continuing in occupation of the land, would be liable to pay the enhanced rent claimed.

But, even, if Mr. Justice *Phear* were right in his opinion, it would hardly avail the plaintiff in the present suit, because all that Mr. Justice *Phear* says is this, that if a notice is given requiring a tenant to quit at the end of the year, or else to pay a rent at a specified rate, and the tenant does not quit, it may be inferred that he agrees to hold at the specified rate, and the landlord may sue him for rent at that rate. He does not go on to say that the landlord would have a right to proceed against him in the same suit *both for rent and ejectment.*

It seems to us that what the plaintiff has attempted to do in this case is not warranted by any rule of law. If the notice to quit was a valid one, *it was a notice to quit at the end of the year* 1287; and if the plaintiff had a right to eject him at all, he had a right to eject him, and treat him as a trespasser *as from the close of that year.*

It was open to the plaintiff at the close of the year to waive his right to eject, and to treat the defendant as a tenant. But he had no right to do both. He had no right to say: "I will waive my right to eject you during the first three months of 1288. I will treat you as a tenant during those months, and after that I will eject you." The plaintiff must avail himself of his notice as from the end of 1287, or not at all. He cannot waive his right to eject for a time, and insist upon it afterwards.

1885

MOHAMAYA GOOPTA v. NILMADHAB RAI.

Thus far we have assumed that the notice to quit was a valid one, but, speaking for myself, I confess I have some doubts whether it is so. A notice to quit ought to be clear and unambiguous. This is the English rule, and it seems to me a sensible one, but it is not necessary under the circumstances to decide that point.

We think that in this case the learned Judge of this Court was right in holding that the decree for ejectment which has been made by the lower Appellate Court must be set aside. We do not desire to add anything to what the learned Judge has said upon the other points. No doubt the first Court has not decided anything as to whether the defendant is a tenant-at-will or not. All that has been decided is, that the defendant's tenure is not the *mourasi* tenure which the defendant claimed. Therefore, in any fresh suit that may be brought, it will be open to either party to show what the nature of the defendant's tenure really is, assuming, of course, that it is not a *mourasi* tenure. This appeal must be dismissed with costs.

MCDONELL, J.—I concur in holding that the appeal must be dismissed on the ground that the plaintiff could not sue the defendant as a tenant and as a trespasser in one and the same suit; by suing as a tenant he must be held to have waived his right to eject him as a trespasser. I am doubtful whether in this country a notice, by which a tenant is given his option either to pay an enhanced rent from a certain day or quit, should be held to be insufficient and invalid. (1) I do not know of any cases in which this has been held, and certainly notices in this form have been not unfrequently given by landlords in this country.

*Appeal dismissed.*

(1) [NOTE.—See *Ahearn* v. *Bellman*, L. R. 4 Ex. D. 201.]