dian of the present applicant having paid money into Court under an order in such a petition, the present petitioner, who was now of age, was entitled to apply in the same way for the payment out.

Mr. Justice WILSON made the order prayed for.

Order as prayed.

Attorneys for petitioner: Messrs. *Sanderson & Co.*

1885

RUTNESSUR BISWAS v. HURISH CHUNDER BOSE.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

RUTNESSUR BISWAS (PLAINTIFF) v. HURISH CHUNDER BOSE (DEFENDANT.)*

1884 *December 2.*

Damages for breach of clause in lease—Rent suit—Assessment of damages—Substantial damage—Nominal damage.

B obtained a lease of certain lands from *A*, agreeing thereunder to pay to *A* a certain rental for the land, and also a sum of Rs. 183-6-3 yearly to *A's* superior landlord, obtaining a receipt therefor.

A sued *B* for the rent due to himself, and for the sum due to his superior landlord. *Held*, that *A* was entitled to recover the sum due to his superior landlord as damages for breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which *A* might become liable to his superior landlord.

THIS was a suit described in the plaint as one for arrears of rent due for the years 1284-1285.

It appeared that up to the year 1279, one Rysona Dasi was the holder of 469 bighas of *ganti jama* lands, and in that year she granted an *ijara* lease of these lands to one Gobind Chunder Sircar for a term of nine years on the following terms, *viz.*, (1), that the Government revenue and rent due to the zemindar, amounting to Rs. 183-5-11, should be annually paid to the Collector and the zemindar respectively, and *dakhillas* taken for such payments; (2), that Rs. 125 should be yearly paid out of the profits of the land; (3), that eight pots of molasses made of date juice should be annually presented, or in default Rs. 3 instead thereof.

* Appeal from Appellate Decree No. 1021 of 1883 against the decree of Baboo Amrita Lal Chatterji, Subordinate Judge of Nuddea, dated the 31st of January 1883, modifying the decree of Baboo Sri Nath Pal, First Munsiff of Bongong, dated the 9th of September 1881.

1884

RUTNESSUR BISWAS v. HURISH CHUNDER BOSE.

On the 9th Bysack 1280, Gobind Chunder Sircar granted to one Hurish Chunder Bose a *dur-ijara* of these lands at a rental of Rs. 127, subject to the other condition under which he himself held. Hurish Chunder Bose obtained confirmation of this *dur-ijara* lease from Rysona Dasi, and she, after receiving a portion of the rent from Hurish Chunder Bose on the 17th Assar 1284, sold her right and interest in the lands, together with her right in the remainder of the profit and rent due to the zemindar, to one Rutnessur Biswas. The rent of 1282-83 not having been paid, Rutnessur Biswas brought a suit for rent against Hurish Chunder Bose for these years, and obtained a decree which was affirmed on appeal. Rutnessur Biswas brought this present suit against Hurish Chunder Bose to recover arrears of rent for the years 1284-85, stating that Rs. 183-6-3 was the sum due to the zemindar; Rs. 127 was due as profits, and Rs. 9-6-8 as road and public works cesses, and Rs. 3 as the value of the molasses for the year 1284, and that the same amount was due for the year 1285, and that the *dakhillas* from the Collectorate and the zemindar had not been make over to him; and he therefore asked for a decree for that amount and for Rs. 225-10-10 as interest due on account of the default of payment of "instalments," and for delivery of the *dakhillas*.

Hurish Chunder Bose contended (1) that he was in possession, of the undertenure merely as *benamdar* of one Bani Madhub Sircar; (2) that the rent claimed was paid; (3) and that the plaintiff owed him certain sums in respect of certain *jummas* held by him in the undertenure, and he claimed to set those sums off as against the rent. He, however, set out in his written statement the terms on which Gobind Chunder Sircar held this *ijara* from Rysona Dasi, and admitted that they were correctly stated in the plaint.

The Munsiff found that the defendant was not the *benamdar* of Bani Madhub Sircar; that a payment of Rs. 116-5-9 had been made by the defendant towards the rent and cesses of the years 1284-85; and he therefore was entitled to a deduction to this amount; that it was not proved that the plaintiff held any undertenure from the defendant, and that the plea of set off could not be allowed. He, therefore, gave the plaintiff a decree for

the amount claimed, less the sums paid, and ordered the *dakhillas* certifying the payment of that sum to be made over to the plaintiff.

The defendant appealed to the District Judge, who confirmed the decision of the Munsiff on all points, save as to the question of the sums payable to the plaintiff's superior landlord and to the collector; and as to this point he held as follows: "There is nothing to show that the plaintiff has been obliged to pay the same, or that any obligation has been cast upon him to pay it. The obligation was upon the defendant to pay these sums; and when no claim has been made upon the plaintiff, and when there is no allegation that the plaintiff has paid them, the presumption is that these sums have been paid by the defendant"; and as to these items he modified the judgment of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Bhobani Churn Dutt* for the appellant contended that the Subordinate Judge should have given the plaintiff a decree for the sums due to the superior landlord and to the Collector for revenue, inasmuch as the *kabuliat* provided for such payments; and that the onus of proving payment of these sums was upon the defendant.

Baboo *Srinath Doss* and Baboo *Gyanendra Nath Doss* for the respondent contended that the suit being one for rent, the monies due to the superior landlord and to the Collector could not be said to be rent, and therefore the plaintiff ought not to recover these sums.

Judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

The plaintiff's case is as follows: The plaintiff is assignee of one Rysona Dasi, who held in possession certain land specified in the plaint. Of that land she granted an *ijara* to one Gobind Chunder Sircar in 1279. He, in 1280, granted a *dur-ijara* of these lands to the defendant, and in 1281 gave up the *ijara* to Rysona Dasi. The defendant after this applied for and obtained from Rysona Dasi a confirmation of his *dur-ijara*; and after this, in 1284, Rysona Dasi assigned her entire right to the plaintiff.

1884

RUTNESSUR BISWAS v. HURISH CHUNDER BOSE.

The terms under which the defendant held are contained in a *kabuliat*, not part of the record in this case. The plaint states, as the reason for not filing it in the present case, that it is already filed in suit 1230 of 1877, being a suit against defendant for the rent due under the *kabuliat* for the years 1282-83 in which a decree for plaintiff had been made, which decree had been appealed to the Judge's Court.

No objection was taken on the ground of the absence of the *kabuliat* containing the terms of the tenancy. It was in truth admitted in the defendant's written statement that the tenancy was held on the terms as to payment alleged by the plaintiff.

According to the terms of the *kabuliat* the tenant was bound to pay (1), Rs. 183-6-3 to the zemindar; (2), road and public works cess, Rs. 4-11-4 each; (3), Rs. 127-0-0 profit rent, and Rs. 3 for value of molasses to the plaintiff. The plaint alleged that "plaintiff frequently called on defendant to pay to him the rent due to the zemindar, or to make over to him the *dakhillas* showing payment of it, and to pay him the profit rent due, but the defendant did not comply with his request."

The plaintiff claimed Rs. 875-4-8, of which Rs. 645-9-10 was in respect of the monies payable by the defendant for the years 1284 and 1285, and Rs. 229-10-10 as interest due on the unpaid "instalments," as they are called in the translation of the plaint.

The plaint seems to have been treated by the Munsiff, and apparently understood by the parties, as including a claim for the delivery by the defendant to plaintiff of such *dakhillas* as he might have in his possession.

The defendant, among other defences (some of which need not be noticed), alleged: 1*st*, that he was Bani Madhub's *benamdar*; 2*nd*, that Bani Madhub had paid the rent due to the zemindar; and 3*rd*, that Bani Madhub had the *dakhilla* for the rents. As to the first defence, that defendant was a *benamdar* only, the Munsiff held him estopped by his admission in, and by the decree in the previous suit. As to the second, the defendant tendered evidence to prove the payment of rent, and produced some *dakhillas*. The Munsiff held that

payment to the amount of Rs. 116-5-9 only was established, pronounced a decree for plaintiff for Rs. 529-4-1, the residue of the Rs. 645-9-10 together with interest, Rs. 132-3-11; and ordered the defendant to hand over the *dakhillas* to the plaintiff.

The Sub-Judge affirmed this decision save as to that part of it which held the defendant liable to pay to the plaintiff an amount equal to the sums payable to the superior landlord. As to these he reversed the Munsiff's decision, on the ground, as stated in the judgment, "that there is nothing to show that the plaintiff has been obliged to pay the same, or that any obligation has been cast upon him to pay it. The obligation was upon the defendant to pay these sums; and when no claim has been made upon the plaintiff, and when there is no allegation that the plaintiff has paid them, the presumption is that those sums have been paid by the defendant." Before dealing with these reasons, a defence set up before us must be noticed.

It is contended, first, that this suit is merely a suit for rent; and second, that the monies payable to the superior landlord are not rent, and cannot be recovered as such.

We think this latter contention correct. Rent cannot be made payable as such to a third person (Woodfall, 12th ed., 355; Lit. s. 346).

But although the suit is described in the first paragraph of the plaint as a suit for rent, we think the case made by the plaint sufficiently makes out (as an alternative) a claim for damages against the defendant for breach of his contract to pay the superior landlord. It was dealt with on that footing by the Subordinate Judge, and on that footing decided against the plaintiff for the reason given in the passage above referred to. The plaintiff's claim under this head must, we think, be construed as a claim for damages.

As to the grounds assigned by the Subordinate Judge for his decision, the defendant alleged in his written statement that the payments had been made, and he tendered evidence to prove it. He failed. If we thought it necessary, we should send the case back for further evidence as to the payment or non-payment of the money. But we think that, as the defendant undertook the onus of proof of payment, and having regard to

1884

RUTNESSUR BISWAS v. HURISH CHUNDER BOSE.

the respective positions of the parties, the Munsiff was right in deciding the issue as to the fact of payment to the superior landlord against the defendant.

It being established that the defendant's agreement to pay the superior landlord the rents for 1284 and for 1285 was broken, the remaining question is whether plaintiff was entitled to recover from the defendant, as damages for these breaches, the amount payable as rent (for each year) for which he himself remained liable: or whether, as plaintiff has not shown that he had paid the money, he is only entitled to nominal damages.

We think the plaintiff is entitled to recover as damages the full amount which the defendant agreed to pay, and has not paid.

In *Loosemore* v. *Radford* (1), plaintiff and defendant being joint makers of a promissory note, plaintiff as surety and defendant as principal, the defendant covenanted with the plaintiff to pay the money on a given day, and made default. It was contended that the plaintiff, not having actually paid any money on the note, had suffered no substantial injury, and was entitled to nominal damage only. The Court held that the defendant was liable in the full amount of the money that he ought to have paid according to the covenant. To this same effect is *Lethbridge* v. *Mytton* (2).

Here, the defendant's promise was an absolute promise to pay in discharge of plaintiff's liability to the superior landlord, the rent due for 1284 and for 1285 within each year; and the plaintiff was entitled to maintain an action in damages for the amount the moment the time expired within which the defendant was bound to pay.

The decree of the Subordinate Judge must be reversed, and that of the Munsiff affirmed. If the Munsiff has awarded interest on the two sums of Rs. 183-6-3 or either of them, his decree must be modified by striking out the interest so allowed, as interest cannot be allowed on these sums, which are awarded to the plaintiff as damages.

Plaintiff to have costs throughout.

Appeal allowed.

(1) 9 M. & W., 657. (2) 2 B. & Ad., 772.