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Sree Ram Chowdhry v. *Denobundhoo Chowdhry* (1), another Division Bench of this Court held that no appeal lay from an order under s. 521. We are of opinion that we should follow the decision of Sir *Richard Couch* in *Mothooranath Tewaree* v. *Brindabun Tewaree* (2), and holding that the lower Appellate Court had no jurisdiction to receive this appeal, we set aside the judgment of that Court.

To this our decision is limited. We do not decide any question whatsoever regarding the validity of the award, and whether it is binding upon the parties or not. These questions, if they are ever raised, must be raised in appeal from the final decision of the Munsiff.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Tottenham, and Mr. Justice Pigot.

CHULTAN MAHTON (DEFENDANT) *v.* TILUKDARI SINGH AND OTHERS (PLAINTIFFS.)*

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"*Abwabs*," *Illegality of—Cesses—Reg. VIII of* 1793, *s.* 54—*Reg. IV of* 1794—*Reg. V of* 1812, *s.* 3—*Beng. Act VIII of* 1869, *s.* 11—*Act X of* 1859, *s.* 10—*Contract Act—Act IX of* 1872, *s.* 23.

Where it is not actually proved that *abwabs* have been paid or have been payable before the time of the permanent settlement, a landlord is not legally entitled to recover them as against his ryots, even assuming that by the custom of the estate the ryots, and their ancestors before them, have for a great number of years paid such *abwabs*.

Semble, that a claim for the recovery of *abwabs* existing before the time of the permanent settlement would not be enforceable.

THIS was a reference to a Full Bench arising out of a case in which the plaintiffs, who were the ticcadars of a certain mouzah, sought to recover from a ryot Rs. 1,105-1-3, as arrears of *nagdi* and *bhowli* rent for the years 1286 to 1288, together with certain

* Full Bench Reference on Special Appeal No. 1076 of 1883, against the decree of the District Judge of Zillah Gya, dated 21st March 1883, modifying the decree of the Extra Subordinate Judge of that district, dated the 31st May 1882.

(1) I. L. R., 7 Calc., 496. (2) 14 W. R., 327.

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"customary *abwabs*" which the plaintiffs alleged had been prevalent in the village from time immemorial. On the *nagdi* tenure measuring 14 bighas 7 cottahs, the following cesses were claimed

	Rs.	As.	P.	
Rent	75	9	0	
Dastur	0	7	9	At ½ anna per bigha.
Hujatana	0	1	0	
Sonari	2	6	0	At ½ anna per rupee.
Batta Mal	3	11	0	At 3 pice per rupee.
Batta Company	3	13	6	Do.
Dâk Cess	1	11	0	
Road Cess	12	10	9	
Total Rs. ...	108	6	0	

On the *bhowli* tenure, the following dues were claimed, *viz.*:—

The *neg* or landlord's due of 1 seer 4 chittaks per maund.

The *punsera* or harvest fee of 5 seers.

The *bodhwara*, 2 chittaks per maund for payment of the wages of the village watchmen.

The *pohwi*, 4 chittaks per maund for payment of the wages of the priest.

The *nocha*, 8 chittaks per maund for payment of the wages of the village establishments, *viz.*, the *putwari* 2 chittaks, the *gomashta* 2 chittaks, the *amin* 2 chittaks, the *pales* 1 chittak, the *nawinsinda* 1 chittak.

The *mangan*, 30 seers per plough.

The *siddha*, 10 seers per plough (putwari's due).

The defendant denied that any arrears of rent were due; but whilst admitting that he was liable to pay 1 anna per ryot for *Hujatana*, and 3 pice per rupee for *Batta Company*, contended that the other items were illegal cesses and were not recoverable. The Subordinate Judge found that the defendant was liable for road-cess and for the items admitted by him, but as regarded the remaining items other than the *assul rent* he held that they were illegal, as being contrary to s. 54 of Regulation VIII of 1793. The District Judge found that the evidence given satisfactorily established a custom showing that the cesses claimed on the *nagdi* tenure had been prevalent in the village for very many years, and that they had been paid by other ryots for a long

period; and as regarded the dues claimed on the *bhowli* lands, that the evidence established (1) that these dues had been collected and paid from, time immemorial; and (2) that having regard to the *bhowli* system that they were not excessive; he therefore held, on the authority of *Budhna Orawan Mahtoon* v. *Jemadar Babu Jogeshur Doyal Singh* (1), that such cesses were not illegal, and gave the plaintiffs a decree.

On the defendant coming up before the High Court on special appeal the Court (GARTH, C.J., and BEVERLEY, J.) having doubts as to whether the claim for *abwabs* could be enforced under the present Rent Law, and having regard to the conflicting authorities on the point, referred the following question to a Full Bench:—

Whether, assuming that the *abwabs* in question have, by the custom of the estate of which the lands form part, been paid by the defendant and his ancestors, for a good many years, they are legally recoverable by the plaintiffs, although they are not actually proved to have been paid or payable before the time of the permanent settlement?

Baboo *Chunder Madhub Ghose* and Baboo *Saligram Singh* for the appellants.

Baboo *Chunder Madhub Ghose*.—Regulation VIII of 1793, s. 54, lays down that *abwabs* should be consolidated with the *assul*, and this claim is in contravention of that section. Regulation V of 1812, s. 3, although altering portions of Regulation VIII of 1793, declares that nothing therein contained shall legalize an imposition of arbitrary cesses. Section 10 of Act X of 1859 and s. 11 of Beng. Act VIII of 1869 provides that damages shall be payable by any person exacting from tenants excess rents under the name of *abwabs*.

The cases which show that such arbitrary cesses are prohibited are—*Kumola Kant Ghose* v. *Kanoo Mahomed Mundul* (2), *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Surmah Mojoomdar* (3), *Dhalee Puramanick* v. *Anund Chunder Tolaputtar* (4),

(1) 24 W. R., 4.
(2) 11 W. R., 395.
(3) 14 W. R., 447.
(4) 5 W. R., 86.

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Sonnum Sookul v. *Shaikh Elahee Buksh* (1), *Orjoon Sahoo* v. *Anund Singh* (2), *Burmah Chowdhry* v. *Sreenund Singh* (3), *Mengur Munder* v. *Baboo Huree Mohun Thakoor* (4), *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Mojoomdar*, (5). The case of *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (6) is distinguishable, as there the tenant consented to pay the cesses.

The case of *Lachman Rai* v. *Akbar Khan* (7) shows, where a custom regarding the payment of cesses is alleged, how such custom should be proved, and lays down that it must be definite to be good.

Mr. *Evans*, Baboo *Anoda Prosad Banerji*, and Moulvi *Mahomed Yusuf* for the respondent.

Mr. *Evans* contended that the liability relating to the payment of the *abwabs* flowed from the incidents of the contract under which the lands were let to the defendant and his ancestors, such incidents, though not expressly mentioned in the contract, being still deducible from the usage or custom established on the evidence. The Courts below have found that these payments have been paid from time immemorial; there is not, nor has there been, any legal enactment which renders *abwabs* which were collected at the time of the permanent settlement, illegal. Reg. V of 1812, s. 3, lays down that such cesses may be enforced in certain cases by the Courts, and the evidence of custom sufficiently shows that there was a contract, express or implied, between the parties for the payment of these dues; and s. 9 of Reg. IX of 1825 saves certain cesses, levied according to ancient custom, from being affected by certain Regulations which abolished such cesses. A claim for the recovery of *abwabs* existing before the permanent settlement would be enforceable notwithstanding the provisions of Reg. V of 1812, Reg. VIII of 1793, Reg. IV of 1794, Act X of 1859 and Beng. Act VIII of 1869, because s. 54 of Reg. VIII of 1793 contains merely a direction for the consolidation of *abwabs* with the *assul* rent, but no penalty

(1) 7 W. R., 453.
(2) 10 W. R., 257.
(3) 12 W. R., 29.
(4) 23 W. R., 447.
(5) 25 W. R., 8.
(6) 22 W. R., 12.
(7) I. L. R., 1 All., 440.

under the Regulation was attached to an omission on the part of the landholders who might act in contravention of that direction.

Section 61 of Reg. VIII of 1793 provides that persons suing on engagements in which the *assul* and *abwabs* shall not appear to have been consolidated shall be non-suited; but this is not a penalty which would render the engagement illegal, but merely a bar to success; and besides it refers to written engagements which were by that Regulation rendered obligatory. But all the formalities as regards such engagements were abolished by s. 3 of Reg. V. of 1812, and it has been settled and undoubted law for sixty years that no written engagements or special forms are necessary. The bar of section 61 having been long removed, there is nothing illegal in a contract to pay items which are lawful under s. 3 of Reg. V of 1812, or which were lawful at the time of the permanent settlement, and have ever since been paid as a customary term embodied in the unwritten contract under which the ryot holds.'

The items in dispute are described in the plaint, it is true, as "old usual *abwabs*," yet I submit they are not *abwabs*, but part of the rent, inasmuch as they are definite and certain items, and anything which is not uncertain or indefinite is not an *abwab* within the meaning of the Regulations.

Harrington's Analysis, Vol. II, p. 19, shows that the committee of circuit in 1772 proposed that such cesses as were oppressive or of late establishment should not be allowed, but that such as were of long standing and had been cheerfully submitted to by the ryots should not be considered illegal. As regards the *putwari* dues, Reg. XII of 1817 shows that they may be paid in money, grain, or land, or in any legal manner whatsoever. The note on *abwabs* in *Field's Regulations*, p. 61, was also cited.

Baboo *Mohesh Chunder Chowdhry*, on the same side, contended that, although there was no written agreement to pay these cesses, yet a contract to do so must be inferred, and cited—*Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (1), *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy* (2). Payments which

(1) I. L. R., 8 Calc., 730. (2) 22 W. R., 12.

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were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform, and had been paid by the ryot from the beginning, according to custom, were held not to be illegal cesses—*Budhna Orawan Mahtoon* v. *Jemadar Babu Jogeshur Doyal Singh* (1).

Baboo *Madhub Chunder Ghose* in reply cited s. 4 of Reg. IV of 1794.

The opinions of the Full Bench were as follows:—

GARTH, C.J.—I think that the sums in question are not recoverable.

They are called *abwabs* by the plaintiff himself, and they are *abwabs*, as it seems to me, to all intents and purposes; and I consider that the Regulation of 1793, as well as the Rent Law of 1859, intended to put an end to the *abwab* system, and to render them illegal.

It has been argued that to abolish this system is contrary to the wishes of both landlords and ryots, and I believe that to be true.

Landlords often find it a convenient means of enhancing their rents in an irregular way; and the ryots, as a rule, would far rather submit to pay *abwabs* than have their *assul* rent increased.

But the system appears to me to be clearly illegal, and I consider that the Civil Courts should do their best to put an end to it.

The plaintiffs' suit will therefore be dismissed as regards the disputed items, with costs in the lower Appellate Court and in this Court, as well as with the costs of this reference.

MITTER, J. (TOTTENHAM and PIGOT, JJ., concurring).—I am of opinion that the question referred to us should be answered in the negative.

The plaintiffs claim the disputed items as "old usual *abwabs*." In the zemindari accounts they are also entered as *abwabs*. The defendant denied that he ever paid them. The District Judge on appeal awarded a decree in favor of the plaintiffs in respect of these items, on the ground that they had been realized by the plaintiffs and their predecessor in title from the defen-

(1) 24 W. R.,

dant and other ryots in the estate for many years. In fact the District Judge finds that, according to the custom of the estate of which the defendant's lands form part, these items have been paid by the defendant and his ancestor for many years.

On these findings of fact it has been contended before us on behalf of the plaintiffs that the liability relating to the payment of these *abwabs* flows from the incidents of the contract under which the lands were let to the defendant and his ancestors, such incidents, though not expressly mentioned in the contract, being still deducible from the usage or custom established on the evidence.

I am of opinion that this contention, so far as it goes, is sound; but the question is whether, having regard to the laws in force relating to *abwabs*, such a contract is enforceable. The solution of this question depends upon another question, namely, whether the imposition of such *abwabs* as these is prohibited and made unlawful by any law in force in this country? If the affirmative be the correct answer of this latter question, it does not admit of any doubt that the plaintiffs are not entitled to enforce the contract and to recover the disputed items; "because every contract made for or about any matter or thing which is prohibited and made unlawful by Statute is a void contract." (Section 23, Indian Contract Act.)

Section 54, Regulation VIII of 1793, says: "The imposition upon the ryots under the denomination *abwab, mathoot,* and other appellations, from their number and uncertainty having become intricate to adjust and a source of oppression to the ryots, all proprietors of land and dependant taluqdars shall revise the same in concert with the ryots and consolidate the whole with the *assul* into one specific sum." Then the section in question fixes the end of the Fusli year 1198 in the Behar districts as the time within which the consolidation was to be effected. The next section provides: "No actual proprietor of land, or dependant taluqdar, or farmer of land, of whatever description, shall impose any new *abwab* or *mathoot* upon the ryots under any pretence whatsoever." This section further provides a penalty for the infraction of the aforesaid provision. Section 61 of the same Regulation has laid down that, "in the event of any claims

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being preferred by proprietors of estates or dependant taluqdars, farmers or ryots on engagements wherein the consolidation of *assul*, *abwab*, &c., shall appear not to have been made, they are to be non-suited with costs." Section 3 of Regulation V of 1812 provides as follows: "Such part of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare forms of pottahs, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded, and the proprietors of land shall henceforward be considered competent to grant leases to their dependant taluqdars, under-farmers, and ryots, and to receive correspondent engagement for the payment of rent from each of these classes or any other classes of tenants according to such form as the contracting parties may deem most convenient and most conducive to their respective interests, provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of *abwabs*, *mathoot*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of the engagements between the parties, or, in other words, enforce payment of such sum as may have been specifically agreed upon between them." Section 10 of Act X of 1859, and s. 11 of Beng. Act VIII of 1869, declared the exaction of any sum in excess of the rent specified in the pottah of an under-tenant or a ryot, or payable under the provisions of the aforesaid Act as *abwabs*, &c., to be illegal.

Under the provisions of the Regulations and Acts cited above, it seems to me that a contract for the payment of *abwabs* is unlawful and is not enforceable by law. It has been contended before us that a claim for the recovery of the *abwabs* existing before the permanent settlement is enforceable notwithstanding these provisions, because s. 54 of Regulation VIII of 1793 contained only a direction for the consolidation of the *abwabs* with

the *assul jumma*, but no penalty was attached to an omission on the part of the landholders to act according to that direction. But it seems to me that this contention is not correct, because s. 61 of the said Regulation, in my opinion, provided the penalty in question, that penalty being the non-suiting of the claim for the recovery of the *abwabs*. Even supposing that this contention is valid, still the plaintiffs cannot succeed in this case. There being this plain direction in the Regulation, if it was not complied with, it is for the landlord to prove that these *abwabs* existed at the time of the permanent settlement. The plaintiffs in this case have not established this fact.

It has been next contended that, although the disputed items in the plaintiffs' claim are described in the plaint as "old usual *abwabs*," and in the zemindari accounts also they are designated as *abwabs* separate and distinct from the specified rent, yet they are not *abwabs* but part of the rent. This contention is mainly based upon the ground that anything which is certain and definite does not come under the class of *abwabs*, the imposition of which is prohibited by the Regulations. Although the Regulations did not clearly define what an *abwab* is, still I think that it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract may call it so. It seems to me that the Regulations, without defining accurately what an *abwab* is, left this question for the determination by the Court in each case upon the evidence. I cannot find anywhere in the Regulation the precise definition of the word *abwab* which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiffs claim them in the plaint and entered them in the zemindari accounts as "*abwabs*."

It has been further said that as there is a contract between the parties for the payment of these dues under the latter portion of s. 3, Regulation V of 1812, the plaintiffs are entitled to recover them. But the language of that section does not, in my opinion, support this contention; on the other hand it provides "that nothing therein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of *abwabs*, *mathoot*, or any other denomination."

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The last four lines of the section in question provide that the engagement for the payment of any sum as may have been specifically agreed upon between the parties shall be enforced. This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord. The section in question provides mainly that the proprietors of land shall thenceforth be competent to grant leases to ryots, &c., and to receive corresponding engagements *for the payment of rent from them.* Having regard to the words of the section in question italicized, I think the words "sum specified" refer to the amount of the rent specified.

I do not think it necessary to notice in detail the decided cases on this point. There is a clear conflict in these decisions, some of them supporting the view which I take. Those in which a contrary view has been taken have been decided either upon the ground that the *abwabs* claimed in them, not being indefinite and uncertain, did not come within the class of *abwabs* prohibited by the Regulations, or, upon the ground that there were clear contracts between the parties for the payment. The last-mentioned ground is evidently based upon the construction of s. 3, Regulation V of 1812, for which the learned Counsel for the plaintiffs contended.

For the reasons given above I am unable to adopt this construction. The view which I take of the section in question is supported by the decision of Sudder Dewanny Adawlut, in *Radha Mohun Serma Chowdhry* v. *Gungapershad Chuckerbuttee* (1). As regards the other ground, *viz.*, that anything which is not uncertain or indefinite is not an *abwab* within the meaning of the Regulations, I have already dealt with it.

I am of opinion that the plaintiffs' suit, so far as the disputed *abwabs* are concerned, should be dismissed.

PRINSEP, J.—I agree in the judgment delivered by Mitter, J. The monies claimed beyond the *assul jumma*, or actual rent, are clearly *abwabs*, and if exacted by the landlord would, under s. 11 of Beng. Act VIII of 1869, entitle the tenant to recover as damages double the sum so exacted.

In determining the matter referred to us by the Division Bench, it has been necessary to trace the course of legislation

(1) 7 Sel. Rep. 142 (o. e.), 166 (n. e.)

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from the permanent settlement, and for this purpose to make use of the edition of the Regulations and Acts of the Legislature recently published by and under the authority of the Legislative Department. This publication reproduces the Regulations and Acts as they now stand on the Statute Book with full effect given to all the amendments and repeals. Attention is nowhere drawn to any alteration in any particular Regulation or Act as it was originally passed. We have been consequently much embarrassed, and might have been misled, in determining the meaning and object of the law, and our time, during the course of the argument, has been wasted in understanding a section of Regulation V of 1812, which, as it is represented in the recent publication by the Legislative Department, contains only a fragment of the section as it was originally enacted. In order to understand s. 2, Regulation V of 1812, it is absolutely necessary that the entire section should be read, and from this it will appear that its object was to withdraw the restriction previously placed on the power of zemindars to grant leases for a period exceeding ten years. The first portion of that section has been repealed, and, if I may venture to express an opinion, inconsiderately repealed. The mutilated section which is now alone law has been republished by the Legislative Department, and if read by itself would reasonably imply that in 1812 the Legislature, for some reason not stated, declared that proprietors of land were competent to grant leases for any period which may seem most convenient to themselves and their tenants, and most conducive to the improvement of their estates.

Other similar instances may doubtless be adduced in which great inconvenience, and probably mischief, will result from the danger of implicitly relying on a mutilated publication of the law emanating from so high an authority as the Legislative Department. I, therefore, desire to draw attention to this matter that those whose duty it is to interpret the law may be warned, and I hope also that the Legislative Department may, on a suitable opportunity, remedy this inconvenience in such manner as may seem most conducive to the public interests involved.

Appeal allowed.