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TARA PRASAD MYTEE v. NUND KISHORE GIRI.

The defendants appealed to the High Court.

Baboo *Omesh Chunder Banerjee* for the appellants.

Baboo *Bhowany Churn Dutt* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The main objection taken before us in this case is that the plaintiffs' suit should be dismissed, because they have failed to produce the sale certificate on which they acquired their title. It has nowhere been denied, nor is it disputed before us, that the plaintiffs purchased in an execution sale the right, title and interest of the defendants, judgment-debtors, in the present case. We, therefore, think that this objection is untenable, and in this respect we agree with the judgment of a Division Bench of this Court in the case of *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (1), in which it was held that "the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate which might afterwards be obtained by him would be merely evidence that the property so passed."

We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

KALI KRISHNA TAGORE (PLAINTIFF) v. FUZLE ALI CHOWDHRY AND OTHERS (DEFENDANTS).*

1883. *April* 10.

Landlord and Tenant—Forfeiture—Waiver by acceptance of Rent.

A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased. It then provided for failure on the lessee's part to execute a kabuliat for the excess lands in the following terms: "If at the fixed time stated above we do not take an amin and cause measurement to be made you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not, our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess rent that will be found

* Appeal from Original Decree No. 228 of 1881, against the decree of Baboo Raj Chundra Sanyal, Officiating Second Sub-Judge of Backergunge, dated the 10th June 1881.

(1) I. L. R., 7 Calc., 129.

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after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliat for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense, subject to payment by the lessees of the "remaining amount."

Held, that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliat when called on to do so.

Davenport v. *The Queen* (1), followed.

Baboo *Kali Mohun Doss*, Baboo *Doorga Mohun Doss*, and Baboo *Ram Sakkhya Ghose* for the appellant.

Baboo *Rashbehary Ghose* for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

CUNNINGHAM, J.—In the suit out of which these appeals arise it is admitted that the plaintiff's father leased to the defendants on 30th Cheyt 1265 (12th April 1859) 4 deores 10½ kanis of culturable land at an annual rent of Rs. 335-4.

The lease provided that every fourth year a measurement should be made, either by the lessor or by the lessees, and additional rent paid for accretions to the land leased in 1859. It then provided for failure on the lessees' part to execute a kabuliat for the excess lands in the following terms:—

"If at the fixed time stated above, we do not take an amin and cause measurement to be made, you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess land that will be found.

(1) L. R., 3 App. Cas., 115.

after deducting the settled land of the dowl executed by us from the land stated therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land as well as of the land which will accrete in future to the said chur; and no objection thereto on our part shall be entertained."

It is alleged in this suit that the plaintiff caused a measurement to be made in 1282 (1875-76) which resulted in a notice dated 31st December 1876, calling on defendants to execute a kabuliat for rent of 9 deores 10 kanis 6½ gundas of excess lands, and the plaintiffs called on the Court to enforce the forfeiture entailed by defendant's failure to execute the kabuliat by ejecting the defendants, or assessing rent on the excess lands.

The defendants denied the fact of measurement, and notice to execute a kabuliat, and in the 9th paragraph of their written statement pleaded that plaintiff had waived his right to enforce the forfeiture by subsequent receipt of rent.

The lower Court has found that the plaintiff measured the land and gave notice to the defendants as alleged, and that there was an excess by accretion of 8 deores 12 kanis and 3 gundas of land. It also found that plaintiff had not waived the right to enforce the forfeiture by subsequent receipt of rent.

But the lower Court, considering that the plaintiff having claimed relief in an alternative form, had really left it to the Court to do substantial equity, decided that the plaintiff should take the rent which it assessed, and should not get possession.

Both sides appeal—plaintiffs in suit No. 228 urging that they are entitled to possession, and that they have not forfeited or waived their right; the defendants in No. 243 questioned the findings of the lower Court, and urged that the decree assessing rent was bad.

Vakils were heard on both sides, and in the end they left it to the Court to decide whether the plaintiffs were entitled to insist on khas possession. The plaintiff's vakil referred the Court to a decision of another Bench in appeal from original decree No. 276 of 1871. That was a case between the plaintiff and other parties. It was founded upon a kabuliat identical in terms as to measurement and forfeiture with the kabuliat in this

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case, and we find that in that case the prayer was for khas possession only, and there was no plea of waiver by receipt of rent. We do not think, therefore, that we are in any way bound to consider that decision, which is under appeal to Her Majesty in Council.

After careful consideration of the case we think that we ought to affirm the decision of the lower Court, and dismiss the plaintiff's appeal on the ground that by receipt of rent in the years 1275, 1276, 1277, 1281, 1282, 1283, 1284, and 1286, for excess lands the plaintiff waived his right to insist on re-entry on defendants' failure to measure the lands, or execute a kabuliat when called on to do so in Pous 1283.

It appears that in each of these years the defendants made an undisputed payment of Rs. 150, which was accepted as rent, but was kept in suspense subject to payment by the defendants of the "remaining amounts." We are decidedly of opinion that such a qualification did not make these payments anything else than payments of rent, and we think that we may be guided on the effect of these payments by the opinion of the Judical Committee in *Davenport* v. *The Queen* (1), to which the defendants' vakil referred us. Their Lordships there remark at pages 131-132: "Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt." In the present case the plaintiff received rent after the defendants had incurred a forfeiture—not indeed conditionally and without prejudice to the forfeiture, but unconditionally and without prejudice to his claim to a larger amount.

The defendants' vakil did not press us with Appeal No. 243. We, therefore, dismiss both these appeals, and under the circumstances direct that both sides bear their own costs in this Court.

Appeals dismissed.

(1) L. R. 3 App. Cas., 115.