chunder Haldar (1). That was also a case of a farming lease, and the only question decided related to the stamp required for an *istafa* or relinquishment. This observation disposes of that case as an authority upon the question before us. 1883 JUDOONATH GHOSE v. SCHOENE KILBURN & CO.

It thus appears to me that none of the cases quoted from the Sudder Dewany Adawlat Reports support the allegation that has been made before us, while there are many cases to be found in those reports which go to shew the contrary.

The very learned Chief Justice has dealt with the case of a patni tenure in which it was distinctly held that a patnidar cannot, of his own option, relinquish his tenure, and, so far as I understand the law of this country, the principle of that case is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, and in this term tenure I do not here include a farming lease.

I think, therefore, that the alleged relinquishment was no answer to this suit for rent, and that this appeal must be decreed with costs.

Appeal allowed.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

CARLISLES, NEPHEWS AND CO. (PLAINTIFFS) *v.* HURMOOK ROY AND ANOTHER (DEFENDANTS.)* 1883 *February* 28.

Contract—Construction of Contract—Printed form of Contract—Writing and Printing—Sale of Goods to arrive.

The defendants contracted to purchase certain piece goods from the plaintiffs, who were dealers in those goods. The contract of sale was written out on one of the printed forms of the plaintiffs' firm, which forms contained in print, the words "now in course of landing or in said godowns" and "now on board ship." As a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on board ship.

Held, that under the circumstances the printed words above set out formed no part of the contract entered into between the parties.

* Small Cause Court Reference, from an order made by H. Millett, Esq., Chief Judge of the Calcutta Small Cause Court, dated the 5th of July 1882.

(1) S. D. A., 1855, p. 205.

1883

CARLISLES NEPHEWS & CO. v. HURMOOK ROY.

THIS was a reference from the Chief Judge of the Calcutta Court of Small Causes. The terms of the reference are as follows:—

This suit is brought by the plaintiffs to recover Rs. 678-7-3 as damages by reason of the failure of the defendants to take delivery of certain goods under a contract, dated 11th August 1880.

Certain facts having been admitted by both sides, the parties have practically stated a special case for me to decide on the points of law raised.

The plaintiffs have given up their interest, *viz.*, Rs. 74, and the defendants in turn admitted that Rs. 604-7-3 would be the damages to which the plaintiffs would be entitled if they have legal right on their side.

The contract runs thus—

"The sellers (*i. e.*, the plaintiffs) sell, and the buyers (*i.e.*, the defendants) buy such of the undermentioned goods as have already arrived and are now in the sellers' godowns or as may hereafter arrive and be deliverable at the said godowns at the rates specified, *viz.* :—

P C S or otherwise 150 cases } per
White Grd. Prints C/2 9 *p. yd.* } and now in course of landing or
To arrive as P C S 4145/69, 4175/80 } in the said godowns.

Nov.	Dec.	Jan.	Feb.	Mar.	April	May
20	20	20	25	25	20	20 cases.

One month's extension for delivery from the last day of each month in which shipments to arrive. No sales to others

45 *chests checks*
105 *chests assorted*

} now on board ship."

The above is the important part of the contract, which is in English, the italicised words representing the words in writing as distinguished from the printed form of the contract. At the foot one of the defendants' made a note in Nagri of which the following is a translation.

"Hurmook Roy Ram Chunder chintz, shirtings boxes 150, rate 2 annas 9 pies Goods same as before $\frac{\text{condition}}{\text{agreement.}}$ November 2, December 20, January 20, February 25, March 25, April 20, May 20. Godown due 30 days more $\frac{\text{condition}}{\text{agreement}}$ from date 30th; goods to be taken according to $\frac{\text{condition}}{\text{agreement.}}$

On the same date as this contract the defendants took 40 cases of the same goods (ready goods) under another contract. A suggestion has been made by the defendants' pleader that the Nagri writing, which must control the English, makes a different contract to that stated in the printed form; but the only difference I can ascertain is, that the defendants say the goods are to be same as before. But the plaintiffs admit that the contract really was for the same class of goods as the defendants had taken before, and

that they (the plaintiffs) have understood it as such. There is therefore no material difference.

Though the contract states it, no cases were, as a matter of fact, in the godown at the time, except those bought under the other contract.

No cases arrived either in November or December, and when they did arrive they were not according to quality. Twenty cases arrived in each of the months of January and February, but they were not according to quality. In March twenty cases arrived according to quality. Notice was given to the defendants, but they declined to take them. This resulted in a correspondence, and on the 5th April 1881, Mr. Camell, the defendants' attorney wrote a letter to the plaintiffs, of which the following is a portion :— "I am further instructed to state that the contract having been broken by you my clients contend they are not bound to take delivery of the March instalment, and they therefore decline to take delivery of the 25 cases now offered to them, and they repudiate all liability in respect thereof, and also of the future instalments, and they will defend any action which you may institute against them." The plaintiffs accordingly resold the goods.

In April 20 cases arrived, but they were not according to quality. In May 20 cases arrived according to quality. Notice was given to the defendants, but they refused to take them, and the plaintiffs resold. The main argument adduced on the part of the defendants is, that the contract is an indivisible one for 150 cases, and that as there was a failure on the part of the plaintiffs to perform the former portion of the contract, the defendants in their turn were justified in refusing to accept both the March and subsequent arrivals, *Honck* v. *Muller* (1) being cited an authority for the proposition. On the other side it is contended, among other things, that this being a contract to arrive, the plaintiffs are not bound to tender delivery unless the goods arrive. Let us see what the material words of the contract are. They are that the sellers sell and the buyers buy such of the undermentioned goods, *i.e.*, 150 cases specifically described as may hereinafter arrive or be deliverable. There can be no difficulty as to the construction of these words. There is nothing ambiguous about them. They mean clearly that the contract is only for such of the goods as may arrive. It is not a contract that the goods shall arrive. If no goods of the specified quality arrived before March 1881, there was no contract to deliver them, but only a contract to deliver them in case they arrived. But if it were necessary to go further than this and put a construction on the words "to arrive," the same conclusion would be arrived at, because the words "to arrive" have already in *Johnson* v. *Macdonald* (2) been construed to mean that the goods shall be sold on arrival. Whether this decision is right or wrong need not affect the construction of this contract, because the words "to arrive" would have to be taken in conjunction with the previous portion of the contract. If then the contract was only to sell such of the goods as did

(1) L. R. 7 Q. B. D., 92. (2) 9 M. & W., 600.

1883

CARLISLES, NEPHEWS & CO. v. HURMOOK ROY.

arrive, there was no breach on the part of the plaintiffs previous to March 1881. If, on the other hand, there was a contract to buy such of the goods as did arrive, there was a breach on the part of the defendants to take delivery of the March arrival, and the same may be said as regards the May arrival.

For these reasons I am of opinion that the plaintiffs are entitled to a decree for Rs. 6014-7-3.

The defendants' pleader has asked me to refer certain questions to the High Court, which I do in the following form :—

(1.) Is the construction of the contract put upon it the correct one?

(2.) If any other construction can be put upon the contract are the plaintiffs entitled to succeed on the facts, as admitted?

(3.) Does the Nagri writing by defendants at the foot of the contract prevail over or control the printed portion thereof?

(4.) Are the plaintiffs entitled under the contract to the damages sued for (*viz.* for the 5th and 7th month's deliveries) when they have failed to deliver the 1st, 2nd, 3rd, 4th, and 6th months' goods?

Mr. *Sale* for the plaintiffs was stopped by the Court.

Mr. *M. P. Gasper* (for the defendants.)—We are not bound to take these goods. The sellers warranted that at the time of the contract these goods were partly on boardship, and partly in their own godowns, neither of which was the fact. The goods were not according to quality—*Honck* v. *Muller* (1) ; *Hoare* v. *Rennie* (2).

Mr. *Sale* (in reply,)—Suppose there were the warranty stated, that would be a separate contract, and be no defence to this suit. [*Garth, C.J.*, referred to *Johnson* v. *Macdonald* (3)] In truth the words relied on by the other side, though they are printed in the paper containing the contract, yet form no part of it whatever, and never were intended to form part of it.

[The Court intimated they would inspect the original contract, before delivering judgment.]

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

GARTH, C.J.—We think that the judgment of the Court below is correct. It is satisfactory to have seen the original contract; because it seems clear that the printed words in the margin "now in course of landing, &c.," were merely the common form generally used by the plaintiffs' firm, and were not intended to constitute

(1) L. R. 7 Q. B. D., 92. (2) 5 H. & N., 19. (3) 9 M. & W., 600.

any part of this particular contract. The argument therefore which was addressed to us upon those words entirely fails.

We think that the questions referred to us should be answered as follows: The first and fourth questions should be answered in the affirmative. The second question of course, does not arise; and as to the third, we do not see that the Nagri writing is at all inconsistent with the English contract.

The defendants must pay the costs of this reference.

1883

CARLISLES, NEPHEWS & Co. v. HURMOOK ROY.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

IN No. 308.—TITU BIBI (DEFENDANT)
„ „ 357.—MUNSURUNNISSA BIBI (DEFENDANT)
„ „ 358.—IBRAHIM MALLA (DEFENDANT)

v.

MOHESH CHUNDER BAGCHI AND OTHERS (PLAINTIFFS.)*

1883 *February* 28.

Sale for arrears of rent—Patni tenure—Darpatni tenure—Under tenure—Incumbrance—Beng. Act VIII of 1869, *ss.* 59, 60, 66.

The sale of a patni tenure for its own arrears under ss. 59 and 60, Beng. Act VIII of 1869, does not *per se* avoid the darpatni tenures, but only renders them voidable at the option of the purchaser.

An under tenure is an incumbrance within the meaning of s. 66, Beng. Act VIII of 1869.

THIS case was referred to a Full Bench by MCDONELL and FIELD, JJ., on the 29th of June 1882. The facts are as follows: The plaintiffs claimed rent as darpatnidar of a certain mehal. The patni mehal was sold for its own arrears in Pous 1285, (December 1878) and purchased by certain persons who were not made parties to this suit. The amounts claimed are arrears for the year 1285 (1878). The ryots objected to the suit on the ground that the patni mehal having been sold for its own arrears the darpatni rights had been extinguished, and that in consequence they were not liable to pay the rent to the plaintiffs for the

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 29th June 1882, in appeal from Appellate Decrees Nos. 308, 357, and 358 of 1881.