1901
March 21.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

BENI PRASAD KUARI (PLAINTIFF) *v.* DUKKHI RAI (DEFENDANT).*

Act No. XII of 1881 *(North-Western Provinces Rent Act), Chapter II, section 93(a)—Landholder and tenant—Suit for rent—Plea of custom allowing deductions on account of land rendered unculturable by action of river—Such deduction not an "abatement of rent" within the meaning of the Act.*

An abatement of rent in the sense of Chapter II of the North-Western Provinces Rent Act, No. XII of 1881, implies the reduction of the rent payable for the holding, if not permanently, at all events for an indeterminate period, the rent as abated being substituted for the original rent and continuing to be the rent of the holding until altered by agreement or by further order. A tenant cannot apply under Chapter II on any ground for a reduction or revision of rent for a particular year only and having no effect beyond that year on the rent payable for the holding.

In a suit for arrears of rent under section 93*(a)* of the North-Western Provinces Rent Act, 1881, the defendant proved a local custom, whereby a tenant was entitled to a proportionate deduction from the rent for any year for such lands as were in that year, owing to fluvial action, unculturable by being submerged by water or covered by sand. No application for abatement of rent had been made under Chapter II of the Act.

Held that inasmuch as the defendant did not by his plea seek for an abatement of rent in the sense of Chapter II, namely, a reduction permanently or for an indeterminate period of the rent payable for his holding, but only a remission or deduction from such rent for a particular year and in respect of such portions of the holding as were unculturable in that year, and inasmuch as no such remission could have been obtained in proceedings under Chapter II, the custom did not over-ride any of the provisions of the Act, and must be given effect by the Court trying the suit.

Radha Prasad Singh v. *Baldeo Misr* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid* and Babu *Bishnu Chandar Moitra*, for the respondent.

* Second Appeal No. 587 of 1899 from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 28th June 1899, confirming a decree of Munshi Kashi Prasad, Assistant Collector of Ballia, dated the 22nd November 1898.

(1) Weekly Notes, 1893, p. 29.

1901

BENI PRASAD KUARI v. DUKKHI RAI.

STRACHEY, C. J. and BANERJI, J.—This is one of a large group of second appeals arising out of suits under section 93(*a*) of the North-Western Provinces Rent Act, No. XII of 1881, for arrears of rent, which have been brought by the Maharani of Dumraon against certain occupancy tenants and tenants at fixed rates. The defence of the tenants raises a question which is common to many of these appeals, and our judgment in this case will govern the decision of the other cases in which the same point arises. The Dumraon estate is situate in the Ballia district. It is well known that the holdings in that district are often of a shifting character owing to changes in the course of the river Ganges. During one year a particular holding, or part of it, may be submerged by water or covered by sand, and therefore not capable of cultivation; and in the next year it may be wholly free from water and sand, while other holdings, or parts of holdings, are, in their turn temporarily covered. Such changes occur frequently and rapidly, and it cannot be foreseen how any particular holding may, in the near future, be affected in the manner described. The defence to the suit is that, by a custom prevailing in the district and recognised by the predecessor of the plaintiff, a tenant is entitled, when sued for rent, to a deduction from the rent payable for the holding proportionate to those lands which, during the period of claim, were unculturable, either because they were submerged by water or because they were covered by sand. It is contended by the defendants that in these suits the rent claimed should only be decreed subject to such a deduction of a proportionate part of the rent. In some of the cases it is said that the entire holding for which rent is claimed has been submerged or covered, in others, that part only has been in that condition. In this particular case the nature of the defence is clearly shown by paragraph 2 of the written statement, which is as follows:—"It is a custom in the village in question to allow a deduction of rent for *bal*, *panchat*, and *bijmar* land (a kind of sandy land and land in which seeds do not germinate). In the years in question more than two bighas and 5 biswas of land were not cultivated, and the remaining land was sandy, under water, and *bijmar* land. Therefore the claim for rent of the land out of cultivation should be dismissed with

1901

BENI PRASAD KUARI v. DUKKHI RAI.

costs." It is admitted by the plaintiff, and it has been found as a fact by the Courts below, that this custom does prevail in the district and in the villages in question. It has also been found that the defendants have proved that portions of their holdings were for part of the period to which the claim relates unculturable for one or the other of the reasons stated. The Courts below have given effect to this plea of the defendants, and have given the plaintiff a decree for rent subject to deduction accordingly. From that decision the plaintiff now appeals. It is necessary, in the first place, to see what is the exact nature of the custom that is pleaded. For that purpose it is sufficient to refer to three documents. The first is an application made to the Collector by the late Maharaja, which is printed at page 3 of the respondent's book in second appeal No. 692 of 1899. This begins by saying that "the custom of allowing deduction on account of *bal* and *panchat* (sandy and submerged) lands prevails in the undermentioned villages." It goes on to give a history of the measures adopted in this estate for giving effect to that custom. It shows at considerable length that in the time of the late Maharaja all disputes as to the submergence of holdings were settled by the Maharaja's agents and by the tenants themselves, sometimes by a sort of *panchayat* by arbitrators appointed in each village, sometimes with the help of investigations and measurements made by the amins and munsarims attached to the Collector's office. In this way disputes of this kind were usually settled amicably by the parties themselves. So that the procedure for giving effect to the custom varied from time to time, but the custom itself was apparently always recognised. There was no question as to the existence or the nature of the custom, but only as to its application to particular cases. The second document to which we refer is the wajib-ul-arz of the village Kawaspur, which is printed at page 26 of the same book. Clause 10 is as follows:—"In this mahal there is a custom of allowing deduction on account of the sandy, submerged, and sterile lands. The estate makes inquiry every year and collects rent after allowing such deduction." The third document is that which gives the fullest description of the custom. It is the Settlement Report of the Ballia district for the years 1882—85.

At page 91, paragraph 6, it is stated as follows:—"A local custom also provides for the remission of rent in cases of *bal*, *panchat*, and *bijmar* (sand, water-logged soil, and blighted seed). Rent is only paid on the productive area in the villages exposed to fluvial action, and the area which is spoilt by a deposit of sand, or on which the fertile deposit is too thin to bear a crop, is deducted. The same custom obtains in the *diara* lands of pargana Ballia. The area to be deducted under this custom is a fruitful source of dispute in suits for arrears of rent, because it can only be accurately determined when the crops are on the ground before harvest time, and there is therefore no means of ascertaining whether the tenant's claim is true or false except the utterly untrustworthy evidence of the witnesses of the parties. There has lately, however, been introduced a system on the Maharaja's estate of annual measurement at the proper time by amins nominated by the Collector. The tenants are made acquainted with the areas allowed by this survey, and objections not made then cannot be usefully brought forward at a later date." In the judgment under appeal in this case the lower appellate Court says, with reference to the custom, "the case before me involves a custom which dates back to the very beginning of the history of agriculture in India, and is to be found everywhere, even in these days of cash payments of rent. It is perfectly definite, inasmuch as it clearly contemplates a deduction of rent at the prescribed rate for the *bal*, *panchat*, and *bijmar* lands. It is reasonable, there can be no question. The alluvial and diluvial tracts change their aspect so often that nothing is a more reasonable understanding between the zamindars and their tenants than to realize rent for the land fit for cultivation only, and to remit that for land that becomes unproductive for causes beyond the tenant's control." Now that being the nature of the custom pleaded by the tenants, how does the plaintiff meet the plea of custom? She does not deny the custom. She does not deny that, if a tenant's holding is in a particular year submerged or otherwise unculturable, it is right and reasonable, and in accordance with the custom, to deduct for that year a proportionate part of the rent. Her only objection is to the method and procedure adopted by the tenants to give effect to the custom. She says

1901

BENI PRASAD KUARI v. DUKKHI RAI.

that a tenant is not entitled to obtain such a deduction by way of defence to a suit for rent: that if portion of his holding were unculturable for the reasons stated during any part of the period for which rent is claimed, his remedy was by application to an Assistant Collector of the first class for an order for abatement of the rent under section 19 of the Rent Act, 1881, in accordance with the preceding sections as to abatement; but in the absence of any such application and order, the entire rent of the holding must be paid. In support of that contention reliance is placed on *Radha Prasad Singh* v. *Baldeo Misr* (1). That decision has reference to the case of tenants at fixed rates, but the principle is equally applicable to occupancy tenants. It was there held that where a tenant has not applied for and obtained an order for abatement under section 19, he cannot, in answer to a suit for rent, plead a local custom, whereby his rent is proportionately abated if the extent of his holding has diminished by reason of diluvion. The ground for that decision is that the Legislature intended that a tenant should be liable to pay the full rent fixed for the holding unless and until such rent has been altered, by enhancement or abatement or otherwise, in proceedings taken in accordance with the provisions of the Act; that local custom cannot override the provisions of the Act in this respect; and that local custom is not referred to as one of the matters which can affect the enhancement or the abatement of rent. If therefore the tenant's plea is equivalent to asking for abatement of rent in the sense of sections 15, 16, 17, 18, 19 and other sections of the Rent Act, the decision is an authority for the view that his proper course was to apply for such abatement under the appropriate section, and that not having done so, he cannot resist on the ground of local custom the claim for the full rent of the holding. We have referred to the written statement in that case, and we find that the plea was apparently open to that objection. The claim was for the rent of a holding of over 11 bighas. The defendant pleaded that he was in possession of only 4 or 5 bighas, the rest having been gradually cut away by the change of the course of the river during the last three or four years, that he had paid the rent for so much of the lands as were in his possession for the years in

(1) Weekly Notes, 1893, p. 29.

question, and that according to the village custom the suit ought to be instituted after deducting rent of the diluviated lands. That was really a claim that, by reason of the custom, the rent for the holding was proportionately and permanently abated because a portion of the holding had disappeared by diluvion. Undoubtedly the tenant could have applied for such abatement under section 18 of the Act. So that in the present case the question is, whether the defendant is by his plea asking for an abatement of the rent of his holding within the meaning of the sections to which we have referred. Could he have obtained what he now seeks to obtain by his plea, by an application made under section 19? To answer this question it is necessary to see what is the nature of the abatement of rent to which those sections refer. Where an order for abatement is made, the rent as abated becomes substituted as the rent of the holding for the original rent as fixed by contract or by order of the Court. The rent as abated continues to be the rent of the holding until altered either by contract or by some further order for enhancement or abatement. That is the effect of several sections, and in particular of sections 16 and 31 of the Act. The essence of the order of abatement is that it diminishes, if not permanently, at all events for an indeterminate period, the rent of the holding as defined in section 3(2) of the Act,—that which is to be paid by the tenant on account of his holding, use or occupation of the land. There can be no doubt that a Court dealing with a suit for arrears of rent cannot by its decree on the ground of local custom or otherwise give the tenant an abatement of the rent of his holding in that sense; and that is what the decision in *Radha Prasad Singh* v. *Baldeo Misr* establishes. Therefore if in any of these appeals the custom is set up with a view to obtaining an abatement of the rent of the holding in the sense explained, a permanent deduction, or a reduction for an indeterminate period of the rent of the holding as fixed by contract or by order of the Court, we shall undoubtedly follow that authority. To any other class of case it does not, in our opinion, apply. To take the present case, what the defendant seeks by virtue of the custom is not an abatement of the rent of the holding in the sense of the sections relating to abatement at all; and he could not have obtained what he

1901

BENI PRASAD KUARI v. DUKKHI RAI.

now seeks by means of any application made under section 19. He does not contend that by virtue of custom the rent of the holding as fixed by contract or order is diminished by a single rupee. The rent of the holding remains exactly the same as before, and he admits that in any year he may have to pay the full amount at the same rate at which he has always been liable to pay rent for the holding. What he asks for is not an abatement of the rent of the holding permanently or for an indefinite period, but remission from the payment of the rent for a particular year only for such part of the holding as in that year is proved to have been unculturable. That seems to us to be no more abatement in the sense of Chapter II of the Act than a release or remission by the landlord of part of his claim for rent in any particular year under section 63 of the Contract Act would be an abatement of rent in the sense of the Chapter. It would affect only the particular year in which the land was submerged, and would have no effect beyond that year on the rent payable for the holding. A tenant cannot obtain on such a ground or on any ground whatever a remission for a particular year only by an application under section 19 of the Act. One must not be misled by the ambiguity of the word abatement: as used in Chapter II of the Act it has the special technical sense which we have explained; but what the tenants claim in this suit would be more correctly described as remission or deduction than abatement, or at all events is abatement in a different sense altogether. The test is whether by his plea in the suit the tenant is indirectly trying to get, not merely a particular remission or deduction for a particular year, and for the portion of the holding which he proves to have been unculturable in that year, but a permanent or indeterminate diminution of the rent of his holding which can only be effected by the procedure which Chapter II prescribes. If he is, then the plea of custom is bad: if he is not, and if he proves the facts which make the custom applicable, it must be given effect. For these reasons it appears to us that the custom pleaded by the defendants in these cases does not override any of the provisions of the Rent Act of 1881. No other reason has been suggested why the custom should not be given effect to, and we think that effect ought to be given to it. In all these cases it

1901

BENI PRASAD KUARI v. DUKKHI RAI.

will, of course, be for the tenant to prove that in the particular year in question the portions of his holding, in respect of which he claims a deduction of rent were in the condition to which the custom is applicable, and if he does not prove this, he will have to pay the full rent of the holding. For these reasons we think that the decision of the Courts below were right, and we dismiss this appeal with costs.

Appeal dismissed.

1901
March 21.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

BENI PRASAD KUARI (PLAINTIFF) *v.* DHARAKA RAI AND ANOTHER (DEFENDANTS).*

Act No. XII of 1881 *(North-Western Provinces Rent Act), section* 93*(a)—Suit for rent—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), section* 5.

Section 5 of the Indian Limitation Act, 1877, applies to a suit under section 93*(a)* of the North-Western Provinces Rent Act, 1881. *Muhammad Husen* v. *Muzaffar Husen* (1) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan*, Mr. *A. E. Ryves*, and Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

STRACHEY, C. J. and BANERJI, J.—This is an appeal in a suit for arrears of rent under section 93*(a)* of the North-Western Provinces Rent Act, No. XII of 1881, brought by the Maharani of Dumraon against certain tenants. The main defence was that by a local custom called *bal panchat* the tenants were entitled to a proportionate reduction of the rent for any year on account of any part of their holdings which was unculturable by reason of being submerged by water or covered by sand. The plaintiff contended that this plea was one which could not be given effect to in such a suit as this without contravention of the provisions of the Rent Act, and relied on the decision in *Radha Prasad Singh* v. *Baldeo Misr* (2). Upon this point the Courts below decided in favour of the defendants. For the reasons given (3) in our

* Second Appeal No. 692 of 1899, from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 28th June, 1899, modifying a decree of Munshi Kashi Prasad, Assistant Collector of Ballia, dated the 22nd November 1898.

(1) (1898) I. L. R., 21 All., 22. (2) Weekly Notes, 1893, p. 29.
(3) See p. 270, *supra*.