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The plaintiff's appeal succeeds to this extent that we decree the plaintiff's claim in reliefs A and B in respect of Hamirpur also, with *pendente lite* and future mesne profits to be determined hereafter by the court below.

In other respects both appeals are dismissed. As each party has partly succeeded and partly failed, we make no order regarding costs.

Before Mr. Justice Banerji and Mr. Justice King.

1932 *March*, 8.

JUTHI UPADHIYA AND OTHERS (DEFENDANTS) v. KESHO PRASAD SINGH (PLAINTIFF).*

Agra Tenancy Act (Local Act III of 1926), *section* 72(6)—*Remission of rent—Diluvion—Local custom—Custom alleged but not proved.*

Sub-section (6) of section 72 of the Agra Tenancy Act, 1926, means that if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion calamities, and if a claim for remission is made under such local custom, then the provisions of the section will not apply. The local custom referred to in sub-section (6) means an existing local custom and does not apply to a local custom which is merely alleged to exist but in fact does not exist. So, the mere fact that the tenant has claimed a remission under an alleged local custom, which he has failed to prove, does not prohibit the court from granting a remission under section 72, sub-section (1).

Dr. *M. L. Agarwala* and Mr. *Jwala Prasad Bhargava*, for the appellants.

Mr. *Haribans Sahai*, for the respondents.

BANERJI and KING, JJ. :—This was a suit for arrears of rent due by an agricultural tenant. The main defence was that the area of the holding had been decreased by diluvion and that the defendant was entitled to remission of rent under a local custom.

The trial court found that the alleged custom, which is described as the custom of *Balpanchat* and *Bijmar*, did not prevail in the village, so the defendant was not

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*Second Appeal No. 1986 of 1928, from a decree of Kameshwar Nath, District Judge of Ghazipur, dated the 10th of July, 1928, confirming a decree of Muhammad Wasi, Magistrate of First Class of Ballia, dated the 29th of February, 1928.

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entitled to any remission by virtue of the alleged custom. The question then arose whether the court should not grant a remission under section 72 of the Agra Tenancy Act, 1926. The court found that over 33 bighas out of the holding of about 38 bighas had been removed by diluvion and that a further area of the holding was unculturable. The court took the view, however, that no remission could be granted under section 72 since that section does not apply to alluvial tracts, and accordingly decreed the plaintiff's claim in full.

The lower appellate court concurred in finding that the alleged custom under which the defendant claimed remission of rent was not proved and held that section 72 does not apply to this case because remission had been claimed under a particular custom of *Balpanchat* and *Bijmar*.

The only question for our decision in this second appeal is whether the courts below have correctly held that in the circumstances of this case no remission can be given under section 72 of the Tenancy Act. Although section 72 reproduces the provisions of section 50 of the Tenancy Act of 1901 almost word for word, the provisions of the section do not seem to have been the subject of judicial interpretation. No previous decisions have been cited by either party.

Under section 72 of the present Tenancy Act the court when making a decree for arrears of rent can allow whatever remission appears to be equitable on the ground that the area of the holding was decreased by diluvion or otherwise, or that the produce thereof was diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrear is claimed. Sub-section (6) lays down: "The provisions of this section shall not apply to remissions of rent claimed in alluvial tracts under any local custom providing for such remissions in holdings, the culturable area of which has been decreased by diluvion, deposit of sand or the like causes."

The trial court took this to mean that the provisions of section 72 are not applicable to alluvial tracts in any circumstances. We think this is clearly wrong, as sub-section (6) only says that the section shall not apply to remissions of rent claimed in alluvial tracts *under any local custom.*

The view taken by the lower appellate court appears to be that if the tenant makes a claim for remission under an alleged local custom, but is unable to prove the existence of such custom, then no remission can be granted under sub-section (1). It is possible to read sub-section (6) in this sense and to hold that if the tenant claims a remission under a local custom, then no remission can be made under section 72, whether the alleged custom does or does not exist. We think that this is a narrow interpretation of the sub-section and that it does not carry out the intention of the legislature. In the present case the lower appellate court has upheld the finding of the trial court that the alleged local custom does not prevail in this village. This is a finding of fact which is binding upon us in second appeal. But, in our opinion, the mere fact that the tenant has claimed a remission under an alleged local custom which he has failed to prove does not prohibit the court from granting a remission under section 72. We think that the local custom referred to in sub-section (6) means an *existing* local custom and does not apply to a local custom which is merely alleged to exist but in fact does not exist. We take sub-section (6) to mean that if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion calamities, and if a claim for remission is made under such local custom, then the provisions of this section will not apply. This is a more liberal interpretation of the sub-section and we consider it more likely to give effect to the true intention of the legislature than the narrow construction which has been put upon it by the courts below.

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We accordingly allow the appeal and set aside the decree of the court below. The case will be returned to the trial court for taking action under section 72 if the court, in its discretion, considers that the full amount of rent cannot be equitably decreed. The appellant will get his costs in this Court and the court below. Costs in the trial court will abide the result.

REVISIONAL CRIMINAL.

Before Mr. Justice Boys and Mr. Justice Young.

1932 March, 16.

EMPEROR *v.* BAIJNATH.*

Penal Code, section 366—"Seduced to illicit intercourse"—Applicable to the first act of illicit intercourse and not to subsequent acts during a continued course of intrigue—Kidnapping to precede the seduction—Criminal Procedure Code, section 435—Revision at the instance of the father of the girl in a kidnapping case.

The phrase "seduced to illicit intercourse" in section 366 of the Penal Code implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse; these must be two distinct acts, though they may follow in immediate sequence.

The term "seduction" can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man. Further, the act of seduction alleged must be subsequent to the kidnapping, in order to make section 366 applicable.

Section 366, therefore, cannot be applied to a case where the accused has been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian, and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it is with the intention of carrying on that intrigue, or in other words, with the intention of continuing illicit intercourse.

In entertaining criminal revisions the High Court is not limited to motions made by any particular person; and where

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*Criminal Revision No. 826 of 1931, from an order of Tej Narain Mulla, Sessions Judge of Allahabad, dated the 16th of November, 1931.