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learned Judge observed :—"I think it is a clear principle of law that parties cannot, either by special agreement or by any conduct of their own, invoke the process of the Court in execution. Process in execution must always be granted by the direct act of the Court itself. And it appears to me that precisely on the same principle that parties are prohibited from invoking the process of the Court *de novo*, either by agreement or by their conduct; they are also prohibited from extending, in like manner, the relief the Court has chosen to award." These observations appear to me to be very germane to the question under consideration. The case I had before me was a still stronger one for the application of the principle laid down, *viz.*, that nothing can be recovered beyond what is comprehended within the terms of the decree itself, and that anything outside that decree, whether it be such a claim as mesne profits, or a sum of money taken in excess of the decree, much more anything that is foreign to such a decree, can only be recovered by a separate suit. In the Full Bench ruling which has given rise to these remarks not the least attempt is made to examine the case then before the Court in the light of the legal principles expounded in these Calcutta cases; but a gloss is put upon them wholly unwarranted by the terms of the judgment. I repeat that such a Full Bench proceeding cannot be binding on me, and it ought not to be followed, and I regret that it was reported.

In the case now before us the plaintiff's claim could not have been made, and if made, ought not to have been entertained, in the execution department, but was clearly and properly the subject of a separate suit. The present appeal is therefore allowed, and the case is remanded in terms of the order proposed by Mr. Justice Straight.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

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August 30.

LALJI AND ANOTHER (DEFENDANTS) *v.* NUR KAN (PLAINTIFF).*

Landholder and tenant—Relinquishment by occupancy tenant of his holding—Effect of relinquishment on co-sharers—Act XVIII. of 1873 (*N.-W. P. Rent Act*), *ss.* 8, 9, 95—*Jurisdiction—Specific performance of contract.*

K, the occupancy-tenant of certain land, to whom the landholder had granted a lease thereof for a certain term, gave the latter a kabuliyat containing

* Second Appeal No. 197 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 17th November, 1881, affirming a decree of Maulvi Kamal-ud-din, Munsif of Sambhal, dated the 16th May, 1881.

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the following clause :—"On the expiration of the term the landholder shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself." *K* died before the expiration of the lease, and was succeeded by his sons. On the expiration of the lease the landholder sued *K's* sons in the Civil Court for possession of the land, claiming under the kabuliyat.

Per MAHMOOD, J.—That, inasmuch as the plaintiff did not seek the determination of the class of the defendants' tenure, and the suit could not be regarded as one for ejectment of a tenant in the manner provided by the Rent Act, but was one for specific performance of a contract, based on the kabuliyat, according to the terms of which the plaintiff was entitled, it was alleged, to oust the defendants, the suit was cognizable in the Civil Court.

Per CURIAM.—That whatever might have been the effect of the kabuliyat as regards *K*, it could not defeat the rights of his sons, who had become by inheritance co-sharers in the right of occupancy or had succeeded thereto under the provisions of the Rent Act.

Per TYRRELL, J.—That a relinquishment by an occupancy-tenant of his holding is not a "transfer" within the meaning of s. 9 of the Rent Act.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (TYRRELL and MAHMOOD, JJ.) delivered the following judgments :—

MAHMOOD, J.—The plaintiff in this case represents the interests of her husband Muhammad Akbar, who owned certain resumed muafi lands including the 1 bigha 18 biswas of land which is the subject of the present litigation. The defendants are the sons of one Khushali, who appears to have been in possession of the land in dispute as an occupancy-tenant. On the 26th January, 1873, Khushali executed a registered kabuliyat in favour of Muhammad Akbar, whereby he agreed to an assessment of Rs. 16 a year from 1281 fasli to 1287 fasli, and *inter alia* the document contains the following clause :—

"After the expiry of the term, the above-mentioned muafidar shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself."

Subsequently, during the progress of the settlement, a dispute between the parties ended in an order of the Settlement Officer dated 9th December, 1875, whereby Khushali was recorded as an occupancy-tenant, it having been found that his cultivation began prior to the year 1269 fasli (1862).

Muhammad Akbar having died, his wife, the present plaintiff, succeeded to his rights and brought a suit in the Civil Court with the object of setting aside the Settlement Officer's order of 9th December, 1875. The suit was however dismissed on the 4th February, 1879, on the ground that the Civil Court had no jurisdiction to entertain the suit, which involved the determination of the class of tenure of a tenant. That decision was upheld by the Subordinate Judge of Moradabad on the 23rd July, 1879, and the litigation does not appear to have gone any further.

During the continuance of the term of the kabuliyat Khushali also died and was succeeded by his sons, the present defendants, who continued in possession of their paternal cultivatory holding.

The present suit was commenced on the 19th November, 1880, having for its object the recovery of possession of the land in dispute from the defendants, on the ground that under the terms of the kabuliyat of 26th January, 1873, the plaintiff was entitled to oust the defendants by enforcement of the contract contained in the kabuliyat.

The defendants pleaded that the suit was barred by s. 13, Civil Procedure Code, by virtue of the decisions of the 4th February, 1879, and 23rd July, 1879, and that even if not so barred, the suit was not cognizable by the Civil Court, as it fell within the provisions of s. 95, Rent Act (XVIII of 1873). The defendants further resisted the claim on the ground that their father Khushali was an occupancy-tenant, having cultivated the land for more than twelve years; that he was so recorded in the settlement on the 9th December, 1875; that the order under which he was so recorded still stood uncancelled; that upon the death of their father the occupancy right devolved upon them; that the right could not be extinguished by reason of the kabuliyat of 26th January, 1873; and the expiry of the term of that kabuliyat was therefore immaterial and could not affect their rights in the occupancy-holding.

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The Court of first instance, accepting the first two pleas urged by the defendants, dismissed the suit on the 22nd January, 1881, holding that the suit was barred by s. 13, Civil Procedure Code, and was moreover not cognizable by the Civil Court. The lower appellate Court however, setting aside that decree, remanded the case under s. 562, Civil Procedure Code, by an order dated the 7th April, 1881.

The Court of first instance thereupon tried the suit on the merits, and held that the plaintiff was entitled to oust the defendants by virtue of the contract contained in the kabuliyat. The claim was accordingly decreed by the Court of first instance, and the decree has been upheld by the lower appellate Court.

The present second appeal has been preferred by the defendants, and the grounds of appeal raise two main questions for determination:—(i) Whether the suit was cognizable by the Civil Court with reference to s. 95 of the Rent Act. (ii) Whether the kabuliyat of 26th January, 1873, had the effect of defeating or extinguishing the occupancy-right, so as to deprive the defendants of such rights in the land in dispute as would otherwise have devolved upon them on the death of their father.

With regard to the first point, I am of opinion that the suit was cognizable by the Civil Court. The relief sought in the plaint is clearly of a civil nature, for it does not seek the determination of class of tenure, nor can the suit be regarded as one for ejectment of a tenant in the manner provided for by the Rent Act. The suit is for specific enforcement of contract, and is based on the clause in the kabuliyat of 26th January, 1873, which, according to the plaintiff's contention, entitles her to oust the defendants. Indeed, the plaint proceeds on the assumption that it is only by virtue of the conditions of the kabuliyat that the defendants are liable to ouster, and the suit assumes that their *status* is higher than that of tenants-at-will. It is quite clear from the facts of the case, and indeed is not disputed, that the defendant's father Khushali, and after his death the defendants themselves, held the position of occupancy-tenants, and therefore the only question on the determination of which the decision of the case depends is whether the kabuliyat of 1873 can operate in defeasance of the occupancy-right.

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This brings me to the consideration of the second point in appeal, the determination of which, in my opinion, depends upon the construction to be placed on ss. 8 and 9 of the Rent Act, which along with some other sections of that Act define the nature and incidents of the occupancy-right. On a recent occasion, in giving my answer to a Full Bench reference in *Gopal Pandey* v. *Parsotam Das* (1), I have at some length explained my conception of the nature of the rights of occupancy-tenants in these Provinces, and in interpreting the Rent Act upon this subject I have held that the Legislature intended to confer the right, not only on the tenants in actual occupation of the soil at the time, but also in the interests of the future members or descendants of the stock to which the occupancy-tenant belongs. It is not necessary to repeat the considerations which led me to the conclusion, but as mine was the dissentient judgment in that case, I may observe that the answer of the majority of the Court does not affect the question now under consideration. In the present case we are not concerned with the effect which the terms of the kabuliyat of 1873 may have had upon the rights of Khushali himself. It is admitted that, as a matter of fact, he never relinquished his holding, and the question before us is, whether any agreement on his part to relinquish his holding in the future could defeat the rights of his sons, the present defendants, in the occupancy-holding which devolved upon them under the provisions of s. 9 of the Rent Act. In my judgment the kabuliyat can have no such effect. It is true that a clause in that document distinctly gave to the zamindar the power to oust the tenant Khushali after the expiration of the term of seven years; but such a power could not be conveyed by the occupancy-tenant so as to prejudice the rights of those who have become by inheritance co-sharers in the right of occupancy, or on whom such right has devolved upon his death. An occupancy-tenant may be at liberty to relinquish his occupancy-holding, but such relinquishment, even if actually carried out, cannot deprive those who are in possession at the time and entitled by law to continue in possession of the occupancy-holding. In the present case the defendants are entitled to the benefit of the 3rd paragraph of s. 8 of the Rent Act, which provides that "the occupation or cultivating of the father or other

(1) See *infra*.

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person from whom the tenant inherits shall be deemed to be the occupation or cultivating of the tenant." Therefore, whatever the effect of the kabuliyat might have been on the rights of Khushali, his sons, the present defendants are entitled to calculate the period of their father's occupation of the land as a component element in the establishment of their occupancy-right, and to continue in possession of the holding as occupancy-tenants. They are not bound by the engagement which their father Khushali entered into in derogation of his own rights of occupancy, and the zamindar cannot in virtue of that engagement force the defendants to relinquish the occupancy-holding which has lawfully devolved upon them. There are, no doubt, provisions made in the Rent Act which, under certain circumstances, have the effect of extinguishing the occupancy-right, and which entitle the zamindar to eject the occupancy-tenant. But no such circumstances are even alleged to exist in this case, and the suit is based entirely upon the clause in the kabuliyat already referred to. For these reasons I would decree this appeal, and, reversing the decrees of both the lower Courts, dismiss the suit; the costs in all the Courts to be borne by the plaintiff-respondent.

TYRRELL, J.—My judgment in this case has been delayed, as I wished to see the record of the proceedings of the Settlement Deputy Collector of the 9th December, 1875, when he determined the dispute between Khushali as plaintiff and Muhammad Akbar as defendant in the matter of the determination of the *status* of the said Khushali as a tenant. It was then decided, after taking evidence and hearing both parties, that Khushali was then, and had for some time been, a tenant with rights of occupancy, having continuously cultivated the land in dispute as the duly recorded tenant thereof from 1269 fasli. The Settlement Court, in pronouncing this decision, observed that the kabuliyat for a certain fixed rent, executed in January, 1873, for a period of seven years, "was concerned with the rent only, and had nothing to do with Khushali's right of occupancy or length of period of cultivation. Being at the time an occupancy-tenant, why should he make any contract about the period of his occupancy?" I do not find in the circumstances of this suit any question of the relinquishment of his right of occupancy by a *maurusi* tenant, or of

transfer of such right in the sense of s. 9 of the N.-W. P. Rent Act. It is sufficient, therefore, to observe here that, in my opinion, there is nothing in the law to hinder an occupancy-tenant from relinquishing his holding; that it is a matter of common experience that such relinquishments not unfrequently take place; that the Rent Act (ss. 31 *et seq.*) provides occupancy-tenants with a machinery for effecting relinquishment without any reference to the claims or interests of their heirs; and that under s. 35 such an occupancy necessarily ceases without respect to heirs or other claimants, if a decree for arrears of rent remains unsatisfied fifteen days after the receipt of the notice of that section. As to s. 9 of the Act, I cannot regard a relinquishment of his tenancy by an occupancy-tenant into the hands of his landlord as a "transfer" thereof to such landlord. A transfer implies investment of the recipient with the right handed over by the tenant divesting himself. But the landlord is not, and cannot, become invested with a right of occupancy as a cultivator in a part of his own land. The prohibitory provisions of s. 9 therefore have no bearing on a tenant's relinquishment of his tenure. In the case before me, Khushali, father of the defendants, being at the time an occupancy-tenant, as defined in s. 8 of the N.-W. P. Rent Act, took a lease in January, 1873, fixing his rent at an enhanced rate to January, 1880. But he died in the currency of the lease, and was at once succeeded by his two sons, the appellants. Now, when Khushali died, he was an occupancy cultivator. Whatever might have been the efficacy or effect of the stipulation he had made in his kabuliyat of 1873, that if he and his landlord did not agree as to the rent to be paid on the expiry of the lease, the latter might engage with a stranger, it is certain that no such circumstances ever came into existence. It is indisputable that on Khushali's death he was succeeded by his sons as his heirs; and "the occupation or cultivating of their father," who was an occupancy tenant when he died, "from whom the appellants inherited, must be deemed to be the occupation or cultivating of the tenants within the meaning of s. 8." It cannot be held that, because the appellants seem to have held on under the terms of their father's kabuliyat for its last couple of years, they then and therefore were mere tenants under an unexpired lease, or that they by reason alone of the kabuliyat were the less occupancy-tenants of their *maurusi*

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holding for 1878-79 and 1879-80, or subsequently in the years during which they have gone on cultivating the land in dispute down to the present time. For these reasons I am of opinion that the suit of the respondent for the ejectment of the appellants, by enforcement of one of the terms of the kabuliyat executed by their deceased father, was unsustainable under the circumstances of the case, and I concur with my brother Mahmood in decreeing the appeal with costs.

1882
August 31.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood

ZAMIR HUSAIN (PLAINTIFF) *v.* DAULAT RAM AND OTHERS (DEFENDANTS).*

Pre-emption—Custom—Hindu vendor and purchaser—Muhammadan pre-emptor—Muhammadan Law—"Talab-i-ishtihad"—Invocation of witnesses.

A Muhammadan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom. The formality of "*ishtihad*," or express invocation of witnesses, required by the Muhammadan law of pre-emption, was not one of the incidents of such custom. *Held* that the circumstance that the plaintiff was a Muhammadan did not preclude him from claiming to enforce such right against the defendants who were Hindus; and that the formality of "*ishtihad*" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right.

Fakir Rawot v. *Sheikh Emambaksh* (1); *Bhodo Mahomed* v. *Radha Churn Bolia* (2) referred to. *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (3) and *Dwarka Das* v. *Husain Bakhsh* (4) distinguished. *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (5) and *Jai Kuar* v. *Heera Lal* (6) followed.

THIS was a suit for pre-emption in respect of a house situate in mohalla Abupura, in the town of Muzaffarnagar. The plaintiff, a Muhammadan, was the owner of a house contiguous to the house in dispute. The defendants, vendors and vendees, were Hindus. The claim was based on the allegation that in the mohalla in which the property in dispute was situate, the custom of pre-emption prevailed universally among Hindus and Muhammadans alike; that it had been repeatedly recognized and enforced by Courts of Justice; that the plaintiff, being the close neighbour, was entitled to pre-emp-

* Second Appeal No. 136 of 1881, from a decree of R. M. King, Esq. Judge of Saháranpur, dated the 11th January, 1882, reversing a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saháranpur, dated the 21st September, 1881.

(1) B. L. R., Sup. Vol. 35.
(2) 13 W. R., 332.
(3) 4 B. L. R., F. B., 134; 13 W. R., F. B., 21.
(4) I. L. R., 1 All. 564.
(5) F. B. Rul., June—Dec. 1867, p. 128.
(6) N.-W. P. H. C. Rep., 1875, p. 1.