

1892 Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the appellant will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant: *Messrs. T. L. Wilson & Co.*  
Solicitor for the respondents: *Mr. J. F. Watkins.*

MOHESI  
NARAIN  
MUNSHI  
v.  
TARUOK  
NATH  
MOITRA.

C. B.

*P. C.\**  
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*December 6*  
*and 16.*

SURJA KANT ACHARYA (DEFENDANT) v. HEMANTA KUMARI  
(PLAINTIFF.)

[On appeal from the High Court at Calcutta.]

*Right of Suit—Enhancement of rent, Suit for—Right of a Hindu widow to sue for enhancement of rent as representing the estate of the deceased zamindar or as guardian of a minor son adopted to him by her—Bengal Rent Act (Bengal Act VIII of 1869), ss. 31, 46, 47.*

A Hindu widow, representing a zamindari interest in a *mahal*, sued for the rent upon a rent-paying tenure at an enhanced rate. She had, in former years, adopted a son to her deceased husband. The defendant objected throughout that this son (deceased in 1884) having been of full age in 1881 when this suit was brought, the widow was not entitled to sue at that time, he having that right;

*Held*, that the Courts below had rightly disallowed this objection. There was no sufficient evidence to show that the adopted son had attained majority when this suit was brought, and the plaintiff could sue either in her character as widow of the deceased, or as guardian of the minor adopted son.

To bring into operation the special limitation enacted in section 31 of Bengal Act VIII of 1869, where deposit had been made under section 46, the deposit could only have been effectively made of rent that had accrued due before the date of such deposit.

Two appeals, consolidated, from two decrees on one judgment (1st February 1869) of the High Court, affirming two decrees (28th February and 28th May 1887) of the Subordinate Judge of Mymensingh.

Both these suits related to the enhancement of the rent of a separate ten-annas portion of an ancestral tenure named Tarafi, comprised within a ten-annas share of zamindari Pakheria

\* *Present*: LORDS MACNAGHTEN, HANNEN and SHAND, and SIR R. COUCH.

Jarusahai, in the Mymensingh district, and forming part of a larger tenure named Kilghati. The ground of enhancement alleged was that the rent of the latter, *i.e.*, Kilghati, had been decided by the Sadar Diwani Adalut in 1806 to be enhanceable in its entirety, and had been accordingly so enhanced; and that Tarati, part of that tenure, had become liable to further enhancement, according to the custom prevalent in the district and pargana, by reason of the rent paid by the defendant before the Bengali year 1288, corresponding to 1881, being less than that paid in similar *mahals* by holders of *ijara taluks* in the surrounding parganas. The defendant, now appellant, denied the plaintiff's right to enhance, either at all, or to the extent demanded.

Questions were raised in the Courts below as to the real character of the tenure held by the defendant, described in some of the documentary evidence as "*maurasi ijara*," and reference was made to the decision of 1806 and the terms of a lease made in 1808 between persons now represented by the parties. It was also considered whether the defendant had held of the plaintiff and her predecessors in estate as proprietors of a separate share and independently of other co-sharers. When it had been decided that the plaintiff was entitled to a decree for rents at rates in excess of those previously subsisting, the rates were then determined. But the only questions on this appeal were in the first suit as to whether Maharani Sarat Sunderi Debi, the plaintiff, who was widow of the late Jogendra Narain Roy, zamindar, had been, when she sued, in a position to bring the suit, she having adopted a son to her deceased husband; and in the second suit a point was involved as to the proper construction of section 31 of Bengal Act VIII of 1869 in connection with sections 46 and 47.

The widow, who died pending the suits, was now represented, as she had been in the appeals to the High Court, by her daughter-in-law, Rani Hemanta Kumari Debi, widow and executrix of the late Kumar Jotindra Narain, the son adopted by Sarat Sunderi to her deceased husband. Jotindra Narain died in 1884. The first suit was brought on the 10th July 1882 (27th Assar 1289) for, enhanced rent in arrear, after service of notice of enhancement, dated 4th January 1881, with cesses and interest, amounting to Rs. 6,790, in respect of the Bengali year 1288, or

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12th April 1881 to 12th April 1882. The second suit was brought by and against the same parties on the 10th April 1886, while the first suit was still pending, to avoid the possible bar of limitation as to part of the claim, and to recover the rent, as sought to be enhanced in the first suit, in respect of the subsequent years 1289, 1290, and 1291, and the first part of 1292.

In the first suit the Subordinate Judge, after obtaining the report of a Sub-Deputy Collector, deputed to make enquiries as to the area and quality of the lands in suit, and the rates prevailing in the district, decided in the plaintiff's favour, decreeing an enhanced annual rent of Rs. 4,076.

In the second suit the Subordinate Judge held that limitation of six months under section 31 of Bengal Act VIII of 1869, on which the defendant relied, was not applicable. He found that the deposits purporting to have been made by him under sections 46 and 47 were all made before the expiration of the respective years in respect of which the plaintiff sued; in other words, before the rent, which was annual, was due. He also disallowed that part of the claim which related to the rent for the unexpired year 1292 as being a premature claim. But he made a decree in the plaintiff's favour at the rates, as enhanced in the first of these suits, for the years 1289, 1290, and 1291.

In the first suit, on appeal and cross appeal from the Subordinate Judge's judgment to the High Court, his decision was affirmed in all respects.

In the second suit the High Court dismissed the defendant's appeal on the ground that the deposits of rent in question had not been made in accordance with law, disposing of the appeals in both suits in a single judgment (delivered by PRINSEP and GHOSE, JJ.) which, on the points now raised, was as follows:—

“It appears that the objection really taken by the defendant, and pressed by him until the last stage of the case, after the evidence had been taken and the arguments of the pleaders on both sides laid before the Subordinate Judge for decision, was, that the suit had been brought by the lady on her own account, and that inasmuch as she had adopted a son who had attained majority, she was not competent to sue. Whether the adopted son, Jotindra Narain Roy, had attained majority or not at the time of the institution of the suit, does not appear on the evidence on the record. There is no evidence either way, except that we are referred to the terms of his will,

the first clause of which refers to a previous will executed by him, from which we are asked to infer, that at the time he made his previous will, he had attained his majority. It is impossible for us to form any conclusion from such a statement. We are also referred to vague statements made by two or three witnesses as to his age. It is impossible from the evidence of these witnesses to come to any reasonable conclusion as to his exact age, or that he had attained majority before the institution of the suit. From the proceedings on the record of this case, it seems that the plaintiff had all along acted as proprietor of the estate, and that she had been so regarded by the defendant. Her own name was registered as proprietor, and continued until Jotindra Narain Roy asserted his right on attaining majority. In the rent-receipts granted by her, which were put in as evidence by the defendant, she appears as the actual proprietor. The notice of enhancement served on the defendant, bearing date the 15th Pous 1287, also purports to proceed from her in her own right; and the rent at the old rates, which alone the defendant admitted was payable, was deposited by him in the Collectorate also in her name as proprietor. If, therefore, the suit be regarded as brought by the plaintiff in her own right, as apparently it was, the objection cannot be regarded by us as in any way fatal. If the suit was brought in her own right, it was simply a case of assignment of her interest in the suit to Jotindra Narain. If, on the other hand, it be regarded as a suit brought by her on behalf of her adopted son, the minor, it is not proved that on that date she was incapable of suing because her son had attained majority; and we may observe that there can be no doubt that when he attained majority, he by his acts approved what may have been done on his behalf."

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As to the appeal in the other suit, the judgment proceeded thus:—

"This appeal relates to a suit brought by the same plaintiff for arrears of rent for the years 1289, 1290, 1291 and up to the Falgun kist of 1292, that is to say, for years subsequent to that which formed the subject of the previous suit, and at the same rate of rent which was there claimed. The defendant deposited the rent at the old rates for all these years within the period ranging from the 27th to the 30th Choyt of each year, and pleaded that, inasmuch as this suit had not been brought within six months from the dates of deposit, it was barred by limitation under the provisions of section 31 of the Rent Act (Bengal Act VIII) of 1869. To this the plaintiff objected, that inasmuch as the deposits had not been made in accordance with law, but had been made before the rents fell due and were therefore premature, the defendant could not get the benefit of that law. Other objections were made which it is unnecessary to consider. We agree with the Subordinate Judge in thinking that the suit was not barred by limitation, and that, consequently, the plaintiff was entitled to decree for

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arrears of rent at the rates given in the other case. This is the only point raised in this appeal before us. We observe that the rent for the year 1292 up to Falgun kist has been disallowed, inasmuch as it was held in the previous case that rent was not payable by monthly instalments, but only at the end of each year. This matter has not been brought before us in appeal. The result is that this appeal is also dismissed with costs."

On this appeal

Mr. *T. H. Cowie*, Q.C., and Mr. *J. H. A. Branson* appeared for the appellant

Sir *H. Davey*, Q.C., and Mr. *R. V. Doyne* for the respondent.

For the appellant it was argued that the first suit could only have been instituted by, or on behalf of, the adopted son Jotindra Narain. He should have sued in his own name, if of full age, or if he was not of full age, the widow might have sued as his next friend, or guardian, on his behalf. There was, however, evidence on the record, to which reference was made, showing that he had attained eighteen years of age when the plaint in the first suit was filed. Reference was made to *Ram Kannye Gossamee v. Meernomoyee Dossee* (1).

The chief ground of appeal in the second suit was that the claim for rent for the years 1289, 1290, and 1291 was barred by the deposit of the rent admitted to be due before suit brought under section 31 of Bengal Act VIII of 1869. As to service of notice reference was made to *Taramonee Koonwarees v. Jeebun Mundur* (2).

Counsel for the respondent were heard only as to the date of rent due and service of notice.

Mr. *T. H. Cowie* replied.

Their Lordships' judgment on 16th December was delivered by

SIR R. COUCH.—The suit in the first of these appeals was brought by Sarat Sunderi Debi, widow, executrix of the late Raja Jogendra Narain Roy, to recover from the appellant the rent at an enhanced rate for one year, ending on the 11th April 1882 of a separate ten-annas share of lands held by the appellant under a lease which was perpetual and heritable, but the rent of which was liable to be enhanced under the provisions of Act VIII

(1) 2 W. R., 49.

(2) 6 W. R., Act X, 99.

of 1869 of the Bengal Council. Raja Jogendra Narain Roy, who was the owner of the ten-annas share, married Sarat Sunderi Debi, and after his death, the date of which does not appear in the proceedings, she adopted a son to him, named Kumar Jotindra Narain Roy, who married the respondent and is now dead. The first Court decided that the plaintiff was entitled to rent for the year at an enhanced rate, and made a decree for it fixing the amount. This decree was affirmed on appeal by the High Court.

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The plaintiff stated that the plaintiff had the title to and the possession of the ten-annas share, which, by a partition of the zamindari, was recorded as No. 122 in the Collectorate of the district, and that the defendant had been paying to the plaintiff the old rent. The defendant, the present appellant, in his written statement took many objections to the suit, but Mr. Cowie, in opening the case for him, said that the only question for determination by their Lordships was whether the plaintiff had a right to bring the suit. This question was raised in the written statement, by the allegation that Jotindra Narain Roy, having come of age long before the institution of the suit, the plaintiff was not entitled to bring the suit in respect of the zamindari left by her husband. The first of the settled issues is: "Whether the plaintiff has a right to sue for enhancement?" Now the allegation in the plaint that the defendant had been paying the old rent to the plaintiff was not denied. Consequently the defendant could not dispute the plaintiff's title. He could only show that it had expired, and that therefore the plaintiff was not entitled to any rent. In addition to his written statement, the defendant, in a petition filed on the 5th December 1883, in answer to a petition filed by Jotindra Narain Roy for the substitution of his name for that of the plaintiff, said that the plaintiff was the owner only during the son's minority, and that, as the son attained majority before the institution of the suit, she had no right to bring it. Construing the issue with the written statement and this petition, the question to be tried appears to be whether the son had come of age before the institution of the suit. This would be the question, whether the plaintiff was suing in her own right or as guardian of her minor son. It is unnecessary to

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consider the effect of the title to the plaint, where she is called "widow of the late Raja Jogendra Nath Roy, mother of Sriman Kumar Jotindra Narain Roy, minor," which may be consistent with her suing in either character. The plaint rather supports the view that she was suing in her own right. Two of the plaintiff's witnesses deposed on cross-examination to the age of Jotindra Narain Roy. The defendant did not give any evidence of it. A will of Jotindra Narain Roy, made when he admittedly was of age, referring to a previous will executed by him, was also relied upon. Their Lordships agree with the judgment of the High Court, which said that it was impossible to form any conclusion from the statement in the will, and impossible from the evidence of the witnesses to come to any reasonable conclusion as to his exact age, or that he had attained majority before the institution of the suit. Therefore the only question for their Lordships' determination must be decided in the plaintiff's favour, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

The suit in the second appeal is between the same parties, and was brought for enhanced rent of the property for the three subsequent years and part of a fourth year. The only defence relied upon before their Lordships was that the old rent and cesses for each of the three years were tendered to the plaintiff in proper time, and she not having accepted them they were deposited in Court under Act VIII of 1869 (Bengal Council), and the plaintiff brought no suit within six months of the date of the deposit, and so the claim for rent at an enhanced rate was barred by a special law of limitation. As to the part of the rent for the fourth year, the defence was that the rent was payable yearly and was not due. Section 46 of Act VIII of 1869 enacts that if any under-tenant or raiyat shall tender payment of what he shall consider to be the full amount of rent due from him at the date of the tender, and if the amount so tendered shall not be accepted and a receipt in full forthwith granted, the under-tenant or raiyat may deposit the amount in the Court having jurisdiction to entertain a suit for the rent. By section 47 the Court is to issue a notice to the person to whose credit the money has been deposited, and serve it.

By section 31 it is enacted that whenever a deposit on account of rent shall have been made no suit shall be brought against the person making the deposit on account of any rent which accrued due prior to the date of the deposit, unless the suit be instituted within six months from the date of the service of the notice required by section 47. The rent for the first of the three years became due on the 12th April 1883, for the second on the 11th April 1884, for the third on the 12th April 1885. The deposits were made on the 10th April 1883, the 8th April 1884, and the 11th April 1885, all before the expiration of the year when the rent became due. The words of the Act are plain that the deposit must be of rent which accrued due prior to the date of the deposit. They do not admit of any other construction. The first Court disallowed the rent for the part of the fourth year on the ground that it was not due, and made a decree for rent for the three years at the rate which had been fixed for the year in the previous suit. The High Court, on appeal, affirmed that decree, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The appellant will pay the costs of the appeals.

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*Appeals dismissed.*

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

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## APPELLATE CIVIL.

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*Before Sir W. Comer Petheram, Knight, Chief Justice, and  
 Mr. Justice Norris.*

BAKSHI AND ANOTHER (PLAINTIFFS) v. NIZAMUDDI AND  
 OTHERS (DEFENDANTS).\*

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 December 8.

*Res judicata—Rent suit Decree as to rent payable for former years—  
 Evidence of rent payable.*

The plaintiffs sued the defendants for rent of a certain jote, claiming a higher rent than the defendants admitted. The High Court in second

\* Appeal from Appellate Decree No. 1053 of 1891, against the decree of Baboo Kalli Prosunno Mookerjee, Subordinate Judge of Tippera, dated the 30th of March 1891, modifying the decree of Baboo Kalli Puddo Mookerjee, Munsif of Moaradnagore, dated the 19th of February 1890.