1900
MAY 31 &
JUNE 1.

APPELLATE
CIVIL.

28 C. 90.

28 C. 90.

[90] *Before Mr. Justice Ghose and Mr. Justice Harington.*

NATH SINGH AND OTHERS (*Defendants*) *v.* DAMRI SINGH (*Plaintiff*).*
[31st May and 1st June 1900.]

Bengal Tenancy Act (VIII of 1885), *s.* 29—*Landlord and Tenant Suit to set aside a kabuliat—Enhancement of rent by contract—Consideration for such contract—Agreement to pay enhanced rent in settlement of* bona fide *disputes* res judicata.

An agreement embodied in *kabuliat* to pay a certain amount of rent agreed upon by the parties in settlement of *bona fide* disputes regarding the rate of rent and to avoid further litigation, is not an agreement in violation of the terms of s. 29 of the Bengal Tenancy Act.

Sheo Sahoy Panday v. *Ram Rachia Roy* (1) followed.

THE plaintiff instituted this suit to set aside a registered *kabuliat* executed by him on the 17th Magh, 1303, F. S. (17th January 1896) in favour of the defendants, his landlords on the grounds that the execution of the document was brought about fraudulently ; that the entries therein contained regarding the amount of *nagdi* rent, the quantity of land, etc., were inserted without the knowledge and consent of the plaintiff ; that the contents of the document were not read out to him ; that there was no consideration for the deed ; and that the agreement to pay the rent at an enhanced rate was illegal under the provisions of s. 29 of the Bengal Tenancy Act.

The defendant zemindars pleaded that the terms of the *kabuliat* were deliberately agreed upon by the plaintiff for certain concessions made to him by the defendants, and that the document was read out to him at the time of the execution.

It appears that the defendants had instituted suits for arreas of rent for the years 1296 to 1298 F.S. claiming rent from the plaintiff and some other tenants at an enhanced rate, on the allegation that the tenants had under a *doul* of 1292 F.S. agreed to pay the same, and that they paid rent from 1293 to 1295 F.S. at the said enhanced rate. The *bhaoli* rent was claimed on the [91] basis of certain *danabandis*. The Court of first instance found that the said *doul* was true and genuine, and decreed those suits in favour of the zemindars. But, on appeal, the then District Judge of Gaya (Mr. Brette), on the 27th of January 1893, dismissed the suits disbelieving the said *doul* and also the allegation of payment of rent by the tenants at an enhanced rate, for 1293 to 1295 F. S., observing at the same time that "what I say refers only to the present suit, and I must not be understood as determining finally what is plaintiff's rent." On second appeal the judgment of Mr. Brett was upheld by the High Court in September, 1894. Subsequent to this, various disputes and litigation took place between the landlords and the tenants ; and the former in 1302 F. S. moved the Sub-divisional Officer of Jehanabad to depute an amin under s. 69 of the Bengal Tenancy Act to take appraisement of the *bhaoli* crops of the tenants ; and that officer under s. 70 of the Act passed decrees against the tenants. The tenants brought a regular suit in the Civil Court to set aside the decrees passed under s. 70 of the Act, but that suit was

* Appeal from Appellate Decree No 1665 of 1898, against the decree of E.G. Drake-Brockman, Esquire, Officiating District Judge of Gaya, dated the 6th of July 1898, affirming the decree of Moulvie Abdul Bari, Munsif of Gaya, dated the 11th of March 1898.

(1) (1891) I. L. R. 18 Cal. 333.

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

dismissed on the 23rd of December, 1895. Thereupon the landlords took proceedings to execute the appraisement decrees; and the *jotes* and houses of the tenants were advertised for sale, which was to have been held on the 22nd of January, 1896.

During the interval between the dismissal of the civil suit brought by the tenants, and the date fixed for the sale of their holdings, the *kabuliat* in dispute was executed.

The Munsif in the present suit gave the plaintiff a decree holding that there was no fraud in the matter of the execution of the *kabuliat*, and that all the conditions embodied therein would be binding on the tenants, with this exception that the *kabuliat* be held void as regards the stipulation to pay enhanced rent at a rate higher than 2 annas in the rupee.

The District Judge, on appeal, held that the rate of rent due by the tenants for the years 1296 to 1298 F. S. was finally decided in 1893 (by Mr. Brett), and there having been no subsequent change, the agreement since entered into being in contravention of s. 29 of the Bengal Tenancy Act (inasmuch as the increased rate of rent mentioned therein was in excess of the **[92]** statutory limit) was void. He, therefore, affirmed the decree of the Munsif.

The defendants appealed to the High Court.

Mr. W. C. Bonnerjee, Babu *Umakali Mukerji* and Babu *Baldeo Narain Singh*, for the appellants.

Mr. C. Gregory and Babu *Durga Dass Dutt*, for the respondent.

1900, MAY 31. Mr. *Bonnerjee*, for the appellants.—The Courts below have treated the judgment of the District Judge in the former suits between the parties as finally determining the rate of *nagdi* rent payable by the tenants to the landlords, and therefore operating as *res judicata* between them. They are wrong. The District Judge expressly left the question open, and only decided that the arrears sued for in the suits before him, namely, those for 1296, 1297 and 1298 F. S., had been paid up in full. Incidentally he dealt with the rate of rent for those years and proceeded upon the tenants' admission as to what it was. There was no final settlement of the question. It is clear that the tenants had not paid any rents since, for the year 1299 and the following years, at the date of the agreement. Disputes regarding the rate of rent continued between the parties until they were finally settled by these *kabuliats*. If by an agreement all *bona fide* disputes are settled, that agreement should be upheld. There was no enhancement of rent in any sense of the word. An agreement by which *bona fide* disputes are finally settled cannot be said to be in contravention of the provisions of s. 29 of the Bengal Tenancy Act: see *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1), and Hukm Chand's Law of *Res Judicata*, para. 52, p. 115. *Punnoo Singh* v. *Nirghin Singh* (2) subsequently reconsidered in the case of *Jeo Lal Singh* v. *Surfun* (3). The agreement, it is submitted, is a perfectly good one, and the plaintiff's suit ought to have been altogether dismissed.

Mr. Gregory for the respondent.—Under s. 29 of the Bengal Tenancy Act rent may be enhanced only under certain conditions; one of them being that it "must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable **[93]** by the raiyat." By the *kabuliats* the respondents were made to pay in some cases double

(1) (1891) I. L. R. 18 Cal. 338.
(2) (1881) I. L. R. 7 Cal. 298.
(3) (1882) 11 C. L. R. 452, (487).

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

the original amount of rent, and therefore the agreement to pay the enhanced rent according to the terms of the *kabuliats* is in contravention of s. 29 of the Tenancy Act.

In the previous suits for arrears of rent for 1296 to 1298 F. S. the District Judge decided them in accordance with the road-cess returns for 1281 and 1282 F. S. prepared by the zemindars, therefore it may be inferred that the District Judge found that the rent was the same as it was fifteen years before those suits. He discussed the amount of rent, and did not confine his finding only to the period for which the rents were claimed, but he found what was the proper rent payable by the tenants. The case of *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1) is distinguishable from the present case. In that case there was no determination of rent, while in the present one there has been the clearest possible determination; the District Judge found not only what was the amount payable by the tenants but what they had actually paid. The *kabuliats* were executed by the respondents under pressure put upon them. The rent having been determined for the three years 1296 to 1298 F. S., and there being no subsequent change, the agreement since entered into in January 1896 (1303 F. S.) was in contravention of the law. The cases cited for the appellants do not strictly apply to the facts of this case.

Babu Durga Das Dutt on the same side.—If the judgment of the District Judge in the previous suit for arrears of rent be not taken as *res judicata*, it being a judgment *inter partes*, is a very strong piece of evidence determining the rate of rent. There are also the road-cess papers showing the rent payable by the tenants.

Mr. Bonnerjee replied.

Cur. adv. vult.

1900, JUNE 1. The following judgments were delivered by the High Court (GHOSE and HARINGTON, JJ.)

GHOSE, J.—This appeal arises out of a suit brought by a certain raiyat, Damri Singh, to set aside a *kabuliat* bearing date [94] the 17th Magh 1303, corresponding to the 17th January, 1896, executed by him in favour of the landlords, the appellants before us. The grounds upon which the said *kabuliat* was sought to be set aside were that it was brought about fraudulently by the landlords; that the statements and conditions inserted therein as regards the *nagdi* rent payable, and the quantity of land for which such rent was payable, were introduced without the plaintiff's knowledge; that he never agreed to pay the rent for the *bhaoli* land comprised in his holding according to the *danabandi*, instead of the *batai*, system; and that the agreement to pay the rent mentioned in the document was in violation of the provisions of s. 29 of the Bengal Tenancy Act.

The case of the landlords, the defendants, was that there was no fraud in the matter of the execution of the *kabuliat* in question; that there was good consideration for the agreement that was entered into; and that it was not in violation of the provisions of s. 29 of the Bengal Tenancy Act as urged on behalf of the plaintiff.

The Court of first instance held that there was no fraud in the matter of the execution of the *kabuliat*; that the raiyat was compelled under pressure of circumstances to agree to the terms thereof with his eyes wide open: and that there was consideration for the agreement that was come to between the parties. At the same time, the Munsif was

(1) (1891) I. L. R. 18 Cal. 388.

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

of opinion that the said agreement was in violation of the provisions of s. 29 of the Bengal Tenancy Act. As regards, however, the *bhaoli* land, that officer held that the agreement *qua* those lands, *i.e.*, to pay rent thereof according to the *danabandi* system, was binding upon the raiyat; and he accordingly decreed, that with the exception of the stipulation contained in the *kabuliat* regarding the *nagdi* rent, the other conditions inserted therein should be held to be binding upon the raiyat.

On appeal on behalf of the defendants, the landlords, the learned Judge of the Court below has affirmed the decree of the Munsif. That officer, in his judgment, in the first instance, refers to a previous suit between the parties, in which suit an issue seems to have been raised as to what the *nagdi* rent of the raiyat's **[95]** holding was; and then, referring to the judgment of the District Judge and of the High Court on second appeal in that suit, he has expressed the opinion that it must be held that the question of the rate of rent payable by the plaintiff for the years comprised in that suit was heard and finally decided by the District Judge, and there having been no subsequent change in the rent of the holding, the agreement entered into in the *kabuliat* of the 17th January, 1896, by which a higher rental was agreed to be paid, was in contravention of s. 29 of the Bengal Tenancy Act. In this view of the matter, he has affirmed the decree of the Munsif, no way interfering with the judgment of that officer as to the agreement regarding the *bhaoli* lands.

Against this decree, the landlords have preferred the appeal which is now before us.

In dealing with the question raised upon the judgment of the District Judge in this case, it will be necessary in the first place to refer shortly to the previous history of the litigation that took place between the parties.

In the year 1891, the landlords brought a suit for rent in respect of the years 1296, 1297 and 1298 F. S. upon a certain *doul* said to have been executed by the raiyat in the year 1298 F. S. The main question, upon which the parties went to trial in that suit was whether this *doul* was true or not; and there was a further question raised between them whether the raiyat had not paid to the landlords all the rent that was payable by them for the years in question. The issue, as stated in the judgment of the High Court, dated the 15th September 1894, were:

"*First.*—What are the quantities of *nagdi* and *bhaoli* lands of the defendants?"

"*Second.*—What amount of *nagdi* rent is payable by each defendant?"

"*Third*—Is the defendants' plea of payment true?"

The Court of first instance found that the *doul* was true, and proceeding upon the basis of that finding held that the plaintiffs were entitled to recover the rent claimed, and that the plea of payment raised by the defendants was not made out. On appeal **[96]** to the higher Court, the District Judge came to a different conclusion. He held that the *doul* in question was not proved, and that the plea of payment was proved. The learned Judge Mr. Brett, evidently found the receipts produced by the raiyat, and said to have been granted by the landlords, to be true; and he accordingly set aside the decree of the first Court, and dismissed the suit of the landlords altogether. In the course of his judgment, however, he incidentally dealt with the question of the rent payable by

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

the raiyats, but it is rather difficult to say from his judgment whether he meant to come to any determination as to what the proper rent payable by the raiyat was during the years for which the suit was brought. His judgment may be construed in either of two ways. It may be construed as determining that the rent of the holding was as the raiyat alleged it to be; and it may also be construed as holding that inasmuch as the landlords had failed to prove the *doul*, and the rent of the holding was as they alleged it to be, there was nothing else to proceed upon than the admission of the raiyat. And this seems perhaps clear from certain passages in his judgment, to which we now propose to refer.

The learned Judge says: "It is argued that even if the *doul* rents are not accepted, the plaintiffs could fall back on the rents of the time immediately preceding. But what were they? There is on the record exhibit 80 which purports to be the road-cess returns for 1292. But in the first place it is not admissible against the defendants. And in the second place it is not proved." Later on, after disposing of the *laggits* and *khasra* papers produced by the landlords to show what was the rent between the years 1286 and 1292, when the *doul* was said to have been executed, he proceeds as follows: "There is nothing in this to show that they are the contemporaneous records of actual collections. Therefore it is that I hold that the defendants' allegations of the cash rents they are liable to pay are the only ones that hold the field. Of course, however, what I say refers only to the present suit, and I must not be understood as determining finally what is plaintiffs' rent."

When the matter came up to this Court on second appeal at the instance of the landlords, the learned Judges who had to [97] deal with the appeal seem to have thought that Mr. Brett ought not to have in his judgment said as he did say, that what he held only referred to the suit then before him, and that he should not be understood as "determining finally" what was the plaintiffs' rent, and that he had no right to determine what effect his judgment would have in another suit. At the same time the learned Judges expressed the opinion that Mr. Brett only meant to determine the actual matter in the suit, *viz.*, whether the rents that were payable for the years in suit were paid. It may well be argued, as indeed it has been argued, that the learned Judges of this Court understood that Mr. Brett did determine what the rent payable was for the years for which the previous suit was brought. But then it will be observed that the learned Judges, after noticing the question as regards the *doul* upon which the suit was founded, and the judgment of Mr. Brett upon that question, referred to the other question, namely, that of payment as considered by that officer; and the rest of their judgment may well be taken to be a judgment upon that question, and upon that question alone, though no doubt in the course of dealing with it they made certain observations which may be taken as observations applicable to the question of the rent that was payable for the years in question. The result, however, was that the suit of the landlords was dismissed in the Court of the District Judge, and their appeal to this Court was dismissed. They obtained no relief at the hands of either of the two Appellate Courts.

Shortly afterwards the landlords invoked the assistance of the Revenue authorities in appraising the crops which had grown upon the raiyat's *bhaoli* land according to the *danabandi* system, and in determining the value of the share thereof as payable to the landlords. The order that was made by the Revenue Courts was an order distinctly adverse to the

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

raiyat. The matter was then brought up in appeal to the higher Revenue authorities, but with no result in favour of the raiyat. The raiyat then brought a civil suit to set aside the decree of the Revenue authority; but *that* also failed. And when in execution of the decree, which the landlords had obtained in the Revenue Court, the raiyat's lands and his homestead were about to be sold, the parties came to a [98] settlement, as embodied in the *pottah kabuliat* of the 17th January 1896, the one being executed by the landlords and the other by the raiyat. The *kabuliat*, which is the document now before us, recites the disputes that existed between the parties as regards the rent of the *nagai* lands, and as to the rule in determining the landlord's share of the produce of the *bhali* lands, and that these disputes have been settled in the manner stated in the document. Among other matters, the raiyat agrees to pay a certain amount of yearly rent of the specified quantity of *nagdi* lands in his occupation; and also agrees that the *danabandi* system should be followed in regard to the *bhaoli* lands.

The first Court, as we have already noticed, held that the raiyat was compelled by force of circumstances to agree to the stipulations contained in the *kabuliat* executed by him, and that he did so perfectly well knowing what he was about. The learned Judge of the Lower Appellate Court, so far as we can see, does not question the propriety of that conclusion of the Munsif. On the other hand, we find, referring to the judgment of that officer in the case of Gangone Singh, to which he refers in the judgment with which we are immediately concerned, that he was distinctly of opinion that there was no fraud in the matter of the execution of the *kabuliat*, and to use the learned Judge's own words: "The probabilities are all in favour of the agreement being as stated by the defendants and their witnesses, and I hold that the plea of fraud by the plaintiff cannot be accepted." That being so, we must take it that there was no fraud in connection with the transaction that was entered into between the landlords and the raiyat.

But then arises the question whether there was any valid consideration for the execution of the *kabuliat* in question. Now if we were to accept the facts as they have been found by the Munsif—facts which have in no way been negatived by the District Judge—there can, we think, be no doubt that there was consideration for the transaction that was entered into between the parties. And one of the matters that we desire here specially to refer to is, that at the time of this transaction no rent, at any rate in cash, was paid by the raiyat for the years 1299, [99] 1300, 1301 and 1302, which had not evidently up to that time been paid. There was, on the one hand, a claim in favour of the raiyat for the costs which had been awarded to him in the previous suit, and on the other hand there was a large claim in favour of the landlords for the rents of those years, and added to *that* there was a decree for *bhaoli* rent which had been found due to the landlords upon the system of *danabandi*, and for which rent the raiyat's holding and homestead were about to be sold. It is stated in the *kabuliat* of January 1896 that the rent due to the Zemindars was set off against the claim of the raiyat for costs, and that there was some remission made and some money paid in cash. Whether anything was paid in cash or not we do not know, but we may well accept it that there was some remission. And that is the view which the Munsif in this case accepted.

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

Then referring to what the bone of contention between the parties then was, we find that it was the rent payable by the raiyat for his *nagdi* lands. The judgment of Mr. Brett was, as it seems to us, such that either view could be taken of it, namely, that he meant to determine that the rent really payable for the years for which the previous suit was brought was as the raiyat alleged it to be; and it may also be taken that he did not mean so to hold, but that he meant only to proceed upon the admission of the raiyat as to the rent of the land, in deciding the question of payment, and of the rent payable, leaving the question as to the proper amount payable to be determined in a subsequent litigation that might be brought for the purpose. In that view of the matter, it seems to us impossible to say that there was not *bona fide* dispute between the parties as regards the true rent payable for the *nagdi* lands in the occupation of the raiyat. If then we are right in taking, as we take it, that there was a *bona fide* dispute between the parties, and if there were other considerations as detailed in the judgment of the Munsif, to which we have already referred, it was quite open to the parties to settle their differences by the transaction in question; and in this view of the matter the stipulation contained in the *kabuliat*, that the raiyat should pay a certain rent for a certain quantity of land to the landlords, could not be in violation [100] of the terms of s. 29 of the Bengal Tenancy Act. That section enacts: "The money-rent of an occupancy raiyat may be enhanced by contract, subject to the following conditions;" and one of the conditions is—"the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat." The question upon this arises, what was the rent previously payable by the raiyat. It will be observed that the previous suit by the landlords for rent was in respect of the years 1296 to 1298 F. S. Since then, and up to the year 1303, when the *kabuliat* was executed, there was no payment of rent by the raiyat. The matter was left unsettled between the parties, the landlords apparently insisting that the rent payable by the raiyat was the higher rent, and the raiyat, on the other hand, alleging that it was the lower rent; and if Mr. Brett did not mean to determine finally (for so he says in his judgment) what was the rent truly payable for the years for which the previous suit was brought, it could not be said that the agreement to pay the particular rent entered in the *kabuliat* was an agreement to pay such enhanced rent as would exceed by more than two annas in the rupee the rent previously payable by the raiyat. In this connection we may refer to the case of *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1) decided by a Bench of this Court (PETHERAM, C. J., and GHOSE, J.) where an agreement, which was embodied in a *kabuliat*, to pay a certain amount of rent agreed upon by the parties, in settlement of differences between them as to what had been the amount and character of the rent and to avoid further litigation, was held to be not an agreement to enhance rent within the meaning of s. 29 of the Bengal Tenancy Act. The facts of that case are very similar to the facts of the present case; and, following the rule of law laid down in that case, we hold that the stipulation contained in the *kabuliat* of the 17th January 1896 was not in violation of the terms of s. 29 of the Bengal Tenancy Act.

In this view of the matter the result is that the decrees of the Lower Courts should be set aside and the suit dismissed, it being

(1) (1891) I. L. R. 18 Cal. 338.

declared that the *kabuliat* is in every respect binding upon [101] the raiyat. The appellants will recover their costs in this appeal from the respondents but, so far as the costs in the Courts below are concerned, we think that in the circumstances of this case each party should bear his own costs.

1900 MAY 31 & JUNE 1.

APPELLATE CIVIL.

28 C. 90.

HARINGTON, J.—I agree that the case of *Sheo Sahoy Panday* v. *Ram Rachia Ray* (1), which has been referred to by my learned brother in his judgment, appears to be an authority for the proposition that an agreement, embodied in a *kabuliat*, to pay a certain amount of rent agreed upon by the parties in settlement of differences between them as to what had been the amount of rent payable, and to avoid further litigation, is not an agreement to enhance rent within the meaning of s. 29 of the Bengal Tenancy Act. Now, in this case, the *kabuliat*, which has been attacked, recites that there has been a dispute between the parties regarding the rate and the amount of rent, and it recites that several cases had been filed in the Collectorate and the Civil Court, and it then states that the tenant agrees to pay the stipulated amount of rent in settlement of these disputes. Those being the allegations in the *kabuliat*, it appears to me that the *kabuliat* is valid on the authority of the case to which I have referred, unless it can be shown that those recitals are untrue, and that no *bona fide* dispute existed between the parties as to the amount and rate of rent to be paid.

Now an action was brought for the purposes of setting aside the *kabuliat*, and the plaintiff in the action did not succeed in establishing that the allegations mentioned in the recitals were untrue. It must be taken, therefore, that the allegations stand as true, and in my opinion nothing has been shown in the judgment of Mr. Brett which renders it impossible or even unreasonable that there should have been at the time when this *kabuliat* was entered into a *bona fide* dispute as to the amount and rate of rent to be paid. It stands, therefore, that the recitals of the considerations are true, and that nothing has been shown in the arguments before us to render the judgments of the Courts below that these recitals were true, open to the [102] charge of resting on a misconstruction of the judgment of Mr. Brett. In these circumstances the *kabuliat* is not a mere agreement to enhance the rent, but is an agreement to settle *bona fide* disputes and differences, and therefore I agree with my learned brother in thinking that it is similar to the agreement which was considered by this Court in the case I have quoted, and therefore is not void under s. 29 of the Bengal Tenancy Act.

For these reasons I agree in the judgment which has been delivered by my learned brother.

Appeal allowed.

28 C. 102.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Handley.

BIDHU CHANDALINI *(Complainant)* v. MATI SHEIKH MONDAL *(Accused.)** [21st June, 1900].

Complaint—Dismissal of complaint by District Magistrate—Absence of complainant—Revival of and further inquiry into case by same Magistrate—Review—Code of Criminal Procedure (Act V of 1898), ss. 259, 369, 437 and 438.

* Crimina Reference No. 115 of 1900, made by S. K. Deb, Esq., Sessions Judge of Nuddea, dated the 8th of June 1900.

(1) (1891) I. L. R. 18 Cal. 333.