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32 C. 459=9 C. W. N. 396.

cle 29, it is for the defendants to make out that the property seized was moveable property. But there is no evidence to show that. In fact, the finding is just the other way. The Subordinate Judge has spoken of the crops that were seized as "standing crops." There is nothing to show that they were cut when the distress was effected, and it is settled law that standing crops are immoveable, not moveable property within the meaning of the Limitation Act. If that is so, what becomes of Article 29? It is obvious that when the property seized is not moveable property, Article 29 cannot apply. Then, the question is what Article is applicable? I think Article 36. That Article says:—"For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for." The case before us is not specially provided for in the Act: so Art. 36 applies, as the case clearly falls within its provisions, and the suit was brought within the two years limited by that Article; so it is not barred by limitation. In my opinion, therefore, the judgment of Mitra J. must be reversed and the decree of the Subordinate Judge restored. I should like to add that if this point had been drawn to the notice of Mr. Justice Mitra, his decision probably would have been different.

The appellant will have his costs in all Courts.

HOLMWOOD J. I agree.

Appeal allowed.

32 C. 463.

[463] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Holmwood.

GOUR CHANDRA SAHA *v.* MANI MOHAN SEN.*

[29th February, 1905.]

Landlord and tenant—Government settlement—Rent, rate of Obligation of under-tenants—Contract with Government—Jamabandi—Regulation VII of 1822, *s.* 9.

On the expiry of the term of a prior settlement the plaintiff took a fresh settlement from the Government of certain lands and contracted with the Government that he would not collect higher rents than are recorded in the settlement papers:—

Held, that that contract would not prevent him from recovering from the defendants higher rents by enforcing a contract which the latter had entered into with him. Section 9 of Regulation VII of 1822 does not render such an agreement illegal.

Section 9, cl. (1) of Regulation VII of 1822 does not preclude the Court from going behind the Collector's *jamabandi*.

Zamir Mandal v. *Gopi Sundari Dasi* (1) followed.

[Ref. 37 Cal. 449; 46 I. C. 98=3 P. L. J. 394.]

* Appeal from Appellate Decree, No. 2630 of 1902, against the decree of Bhuban Mohan Ghosh, Subordinate Judge of Nuddea, dated September 1, 1902, modifying the decree of Shashi Bhusan Sen, Munsif of Chuadanga, dated June 20, 1901.

(1) *Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.*

ZAMIR MANDAL *v.* GOPI SUNDARI DASI.†

[29th August, 1900.]

MACLEAN C. J. In these cases, there are twenty-two appeals, the plaintiff sues various defendants for the rents of certain chur-lands, upon certain kabuliats.

† Appeals from Appellate Decrees, Nos. 526, 543 to 563 of 1898, against the decree of G. K. Deb, District Judge of Nuddea, dated Dec. 20, 1897, reversing the decree of Satkowri Haldar, Munsif of Kushtea, dated Feb. 16, 1897.

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APPELLATE CIVIL.

32 C. 463.

Second Appeal by the principal defendants, Gour Chandra Saha and another.

[464] The appeal arose out of a suit by the plaintiffs to recover their share of rent for the years 1303 to the Pous *kist* of 1306, due under a kabuliat dated the 26th Ashar 1300 executed by the defendants in favour of the plaintiffs and their co-sharers, the *pro forma* defendants, in respect of a *be-meaai jama* of 1,000 bighas of land included in certain *churs* held by the plaintiffs and the *pro forma* defendants under Government. The plaintiffs and their co-sharers realized their shares of the rent separately.

The defendants pleaded, *inter alia*, that the plaintiffs held the lands under temporary settlements from Government ; that the kabuliat sued upon had been executed during the period of the settlement which expired in 1302 ; that under the fresh settlement taken by the plaintiffs in 1303 portions of the lands included in the *jama* were taken away from the plaintiffs by the Government and made over to third parties, and that under the kabuliat dated the 23rd April 1898 (Chait 1304) executed by the plaintiffs and their co-sharers in favour of Government on the occasion of the fresh settlement they bound themselves "to respect the recorded rights **[465]** possessed by the raiyats, under-tenants, village-headmen and others in the said estate" and agreed not to "collect higher rents than are recorded in the settlement papers as demandable from raiyats, under-raiyats, and others." They pleaded that the plaintiffs were entitled to recover rent only for the lands included in their settlement and at the rate mentioned in the settlement papers ; they pleaded payment and deposited in Court

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32 C. 463. (Note.)

After the plaintiff had granted these kabuliats, he took a settlement from Government of the chur-lands comprised in those kabuliats, and in his contract with the Government he bargained that he would not collect higher rents than are recorded in the settlement papers, "as demandable from raiyats, under-tenants and others." The rent reserved by the kabuliats is a higher rent than that recorded in the settlement papers, and the argument for the defendants is, that, inasmuch as the plaintiff had thus bargained with the Government, he was not entitled to demand from the defendants, and the defendants were not liable to pay, more than the rent recorded in the settlement papers. The next question, then, between the parties is, whether the plaintiff is entitled to recover from the defendants the rent stipulated for in the kabuliats or merely the rent recorded in the settlement papers.

The learned Judge in the Court below, has held that he is entitled to recover the rents reserved in the kabuliats, and I think he is right. I do not see why, because the plaintiff has entered into this contract with Government, a contract which may, or may not, give the Government, as against him, certain rights, if he broke that contract,—I cannot appreciate, I say, why that should prevent him from enforcing the bargain which the tenants thought fit to make with him.

Considerable reliance is placed upon section 9 of Regulation VII of 1822, a section which directs detailed investigation to be prosecuted by Collectors and other Officers making or revising settlements, and stress is laid upon the last sentence of clause (1) of that section which is as follows :—"The information collected on the above points shall be so arranged and recorded, as to admit of an immediate reference hereafter by the Courts of Judicature ; it being understood and declared, that all decisions on the demands of the zemindars shall hereafter be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement and recorded in the Collector's proceedings, until distinctly altered by mutual agreement, or after full investigation in a regular suit." I do not think that there is any-

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the balance alleged by them to be due. The rate of rent mentioned in the defendants, kabuliat was higher than that in the settlement papers.

The Court of first instance disallowed plaintiff's claim for rent for the lands which had been released by Government to third parties. As regards the rest of the lands he held that the plaintiffs were entitled to recover at the rate mentioned in the defendants' kabuliat to the end of 1304 and thenceforward at the rate mentioned in the settlement papers. On appeal by the plaintiffs the Subordinate Judge held that the plaintiffs were entitled [466] to recover at the rate stipulated in the defendants' kabuliat for the whole period and confirmed the decision of the first Court in other respects.

The principal defendants appealed to the High Court.

Babu *Nilmadhab Bose* (Babu *Hara Kumar Mitter* with him) for the appellants. The old kabuliat ceased with the expiry of the period of the old settlement; when the plaintiff took the new settlement he bound himself by the kabuliat executed by him in favour of Government not to claim higher rent than that mentioned in the jamabandi. [Reference was made to the clauses of the kabuliat quoted above.]

Babu *Tarak Chandra Chakravarti* (Babu *Nikhil Nath Roy* with him) for the respondents. The old kabuliat did not expire with the settlement —it was permanent in its nature; the defendants [467] being no party to

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thing in that Regulation which really assists the present appellants. On the contrary the words "until distinctly altered by mutual agreement" would appear to import that the parties may, if I may use the expression, contract themselves out of the Regulation, and make a bargain for themselves, and that is just what the parties have done here. It is true that the contract with the defendants was entered into before the settlement with the Government, but that does not appear to me to make any difference. The Regulation does not say that such contracts shall be illegal: on the contrary it suggests that parties by mutual agreement may make them.

It is somewhat curious that, if the argument of the appellants be well founded, seeing that this Regulation has been in force since 1822, and still is in force, the point we are now asked to decide has never, save in one case, been the subject of any judicial decision. The absence of such judicial decision for so long a time tends rather to indicate that it was regarded as not susceptible of any serious argument. In point of fact, however, the precise point has been decided by Mr. Justice O'Kinealy and Mr. Justice Gupta—the former of whom had very considerable experience in these matters—in the unreported case, Appeal from Appellate Decree No. 1741 of 1896, and decided against the present appellants. But quite apart from authority, I fail to see how, upon principle, the existence of his contract with the Government, with the clause in it to which I have referred, can prevent him from enforcing the contract, which the defendants have entered into with him.

With respect to the question as to the additional lands, there really is nothing in it. The question of whether or not there are additional lands is a question of fact, and, inasmuch as it is conceded that by the contract between the parties the defendants were to pay extra rent for additional land, if there were any, and it has been found that there are additional lands, I do not see how any question arises on that point.

On these grounds I think that the decision of the Court below is right, and these appeals must be dismissed with costs.

BANERJEE, J. I am of the same opinion. I only wish to add a few words with reference to the contention urged by the learned vakil for the appellant that the effect of clause (1) of section 9 of Regulation VII of 1822 is to preclude the Court from going behind the Collector's jamabandi in this case.

The words of the clause that were relied upon are these:—"The information collected on the above points shall be so arranged and recorded, as to admit of an immediate reference hereafter by the Courts of Judicature; it being understood and declared, that all decisions on the demands of the zemindars shall hereafter be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, and recorded in the Collector's proceedings, until distinctly altered by mutual agreement, or after full investigation in a regular suit."

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the agreement between the plaintiffs and Government cannot take any benefit under it. Regulation VII of 1882 only protects resident raiyats; the defendants are tenure-holders; the plaintiffs were the settlement-holders and were by the Regulation entitled to renewal, and they went on paying the revenue.

Babu *Nilmadhab Bose*, in reply. We are entitled to rely on the plaintiffs' kabuliat as otherwise the object of Government in taking it would be frustrated. After the expiry of the old settlement the plaintiffs ceased to be our landlords; the lands became *khas* lands of Government, and therefore our old kabuliat expired.

[468] MACLEAN C. J. I think the view taken by the Subordinate Judge in this case is right. We have sent for the unreported case of *Zamir Mandal* v. *Gopi Sundari Dasi* (1) referred to in his judgment, and it seems to me that that is an authority precisely in point. I was a party to that judgment and I see no reason to resile from the view that I then took. The appeal is dismissed with costs.

HOLMWOOD, J. I agree.

Appeal dismissed.

(1) See *ante*. [p. 463 (note.)] p. 291.

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To understand the true effect of this provision, it must be borne in mind that the procedure for realization of rent by zemindars that was in force at the time when Regulation VII of 1822 was passed, and that must have been in the contemplation of the framers of that Regulation, was a summary procedure; and the effect of the words quoted above was, that in any summary proceeding instituted by a zemindar for the realization of rent against a tenant, in regard to whose holding there had been a record of the rent payable in the Collector's proceedings, the Collector's record was to be followed until it was distinctly altered by mutual agreement, or after full investigation in a regular suit, that is, a regular suit as distinguished from the summary procedure then in force for the realization of rent.

That being so, would it be right to hold, now that the procedure for the relization of rent has been altered, and materially altered, that the provisions of the law quoted above should stand in the way of a Civil Court going behind the Collector's Jamabandhi in a suit for arrears of rent brought by a landlord against his tenant? I am of opinion that the question must be answered in the negative. In a suit for arrears of rent, it is open to the tenant to dispute the rate at which rent is claimed, and, upon such a dispute being raised, the Court is to enter into an investigation as to the rate of rent; and where it enters into such an investigation, an appeal and a second appeal are allowed against the decree passed in such a suit. The investigation is always as full as it can be in a regular suit, and notwithstanding that this is the procedure for rent suits, can it still be said that the Court is bound by the Collector's jamabandhi, and the question of the true rate of rent payable by the tenants must be reserved for determination in some other civil suit to be subsequently brought?

The view I take that it is open to the Civil Court to go behind the Collector's jamabandi and ascertain the true rate of rent payable by the tenant, is amply supported by the cases to which reference has been made, namely, *Ledlie* v. *Doorgamonee Dossee* (1) and *Keazoodeen Mahomed* v. *McAlpine* (2), in which it has been held that a tenant is not bound by the rent recorded in the Collector's jamabandi; for, if the tenant is not bound by the record, there is no reason why the landlord should be held to be bound by it.

The unreported case of *Jameer* v. *Tarini Charan Singh* (S. A. No. 1741 of 1896) is a direct authority upon the question in favour of the view I take; and as for the other unreported case, namely, S. A. No. 2552 of 1894, that was cited by the learned vakil for the appellant, it is enough to say that in that case the kabuliat given by the tenant, upon which reliance was placed by the plaintiff landlord, was found to have no permanent force, and it was accordingly held that in the absence of evidence of any other rate, the rate recorded in the Collector's jamabandi should prevail.

Appeals dismissed.

(1) (1874) 21 W. R. 410. (2) (1874) 22 W. R. 540.