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APPEAL FROM ORIGINAL CIVIL.

32 C. 379=9 C. W. N. 521 =2 Cr. L. J. 106.

jurisdiction in *quasi* criminal matter; it is the Civil Court which is to grant or refuse the sanction. Then the sanction may be revoked or granted by any authority to which the authority giving or refuing it, is subordinate: this again must be a Civil Appellate Court: then the High Court for good cause shown, may extend the time. This must, we think, mean, regard being had to the definition which points to the High Court in its *Appellate* jurisdiction, the Appellate Side of the High Court; and seeing that the section indicates clearly that the Civil Courts are to deal with these questions, the context would seem to show an intention that the Appellate Side of that Court, sitting in the exercise of its Civil Jurisdiction was the proper Court to extend the time. The Legislature could scarcely have intended that when all the other applications in this connection are to be heard by the Civil Court, an application for extension of time was to be heard by the Criminal Appellate Bench of the High Court. A Judge sitting alone on the Original Side of the High Court, is not subordinate to a Division Bench of that Court, though the latter can sit in appeal from a decision of the former. "High Court" in section 195 cannot, we think, mean a Judge sitting on the Original Side of the Court, but for the reasons given above we do not see why it should not mean a Civil Appellate Bench of the High Court. Mr. Justice Henderson consequently had no jurisdiction to hear the application.

The other questions do not, in this view, become material: but as they have been argued we may say that we do not agree with the view that the time can be extended when it has expired. If the time has expired, there is nothing to extend. The cases in the Madras High Court, upon which the Court of first instance relied, were heard *ex-parte*, apparently without the question being argued, and can scarcely be treated as authorities. Any way, we respectfully differ.

The appeal must be allowed with costs in both Courts.

Appeal allowed.

Attorneys for the appellants: *Swinhoe & Co.*
Attorney for the respondent: *O. C. Gangooly.*

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32 C. 386 (=9 C. W. N. 249=1 C. L. J. 1.)

[386] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Harington, and Mr. Justice Brett.

RAM MOHAN PAL AND OTHERS *v.* SHEIKH KACHU.*

[20th January, 1905.]

Occupancy right, transfer of—Co-sharer, acquisition by—Bengal Tenancy Act (VIII of 1885), s. 22, cl. (2).

Held by the Full Bench (RAMPINI, J., dissenting), that by the transfer of the occupancy right to person jointly interested in the land as proprietor or permanent tenure-holder, the holding does not cease to exist, but only the occupancy right is terminated; and that the cases of *Jawadul Huq* v. *Ram Das Saha* (1), *Miajan* v. *Minnat Ali* (2) and *Sitanath Panda* v. *Pelaram Tripati* (3) were rightly decided.

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* Reference to Full Bench in Appeal from Appellate Decree No. 2072 of 1901.

(1) (1896) I. L. R. 24 Cal. 143.
(2) (1896) I. L. R. 24 Cal. 521.
(3) (1894) I. L. R. 21 Cal. 869.

[Ref. 7 C. L. J. 712 ; 34 Cal. 516=11 C. W. N. 626=5 C. L. J. 457 ; 59 I. C. 337 ; 12 I. C. 67 ; 15 I. C. 705 ; Fol. 13 C. W. N. 919=2 I. C. 654 ; 20 I. C. 698=18 C. L. J. 262=19 C. W. N. 246 ; Appr. 42 Cal. 172 ; 38 I. C. 534 ; Dist. 13 I. C. 836 ; 19 C. L. J. 400=25 I. C. 546 ; Fol. 5 Pat. L. J. 302=56 I. C. 366=65 I. C. 281 ; 1920 Pat. 168.]

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FULL BENCH.

32 C. 386=9 C. W. N. 242 =1 C.L.J. 1.

REFERENCE to full Bench by RAMPINI and MITRA JJ. in second appeal by the plaintiff, Ram Mohan Pal and on his death by his heirs, Dinamoyi Dasi and others.

The plaintiffs, respondents, were the putnidars of 3 annas 17½ gundas undivided share of a mouzah known as Atubbanga, and the defendants 3 to 9 held in that mouzah, in occupancy right, three *kanis* of land. The latter sold their interest in the said land to the defendants Nos. 1 and 2 who were also part proprietors of the mouzah, having a share in the putni and who took khas possession of the said three *kanis* of land. Thereupon the present suit was instituted in the Munsif's Court at Naraingunge for having the sale set aside on the ground that occupancy rights were not transferable by sale, or whether they were or not for khas possession in proportion to their share jointly with the defendants.

[387] The Munsif held that no custom or usage had been proved, that occupancy rights were transferable by sale and he decreed the plaintiff's suit, giving *khas* possession as prayed.

On appeal, the Subordinate Judge held that occupancy rights were transferable by custom in the locality, and that the plaintiffs were not entitled to *khas* possession. Against this decision the plaintiffs preferred an appeal to the High Court.

The second appeal came on for hearing before RAMPINI AND MITRA JJ., and their Lordships were of opinion that the plaintiffs were entitled to *khas* possession jointly with the defendants Nos. 1 and 2, and that the appeal should therefore be decreed. But as this view was opposed to that expressed in three reported cases mentioned in the Order of reference, the question was referred for decision by a Full Bench.

The Order of reference was as follows:—

"The plaintiffs have a 3 annas 17½ gundas share in a certain putni. The principal defendants have also a share in this putni. The plaintiffs sue for *khas* possession, in proportion to their share, of certain lands appertaining to the putni of which the defendants are in *khas* possession by virtue of their purchase of the occupancy rights of the old tenants of these lands.

The plaintiffs plead (i) that occupancy rights are not transferable by sale ; (ii) that whether they are or are not, they (the plaintiffs) are entitled to joint *khas* possession along with the defendants.

"The Subordinate Judge has held (*a*) that occupancy rights are transferable by custom, and (*b*) the plaintiffs are not entitled to *khas* possession as prayed.

"The plaintiffs appeal and impugn the correctness of the Subordinate Judge's decision on both points.

"The finding of the Subordinate Judge that the occupancy rights in the locality in which the disputed lands are situate are transferable by custom without the consent of the landlord is a finding of fact, which we cannot disturb in second appeal. But we are of opinion that the Subordinate Judge is in error in holding that the plaintiffs are not entitled to *khas* possession. Under section 22 (2) of the Bengal Tenancy Act "if the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it *shall cease to exist*; but nothing in this sub-section shall prejudicially affect the right of any third person." Now, the principal defendants are jointly interested in the land with the plaintiffs as permanent tenure-holders (*viz.*, as putnidars). Hence, the occupancy right they have purchased has ceased to exist. They are in direct possession of the lands as putnidars, and consequently the plaintiffs are as much entitled to *khas* possession as they are. The plaintiffs should accordingly be put in *khas* possession in proportion to their interest in the putni.

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"[388] The Subordinate Judge observes that the rulings of this Court on the subject are conflicting. He cites the cases of *Palakdhari Rai* v. *Manners* (1) and *Dilbar Sardar* v. *Hosein Ali Bepari* (2). In the former of these two cases, it is incidentally remarked at page 185 :—'We may here point out that in the case of a purchase by one of the maliks, the other maliks cannot maintain a suit for ejectment. Their only remedy would be by partition of the property within which the land purchased is situate, though perhaps they might also sue for a declaration of the invalidity of the sale." But this is an *obiter dictum*, as pointed out in the second of the two cases above cited, in which it is also dissented from. In this case at page 555 it is said : 'In this Court it is contended that the form of the suit was misconceivad and that the plaintiff, if entitled to any relief whatever, is entitled only to a partition of the estate. No authority has been cited for this proposition, but reliance has been placed on a remark made in the judgment which was delivered in case of *Palakdhari Rai* v. *Manners* (1), which possibly, so far as it goes, may tend to sustain the contention. That, however, is merely an *obiter dictum*, and there is no doubt that the view of this Court has been, so far as we are aware, for a long series of years to the contrary effect. Reliance has also been placed upon the well-known cases of *Watson and Company* v. *Ram Chund Dutt* (3) and *Luchmeswar Singh* v. *Manowar Hosein* (4). These cases are, however, in our opinion clearly distinguishable from the present. Upon the findings of fact arrived at by the courts below, the present case might thus be stated: A two-anna sharer in the taluk has, without the consent of his co-sharers, expelled (for it comes to that) one of the common tenants of the *talukdars* and has possessed himself to the exclusion of his co-sharers of the lands held by him. But this is not a case such as is contemplated by either of the decisions cited; for there are in this case no considerations whatever of an equitable kind, so far as we can perceive, to sustain the claim brought forward by the appellants to retain possession of the land from which they have expelled the tenants to the exclusion of their co-sharers. There is, therefore, no conflict on the subject, as supposed by the Subordinate Judge. The case of *Dilbar Sardar* v. *Hosein Ali Bepari* (2) is an authority for holding that in a case such as the present, the plaintiffs are entitled to khas possession. The case of *Palakdhari Rai* v. *Manners* (1), for the reasons assigned in *Dilbar Sardar's* case (2), is no authority to the contrary."

"But there are authorities to the contrary. These are the cases of *Sitanath Panda* v. *Pelaram Tripati* (5), *Jawadul Huq* v. *Ram Das Saha* (6), and *Miajan* v. *Minnat Ali* (7). These cases lay down the principle that when a co-sharer landlord purchases an occupancy right, the tenancy is not extinguished, but continues to exist divested of the occupancy right previously attached to it. If these rulings are followed, the plaintiffs are not entitled to joint khas possession, as prayed for. But we do not [389] think the above cited cases have been rightly decided, and we are of opinion that according to the terms of section 22 (2) and the intention of the Legislature which framed the Bengal Tenancy Act, an occupancy right purchased by a co-sharer landlord who is a joint proprietor or a joint permanent tenure-holder ceases to exist, and no tenancy or any other right remains by virtue of which the purchaser can obtain khas possession of the land as a tenant our reasons for coming to this conclusion are—(i) that to hold otherwise is to introduce a new class of tenants, not comtemplated by the Act (*see* section 4); (ii) that to lay down this principle is to frustrate the object of the introduction into the Act of section 22, which was to discourage the purchase by landlords of their tenants' rights so as to prevent their encroaching upon the raiyati land of the province and converting it into *nij jote* land; (iii) the words in section 22 (2) 'shall cease to exist' occur also in section 22 (1); and so, if in the circumstances referred to, the tenancy is not to cease to exist, but to continue divested only of the occupancy right, then under section 22 (1) a landlord may purchase an occupancy right and become his own tenant, which would seem to be opposed to the fundamental principles, which underlie the law of landlord and tenant in all countries; and (iv) that if the Legislature had intended to lay down any such rule as has been laid down in the above cited rulings, it would surely have conveyed its meaning not by implication, but by means of clear and unambiguous language.

"The words 'but nothing in this sub-section shall prejudicially affect the rights of any third person,' occuring in section 22 (1) and (2) would seem to us to mean

(1) (1895) I. L. R. 23 Cal. 179.
(2) (1899) I. L. R. 26 Cal. 553.
(3) (1890) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110.
(4) (1891) I. L. R. 19 C. 253; L. R. 19 I. A. 48.
(5) (1894) I. L. R. 21 Cal. 869.
(6) (1896) I. L. R. 24 Cal. 143.
(7) (1896) I. L. R. 24 Cal. 521.

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that when an occupancy right has been sublet or is subject to a mortgage, then its purchase by a sole or co-sharer landlord shall not be regarded as destroying or injuring the rights of the under-tenant or mortgagee. The rights of the under-tenant will remain, but he will be brought into direct relations with the landlord and become a tenant and not be an under-tenant any longer; while the rights of the mortgagee will continue unaffected and he will still be at liberty to enforce his mortgage lien.

"In the case of *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (1), the Judges who decided it refrained from following the ruling in *Jawadul Huq's* (2) case. They endeavoured to distinguish it from the case before them on the ground that the rule therein laid down applied only to transferable and not to non-transferable holdings, which was the nature of the disputed holding in the case before them. But we see no reason for distinguishing transferable from non-transferable occupancy rights. In either case we consider according to the terms and intention of section 22 of the Bengal Tenancy Act, the occupancy right must cease to exist if purchased by a sole or joint proprietor or permanent tenure-holder. 32 C. 386=9 C. W. N. 249 =1 C.L. J. 1.

"For these reasons we consider that this second appeal should be decreed. But as our views are opposed to those of the Judges who decided the three cases cited above, we are constrained to refer this second appeal to a Full Bench. In doing so we would point out that the case of *Jawadul Huq* v. *Ram Das Saha* (2), though decided by a special Bench of five [390] Judges, is not a decision of a Full Bench. It can therefore be set aside by a Full Bench, and does not require the decision of the Full Court.

"The questions we would propound for the consideration and determination of the Full Bench are as follows:—

(*i*) Are the plaintiffs in this case entitled to joint khas possession with the principal defendants?

(*ii*) Where the cases of *Sitanath Panda* v. *Pelaram Tripati* (3), *Jawadul Huq* v. *Ram Das Saha* (4), and *Miajan* v. *Minnat Ali* (5), so far as they lay down that when an occupancy right is purchased by a sole or joint proprietor or permanent tenure-holder, only the occupancy right ceases to exist, but the tenancy remains divested of the occupancy right, correctly decided, or in such a case does the occupancy right and the tenancy right cease to exist, so that the sole or joint proprietor or permanent tenure-holder who purchases acquires no right as a tenant at all?"

Babu *Mohendra Nath Roy* (Babu *Biraj Mohan Mazumdar* with him) for the appellants. The words "occupancy right" are not defined anywhere in the Bengal Tenancy Act, but the definition of 'occupancy raiyat' in s. 4 of the Act shows that occupancy right is the sum total of the rights of an occupancy raiyat. If so, *i.e.*, if occupancy right means and includes the whole bundle of rights of an occupancy raiyat, then *Jawadul Huq* v. *Ramdas Saha* (4) was wrongly decided. But if occupancy right is a mere incident attached to a holding, then that case was rightly decided.

[GHOSE, J. The occupancy right which is acquired after 12 years is separable from the other incidents of the tenancy.]

[MACLEAN, C. J. Why should not section 22 of the Bengal Tenancy Act be construed strictly? The decision in *Jawadul Haq* (4) has stood good for ten years.]

That decision is contrary to the provisions of the Bengal Tenancy Act. Section 4 of the Act enumerates the different classes of tenants recognised by the Act, and if occupancy right in section 22 does not mean the whole bundle of rights of an occupancy raiyat, then a new class of tenants will come into existence, and if a co-sharer landlord by virtue of his purchase of an occupancy holding becomes a non-occupancy raiyat, then after 12 years he would acquire right of occupancy.

[391] The same words "occupancy right shall cease to exist" occur in both the clauses (1) and (2) of section 22 of the Act, and if in one clause,

(1) (1899) I. L. R. 27 Cal. 473.
(2) (1896) I. L. R. 24 Cal. 142.
(3) (1894) I. L. R. 21 Cal. 869.
(4) (1896) I. L. R. 24 Cal. 142.
(5) (1896) I. L. R. 24 Cal. 521.

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viz., clause (2), it is held to mean that only the occupancy right and not the entire tenancy right should cease to exist, then the same interpretation should be given to the other clause, with the result that in cases coming under clause (1) a person would come to be his own tenant.

[GHOSE, J. The doctrine of merger may apply to cases coming under clause (1) but it cannot apply to any case under clause (2).]

As to how far the doctrine of merger is applicable to cases under the Bengal Tenancy Act see *Lal Bahadoor Singh* v. *Solano* (1) and *Radha Gobind Koer* v *Rakhal Das Mukherjee* (2); Finucane's Bengal Tenancy Act, p. 130, and Tagore Law Lectures (1895), p. 312.

In s. 6 of Act X of 1859 the words "occupancy right" were first used by the Legislature as denoting the right to hold land on payment of rent. The rights of an occupancy raiyat are co-extensive with the right of occupancy thus indicated.

Babu *Sarat Chandra Basak* for the respondent. The term "occupancy holding" has been made use of in s. 22 of the Act; if the intention of the Legislature were that the holding should cease to exist, then it would have repeated that expression instead of saying that the "occupancy right" shall cease to exist. When any third person is concerned, the holding is recognized as existing, *i.e.*, he will be able to enforce his rights against that holding, although it may have been transferred to a co-sharer landlord.

[MACLEAN, C. J. What is your answer to the reasons given in the referring order?]

With regard to the first reason the answer is that the effect of the decision in *Jawadul Huq* v. *Ram Das Saha* (3) is not to introduce a new class of tenants not contemplated by the Tenancy Act. After the occupancy right ceases to exist, the person becomes a tenant not having a right of occupancy, *i.e.*, a non-occupancy raiyat.

[392] Section 120 of the Tenancy Act lays down that a landlord can never convert a raiyati land into *nij jote* land; therefore the second reason is based upon an erroneous presumption, *viz.*, that a landlord can convert raiyati land into *nij jote* land.

The answer to the third question is that the words "occupancy right shall cease to exist" have the same meaning in both the clauses of s. 22, but their effect is not the same in both, because the doctrine of merger very properly applies to cases under clause (1), but not to those under clause (2). There is no breach of any fundamental principle in saying that a co-sharer landlord can hold a raiyati holding under his co-sharers.

The fourth reason may be answered by saying that if the Legislature intended that the tenancy would terminate, there was nothing to prevent it from saying so in express terms.

MACLEAN, C. J. The only question we have to decide upon this reference is, whether the case of *Jawadul Huq* v. *Ram Das Saha* (3) was rightly decided. The question submitted refers to two other cases; but if we hold that the case of *Jawadul Huq* (3) was rightly decided the others follow. In my opinion it was. The point, however, is not free from some difficulty, and the reasons given by the learned Judges who have made this reference against the soundness of that decision are entitled to every respect. But it seems to me that the reasons urged by the Judges who decided that case ought to prevail. Virtually that case was decided by six Judges, as the five Judges who sat in that Court affirmed the view taken by

(1) (1883) I. L. R. 10 Cal. 45.
(2) (1885) I. L. R. 12 Cal. 82.
(3) (1896) I. L. R. 24 Cal. 143.

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Mr. Justice Beverley. It is a decision which has not been challenged for eight or nine years, though it is, perhaps, a little difficult to suppose that a similar case has not occurred in the meantime. I am satisfied with the reasons given by the learned Judges in that case, and I do not think I can usefully add anything to those reasons which, to my mind, are sound. The first question must be answered in the negative ; and the second *qua* the case of *Jawadul Huq* v. *Ram Das Saha* (1), in the affirmative. 32 C. 386=9 C. W. N. 249 =1 C. L. J. 1.

[393] The result is that the suit must be dismissed with costs in all the Courts.

GHOSE, J. I entirely concur with my Lord. I do not think that any sufficient ground has been shown why we should differ from the decision that was arrived at in the case of *Jawadul Huq* v. *Ram Das Saha* (1). The Bengal Tenancy Act contemplates two classes of raiyats—occupancy raiyats and non-occupancy raiyats. Non-occupancy raiyats may, no doubt, by 12 years' occupation, acquire a right of occupancy ; but if he has not acquired such a right, or does not possess such a right, he is only a non-occupancy raiyat. Section 22 of the Bengal Tenancy Act speaks of an occupancy right ; and, in the circumstances mentioned in clause (2), it says :—such " occupancy right shall cease to exist." But it does not say that the holding itself shall cease to exist. It has, however, been said that the same words " shall cease to exist " occur in both clauses (1) and (2) of the said section 22 ; and if the tenant's right is to be taken to come to an end in one case, it must also be taken to have come to an end in the other case as well. To my mind there is an obvious distinction between the two cases comtemplated by section 22. In the first-mentioned case, I mean that in clause (1) the interest of the raiyat and the landlord becomes united in one and the same person, and the necessary result is that the tenant's right is merged in the higher right of the landlord, because the latter could not hold the land as a raiyat to himself. But the like result does not follow in the other case, for the co-sharer landlord having acquired the rights of a raiyat could hold the land as a raiyat, if not to himself certainly to the other co-sharer landlords. I am of opinion, therefore, that when the Bengal Tenancy Act does contemplate a class of raiyats different from raiyats with right of occupancy, namely, non-occupancy raiyats, the result of a purchase by a co-sharer landlord of the occupancy holding of a tenant, as it is in the present case, will not be the termination of the tenancy right altogether, but only of his occupancy right in the holding.

[394] RAMPINI, J. I regret I am unable to agree in the judgment of my Lord, the Chief Justice, and of my brother, Mr. Justice Ghose. I do not think it necessary to set forth my views at any length because they are expressed in the order of the referring Judges, of whom I was one. I adhere to my views, and I would answer the first question propounded for our decision in the affirmative, and the second in the negative.

HARINGTON, J. I agree in the judgment delivered by my Lord. In this case the purchaser of the tenant's interest was not the landlord but one individual out of a number of persons who jointly constituted the landlords, so that the greater estate, that is, that of the joint landlords, and the lesser estate, that is, the interest of the tenant which is purchased by one individual out of many, do not coincide and meet in the same persons: there cannot, therefore, be any merger. I do not think that in section 22, clause (2) of the Bengal Tenancy Act, the Legislature has expressed an intention that the tenancy should cease to exist under the circumstances of this case.

(1) (1896) I. L. R. 24 Cal. 143.

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I think the Legislature only intended that the occupancy right, which is an incident of the tenancy under Chapter V of the Tenancy Act, should cease to exist. If it was intended that the tenancy should come to an end, I think the Act would have said so and would not have been limited in terms of the cesser of the occupancy right only.

BRETT, J. I agree with my Lord the Chief Justice in the answer which he proposes to give to this reference. I accept the reasons given by the learned Judges in the case of *Jawadul Huq* v. *Ram Das Saha* (1) in support of the view which we take, and I have nothing to add to the reasons which they have given for their opinion as expressed in that judgment.

Appeal dismissed.

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32 C. 395 (=1 C. L. J. 10=9 C W. N. 265.)

[395] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Harington and Mr. Justice Brett.

BIPIN BEHARI MANDAL *v.* KRISHNADHAN GHOSE.*

[23rd January, 1905.]

Landlord and tenant—Enhancement of rent—Bengal Tenancy Act (VIII of 1885), s. 29, cl. (b), proviso (1)—Average rate of rent—Registered kabuliat.

Proviso (i) to s. 29 of the Bengal Tenancy Act (VIII of 1885) does not control clause (b) of that section. The landlord of an occupancy raiyat cannot, therefore, recover rent at the rate at which it has been paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed, if such rate exceeds by more than two annas in the rupee the rent previously paid by the raiyat.

Mothura Mohun Lahiri v. *Mati Sarkar* (2), so far as it decides to the contrary, was wrongly decided.

The rate contemplated by proviso (i) is not the average rate.

APPEAL by the defendant, Bipin Behari Mandal.

The respondent instituted this suit in the Court of the Munsif at Kandi for recovering from the appellant rent at the rate of Rs. 31 per annum on the basis of a registered *kabuliat*. The Munsif decreed the suit at the *kabuliat* rate. On appeal before the District Judge the following two issues, amongst others, were raised :—

(*i*) Did the *kabuliat* contravene the provisions of s. 29 of the Bengal Tenancy Act?

(*ii*) Had the tenant paid rent at the rate of Rs. 31 per annum for a continuous period of three years preceding the period for which rent was claimed?

The rent formerly paid by the defendant was Rs. 24-13-9 and the *kabuliat* rendered him liable to pay at the rate of [396] Rs. 31 per annum. The District Judge, therefore, refused to enforce the *kabuliat* as it contravened the provisions of s. 29 of the Bengal Tenancy Act, the rent being enhanced by it by more than two annas in the rupee, but he gave the plaintiff a decree for rent at the rate of Rs. 30-3-1½ p., on the ground that that was the average rate of rent paid by the tenant continuously for not less than three years before the period for which the rent was claimed.

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* Reference to Full Bench in Appeal from Appellate Decree, No. 1768 of 1902.

(1) (1896) I. L. R. 24 Cal. 143. (2) (1898) I. L. R. 25 Cal. 781.