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aside which this suit is brought, the rule of limitation in force was that laid down in section 14, Reg. III of 1793. It is clear from the cases of [168] *Lakshman* v. *Radabai* (1), *Nathaji Krishnaji* v. *Hari Jagoji* (2), *Moro Narayan* v. *Balaji Raghunath* (3) and *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji* (4) that the cause of action in respect of the alienation accrued to Kali Nath as soon as he was adopted. According to the old law, it became barred 12 years from that date, *i.e.*, in 1869. The case of *Gobinda Nath Roy* v. *Ram Kanay Chowdhry* (5) is a peculiar one. The facts of the case are not clear, and the correctness of the decision has been impugned by Mr. Mayne at section 197, p. 254 of his "Hindu Law and Usage." The case of *Prosonna Nath Roy* v. *Afzolonnessa* (6) is also a peculiar one, and the correctness of the decision in it has apparently been doubted by Babu Upendra Nath Mitter at page 684 of his work on Limitation, and by Mr. Starling at page 178 of his work on the same subject.

We are, however, relieved from the burden of distinguishing these cases by the fact found, and in our opinion correctly found, by the Subordinate Judge that Kali Kishen Bagchi had attained the age of 16 years before he died. The oral evidence on the point in this case is no doubt neither consistent nor reliable, but we rely on a statement made by one of the plaintiffs, Umesh, in a previous suit, in which he said that Kali Kishen was 14, 15 or 16 when he died. In a previous judgment of this Court, dated the 8th March, 1900, it is stated that "Kali Kishen died at the age of 16, leaving his adoptive mother and his widow him surviving," and in a deed to be found at page 19 of the paper book he is described as "having died intestate," an expression not usually used with regard to a minor. Till this case arose it never seems to have been questioned that Kali Kishen died after attaining the age of 16. We do not rely on the entry of his age in the register of attendance of the Hare School, the admission of which has been objected to, for the ages of boys attending school are not always accurately entered in the school register.

That being so, there can be no doubt that the suit is barred by limitation. We dismiss the appeal with costs.

Appeal dismissed.

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[169] APPELLATE CIVIL.

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

HEMENDRA NATH MUKERJEE *v.* KUMAR NATH ROY.*

[25th June, 1904.]

Limitation—Suit for damages—Suit for rent—Whether a suit, for rent payable by tenant under lease to superior landlord, is one for rent or damages—Bengal Tenancy Act (VIII of 1885) s. 3 (5), lease, construction of.

A took a lease of certain mouzahs from *B* in darputnee and seputnee, and covenanted to pay annually Rs. 3,191 *to the superior landlords of B direct* and Rs 1,800 to *B*. A was to take receipts from the superior landlords, make them over to *B* and take receipts from the latter. The whole amount of Rs. 4,991 was described in the lease as *annual rent fixed*, and in certain eventualities

* Appeal from Original Decree No. 420 of 1902, against the decree of Bhuban Mohan Ghose, Subordinate Judge of Nuddea, dated 26, Sept. 1902.

(1) (1887) I. L. R. 11 Bom. 609.
(2) (1871) 8 Bom. H. C. 67.
(3) (1894) I. L. R. 19 Bom. 809.
(4) (1903) I. L. R. 30 Cal. 990.
(5) (1875) 24 W. R. 183.
(6) (1878) I. L. R. 4 Cal. 523.

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arising out of non-payment by *A* to the superior landlords, *B* was authorized to realise the amount from *A* by bringing a suit for *arrears of rent*.

Held, upon a construction of the lease, that a suit brought by *B* for realisation for *A* of the amount which the latter failed to pay to the superior landlords under the terms of the lease, was, for the purpose of limitation, one not for rent but for damages for breach of covenant.

Rutnessur Biswas v. *Hurish Chunder Bose* (1) followed.

Basanta Kumari Debya v. *Ashutosh Chuckerbutti* (2) distinguished.

[Ref. 10 I. C. 406=14 C. L. J. 589 ; Dist. 15 I. C. 361 : Rel. 19 I. C. 752=19 C W. N. 174.]

APPEAL by the plaintiffs, Hemendra Nath Mukerjee and others.

The suit was brought by the plaintiffs for the recovery of Rs. 5,733-1-3, as per account given in the plaint, from the defendants, Kumar Nath Roy and others. It was based upon a registered kabuliat, dated the 4th July 1881, executed by one Jadunath Roy who was the eldest brother of the defendants 1 to 3 and the father of the defendants 4 to 7. The material portion of the kabuliat is set out in the judgment of the High Court. **[170]** It was alleged that the defendants having defaulted to pay the putnee and durputnee rents for 1303 and 1304 B. S., under the terms of the kabuliat to the superior landlords, the latter sued the plaintiffs and in execution of the decrees obtained by them, advertised their putnee and durputnee properties for sale, that the plaintiffs paid the decretal debts and saved the property from sale. They accordingly brought this suit on the 7th September 1901, for the recovery of the amount, in the shape of damages.

Upon the pleadings the two following issues, amongst others, were framed on the merits :—

(*i*) Is the suit maintainable in its present form ?

(*ii*) Is the claim or portion of it barred by limitation ?

Upon those issues the Subordinate Judge held that the suit was not maintainable in its present form, that the claim of the plaintiffs was one for rent and was therefore barred by limitation under Article 110, schedule II, of the Limitation Act. He accordingly dismissed the suit, without entering into the merits.

The appeal originally came on for hearing before a Division Bench (RAMPINI AND BODILLY JJ.). Their Lordships having differed in opinion as to the main point at issue, *i.e.*, whether the suit lay as framed, it was heard in due course by MACLEAN, C. J., as the third Judge, under s. 575 of the Civil Procedure Code.

Mr. *S. P. Sinha* (Babu *Haraprasad Chatterjee* and Babu *Charu Chandra Ghose* with him), for the appellants, contended that as the defendants distinctly covenanted to pay a particular portion of the rent to a third party, the suit was, upon a proper construction of the kabuliat, one for recovery of damages for breach of covenant.

Dr. *Rash Behary Ghose* Babu *Naliniranjan Chatterjee* with him), for the respondents, relied upon *Basanta Kumari Debya* v. *Ashutosh Chuckerbutti* (2) and *Mohebut Ali* v. *Mahomed Faizullah* (3), and submitted that the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) was practically dissented from by the Full Bench case of *Basanta Kumari Debya* v. *Ashutosh Chuckerbutti* (2). The rent reserved in the kabuliat was the total of the sum payable to **[171]** the superior landlords *plus* the amount payable to the plaintiffs as profits.

(1) (1884) I. L. R. 11 Cal. 221.
(2) (1899) I. L. R. 27 Cal. 67.
(3) (1898) 2 C. W. N. 455.

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MACLEAN, C. J. This is an appeal by the plaintiffs for damages for an alleged breach of a covenant contained in a kabuliat dated 21st Assar 1288.

The defendants say that the suit, as a suit for damages, will not lie, that it is properly a suit for rent and, being a suit for rent, it is barred by limitation.

It has been practically conceded that, if it is a suit for rent, the objection as to limitation ought properly to prevail, but that, if it be an action for recovery of damages, subject to anything that may be said in relation to a point which is suggested by Dr. Rash Behari Ghose but which is not now before me, the statute does not apply. The question to my mind turns upon the construction of the contract between the parties. The defendants took certain land from the plaintiffs in darpatni and sepatni settlements. The aggregate rent payable to the superior landlords was Rs. 3,191-12-3. The material portions of the kabuliat are as follows :—" In all fixing the annual rent in your 16 annas share as aforesaid at Rs. 4,991-12-3, and granting a permanent darpatni and sepatni settlement from the 1st Baisakh of the current year, you have executed in my favour the darpatni and sepatni settlement pottah. I therefore execute this kabuliat and agree that I shall pay Rs. 3,191-12-3, the annual rent payable into the estate of your said patnidars and maliks year by year and instalment by instalment and pay the remaining profit of Rs. 1,800 a year to you according to the following instalments." Then lower down, we have this clause :—" I shall pay the patni and darpatni rents and cesses of those mehals payable by you into the estate of the above maliks year by year and instalment by instalment and take *dakhilas* for that and make them over to you and I shall take *dakhilas* from you. Should I make default in paying the said rent into the estate of the above maliks according to the instalments, I shall pay interest on the overdue instalments. If by reason of my default in the payment [172] of the said rents the maliks bring suits for arrears of rent, and in execution of decree, your said patni and darpatni rights be attached, and brought up for sale, or if your other properties, moveable and immoveable, be attached, then you will deposit the said amount of rent, and bring a suit against me for arrears of rent and recover that amount with interest and costs by sale of this my darpatni and sepatni rights, and from other properties and no objection thereto on my part shall be entertained." This being the contract between the parties it fell out that the defendants failed to pay the rent due to the superior landlords, and the superior landlords thereupon took proceedings against the plaintiffs. The plaintiffs had to pay and did pay the amount claimed, and they bring the present suit against the defendants claiming damages against the defendants for the breach of their covenant to pay the Rs. 3,191 odd to the superior landlords. It is said that this is not a suit for damages but a suit for rent.

It is essential to see, in order to arrive at a conclusion upon this question, what was the bargain between the parties and especially, what the defendants covenanted to pay the plaintiffs by way of rent. It seems reasonably clear, upon the language of the kabuliat, that all that the defendants covenanted to pay to the plaintiffs as rent was the Rs. 1,800 a year, and that, for reasons which, perhaps, are fairly obvious, they declined to treat the rent due to the superior landlords as rent due from them to the plaintiffs, but entered into a separate and distinct covenant as regards that rent, *viz.*, to pay it to the superior landlords direct. There is no covenant by the defendants to pay the total amount of Rs. 4,991 odd as rent to the plaintiffs.

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Rent as defined in the Bengal Tenancy Act, means whatever is lawfully payable or deliverable in money or in kind by a tenant *to his landlord* for the use and occupation of the land, etc. No portion of the Rs. 3,191 was payable or deliverable to the landlord. There are here two separate and distinct covenants one to pay Rs. 3,191 odd to the superior landlords, and the other to pay Rs. 1,800 as rent to the plaintiffs, as landlords, and the contract was doubtless taken in this form for the benefit of the tenant. Great stress has been laid upon the words to which I have referred "in all fixing the annual rent in your sixteen-annas share as [173] aforesaid at Rs. 4,991 odd" etc. This I think only means that the total sum to be paid for the use and occupation of the land was to be the Rs. 4,991 odd; but this is subject to the later provisions in the deed which show how that sum is to be dealt with. It does not occur to me that the passage which I have read beginning: "I shall pay the patni and darpatni rents and cesses," helps the defendants' case. It is consistent with the previous covenant that the defendants should pay the rent due to the superior landlords, take receipts from them for such payment and hand such receipts over to the plaintiffs, taking again from them receipts to show that as between themselves and the plaintiffs, they had discharged their obligations under their covenants.

Some stress has been laid upon the clause:—"you will bring a suit against me for arrears of rent and recover that amount with interest," etc., as indicating that the parties intended to treat the whole sum as rent. I do not think this reference can avail as against the clear terms of the previous portions of the contract. It cannot be successfully contended that these words mean that the plaintiffs could only bring a suit for arrears of rent, as opposed to any other form of action which the law allowed. It would be going far to hold that this reference to a suit for arrears of rent implied in the presence of the special covenants in the deed, that there was an implied contract on the part of the defendants to pay the sum of Rs. 3,191 as rent to the plaintiffs: the words "arrears of rent" apparently refer to the arrears due to the superior landlords.

Upon the best construction that I can put upon the deed, I do not think that the sum of Rs. 3,191 odd was rent payable by the defendants to the plaintiffs' and I think that the plaintiffs' proper remedy was, as has been done, to bring a suit for damages for the breach of the defendants' covenant.

With respect to the authorities cited, it seems to me that the Full Bench case of *Basanta Kumari Debya* v. *Ashutosh Chuckerbutti* (1) is clearly distinguishable. In that case *the whole amount* was to be paid to the landlords by the tenants as rent due. There is no such covenant in the present case; but there is a covenant to pay the Rs. 3,191 to some one other than the defendants' landlord. [174] The present case seems to me to be undistinguishable from the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (2), which although referred to was certainly not overruled by the Full Bench case to which I have referred. I think therefore, that the view taken by Mr. Justice Rampini was correct, and that the case must go back to the lower Court to be tried out on the merits.

Appeal allowed; *case remanded.*

(1) (1899) I. L. R. 27 Cal. 67.

(2) (1884) I. L. R. 11 Cal. 221.