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It appears to me that it cannot be so said, for all that the Court said in that decision was that Nabinkishor Roy had not established his title to the land, but the fact remains that he is in possession of those lands, and it does not follow that, because he has failed in this Court to prove his title to the lands, he may, therefore, be ousted by the petitioners from them. If the lands belonging to the petitioners before us, and if Nabinkishor Roy is actually in possession of them, without any title, then the petitioners have their remedy in a suit for possession; and if on the other hand, as a matter of fact, Nabinkishor Roy, notwithstanding the Magistrate's order of the 6th August 1866, is not in possession, then the petitioners are not aggrieved by that order.

In this view, I think that the petitioners have not made out a case for our interference under the provisions of section 404, and I therefore agree in rejecting this application.

Before Mr Justice Kemp and Mr. Justice Glover.

SHALGRAM (DEFENDANT) v. MUSST. KUBIRUN AND OTHERS (PLAINTIFFS.)*

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April 28.

Act X. of 1859, s. 4—Rent of Stone Quarries—"Quarrying."

In a suit for rent under a lease of eight annas of a certain hill, and of fourteen bigas of land, by which the lessor reserved a yearly rent of rupees 201 for the land, and the right of levying a yearly tax on the parties, who were employed in quarrying the stone, *held*, this was not a suit cognizable by the Revenue Courts, under Act X. of 1859.

Khalut Chunder Ghose v. *William Minto* (1) considered and approved.

Baboo *Tarak Nath Dutt* for appellant.

Mr. *C. Gregory* for respondent.

THE facts of this case sufficiently appear in the judgment of

KEMP, J.—The point involved in this special appeal being one of considerable importance and of some nicety, the pleaders

* Special Appeal, No. 2767 of 1868, from a decree of the Judge of Gya, dated the 30th July 1868, affirming a decree of the Deputy Collector of that district, dated the 23rd January 1868.

(1) 1 I. J., N. S., 426.

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on both sides have argued it at considerable length and with great ability. The special appellant before us is the defendant in the Court below; the plaintiffs, special respondents, sued him for arrears of rent, amounting to rupees 779-7, and also to cancel his lease on account of default of payment of the rent, and to obtain direct or khas possession.

The course of the suit was a somewhat peculiar one; the Revenue Authorities, in the first instance, and we think rightly holding that they had no jurisdiction. On appeal, and remand of the case, the Collector, accepting the jurisdiction, found that the plaintiff had not made out his case against the defendant, who was present, and dismissed the plaintiffs' suit. On appeal, the Judge, on the question of jurisdiction, held that "stone being a product of the land, it followed that the rent of stone quarries was recoverable in the Revenue Courts," the plaintiffs, therefore, obtained a decree for the amount due, calculated upon the admission of the defendants.

The question of jurisdiction has again been raised by the pleader for the special appellant, and must now be considered.

It is unfortunate that in this case we have not the original lease or its counterpart before us. It appears that the plaintiffs, although relying on the lease in support of their claim, accounted for its non-production with the plaint by alleging that they had lost it. We are not aware whether the Collector considered the non-production of the lease sufficiently excused; but it is clear that the counterpart of the lease which was in the possession and power of the defendant, was called for under section 29 of Act X. of 1859, and was not produced; he said that the co-lessee of the present special appellant was colluding with the plaintiff, and that he had purposely withheld the counterpart of the lease which was in his possession. Be this as it may, the absence of the lease or the counterpart of it is not very material, as the terms of the lease are, for the purposes of this contention, sufficiently set out in the written statement of the defendant. It appears from that statement that 8 annas of a certain hill with 14 bigas of land, and the right to levy a tax upon parties who are employed in cutting the stone at so much a head per annum, were included in the lease, the rent payable being a lump

sum of rupees 201 per annum. It has been contended by the pleader for the special appellant that the present suit is not for arrears of rent due on account of land, khiraj or lakhiraj, or on account of any right of pasturage, forest right, fisheries, or the like, so as to come within the purview of clause 4, section 23, of Act X. of 1859. The pleader has called our attention to a decision on the original side of this Court, in the case of *Khalut Chunder Ghose* v. *William Minto* (1). We are of opinion that the principle laid down in that decision is a correct one, and that it applies to the case before the Court. In the case alluded to, the plaintiff let five small pieces of land, together with extensive mining rights to the defendant; the land being accessory and necessary to the enjoyment of those mining rights. In that case, as in this case, the rent was indivisible, and there was no means of ascertaining what rent was reserved on the land, and what on the mining rights. In that case it was contended, as it has been done in this case, by the pleader for the special respondent, that the case came under the class of cases for rent on account of "any right of pasturage, forest rights, fisheries, or the like." In that case the learned Judge observed, "that each of the modes of partial enjoyment or use of the land," namely, the pasturage, forest rights, and fisheries, mentioned in the clause of the section quoted, "is an instance of the use of the land as an agent of vital reproduction," and that "mining, smelting, and converting ores into metals, are clearly not the like." Now, in the case before us, it is clear that the rent is indivisible, and we cannot say how much was reserved on the land, and how much on the right to quarry. It is also clear that this small quantity of land was not taken for agricultural purposes, but was taken for purposes, subsidiary and necessary to the main purpose of the lease, namely, quarrying the stone; the land being required for the erection of the huts of the stone-cutters, and, therefore, the principle laid down in the case quoted from the *Indian Jurist* applies to the case before this Court. It has been said that because a small quantity of land was taken, that, therefore, ths suit must be held to be a suit for rent of land, and, therefore, cognizable by the Revenue Authorities; but in the case of *Furlong* v. *Johurree Mall* (2),

(1) 1 I. J., N. S., 426. (2) Hay's Rep., 1862, 453.

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it was held that the right to erect salt golahs at certain ghauts, and to charge a cess to persons for using them, did not fall within clause 4, section 23 of Act X. of 1859. Now, it is clear that, to enable a person to erect salt golahs, he must have taken a lease of the land, and have obtained exclusive occupation of the site of the golahs; and, therefore, this case is also, in some measure, applicable to the case before the Court, inasmuch as, unless the defendant had taken a small portion of land to enable him to carry out the main purpose of his lease, namely, the quarrying of the stone, his lease would have been altogether infructuous We also observe, from the terms of the lease, in as far as they are admitted by the defendant, and not questioned by the plaintiff, that all the cultivated and culturable land and the product of the trees and such like were distinctly reserved, and did not form a portion of the defendant's lease. It was, therefore, obviously the intention of the parties and of the defendant to lease the land for the purpose of quarrying the stone, and the small are a demised was looked upon by the parties as necessary and accessory to the carrying out of the purposes for which the lease was taken.

We are, therefore, of opinion that this claim is one which does not fall within the purview of clause 4, section 23 of Act X. of 1859, and that the Revenue Court had no jurisdiction in the case. We, therefore, reverse the decision of the Judge, and dismiss the plaintiffs' suit with costs, including the costs of this special appeal.

In respect of the remaining points taken by the special appellant, we need not give any decision, inasmuch as we have held the suit to be one in which the Revenue Courts have no jurisdiction.