Baboos *Gupinath Mookerjee* and *Anand Chandra Ghosal* for the appellant.

Baboos *Ramesh Chandra Mitter*, *Torrucknath Sen*, and *Prasanna Kumar Roy* for the respondents.

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PURI SUNDARI DEBI v. DROBOMAYI DEBI

The judgment of the Court was delivered by

KEMP, J.—The only point taken in this case is that the Judge was wrong in holding that the surety was discharged from all liability to the plaintiff. The Judge, in support of his decision, has quoted a decision—*Pogose* v. *Anundo Chunder Gohoo* (1). The Judge found that the surety had no knowledge of the bond or ikrar, for the ikrar is in the nature of a bond taken by the plaintiff from the principal,—that is to say the gomasta; and that this bond or ikrar was taken without the knowledge or consent of the surety, and fixing certain periods for the payment of the sums named in the bond without the knowledge of the said surety. We think that the Judge was quite right in applying the decision in *Pogose* v. *Anund Chunder Gohoo* (1) to this case. The liabilities of the parties were changed by this ikrar, and the surety in our opinion was rightly discharged. There can be no doubt that by the ikrar, which was executed on an adjustment of accounts, and which states that a certain sum, after deductions, was found to be due by the principal, the gomasta, who accepted that liability, stating that he could not pay that sum at present, and he took time up to the month of Falgun of the year in which the ikrar was executed, and this having been done without the consent or knowledge of the surety and his liability being thereby changed, he is entitled to be discharged from all liability, and the mere recital in the ikrar that the surety was still bound, cannot in any way affect or bind him.

The second ground taken in appeal is that the Judge has dismissed the whole case of the plaintiff even as against the principal who has been found liable by the first Court, and who has not appealed. Nobody appears for him in this Court, and as he has not appealed to the Judge against the decree of the first Court, that decree as against him must stand, and the decision of the lower Appellate Court will be modified to that extent. Costs in proportion.

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*Before Mr. Justice Macpherson and Mr. Justice Mookerjee.**

TILAK PATAK (DEFENDANT) *v.* MAHABIR PANDAY AND ANOTHER (PLAINTIFFS.)*

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April 27.

Landlord and Tenant—Onus Probandi—Act VIII of 1869 (B. C.) *s.* 20.

THIS was a suit for arrears of rent of a ticca cultivation, from 1274 Fusli (1867) to the 12 annas kist of 1277 (1870).

* Special Appeal, No. 2417 of 1870, from a decree of the Subordinate Judge of Sarun, dated the 26th August 1870, modifying the decree of the Moonsiff of that district, dated the 18th June 1870.

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The defendant set up in his written statement that he had given up the land on the expiry of his lease in 1274 (1867), and was not liable to pay the rent for the years 1275—1277 (1868—1870).

The Moonsiff held that the plaintiff had failed to prove that the defendant was in possession of the land for the period for which arrears of rent were claimed, and that the defendant had relinquished the farm on the expiry of the lease. He accordingly passed a decree for arrears of rent of the year 1264 (1867), and dismissed the suit as to the claim for the arrears of 1275—1277 (1868—1870).

On appeal by the plaintiff, the Subordinate Judge held that the evidence of the witnesses adduced by the defendant was not sufficient to prove that he had relinquished the jote; that he was bound, under section 20, Act VIII of 1869 (B. C), to give notice in writing of his intention to relinquish; that since he had failed to give such notice, he was liable for the rent. He accordingly passed a decree in favor of the plaintiff for the rent of the years 1274—1277 (1867—1870.)

The defendant appealed to the High Court.

Baboo *Debender Narayan Bose* for the appellant.

Baboo *Bama Charan Banerjee* for the respondents.

MACPHERSON, J.—The case must be remanded to be re-tried upon the question as to whether the defendant did or did not remain on after the year 1274 (1867), so as to be liable to the plaintiff for the rent which the plaintiff claims from him in this suit.

The Subordinate Judge has entirely misapplied section 20, Act VIII of 1869 (B. C.), which has no reference to this case. Section 19, Act X of 1859, is almost equally inapplicable; because the tenant held under a lease which came to an end in the year 1274 (1867); and it is clear that a ryot is under no obligation to give any notice under section 19, merely to entitle him to give up the land at the termination of a lease for a short term under which he holds.

The Subordinate Judge has also gone wrong in thinking that it lay wholly and exclusively upon the defendant to prove the fact of his having given up the land. It appears to me that it lies upon the plaintiff who says that he did not relinquish when the term of his lease expired, to prove that the defendant held on.

The Court must look at the whole of the evidence on the record, and find whether, as a matter of fact after the expiry of his lease, the defendant did hold on. If he did, he will be liable to pay rent, if not, the plaintiff's case must fail.

The appellant is entitled to the costs of this appeal.

MOOKERJEE, J.—This was a suit to recover arrears of rent for the years 1274, 1275, 1276 (1867, 1868, 1869) and 12 annas kist of 1277 (1870). The

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defence was that, as the lease expired in 1274 (1867), the defendant had given up possession at the end of that year. The defendant also pleaded that he had paid the rent for 1274 (1867).

The first Court gave a decree for the rent of 1274 (1867), and dismissed the rest of the claim. Both parties appealed to the Subordinate Judge, Moulvi Itrat Hossein, who decreed the appeal of the plaintiff, and dismissed that of the defendant. The Subordinate Judge holds that, inasmuch as the defendant ryot has not given any written notice to the plaintiff, under section 20, Act VIII of 1869 (B. C.), of his intention to relinquish the land, he is liable for the rent of the same. He also lays it down as a proposition of law that "parol evidence of witnesses is not sufficient proof to establish" the point of relinquishment, but that the defendant ought to have produced a written notice.

I think the Judge is wrong in a every point that he has decided. He is wrong in holding that the *onus* of relinquishment is on the ryot. It is admitted that the lease under which the ryot entered was a lease for three years certain, and extended from 1272 to 1274 (1865 to 1867). The allegation of the plaintiff is that, although the lease expired at the end of 1274 (1867), the ryot continued to hold on, and has consequently made himself liable for rent. The plaintiff must therefore prove his allegations.

Then it is said that the duty of the ryot was to give a written notice under section 20 of Act VIII of 1869 (B. C.). This section has been wrongly applied by the Subordinate Judge. It does not apply to cases were the ryot holds under a lease, which was for a limited period, and which period has expired. After the expiry of the lease, the ryot had no right to hold; he might have been considered to be a trespasser by the plaintiff, and would have rendered himself liable to wasilat. He would therefore be perfectly justifie in giving up possession. The plaintiff ought to have known that the lease had expired, and not required a written notice.

The defendant, however, has adduced witnesses to prove that he left the jote on the expiry of the term of the lease. The Subordinate Judge was of opinion that parol testimony was insufficient in law to prove the fact of the relinquishment. In this view he is entirely wrong. Parol evidence, if believed, is as sufficient to prove a fact as documentary evidence. The Subordinate Judge should not have rejected it as insufficient in law to prove the defendant's averments. I would, therefore, remand the case for a proper decision, with advertence to the above remarks. The Judge should in the first instance call on the plaintiff to establish his case; and if he succeeds in doing so, will then see whether the defendant has been able to rebut the evidence produced by the plaintiff, and decide the case according to the result of that enquiry.