

## [FULL BENCH.]

Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Macpherson, and Mr. Justice Mitter.

INDAR CHANDRA DUGAR (PLAINTIFF) v. BRINDABAN BIHARA  
AND ANOTHER (DEFENDANTS).\*

1871  
April 17

*Kabuliat, Suit for, by a Fractional Shareholder of the Superior Tenure—  
Questions referred to Full Bench not answered.*

The question was referred to a Full Bench "whether a suit by the owner of a fractional share of an undivided estate for a kabuliat will lie." Norman, J., was of opinion that, as a general rule, the holder of a tenure cannot be sued by owners of fractional shares in the superior tenure for separate kabuliat according to the proportions to which they allege themselves to be entitled in the superior tenure. A tenure is an entire thing, and cannot be sub-divided against the will of the tenant. Loch, Bayley, Macpherson, and Mitter, J J., did not answer the question on the ground that it did not arise in the suit.

See also  
15 B LR. 113

CERTAIN lands were held by the defendant in this suit from the zemindar, on condition of rendering service as a bearer. The zemindar sued the present defendant in the Civil Court for khas possession of these lands with mesne profits. In that suit the defendant set up a rent free title. The Court dismissed the zemindar's claim for possession and mesne profits, but held that the lands were not rent-free; that the defendant was liable to render service as bearer; and that on his failure to do so, the zemindar would be at liberty to resume the lands. The present plaintiff purchased a 10-anna share of the zemindari, and 1-anna share of the patni estate, within which the disputed lands were situated. He instituted this suit in the Collector's Court under Act X of 1859 for the delivery of a kabuliat for these lands at a jumna proportional to the plaintiff's interest in the superior tenure, service not being now required of the defendant.

The Deputy Collector who tried the case in the first instance gave a decree for the plaintiff.

\* Special Appeals, Nos. 1798 of 1870 and 1804 of 1870, from the decrees of the Judge of Beerbhoom, dated the 7th June 1870, reversing the decrees of the Deputy Collector of that district, dated the 1st March 1870.

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The defendant appealed to the District Judge, who reversed the first Court's decree, and dismissed the suit on the ground that no suit would lie for a kabuliati for a fractional share of an undivided tenure:

Against this decree, the plaintiff preferred a special appeal to the High Court. The High Court (KEMP and GLOVER, J. J.,) owing to conflicting decisions on the point of law on which the lower Appellate Court's decision was based, referred the following question for the opinion of a Full Bench, "whether a suit by the owner of a fractional share of an undivided estate for a kabuliati will lie."

The conflicting decisions were *Nidhy Ram Sircar v. Dhun Kishen Bhuttacharjee* (1), *Rani Sarat Sundari Debi v. Watson* (2), *Udaya Charan Dhur v. Kali Tara Dasi* (3), *Ganga Narayan Das v. Saroda Mohun Roy* (4), and *Ramanath Rakhit v. Chand Hari Bhuya* (5).

*Baboo Hem Chandra Banerjee* (with him *Baboo Debendra Ghose*) for the appellant began to argue the point, when the Court observed that the point apparently did not arise in the case.

*Baboo Bama Charan Banerjee* for the respondents was not called upon.

The judgments of the Full Bench were delivered as follows:—

NORMAN, J. (after stating the facts as above, continued.)—A tenure is an entire thing. The obligation to pay the rent reserved upon the letting of land, or in respect of tenure of land by a ryot, is either a contract or an obligation in the nature of a contract to pay the rent. The obligation is single and entire. A tenant is not liable to have an entire tenure sub-divided and split up against his own will, and to his own prejudice, by any act on the part of the persons to whom he is liable to pay rent. Again the contract or obligation to pay rent as a single sum cannot be split up and sub-divided and converted into several

(1) 6 W. R., Act, X Rul., 53

(2) 2 B. L. R., A. C. 159

(3) *Id* App 52

(4) 3 B. L. R. A. C. 230.

(5) 6 B. L. R. 356

obligations to pay different proportionate parts of the sum to different individuals, at the will of the party to whom the rent is payable. But if all the obligors to whom the entire rent is payable could not, against the will of the tenant, increase the burden of the obligation by compelling the ryot to pay to several persons at different places and in separate proportions, much less can one shareholder who could not, in absence of the others, even sue alone to enforce the original obligation, maintain a suit to compel the ryot to pay him a proportion of the debt. If such a suit could be maintained, the greatest injustice would be done to ryots. A ryot's undertaking is to pay his rent simply, not to pay to the several proprietors according to their shares. The ryot sued by a person who alleges himself to be entitled to a particular share of the rent has no means of knowing what are the rights of the different co-proprietors as amongst themselves. If he were sued and compelled to enter into a kabuliat for 8 annas of the rent by one co-proprietor, he might afterwards find that he had no answer when sued by another who alleged that he had a 10-anna share. I may say that, since I have sat in this Court, I have seen several instances in which ryots have been compelled, by proceedings of an analogous character, to pay 18 annas in the rupee.

I think it clear that, as a general rule, the holder of a tenure cannot be sued, by owners of fractional shares in the superior tenure, for separate kabuliats according to the proportions to which they allege themselves to be entitled in the superior tenure (1).

In the case before us, for aught that I know, it may be that, while the 11-anna shareholder represented by the plaintiff wants a money rent, the 5-anna shareholder may desire to be carried in his palki.

I do not mean to say that, where a fractional share of an undivided estate is held by the subordinate tenant as a separate tenure, a suit for a kabuliat, in respect of such fractional share of such estate, will not lie against the tenant. Nor do I contend that the several owners of shares in a Zemindari may not sue separately for proportions of rent payable to each of such

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owners, in cases where the facts give rise to the presumption of an agreement by all parties that the rent should be paid in separate fractional shares to the several parties interested.

The party who caused this reference must pay costs,

LOCH, J.—I desire to add a few words. It appears to me that looking at the facts of this case as they are now disclosed to us, we ought not to answer the question which has been referred to us, because it does not arise in the present case.

The Zemindar sought to recover possession with mesne profits, the tenant declared the land to be rent-free. The decree gained by the Zemindar declared the land to be *mâl*, but refused to give possession and mesne profits, and it declared the defendant entitled to possession so long as he performed the service for which the land was granted, but that on his failure to do so, the Zemindar might resume the land. There the matter rests. The Zemindar did not resume. But the plaintiff, who is a purchaser from the Zemindar, comes in and asks for a kabuliât from the tenant who is still in possession and perfectly willing, so far as we know, to perform the service which he is required to render.

Under these circumstances the question which has been referred to us does not arise, and I think we should decline to answer it.

MACPHERSON, J.—The circumstances before us are so peculiar that the general question referred to us can scarcely be said to arise at all. I therefore desire to limit my answer to the particular case which is now before us. It is clear, the plaintiff cannot be entitled to a kabuliât, as Mr. Justice Loch has shown.

BAYLEY, J.—I am of the same opinion as Mr. Justice Loch. I also think that the question referred does not arise on the facts stated in the plaint or in the decree. Upon the facts as stated by the Chief Justice, I think it clear that a suit, as brought in the present case, would not lie.

MITTER, J.—I concur in the opinion expressed by Mr. Justice Loch. The point referred to us does not arise on the facts

admitted by the plaintiff, and I do not therefore think myself bound to express any opinion upon it. I wish to state, however, that, as a matter of principle, the shareholders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each shareholder of his quota of the rent is of itself no evidence of such consent; although when coupled with other facts and circumstances, it may justify a Court of Justice in coming to the conclusion that the tenant actually consented to the division of his tenure into a corresponding number of distinct holdings.

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[ORIGINAL CIVIL.]

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*Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Macpherson*

C. SETON AND ANOTHER (PLAINTIFFS) v. A. S. BIJOHN (DEFENDANT).

*Execution of Decree—Attachment of Person of Debtor—Onus—Act VIII of 1859, ss. 201,207,212,231,273,274,275,280,281—Act XXIII of 1861, ss. 8,13,15*

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Where a judgment-creditor had obtained a writ of attachment against the property of his judgment-debtor, but the debtor had no property to the knowledge of the creditor against which the attachment could be enforced,—*Held* (reversing the decision of the Court below), that he was entitled to an order for execution of the decree by attachment of the person of the debtor.

In an application for such an order, the *onus* is on the judgment-debtor to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, and not on the creditor to show that, by sending the debtor to prison, some satisfaction of the debt would be obtained.

THIS was an appeal from a decision of Mr. Justice Phear, dated 26th August 1871, refusing an application made by the plaintiffs, who carried on business in Calcutta, under the name of the Bengal Oil Company, for execution of a decree obtained by them in this suit on 2nd June 1871, against the defendant who carried on business in Calcutta as a merchant, by attachment of the defendant's person.

The application was by petition verified by affidavit which set out the following circumstances:—

“ That on 2nd June 1871, the plaintiffs obtained a decree in the suit against the defendant for Rs. 2,227-15-6, with interest at 6 per cent