*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Mitter.**

1868 Aug. 8.

RAJA NILMANI SING *v.* ANNADAPRASAD MOOKERJEE.†

Damages—Breach of Covenant in Lease—Act VIII. of 1859, *s.* 7.

A. recovered from B., under the terms of the lease set out in the case preceding, a refund of the excess of rent paid by him in respect of the years 1861, 1862, and 1863. While that suit was pending, B. recovered from A., rent at the same rate in respect of the three succeeding years. *Held*, that A. was entitled to bring another suit against B. for damages in respect of the excess of rent paid by him during the years subsequent to the institution of the prior suit.

THE plaintiff obtained a putni lease of lot Purulia, from the Pachet Raja, Nilmani Sing, the material parts of the lease which was dated the 23rd Paush 1267 (5th January 1861), are set out in the preceding case.

In that case, the plaintiff sued for a return of rent which had then been paid in excess, *viz.*, for the years 1267, 1268, 1269 (1861, 1862, 1863); and now sued for a refund of the excess rent paid by him during the years 1270, 1271, 1272 (1864, 1865, 1866), the Raja having, under Regulation VIII. of 1819, realized from him during those years the entire rent mentioned in the putni lease, while the former suit was pending. The Principal Sudder Ameen, the same officer who decided the suit for abatement in favor of the putnidar, gave a decree for the plaintiff. The Raja appealed, on the ground that as the plaintiff did not include his present claim in the former suit, his remedy was barred by section 7 Act VIII. of 1859. See *Raja Nilmani Sing* v. *Iswar Chandra Ghosal* (1).

The case was heard before LOCH and GLOVER, JJ., by whom a reference was made to a Full Bench, as follows:

GLOVER, J.—No question is raised in this appeal on the merits; the defendant (appellant) rests his case upon a point

* M. Justice Mitter declined to express an opinion as he had been professionally engaged in this case.

† Regular Appeal, No. 361 of 1867, from a decision of the Principal Sudder Ameen of Manbhoom.

(1) 9 W. R., 121

1863

RAJA NILMANI SING v. ANNADA-PRASAD MOOKERJEE

of law, and contends that as the plaintiff did not include his present claim in the suit originally brought by him (the suit for abatement) his remedy is barred by section 7, Act VIII. of 1859. In support of this contention we have been referred to an anologous case between the Raja and another putnidar, *Raja Nilmani Sing* v. *Iswar Chandra Ghosal* (1), in which a Division Bench of this Court, (Bayley and Phear, JJ.), ruled that so long as the potta remained in force, the Raja was entitled to be paid all the money due thereon, and to keep that money when received, he having committed no wrong against the plaintiff since he made the misrepresentations which constituted the cause of action in the first suit; "that the plaintiff's cause of action once having matured, the subsequent occurrence of further damage, after or before adjudication of the original matter, did not orginate a fresh cause of suit;" and that "the plaintiff could not, therefore, succeed in a second suit to get back so-called excess of rent paid by him in terms of the putni potta since the institution of the first suit." I venture to dissent from this ruling. The contract between the Raja and the putnidar was not fixed by the putni potta; on the contrary, it was expressly stated in that deed, that the amount of rent therein named was to depend upon certain enquiries to be thereafter made by the lessee in the Mofussil; that if the hastabud papers showed that the Raja's estimate was correct, the putnidar was to pay the rent named in the potta; if, incorrect, he was to receive abatement and refund. It seems to me, therefore, that there was not, at the time either of the two suits were brought, an absolute contract on the part of the putnidar to pay the amount mentioned in his lease, and that the lease gave the Raja no power to realize that amount until the Mofussil enquiry had been concluded; and that being so I do not see how the decree obtained by the putnidar for refund of excess rents paid in previous years can prevent his suing for the excess of subsequent years.

It has been urged that he ought to have included these amounts in his estimate of damages when he brought the first suit. But how could he have done so? If he succeed in that

(1) 9 W. R., 121.

1868

RAJA NILMANI SING v. ANNADA-PRASAD MOOKERJEE

suit, the putni potta would have been altered in the terms of the decree, and his rent for the putni declared to be so much less. That suit might have been decided before the years for which plaintiff now claims a refund; and have therefore rendered such claim unnecessary. How far, moreover, should the plaintiff's claim have extended? If he ought to have included the excess rent which he might or might not have had to pay for these three years in his estimate of damages in the former suit, he ought, I suppose, to have gone still further, and have sued for the excess which might possibly have been taken from him (supposing him to fail in his suit for altering the terms of the potta) for twenty years in advance.

It does not appear to me that the plaintiff's cause of action was matured when he brought his first suit; he was not compelled to do more then than sue for the injury already sustained; and that could not include an uncertain claim for a refund of what, in all probability, would never be paid. If the putni lease had definitely fixed the plaintiff's rent, it would have been different, as until the potta had been cancelled the tenant would have been bound; but, in this case, the lease settled nothing, but left the amount of rent to be determined by after-enquiry. It seems to me, therefore, that the taking year by year of the full amount of rent mentioned in the potta gave a constantly recurring cause of action to the plaintiff, and that he could not have included his claim for refund of what he might be made to pay improperly in the years 1270, 1271, and 1272 in a suit brought for refund of rents actually paid in 1267 1268, and 1269.

There being no contention as to the merits of the plaintiff's claim, I think that this appeal ought to be dismissed, and the Principal Sudder Ameen's order upheld with costs. But, as another Division Bench has come to a different conclusion, in a case precisely similar to this, judgment must, in accordance with our rules of practice, be deferred, until a Full Bench decides which is the correct view.

LOCH, J.—This case is a very simple one. The plaintiff holds a lease under terms of which he was to ascertain what

1863

RAJA NILMANI SING v. ANNADA-PRASAD MOOKERJEE

were the real assets of the property, the zemindar defendant agreeing that if they were less than the rent mentioned in the lease, a corresponding deduction therein should be made, and that he would refund the consideration-money in proportion. Before the investigation was completed, the defendant realized rents for three years at the rate given in the lease. The plaintiff then brought a suit for abatement of rent, for refund of consideration, and of rent paid in excess of the sum which would be payable on the amount of the rent being adjusted according to the terms of the contract. While this suit was pending, the defendant, under the provisions of Regulation VIII. of 1819, realized the rents of other three years from the plaintiff at the rate specified in the lease, and plaintiff now sues to recover the difference between the rent mentioned in the potta and that ascertained by him on local enquiry to be the proper rent. A Division Bench, in a similar case, *Raja Nilmani Sing* v. *Iswar Chandra Ghosal* (1), has held that the action would not lie; that the claim should have been included in a previous suit for damages brought by the same plaintiff. We differ from the view taken of the case by the Division Bench which passed the judgment referred to above, for we fail to see how a sum not realized from the plaintiff when his former suit was brought could have been included in that claim, whether such claim be looked upon as a claim for damages, or a claim for refund of rent taken in excess of the sum due to the landlord. I concur with my colleague in referring this case for the consideration and decision of a Full Bench.

The opinion of the learned Judges was delivered by

PEACOCK, C. J.—We have no doubt that this suit was maintainable. There was a covenant, on a given event, to make an abatement in the rent nominally fixed, and to refund a rateable proportion of the consideration-money. The event was, if it should turn out on enquiry and after preparation of the hastabud papers by the lessee, that the jumma stated by the

(1) 9 W. R., 121.

1868

RAJA NILMANI SING v. ANNADA-PRASAD MOOKERJEE

Raja was not the real rent of the estate. The fact has so turned out, and the defendant has not made the abatement, but has recovered the rents for the years 1271, 1272, and 1273, without making any deduction in the amount.

We are of opinion that the plaintiff is entitled to recover damages against the defendant for not making the abatement for those three years, which had not arrived at the time when the former suit was brought. The plaintiff could not, in that suit, have recovered damages in respect of those years for which he had not paid, and for which he had not at that time been called upon to pay any rent.

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Mitter.

AMIRUDDIN *v.* JIBAN BIBI.*

1868 *Aug.* 3.

Special Appeal—Act VIII. of 1859, *s.* 347.

No appeal lies against an order rejecting an application for the re-admission of appeal under sec. 347, Act VIII. of 1859.

PLAINTIFF brought a suit for recovery of possession in the Moonsiff's Court, and obtained a decree. Defendant appealed to the Judge. But the appeal was struck off for default, on the 24th of December 1867. Within 30 days from that date, defendant made an application, under sec. 347, Act VIII. of 1859, for the restoration of his appeal. The Judge, however, rejected the application on the ground, that "no good or sufficient reason was assigned for re-admitting the appeal." Thereupon defendant preferred an appeal to the High Court. The case came on before PEACOCK, C. J., and MITTER, J., by whom it was referred to a Full Bench, with the following remarks by—

PEACOCK, C. J.—At present, I do not see that an appeal lies at all from an order rejecting an application for the

* Miscellaneous Appeal, No. 157 of 1868, from an order of the Judge of Beerbhoom, affirming an order of the Moonsiff of that district.