

from the ostensible owner Izzutunnissa, if the husband consented to the sale, and if the transaction was *bona fide* on the part of the plaintiff for consideration, the purchase would be a good one, even if the property were not the wife's, but the husband's, and would not depend, as the Subordinate Judge has supposed, upon the validity or otherwise of the *hibbah-bel-ewuz*.

The case must, therefore, be remanded for a fresh trial. Costs to follow the result.

The 9th January 1871.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Rent-suit by sharer—Pleas.

Case No. 1442 of 1870 under Act X. of
1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 20th July 1870, reversing a decision of the Deputy Collector of that District, dated the 31st March 1869.

Brijo Lall Roy (Plaintiff), *Appellant,*

versus

Shama Churn Bhutt and another (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter, Grish Chunder Mookerjee, and Rash Beharee Ghose for Appellant.

Baboos Sreenath Doss and Motee Lall Mookerjee for Respondents.

In a suit by a *dur-putneedar* for rents for a portion of an estate, where the defendant abandoned in the first Court the plea that plaintiff could not sue separately from his co-sharer:

Held that the plea could not be entertained in the Lower Appellate Court.

Ainslie, J.—In this suit the plaintiff claims rent of certain lands situated in four villages. It is stated that six villages were granted in *putnee* to one Rakhal Doss Banerjee, and that in these six villages the

defendant held lands at an annual rent of Rupees 1,342.

Rakhal Doss Banerjee sub-let the villages in *dur-putnee*, 4 to the plaintiff and 2 to one Judoonath Chatterjee. In a written statement in a former suit, the defendant stated the amount payable on account of the last two villages, and also in this suit at the time of settling the issues, that amount, *viz.*, Rupees 293-3, was admitted before the Deputy Collector. The plaintiff claims the difference between the total rent of Rupees 1,342 and the rent of the land in those two villages.

The Deputy Collector has held that the rent payable to the plaintiff is sufficiently determined by the defendant's own admissions. He has also adjudicated on the plea of non-occupation set up by the defendant, and deducting the amount paid as admitted by the plaintiff, he has given a decree for the balance, with an order for ejection on failure to pay the amount decreed within 15 days.

The defendant appealed to the Judge, who has dismissed the suit without going into the merits, on the ground that the plaintiff fails to disclose a title in the plaintiff to sue separately from Judoonath Chatterjee, and says: "The grounds of the claim are so utterly inadmissible, that, even though the defendant has gone far in admitting the claim (though not so far as to enable the Court to pronounce any decision on the merits), the whole of the costs must fall on the plaintiff."

In special appeal, it is contended that the defendant never pleaded that the lands of the six *mouzahs* constituted an indivisible tenure, and that there was no issue as to plaintiff's right of separate suit, and that defendant pleaded payment of a portion of the claim to the plaintiff. On the other hand, we have been referred to cases reported at page 109, Volume X., Weekly Reporter; page 30, XII. Weekly Reporter; and page 469, XIII. Weekly Reporter.

In the first case Mr. Justice Phear, while holding that a *kubooleut* given to a mother could not, after her death, be treated as two separate *kubooleuts* in favor of her two daughters for their respective shares of their mother's estate, remarks that the original contract might probably have been varied by a subsequent parol agreement so as to give each daughter a separate right of suit.

In the second case Mr. Justice Macpherson, in commenting on the judgment of the Lower Appellate Court, which held that a clear and undisputed definition of shares was sufficient to warrant separate suits, observes if the plaintiff can prove that the defendants have heretofore recognized him as being the proprietor of a particular share, and have paid him separately a certain proportion of the rent, then, no doubt, a suit will lie against them.

The third case is in no way in point.

In both the earlier cases, the defendants appear to have, from first to last, contested the plaintiff's right of suit.

But this case is clearly distinguishable from those cases.

The defendant claimed that plaintiff should specify the separate rents of all the villages with a view to showing that, owing to non-occupation of certain portions of the land in suit, he was entitled to abatement; but when the issues were framed, he did not insist on the plea that plaintiff could not sue separately from Judoonath Chatterjee. On the contrary, he appears to have admitted that the rent of his lands in the two villages held by Judoonath was Rupees 293-3, and the issues on which he went to trial were only whether he was responsible to the plaintiff for the whole of the balance. He had, on a previous occasion, made a similar statement as to the apportionment of the rents. I think it must be held that defendant in this suit went to trial on the understanding that he was the tenant of the plaintiff, separately, for the four villages which originally bore a certain rent, and that the only contention was whether he was not entitled to an abatement of that rent for reasons which in no way affected Judoonath Chatterjee, and whether he had not paid to the plaintiff the full amount due to him as dur-putneedar of the four villages.

The plea on which the Judge has dismissed the suit appears to have been designedly abandoned in the first Court, and should not have been entertained in the Lower Appellate Court.

In this view I would remand the suit for trial by the Judge on the issues laid down by the first Court.

Costs to follow the result.

Loch, J.—I concur.

The 10th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Bond—Section 8, Act XXIII. of 1861—Section 204, Act VIII. of 1859.

Case No. 271 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 4th July 1870, modifying an order of the Sudder Moonsiff of that District, dated the 18th April 1870.

Abdool Kureem and others (Sureties),
Appellants,

versus

Abdool Huq Kazee (Decree-holder),
Respondent.

Baboo Mohendro Lall Mitter for
Appellants.

Baboo Bama Churn Banerjee for
Respondent.

A bond taken by the Court as security under Section 8, Act XXIII. of 1861, can be enforced under Section 204, Act VIII. of 1859.

Norman, C. J.—SHAHZADAH Mahomed Shumsooddeen, having been arrested under a warrant in execution of a decree for Rupees 822-8, applied for his discharge under Section 273 of Act VIII. of 1859, on the ground that he had no means of paying the debt.

Pending the enquiry which the Moonsiff considered necessary, he released the judgment-debtor on the security of Syud Abdool Kureem and Huro Pershad Bose, who, by an obligation or bond addressed to the Moonsiff, bound themselves thus: "We do hereby stand security for the said debtor, and covenant that, should his application for the benefit of insolvency be refused, and he be called upon to pay, we shall immediately produce him; and should we fail to produce him, we shall pay without objection the above amount together with costs and future interest due to the decree-holder," &c.

This bond was dated on the 22nd of December 1868.