1866. *October* 22. *R. A. No.* 60 *of* 1866.

We therefore reverse the decision of the Civil Judge, and remand the case with directions that it be replaced on the register and proceeded with afresh.

The costs of this appeal will be costs in the cause.

*Appeal allowed.*

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APPELLATE JURISDICTION. (*a*)

*Regular Appeal No.* 57 *of* 1866.

G. RÁMAIYA.....*Appellant.*
G. NÁRÁYANASÁMY and 2 others..... *Respondents.*

Where defendants sub-rented an Abkári farm for one year from 31st July 1864 under a muchalka, by which the defendants covenanted to pay monthly instalments of rent to plaintiff, and plaintiff covenanted to furnish defendants with the accounts of the farm for the month of July 1864, during which period the management was in the hands of plaintiff's agent. In an action by plaintiff for rent due to him and the value of arrack supplied by him.—*Held*, that the non-performance by the plaintiff of the covenant to furnish accounts was not sufficient to justify the entire dismissal of his suit against the defendants.

1866. *October* 25. *R. A. No.* 57 *of* 1866.

THIS was a regular appeal from the decree of E. B. Foord the Civil Judge of Berhampore, in Original Suit No. 24 of 1865.

The suit was brought to recover Rupees 1,599-2-6 principal and interest. The plaint set forth that the defendants sub-rented a portion of the Abkári contract for the sub-division of the Ganjam District, amounting to Rupees 14,000, for Fasli 1274, that defendants owed plaintiff on that account Rupees 1,200, being the instalments payable in the months of April and May 1865, and Rupees 365 for liquor supplied to them by plaintiff in the month of July 1864. The defendants admitted that Rupees 1,200 was due by them for the instalments payable in April and May 1865, and that they owed Rupees 47-8-0 on account of liquor supplied, but pleaded that as plaintiff had neglected to furnish them with the accounts for the month of July 1864, during which period the management was in the hands of plaintiff's agent, they were justified in withholding payment until furnished with those accounts.

(*a*) Present : Innes and Collett, J. J.

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The plaintiffs filed the original deed of agreement, the important clauses in which are as follows.

"*Muchalka executed on the* 31*st July* 1864, *by Gainadi Narayanasamy and Chuppah Ranganaikulu, inhabitants of Chicacole, to Gudisha Chitti Ramaiya, the renter of the Abkari farm of the sub-division of the District of Ganjam.*

Of the three taluqs of Parlakhimedi, Tekkali and Chicacole, whereof the Abkári farm you have rented from the sirkar for Fasli 1274, *i*, *e*., for the year commencing with the first July 1864 and ending with the 30th June 1865, you have retained to yourself the two taluqs of Parlakhimedi and Tekkali, and the third, viz., Chicacole, we sub-rent from you, and undertake to sell the Abkári produce of all the villages included therein, as follows:—

Rupees 14,000. This sum of fourteen thousand rupees we agree to pay in the instalments specified below, and execute this muchalka and obtain a cowle.

The instalments are, [here follow the instalments.]

Rupees 14,000 total. Thus we shall pay without default the amount of each instalment as it becomes due, and obtain receipt. If on any instalment default is made, we shall pay the amount of that instalment with interest at ½ per cent. per mensem, the rate fixed by the sirkar.

. . . . . .

6. If we, or any of our sub-renters with our culpable connivance or knowledge, do intentionally violate any of the above conditions, you shall be at liberty to set aside the above rent agreement. If the rent amount is not regularly paid, you shall be at liberty to assume the management on yourself at our risk (*i*, *e*., leaving us still responsible to the chance of loss or gain ) or to recover the arrears by attachment and sale, under Act XXXIX of 1858.

. . . . . .

9. V. Bhima Ráu, who has acted as your agent from the beginning of this Fasli, *i. e*., from the 1st July 1864, to the present day, having delivered to us Rupees the balance of cash and gallons of arrack, the quantity of liquor remaining, as shown by the cash chittah and arrack

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accounts, which he kept during his management, we received the same. We received also , muchalkas to the amount of Rupees , which were executed up to the present day both in favor of yourself and your partner, Chuppa Varada Rámánuja Gáru, and which you endorsed over to us. We shall conduct our business in accordance with these muchalkas, which are endorsed over to us."

The Civil Judge decided that defendants were entitled to be furnished with the abovementioned accounts before making the payment to plaintiff, and dismissed the suit with costs.

The plaintiff appealed.

*Sloan*, for the appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—In this case we must look to the muchalka, exhibit A, as containing the agreement between the parties, for it is clear that no evidence was given at the trial of the new and subsequent agreement referred to in the statement of the defendants. As stated by the Civil Judge, the first question for determination is "whether the defendants are justified in withholding payment of the instalments due in April and May 1865, and of the value of the arrack supplied to them, until furnished with the accounts connected with the management during July 1864." The defendants, it is admitted, entered into the management of the Abkári farm, and held it, apparently, up to the close of the period fixed by their agreement with the plaintiff. Treating then Clause 9 of the muchalka as an agreement on the part of the plaintiff to account with the defendants, and hand over to them the balance of cash and liquor in hand on the 31st July 1864, yet we are clearly of opinion that the Civil Judge was wrong in holding that the non-performance by the plaintiff of this covenant, on his part, was sufficient to justify the entire dismissal of his suit against the defendants. It is of course that, if the defendants are on this ground to be held justified in withholding one or more of the instalments, they would be equally justified in withholding each and every one of them, and

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this though they had, as in fact it seems admitted they had been in possession as sub-renters during the whole period fixed by their agreement.

The 3rd rule laid down in the notes to *Pordage* v. *Cole* (II Sm. L. C. 13) is, that when a covenant or promise goes only to *part* of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise : and an action may be maintained for the breach of the agreement by the defendant, without averring performance or readiness in the declaration. The object of this and other rules is to discover the real intent of the parties, and looking to the terms of this agreement, it seems out of the question to suppose that it could have been the intent of the parties to make the payment by the defendants of the Rupees 14,000 dependent upon the delivery of the accounts and balance for the month of July 1864. The substantial part of the consideration for the agreement by the defendants was their being put into possession as sub-renters, and that part they have enjoyed.

The rule we have referred to, has been recognised and acted upon in many cases in England, and appears entirely consistent with justice and convenience. We will only refer to one case (*Pust* v. *Dowie*, 9 Jur. N. S. Q. B. 1322) in order to adopt the language of the judgment as applicable to the present case. We think that inasmuch as the defendants have received the benefit of part of the consideration for which they entered into the agreement, they cannot say, in answer to the suit, that because they have not received the whole consideration, they will pay nothing. In common justice we ought to hold that the defendants are only entitled to one of two remedies : either to give the failure of part of the consideration in reduction of damages, or to bring a cross suit. Seeing that here what the defendants would seek to set off as damages for breach by the plaintiff of his promise would be an unliquidated amount, we think that the proper course is to refer the defendants to their remedy by a cross suit.

The result is, that we consider that the plaintiff is entitled to recover Rupees 1,200, the amount admitted to be

due for instalments, together with interest thereon till recovered, at the rate of ½ per cent. per mensem as fixed by the muchalka.

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As to the item of Rupees 375, claimed for arrack supplied, the defendants admit that Rupees 47-8-0 are due on this account, and as to the disputed balance the plaintiff admits that he has produced no evidence to support his claim; there will consequently be a decree for the sum of Rupees 47-8-0 only.

The defendants to pay costs of the plaintiff proportionate to the sums decreed.

*Appeal allowed.*

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APPELLATE JURISDICTION (*a*)

*Referred Case No.* 14 *of* 1866.

GAURI ANANTHA PARATHESI *alias* SÁTTHAPPAYYAN.

*against*

KÁLIAPPA SETTI and another.

At the date of the enactment of Act XI of 1865, suits for rent of land could not be entertained by the Revenue Officers of this Presidency so as to bar the cognisance of such suits by the Small Causes Court.

Madras Act VIII of 1865, equally with the prior enactments, abstains from authorising the cognisance by the Revenue Authorities of suits for arrears of rent.

The cognisance of such a suit by a Head Assistant Collector is a proceeding *coram non judice*.

THIS was a case referred for the opinion of the High Court by J. H. Nelson, the Acting Judge of the Court of Small Causes of Madura.

1866. *November* 5. *R. C. No.* 14 *of* 1866.

No counsel were instructed.

The Court delivered the following judgments.

INNES, J :—The questions submitted with this reference are first, whether at the date of the enactment of Act XI of 1865 suits for rent of land might be entertained by the Revenue Officers of this Presidency, so as to bar the cognisance of such suits by the Small Causes

(*a*) Present : Innes and Collett, J. J.