

tion, but the principle upon which it has been held that in cases brought under that Act a co-sharer cannot sue to enhance rent, applies here. The original lease granted by all the proprietors, cannot be varied or terminated at the suit of one.

The appeal must, therefore, be allowed, and the suit must be dismissed with costs.

Appeal allowed.

Before Mr. Justice Birch and Mr. Justice Mitter.

BROJO KISHORE SINGH (PLAINTIFF) v. BHARRUT SINGH
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Kabuliat, Suit for.

If a plaintiff brings a suit for a kabuliat at an enhanced rent against a tenant holding a mouza under him at a wholly insufficient rent, and the tenant sets up a wholly false and fraudulent defence, e.g., that the rent he pays is not liable to enhancement, as he holds under a potta which entitles him to hold so long as he pays a certain fixed rent quite irrespective of the value of his holding; and if on enquiry it is found that the defendant's plea is entirely false, and that he is not entitled to hold at any fixed rent, but only on payment of a fair rent with reference to the value of his holding, still if it be found that the plaintiff has at all over-estimated the amount of rent to which he is entitled, his suit must be dismissed with costs.

THIS was a suit for a kabuliat at an enhanced rent, laid at Rs. 93-7-1-3.

The plaintiff was the zemindar of Pargana Bara-Nobhum; the defendant, the tenant of Mouza Ramkanali, a mouza comprised in Pargana Bara-Nobhum. The defendant had been holding Mouza Ramkanali at a rent equivalent to Rs. 3-2 per annum. Before the institution of this suit, the plaintiff had caused the defendant to be served, through the Collector of the division, with a notice calling upon him to take a potta and execute a kabuliat for Mouza Ramkanali at the enhanced rent of Rs. 93-7-1-3.

The grounds for enhancement were—

1st,—That the defendant was paying a much lower rent than that paid by the same class of tenants with the defendant for

* Appeal from Appellate Decree, No. 1613 of 1878, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Zilla Chota Nagpore, dated the 7th of June 1878, reversing the decree of Baboo Radha Madhub Bose, Deputy Collector of Manbhoop, dated the 6th of February 1878.

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lands enjoying similar advantages for cultivation, situate in the neighbourhood of the mouza held by the defendant; and 2nd,—that the productive power of the land in the mouza and the value of its produce had increased otherwise than by the agency or at the expense of the defendant.

The defendant pleaded, that the rent of the mouza held by him was not subject to enhancement, as he held it under a jungle-bari panchuki bromottar potta granted to him in 1247 (1841) by the plaintiff's father, and that under this potta he was entitled to hold the mouza in perpetuity at a fixed annual rent of Rs. 2-2. He said that he was unable to produce the original potta, but filed in Court what purported to be a certified copy of it.

The Deputy Collector, before whom the case came in the first instance, entirely disbelieved the defendant's story as to his having ever received such a potta as he described, and holding that the rent of the mouza was clearly liable to enhancement, deputed an ameen to make a local enquiry and ascertain what would be a fair rent for the mouza, having reference to the rent actually paid for similar lands in its immediate vicinity.

The ameen reported that, having reference to the rates actually paid, or which had been decreed to be paid, for such lands in the vicinity, the proper rent payable for the mouza would be Rs. 103-0-7.

On this the Deputy Collector, at the instance of the defendant, went personally to the spot and held a fresh enquiry, and found that some of the decrees on which the ameen had based his opinion had not been enforced, and that the lands whose rent had been determined by them had been subsequently let to new izaradars at a lower rental. It did not appear that the Deputy Collector made any enquiry as to whether the present izaradars had paid any *pon*, or bonus to the zemindar, or gratification to his dewan, in consideration of getting their izaras at the lower rent; but as the result of his enquiry, and in modification of the report of the ameen, he gave a decree to the plaintiff for a kabuliat from the defendant at an enhanced rental of Rs. 50 per annum, and ordered the costs of the parties to be assessed with reference to the amount of the claim allowed, and disallowed.

Immediately upon this decree being made, the plaintiff, to avoid further litigation, tendered a potta to the defendant for the mouza at the rate decreed, and asked for a corresponding kabuliat.

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The defendant refused the offer of the plaintiff, and appealed from the order of the Deputy Collector to the Judicial Commissioner of Nagpore, on the ground that as the lower Court had found that the fair rent payable for the mouza was not the sum claimed by the plaintiff but a lower sum, it ought not to have given the plaintiff a decree for a kabuliat for the rent which was in its opinion the fair rental, but should have simply dismissed the plaintiff's suit with costs, leaving him to bring a fresh suit if so inclined; suits for enhancement of rent being a class of litigation which it was not right to encourage.

The plaintiff also filed a cross-appeal, submitting that the ameen had properly based his opinion upon the decrees of a competent Court as to what was the fair rent assessable upon similar lands; and that the Deputy Collector ought not to have been satisfied with enquiring what rent was paid by a neighbouring izaradar, but should have enquired whether that was the fair rent for the lands taken in izara, or whether a lower rent had been taken from the izaradar in consideration of a *pon* or bonus or premium, or for some other sufficient reason.

When the appeal and cross-appeal came on to be heard by the lower Court of appeal, it appeared that the necessary seven days' notice of the cross-appeal had not been given under s. 561 of Act X of 1877, and the following judgment was delivered by the Judicial Commissioner:—

“ This is a suit for a kabuliat at enhanced rent. Plaintiff claimed
“ a rental of Rs. 93-7 per annum, and the lower Court has given
“ a decree at the rate of Rs. 50 per annum. Defendant appealed,
“ and plaintiff put in a cross-appeal, which must be rejected, as
“ due notice of it was not given under s. 561 of Act X of 1877.

“ The lower Court was wrong in giving a decree at all, when it
“ found that the rate claimed by the plaintiff was not allowable—
“ *Golam Mohamed v. Asmut Alee Khan Chowdhry* (1) and
“ *Gagan Manjhi v. Gobind Chunder Khan* (2). Plaintiff

(1) 10 W. R. (F. B.), 14. (2) 1 O'Kinealy, 241.

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“ contends that the lower Court ought to have given him a
 “ kabuliat at the rate claimed in the plaint according to the
 “ ameen’s report. This is a contention which the plaintiff is not at
 “ liberty to raise except in cross-appeal, and his cross-appeal
 “ is inadmissible for reasons already given, and besides the
 “ contention itself is invalid. According to the ameen, the rent
 “ assessable on the defendant’s land would be about Rs. 11 more
 “ than the plaintiff has demanded. This he found by investi-
 “ gating the rates fixed by decrees of Court on lands similar
 “ and contiguous to the lands of the defendant. But the lower
 “ Court on personal enquiry found that these rates were inopera-
 “ tive, and had never been enforced.”

From this decision the plaintiff appealed to the High Court.

Baboo Rash Behary Ghose for the appellant.

Baboo Jogesh Chunder Dey for the respondent.

Baboo Rash Behary Ghose for the appellant.—The decisions relied upon by the Court do not govern the present case. The governing principle in those cases was, that the defendant should not have to bear the costs of a suit, which might have been avoided, if the plaintiff had, previous to the suit tendered him a potta at the rate which the Court eventually found to be demandable from him. In the present case it must be presumed that the defendant would not have accepted a potta at Rs. 50 per annum. He insisted upon a right to hold at Rs. 2-2 per annum. The Court of first instance has found that his claim to hold at that rate was devoid of foundation, and that he had put forward a document which is believed to be fabricated. And yet the lower Court of appeal, without disbelieving that the plaintiff is entitled to rent at the rate decreed to him by the Court of first instance, has dismissed the plaintiff’s suit and thrown upon him the whole costs of this litigation.

The following judgments were delivered :—

BIRCH, J.—I think that the lower Appellate Court, upon the authority of the cases cited in its judgment, was right in dismissing this suit.

The mere fact that the defendant, in ignorance of his rights, allowed the local investigation to proceed, and the rates to be ascertained by an ameen without objection, does not in my opinion raise any distinction between this case, and the cases relied on by the Judicial Commissioner.

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The local investigation was made to enable the Court to decide whether the rent claimed by the plaintiff was a fair and equitable rent such as the Court could by its decree impose. If the result of the investigation was to satisfy the Court that the rent claimed was not the rent fairly payable, the plaintiff's suit would rightly be dismissed.

From that enquiry the plaintiff may or may not derive benefit in future litigation, but he cannot succeed on his present plaint, as his claim is shown to be unfounded.

The special appeal is dismissed with costs.

MITTER, J.—I concur. I was inclined to hold that, having regard to the proceedings taken in the Court of first instance, the defendant should be considered to have waived his objection regarding the previous tender of a potta at the enhanced rate decreed in the lower Court. But as my learned colleague is of a different opinion, and as this case is not distinguishable from the authorities on which the lower Appellate Court relies, and as the present suit has been dismissed on a ground which would not preclude the plaintiff from asserting the same right in another suit framed in a different way, I agree to the special appeal being dismissed with costs.

Appeal dismissed.