

equally improbable, inconsistent with its previous policy, and unwarranted by its own language, to suppose that the legislature meant in 1858 to sweep away all ancient law on the subject, and to subject to one inflexible rule the property of all minors throughout Bengal.

We, therefore, answer the question put to us in the affirmative; and this being the only question in the case, the appeal is dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Mitter.

NISTARINI DAS (PLAINTIFF) v. BONOMALI CHATTERJI AND OTHERS (DEFENDANTS) AND DINO NATH DAS AND OTHERS (PLAINTIFFS) v. BONOMALI CHATTERJI AND OTHERS (DEFENDANTS).*

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April 10.

Stipulation in Potta for increase in Rental to be made yearly—Suit to recover Rent as per Potta—Notice of enhancement—Beng. Act VIII of 1869, s. 14.

Where a potta in its terms expressly stipulates for an increase of rental according as the lands let are brought under cultivation, and a measurement taken, a landlord is entitled to recover such increased rent as agreed upon in the potta without serving on the tenants any notice under s. 14 of Beng. Act VIII of 1869.

In this case the plaintiffs stated, that they were the owners of a ganti jumma, which was registered under the names of Panchanun and Muddosoodhun Chuckerbutty, and that in the year 1277 (1870) they sold a seven-and-a-half anna share of their ganti to one Nistarini Dasi, and that they had since that been in possession of the property jointly with her, each party collecting separately his own rents. In the year 1253 (1846) the plaintiffs granted a potta to, and received a kabuliat from, one Samjuddi, the terms of the kabuliat being, "that the land should be held rent-free for three years, and on the expiration of that period,

* Full Bench Reference on Special Appeals, Nos. 1867 and 1868 of 1877, from a decision of Baboo Kedaressur Roy, Subordinate Judge of Jessore, dated 31st May 1877, reversing the decree of Baboo Prosunno Cumar Sen, Munsif of Baghat, dated the 9th of September 1876.

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at a rental of four annas per biga for the fourth year, at eight annas for the fifth year, and subsequent to that year, at a rental of fourteen annas per biga, according to the amount of land brought into cultivation, and that as soon as the whole of the lands described in the kabuliat should have been cultivated, a measurement should be taken, and the land assessed at fourteen annas per biga." That on the rent falling into arrears, the jumma was sold by auction, and the defendants purchased the right of Samjuddi. In the year 1278 (1871) a measurement took place according to the terms of the kabuliat, and it was found that the number of bigas under cultivation largely exceeded the number of bigas paid for by the defendants. The plaintiffs, after demanding payment on the increased area, brought this present suit to recover the amount due, making Nistarini Dasi, who declined to sue jointly with them, a defendant. The defendants contended that Nistarini Dasi ought to have been joined as plaintiff; that the suit was one for enhancement of rent; and that they had not been served with notice of enhancement under s. 14 of Beng. Act VIII of 1869, and further denied that any measurement had been come to in 1278 (1871).

The Munsif found that the plaintiffs and Nistarini Dasi were the owners of the lands in question, and that it had been clearly proved that the rents were collected separately by the co-sharers; that notice of enhancement was not necessary, because the suit was not in reality one for enhancement of rent, but one for recovery of rent at the rates mentioned in the kabuliat, in which there was a condition that the rent was payable on the lands according to measurement; and further finding that a measurement had been come to in 1278 (1871) gave the plaintiffs a decree for the amount claimed.

The defendants appealed to the Subordinate Judge, who, without giving any express opinion as to the other points raised, disallowed the claim for rent at fourteen annas on the ground of want of notice, but gave a decree according to the rent payable at the time when the defendants purchased.

The plaintiffs appealed to the High Court on the ground that no notice of enhancement was necessary, as the case was not one for enhancement of rent.

Baboo *Mohini Mohun Roy* and Baboo *Bungshidhur Sen* for the appellants.

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Baboo *Chunder Madhub Ghose* and Baboo *Grija Sunker Mozumdar* for the respondents.

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The judgment of the High Court was, as far as is material to the points raised for the Full Bench, delivered by

MITTER, J. (PRINSEP, J., concurring).—“The plaintiffs contend in special appeal that the lower Court’s decision is erroneous in law. That having regard to the express stipulation in the potta of 1253 (1846) they are entitled to enhance the rent of the tenure without serving a notice upon the tenants under s. 14 of Beng. Act VIII of 1869.

“They rely on two decisions of this Court—*Bhyrub Chunder Mojoomdar v. Huro Prosunno Bhattacharjee* (1) and *Ram Narain Lall v. Gumber Singh* (2)—in support of their contention.

“The respondents on the other hand have cited before us two reported decisions *Burodakant Roy v. Sib Sunkuree Dossee* (3) and *Ekram Mundul v. Holodhur Pal* (4), and also rely on an unreported decision of the Court, dated 2nd January 1878, in special appeals, Nos. 921, 922 and 923 of 1877.

“On referring to these cases we find that there is a conflict in the decisions of this Court upon the point raised before us, and as the question involved is one of general importance we think it right to refer it to a Full Bench.

“The question referred is, whether in accordance with the express stipulation of the potta of 1253 (1846) the plaintiffs are entitled to recover rent for the year 1279 (1872) at a higher rate than what was payable in the year preceding, without serving upon the tenants any notice under s. 14 of Beng. Act VIII of 1869.”

On the case coming on for hearing before a Full Bench, Baboo *Mohini Mohun Roy* and Baboo *Bungshidhur Sen* appeared for the appellants.—The present case does not properly

(1) 17 W. R., 258.

(3) 4 W. R., Act X Rul., 35.

(2) 19 W. R., 188.

(4) I. L. R., 3 Calc., 271.

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come under s. 14 of Beng. Act VIII of 1869, as the potta prevents the landlords from enhancing the rent; the suit is one for arrears of rent according to the kabuliati. The meaning of s. 14 is, that although a tenant might not be protected from the ordinary rules of enhancement, still he is not liable to pay a higher rent unless a notice be served upon him; but if there be a stipulation in his lease, that the land should be measured, and paid for accordingly, and at such measurement a larger amount of land is found than previously was paid for, then no notice is necessary, as the rent is payable under the kabuliati. [GARTH C. J.—It has been held that if a measurement has been made no notice is necessary, but if no measurement has been taken then notice must be given under the Rent Act. The whole question is one of measurement, and the case ought to be sent back in order to determine if measurement has been made?] A suit to enhance rent according to contract is not on the same footing as a case of enhancement under the Act, and enhancement under the Act has a technical meaning, and is wholly irrespective of any lease. See *Bhyrub Chunder Mojomdar v. Huro Prosunno Bhattacharjee* (1) *Ram Narain Lall v. Gumbeer Sing* (2), *Mudhoo Manjee v. Rajah Nil Monee Singh* (3), *Brojo Soonduree Debia v. Collins* (4), and an unreported decision in special appeal No. 759 of 1878.

Baboo Rash Behary Ghose for the respondents.—Notice is necessary under the Act. [PONTIFEX, J.—Suppose you rent land at Re. 1 a biga with a stipulation that when called upon, you will pay Rs. 2 a biga, is notice under s. 14 then necessary?] Some kind of notice is necessary, in order that the tenant may have the option of quitting his holding rather than have his burden doubled. [PONTIFEX, J.—Supposing land were let out at a rental which doubled itself each year for a certain number of years, would then notice be necessary?] Yes because there are a certain class of people in India whom the legislature have thought right to protect against their own special contracts, and it may be that the ryots who hold land in India are such,

(1) 17 W. R., 258.

(3) 18 W. R., 533.

(2) 19 W. R., 188.

(4) 13 W. R., 359.

and therefore the Government have thought fit to lay down that notice must be served before enhancement. I submit, that notwithstanding the terms of any agreement between the landlord and tenant, the latter is still entitled to notice before his rent can be enhanced. See the case of *Ekram Mundul v. Holodhur Pal* (1) *Burodakant Roy v. Sib Sunkuree Dossee* (2).

The judgment of the Full Bench was delivered by

GARTH, C. J.—We are of opinion that, under the circumstances stated, it was not necessary for the plaintiffs to give any notice under s. 14 of Beng. Act VIII of 1869, before bringing a suit against the defendant for the increased rent.

It is apparent from the language of the section itself, as well as from other provisions in the Act, that s. 14 was never intended to apply to a case like the present.

Immediately upon the measurement being made between the parties, and the extent of the cultivated land ascertained, the defendant by the express terms of the contract of tenancy would have to pay an increased rent in proportion to the increased area brought into cultivation; whereas, if the provisions of s. 14 were binding upon the plaintiffs, the increased rent would become payable, not from the time of the measurement, but from the expiration of the notice to be given under that section. We think, therefore, that the question referred to us should be answered in the affirmative; and as the Subordinate Judge has decided against the plaintiff upon the ground that no notice was given, without trying the sixth and seventh issues, which relate to the measurement, the case must be remanded to the lower Court for the trial of those issues. Costs will abide the result.

Case remanded.

(1) I. L. R., 3 Calc., 271.

(2) 4 W. R., Act X Rul., 35.

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