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IN THE MATTER OF ABDOOL HAMED.

with reference to this person. To hold the contrary would be a manifest hardship. We understand from the observations of the Deputy Commissioner, that the Recorder never sits as an Insolvent Court at Akyab; and prisoners, therefore, in the civil jail in Akyab, if they cannot apply to the Deputy Commissioner, are in a worse position than other prisoners for debt under the new Code. The result would, in fact, be, that they would always have to stay out their full time in jail, an application to the Recorder sitting at Rangoon being practically impossible.

The decision of the Bombay Court in Bombay Crown Cases, vol. vii, p. 6, referred to by the Judicial Commissioner, turns upon the construction of the words "in any way affect" as used in the 24 and 25 Vict., c. 67, s. 42. Words of this kind must be construed with reference to the general provisions of the Act of which they form a part. The decision of the Bombay Court can scarcely, therefore, throw any light upon the construction of Act X of 1877.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Markby, Mr. Justice Ainslie, and Mr. Justice Mitter.

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June 3.

GUNI MAHOMED (DEFENDANT) *v.* MORAN (PLAINTIFF).*

AND

DOORGA PROSHAD MYTSE AND ANOTHER (DEFENDANTS) *v.* JOYNARAIN HAZRA (PLAINTIFF).†

Co-Sharers of Land—Arrangement for separate Payment of Rent—Separate Suits for Arrears of Rent—Evidence of Arrangement—Suit for Kabuliat —Cancellation of Original Lease, Presumption as to—Enhancement—Beng. Act VIII of 1869, *ss.* 2, 20.

Where it has been arranged between the co-sharers of an estate and their tenant, that he shall pay each co-sharer his proportionate share of the entire rent, each co-sharer may bring a separate suit against the tenant for such proportionate share.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice White, dated the 3rd July 1877, made in Special Appeal No. 1713 of 1876.

† Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Prinsep, dated the 5th July 1877, made in Special Appeal No. 2601 of 1876.

In the absence of such an arrangement no such suit can be maintained.

Such an arrangement may be evidenced either by direct proof, or by usage from which its existence may be presumed, and is perfectly consistent with the continuance of the original lease of the entire tenure.

But an arrangement of this nature will not enable one co-sharer to sue the tenant for a kabuliat, for a co-sharer who obtains a kabuliat is bound at the request of the tenant to give him a pottah upon the same terms, and the grant and acceptance of a binding lease of any separate share cannot exist contemporaneously with the original lease of the entire tenure.

The cancellation and determination of the original lease ought not to be presumed from the mere fact of a separate payment of rent to one or more of the co-sharers.

One co-sharer cannot enhance the rent of his share, such an enhancement being inconsistent with the continuance of the lease of the entire tenure.

THE facts of these cases are sufficiently stated in the following referring order:—

GARTH, C. J.—As the question in each of these cases is of a somewhat similar character, and seems to depend upon the same principle, and as on looking into the authorities there appears to be some difference of opinion in this Court upon the subject, we think it right to refer both cases to the decision of a Full Bench.

In Letters Patent appeal No. 1713 of 1876 the suit was brought by an ijaradar against a ryot for a kabuliat at a certain rent. The plaintiff had taken an ijara for a term of years of a moiety of an undivided estate. The defendant was the tenant of a nunker jote within this estate at a rental of Rs. 16-8, and it has been found that, for some years before the suit, he had been paying Rs. 8-4 separately to Ramanand and Anandomoyee, who were the owners of one moiety of the entire estate.

The lower Court held that, as he had thus paid a separate rent to the plaintiff's lessors, the plaintiff was entitled to sue him for a kabuliat, and decided accordingly; which decree was upheld by Mr. Justice White. The case of *Ramanath Rakhit* v. *Chand Hari Bhuya* (1) is an authority in favor of that position; and the case of *Saratsundari Debi* v. *Watson* (2) seems opposed to it.

(1) 6 B. L. R., 356; S. C., 14 W. R., 432.

(2) 2 B. L. R., A. C., 159; S. C., 11 W. R., 25.

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In the Letters Patent Appeal No. 2601 of 1876 the suit was brought by an ijaradar of a one-third share of an undivided estate to recover, at an enhanced rate, one-third of the rent of a tenure held by the defendant within that estate.

It was found that the tenant had for some time been paying his one-third share of rent separately to the plaintiff's lessors, and the Subordinate Judge held that there was nothing to prevent the plaintiff from enhancing his share of the rent by a separate suit, inasmuch as his collections had been separate.

In special appeal we find that it was held by Kemp and E. Jackson, JJ.—*Dookhee Ram Sircar* v. *Gowhur Mundul* (1) that a suit to enhance a separate share of the rent of an undivided estate will not lie. The suit should be to enhance the entire rent of the estate; see also *Haradhun Gossamee* v. *Ram Newaz Missery* (2), *per* Kemp and Glover, JJ.

The questions which we refer for the opinion of the Full Bench are:

1*st.*—Whether the ijaradar of a co-sharer of an undivided estate, who has made separate collections from the tenant of the whole estate in respect of his share, can sue to obtain a kabuliat at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit?

2*nd.*—Whether the ijaradar of a co-sharer of an entire tenure, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share separately without joining the other co-sharers of the tenure?

It was arranged that both these appeals should be argued together.

Baboo *Tarinihant Bhuttacharji* for the appellant in the first suit.—The only case in favour of the contention that such a suit as this will lie is that of *Ramanath Rakhit* v. *Chand Hari Bhuya* (3), in which Paul, J., says, that he has no doubt that the proprietor of a fractional share of an undivided estate can sue for a kabuliat, his action being simply one intended to put upon paper a separate engagement and contract already existing be-

(1) 10 W. R., 307. (2) 17 W. R., 414.
(3) 6 B. L. R., 356; S. C., 14 W. R., 432.

tween himself as landlord and the defendant as tenant. On the other hand, in *Saratsundari Dabi* v. *Watson* (1), it was decided, that a person entitled to a fractional share of an undivided estate, though he receives a definite portion of the rent from the tenant or ryot, is not entitled to maintain a suit for a separate kabuliat in respect of such undivided share. The case of *Udaya Charan Dhar* v. *Kali Tara Dasi* (2) is to the same effect. Under s. 20 of Beng. Act VIII of 1869 if a ryot finds his land unprofitable he may relinquish it, but he must relinquish the whole, he cannot retain a part. Now the effect of a kabuliat would be to bind the tenant; he might be willing to relinquish, but he would be bound as to a part of the land by the kabuliat, and therefore could not take advantage of this section—*Saroda Soonduree Debee* v. *Hazee Mahomed Mundul* (3). Another difficulty is, that as there can be no suit for a kabuliat without a previous tender of a pottah, and as according to s. 2 of Beng. Act VIII of 1869 the boundaries of the land must be distinguished in the pottah, it would be impossible to follow the provisions of the section where the lands are joint and undivided.

As to the second question referred, it has been decided that a single co-sharer cannot bring a separate suit for his share of the rent, and that the rule applies with greater force to cases of enhancement: *Bhyrub Mundul* v. *Gungaram Bonnerjee* (4), *Haradhan Gossamee* v. *Ram Newaz Missery* (5), and *Raj Chunder Mojoomdar* v. *Rajaram Gope* (6). So it has been decided, that a suit by one of several joint proprietors to recover a certain proportion of rent, which he alleges is payable by the defendants in respect of lands occupied by them, will not lie unless the plaintiff either proves that the defendants have paid their rent to him separately, or proves an express agreement on their parts to pay to him separately. The early case of *Mohammed Singh* v. *Mussamut Mughoy Chowdhrain* (7), in which it was held that

(1) 2 B. L. R., A. C., 159; S. C., 11 W. R., 25.

(2) 2 B. L. R., Ap., 52; S. C., 11 W. R., 393.

(3) 5 W. R., Act X. Rul., 78.

(4) 12 B. L. R., 290 note; S. C., 17 W. R., 408.

(5) *Ibid*, 414.

(6) 22 W. R., 385.

(7) 1 W. R., 253.

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an owner of a fractional share of an undivided estate, as to whose share there is no doubt, can sue for his share of the rent, was expressly dissented from by Kemp and L. S. Jackson, JJ. in *Ramjoy Singh* v. *Nagur Gazee* (1). The Full Bench case of *Indar Chandra Dugar* v. *Bindaban Bihara* (2) also shows that such a suit as this will not lie. [GARTH, C. J.—The question is whether there has been a binding agreement between the parties. Suppose, that instead of one co-sharer suing, all had sued, could the tenant have said that there had been a misjoinder of parties?] The payment of rent to each of the co-sharers separately is presumptive but not conclusive proof that the original contract has been dissolved and a new contract substituted: *Anoo Mundul* v. *Shaikh Kamalooddeen* (3), *Indar Chandra Dugar* v. *Bindabun Bihara* (2). Even if a tenant who has a kabuliat holds over after his term has expired, he cannot be sued by each of the co-sharers separately: *Tara Chund Bonnerjee* v. *Ameer Mundul* (4).

Baboo *Amerendronath Chatterjee* for the respondent. The question is, whether a suit will lie by a co-sharer for a fractional share of rent. There is no doubt according to the decisions that where rent is paid separately one co-sharer can sue for his share without joining the other co-sharers. Now if a suit will lie for rent, a suit will equally lie for a kabuliat. Upon that point there are no decisions besides the case of *Ramanath Rakhit* v. *Chand Hari Bhuya* (5). It is for the advantage of the peasantry in this country that suits for kabuliats should be encouraged. Section 10 of Beng. Act VIII of 1869 provides that every person who grants a pottah shall be entitled to receive a kabuliat. If the tenant has been paying rent separately, what hardship is there if he is asked to execute a kabuliat. [GARTH, C. J.—Is it not a contract in the future?] He can relinquish. [AINSLIE, J.—Yes by giving up the whole of his tenure.] The landlords cannot

(1) 5 W. R., Act X. Rul., 68.

(2) 8 B. L. R., 251; S. C., 15 W. R., F. B., 21.

(3) 1 C. L. R., 248.

(4) 22 W. R., 394.

(5) 6 B. L. R., 356; S. C., 14 W. R., 432.

compel the tenant to continue his occupation: *Hills* v. *Ishore Ghose* (1). The possession of the ryot is not altered; he has been paying rent under an oral agreement which is reduced into writing by his taking a kabuliat. The case of *Jagadamba Dasi* v. *Haran Chandra Dutt* (2) shows that where co-sharers are not interested they need not be joined as parties. If a tenant executes a kabuliat he can relinquish the whole land; if he does not execute he cannot relinquish part. So that if he gives a kabuliat to one shareholder he is not prejudiced.

Baboo *Umakali Mookerji* for the appellants in the second suit in reply.

The opinion of the Full Bench was delivered by

GARTH, C. J.—We think that both questions referred to us should be answered in the negative. They both depend upon similar considerations, and must be governed by the same principles.

We understand that in both cases the entire tenure was originally held by the tenant under all the co-sharers at an entire rent; but that, by some arrangement amongst themselves, consented to by the co-sharers on the one hand, and by the tenant on the other, the latter had been in the habit of paying a portion of the rent of each co-sharer in respect of his separate share.

Such arrangements are by no means unusual, and they may be evidenced either by direct proof, or by usage from which their existence may be presumed. But in either case they are perfectly consistent with the continuance of the original lease of the entire tenure; and the same consent of all the parties, by which the arrangement was originally created, may at any time put an end to it.

So long as it continues, however, it has been constantly held in this Court, and must be considered now as well established law, that each co-shraer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an

(1) W. R., Spl. No., 131.
(2) 6 B. L. R. 526 S. C., 10 W. R., 198.

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arrangement, it is equally clear that no such suit can be maintained. See *Ganga Narayan Das* v. *Saroda Mohun Roy Chowdhry* (1), *Sree Misser* v. *Crowdy* (2), *Dinobundhoo Coondoo Chowdry* v. *Dinonath Mookerjee* (3) and *Mussamut Lalun* v. *Hemraj Singh* (4).

But a suit for a kabuliat under such circumstances by one co-sharer against the tenant is a very different thing from a suit for arrears of rent. The separate suit for arrears, as we have already said, is perfectly consistent with the continued existence of the original lease of the tenure. A kabuliat, by which an entirely new and separate tenancy is created, is obviously inconsistent with it. A suit for arrears deals only with the past. A suit for a kabuliat binds the tenant in the future. In fact it is binding upon both parties, because the co-sharer who obtains a kabuliat is bound at the request of the tenant to give him a pottah upon the same terms, and the grant and acceptance of a binding lease of the separate share cannot exist contemporaneously with the original lease of the entire jote. This is quite in accordance with the view of Norman, Acting C. J., and Dwarkanath Mitter, J., in the Full Bench case of *Indar Chandra Dugar* v. *Bindabun Bihara* (5), in which Mr. Justice Mitter points out the distinction between a mere separate payment of rent to a co-sharer, and a claim for a kabuliat as to the separate share. (See *Saratsundari Debi* v. *Watson* (6).

The only authority to the contrary appears to be the decision of Bayley and Paul, JJ., the case of *Ramanath Rakhit* v. *Chand Hari Bhuya* (7), but it is not clear from that case, whether the tenure had ever been held at an entire rent; and at any rate the distinction between a separate payment of rent by arrangement, and a binding lease of a separate share, does not seem to have been considered.

Of course if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the

(1) 3 B. L. R., A. C., 230; S. C., 12 W. R., 30.
(2) 15 W. R., 243.
(3) 19 W. R., 168.
(4) 20 W. R., 76.
(5) 15 W. R., 21.
(6) 2 B. L. R., A. C., 159; S. C., 11 W. R., 25.
(7) 6 B. L. R., 356; S. C., 14 W. R., 432.

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co-sharers and the tenant are at liberty to enter into any fresh contracts which the law allows; but no Court of Justice ought to presume such a cancellation or determination of the lease, from the mere fact of a separate payment of rent to one or more of the co-sharers.

The right of one co-sharer to enhance the rent of his share separately must be governed by the same principles as his right to a kabuliat.

The Rent Law in our opinion does not contemplate the enhancement of a part of an entire rent; and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure.

In each of the special appeals therefore, 1713 and 2601, the judgment of the lower Appellate Court and of the High Court will be set aside, and the plaintiff's suit in each case will be dismissed, with costs in all the Courts.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Tottenham.

NARAIN CHUNDER (PLAINTIFF) *v.* TAYLER AND OTHERS (DEFENDANTS).*

1878
June 12.

Settlement by Revenue authorities—Right of Suit—Limitation—Effect of Order under Act IX of 1847.

Although a settlement made by the Revenue authorities under Act IX of 1847 is final, the fact of such settlement will not preclude a proprietor from seeking in a Civil Court to establish his right to the lands so settled.

In suits instituted by a purchaser to recover possession of an estate sold for arrears of Government revenue due in respect of such estate, the period of limitation cannot be calculated, under any circumstances, from a day anterior to the date of purchase.

THIS was a suit for possession of Turuf Hossainpore in Parganna Kakjote, and for wasilat. The plaint stated that the lands in dispute were permanently settled in 1793, and that, at the time of the revenue survey in 1848, the said lands lay on

* Regular Appeal, No. 268 of 1876, against the decree of C. F. Manson, Esq., Deputy Magistrate and Deputy Collector of Zilla Rajmahal, dated the 11th July 1876.