1895

MANICK LALL SEAL v. SURRUT COOMAREE DASSEE.

Mr. Garth applied on behalf of a corporation stated to have advanced money in pursuance of the scheme, to which I have referred. I said then that I thought he had no *locus standi*. I am still of that opinion.

As to the costs of this application, they certainly ought not to be borne by the estate. I shall make no order as to the Receiver's own costs, but as regards the costs of the plaintiff and of the Administrator-General, they must be paid by Surrut Coomaree, who proposed the original agreement and adhered to it until the hearing of the application, when it was withdrawn

I feel bound to add, that if the attorneys in this matter had done their duty to the Court, as they ought, this application would not have been necessary, and the parties would not have been put to the costs occasioned thereby.

Attorney for the plaintiff: Babu *Bhoopendra Nath Bose.*
Attorney for the defendant, the Administrator-General of Bengal: Mr. *Swinhoe.*
Attorneys for the defendant, Surrut Coomaree Dassee: Messrs. *Remfry & Rose.*
Attorneys for the mortgagees, Messrs. Gillanders Arbuthnot and Co.: Messrs. *Sanderson & Co.*

C. E. G.

APPELLATE CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Ghose, and Mr. Justice Rampini.

1895 *March* 6.

TEJENDRO NARAIN SINGH (PLAINTIFF) *v.* BAKAI SINGH AND OTHERS (DEFENDANTS).*

Contract Act (IX of 1872), section 74—Penalty—Suit by a joint proprietor for arrears of rent—Bengal Tenancy Act (VIII of 1885), section 29 (b), Kabuliat executed prior to—Covenant for a higher rate—Bengal Act VIII of 1869, section 5.

In a *kabuliat* executed in 1881, it was stipulated that, upon the expiry of the term of seven years fixed therein, a fresh lease should be executed; that,

* Appeal from Appellate Decree No. 2339 of 1893, against the decree of Babu Huro Gobind Mookerjee, Subordinate Judge of Bhagalpore, dated the 31st of August 1893, affirming the decree of Babu Uma Churn Kur, Munsif of Modhepura, dated the 4th of March 1893.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

should the defendant cultivate the lands without executing a fresh *kabuliat*, he would pay rent at the rate of Rs. 4 a bigha (a rate much higher than that fixed for the term). No fresh *kabuliat* was executed on expiry of the term, and the plaintiff, a part proprietor, collecting rent separately, brought this suit for arrears of rent at the new rate of Rs. 4. The defendant objected *inter alia* that the plaintiff being a part proprietor was not entitled to sue for enhanced rent, and that the stipulation for the higher rate was a mere threat, and not intended to be carried out. The first Court gave a decree at an enhanced rate, or an addition of 2 annas in the rupee in terms of section 29 (*b*) of the Bengal Tenancy Act. On appeal, the Subordinate Judge dismissed the whole suit, on the ground that the suit being one for enhanced rent, and the plaintiff a part proprietor, the suit did not lie.

Held, that the *kabuliat* having been executed before the Bengal Tenancy Act was passed, the present case did not come within the operation of that Act, and the plaintiff, although a part proprietor, could bring this suit. *Ram Chunder Chaokrabutty* v. *Giridhur Dutt* (1) followed.

Held by PRINSEP and GHOSE, JJ. (RAMPINI, J., dissenting), that the additional rent was intended to be enforceable only on default to execute a fresh *kabuliat*, and the so-called agreement to pay at the enhanced rate of Rs. 4 was in the nature of a penalty.

Held by RAMPINI, J.—The plea that the rate of Rs. 4 was a penalty was not taken by the defendant in his written statement, and, in any case, the stipulation did not come within the purview of section 74 of the Indian Contract Act. Moreovor the suit is not for compensation for breach of contract, but for rent at a rate which the defendant has agreed to pay from a certain time. *Held*, also, that section 29 (*b*) of the Bengal Tenancy Act has no retrospective effect, and did not apply to the present *kabuliat*, which was executed before the passing of that Act. Section 5 of Bengal Act VIII of 1869, which would be the law applicable, did not debar an agreement by an occupancy ryot to pay whatever rate he pleased.

THE plaintiff, as shareholder of 7 annas of *mouza* Boruari, brought this suit in respect of his share of arrears of rent for the years 1296 to 1299 Fusli (1889 to 1891), under the terms of a *kabuliat* executed by the defendant on 19th Asin 1289 Fusli (27th September 1881.) The plaint alleged that the rent of the *mouza* was collected jointly by all the proprietors, including the plaintiff, up to the year 1295 Fusli, and that from the year 1296, after settlement of a dispute between them as regards their shares, they had been realizing the rent from the tenants separately according to their respective shares.

(1) I. L. R., 19 Calc., 755.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

The terms of the *kabuliat*, dated 19th Asin 1289, were as follow :—

"I have, of my own free will and accord, taken for the purposes of cultivation, from Munshi Kamla Pershad, son of Munshi Pyari Lal, deceased an inhabitant and part proprietor of *mouza* Nagwara, Pergana Tirsath, District Tirhut, the manager of Raj Boruari, Pergana Mulhani Gopal, Sub-District Sopoul, and of the zemindar of the said *mouza* Boruari, 42 bighas 15 cottas of paddy and homestead lands, lying within the boundaries given below, in the said *mouza*, at an annual *jama* of Rs. 10 annas 9, exclusive of the road and public works cesses, and for a term of seven years, from 1289 to 1295, agreeing to pay at the undermentioned rates for the paddy and homestead lands. I accordingly execute and deliver this *kabuliat* respecting the same, to the effect that I shall cultivate the said lands, and appropriate their produce ; that I, the tenant, shall have to bear the consequences of inundation of the lands remaining waste, of the want of proper cultivation, and of the heavenly calamities ; that I shall, on taking receipts, pay in the *zemindary cutcheri*, year after year, and instalment after instalment, the rent at the *jama* defined above ; that, should I fail to pay any of the instalments, I shall, in addition to the *jama*, pay interest for non-payment of the instalments at 2 annas a rupee for every instalment ; that, in case of non-payment of all the instalments, the proprietors hereinbefore alluded to shall have power to oust me of the lands, without having recourse to a lawsuit ; that upon expiration of the term fixed in this *kabuliat*, I shall execute a fresh *kabuliat* in favour of the proprietors, and then cultivate the said lands ; that, should I cultivate the lands without executing a fresh *kabuliat*, I shall, without any objection, pay rent for them at one and the same rate of Rs. 4 a bigha ; and that and my heirs shave and shall have, in that case, no objection whatever to pay rent at one and the same rate. I have, therefore, executed this *kabuliat* for a term of seven years in respect of lands other than *kamat*, so that it may be of use when necessary."

The defendant in his written statement objected to the rate of Rs. 4 on the grounds among others :—

"(5.) That the plaintiff is only a shareholder of *mouza* Boruari, and he has consequently no right to enhance the rent of any tenant. The suit is, therefore, liable to be dismissed.

"(7.) That the defendant has now come to know, upon enquiry, that in the *kabuliats* executed by tenants of Raj Boruari, there is a stipulation to the effect that, if upon expiration of the term thereof fresh *kabuliats* be not executed, the rent should be realized at the rate of Rs. 4 a bigha. This leads the defendant to believe that this condition was laid down as a mere threat to the tenants. The defendant has also come to know that rent is being realized at the old rates from those tenants also, the terms of whose *kabuliats* have expired. The condition as to enhancement of rent was put down in

the *kabuliats* simply as a matter of form. The said condition was not intended to be enforced.

"(9.) That the defendant has paid the plaintiff in full the rent for the years in suit at the rates alleged by him; and for this reason also the present suit cannot proceed."

The Court of first instance found that the plaintiff's collection of rents was separate, and held that the present suit was maintainable; but that the defendant being an occupancy ryot, under the law, his rent could not be enhanced by more than 2 annas in the rupee by virtue of an agreement in writing.

On appeal the Subordinate Judge observed :—

"Under section 28 of the Bengal Tenancy Act, the rent of an occupancy *ryot* cannot be enhanced, except under the provisions of that Act, and under section 29 the rent of such a *ryot* may be *enhanced* by contract. In each of the present cases, higher rent for the same land has been claimed than what was formerly payable for the same. The suits, therefore, are suits for enhanced rents, and as they were brought only by one of the two joint landlords, the claims for enhanced rents cannot succeed."

The plaintiff appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Joges Chandra Dey* for the appellant.

Babu *Sarada Charan Mitra* for the respondent.

Babu *Umakali Mukerjee.*—This is not a suit for enhancement of rent. It is a suit for rent at a rate agreed upon by the defendant. There can be no objection to this suit on the ground that the plaintiff is only a fractional shareholder. Section 188 of the Bengal Tenancy Act does not apply. *Premchand Nuskur* v. *Mokshoda Debi* (1), *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2). Section 178 of the Act does not affect this case, and sections 27, 28 and 29 would not touch it, as it is not a suit for enhancement. The case of *Ram Chunder Chackrabutty* v. *Giridhur Dutt* (3) is on all fours with the present. The plaintiff is entitled, under the provision of the contract entered into with the defendant, to a decree for rent at the rate of Rs. 4. [GHOSE, J.—The question seems to be whether that provision is not in the nature of a penalty.] The parties intended a re-adjustment after seven years; if there was none, the parties agreed upon the rate of Rs. 4. The

(1) I. L. R., 14 Calc., 201. (2) I. L. R., 15 Calc., 47.
(3) I. L. R., 19 Calc., 755.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

agreement provides for the *future* rate, and on the principle of the Full Bench ruling in *Kalachand Kyal* v. *Shib Chunder Roy* (1), the rate of Rs. 4 is not a penalty. The question of penalty was not raised by the defendant in the Courts below, and he cannot raise it now.

Babu *Sarada Charan Mitra* for the respondent.—The question of penalty was raised by the defendant in paragraph 7 of his written statement, where he said that the condition was a threat. The only contingency contemplated in the provision in question was non-execution of a new *kabuliat;* the provision then would be a penalty. The law (section 24 of the Bengal Tenancy Act) provides for fair and equitable rates, and that was also the old law. That is the true test to examine whether the condition is penal or not. The suit should be dealt with as one for compensation. Section 74 of the Contract Act allows only a reasonable compensation; in the absence of any evidence to the contrary, the original rent should be held to be such compensation.

Babu *Umakali Mukerjee* was heard in reply.

The following judgments were delivered by the Court (PRINSEP, GHOSE and RAMPINI, JJ.) :—

PRINSEP, J.—This is a suit for rent due to the plaintiff as part proprietor of an estate.

The defendant Bakai Singh held 42 bighas 15 cottas of land at a rent of Rs. 10 for seven years, which expired in Asin 1296 (F.), and in a *kabuliat* executed by him, he agreed that, "on expiration of the term fixed, I shall execute a fresh *kabuliat* in favour of the proprietors, and then cultivate the said lands," and further that, "should I cultivate the lands without executing a fresh *kabuliat*, I shall, without any objection, pay rent to them at one and the same rate of Rs. 4 per bigha."

The defendant did not execute a fresh *kabuliat*, and accordingly the plaintiff has brought this suit, claiming rent at Rs. 171 instead of at Rs. 10 as formerly.

It has been found that the tenant defendant had acquired rights of occupancy under the Rent Act then in force before the execution of that *kabuliat*.

(1) I. L. R., 19 Calc., 392.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

The Munsif was evidently of opinion that the agreement to pay at the rate of Rs. 4 per bigha in the event of a breach of the condition as to the execution of a fresh *kabuliat*, at the end of seven years, was in the nature of a penalty, and he held that the plaintiff was entitled to enhanced rent, only at an increase of 2 annas per rupee on the former rent as a "compensation," and he gave plaintiff a decree for the amount so due. As we understand him, in coming to this conclusion, he applied section 29 of the Bengal Tenancy Act, and the principles of section 74 of the Contract Act. In appeal the Subordinate Judge dismissed the suit, holding that, as the plaintiff is only a part proprietor of the estate, he cannot sue for an enhancement of rent, such enhancement can be made only under the Bengal Tenancy Act, and cannot be made, except by all the proprietors conjointly.

The *kabuliat* was executed before the Bengal Tenancy Act was passed, and, therefore, any contract then made would not come within the operation of that Act. For a similar reason, the Subordinate Judge has misapplied that Act, so as to bar this suit brought by the plaintiff, a part proprietor of the estate. The suit is not under the Bengal Tenancy Act, and the defendant has admitted in his evidence that he has been paying the co-sharers of the estate the rents due to them separately, and, therefore, as already held by this Court, the suit is permissible.

The question then arises whether the plaintiff is entitled to rent at the rate claimed by reason of the terms of the *kabuliat*.

It has been contended before us for the plaintiff appellant that the enhanced rate of rent which was to be paid on default of executing a fresh *kabuliat* was what was in the contemplation of the parties should be the new rent, and that the fresh *kabuliat*, which the defendant undertook to execute, was to be in those terms.

On the other hand, it is contended that no such agreement was made, and that this was in the nature of a penalty for not executing a fresh *kabuliat*.

The plaint certainly does not state any such agreement.

It is in the following terms: "It was stipulated in the said *kabuliat* that, upon expiration of the terms thereof, he would execute a fresh *kabuliat*, and then cultivate the land, and that, should he cultivate the land without executing a fresh *kabuliat*, he

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

would pay for all the lands at one and the same rate, that is, Rs. 4 a bigha. The defendants, however, notwithstanding that this term of the *kabuliats* has expired, has neither executed a fresh *kabuliat* nor given up the lands. The plaintiff is, therefore, entitled, under the terms of the *kabuliat*, to recover the rent for the said lands at one and the same rate of Rs. 4 a bigha from the year 1296 Fusli."

There is no evidence to support the case now set up that any such agreement was made, nor is there anything to show on what ground this rate of Rs. 4 a bigha is claimed, except on default of the defendant in executing a fresh *kabuliat*.

The plaintiff's case, as brought, was that he was entitled to this increase of rent, because the defendant did not execute a fresh *kabuliat*. Moreover, it has not been stated, except in the course of argument before us, what the terms of the fresh *kabuliat* in respect of the rent to be payable were to be, and it has been now stated that the rent was to be at Rs. 4 a bigha. By this we are asked to understand that whether the defendant did or did not execute a fresh *kabuliat* was of no consequence, for if he retained the lands, he was to pay enhanced rent, raising his rent from Rs. 10 to Rs. 171, and this, although, before he executed that *kabuliat*, he had a right of occupancy entitling him to hold the lands at rates which, under the law, could be raised only on the existence of certain specified circumstances. It seems unnecessary to remark that it is hardly possible that any one having a right of occupancy, like the defendant, would willingly so surrender his rights under the law.

The agreement was to execute a fresh *kabuliat* on expiry of the existing lease, but there is nothing to show either the amount of rent to be payable under such *kabuliat*, or the term of the new lease. And the defendant has stated in his written statement that he believed that the condition as to the payment of Rs. 4 a bigha on default of executing a *kabuliat* "was laid down as a mere threat to the tenants," and that, it was "put down in the *kabuliats* simply as a matter of form, &c. The said condition was not intended to be enforced."

We are unable to hold that the defendant agreed to pay rent at Rs. 4 a bigha at the expiry of his lease, or that he agreed to execute a fresh *kabuliat* on these terms. The additional rent was

intended to be enforceable, only on default to execute a fresh *kabuliat*, and this was the plaintiff's case as brought and tried. We rather hold, as the Munsif seems to have held, that the so-called agreement to pay at the enhanced rate of Rs. 4 a bigha, was in the nature of a penalty.

It must next be considered whether, if this be regarded as a penalty, plaintiff is entitled to a remand in order that it may be determined whether, having regard to section 74 of the Contract Act, he is entitled to any, and, if so, to what compensation for the breach of the contract in not executing a fresh *kabuliat*. Any compensation so awardable must be reasonable under the law, and is not necessarily what may be stated in the contract. The amount so stated should be regarded only as the full amount which can be claimed. In this case the compensation is an enhancement of rent on a tenant with rights of occupancy and holding at rates of 8 annas, 4 annas and 2 annas per bigha to an uniform rate of Rs. 4. That is *primâ facie* altogether unreasonable, but that is what the plaintiff claims, and there is no evidence to show how that rate was fixed, or, indeed, what would be a reasonable compensation by way of an enhancement of rent.

The only conclusion at which I can arrive is, therefore, that the plaintiff has failed to show that he is entitled to anything more than the former rate of rent. The plaintiff is entitled to a decree for the arrears admittedly due at the former rates with interest, and to nothing further. To that extent the decree of the lower Appellate Court is modified. Each party will bear his own costs throughout.

I would add, in conclusion, that a case heard by my learned colleagues has been referred to by Rampini, J., in which judgment has not yet been delivered. I am not aware of the facts of that case, so that I am unable to consider it in connection with this case.

GHOSE, J.—I agree. I desire to add, with reference to the case referred to by Mr. Justice Rampini in his judgment, that the facts of that case and the terms of the agreement are very different from the facts and conditions of the *kabuliat* in this case.

RAMPINI, J.—The plaintiff in this suit sues for arrears of rent of the years 1296 to 1299, on the basis of a registered *kabuliat* executed by the defendant on the 27th September 1881. The

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

terms of the *kabuliat*, with regard to the execution of which no question has been raised before us, are that the defendant shall pay rent at various rates, 2 annas, 4 annas, and 8 annas, for the land held by him for a term of seven years ; that if, on the expiry of that term, he shall continue to cultivate the land, he shall execute a fresh *kabuliat* ; and that if he fails to do so, he shall pay rent for land held by him at the rate of Rs. 4 per bigha. Now, the plaintiff alleges, and it is not denied, that the defendant continues to hold the land and has executed no fresh *kabuliat*. He accordingly sues for arrears of rent at the rate of Rs. 4 per bigha. The Munsif held that the rate of the defendant's rent could not be increased by more than 2 annas in the rupee. He accordingly gave the plaintiff a decree at that rate. The Subordinate Judge, however, held that as the plaintiff was but one of the two joint landlords, he could not get any enhanced rent at all.

The plaintiff now urges (1) that the lower Courts are mistaken in supposing that he is suing for the enhancement of the defendant's rent. He does not seek in the suit to enhance the defendant's rent, but merely for arrears of rent at a rate agreed upon by the defendant in 1881, long before the Tenancy Act came into operation, and which arrears there is nothing in the Tenancy Act to prevent his recovering ; (2) that, although he and his co-sharers formerly collected their rents jointly, they have collected them separately from 1296 ; that the defendant has, in his written statement, raised no objection to this, and has not resisted his claim on this ground. On the contrary, in para. 7 of his written statement, he pleads payment to him of his share of the rent, and in his deposition he has deposed to having paid his co-sharers share of the rent to him separately. In my opinion both these contentions are sound and should prevail. I think the reason the lower Appellate Court has given for dismissing the suit is manifestly wrong. The present case is, I consider, similar to the case of *Ram Chunder Chackrabatty* v. *Giridhur Dutt* (1), in which the ryot had been previously holding 11½ bighas of land, rent free, and was held liable for rent for this land at the rate of Rs. 1-8 per bigha, which, in circumstances similar to those

(1) I. L. R., 19 Calc., 755.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

of the present case, he had agreed to pay from the date of the expiry of his previous lease.

But it has been said that, even if this be so, the rate of Rs. 4 per bigha, which the defendant in his *kabuliat* agreed to pay if he did not execute a fresh *kabuliat* after the expiry of the seven years mentioned in the *kabuliat*, is a penalty, and, therefore, cannot be enforced against him. But he took no such plea in his written statement, and in any case, I am of opinion that the stipulation to pay Rs. 4 per bigha is not one coming within the purview of section 74 of the Contract Act, which is the only section, as far as I am aware of, that incorporates in the Statute law of this country the rule of English law against penalties, which, I may observe, has been described in a recent Full Bench judgment of the Allahabad High Court as an "irrational doctrine bequeathed to people in England by a school of English judges, eminent, no doubt, in the law, but overprone to making agreements for parties which the parties had not made and did not intend to make for themselves." *Banke Behari* v. *Sundar Lal* (1). This suit is not brought on the allegation that a contract has been broken. The suit is for arrears of rent at a rate at which the defendant agreed to pay on his failure to execute a fresh *kabuliat*, which he has failed to execute. The rate of rent mentioned in the *kabuliat* is not named as "the amount to be paid in case of a breach of the contract, and the amount which the plaintiff seeks to recover in this suit is not compensation for a breach of any contract," but rent for land held by the defendant at a rate which the defendant has agreed to pay from a certain time. For these reasons the provisions of section 74 of the Contract Act, in my opinion, do not apply, nor is this rate a penalty according to the rule laid down in the Full Bench cases of *Kalachand Kyal* v. *Shib Chunder Roy* (2) and *Umarkhan Mahamadkhan* v. *Salekhan* (3.) The rate runs from the expiry of the seven years term for which the *kabuliat* was executed, and not from the date of the execution of the *kabuliat*.

I am further unable to see that the *kabuliat*, at the time it

(1) I. L. R., 15 All., 232, 253.
(2) I. L. R., 19 Calc., 392.
(3) I. L. R., 17 Bom., 106.

1895

TEJENDRO NARAIN SINGH v. BAKAI SINGH.

was executed, contravened the provisions of any law then prevailing. It is, no doubt, an illegal contract now according to section 29, clause (*b*), of the Bengal Tenancy Act, and if it had been made since the passing of that Act, it could not be enforced, but that section has no retrospective effect. Section 5 of Bengal Act VIII of 1869 lays down that ryots having rights of occupancy (and the defendant is, of course, a ryot with a right of occupancy) are entitled to receive *pottahs* at fair and equitable rates. But this provision has never, as far as I am aware, been interpreted as meaning that a ryot with a right of occupancy may not agree to pay whatever rate he pleases.

Nor can it, I think, be said that the rate of Rs. 4 per bigha, which the defendant has agreed to pay, is an unconscionable rate, which a Court of Equity would be justified in setting aside, inasmuch as in another case, in which, in similar circumstances, a non-occupancy ryot has agreed to pay Rs. 5 per bigha, the judgment in which case will be presently delivered, my learned brother Ghose and I concur in holding that he is bound to pay that rate. The fact that the defendant in that case is a non-occupancy ryot, does not in my opinion affect the question whether the rate stipulated for is a penalty or not. For if it be a penalty and void for that reason, it must be so, whatever be the status of the ryot. If it be not a penalty, it is not one whether the tenant be an occupancy or a non-occupancy ryot.

The respondent's pleader has also alluded to the provisions of section 45 of the Contract Act, and has raised the plea that the defendant is not bound to fulfil to one of two joint promises a promise made to both jointly. This contention is, in my opinion, met by the fact that a fresh contract was made by the parties in 1296, as is clear from the defendant's written statement and his deposition.

I am, therefore, of opinion that this second appeal should be decreed with costs.

S. C. C. *Decree varied.*