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to make an order for imprisonment, it was illegal to make such an order until some attempt had been made to levy the amount.

For these reasons, we think that the order of the Deputy Magistrate is bad in law, and we set it aside accordingly. We think it unnecessary to consider the other grounds urged by the District Magistrate.

H. T. H. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

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July 31.

SHITAL MONDAL (DEFENDANT) *v.* PROSSONNAMOYI DEBYA AND OTHERS (PLAINTIFFS.)*

Bengal Tenancy Act (VIII of 1885), section 30, clause (a)—Suit for enhancement of rent—Prevailing rate, Meaning of—Average rate.

The words "prevailing rate" in section 30, clause (*a*) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859.

THE facts of this case and the points material to the report sufficiently appear from the judgment of the Judge which confirmed the Munsif's decision and which was as follows:—

"This is an enhancement suit brought under the provisions of section 30 (*a*) and section 3 of the Bengal Tenancy Act, against an occupancy ryot. The defendant holds 19½ *bighas* at a *jama* of between Rs. 6 and Rs. 7. The plaintiff claimed enhancement to a rate of Rs. 2 per *bigha*. The Munsif decreed an enhanced rate of Rs. 1-8 per *bigha*, and the defendant now appeals. The question of enhancement is the sole question taken in appeal. The first ground of appeal to the effect that the lands are 'protected from enhancement' is admitted by the appellant's pleader to mean merely that defendant has held a long time at the old rate; he admits for his client that there is no legal protection.

"The Munsif's judgment is based mainly, if not entirely, upon the report of a Commissioner, who was appointed under the provisions of section 31 (6)

* Appeal from Appellate Decree No. 167 of 1894, against the decree of C. A. Wilkins, Esq., District Judge of 24-Perganas, dated the 20th of November 1893, affirming the decree of Babu Tarak Chunder Dass, Munsif of Basirhat, dated the 6th of September 1892.

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of the Tenancy Act to hold a local enquiry. That report, with the evidence taken by the Commissioner, are evidence in the suit, and form part of the record (section 393 of the Civil Procedure Code).

"The Commissioner examined sixteen witnesses who, as is inevitable in such cases, give very discrepant accounts as to what is the prevailing rate in the village. In order to push his enquiry as far as possible, he examined witnesses as to the rents paid in kind; he reduced these rents to cash at a fair rate, and came to the conclusion that, upon the whole, the prevailing rate for such lands as those in suit was Rs. 1-8 per *bigha*.

"It is contended for the appellant that the Commissioner has calculated the prevailing rate solely on the comparison made with lands paying rent in kind. This is not so.

"The question is whether the evidence justifies the conclusion that the 'prevailing rate' in the village for similar lands is Rs. 1-8. That evidence seems to me to show that there are several rates, but I can find nothing which proves that any one rate prevails more than another—a rate in fact which is paid by the majority of the ryots in the village. Nor is it necessary to find this under the present law; for, in order to determine the 'prevailing rate,' it is permissible, and indeed necessary, to have regard to the 'rates' generally paid; in fact clause (*a*), of section 31, presupposes the existence of more rates than one.

"Still the Act does not allow the Courts to strike an average of different rates current in the village, in order to ascertain the enhanced rate payable, except in very special cases. Such a special case would be where a landlord proves that the lands are held at a rent below their value, and when a distinctly prevailing rate cannot be found on account of the currency of different and nearly equal rates. In such a case the Court might justly take an average—*Dena Gazee* v. *Mohinee Mohun Doss* (1).

"What does the evidence in the present case show? To my mind it does not go beyond asserting that different ryots held at different rates; it does not go so far as to establish that any one rate is, or that more rates than one are, prevalent in the village. No two witnesses agree. The landlord does not produce his *jamabandi* to help to a correct decision, and all that we have to rely upon is the oral evidence in the case, and that evidence shows that there are several rates current, (although none in particular is 'prevalent.') What I gather from the evidence is that originally the village rate was very low; but that for several years past fresh settlements have been made at enhanced rates, varying from Re. 1 to Rs. 1-8 and more. This seems therefore one of those special cases in which under the old law the Court would be justified in striking an average in order to determine the enhanced rent payable by the defendant. It does not appear to me that the present law materially differs from that laid down in the later decisions of the High

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Court under the old law. The Courts are to 'have regard to the rates generally paid,' during the three years preceding the institution of the suit. I can find no reasonable interpretation of these words other than this, that the Courts, *looking* to what other tenants of similar lands in the village have been paying, shall determine what the defendant will in future pay, and shall not necessarily say that that rent is to be enhanced up to the limit of any of the prevailing rates.

"Acting upon this principle, I find that the decision of the Munsif is reasonable and proper, and I accordingly confirm his decree and dismiss this appeal with costs."

From this decision the defendant appealed to the High Court, mainly on the ground that the Judge having held that there was no prevailing rate in the village, and the plaintiff therefore having failed in his opinion to prove the "prevailing rate," within the meaning of clause (*a*) of section 30 of the Bengal Tenancy Act, the suit ought to have been dismissed; and that the Judge was wrong in law in striking an average of the rates found current in the village.

Babu *Grish Chunder Chowdhry* for the appellant.

Babu *Opendra Chunder Bose* and Babu *Shib Prosunno Bhuttacharji* for the respondents.

The judgment of the Court (O'KINEALY and HILL, JJ.) was as follows:—

This is an appeal from the decision of the District Judge of the 24-Perganas. It arises out of an action under section 30 of the Rent Law, seeking to enhance the rent of a tenant under clause (*a*) of that section, which says that "the landlord of a holding may sue for enhancement if the rate of rent paid by the ryot is below the prevailing rate paid by occupancy ryots for land of a similar description and with similar advantages in the same village, and that there is no sufficient reason for his holding at so low a rate."

In the Court below the Judge came to the conclusion that the plaintiff had not succeeded in proving any prevailing rate; but upon the authority of a case of *Dena Gazee* v. *Mohinee Mohun Doss* (1), he held that he might, in this particular case, take the average of the different rates current in the village and treat that as the prevailing rate. That, no doubt, was a peculiar case;

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but with the exception of that case, in all other cases, from the case of *Shadhoo Singh* v. *Ramanoograha Lall* (1) upwards, the rate actually paid and current in the village has always been taken to mean the "prevailing" and not the "average" rate. In the new Act the words "prevailing" and "average" are used in different senses in different sections. In section 30, for instance, reference is made to the "prevailing rate;" in section 32 reference is made to "average prices" and not "prevailing prices;" in section 40, sub-section 4, clause (*a*) the terms "average money rent," and in clause (*b*) the "average value of the rent" are mentioned as distinct from "prevailing rate." We think, therefore, that the words "prevailing rate" in this case are used in the same sense in which they are used in the earlier cases under Act X of 1859.

The result is that this appeal is decreed, the decision of the lower Appellate Court is set aside, and the plaintiff's suit dismissed with costs in all the Courts.

J. V. W. *Appeal allowed.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894
July 27.

RAJA SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* KOOLDIP SINGH AND ANOTHER (DECREE-HOLDERS.)*

Mesne profits—Execution of decree in suit for possession—Execution pending appeal—Reversal of decree on appeal and restoration of possession—Right to restitution of mesne profits—Civil Procedure Code (Act XIV of 1882), sections 244, 583—Separate suit.

R brought a suit against *K* for possession of certain land, and obtained a decree. *K* appealed, but pending the appeal *R* took possession of the land in execution of his decree. *K* was successful in the appeal, and was restored to possession in execution of the decree of the Appellate Court, which, however, was silent as to mesne profits. In an application by *K* for mesne profits for the period during which *R* was unlawfully in possession, *Held* that *K* was entitled to restitution of such mesne profits in the execution proceedings, and it was not necessary for him to bring a separate suit to recover

* Appeal from Order No. 256 of 1893, against the order of H. Holmwood, Esq., District Judge of Bhagulpore, dated the 3rd of June 1893, reversing the order of Babu Bobin Bepery Mukerjee, Munsif of Begusarai, dated the 18th of April 1893.

(1) 9 W. R., 83.