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There is no doubt very considerable difficulty in ascertaining what is the true rule of succession to this office. Probably it has hitherto been disposed of in a manner which has been generally approved of by all parties concerned. It is sufficient for us to say that the evidence does not, in our opinion, establish the plaintiff's right to succeed under the Hindu law of inheritance.

The decree of the lower Court was, therefore, right, and this appeal must be dismissed. The plaintiff, appellant, will pay the costs of the defendant, respondent, Gopaul Acharjea; the Rajah will pay his own costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

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April 25.

KISHEN GOPAUL MAWAR (DEFENDANT) *v.* BARNES (PLAINTIFF).*

Beng. Act VIII of 1869, *ss.* 2, 21, 22, *and* 52—*Ejectment—Arrears of Rent—Bhaoli Rent.*

Under the provisions of Beng. Act VIII of 1869 a suit in ejectment will lie for arrears of rent due on a bhaoli tenure.

A suit which is in reality a claim for compensation for use and occupation of lands, cannot be described as a suit for arrears of rent under s. 52 of Beng. Act VIII of 1869.

THIS was a suit for the recovery of Rs. 550 and 4 annas principal, with interest, on account of arrears of rent due (after giving the defendant credit for certain moneys paid into Court) in respect of 69 bigas and 6 cottas of nagdi lands, at different rates, together with certain bhaoli lands. The plaintiff also prayed that the defendant be dispossessed from such lands under s. 52 of Beng. Act VIII of 1869. The plaint further stated that 69 bigas 6 cottas of nagdi land was made up of 67 bigas 6 cottas originally leased to the defendant, and 2 bigas of land brought into cultivation by the defendant during the term of his lease, and on which the plain-

* Special Appeal, No. 1391 of 1875, against a decree of R. Towers, Esq., Subordinate Judge of Zilla Bhagulpore, dated the 25th March, 1875, affirming a decree of Baboo Gopee Nath Matey, Sudder Munsif of that district, dated the 8th December, 1874.

tiff had assessed a rent of Rs. 5 a biga, agreeably to the rate prevailing in the village. In the Munsif's Court the plaintiff obtained a decree for the whole of the arrears of rent due on the nagdi and bhaoli lands comprised in the original lease. With respect to the two bigas originally brought into cultivation by the defendant, the Munsif modified the rate of rent according to the rate of certain of the nagdi lands in the defendant's occupation. There was also the usual decree for ejectment on failure of satisfaction being entered into within fifteen days of the date of decree. On appeal the Judge upheld the decision of the Munsif, and the defendant preferred a special appeal to the High Court.

Baboo *Hem Chunder Banerjee* and Mr. *Younan* for the appellant.

Baboos *Bhyrab Chunder Banerjee* and *Bama Churn Banerjee* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—The question between the parties in this special appeal is, whether or no the decree passed under s. 52, Beng. Act VIII of 1869, by which the defendant was directed to pay a certain amount as arrears of rent within fifteen days, otherwise he was to be ejected, is good in law.

It appears that the Court below has held that the land to which the suit relates consisted of two portions,—one of which is nagdi land, and the other bhaoli land. There was an objection taken in special appeal that the Court below was wrong in treating any of these lands as bhaoli. But we expressed our opinion in the course of the argument yesterday that there was nothing in that objection. No doubt there was evidence that, for some time, the land had been in possession of a person under the present plaintiff, between whom and the defendant the rent was treated as all payable in money: but that could not alter the terms of the tenancy as between the plaintiff and the defendant, and when that intermediate interest terminated, the land was held partly as bhaoli as before.

Then arises the important question in this case, whether the provisions of the law in respect of ejectment upon nonpay-

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ment of arrears of rent can be applied to bhaoli land. I admit that, on first reading these sections of the Act relating to this matter, I was under the impression that they did refer only to rents reserved in money. But, on further consideration, I think that the construction of the sections is that they cover not only rent reserved in money but rent reserved in kind. S. 52 provides for ejectment for nonpayment of arrears of rent. An arrear of rent is defined by s. 21. It says: "Any instalment of rent which is not paid on or before the day when the same is payable according to the potta or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per centum per annum." Now the word 'rent' may, undoubtedly, include both rent in kind and rent in money. But the word 'paid' does at first sight suggest rent reserved in money. But when we turn to s. 2, it is clear from that that the Legislature did not use the word 'paid' in reference to rent reserved in money only, because in s. 2 we find the expression "if the rent is payable in kind," thereby clearly showing that the Legislature at any rate considered that the word 'paid' or 'payable' was a proper expression for the proportionate produce which had to be delivered in kind, or a bhaoli tenure. No doubt there are also the words at the end of s. 21 which provide for interest on an arrear of rent. But then I think those words may be applied to a case of arrear of rent which is payable in kind, because, as we know, those arrears, though originally reserved in kind, are ultimately, as between the parties, almost always payable in money. There is, therefore, nothing in the words of the law which is inconsistent with the term "arrears of rent" including arrears of rent in kind as well as arrears of rent in money; and I think the reasonable construction to put upon the Act is, that both kinds of arrears are included. I cannot see any reason why a landlord whose rent is payable in kind should not have the same remedies as a landlord whose rent is payable in money. There being nothing in the Act which is any way

inconsistent with this reasonable construction, I think we ought to put that construction upon it.

Then this further objection is raised to this decree by the appellant, that the plaintiff's (respondent's) own jamma-wasil-baki papers show that there had been a full payment of all that was due upon the nagdi portion of the tenure. Now the only evidence before us upon that point is the jamma-wasil-baki paper. No doubt those two tenures are distinct. But then we find in making up the account, following out the custom to which I have already alluded, after the proprietor's share upon the bhaoli portion of the tenure has been ascertained, that is turned into money, and one lump sum is found to be due from the ryot to the landlord. The sum which has been paid on account is credited not to the nagdi tenure in particular, but the total sum found to be due by adding the two rents together. There is no evidence that the ryot himself appropriated this payment to the nagdi tenure. All that we have is this document, and on this document we are bound to treat it as a general payment on account. On that objection, therefore, the special appeal has failed.

Then there is another objection which it is more difficult to get over. It appears that the ryot has, in addition to the original 67 bigas and odd cottas of land, of which the nagdi portion of the tenure consisted, taken into his possession two bigas more. Now, in suing the tenant in respect of the rent of these two bigas, the landlord does not treat these two bigas as an addition to the nagdi tenure held upon the same terms as the rest of the nagdi tenure. He chooses to place on those two bigas a rent of Rs. 5, which is more than the rate at which the nagdi tenure is assessed. It is not shown that that rent has ever been paid by the tenant. The suit, therefore, in reality, so far as it relates to those two bigas, is a suit to recover compensation for the use and occupation of those two bigas. And the question then arises whether that can be an arrear of rent to which the provisions of s. 52 can be applied.

In order to decide that question, we must, as in deciding the other question upon the construction of the Act, go back to

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s. 21 and see what an "arrear of rent" is. That section speaks of an arrear of rent as "any instalment of rent which is not paid." Now I do not think it possible to say with regard to those two bigas that there was any instalment of rent which remained unpaid. No doubt there had been for a considerable time something due from the ryot to the landlord for the occupation of this land, but I think the words "instalment of rent which is not paid" assume a rent which has been fixed, which has become due at the expiry of certain recovering periods, and which had not been paid by the tenant. I think, therefore, it is impossible to say that, as regards those two bigas, there was an arrear of rent due which remained unpaid when the suit was brought. Although that is a small portion of the tenure in respect of which the suit was brought to recover rent, still, according to the decisions of this Court, that error will vitiate the whole decree. The tenant is to be ejected under s. 52 if he does not pay the amount of rent specified in the decree. But the amount specified in the decree must consist entirely of arrears of rent due. And if it turns out that there was not really so much arrears of rent due, the tenant never has had the opportunity, which the law gives him, to pay within fifteen days that which he is liable to pay as arrears of rent.

The result is, that we must set aside the decree of the Court below, and we must make the decree which the Court below ought to have made. There will be a decree as for arrears of rent for the amount found to be due, minus the rent of those two bigas, and for ejectment from all but those two bigas. And if that amount, together with interest and costs in proportion, be paid into Court within fifteen days from the date of the decree, execution of the decree for ejectment will be stayed. There will also be a further decree for the amount fixed by the Court below in respect of those two bigas; but that being arrear of rent will not be included in the decree which directs the defendant to pay the money into Court (1).

Appeal allowed.

(1) The plaintiff withdrew his claim for ejectment, and a decree was made for the arrears, with interest and costs.