

The case will be remanded to the District Judge in order that he may proceed in accordance with the above directions. All costs in the case will follow the ultimate result.

1881
 ANNODA
 PERSAD ROY
 v.
 DWARKA-
 NATH
 GANGO-
 PADHYA.

Case remanded.

Before Mr. Justice McDonell and Mr. Justice Field.

NOBIN CHUNDER SIRCAR AND ANOTHER (DEFENDANTS) v. GOUR
 CHUNDER SHAHA AND ANOTHER (PLAINTIFFS).*

1881
 Feb. 15.

*Assessment of Rent—Enhancement—Decree for Rent at Enhanced Rate—
 Beng. Act VIII of 1869.*

On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a kabuliat, at a reduced rate, for eleven years ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864.

Held, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Beng. Act VIII of 1869.

IN this case it appeared that, in 1863, Messrs. Hill & Co. brought a suit against the defendants for assessment of rent, and obtained a decree on the 25th of January 1864, by which the jama was fixed at Rs. 139-3-7. Shortly afterwards, on the 1st of Kartick 1271 (16th October 1864), the defendants executed a kabuliat in respect of the lands covered by the decree, by which they agreed to pay a rent of Rs. 26-6 per annum and to grow indigo for Messrs. Hill & Co., and that in case the defendants should make default in the payment of the rent or in the growing of the indigo, then the whole jama fixed by the decree of the 25th January 1864 should become due and payable by the defendants. The kabuliat was for a term of eleven years, which expired on the 31st Assin 1282 (16th October 1875).

* Appeal from Appellate Decree, No. 2289 of 1879, against the decree of Baboo Krishna Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 27th June 1879, affirming the decree of Baboo Shushee Blusan Banerjee, Munsif of Chooadanga, dated the 31st January 1878.

1881
 NOBIN
 CHUNDER
 SIRCAR
 v.
 GOUR
 CHUNDER
 SHAHA.

In the month of Pous 1282 (December 1875, January 1876), the plaintiffs, who are the assignees of Messrs. Hill & Co., served a notice on the defendants to the effect that, in future, the rent should be that fixed in the decree of the 25th January 1864.

The main contention of the defendants was, that the arrangement under the kabuliat superseded the decree; and also that the right under the decree had become extinct, as no rent had been realized under it for upwards of twelve years. The Court of first instance, citing *Doorga Churn Chatterjee v. Doyamoyee Dossia* (1), held, that the enhancement decree had not become ineffectual, but had merely remained in abeyance, and decided in favor of the plaintiffs. This decision was upheld on appeal. The defendants then appealed to the High Court.

Baboo *Bhowany Churn Dutt* for the appellants.

Baboo *Mohiny Mohun Roy* for the respondents.

The judgment of the Court (MCDONELL and FIELD, JJ.) was delivered by

MCDONELL, J. (who, after stating the facts, continued).— Now it appears to us that the plaintiffs are not entitled to succeed in this suit. It may be well to point out in the first instance that the case of the plaintiffs is, not that the defendants, holding over after the expiry of the term of the kabuliat, are bound by the conditions of the kabuliat, and are, therefore, liable to pay rent according to the terms of that instrument, nor is it contended that the defendants have refused to grow indigo, and are, therefore, liable, under the penalty-clause, to pay the rent fixed by the decree. As a matter of fact, the plaintiffs do not seek to enforce the conditions of the kabuliat in any way. Their contention is, that, on the expiry of the term of the kabuliat, the enhancement decree of 1864 revived, and has full effect.

In the first place, it is to be observed that this decree does not contain any direction as to the time for which it is to have effect. Those who are conversant with the history of the law of enhancement of rent in this Presidency, are well aware that

(1) 20 W. R., 243.

there has been some discussion and difference of opinion as to the length of time for which the Courts have authority to fix enhanced rent.

Then, in the next place, the parties did not, when executing the kabuliat, make any stipulation to the effect that, upon the expiry of the term of the kabuliat, the enhancement decree should survive and have effect. It would no doubt have been competent to the parties to have provided in this manner for what was to take place on the expiry of the term of the kabuliat, but they did not do so; they did not provide for the contingency by their own contract, and we have, therefore, to see how the position of the parties is affected by the law of landlord and tenant.

It appears to us, that the arrangement embodied in the kabuliat had the effect of superseding the enhancement decree; and that, upon the expiry of the term of the kabuliat, if the plaintiffs seek to enhance the rent, they must do so by having recourse to the procedure laid down by Beng. Act VIII of 1869.

The notice served by the plaintiffs upon the defendants, is, admittedly, not such a notice of enhancement as is required by the provisions of this Act. It is merely a notice calling upon them to pay the rent decreed in 1864. Then, having regard to the provisions of s. 5 of the Act, in cases of dispute between the parties, the rent previously paid by the ryot is to be deemed fair and equitable, unless the contrary be shown by either party in a suit under the Act. Now the rent previously paid in this case is the rent payable under the kabuliat; and we think, that if the plaintiffs seek to recover a higher rent than that so previously paid, they must proceed under the enhancement provisions of Beng. Act VIII of 1869.

The appeal will, therefore, be decreed with costs of both Courts.

Appeal allowed.

 1881

 NOBIN
CHUNDER
SIRCAR

 v.
GOUR
CHUNDER
SHAMA.