Rs. 150. Now, if the *hiba* passed the lunatic's interest in the property inherited from collaterals, then there is nothing before us to show that such interest became revested in the lunatic; and, under these circumstances of doubt, we think we ought not to allow the Act to be put into operation, but that it ought to be left for the natural heir of the lunatic, if so disposed, to institute a suit as next friend of the lunatic to have that matter cleared up. If such a suit is instituted, and if it shall appear that this property is separate property belonging to the lunatic, then, if necessary, a further application might be made under the Act. But we wish to observe that the nephews who now, as members of the joint undivided family, have the custody of the lunatic and are managing the estate, ought, in our opinion, when requested thereto by the daughter of the lunatic as the natural heir, to produce and furnish her with accounts of the management of the property. We think it would be sufficient, if such accounts were produced yearly. If such accounts are refused, or if the lunatic's daughter is refused proper access to him, then a case might perhaps be made, which might influence the Court to interfere under the Act. At present we are of opinion that no sufficient case has been made, but, under the circumstances, we think there ought to be no costs of this application.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

NEWAJ BUNDOPADHYA (DEFENDANT) *v.* KALI PROSONNO GHOSE (PLAINTIFF).*

1880 *Dec.* 10.

Suit for Enhancement of Rent—Plea that certain of the Lands included in Notice are not enhanceable—Onus of Proof of such Fact—Notice of Enhancement.

In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the onus is on the tenant to prove *primâ facie* that such portion of the land is so held by

* Appeal from order, No. 143 of 1880, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 2nd February 1880, reversing the order of Baboo Akhoy Coomar Bose, Deputy Collector of Manbhoom, dated the 5th May 1879.

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him; and if he be successful in this, the onus is then shifted upon the landlord to rebut such *primâ facie* evidence.

A notice for enhancement, otherwise sufficient, is not invalidated because a portion of the lands claimed as enhanceable in such notice turns out to be rent-free land; but is good so far as it is applicable to the portion of the land which is liable to enhancement.

ONE Kali Prosonno Ghose, a taluqdar, sued one Ram Sarun Banerjee for enhancement of rent.

The defendant pleaded that only 3½ kanis of the land held by him were rent-paying; that a portion of the land was rent-free debutter and lakhiraj, and a further portion held at a quit-rent; and that the rate of rent paid by him was the same which had been paid for the last 150 years.

The Deputy Collector held, that the onus was on the plaintiff to prove that the lands which were claimed as rent-free were mal lands; and further held, that as to the rent-paying lands the defendant had failed to prove a uniform rate of payment for upwards of twenty years, and that, therefore, such lands were liable to enhancement; but inasmuch as the plaintiff in his notice of enhancement made no distinction between mal lands and rent-free lands, he held the notice to be illegal, and dismissed the suit.

The plaintiff appealed to the Judicial Commissioner, who remanded the case to the lower Court, on the ground that the tenant was bound to have given some *primâ facie* proof that a portion of the lands held by him was rent-free, and that the lower Court should have tried the question as to whether the mal lands were liable to enhancement, notwithstanding that the notice to enhance included both rent-free and mal lands.

The defendant appealed to the High Court.

Baboo *Bama Churn Banerji* for the appellant.

Baboo *Taruk Nath Dutt* for the respondent.

The following judgments were delivered:—

GARTH, C. J.—I think that this appeal should be dismissed.

A suit was brought by the zemindar to enhance the rent of certain lands after notice. The defence in respect of one portion

of these lands was, that it was lakhiraj; and the defendant called two witnesses to prove that defence.

The first Court dismissed the suit upon this ground. It held that, as regards the lands said to be lakhiraj, a *primâ facie* case had been made out by the defendant that they were lakhiraj; and that the plaintiff had failed to show that the whole of the lands in suit were rent-paying lands; and as the notice of enhancement was a general one applicable to all the lands in suit, not distinguishing the rent-free from the rent-paying lands the notice was bad even for the rent-paying portion; and therefore he dismissed the suit, and declined to go into the question of enhancement at all.

The case then came before the Judicial Commissioner on appeal: and he has remanded it to the first Court upon the grounds;—1st, that as it is admitted that the defendant holds some lands in the plaintiff's zemindari, and pays him an entire rent, he was bound, if he wanted to show that a portion of the lands was rent-free, to have given some *primâ facie* proof to that effect, showing what particular lands were rent-free; and as the Judicial Commissioner considered that the evidence offered by the defendant did not make out a *primâ facie* case that any lands were lakhiraj, he sent the case back to the Court below to have the question of enhancement tried.

Then, secondly, with regard to the notice, the Judicial Commissioner held, that even if the defendant had succeeded in proving a portion of the lands to be lakhiraj, still there was no reason why the first Court should not have tried the question, whether the mal lands were liable to enhancement, and whether the rent ought to be enhanced.

It has now been contended before us that the learned Judicial Commissioner was wrong upon both these points.

It was argued that, in the case of *Huryhur Mookerjee* v. *Goomanee Kazee* (1), it was decided by a Full Bench of this Court, that in all cases where a plaintiff brings a suit for enhancement, the onus is upon him to show that the whole of the lands, the rent of which he seeks to enhance, are rent-paying. But that case does not decide anything of the kind. There a certain part of

(1) Marshall's Rep., 523; S. C., B. L. R., Sup. Vol., 15.

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the land, the rent of which the plaintiff sought to enhance, was assumed by the lower Court to be lakhiraj; and what the Court held was, that the validity or invalidity of the defendant's title to that land could not be tried in that suit. The head-note of that case is rather calculated to mislead.

In another Full Bench case, *Gooroo Persad Roy* v. *Juggobundoo Mozoomdar* (1), it was distinctly held by Sir Barnes Peacock and two other Judges, that, in a suit for a kabuliat, where the defendant had acknowledged himself to be the plaintiff's ryot as to a portion of the lands in suit, the onus was on him to prove the defence which he set up, *viz.*, that he was not the plaintiff's ryot as to the rest of the land.

Sir Barnes Peacock, in delivering judgment, says:—"We find that the defendant admitted that, as to a certain portion of the land for the rent of which plaintiff sued, he (defendant) had given a kabuliat, or in other words, had acknowledged that he was plaintiff's ryot. With this *primâ facie* evidence of the fact of defendant being plaintiff's ryot, the burden of proving the special plea raised by the defendant of his not being plaintiff's ryot for the rest of the land, was clearly upon the defendant; otherwise, indeed, every ryot might meet every rent case by a false plea of proprietary title."

The same principle appears to have been acted upon in the case of *Nehal Chunder Mistree* v. *Huree Pershad Mundul* (2). Mr. Justice Kemp, who delivered judgment in that case, being one of the Judges who composed the Full Bench in the above case, cited from Marshall's Reports.

And in another case, *Beebee Ashrufoonissa* v. *Umung Mohun Deb Roy* (3), the learned Judges (Seton-Karr and Sumbhoonath Pundit, JJ.) held, that "it could never have been the intention of the Full Bench that a bare allegation of a defendant of a rent-free holding was to bar the plaintiff's claim. The meaning must have been that there should be some *primâ facie* evidence of an ostensible rent-free title in some portion of the land for which rent is sought."

It seems to me that these decisions are quite conclusive upon the point which we have to decide; and if the question were an

(1) W. R., Sp. No., 15. (2) 8 W. R., 183. (3) 5 W. R., Act X Rul., 48.

open one, I should undoubtedly hold that to be the law; because I think it must be unreasonable, where a zemindar sues a tenant for enhancement, who undoubtedly holds and pays rent for lands within his zemindari, that the mere allegation by the tenant that a portion of those lands is rent-free, should throw the onus upon the landlord of proving what particular portion of the land which the tenant holds is rent-paying. The onus ought to be upon the tenant to prove *primâ facie* that some and what part of the land is rent-free; and when he has done so, the onus would then be thrown upon the landlord to rebut such *primâ facie* evidence.

Then it is also contended in this case, that the Judicial Commissioner had evidence before him, which he ought to have considered sufficient to establish a *primâ facie* case for the defendant. But it was for him to determine whether that evidence was sufficient or not, and I consider it no part of our duty upon this appeal to go into the question of its sufficiency.

Then, with regard to the notice, I am clearly of opinion that the Judicial Commissioner was right. Suppose a suit brought to enhance the rent of 100 bighas of land, and a notice given setting out the grounds of enhancement, surely the notice would not be altogether bad because the defendant might prove that of those 100 bighas he holds 10 bighas rent-free. The notice would be perfectly good, so far as it was applicable to the remaining 90 bighas.

The appeal will, therefore, be dismissed with costs.

FIELD, J.—I also am of opinion that the Judicial Commissioner rightly laid the burden of proving a *primâ facie* case of lakhiraj holding upon the defendant ryot, and I think that it is impossible to say that the evidence of the two witnesses examined amounted to sufficient proof of such a *primâ facie* case.

Appeal dismissed.