*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Soorasoonderee Dabea and another, Representatives of the late Gopal Lall Thakoor,* v. *Gholam Ali, from the High Court of Judicature at Fort William, in Bengal; delivered 24th January,* 1873.

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Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.

Sir Lawrence Peel.

THE Appellants are the executors and representatives of Gopal Lall Thakoor deceased, who was the Plaintiff in the suit below.

The appeal is from a decision of a Division Bench of the High Court in Bengal, overruling a decision given in favour of the Plaintiff by the Deputy Collector of Madareepore, Zillah Backergunge.

The suit was brought on the 12th July, 1866, to recover the sum of 5,120 rupees for arrears of rent for the year 1272, in pursuance of a notice of enhancement served under the provisions of section 13, Act 10 of 1859, together with interest thereon, amounting altogether to the sum of rupees 5,613 : 13 : 10 with costs and future interest.

The grounds of enhancement relied upon by the Plaintiff were, 1st, that the value of the produce, and the productive powers of the land had increased, otherwise than by the agency or at the expense of the Defendant; and 2ndly, that the quantity of land held by the Defendant was greater than the quantity for which rent had been previously paid by him.

The excess as regards the quantity of land held by the Defendant and in respect of which enhance-

ment was claimed, consisted partly of lands within the boundaries described in the Kabooliut under which the Defendant held partly of lands subsequently added thereto by alluvion.

It is necessary to consider—1st, whether the Defendant is liable to enhancement; 2ndly, if liable, whether he was liable to be enhanced as a middleman or as a ryot. And 3rdly, if liable only as a middleman, whether he was liable to be enhanced in the manner and to the extent claimed by the notice.

The Defendant produced a document purporting to be a pottah executed by the Plaintiff. It was contended on the part of the Plaintiff, and found by the Deputy Collector that the document was a forgery. Their Lordships are of opinion that the High Court was right in holding that it was not material to determine whether the alleged pottah was a forgery or not, for a Kabooliut, dated the 4th Bhadro, 1260, signed by the Defendant, was produced on the part of the Plaintiff, and was admitted by the Defendant to be a genuine document. That document shows the nature and terms of the Defendant's holding; it is set out at page 94 of the record. By that instrument, after reciting that within the Chur formed on the site of the old diluviated lands of the villages of Panchcotee and Chur Panchcotee, &c., bounded as therein mentioned, there were about 8 drones, 6 kanees, and 8 gundahs of jungle waste land fit for cultivation, for 8 annas, whereof, viz., 4 drones, 3 kanees, and 16 cowries the Defendant had applied for a howaladaree amulnamah, at a rate of rent of 5 rupees per kanee, without any rent for the then present year 1260; at the rate of 1 rupee per kanee for the year 1261; at the rate of 2 rupees per kanee for the year 1262; at the rate of 3 rupees per kanee for the year 1263; and at the full customary rate of 5 rupees for the year 1264, it was declared by the Defendant that for 4 drones, 3 kanees, and 4 gundas of land within the boundaries therein mentioned, the said Gopaul Lall Thakoor had granted a howaladaree amulnamah according to the prayer contained in the said application, and the Defendant then agreed as follows :—

"We shall till and cultivate the d. 4, k. 3, g. 4, (four drones, three kanees, and sixteen cowries), of land situate within the

boundaries aforesaid, less rukba, at the rate of g. 4 (sixteen cowries), per kanee, viz., k. 11, g. 4 (eleven kanees and sixteen cowries), that is, d. 3, k. 8 (three drones and eight kanees), and hold during the year 1260 without any rent, after which we shall continue to pay as rent according to the instalments mentioned below, year by year, and month by month,—in the year 1261, rs. 56 (fifty-six), being at the rate of 1 rupee per kanee; in the year 1262, rs. 112 (one hundred and twelve), being at the rate of rs. 2 per kanee; in the year 1263, rs. 168 (one hundred and sixty-eight), being at the rate of rs. 3 per kanee; and in the year 1264, rs. 280 (two hundred and eighty), being at the full customary rate of rs. 5 per kanee. We will not make any objections or excuses on the ground of drought, inundation, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, and the like, and even if we do, they shall not be admitted. In the event of our making default in paying our rent according to the instalments, we will pay the arrear due with interest at the rate of 1 (one) rupee per cent. per mensem on the lapsed instalments. Should we neglect to do so, the arrear will be realized with interest according to the law for the time being in force. After the month of Pous of the year 1261 (twelve hundred and sixty-one) notice of 15 days will be issued to us from your office to file a kuboolyut, specifying the quantity of land and amount of rent, according to measurement as per boundaries. In the event of our not attending before the ameen, who may be deputed to make the measurement, and causing the measurement to be made, and the rent to be fixed, the measurement will be made in our absence, and whatever quantity of land may be found on measurement to be cultivated or fit for cultivation, we shall be taken to have accepted and engaged for, as part and parcel of this howala; out of the same, the cultivated land in excess of the quantity mentioned above, less rukba, shall be charged with rent, which being added to the rent fixed at the rates mentioned above, we will pay from the year 1261. We will take a pottah according to the practice of your zemindary office after executing a kuboolyut, specify the total quantity of land measured, with the rent thereof, at the rates mentioned above and progressive rates, being exempt from the payment of rent for two years in respect of lands fit for cultivation, continue to pay rent according to the instalments and conditions mentioned in the kuboolyut. We shall not be able to make any excuse or objection thereto, and even if we do, they shall not be admitted. To this effect we execute this kuboolyut, having received the howaladaree amulnamah. Dated the 4th Bhadro, 1260."

It was admitted on the part of the Appellant that the Defendant was entitled to a perpetual right of occupancy so long as he paid the rent which the Appellant had a right to demand, but it was contended on his behalf that the rent was not fixed beyond the year 1264, and was therefore subject to enhancement after that date. The Defendant was a middleman and not a cultivator

of the land. By the express terms of the Kabooliut he was to have a howaladaree allowance at the rate of 4 gundas per kanee and he agreed to make no objection or excuse in regard to the payment of rent on account of the debt or absconding of tenants. Indeed it was admitted that the holder was a middleman and not a cultivator of the land himself. In his judgment the Principal Sudder Ameen said:—"It is admitted that the holder is a middleman ryot;" and he held that the tenure of the Defendant was nothing more than a right of occupancy and that he was liable to enhancement under Section 17, Act 10 of 1859.

He said: "The tenant or holder of such a tenure is, strictly speaking, a ryot with a right of occupancy, whether he cultivates the land himself or sublets to others, and is a middleman. For enhancement of such a tenure there is no other law but section 17 of Act X. of 1859, which is necessarily applicable; notice under clauses 2 and 3 of section 17 served on the Defendants, under section 13 of the Act, is therefore valid at law."

Having held that the rent was subject to enhancement, he proceeded to try to what extent it ought to be enhanced. There was a contest before him as to what quantity was within the boundaries specified in the Kabooliut; but he considered it entirely immaterial, and held that all the cultivable lands, whether included within the boundaries or not, ought to be assessed at the same rate. He found that, instead of rupees 5 per kanee (the Plaintiff having claimed 16 by his notice), the rent ought to be rupees 10 : 10; and after deducting the howaladaree allowance at the rate mentioned in the Kabooliut, there were 16 drones 10 kanees and 17½ gundas of culturable land fit for assessment (p. 415), and that the jumma, according to that rate, was rupees 2,881 : 11 : 7. He held that the Defendant, being a middleman, ought to have an allowance of 10 per cent. for collection. Deducting that allowance, he considered that the jumma should be enhanced to rupees 2,599 : 12 : 11, and gave the Plaintiff a Decree for the amount, with interest.

Upon appeal from that decision, the High Court held that, according to the terms of the Kabooliut, there was a grant from the Plaintiff to the Defen-

dant of a permanent tenure at a fixed rate of rent, and that the Plaintiff's suit ought to be dismissed.

Mr. Justice Bayley, in delivering his Judgment, said:—

"It is impossible, I think, to read this kuboolyut without coming to the conclusion, that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of merely rent-free, or partly progressive jummah allowed in those cases (and not in the case of cultivated lands), and that the full customary rent of rs. 5 per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expense and trouble of reclamation, and having done so, was, in the first year after the full rent would be paid, viz., after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rates of neighbouring cultivated lands as to which no jungle waste had to be cleared."

The Kabooliut did not contain the term "Mocurree," or the words "from generation to generation," or any word to that effect and the Kabooliut was one of modern date, and there was not as in Dhunput Singh's case any long uninterrupted enjoyment at a fixed unvarying rent. It was however admitted by both parties on argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion upon that point, and they therefore abstain from doing so. Looking at the words of the Kabooliut their Lordships are of opinion that it was the intention of the parties that, in and after the year 1264, the Defendant should hold at the fixed rent of 5 rupees per kanee, and that consequently the rent was not liable to enhancement beyond that rate. It appears from the recital in the Kabooliut that the Defendant applied for a howaldaree amulnamah at the rate of 5 rupees a kanee without any rent for the year 1260, and at varying rates less than 5 rupees a kanee up to and inclusive of 1264, and that a howaldaree amulnamah had been granted according to the Defendant's prayer. The rent was to be payable by certain instalments, and the Defendant agreed to pay it after 1260, year by year, and month by month, according to the instalments mentioned in the Kabooliut. In applying for an amulnamah at the rate of 5 rupees a kanee it could not have been intended that the 5 rupees should be the rent for the year 1264 only: it is a

much more reasonable construction to hold that 5 rupees a kanee was intended to be the rent for 1264 and during the remainder of the holding. The Defendant, as a middleman, might be ruined if he were liable to have his rent enhanced in the manner contended for by the Plaintiff. By the terms of the notice it was proposed to enhance his rent from 280 rupees, the amount fixed for the year 1264 to 5,120 rupees for the year 1272. The notice was dated the 19th Cheyt, 1271, and was served on the 25th or 26th, not many days before the end of that month. It does not appear what rent the Defendant was receiving from his ryots but he could scarcely have had time before the end of the month of Cheyt to serve his ryots with notices of enhancement for 1272, yet according to section 13, any notice from him to his ryots to be available for 1272 must have been given before the end of Cheyt 1271.

Their Lordships are of opinion that the rent was not subject to enhancement beyond 5 rupees a kanee. The Defendant might be liable under Regulation XI, 1825, clause 1 of section 4, to pay rent for the lands gained by alluvion; but this is not a suit merely to recover rent for those lands, or to assess them, but it is a suit to enhance the rent of the Defendant, under section 17, Act 10, of 1859, upon the ground that he was liable to enhancement under that section. The Defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of section 17, Act 10, of 1859, or liable to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the Pergunnah rate of the rents payable by similar holders. (Dhunput Singh's Case, 11 Moore's Indian Appeal Cases, 265, and the case there cited with approbation.)

Their Lordships consider that this objection is fatal to the whole of the Plaintiff's case. In Dhunput Singh's case it was said, "To assess an intermediate tenant according to the rent paid by ryots, must necessarily deprive him of all beneficial interest in his tenure." According to the tenure of the Defendant in the present case, he was not to make any objections on the ground of drought, inundations, death of tenants, absconding of them, sandy

land, fitness or unfitness for cultivation, cultivated or not cultivated, or the like. He could not at any rate be liable to any higher rent than holders of tenures upon those terms.

In the present case, if the Defendant was liable under clause 3 of section 17, to be assessed for land gained by alluvion beyond the boundaries mentioned in the Kabooliut, upon the ground that the land held by him had been found upon measurement to be more than that for which he had previously paid rent, he would be liable to pay rent for the land outside the boundaries mentioned in the Kabooliut, even though it might be sandy or unfit for cultivation.

It was contended on the part of the Appellants that, even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the Kabooliut. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised nor could an issue have been properly raised in this suit as to whether the rent for 1272 at the rate specified in the Kabooliut had been paid or satisfied, nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the Plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by the Kabooliut. They concur with the High Court in thinking that the present suit ought to be dismissed with costs, and they will therefore humbly advise Her Majesty that the Decree of the High Court be affirmed with the costs of this Appeal.

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PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—28/1/73.