Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ramcoomar Ghose and others v. *Kali Krishna from the High Court of Judicature at Fort William in Bengal; delivered 24th July* 1886.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.

The arguments upon this appeal had reference mainly to the construction of the following stipulations in a kabulyat, dated 23rd of April 1850, executed by the then tenants, under a howladari tenure, of certain lands comprised in "the chur to the east of Makhuakhali," forming part of the zemindary now belonging to the Respondent:—

"If a new chur accretes contiguous to the aforesaid howla, and as *hakiat* of the aforesaid (torn), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation, a fresh measurement shall be made of the land of the said chur and of the aforesaid howla; and after a deduction of the aforesaid 13. 6. 16 gundahs of land, we shall pay rent at the rate of Rs. 2. 7. 7 pie for the excess of land up to five drones, and at the *sara* (prevailing) pergunnah rates for land exceeding that quantity. If we fail to do so, the rent will be realized according to the law for the realization

of rent, with interest on lapsed instalments according to the demands of the towzi of the said pergunnah; or at the close of the year, you will serve on the spot, and on some conspicuous place in the *mahakuma* (head-quarters) of any hakim, an itlanama (notice) to our address, requiring us to take a settlement of the said excess land, and to file a kabulyat, and fixing the time at fifteen days; if, thereupon, we do not appear before you and take a settlement and fix a kabulyat, you will settle the said excess lands with others."

The 13. 6. 16 gundahs thus referred to was the original extent of the cultivable howla, and the rent payable for it was fixed by the kabulyat at Rs. 462. In a suit brought by the zemindar in the year 1865, it was found that 2. 11. 13 gundahs, &c., had accreted to the said 13. 6. 16 gundahs, and that for such excess additional rent was payable at the rate of Rs. 2. 7. 7 pie per khani, in terms of the kabulyat of 1850. The Appellants have since continued to be tenants of the howla and said accreted lands, amounting in all to 16. 2. 9 gundahs, &c., at a *cumulo* rent of Rs. 570. 1. 1, &c.

It is not matter of dispute that, at the commencement of the year 1876, a new chur had accreted to the howla in question, which was to a large extent composed of land fit for cultivation. The Respondent alleges that, in April of that year, a new measurement of the original howla and of the accreted chur was made by his servants under his instructions. The measurement was made without intimation to the Appellants, and in their absence. The Respondent thereafter, on the 28th March 1878, caused a notice to be served on the Appellants, who are the registered tenants of the howla, setting forth the fact of measurement, intimating the precise amount of the increased rent due in respect of the excess land, according to the rates

specified in the kabulyat, and requiring the Appellants to appear, either before himself or his principal officer, within fifteen days from service, "and file a kabulyat for the said quantity of "land and for the said amount of rent; other- "wise after the expiry of the said fixed period, "under the terms of the said kabulyat, I shall "take khas possession of the land in excess of "the said Dr. 16. 2. 9 gundahs of land, for the "purpose of settling the same with others."

The Appellants paid no attention to the notice, and the Defendant, on the 29th March 1879, presented his plaint to the Subordinate Judge, in which he prayed, (1) that the Court should direct a measurement of the excess land and give him khas possession thereof; or otherwise, (2) that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the kabulyat. On the Respondent's motion the Judge ordered a measurement of the accreted land, which was made by the Court Amin in presence of the parties, and duly reported. Evidence was then led on both sides, and, on the 29th June 1881, judgement was given dismissing the suit with costs, but the formal decree was not made out and signed until the 27th July 1881. The Subordinate Judge came to the conclusion, though with some hesitation, that service of the notice of 28th March 1878 was established. He was of opinion that the Respondent had failed to prove any measurement of the excess lands as alleged, and had also failed to prove pergunnah rates, both of which he held to be conditions precedent of the Respondent's right to possession. And, as matter of law, the learned Judge decided that the stipulation in the kabulyat with respect to khas possession, which he terms the forfeiture clause, is void. The learned Judge further held that the suit, so far as it prayed for

assessment of rent, could not lie, inasmuch as the case was regulated by Section 14 of the Rent Act.

On appeal the decision of the Subordinate Judge was reversed by the High Court, consisting of Cunningham and Maclean, J.J., who, on the 11th May 1883, gave the Respondent decree for khas possession of whatever land may be found, according to the Civil Court Amin's map, to be in excess of 16d. 2k. 9g. 2c. 2k. Unfortunately the Amin reports two measurements on the map prepared by him, leaving it to the Court to select one or other of them, and the decree does not specify according to which of these the excess lands are to be ascertained.

The learned Judges of the High Court differed in opinion from the Subordinate Judge, as to the fact of a measurement having been made by the Respondent before the notice of 28th March 1878 was served. They state that, upon the evidence, they are "unable to find that there has not "been a measurement within the terms of the "kabulyat." Upon that view of the facts they seem to have been of opinion that, on receipt of the notice, the Appellants ought to have appeared within the fifteen days, and to have then stated any objections which they had to the measurement or to the rent intimated, and that, seeing they raised no objection to either until the present suit was instituted, the Respondent was entitled to the alternative of possession.

Their Lordships are of opinion that the Subordinate Judge erred in holding that the provisions of Section 14 of the Rent Act apply to the additional rent, which is stipulated in the kabulyat of 1850. There is nothing in the terms of that document, or of Section 14 of the Rent Act, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid

for it. It is stipulated that before excess rent is payable, and before the zemindar can call upon his tenants to choose between making a settlement and yielding possession to him, there shall be a measurement, but the document does not specify by whom that measurement is to be made. If the Respondent had given the Appellants full notice of his intention to make a new measurement, so as to enable them to be present, if they saw fit, at the time it was made, that would have cast upon them the duty of appearing before him within fifteen days after the notice was served; and if they had failed to appear within that period, the Court, if satisfied that the measurement was made in good faith, would probably have held them precluded by their own laches from objecting to it. But the Respondent gave them no intimation of his intention to measure; and, in the notice which he served, he did not require them, in terms of the kabulyat of 1850, "to take a settlement of the excess land, "and to file a kabulyat," but called upon them within fifteen days to "file a kabulyat for the "said quantity of land, and for the said amount "of rent." The difference between these two requisitions is not one of form merely, but of substance. What the deed of 1850 contemplates is that after a measurement has been made, within the knowledge of the tenants, and to which they ought therefore to be prepared to state specific objections, they may be required to come in and say whether they are or are not willing and ready to take a lease of the excess land. It does not contemplate that the new kabulyat must of necessity be executed within the fifteen days. It is obvious that, after the tenants have come in, and have agreed to take a lease of the excess land, they and the proprietor may differ both as to the precise extent of the land and as to the rent to

be paid for it; and in that case their differences must be settled by the Court. On the other hand their Lordships are of opinion that, under the terms of the kabulyat of 1850, the proprietor is not precluded from bringing his suit, without taking any preliminary step, in order to have an authentic measurement made, and the rent assessed; but, in that case, he cannot put the tenants to their election between paying rent and giving up possession until both these things have been done judicially.

In the present case, their Lordships are of opinion that the measurement of 1876, without intimation to the Appellants, coupled with the peculiar terms of the notice of March 1878, is not *per se* sufficient to entitle the Respondent to insist in his claim for khas possession of the excess land, as now ascertained by the measurement of the Court Amin. But the Respondent is, in their opinion, entitled to have decree, in terms of the alternative prayer of his plaint, fixing the extent of the excess land, and assessing the rent payable for it, in terms of the kabulyat of 1850. Their Lordships are unable to concur in the finding of the Subordinate Judge, to the effect that the Respondent has failed to prove "the prevailing pergunnah rates" within the meaning of the kabulyat. The evidence on both sides clearly shows that there is not now, and probably never was, any such thing as a fixed scale of rents for lands like these within the pergunnah, but that circumstance does not warrant the conclusion that no pergunnah rate has been proved. It leads to the inference that the parties to the kabulyat must have contemplated payment of a fair rent, to be computed according to the average of rents paid by the tenants of similar lands within the pergunnah, due regard being had to the nature of

the tenure. Their Lordships are of opinion that, taking into account the character of the Appellants' tenure, the pergunnah rate ought, for the purposes of this case, to be fixed at Rs. 6. 4 annas per khani.

In the absence of any evidence enabling them to decide between Statements A and B contained in the report of the Court Amin, their Lordships are of opinion that (the onus being upon the Respondent) the measurements given in Statement B must be adopted as correct. They are further of opinion that the increased rent now assessed ought to be paid by the tenants for their possession, from and after the date when the Respondent's notice was served upon them.

It will be necessary to remit the cause, in order that the precise extent of excess land for which rent is now payable, and also the precise amount of the increased rent may be ascertained in the Court below, and decree given accordingly. When that has been done, it will be in the option of the Respondent, either to realize the rents in terms of law, or to serve a fresh notice in terms of the kabulyat of 1850; and, if the Appellants do not come in and make a settlement and file a new kabulyat, he will then be entitled to khas possession of the excess land which has accreted to the original howla, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865.

The parties to this suit seem to have maintained in the Courts below, as they certainly did in this appeal, pleas far in excess of their respective legal rights, the Appellants succeeding before the Subordinate Judge, and the Respondent, in his turn, succeeding before the Court of Appeal. In these circumstances, it appears to their Lordships that there can be no injustice done by deciding that each of them ought to bear their own costs.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgement of the High Court appealed from, dated 11th May 1883, save in so far as it sets aside the decree of the the Lower Court, dated the 27th July 1881, and to find that neither the Appellants nor the Respondent are entitled to the costs of suit incurred by them in either of the Courts below; to declare (1) that the Respondent ought to have decree ascertaining the extent of excess lands in the possession of the Appellants, and assessing the rent payable therefor, in terms of the kabulyat dated the 23rd April 1850; (2) that for the purpose of ascertaining the extent of the said excess land, the measurements contained in Statement B annexed to the report by the Amin of the Subordinate Judge's Court are to be taken as correct, and that from the total area of land in the possession of the Appellants ascertained by the said Amin to be cultivable and properly assessable with rent, there must be deducted 13d. 6k. 16g., the extent of the original howla as fixed by the said kabulyat, the balance remaining after such deduction representing the extent of excess lands for which rent is payable; (3) that the rent payable for the excess lands ascertained as aforesaid is at the rate of Rs. 2. 7. 7 pie per khani for five (5) drones thereof, and for the remainder thereof at the rate of Rs. 6. 4 annas per khani; (4) that rent became payable in respect of the said excess lands from and after the 28th day of March 1878; and, subject to these declarations, to remit the cause to the Court below.

There will be no costs of this appeal.