

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

DENA NATH BANEBJEE AND OTHERS (PLAINTIFFS) v. HARI DAS
(DEFENDANT).^o

1885
April 10.

Second Appeal, Interference on question of facts in—Remand of Appeal heard by a Subordinate Judge to District Judge—Act XIV of 1882, s. 568.

If, on second appeal, it is found that certain material facts, having an important bearing upon a question at issue in the suit, have been omitted to be considered by the lower Appellate Court, the High Court will interfere with the decision of the lower Appellate Court, even though it be on a question of fact.

THIS was a suit for arrears of rent, the plaintiffs alleging that the amount of the *jumma* held by the defendant was Rs. 20 per annum.

The defendant admitted that the amount of the *jumma* was originally Rs. 20 per annum, but pleaded that he had, on the 25th June 1862, purchased from plaintiff No. 1 his six-anna share in the property under a *kobala*, and that he had since that date paid rent for the remaining ten annas at the rate of Rs. 12-8.

It appeared from the evidence that the plaintiffs and defendant had originally interchanged a *pottah* and *kabuliat* on the 11th June 1862, and it was admitted that the *pottah* had been lost, and a second granted in its stead on the 29th July 1862. On the 4th August 1862 the second *pottah* and the *kobala* were both registered by a person, who was the *mokhtar* of all the plaintiffs.

The Munsiff framed no issue as to whether the *kobala* was genuine, but as incidental to an issue which was framed as to the amount of the *jumma* at which the defendant held he allowed evidence to be given as to whether the plaintiff No. 1 had sold his six-anna share to the defendant, and finding that the plaintiffs had failed to prove that they had ever collected rent at

^o Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Beverley, one of the Judges of this Court, dated the 3rd of September 1884, in Appeal from Appellate Decree No. 631 of 1883, against the decree of Baboo Bluber Chundra Mukherji, Subordinate Judge of Hooghly, dated the 29th December 1882, reversing the decree of Baboo Panna Coomar Sen, Munsiff of Serampore, dated the 26th June 1882.

1885 Rs. 20, and that he saw no reason for disputing the *kobala*,
 DINA NATH gave the plaintiff a decree at the rate of Rs. 12-8.
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v.
 HARI DASL. On appeal to the Subordinate Judge the case was remanded to the Munsiff's Court, in order that an issue should be raised as to the genuineness of the defendant's *kobala*, and on such remand the issue was found in favor of the defendant.

On the case again coming before the Subordinate Judge, the Court reversed the finding as to the genuineness of the *kobala*, and gave the plaintiff a decree at the rate of Rs. 20 per annum.

The ground for the Subordinate Judge's disbelief in the defendant's *kobala* being, that the *pottah* of the 29th July 1862 purported to have been granted by all the plaintiffs; whereas if the sale of the 25th June 1862 had really taken place, the *pottah* would have been granted by the plaintiff who owned the ten anna share only.

The defendant appealed to the High Court on the question of the genuineness of the *kobala*. Mr. Justice *Beverley* was of opinion that the reasons given by the Subordinate Judge would have had some force, had the second *pottah* been an instrument creating a new tenure between the parties; but seeing that the second *pottah* was given in place of the one lost, and in correspondence with the *kabuliat* which the defendant had given, it was probable that this would sufficiently account for the name of plaintiff No. 1 appearing in the second *pottah*, even though he might have in the meantime sold his right thereunder. He was also of opinion that the Subordinate Judge should have taken into consideration the fact that the person appearing at the Registration Office on behalf of all the plaintiffs on the 4th August 1862, when both the second *pottah* and the *kobala* had been registered, was the *mokhtar* of all the plaintiffs; he therefore remanded the case for the reconsideration of the Subordinate Judge.

The plaintiffs appealed under s. 15 of the Letters Patent.

Baboo *Jagat Chunder Bannerjee* for the appellants contended that the case should not have been sent back for the reconsideration of the Subordinate Judge, as the latter had already clearly found as a fact that the defendant's *kobala* was not genuine.

Bahoo Bhobani Charan Dutt and Bahoo Tarucknath Sen for
the respondent.

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Judgment of the Court was delivered by

MITTER, J.—The principal question in this case is, whether the *kobala* set up by the defendant, and said to have been executed by one of the plaintiffs, Dena Nath, in 1862, is genuine or not?

It is true that this is a question of fact, and the Subordinate Judge, on appeal, came to the conclusion that the document in question was not genuine; but if in second appeal it is found that certain material facts which have an important bearing upon the question at issue have been omitted to be considered, this Court has always interfered with the decision of the lower Appellate Court even if it be on a question of fact.

In this case the learned Judge of this Court, in his judgment, has pointed out certain facts which have a material bearing upon the question, whether the *kobala* is genuine or not; he has also pointed out that these facts have not been considered by the Subordinate Judge. That being so, we think that the case was properly remanded; but under the circumstances we think it right to add that the appeal will be remanded to the District Judge. This appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Field and Mr. Justice Beverley.

LADLEY AND OTHERS (DEFENDANTS) v. GOUR GOBIND SARKAR
(PLAINTIFF).*

1885

April 15.

Occupancy rights—Partnership holding a cultivating lease—Indigo concern as a cultivating ryot.—Beng. Act VIII of 1869, s. 6.

A firm owning an indigo concern, and carrying on the manufacture of indigo, took, in the collective names of Robert Watson & Co., a cultivating lease of certain lands, which they held continuously for more than twelve years; cultivation of these lands being carried out by the servants of the firm; and also by sub-tenants.

Held, that the lease must be taken to be a lease to the individuals who were at the time of the grant members of the firm; and that under the circumstances of the particular case they had obtained an occupancy right.

* Appeal from Original Decree No. 171 of 1883, against the decree of Bahoo Jugad Bundhoo Gangooly, Officiating Subordinate Judge of Moershodabad, dated the 4th of May 1883.