Before Mr. Justice Loch and Mr. Justice Macpherson.

1869. *July* 9.

NAIMUDDA JOWARDAR (DEFENDANT) *v.* R. SCOTT MONCRIEFF (PLAINTIFF).*

Plea to the Jurisdiction of the Court—Jurisdiction—Appeal—Bastu Lands—Act X. of 1859.

The question of jurisdiction cannot be raised in appeal for the first time, unless it appear upon the face, of the pleadings or the admission of the parties or upon the evidence, that the suit will not lie.

Batsu land (land used for sites of houses) situated in a town, cannot form the subject of suits under Act X. of 1859 for enhancement.

Bastu land which is the site of a house occupied by a ryot engaged in cultivating the surrounding lands does fall under the provisions of Act X. of 1859.

When it did not appear on the face of the pleadings or on the evidence, under what kind of bastu the land in dispute falls: and no plea to the jurisdiction of the Court under Act X of 1859 had been taken in the Courts below, the High Court will not remand the case to enquire under which class of bastu land the subject-matter of suits falls, or entertain the point of jurisdiction in appeal.

THE plaintiff brought this suit in the Court of the Deputy Collector of Kooshtea for arrears of rent of certain bastu land at an enhanced rate. The defendant alleged that he had the jumma from time immemorial, and that he had paid one uniform rent of rupees 3 for 20 years. The defence was held in the Court of first instance not to be proved, and the plaintiff's claim was accordingly decreed. This decision was upheld by the Jndge, who relied on an admission made by the appellant, defendant, that for ryots of his class the rate for bastu land was rupees 5; he also considered and said that there was evidence to show that rupees 5 was the prevailing rate for lands of a similar description held by ryots of the same class as the appellant.

The defendant then appealed to the High Court, where the point mainly relied on was that no suit would lie under Act X.

* Special Appeal, No. 478 of 1869, from a decree of the Judge of Nuddea, dated the 25th November 1868 affirming a decree of the Deputy Collector of that district dated teh 29th November 1867.

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of 1859 for bastu land, or land which used as the site of a house and not for agricultural or horticultural purposes.

The objection was taken for the first time before the High Court.

Mr. *Sandal* for appellant cited *Kalee Kishen Biswas* v. *Sreemutty Jankee* (1) *Ranee Shurno Moyee* v. *Revd. C. Blumhardt* (2) *Kali Mohan Chatterjee* v. *Kali Krishna Roy* (3); a Full Bench decision of the High Court at Agra (4), and *Kailas Chandra Sirkar* v. *Durgadas Tarafdar*, (5).

Mr. *R. T. Allan* for respondent.

LOCH, J.—The first ground taken in special appeal in this case is that the Collector had no jurisdiction to try this case under Act X. of 1859, as the land was not used for agricultural or horticultural purposes.

The question of jurisdiction is now raised in special appeal for the first time, and we think it is taken at too late a stage of the proceedings. Certain cases have been referred to, in which it is said that the plea of want of jurisdiction was admitted in special appeal, although it was not urged in the Courts below. But in those cases the question of jurisdiction was clear upon the pleadings, or from the admission of parties. It is urged that

(1) 8 W. R., 251.

(2) 9 W. R. 553.

(3) 2 B. L. R., Appx. 39.

(4) 3 Agra H. C. Rep., F. B. 52.

(5) *Before Mr. Justice Loch, and Mr. Justice Macpherson.*

KAILAS CHANDRA SIRKAR (DEFENDANT) v. DURGADAS TARAFDAR (PLAINTIFF.)

13th July, 1869.

Act X. of 1859—Enhancement.

Lands used for building purposes situated in a town are not liable to enhancement of rent under Act X. of 1859.

LOCH J.—We think that this case is similar to *Kali Mohan Chatterjee* v. *Kali Krishna Roy (3)*. In that case it was held that the lands held by the defendant being used for building purposes, in fact, in the centre of a town, were not liable to enhancement of rent under the provisions of Act X. of 1859. The present case is similar to that. The lands for which enhancement for rent is claimed, clearly appear from the judgment of the lower Courts to be situated on the road leading to the bazar and used for building purposes within the municipality of the town of Kistonagar. We therefore differ from the judgments of the lower Court, and decree this appeal and dismiss the plaintiff's suit. As however the ground urged in this appeal was not taken in the lower Courts, we award no costs.

MACPHERSON, J.—I concur.

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in this case also the question of jurisdiction is patent upon the pleadings, for the suit is to enhance the rent of bastu land only; and bastu land is land used for sites of houses, and not for agricultural and horticultural purposes; and reference has been made to certain judgments of this Court, *viz. Kalee Kishen Biswas* v. *Sreemutty Jankee* (1), *Ranee Shurno Moyee* v. *Revd. C. Blumhardt* (2), *Kali Mohan Chatterjee* v. *Kali Krishna Roy* (3), and to a Full Bench decision of the Agra High Court (4) to show that suits for enhancement of rent of lands of this description do not come under the provisions of Act X. of 1859. It is admitted, however, that there is nothing in the pleadings to show that the land, which is the subject of this suit, is situated in a town, and it is only to the lands of this description that the judgments quoted apply. Bastu land, when it is a part of a ryot's jote or holding, is as much liable to enhancement as any other kinds of lands, and is equally liable to be dealt with as other lands under the provisions of Act X. of 1859. There is nothing in the proceedings below to show that any question of jurisdiction was raised on the use of the word bastu land, and while we concur in the rulings which have been quoted to us, yet we think it is now too late in this case to admit this question of jurisdiction.

The second point taken in this special appeal is that the facts found by the Judge below are not sufficient in law to establish enhancement under clause 1, section 17, Act X. of 1859. This may be disposed of with another objection *viz.* that the Judge was wrong in saying that the defendant's deposition amounts to an admission of the rate of rent being rupees 5.

What the defendant says on being examined with regard to this land is, that the whole of it is bastu land, and that the rate of rupees 5 is prevalent. The Judge considers this statement, with the evidence regarding rates recorded in another case, which appears to have been disposed of at the same time, and he says, "the Court considers that there is evidence sufficient "to show that rupees 5 is the prevailing rate for lands of a "similar description held by ryots of the same class as the appel-

(1) 8 W. R., 251.
(2) 9 W. R., 552.
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"lants." This finding meets all the requisitions of clause 1, section 17, Act X. of 1859, but omits to find whether the land "is with similar advantages in the places adjacent," and it is urged for the appellant that the absence of these words renders it necessary that the judgment should be reversed. No doubt it would have been better had the Judge made his judgment complete by the use of these words. But, looking at the finding of the Judge on this point, it appears to me very unlikely that he omitted to look to this point while considering the other points referred to in clause 1, section 17, Act X, of 1859, though he has failed to state it distinctly. I do not think that the omission of these words is sufficient to justify a remand or reversal.

Another ground taken in this special appeal is that the Judge was wrong in saying that there is no evidence of the purchase by the defendant of his alleged mokurrari and mourasi tenure. We have no doubt that, when the Judge made use of the words "no proof," all that he meant to say was that there was no sufficient proof, because he himself mentions the evidence that was adduced by the plaintiff to prove this point, and in the face of that he could not have meant that there was no evidence. Under the circumstances stated above, we think this special appeal must be rejected, and we dismiss it accordingly with costs.

MACPHERSON, J.—I wish to add one word with regard to the point of jurisdiction, and to say distinctly that in my opinion the appellant would have been entitled to have this suit dismissed, if it appeared upon the face of the pleadings or the admissions of the parties, or upon the evidence, that the land is of such a nature that a suit for enhancement will not lie under Act X. of 1859. But I consider that there is no evidence whatever, and that it does not appear on the pleadings that the land is of such a nature.

It is true that some kinds of bastu land cannot be enhanced under Act X., *e. g.* land in a town on which a house is built. But it is equally true that some kinds of bastu lands are liable to enhancement, and do come under the provisions of Act X. of

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1859, *e. g.* land on which stands the house of a ryot, who is engaged in cultivating the surrounding lands; and in the absence of any plea by the defendant, or of any suggestion even by him in the lower Courts that the lands, the subject of suit, belong to the former class, it certainly seems to me that it would be preposterous for us, upon a mere suggestion (for it is nothing more than a mere suggestion), of the appellants now made by them in special appeal, to send the case back in order to ascertain what kind of bastu land it is for the enhancement of the rent of which a decree has been obtained, and in order now to consider whether the Revenue Court had jurisdiction or not.

Our decision in no way conflicts with any of the cases quoted by the special appellant; nor do we at all dissent from the rules to be found laid down in them.

Before Mr. Justice Kemp and Mr. Justice Glover.

1869. *July 12.*

SATTO SARAN GHOSAL BAHADUR (DEFENDANT) *v.* TARINI CHARAN GHOSE, AGENT OF BABOO DIGAMBAR MITTER (PLAINTIFF.)*

Application for Review—Lapse of Time Specified.

This was an application for review of judgment of three out of five analogous cases decided by the High Court, the judgment in two of which had been reversed by the Privy Council. The application was made after a lapse of more than 90 days from the date of judgment.

Held, a lapse of 90 days, under the circumstance, would not be a bar to the granting of the review.

Shama Churn Chuckerbulty v. *Bindabun Chunder Roy* (1) *distinguished.*

Baboos *Hem Chandra Banerjee* and *Abhai Charan Bose* for petitioner.

Baboos *Mahendra Lal Shome* and *Khettranath Bose* for opposite party.

* Applications of Reviews, Nos. 91, 92, and 93 of 1869, against the judgments of Mr. Justice Kemp and Mr. Justice Seton-Karr, dated the 3rd August 1865, in Special Appeals, Nos. 937, 1635, and 3288 of 1865.

(1) Case No. 1395 of 1866; January 30th, 1868.