

# APPENDIX.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

DIN&NATH MOOKERJEE (PLAINTIFF) v. DEBNATH MALLICK AND ANOTHER  
(DEFENDANTS).\*

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*Instalment Bond*—"Nuzzur"—"Salami"—*Abwab*—*Unregistered Potta and Kabuliat*  
—*Set-off*—*Evidence*.

Plaintiff sued in a Small Cause Court, on an instalment bond, for 81 rupees. The bond had been executed for *Nuzzur* or *Salami* contemporaneously with the execution of a potta and kabuliat, by which the defendants agreed to pay the plaintiff 335 rupees a year, for two years, as rent for certain land. The potta and kabuliat had not been registered. A previous suit brought by the plaintiff under Act X of 1859, had been therefore, dismissed, and no oral evidence was admitted to prove the terms of the potta and kabuliat. The defendants now claimed a set-off against the amount claimed under the bond, on the footing of a contract contained in the potta and kabuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favour of the plaintiff, subject to the opinion of the High Court on four questions submitted by him.

*Held*, the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for an *abwab* or illegal cess; whether it was *Nuzzur* or *Salami* was immaterial. The defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the potta and kabuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off.

THE following case was referred for the opinion of the High Court :

"Plaintiff sues defendants, on an instalment bond, for rupees 81. Defendants, admitting execution of the bond, have raised a variety of pleas, and have presented a petition praying for a reference to the High Court on several points. The bond was executed contemporaneously with a lease of certain land by plaintiff to defendants, whereby the latter undertook to pay him a yearly rent of rupees 335, for two years. The bond contains a statement that the consideration consisted of a sum of money then and there lent by plaintiff to defendants in cash, which they undertook to repay by instalments; but in the plaint it is admitted that no cash passed at the time, and that the bond was executed in lieu of *Nuzzur* on account of the lease. Plaintiff was personally examined on this point, and says it was for *Salami*. Defendants have produced several witnesses, who have stated that it was in lieu of additional rent over and above that stated in the lease. I do not think the conflict of evidence on this point, however, matters much. There is no doubt that the bond had reference to the engagement of defendants, to rent the land of plaintiff, and

\* Reference, No. 5, dated the 4th February 1870, from the Judge of the Small Cause Court at Kishnaghur.

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whether it was *Nuzzur* or *Salami*, or by way of additional rent, defendants executed it with their eyes open, and under no compulsion; and further they have derived the full benefit of the consideration even on their own showing, inasmuch as they obtained possession of the land and held it for the specified period of two years.

“The first point which I have to refer for the High Court’s decision is, Whether the suit on the instalment bond is cognizable in this Court, or the Revenue Court? *Bhubo Soonduree Debia v. Nawab Syud Jynal Abdin* (1) and *Raja Sutto Churn Ghosal v. Mahomed Ally* (2).

“The second question which I have to propose for the High Court’s decision is, Whether there is a variance sufficient to justify the dismissal of the suit, between the allegations in the plaint and those in the evidence?

“The third question submitted is, Whether the sum stated in the bond is to be considered as *abwab* or illegal cess, and so not recoverable. *Bhubo Soonduree Debia v. Nawab Syud Jynal Abdin* (1).

“There is a fourth, however, which I consider of sufficient importance to refer, of my own motion. Assuming that there is nothing illegal in plaintiff’s claim, and that it will lie in this Court, defendants have raised a plea of payment in various ways, or more properly as set-off, though they have not filed a written statement of set-off according to section 121 of the Civil Procedure Code. These payments, for which defendants claim credit, consist partly of money payments with which they have been credited by plaintiff in the rent, partly of the expenses incurred by them on plaintiff’s account in certain “*Nijabad*” cultivation, partly of collection charges, and miscellaneous expenses in litigation and the like. If defendants are credited with all they claim on these heads, both the rent under the lease and the amount of the bond in this suit, will have been liquidated; but their authority for deducting these sums from the rent consists in the potta and the kabuliat interchanged between them and plaintiff, the former of which has not been produced, but which is admitted not to have been registered, and the latter is inadmissible in evidence under section 49, Act XX of 1866. Clause 4, section 17 of Act XX of 1866 read in connection with the definition of lease given in section 2 of the same Act, making the registration of such a document compulsory; in fact in a suit for arrears of rent which plaintiff had already instituted against defendant in the Revenue Court, the suit was thrown out on the ground of the inadmissibility of this kabuliat for want of registration.

“The question then with regard to these alleged set-offs or repayments which I have to submit is, Whether oral evidence is admissible to prove defendants authority to set-off these sums against the amount of the rent and bond, when the instrument itself which contains that authorization is inadmissible as evidence?

“In the Act X case, defendants’ suit was dismissed, because the kabuliat was not registered, and oral evidence was not allowed in lieu of it. Defendants

(1) 8 W. R., 393.

(2) 2 W. R., S. C. C. Ref., 5.

profited in that case by an interpretation of the law which would be fatal to their plea in the present one. See *Sheikh Rahmatulla v. Sheikh Sariutullah Kagchi* (1).

"I have given plaintiff a decree contingent on the opinion of the High Court."

Baboo *Durga Das Dutt* for plaintiff.

Baboo *Rash Behari Ghose* for defendant,

The opinion of the Court was delivered by

JACKSON, J.—The Judge in this case refers four points for the opinion of this Court, three of which are so referred at the request of the defendants, and the fourth by the Judge, of his own motion. Of the three first points, the pleader who appears before us here for the defendants, has only thought fit to argue one, that is, whether the suit was within the competency of the Small Cause Court.

It appears to me quite clear that the suit was one cognizable by the Court of Small Causes. The amount claimed was due under a bond executed by the defendants, in which the money was described as money lent; but the plaintiff alleged that it was payable as *Nuzzur*, and the plaintiff in his examination stated that it was payable by way of *Salami*. Both these terms are used to denote money paid by a lessee in consideration of a lease granted, and it appears that the defendants in this case had taken a lease from the plaintiff, and a potta and kabuliat were interchanged between them. The defendants contended, under these circumstances, that the money conditioned for was rent. I think it cannot be looked upon as rent, but it was simply a debt due by the defendants upon a contract (not of the excepted kinds) and therefore recoverable in the Small Cause Court.

The second question submitted by the Judge, and which has not been argued here, is one which, if we were to answer, we should, in fact, be deciding the suit upon the merits between the parties.

The third question is also one which the defendants' pleader has abstained, and, I think, wisely, from arguing here. The amount claimed, clearly, could not be looked upon as *abwab*.

On the fourth point, it appears to me that the opinion of the Judge is correct. The defendants alleged a set-off against the claim of the plaintiff, and the right to make such set-off was derived by the defendants, or alleged to have been derived, under a special contract between the parties. The contract was not contained in the bond, but it had been reduced to writing, and is to be found in the potta and kabuliat. These two instruments have been found inadmissible by reason of non-registration, and it seems that the suit of the plaintiff for rent against the defendants was dismissed.

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by reason of such non-registration, and the plaintiff's consequent failure to prove the defendants' engagement. Under these circumstances, it would be not only contrary to rule, but highly inequitable, to allow the defendants to set up and prove the set-off which they claim under the same contract. I think therefore, that all the questions must be answered in favour of the plaintiff, who will be entitled to the costs of this hearing.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

NANDA KUMAR SHAHA (PLAINTIFF) v. GAUR SANKAR AND ANOTHER  
(DEFENDANTS).\*

1870

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Act VIII of 1859, ss. 92, 96—*Injunction—Compensation, Suit for—Limitation*  
Act XIV of 1859, s. 1, cl. 2.

A. having brought a suit against B., obtained and issued, on the 24th July 1868, an injunction against him under section 92, Act VIII of 1859. The suit was, on the 18th August 1868, dismissed; but no compensation was awarded to B. under section 9 of Act VIII of 1859, in respect of the injunction which had been issued against him. A. and B. both appealed; the former against the decision dismissing his suit, the latter for compensation. Both appeals were dismissed on the 23rd November 1869,—B.'s, because it was engrossed on a stamp paper of the value of eight annas only.

B., on the 16th December 1869, then instituted a suit against A. in the Small Cause Court, for damages in consequence of the injunction which A. had caused to issue against him in his suit.

*Held*, that B. was not debarred, by section 96 of Act VIII of 1859, from instituting a suit against A. for damages, there not having been an award of compensation under that section. The cause of action accrued from the time at which the plaintiff was first damaged by the wrongful injunction; continued as long as the injunction remained in force; and limitation began to run as soon as the injunction was at an end.

This was a reference from the Judge of the Small Cause Court, Backergunge, dated, the 2nd January 1870.

"The defendant's predecessor, Jiban Sing Burmon, deceased, had, on the 24th July 1868, issued an injunction, under section 92 of Act VIII of 1859, against the plaintiff, after instituting a suit in the Moonsiff's Court, which was dismissed, on the 18th August 1868, without compensation, under section 96 of the same Act, being allowed to him (plaintiff). Both the defendant and plaintiff had preferred appeals against the decision of the Moonsiff, the first for being dissatisfied with his decision regarding his suit, and the second for compensation being denied to him. Both appeals were dismissed on the 23rd November 1869, and the plaintiff's petition of cross appeal for compensation was rejected for its being engrossed on a stamp of the value of eight annas only. On failure in obtaining compensation from the Appellate Court, the plaintiff instituted the present suit, on the 16th December 1869, which, too, was dismissed on the 31st of the same

\* Reference, No. 6 of 1870, from the Judge of the Small Cause Court of Backergunge, dated the 28th January 1870.