following cases were relied on :—*Bhoyrub Chunder Chowdhry* v. *Haradhun Ghose* (1), *Sheikh Jeetoo* v. *Sheikh Beetun* (2), *Mussamut Fatima Bibee* v. *Arif Sookanee* (3), *Simroo Kareegur* v. *Anund Chunder Roy* (4), *Narainee Dossee* v. *Nurrohurry Mohonto* (5), and *Bonomalee Churn Mytee* v. *Sheikh Hafizuddeen* (6).

plaintiff is to be obliged to bring a fresh suit to recover the balance of the rent admitted to be due. I think it would be unreasonable to hold that because he has been guilty of setting up a forged kabuliat, he should be obliged to bring a fresh suit to recover an admitted balance of rent. I think in this case the plaintiffs are entitled to recover the balance which was admitted.

Then what sum admitted was to be due? The defendants' admission was that Rs. 123-8 remained due from them to the plaintiffs, but in making that the balance, they took credit for Rs. 100 which they said they had paid. It is found that they had not paid the Rs. 100, and therefore, if their admission be taken with this, they are really shown to be indebted to the plaintiffs for rent in the sum of Rs. 223-8. That is the sum for which a decree ought to have been given by the lower Appellate Court. The decree must be altered accordingly. Each party must pay their own costs of this appeal.

(1) Marsh., 561.

(2) *Id.* 47.

(3) *Id.*, 263.

(4) *Id.*, 57.

(5) *Id.*, 70.

(6) *Before Mr. Justice Kemp and Mr. Justice Markby.*

BONOMALEE CHURN MYTEE (PLAINTIFF) *v.* SHEIKH HAFIZUDDEEN (DEFENDANT).*

*The 18th August* 1869.

*Admission—Variance between Pleading and Proof—Remand—Act VIII of* 1859, *s.* 162—*Neglect to obey Summons.*

Baboo *Hem Chunder Banerjee* and *Bhoyrub Chunder Banerjee* for the appellant.

Baboo *Beepin Behary Dutt* for the respondents.

THE judgment of the Court was delivered by

MARKBY, J. (KEMP, J., concurring).—It will perhaps be most convenient in this case to dispose of the fifth ground of appeal first; the plaintiff sues to recover rent for several years for 13 bigas and 4 katas at Rs. 29-11-15 a year; he says that the defendant holds under an instrument, which he calls a *jamabandi*, which he says was signed by all the ryots on the estate when he came into possession; he therefore sues, in fact, upon that *jamabandi* as his cause of action. The defendant denies the *jamabandi*, or at any rate he denies that he was a party to it; he admits that

* Special Appeal, No. 1251 of 1869, against a decree of the Judge of Zilla Midnapore, dated the 17th March 1869, reversing a decree of the Deputy Collector of that district, dated the 5th September 1868.

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Owing to this conflict of authorities the learned Judges referred the following question to a Full Bench, *viz.*:—Whether he holds some land of the plaintiff, but he says that it only amounts to 3 bigas and a fraction, with an annual rent of Rs. 4-13, and that the only balance due by him to the plaintiff is Rs. 5-15. The fifth ground taken before us is that, even supposing the lower Appellate Court was right in finding that the *jamabandi* was not established, the plaintiff was entitled not only to a decree for Rs. 5-15, the balance admitted to be due by the defendant but that he was entitled to a decree for all the years which he claimed at the full admitted rent of Rs. 4-13 per annum, subject only to such deductions as the defendant was able to establish. Now I think it is quite clear that this contention is erroneous; had the defendant admitted the *jamabandi* and pleaded payment, it of course would have been incumbent upon him to prove those payments, but here the plaintiff has altogether failed to prove his cause of action as alleged by him in his plaint, and the only thing left him is the relation of landlord and tenant which is admitted to exist between him and the defendant. Now I am by no means sure that the first Court under such circumstances, would not have been justified in dismissing the suit altogether, but I am quite clear that the utmost to which the lower Courts could go would be to give the plaintiff a decree for the sum which was admitted to be due by the defendant. That sum was due on a different cause of action than that set forth in the plaint; the cause of action set up by the plaintiff arose upon a special agreement to pay rent at a certain rate, while this was due on a totally different agreement, the nature of which is not disclosed, or simply for use and occupation. Therefore, as the plaintiff relies entirely upon the admission of the defendant both as to the amount due and for proof of his cause of action, he must accept this admission as a whole, and can only have a decree upon it for the balance admitted to be due.

Then upon the other points in the case it seems that when this suit was before the first Court (and I take this from the finding of the lower Appellate Court when it made the order of remand), that a request was made by the defendant that his landlord should be summoned and examined upon the question of the making of the *jamabandi*, and the first Court did not then pass any order upon that application. When the case came before the lower Appellate Court upon the appeal of the defendant, and this omission on the part of the first Court was brought to its notice, the Judge directed the first Court to entertain that application and consider whether or no it ought to be granted, and if it ought to be granted, then to summon the plaintiff into Court and record his evidence. The first Court failed in its attempt to cause the attendance of the plaintiff, but apparently thought that it was an application which ought to be granted for it issued a summons to bring the plaintiff into Court. The Deputy Collector then informed the lower Appellate Court of the issue of the summons and the failure to serve it.

Now the first complaint made before us in special appeal is that that was wrong in point of procedure. It has

a landlord having sued a ryot for arrears of rent alleged to be due under a kabuliat, and the Court having found that such kabuliat had not been executed by the ryot, but it appearing

been argued before us not precisely upon the first ground taken in special appeal, but upon one which in substance comes within it, namely, that the Judge ought himself to have disposed of the application, to examine the plaintiff, and himself to have summoned the plaintiff, if he thought it was a case in which that application ought to be granted. Now there is not possibly in the Code of Civil Procedure any exact provision applica ble to this case; for I do not think it was a case in which the lower Appellate Court intended to act under the provisions of s. 351, or of s. 354, which relate to remands, or under s. 355, which relates to the taking of fresh evidence; but I take it that the view which the lower Appellate Court took of this matter was this, that the application brought to its notice being one entirely undisposed of by the first Court, the lower Appellate Court thought, and in my opinion properly thought, that the best course to take was to refer that point back to the first Court for disposal, for there are many cases, and this may well have been one of them, in which the first Court is in the best position to decide whether or no it is actually necessary to summon the plaintiff. I see nothing irregular in taking this course, although there is nothing which provides specially for it in the Code of Civil procedure. It seems to me that an Appellate Court, when it finds an application of this nature wholly undisposed of by the Court of first instance, may, if it thinks it desirable to do so, send back the case and order the first Court to dispose of that application instead of disposing of it itself. It seems to me, therefore, that the proceeding of the Judge was perfectly regular so far as concerns his sending back this application to be disposed of by the first Court. As to the other part of this ground of special appeal, it has not been relied on before us, and in fact it has been admitted that it was competent for the Judge, when once it was decided that the plaintiff ought to be examined, either to direct the first Court to examine him, or to summon and examine him himself under the provisions of s. 356.

The next ground taken is the fourth namely, that there was no proper application made to the first Court under s. 162. The application made was probably one which we find inserted with some incongruity together with some objections taken to the report made by an Ameen; but I do not think that s. 162 requires that any special formalities shall be observed in making the application; it simply directs that an application shall be made, and points out the proper manner of disposing of that application. The lower Appellate Court has found on this point that there was a request, and that that request has not been disposed of, and I think we ought to act upon that finding. If the application had been objected to as informal, the Court might have accepted a fresh one: and at all events it is now too late to make any objections to its informality.

The next ground argued was that no legal summons was served upon the plaintiff, and that, therefore, no inference ought to have been drawn against him from his non-appearance by the lower Appellate Court. The

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notwithstanding that the ryot occupied the land under the zemindar, the landlord is entitled to have a further trial of the question whether any rent, and how much, is due on account of the ryot's occupation of such land ?"

Baboo *Kali Mohun Doss* (with him Baboo *Kashicanth Sein*), for the appellant, contended that the plaintiff ought to be allowed to raise the question of the amount of rent, if any, due to him, and that an enquiry might be made in the present suit. He referred to the cases cited on behalf of the appellant in the argument on special appeal, and relied principally on the case of *Rookhini Kant Roy* v. *Sharikatunissa Bibee* (1). [COUCH, C.J.—In that case there was an admitted balance.] True, but that does not alter the principle. If the plaintiff can

lower Appellate Court says, "that after the failure on the part of the first Court to serve the summons personally on the plaintiff, and as the summons had actually not been served, the case could not be decided against the plaintiff under the provisions of s. 170 of Act VIII of 1859: although the fact of his absenting himself when he was summoned must, to some extent, add strength to the defendant's case; for considering the processes that have been issued, it must be presumed that the talookdar was aware of the issue of the summons." I do not think there can be any doubt as to what the Judge meant to say, though there is a very slight discrepancy in the language. I think it is quite clear that he means to say that as a legal summons has not been served upon the plaintiff, he cannot take advantage of the provisions of s. 170, and, on the ground of that party's non-attendance alone, dismiss the suit against him; but he says, nevertheless, I am satisfied that he must have known that his attendance in Court was desired, and I am perfectly justified to take the circumstance of his neglect to attend into consideration when deciding the case upon the facts. I think that the lower Appellate Court was perfectly justified in taking that course and drawing the inferences which it has drawn; for although the law provides most necessary and proper precautions to protect parties from being summoned wantonly and for purely vexatious purposes, the Courts have full discretion in a matter of this kind to decide whether or no the parties are making use of that protection which the law affords them for the purpose of evading the giving of evidence which might be fatal to their case; in the latter view any Court is perfectly justified in using the absence of the party most strongly against him.

As therefore all the grounds taken in special appeal fail. the appeal ought to be dismissed with costs.

(1) *Ante*, p. 246.

show that the ryot has not paid rent, and that the plaintiff has a true case, he ought not to be driven to another suit—*Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (1). [PONTIFEX, J.—In that case it was a document relied on by the defendant that was held to be spurious. That does not entitle the plaintiff at once to succeed.] A second suit for the same arrears of rent would be liable to be dismissed on the ground that the matter had already been decided. The rate admitted by the tenant is not objected to, but an enquiry should be whether any and what balance is due.

Baboo *Srinath Doss* (with him Baboo *Anund Gopal Paulit*) on the respondent.—The plaintiff's claim was based upon the kabuliat alone, and the plaintiff was bound to make out his case as put in his plaint. There was no alternative claim for rent for account of use and occupation. Where the plaintiff fails to prove the document on which he rests his claim, he ought not to succeed on any other ground. This was decided by a Full Bench of the Bombay High Court in *Lakshmibai* v. *Hari bin Ravji* (2). To allow the plaintiff to alter his case in such a way would encourage fraud. In *Narainee Dossee* v. *Nurrohurry Mohonto* (3), Sir Barnes Peacock, who delivered the judgment of the Court, said that the plaintiff must prove his case, but if there be a variance between the statements and his proofs, arising from inadvertence or mistake, the Court may allow the issues to be amended, but that is entirely at the discretion of the Court; then he adds:—"And we think that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to the execution of such document is found against him, and there are good grounds for believing that the document is a forgery." In this case the lower Courts have exercised that discretion, and it cannot be urged now that they were wrong in law. In *Simroo Kareegur* v. *Anund Chunder Roy* (4), which was similar to this case, the plaintiff was not considered entitled to succeed; see also *Gobind Chunder Lahory* v.

(1) 10 Moore's I. A., 123.
(2) 9 Bom. H. C. Rep., 1.
(3) Marsh., 70.
(4) *Id.*, 57.

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*Jardine, Skinner & Co.* (1). Cases where a balance was admitted by the defendant to be due are not applicable to the present case.

Baboo *Kali Mohun Doss* in reply.—The principle laid down in *Rookhini Kant Roy* v. *Sharikatunissa Bibee* (2) is that all questions between the parties connected with the subject matter of the suit should be decided in the shortest possible time.

The judgment of the Full Bench was delivered by

COUCH, C.J. (who, after reading the question referred, continued).—Whether the landlord is entitled to this, or not, depends in our opinion upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the ryot has notice that the landlord, if he fails to prove the execution of the kabuliat, will claim rent for the occupation, of the land, we think an issue ought to be framed to try whether any rent, and how much, is due on account of the occupation, and that the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a kabuliat, and he should not be made to bring two suits when the questions between him and the ryot can be determined in one.

But where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due. "The determinations in a cause should be founded on a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made."—*Eshen Chunder Singh* v. *Shamachurn Bhutto* (3). "The state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, are not to be departed from (4)."

It is in the discretion of the Court to amend the plaint or the issues and to allow it to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so. "If

(1) 7 W. R., 163.
(2) *Ante*, p. 246.
(3) 11 Moore's I. A., 20.
(4) *Id.* 24.

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by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute."—*Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonwaree* (1).

But where there is reason for thinking that the omission was deliberate, it would generally not be proper. The landlord may then be justly left to bring a fresh suit, and to lose any part of the rent, the suit for which would be barred by the law of limitation. This appears to be the opinion of the High Court at Bombay in *Lakshmibai* v. *Hari bin Ravji* (2).

When a Court of first instance in the exercise of its discretion allows the question to the tried, the reason for doing so should be distinctly stated. An arbitrary exercise of the power might be a ground of appeal. In the suit in which this reference has been made, the landlord was clearly not entitled to have the question tried. An issue raising it had, indeed, been framed by the first Court, but the issue whether the cosharers ought to have been made a defendant was decided in favor of the landlord on the ground that his suit was based on the kabuliat. The two claims could not be properly joined in the suit as upon the second claim other persons ought to have been made defendants.

We wish also to remark that where, as in *Rookhinie Kant Roy* v. *Sharikatunissa Bibee* (3), the defendant admits a sum to be due for rent, the Court may rightly in our opinion give a decree for it, irrespectively of the claim made in the plaint. This is all that was decided in that case. It was there said by the pleader for the appellant in a general way that there were decisions in Marshall's Reports against this being done, but the references to them were not given, and it now appears that none of the decisions go so far as this. We think in this appeal the questions put to us should be answered in the negative; and the appeal should be dismissed with costs.

(1) 6 Moore's I. A. 393, at p. 411.

(2) 9 Bom. H. C. Rep., I.

(3) *Ante*, p. 21[illegible].