

1874

LEKHEE
KANTO DASS
CHOWDREY
v.
SUMEERUDDI
LUSKER.

nissa Bibee (1). On behalf of the respondent it was contended that the plaintiff was not entitled to the enquiry he asked; the portion of the rent due from them to the plaintiff's landlord. The judgment of the Court was delivered by

THE Munsif, who tried the case in the first instance, came to the conclusion that this allegation was not proved, and he further held that the alleged payment by the defendants to the plaintiff's landlord without the plaintiff's permission or authority was not binding against the plaintiff. The defendants did not appeal to the Judge against either of these findings, and it is therefore clear that the plaintiff is entitled to obtain a decree for arrears of rent at the full rate of Rs. 29-11-5 per annum, the defendants' plea of payment having fallen to the ground. A decree will therefore be entered for the plaintiff for the sum of Rs. 89-10-3, that being the amount due for the three years for which this suit was brought.

We think that, under the circumstances of this case, each party ought to bear his own costs both in this Court and in the Courts below.

(1) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.*

ROOKHINI KANT ROY AND ANOTHER
(PLAINTIFFS) v. SHARIKATUNISSA
BIBEE AND ANOTHER (DEFENDANTS).*

The 15th May 1873.

*Variance between Pleading and Proof
—Suit for Rent—Failure to prove
Kabuliat—Admission.*

Baboo Kashi Kant Sen for the appellant.

Baboo Rosh Behari Ghose for the respondents.

COUCH, C.J.—This suit was brought to recover arrears of rent from 1274 to 1276 (1867 to 1869); the plaintiff claiming a balance of Rs. 222-7 for principal and Rs. 70-9 for interest, making a total of Rs. 293.

The judgment of the Subordinate Judge, which is appealed from, is not altogether clear, and it might at first sight appear that he had held that, because a part of the land had been washed away, and it could not be shown what the quantity was, the plaintiffs were entitled to receive the rent which was admitted by the defendants; but his decision was really founded upon the plaintiffs having failed to prove the kabuliat which fixed the amount of rent, and he has stated that there was no evidence on the part of the plaintiffs which would show that they were entitled to the amount at the rate they had estimated it at. Under these circumstances the Judge was right in taking the amount which was admitted by the defendants to be due as rent.

I must say I do not concur in those cases, if, as is said, there are any such, which have decided that, where a man sues for arrears of rent as due under a kabuliat, and the defendant denies the kabuliat, but admits that a certain amount of rent is due to the plaintiff, if the plaintiff fails to satisfy the Court that the kabuliat is a genuine one, the suit is to be dismissed altogether, and that the

* Special Appeal No. 945 of 1872, against a decree of the Subordinate Judge of Zilla Backergunge, dated the 12th February 1872, modifying a decree of the Munsif of Burrisal, dated the 31st July 1871.

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

The 18th August 1869.

*Admission—Variance between Plead-
ing 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 Beopin Behary Datt for the
respondents.

THE judgment of the Court was
delivered by

MARKBY, J. (KEMP, J., concur-
ring).—It will perhaps be most con-
venient in this case to dispose of the
fifth ground of appeal first; the plain-
tiff 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 posses-
sion; 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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CHOWDHRY
v.
SUMMERUDDI
LUKHEE.