

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Glover, and Mr. Justice Pontifex.

LUKHEE KANTO DASS CHOWDHRY (PLAINTIFF) v. SUMEER-
UDDI LUSKER AND OTHERS (DEFENDANTS).*

1874
Feb'y. 24.

Variance between Pleading and Proof—Amendment of Plaint or Issues—Suit for Rent—Failure to prove Kabuliat.

Where a landlord sued a ryot for arrears of rent alleged to be due under a kabuliat, and the Court found that such kabuliat had not been executed by the ryot, although he had occupied the land, the landlord is not entitled to have a further trial of the question whether any, and what amount of rent is due on account of the ryot's occupation of the land.

THIS was a suit to recover arrears of rent at a certain rate under a kabuliat. The defendants admitted the rate, but pleaded payment. It appeared that the defendants held jointly with another person, and an issue was framed as to whether such person ought not to have been joined as a co-defendant: this issue was decided in the plaintiff's favor on the ground that his suit was based on the kabuliat. On the facts the Courts below found that the defendants had held and occupied the land for a long time, but that the kabuliat upon which the suit was based was spurious, and they accordingly dismissed the suit.

On special appeal before Jackson and Mitter, JJ., it was contended that the plaintiff was entitled to have an enquiry whether any, and what, rent was due to him by the defendants for the use and occupation of the land; and the following cases were cited:—*Raj Coomar Singh v. Choto Raj Coomar Sing* (1),

* Special Appeal, No. 1899 of 1872, against a decree of the Subordinate Judge of Furreedpore in Zillah Dacca, dated the 8th of August 1872 affirming a decree of the Munsif of Bhanga, dated the 3rd of May 1872.

1874

Phoolabutte Kooer v. Gopal Mundur (1), Kishen Mohun

LUKHEE
KANTO DASS
CHOWDHRY
v.
SUMEERUDDI
LUSKUR.

(1) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

PHOOLABUTTEE KOOER (PLAINTIFF) v. GOPAL MUNDÜR (DEFENDANT) AND ANOTHER (INTERVENOR).*

The 26th June 1868.

Act X of 1859 s. 77—Suit for Rent—Variance between Pleading and Proof—Admission.

Baboos Chunder Madhab Ghose and Sib Chunder Chatterjee for the appellant.

Baboos Hem Chunder Banerjee and Anundo Gopal Palit for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—This was a suit for arrears of rent. The plaintiff, alleging himself to be the proprietor of an 8-anna share of Mauza Gedwah, sued one of the ryots in the village for rent. A third party intervened and alleged that he had been in possession and enjoyment of the rents of 4 annas out of the 8 annas which the plaintiff had claimed. The ryot supported the intervenor. The Judge on appeal has found that the plaintiff has not proved his possession and enjoyment of the rents of the 4 annas, and he goes on also to state that he is of opinion that the intervenor has not

proved his possession and enjoyment of that 4 annas of the rent.

On these two findings the Judge has dismissed the plaintiff's suit.

On behalf of the special appellant it is said that the question that the Judge had to try was as to the actual receipt and enjoyment of the rents by the intervenor, and that the Judge having found that the intervenor was not in receipt and enjoyment of the rents, the Judge should then, in accordance with s. 77 of Act X of 1859, have decided the suit according to the result of such inquiry. It is said that by the words of that section the Judge was bound under his finding to give a decree in favor of the plaintiff. The words of the law, we think, support this contention of the special appellant, and that, as between the claim of the plaintiff and that of the intervenor the Judge having found against the intervenor, was bound to decree for the plaintiff.

We therefore reverse the decision of the Judge and decree this appeal with costs.

As between the ryot and the plaintiff, we observe that there is also a point in dispute as to rates of rent. The document under which the plaintiff claims a higher rate than the defendant admits, namely, a *shark-nama*, had been held not to have been proved. The decree in favor of the plaintiff will therefore be only to the extent and at the rate admitted by the ryot.

* Special Appeal, No. 3413 of 1867, from a decree of the Officiating Judge of Zilla Tirhoot, dated the 19th August 1867, affirming a decree of the Assistant Collector of that district, dated the 28th December 1866.