APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Birch.

1874 *Jan.* 19 & *Mar* 9.

MAJORAM OJHA AND OTHER (SOME OF THE DEFENDANTS) *v.* RAJA NILMONEY SINGH DEO (PLAINTIFF). *

Regulation VIII of 1819, *s.* 11, *cls.* 1 *&* 3—*Sale of Patni—Rate of Rent—Incumbrance—Remand—Appeal—Act VIII of* 1859, *s.* 351—*Regulation VIII of* 1819, *s.* 11, *cls.* 1 *&* 3—*Costs.*

The grantor of a patni tenure who subsequently purchases the lands granted by him in patni at a sale of the patni tenure does not revert *ipso facto* to the position he formerly held as proprietor, and is not entitled to recover rent from the tenants at the rate he was receiving when he granted the patni, without reference to the rents realized by the patni-holder in the interim.

A lower Appellate Court is not competent to remand a case for a second decision except as provided by s. 351, Act VIII of 1859, and therefore has no power to remand a case when a Court of first instance has investigated the merits of the case and passed its judgment upon the evidence.

The objection, that a case has been improperly remanded by the lower Appellate Court, can be taken in special appeal from the decree passed upon the remand although a special appeal might have been preferred from the order of remand, but the appellants were held not entitled to their costs.

THIS was a suit against the shareholders of a certain village for arrears of rent for part of the year 1274 (1867-68) and for the whole of the years 1275 and 1276 (1868-69) and 1869-70) at a yearly rent of Rs. 210-8-11. The plaintiff had granted the lands, for which he now claimed rent, in patni, to one Annoda Persad, and had subsequently purchased the same at a sale of the patni tenure. He now contended that he was entitled to receive rents at the rate he was receiving when he granted the patni.

Only some of the defendants, the holders of a 2½-anna share of the village, appeared and pleaded that they held their tenures at a fixed quit-rent of Rs. 88-1-0, and they produced a copy

* Special Appeal No. 881 of 1873, from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 21st of January 1873, reversing a decree of the Deputy Commissioner of Manbhoom, dated the 6th July 1872.

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of a judgment in a suit brought to recover rent for the year 1267 (1860), in which, as between them and the patni talookdar it was declared that the rent payable by them was Rs. 88. The issue was fixed "from whom and to what amount can the plaintiff recover rent." The Deputy Commissioner gave the plaintiff a decree as against the defendants who appeared for the rent admitted by them. Against those who had not appeared an *ex parte* decree for the amount claimed was passed. The plaintiff appealed against the former portion of the decision to the Judicial Commissioner who held that the plaintiff was entitled to recover rents from the tenants at the same rate he was receiving when he granted the patni without reference to the amount realized by the talookdar in the interim; that the plaintiff by his repurchase of the *talook* from Annoda Persad had, by virtue of cls. 1 and 3 of s. 11 of Regulation VIII of 1819, reverted *ipso facto* to the position he held as proprietor; that the tenure in question was a *khiraji brahmutter* holding at a fixed rent; and that this was not a case in which notice under s. 13 of Act of X of 1859 could issue He was however of opinion that the evidence was insufficient to determine whether the amount of rent alleged by the plaintiff, or that alleged by the defendants, to be payable, was the right one, and remanded the case. Upon remand, no further evidence was adduced, and the Deputy Commissioner affirmed his former decision, expressing an opinion that notice should have been issued under s. 13 of Act X of 1859. An appeal was again preferred to the Judicial Commissioner who reversed the decision of the lower Court, and gave the plaintiff a decree for the full amount claimed with costs and interest. From this decision the defendants who had appeared, brought a special appeal to the High Court.

Baboo *Chunder Madhub Ghose* for the appellants.—The order of the Judicial Commissioner remanding the case was illegal; if he considered the evidence insufficient, he ought to have dismissed the plaintiff's suit under s. 352 of Act VIII of 1859. Only when the lower Court decides a case upon some preliminary point, so as to exclude evidence which the Appellate Court may

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consider essential, can a remand be directed under s. 351 of the Act. The lower Court decided this case on the evidence, and not on a preliminary point. [PONTIFEX, J.—Why did you not appeal from the order of remand? Is it not too late to raise that objection now that you have submitted to that order.] It is submitted it is not; see *In re Mirza Himmat Bahadur* (1). A special appeal lies from the decision of the lower Court in its entirety, and that could not be until the case was decided on the remand. It is submitted that under such circumstances as the present the law does not prohibit an appeal, although the appellants might not be allowed their costs. The principle of *In re Mirza Himmat Bahadur* (1) has been applied to subsequent cases—*Mahesh Chandra Das* v. *Madhab Chandra Sirdar* (2) and *Brindabun Dey* v. *Bisona Bibee* (3). Any interlocutory order

(1) B. L. R., Sup. Vol., 429
(2) 2 B. L. R., S. N. xiii.
(3) Before Mr. *Justice Phear* and Mr. *Justice D. Mitter*,

The 26th January 1870.

BRINDABUN DEY (DEFENDANT) *v.* BISONA BIBEE (PLAINTIFF).*

Suit for a Kabuliat—Grounds of Enhancement—Trial—Enhancement of Rent—Proof—Remand—Act VIII of 1859 ss. 352 *&* 354.

Mr. *G. A. Twidale* for the appellant.

Baboo *Anund Gopal Paulit* for the respondent.

THE judgment of the Court was delivered by

PHEAR, J.—The judgment of the lower Appellate Court is clearly wrong on the face of it.

The plaintiff sued the defendant for a kabuliat at enhanced rates of rent and the ground of enhancement on which she relied was the prevailing rate paid by adjacent occupiers of similar land. With regard to this the Judge says:—"It is said that there were no witnesses on the spot who actually paid at the rate claimed by plaintiff, but there was ample evidence to show that, if the rates were re-adjusted, they would come up to the rate claimed, and for that reason he appears to be of the opinion that the plaintiff has established her ground of enhancement.

I confess I am utterly unable to see that there was any evidence, according to the Judge's own account, before him which could justify this conclusion. The probability, or even the certainty, that, if the rates of the neighbouring occupants were re-adjusted, they would come up to the rate claimed does not, to my mind, make out that the rate claimed is actually being paid by neighbouring ryots.

But not only is the judgment of the lower appellate Court now sent up to us in my opinion bad in law,

* Special Appeal, No. 2264 of 1869, against the decree of the Officiating Assistant Judge of Zilla Chittagong, reversing a decree of the Deputy Collector of that district, dated the 13th February 1869.