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FAKIRUDDIN MOHAMMED ASAN CHOWDHRY v. NAJUMUNNISSA CHOWDHRAIN

land, as they do not form a part of the record; and on referring to Macpherson's Privy Council Practice, page 123, I find that "the Sudder Adawlut having decided a cause, an "application for review of judgment was made to it, and fresh "evidence was tendered. The Sudder Adawlut refused to "grant a review. The original decree was appealed from, "but not the order refusing a review. The Judicial Committee "declined to consider the additional evidence, although it was "included in the transcript."

The case alluded to in Macpherson is that of *Sheikh Imdad Ali* v. *Mussamat Kootby Begum* (1); and in page 7, their Lordships say: "that, as the appeal was from the decree of the 31st May 1831 "only, the objection was valid, and the subsequent order not "being appealed from, the documents produced to the Court "ought not to have formed part of the transcript."

As no appeal has been filed from the order passed on the application for review, I think this application ought to be rejected, and it is hereby rejected with costs.

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Feby. 24.

Before Mr. Justice Loch and Mr. Justice Hobhouse

KASIMUDDI KHANDKAR (PLAINTIFF) *v.* NADIR ALI TARAFDAR AND OTHERS (DEFENDANTS.)*

Kabuliat—Enhanced Rate—Potta—New Ground.

In a suit for a kabuliat, at an enhanced rate, under a potta, the term of which were that the lessee should hold the lands for four years rent-free; that after measurement the lands were to be assessed; that then that he was to pay four annas a biga in year 1265, six annas in 1266, and eight annas and three gundas in 1267 and for five years after, *held*, this did not constitute amokurari holding at a fixed rate. Case was remanded to ascertain what were the rates of similar lands in the neighbourhood in 1274, and decree to be made accordingly.

See also, 15 B. L. R. 126.

Held also, that a fresh ground could not be taken in appeal which had not been taken below, though based upon a Full Bench Ruling.

* Special Appeal, No. 1792 of 1868, from a decree of the Judge of Jessore, dated the 27th April 1868, reversing a decree of the Deputy Collector of that district dated the 31st December 1866.

(1) 3 Moore, I. A., 1.

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KASIMUDDI KHANDKAR v. NADIR ALI TARAFDAR.

Mr. *Rochfort* for appellant.

Baboos *Kali Mohan Doss* and *Bhawani Charan Dutt* for respondents.

THE facts appear sufficiently in the judgment delivered by

LOCH, J.—This was a suit for a kabuliat at an enhanced rate. The Judge has disposed of it by referring to a judgment of this Court, in the case of *Golam Ali* v. *Baboo Gopal Lal Thakoor* (1), and has held that the words "full customary rent" are equivlent to saying that, when the rent reaches that rate, it will be considered permanent. There is another ruling in the case of *Bharat Chandra Aitch* v. *Gaurmani Dasi* (2)

(1) 9 W. R., 65.

(2) *Before Mr. Justice Loch and Mr. Justice Hobhouse.*

BHARAT CHANDRA AITCH *v.* GAUR MANI DASI.*

The judgment in this case was delivered on the 11th January 1869, by

HOBHOUSE, J.—THE suit in the Court below was for arrears of rent at an increased rate. The defendant holds under what is called a jungle-buri howla tenure, by a potta dated 29th Baisakh 1250 ; and the questions in the Court below were much the same questions which are now raised in special appeal before us.

Special appellant contends:

First.—That he is not bound to pay enhanced rent, because his potta does not provide for, but rather in its terms precludes, enhancement.

Secondly.—If I understand him right, he argues that there can be no increase in his howla settlement, because no such increase had ever been made in such settlements since the rates of the *khosra* or under-tenures have risen from rupee 1-4 to rupee 1-8 a biga; and

Thirdly.—He contends, that if he is held liable to pay enchanced rent, he is entitled to have deducted from the amount of such enhancement whatever expenses he incurred in clearing the lands in making them fit for cultivation, his tenure having been in the first instance what is called jungle-buri tenure.

In support of his first contention, the special appellant relies upon the case of *Golam Ali* v. *Gopal Lal Thakoor* (1) and no doubt there is a very great similarity between the document discussed in that case and the document now before us. But the documents being different documents we do not think we should be justified in following any precedent, which does not really touch upon the very document actually befors us ; and it follows that we must put the best construction we can upon the document now before us. The terms in the document on which the special appellant relies, are these: that the lands covered by it shall be held rent free for a period of five years *viz.*, from 1250 to 1254, and for the year 1255; the lands shall bear a rate of five annas per bigas for the year 1256, a rate of 10 annas per biga; and that from the year 1257, the rate to be paid every year shall be the "*pura dastur*" or full customary rate of 14 annas.

On the terms of this document, the special appellant contends that the inten-

* Special Appeal No. 4 of 1868, from Jessore.

(1) 9 W. R., 65.

in which it is held that the words "full customary rate" refered to the highest rate for the time being, *i. e.*, at the time when the potta was drawn up.

Looking into the terms of the lease before us, we find that the lessee was to hold the lands for four years rent-free; and that after a measurement, the lands were to be assessed; that he was then to pay four annas a biga in the year 1265, six annas in 1266, and eight annas and three gundas in 1267, and for five years after. So that at the close of these five years, the lease would fall in. This, we think, is a much stronger case than that of *Bharat Chandra Aitch* v. *Gaurmani Dasi* referred to above; and under the terms of the lease before us, we think the defendants have no ground for urging that, by the words "full customary rates," the rates were to be considered as permanentfy fixed.

Another objection has been taken that the Full Bench Ruling case of *Golam Mahammed* v. *Asmutali Khan Chowdhry* (1) is applicable to this case. We think, however, that the respondent

(1) Case No. 1175; of 1867; 19th March 1868.

tion of the parties was that from the year 1257 and thereafter, no higher rate than the full customary rate of 14 annas should ever be taken for the lands. We think this contention is not sound. We think the meaning of the parties simply was, that inasmuch as the ryot, appellant before us, was bringing those lands into cultvation for the first time, he should, as an encouragement and as a re-payment for his expenses and labor, pay for these lands for a certain period either no rent at all, or at something less than customary rates; and that when that period had expired, he should pay for the lands at full customary rates, whatever they might be for the time being, the rate of 14 annas being found in this case the rate at the period for the settlement; and we think it would be going too far were we to say that by such a condition as is here recited, the landlord bound himself never to exercise the privilege which, generally speaking, all landlords have of enhancing rents under certain given circumstances.

On the second objection taken, we remark that when once it is determined that the plaintiff may enhance the rates in question, the only question then left is to ascertain what is the fair rate at which, under the pleadings, that enhancement should be made; and we think that the Court below has, upon the evidence, arrived at a proper finding on this point. It says that when the under-tenants paid 1 rupee 4 annas per biga to the howladar, he paid 14 annas to the landlord. So when now the under-tenants pay 1 rupee 8 annas to the howladar, it is only fair that he should pay one rupee to the landlord. We think this finding is a proper one of a fair and equitable rate.

And on the third objection taken, we agree with the Appellate Court below. We think the appellant's expenses in bringing the lands to the state in which they now are, cannot be taken into consideration in assessing the enhanced rates to be paid; for a consideration had already beeo given for these expenses and it was this, *viz.*, that of paying no rent at all for five years and that of paying less rent for the two years immediately preceding the year 1257.

In this view of the objection taken, we dismiss the special appeal with costs.

LOCH, J.—I entirely concur.

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cannot be allowed to make use of the objection raised in that case at this stage of the suit. The questions raised in that case were not urged in this suit in the Courts below. The simple question there raised was, whether the plaintiff could ask for a kabuliat, at an enhanced rate, under the terms of the lease. This, therefore, is the only question which we think can be decided upon now. The case, we think, should be remanded to the first Court to ascertain, from the evidence on the record what were the rates payable in 1274, by the same class of ryots for lands of similar descriptions, and with similar advantages in the places adjacent. The costs to follow the result.

HOBHOUSE, J.—I should have been content to rest my judgment in this case, on the judgment which Mr. Justice Loch and I have already given in a somewhat similar case, that of *Bharat Chandra Aitch* v. *Gaurmani Dasi* (1), but I think that the terms themselves of the kabuliat, in this instance, expressly declare that the lease in question is not a mokurari lease; for by those terms it is declared that the rental, which the defendant now sets up as a mokurari rental, is only to last for a period of five years, from the year 1267. I think, therefore, that the Judge is wrong in holding this lease to be a mokurari one, and I do not think that the special respondent is entitled, at this stage of the suit, to take an advantage of the ruling in the case of *Golam Mohammed* v. *Asmutali Khan Chowdhry* (2). The plaintiff sued for a kabuliat at an enhanced rate. The defendant did not contend that the suit ought to be dismissed for any of the reasons specified in the Full Bench Ruling quoted above, but he raised two points: he said, first of all, that he was not bound to give a kabuliat at an enhanced rate at all, because his present lease was a mokurrari one; then he said that, if he was bound to give a kabuliat, it was overrated at rates lower than those claimed by the plaintiff.

The only question remaining now between the parties is as to what those rates are upon the evidence, and I agree, with my learned colleague, in remanding the case to the first Court to ascertain from the evidence on the record, what those rates should be; and when the Court has determined those rates, it will give the plaintiff a decree for a kabuliat at the rates it finds for the year 1274.

(1) *Ante* 266 N.

(2) Case No. 1175 of 1867 : 19th March 1868. Sup. Vol. 538.