

Before Mr. Justice Loch and Mr. Justice Mitter.

1869  
Feb'y. 16.

KALAM SHEIKH AND OTHERS (DEFENDANTS) v. PANCHU MANDAL AND ANOTHER (PLAINTIFFS.)\*

*Kabuliat—Landlord and Tenant.*

The defendant was under-tenant in respect of lands which his lessor held under a *modafut* from the zemindar. Subsequently the lessor left, and the zemindar gave to the defendant a potta for part of the lands covered by the *modafut*, and to the plaintiff a potta for the whole land covered by the original *modafut*, but did not assign any of his rights, as zemindar to the plaintiff, to recover or enhance the rents reserved in the potta he had granted to the defendant.

*Held*, in a suit for a kabuliat at an enhanced rate, that the plaintiff and defendant were not in the position of landlord and tenant, so as to enable the plaintiff to maintain his suit.

THE defendant in this case was an under-tenant of one Jaga Mohan Sircar of part of the land which the latter held under a *modafut* from the zemindar. Jaga Mohan Sircar left the property, and then the defendant applied to the zemindar, who in 1257 granted him a potta of part of the lands which had been comprised in Jaga Mohan Sircar's *modafut*. Afterwards in Aswin 1269, the plaintiff obtained from the same zemindar a potta for all the lands covered by the original *modafut* of Jaga Mohan Sircar, while the potta under which the defendant held under the zemindar still subsisted. The plaintiff now sued the defendant for a kabuliat at an enhanced rate of the lands held by him under his potta. The Deputy Collector dismissed the suit, on the ground that the plaintiff had failed to adduce any evidence that the relations of landlord and tenant existed between him and the defendant. The Judge reversed this decision, and declared that the plaintiff was entitled to a kabuliat, on the ground that he had obtained a lease of all lands covered by the *modafut*, formerly held by Jaga Mohan Sircar, and the lands held by defendants were part of those lands.

The defendants then appealed to the High Court, on the following grounds:—

\* Special Appeal No. 1656 of 1868, from a decree of the Officiating Additional Judge of Jessore, dated the 7th April 1868, reversing a decree of the Deputy Collector of that district, dated the 25th January 1867.

1. That no suit for a kabuliat would lie, when the relationship of landlord and tenant was not proved to exist by a contract to pay rent.

2. That the lower Appellate Court was wrong in holding that the payment of rents by the plaintiff to the zemindar, created the relationship of landlord and tenant between the plaintiff and the defendant.

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Baboo *Rama Nath Bose* for appellants.

Baboo *Ananda Gopal Palit* for respondents.

MITTER, J.—This was a suit for a kabuliat at an enhanced rate. The plaintiff in this case held a potta from the zemindar, alleged to have been granted to him in Aswin 1269. The defendant claimed under a potta granted to him by the same zemindar in 1257. The Deputy Collector dismissed the plaintiffs' suit, holding that the plaintiff failed to give any evidence that the defendant was his tenant. On appeal, the Judge reversed the decree of the Deputy Collector, upon the ground that, inasmuch as the plaintiff had obtained a lease of all the lands appertaining to the *modafut* of Jaga Mohan Sircar, and inasmuch as the lands in dispute were included in that *modafut*, the plaintiff was entitled to obtain a kabuliat from the defendant.

We are of opinion that this decree is not correct. On referring to the pottas, propounded by both the parties to this suit, we find that the defendant was formerly an under-tenant of Jaga Mohan Sircar; and that on the desertion of the latter, the defendant applied to the zemindar for a settlement of the said *modafut*, and accordingly obtained a lease of part of the land appertaining thereto. Under such circumstances the lease, subsequently granted to the plaintiff of the whole of the *modafut*, cannot constitute the plaintiff the landlord of the defendant. For it is clear that, with regard to the land in dispute, the plaintiff and the defendant stand precisely in the same relation towards the zemindar; and as the plaintiff has not obtained any assignment from the zemindars of the zemindar's right to collect or to enhance the rent reserved in the lease of the defendant, he is not in a position to treat the defendant as his tenant.

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Nor can the circumstance of the zemindar refusing to accept rent from the defendant, create a right on the part of the plaintiff to sue the defendant for a kabuliat.

Under such circumstances it appears to us that the mere fact of the zemindar granting to the plaintiff a lease of the whole of the lands appertaining to the *modafut* of Jaga Mohan Sircar, cannot create the relation of landlord and tenant between the plaintiff and the defendant, so as to entitle the former to institute a suit for a kabuliat at an enhanced rate. We, therefore, reverse the Judgment of the lower Appellate Court, and decree this appeal with costs in this Court and in the lower Appellate Court. The decree of the first Court is affirmed.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

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Feb'y. 15.

DURGARAM ROY AND OTHERS (DEFENDANTS) v. RAJA  
NARSING DEB (PLAINTIFF).\*

*Limitation—Objection—Special Appeal—Act XIV. of 1859, cl. 5, s. 1—Act  
VIII. of 1859, s. 246.*

An objection, not taken in cross-appeal before the lower Appellate Court, cannot be taken in special appeal. But if the case be remanded for new trial, such objection may then be taken before the Court of first instance.

On attachment of certain property, plaintiff and defendants preferred their respective claims thereto. The plaintiff's claim was disallowed. But the defendants' claim was allowed. The plaintiff, after the lapse of a year from the date of the order disallowing his claim, sued to recover possession of the said property. The defence was that the suit was barred by lapse of time under clause 5, section 1, Act XIV. of 1859, and section 246, Act VIII. of 1859.

*Held*, Clause 5, Section 1, Act XIV. of 1859, and section 246, Act VIII. of 1859 do not apply to such a suit.

THIS was a suit for possession of a mauza in Pergunna Bishnupore, a resumed mehal, on the allegation that the said mehal was the ancestral rent-free dewattra property of the plaintiff; that the defendants' ancestors, the late Kamalakant Roy, Panchanan Roy, and Ganganaran Roy, on the allegation that they were purchasers thereof, had obtained a decree, but on the 12th Jaishtha 1236 (1829) on receipt of a sum of Rs. 400

\* Special Appeal, No. 1927 of 1868, from a decree of the Principal Sudder Ameen of East Burdwan, dated 7th May 1868, reversing a decree of the Moonsiff of that district, dated the 12th August 1867.