

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

SRIDHAR NANDI (DEFFNDANT) v. BRAJA NATH KUNDU  
CHOWDRY AND OTHERS (PLAINTIFFS.)\*

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Dec. 3.

*Onus Probandi—Lakhiraj—Enhancement of Rent.*

The suit was for enhancement of rent. The defendant set up that certain plots of land, rent of which was sought to be enhanced, were lakhiraj, and therefore not liable to pay rent.

*Held*, that the *onus* was not upon the defendant to prove the land was lakhiraj, but upon the plaintiff to prove that the land was *mâl*, or rent-paying.

*Semble*.—The Courts are accustomed to require some *primâ facie* evidence from defendants raising such defence, that they hold some lakhiraj lands.

Baboo *Ramanath Bose* for appellant.

Baboo *Tara Prasanna Mookerjee, Sham Lal Mittra, and Mahendra Lal Seal* for respondents.

THE facts of the case fully appear in the judgment of the Court which was delivered by.

E. JACKSON, J.—This appeal only refers to certain plots of land which the defendant has alleged to be lakhiraj, and for which he, therefore, contends that the plaintiff's suit for enhancement of rent should be dismissed. In support of his plea that the land is lakhiraj, he has put in his taidad and kabalas; the Judge finds that these are not even *primâ facie* evidence of a lakhiraj title, that the *onus* of proving that these lands are lakhiraj is upon the defendant, and that it is for him to prove that these lands are not included within the tenure which the defendant held from the plaintiff. To each of these points the special appeal relates. We are of opinion, as we have already stated in several other decisions, that the Judge is wrong on all three points. It is not for the defendant to show that this land is not included within the *mâl* tenure; the *onus* is not upon the

\* Special Appeal No. 1760 of 1868, from a decree of the Judge of Hooghly dated 27th March 1868, modifying a decree of the Deputy Collector of that district dated the 31st July 1867.

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defendant to prove that these lands are lakhiraj ; the *onus* is upon the plaintiff, as it has been frequently stated in numerous decision of this Court ; the *onus* is on the plaintiff to prove that these lands are *mâl* lands, and that they have been paying rent. At the same time, to prevent the ryots from merely setting up this plea without any evidence at all that they hold any lakhiraj lands, the Courts have been accustomed to require the defendants to show, by some *primâ facie* evidence, that they do hold lakhiraj lands.

In this case the defendant has put in kabalas and extracts from the lakhiraj register, which are such sufficient *primâ facie* evidence as is required. We think the Judge is wrong in saying that it is not *primâ facie* evidence ; and it is evident from the reasons that the Judge gives for so holding, that he makes no distinction between *primâ facie* evidence and complete and conclusive evidence

We are obliged, therefore, to reverse the decision of the Judge in this suit, in so far as it affects the lands which the defendant claims as lakhiraj ; and as it appears from the decision of the Judge that the plaintiff has not proved that these lands are *mâl*, we decree this appeal, and dismiss the plaintiff's suit as far as it refers to these lands.

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

COLVIN, COWIE, AND OTHERS (PLAINTIFF) v. MRS. BARBARA OWEN JULIA ELIAS AND OTHERS (DEFENDANTS.)\*

*Plaint—Act VIII. of 1839, s. 246 —Claim—Declaratory Decree.*

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint.

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*Held*, that a party against whom an order has been obtained under section 246, Act VIII. of 1839, must, if he sue for its reversal, assert substantially the same right as that which has been contended for in the execution.

*Held*, by JACKSON, J., that in a suit for declaration of title, defendants must have given a cause of action, by impugning it antecedently to plaint filed even though their written statement be hostile.

The *Advocate-General* and Baboo *Ashutosh Dhur* for appellants.

\* Special Appeal, No. 2204 of 1868, from a decree of the Judge of East Burdwan, dated the 21st May 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 19th February 1868.