adduced in support of the pottah. The Judge, we observe, has given no reasons for admitting this evidence at the appeal-stage, and after it had been rejected by the Court of first instance, and his judgment is, therefore, defective according to the ruling of the Privy Council in the case of Gunga Gobind Mundul, 4th March 1867 (7 Weekly Reporter, p. 21).

And with reference to the objection taken by the special appellant, that the pottah, even if admitted, could only bind Zoolfekar Ali, the Judge has declined to consider the point, on the ground that it had not been urged in the Court below.

Now, in the first Court, the plaintiff got a decree on the failure of the defendant to prove his pottah, and he had no opportunity of taking the objection referred to, until the case was heard by the Judge on appeal.

We think that the special appellant was clearly entitled to take the objection when he did, and that the Judge ought to have disposed of it. It is admitted that the only evidence in support of the pottah is the admission of one of the sharers of a fractional part of the estate; and this evidence, if receivable, cannot bind the remaining co-sharers, who are not shown to have had anything to do with granting the lease, or to have even known of its existence.

The case must go back to the Judge. He will first give his reasons for admitting the copy of Zoolfekar's deposition as evidence against the special appellant; and if he does admit it, he will only use it as against the party making it. The special appellant is the theekadar of the entire 16 annas of the estate, and is in any case (there being no other evidence in favor of the defendant) entitled to a decree for any portion of the property not covered by Zoolfekar Ali's share.

It has been urged upon us, as a cross-appeal by the special respondent under Section 348, that the Judge ought also to be directed to find as to the increase in the productive powers of the land; but this, we think, cannot be done at this stage of the case. The special respondent admits receipt of the notice, and therefore knew from the first the ground on which enhancement was sought; but he took no objection to the rates *quoad* the ground of notice, but contented himself with relying on his pottah. We therefore reject his application, and remand the case with reference to the remarks above recorded. Costs will follow the result.

The 5th January 1869.

*Present:*

The Hon'ble G. Loch and F. A. Glover, *Judges.*

**Jurisdiction—Suit for enhanced rent—Stipulations in a kubooleut—Damages—Rent in kind —Act X. suits not summary.**

Case No. 147 of 1868 under Act X. of 1859.

*Regular Appeal from a decision passed by the Collector of Maldah, dated the 20th May 1868.*

Nubo Tarinee Dossee and others (Plaintiffs), *Appellants,*

*versus*

Mr. J. J. Gray (Defendant), *Respondent.*

*Baboos Onookool Chunder Mookerjee* and *Anund Chunder Ghossal* for Appellants.

*Baboo Juggodanund Mookerjee* for Respondent.

In a suit for arrears of rent at an enhanced rate on a kubooleut in which defendant had agreed to pay a fixed rent for plaintiff's share of the estate, with a further stipulation that he was to measure and enhance the rents of the ryots, and pay over to the zemindar half the enhanced rent:

HELD that the suit was cognizable by a Revenue Court.

HELD that damages on account of the wanton destruction of trees, though stipulated for in a kubooleut, cannot be claimed as rent; but that a stipulation to supply a number of mangoes yearly is one to pay part of the rent in kind, and the value of the mangoes is realizable as rent in a Revenue Court.

Suits for rent under Act X. of 1859 are not summary suits, but, to all intents and purposes, regular suits only tried by Collectors.

*Loch, J.*—THIS suit has been brought for arrears of rent for 1271, 1272, and 1273. It appears that the defendant executed a kubooleut in favor of the plaintiff, agreeing to pay rent at the rate of 8,884 rupees for plaintiff's share of the Zemindary Shershahabad, &c. There was a further stipulation in that kubooleut that the defendant was to measure and to enhance the rents of the ryots, and of that enhanced rent he was to pay over half to the zemindar, and retain half for himself. He was also bound at the close of each year to render an account to the zemindar.

The present suit was instituted on the 2nd Bysack 1275, and the Collector has held that the claim for rent of 1271 is barred by limitation, the suit not having been brought within three years from the close of the Bengal year 1271; and he has further held that, as the suit is not brought for the jumma specified in the kubooleut, but for the amount of the enhanced rent realized from the ryots

under the provisions of the lease, it is a suit only cognizable by the Civil Court. He has, therefore, dismissed the claim.

We think that the Collector has taken an erroneous view of the nature of the claim. He has treated it as if it were similar to other stipulations in the kubooleut, such as damages for trees wantonly destroyed, supply of 1,000 mangoes yearly; and he has considered that all these items can only be disposed of by a regular suit, and that it was never contemplated that they should be brought before the Revenue Court in summary suits, each item requiring judicial enquiry.

It is necessary to point out to the Collector the difference in these items. The stipulation for damages on account of wanton destruction of trees could not be claimed as rent, and could not, therefore, be sued for in the Revenue Court. The supply of 1,000 mangoes yearly is clearly part of the rent paid in kind, the rest in cash, and the value of them is clearly realizable as part of rent in the Revenue Court.

Further, the Collector is wrong in considering suits for rent under Act X. of 1859 to be summary suits. They are not summary suits, but they are, to all intents and purposes, regular suits only tried by the Collectors, and not by the Civil Court; and, therefore, there can be no doubt that every point on which the parties are at issue which comes before the Collector does involve judicial enquiry.

Then, with regard to the particular item which is claimed in the present case, we think that it is clearly a part of the rent, and may be sued for as rent. The defendant agreed to pay a certain fixed sum, and knowing that higher rents might be realized from the tenantry, he agreed with the plaintiff that, if permitted to enhance the rents, he would, in addition to the sum already entered in his kubooleut, pay to him half of whatever should be realized from the tenants. He was bound to render an account every year to the plaintiff; and on looking at the accounts, if anything were in balance, whether part of the fixed rent as stipulated in the kubooleut or part of the enhanced rent, and were not paid up, we see no reason why plaintiff should be debarred from suing for such sum in the Collector's Court as arrears of rent. The case in V. Weekly Reporter, page 34, Act X. Rulings, is very much in point. In that the dur-putneedar agreed, in addition to his rent, to realize and to pay to the putneedar the arrears of the rent then due by the ryots to the putneedar; and it was held by this Court that the putneedar could sue for such rent realized by the dur-putneedar in the Revenue Court.

It has been attempted by the pleader for the respondent to show that half of the enhanced rents which were to remain in the hands of the defendant must be considered merely as remuneration for the trouble that he took in measuring the lands and enhancing the rents, but this is a mistaken view; but whatever it may be, it certainly did not in any way alter the character of that money which was to be paid to the zemindar. A Full Bench decision, reported in X. Weekly Reporter, page 41, has been quoted by the respondent to show that a case of the nature before us is cognizable by the Civil Court. That case is entirely at variance with, and is by no means applicable to, the present case. We think the suit is one for rent, and is triable by the Revenue Court; but as there is no sufficient evidence to dispose of this case, we therefore remand the case to the Collector that evidence may be called for, and the case disposed of on the merits.

With regard to the rent of 1271, we concur with the opinion expressed by the Collector that the claim for the rent of 1271 is barred by limitation. The costs of this appeal will follow the ultimate result of the case.

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The 5th January 1869.

*Present :*

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

**Execution—Proceedings to keep alive a decree.**

Case No. 444 of 1868.

*Miscellaneous Appeal from an order passed by the Additional Judge of Chittagong, dated the 6th August 1868, reversing an order of the Moonsiff of Howlah, dated the 30th March 1867.*

Ram Soondur and another (Decree-holders), *Appellants,*

*versus*

Ram Kanto and another (Judgment-debtors), *Respondents.*

*Baboo Okhil Chunder Sein* for Appellants.

*Baboo Bama Churn Banerjee* for Respondents.

Plaintiff, as decree-holder, applied for execution, and the property attached was sold. Intermediately, another