in which they were filed and trying an issue as to their genuineness, the Judge would have adopted this course of proceeding before pronouncing judgment. It appears, however, that the Judge preferred deciding the case without removing the doubts he entertained, as he might have done by a very simple enquiry and investigation.

The error into which he thus fell, the party against whom the decree was passed endeavoured to rectify by an application for review. That application was admitted, and the case was ordered to be heard two months after the admission of the application for review. At the hearing on review, both parties came prepared with their evidence upon the principal issue then before the Appellate Court, namely, whether these farkhutees were genuine or not, and upon this issue additional evidence was adduced on both sides. The additional evidence adduced by the plaintiff satisfied the Court that these farkhutees were genuine; and relying principally upon their genuineness, the Judicial Commissioner reversed his former decision. If the matter of complaint put forward by the special appellant merely consisted of the particulars I have mentioned, hardly any objection could be raised to the decision of the Court below; but unfortunately various other matters, which appear not altogether relevant to the case, were introduced into the judgment of the Lower Appellate Court, and other points, which the Judicial Commissioner had at first thought went far to negative the genuineness of the mokurruree pottah, were further allowed to be explained by fresh evidence, and these circumstances have given rise to the just complaint of Mr. Piffard which he has very ably put forward—that it would be highly dangerous to allow parties on review to explain away such parts of a judgment as are obnoxious to them by the production of fresh evidence. In this remark, I believe, every one here fully concurs; but inasmuch as it appears that these farkhutees did exist to the knowledge of defendant, and it was simply an omiss not to have gone into the question whe they were genuine or not, I do not thi that any injustice has been committed investigating and adjudicating upon the genuineness, and in fact I consider injustice would have been committed if such investigation had not taken place. Therefore, while admitting the correctness of the general remarks made by Mr. Piffard as to the impropriety of allowing parties the liberty to prop up a failing case by the production of additional evidence in the appeal or review-stage, the present case is, I think, clearly distinguishable. In this particular case, the Judicial Commissioner was perfectly right in satisfying his conscience in the way he has done on a matter as regards which he was admittedly not satisfied, and in making the enquiry which he has made for the purpose of removing the doubts which he at first entertained, and which, on being removed, enabled him to give judgment in favour of the plaintiffs. This being so, there is no reason why this case should be heard as a regular appeal; and as it is admitted that, in special appeal, the judgment of the Lower Appellate Court is impregnable, this special appeal must be dismissed with costs.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Act VIII. of 1835—Sale of tenure—Incumbrances.

Case No. 1382 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 22nd April 1870, reversing a decision of the Moonsiff of that District, dated the 25th August 1869.

Meer Jaseemooddeen (Plaintiff), *Appellant,*

versus

Shaikh Munsoor Ali and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Okhil Chunder Sein for Respondents.

A sale under Act VIII. of 1835 does not convey a tenure free from all incumbrances, unless there was a stipulation in the documents by which the tenure was created providing for its sale for arrears of rent.

Mookerjee, J.—The plaintiff brought this suit for possession of a certain piece of land, on the ground that it is covered by his *howladaree* pottah dated 1267; that the land is situated in talook Mojid Mali, which has been sold under the provisions of

Act VIII. of 1835, and purchased by the defendants who have dispossessed him from this *howla*.

The defendants, among other pleas, contended that this pottah was a false and fabricated document, and that the plaintiff's claim was a false one; that, the sale having been held under Act VIII. of 1835, they acquired the talook free from all incumbrances, and that therefore, the plaintiff has no right to recover possession of this land.

The first Court gave a decree to the plaintiff, finding that the pottah produced by him was genuine, that it was registered, that possession was held under that pottah, and that, the defendants having dispossessed him, the plaintiff was entitled to recover.

On appeal, the Judge, after having required the appellant, defendant, to produce the pottah constituting the original tenure which had been sold, takes up the case on another day and says: "The original *talookee* "*pottah* of 1856 has been filed. It con- "tains no clause the effect of which would "be to render such tenures as might be "created by *howladaree pottahs*, such as "that relied on by the plaintiff, superior to "the result of a sale of the talook for its "own arrears." And he considers that the sale under Act VIII. of 1835 has cancelled the pottah, because it was a sale of the tenure for its own arrears.

We find, however, that the original *talookee pottah* has not been filed.

It has been contended on special appeal before us that the sale of this tenure under Act VIII. of 1835 did not, under the Full Bench Ruling of this Court reported in 7 Weekly Reporter, page 260, confer upon the purchaser any right to hold the tenure free from all incumbrances imposed upon it by the former holder; and that, therefore, it has not the effect of rendering inoperative the pottah created by the defaulting talookdar, but that the purchaser is only entitled to rent.

We find this contention to be good. The sale under Act VIII. of 1835 does not convey to the purchaser the tenure free from all incumbrances, "unless there was a sti- "pulation in the documents by which the "tenure was created providing for the sale "of such tenure for arrears of rent." The pottah of the tenure sold has not been filed in this case, nor is there any contention that the documents contain the stipulation referred to above. The only plea raised by the defendant was that the *howladaree pottah* set up by the plaintiff was false. The *howla pottah* of the plaintiff, therefore, if proved to be genuine, would not fall by the operation of the sale under that Act. The Judge, being of opinion that the mere fact of the sale gets rid of the tenure, considers "that the question of the genu- "ineness of the pottah in question need "not be gone into." As we are of opinion that the view taken by the Judge of the law is not correct, the case must go back to him for an adjudication upon the question of the pottah. The Judge should enquire into the genuineness or otherwise of the pottah, and decide the case according to the result of that enquiry. We, therefore, remand the case to the Judge for a decision on the merits with reference to the above remarks.

Costs to follow the final result.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Parties—Benamee purchases—Beneficial ownership.

Case No. 1130 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 21st March 1870, reversing a decision of the Moonsiff of Soodharam, dated the 31st May 1869.

Akbur Ali (Plaintiff), *Appellant,*

versus

Mahomed Faiz Buksh and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboo Chunder Madhuh Ghose for Respondents.

In a suit by a father against a son to recover the title-deeds of certain property alleged to have been purchased by the plaintiff in the name of the defendant when the latter was about 2 or 3 years old, which title-deeds were said to be fraudulently retained by the son, the defendant did not appear, but two other persons who alleged that they were mortgagees from the son were made parties.