The plea of limitation was held to fail in a case where it was impossible to distinguish the defendant's possession in his own right from his possession as farmer of the plaintiff.

But the Court refused to allow a decree to stand which gave to the plaintiff something (*i. e.*, lands whose boundaries were) unascertained and which might after all not be ascertainable.

Jackson, J.—These two appeals have been argued almost simultaneously, and both cases have been disposed of in a single judgment by the Moonsiff as well as by the Lower Appellate Court. The plaintiffs are mainly, it seems, the same parties, though there are some one or more concerned in one case who are not concerned in the other. In suit No. 1288 the defendants are Lalljee Singh and others, and in suit No. 1287 the defendants are Nuthoo Singh and others. In both cases the plaintiff sued to recover certain specified parcels of land, being portions of putnees, described and set out with particularity in the *khusrah* of the Collectorate.

The defendants set up the plea of limitation, and they moreover denied the plaintiff's title. It will be more convenient to deal with the case in which Lalljee and others are defendants, namely, appeal No. 1288, first. The plaintiffs have had decrees in their favor in both suits. As to the defendant Lalljee Singh, the plea of limitation must fail, because the defendants who, it appears, hold other lands in the vicinity, also held in farm some share of the plaintiffs, and therefore it does not lie in their mouths to say that they have been holding adversely to the plaintiffs If the lands now in dispute be found to belong to the plaintiff they must be given up, because it would be impossible to distinguish the defendant's possession in his own right from his possession as farmer of the plaintiff. But there is another and a very serious objection to the judgment of the first Court which has been confirmed by the Subordinate Judge.

The decree as we read it, taken by itself, has the appearance of a final decree, for it purports to give the plaintiff the parcel of land claimed according to the boundaries and the description given in the *khusrah*. But it is manifest, on looking to the judgment, that the Court was unable to ascertain before the decision of the suit what were the precise position and boundaries of the land claimed. In fact, by the terms of the judgment, the Court expressly reserves the ascertainment of these particulars by directing that an Ameen shall be sent after the rainy season to measure and ascertain the boundaries of the land. Therefore the decree, although it appears final, is not so, and Mr. C. Gregory, who appears for the respondent, is unable to give any explanation of how the decree and the judgment do not conform.

There must have been some error on the part of the officer who drew up the decree, because it is not in accordance with the judgment. We cannot allow a decree to stand which gives to the plaintiff something unascertained, and which might after all not be ascertainable. This is not like a case where an account is ordered to be taken, or where wassilat has to be calculated; but it is a suit for a certain specified parcel of land, and the decree must define the boundaries.

This case (No. 1288) in which Lalljee Singh is concerned must therefore go back to the first Court, the decree of the Lower Courts being set aside, with direction that the necessary enquiries may be completed and a final decree drawn up.

In the other case No. 1287, in which Nuthoo Singh is defendant, the ground on which the plea of limitation ought not to prevail in the other case does not exist. Nuthoo Singh and the others deny that they ever held a share in the plaintiff's land, and therefore the decision in Lalljee's case cannot apply to this case. The case must go back to the Lower Appellate Court in order that it may determine the plea of limitation on its merits. If the determination be in favor of the defendants, then there is an end of the suit; but if it be determined in favour of the plaintiff, then the case will go to the first Court with the like directions as in the other cases.

Markby, J.—I concur in the order of remand.

The 2nd May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (Plea of want of)—**Conflicting Claims to Land—Appeal to Judge—Special Appeal—Benamee and Equitable liability.**

Cases Nos. 1310 and 1313 of 1871 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Beerbhoom, dated the 22nd June 1871, reversing a decision of the Deputy Collector of that district, dated the 28th September 1870.

Hurish Chunder Roy (Defendant), *Appellant,*

versus

Poorna Soonduree Debee (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Sreenath Doss and *Rash Beharee Ghose* for Respondent.

Where a Deputy Collector determined a question relating to an interest in land as between parties having conflicting claims, although in a former part of his decision he was of opinion that a Revenue Court was not competent to entertain and decide the question, the appeal was held to lie to the Judge; but as this objection was not taken in the Lower Appellate Court, the High Court declined to entertain it in special appeal.

The Revenue Courts were held not competent to try a question of *benamee* and equitable liability arising out of a suit for rent where the relation of landlord and tenant was clearly and distinctly denied.

Kemp, J.—These two appeals No. 1310 and No. 1313 have been heard together and one decision will govern the two cases. We have had the advantage of a very able argument by the pleaders on both sides. The suit was brought against the defendant No. 2, special appellant, for arrears of rent. The allegation was that there is a *mowrosee jote* in *mouzah* Dourka originally held in the name of one Shama Churn Mookerjee. The plaintiff Poorna Soonduree Debee is the purchaser of this *jote*, or rather her husband purchased it *benamee* in her name. The allegation of the plaintiff is that in this *jote* in which the defendant is also a co-sharer, 1 beegah 16 cottahs of land was taken in lease by the defendant No. 1 Gour Soondur Mookerjee and another at a jumma of Rs. 4-4 annas on a *kubooleut* executed by them Gour Soondur and another, but that the real beneficial owner was the defendant No. 2, Hurish Chunder Roy. The suit is for the rent of the two holdings.

The defendant Hurish Chunder Roy denied the relationship of landlord and tenant; he also denied the execution of the *kubooleut* and alleged that the *mowrosee jote* was the joint property of the defendant and of the plaintiff's husband Protab Chunder.

The first Court, the Deputy Collector, was of opinion that the question could not be decided by the Revenue authorities; but he went further, and although he held that he had no jurisdiction to try the case, went into the merits and found that there was nothing to prove that Hurish Chunder Roy executed the *kubooleut*. He accordingly dismissed both suits.

On appeal, the Judge, Mr. Craster, on the question whether the Revenue Courts had power to entertain this suit, after commenting upon the case of Prosunno Coomar Roy Chowdhry, decided by the Full Bench, to be found, in Volume VIII. Weekly Reporter, page 428 was of opinion that that ruling did not apply to the circumstances of the present case. The Judge was of opinion that this case was one which the Revenue Courts were fully competent to try, and he refers, in support of his opinion, to the case of Bipin Beharee Chowdhry *vs.* Ram Chunder Roy, reported at page 12, Volume XIV., Weekly Reporter, and also to a case to be found in Volume IX. page 17. The Judge then says that it is true there is a decision in Volume XI. Weekly Reporter, in the case of Kishen Buttee Misrain *vs.* Hickey, at page 406, which conflicts with the decision cited above, but that he prefers to be guided by the decision first cited by him. He, therefore, held that the Revenue Court was competent to entertain the question. On the merits he found that Hurish Chunder was in possession and that there was sufficient evidence to warrant the Court in concluding that he was the tenant actually in possession of the land and liable for the rent claimed. The decision of the Deputy Collector was therefore reversed in both csaes and the appeal decreed.

The defendant is the special appellant, and the first ground raised by him in special appeal is that the Judge had no jurisdiction to try the appeal, inasmuch as the decision of the Deputy Collector did not determine any question relating to a title in land or to some interest in land, and therefore that, under section 153 of Act X. of 1859, there was no appeal to the Judge; that the appeal, if any, from the decision of the Deputy Collector, which was a decision on a question of whether rent was due or not, would lie to the Collector, and therefore that, on the point of jurisdiction, the Court ought to set aside the decision of the Judge.

The second point is that the Judge was wrong in holding that the question of *benamee* and equitable liability arising therefrom, as raised in the present case, could be determined by a Revenue Court under Act X. of 1859; and, lastly, on the merits that the mere fact of the defendant having had possession of the land which he claimed to hold direct under the proprietors and not as tenant under the plaintiff, it was not a possession which entitled the Court below to assume that the special appellant was liable to pay the rent claimed by the plaintiff.

On the first question raised, namely, the question of jurisdiction, we may observe that this objection was not taken in the Lower Appellate Court. Moreover, we are of opinion that a question relating to an interest in land as between parties having conflicting claims, was determined by the judgment of the Deputy Collector, for, although the Deputy Collector in the first part of his decision was of opinion that a Revenue Court was not competent to entertain and decide the question, he did really enter into and determine it.

The question at issue in the first Court, and which was determined by that Court, was whether Hurish Chunder Roy was a co-sharer of the plaintiff, or whether he was a tenant subordinate to the plaintiff. Therefore, we think an appeal did lie to the Judge, but we are further of opinion that this objection not having been taken in the Lower Appellate Court, we ought not to entertain it at this stage of the case, and we are supported in this opinion by a decision reported in Volume I. Weekly Reporter, page 279, and by a late decision in Volume II., Bengal Law Reports, page 42, Appendix,* in which the judgment was delivered by Mr. Justice Markby. We therefore overrule the plea of want of jurisdiction to hear this appeal by the Judge.

Then comes the question whether the Revenue Courts were competent to entertain this question. The Judge appears to rely upon the decision in the case of Bipin Beharee Chowdhry and on a case to be found in Volume IX, Weekly Reporter, page 72. We will take the case of Bipin Beharee Chowdhry, first. There can be no doubt that, if the decision of the Full Bench, which is to be found in Volume VIII. applied to the circumstances and facts of the case of Bipin Beharee Chowdhry, the majority of the Judges who decided the case of Bipin Beharee would have felt themselves bound by the decision of the Full Bench, but those learned Judges in their judgment show, and we think very clearly show, a clear distinction between that case and the case decided by the Full Bench. In the case of Bipin Beharee Chowdhry there was no denial of the relationship of landlord and tenant, while in the present case there is a distinct denial of such relationship on the part of Hurish Chunder. In the present case, there is a repudiation of liability by the defendant, and in the case of Bipin Beharee, on the contrary, liability was, as observed by Sir Barnes Peacock, eagerly claimed by all the defendants We think, therefore, that, as laid down in the decision in Bipin Beharee's case, there is a clear distinction between that case and the case decided by the Full Bench.

We now come to the decision in Volume IX. on which the Judge has also relied. The facts and circumstances of that case appear to us to be entirely different from the case before us. That case was decided by one of the Judges who sat on the Full Bench when the decision to be found in Volume VIII. was passed. We allude to Mr. Justice Macpherson. That learned Judge observes that his decision in Volume IX. agrees generally with the principles laid down in the Full Bench decision in Volume VIII. He observes also that credit was not given to the real lessee, but to the person in whose name the lease was granted; the Judge had accepted the finding of the Deputy Collector that the respondents were the real lessees in possession, and if so, observed Mr. Justice

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* The 5th March 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Plea of Jurisdiction—Waiver of.

Case No. 581 of 1868.

Special Appeal from a decision of the Officiating Judge of Midnapore, dated the 18th December 1867, affirming a decision of the Principal Sudder Ameen of that district, dated the 18th June 1867.

Mahomed Hossein (Defendant), *Appellant,*

versus

Rajah Akhoya Narain Paul (Plaintiff), *Respondent.*

Mr. E. Twidale for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Where defendant objected to the jurisdiction in the first Court, but took no objection to the jurisdiction in the Lower Appellate Court, the High Court considered the objection as waived.

Markby, J.—In this case the plaintiff, having borrowed money from the defendant, gave his zemindar in farm to the defendant, who was to re imburse himself from the proceeds, paying to the plaintiff Rs. 300 a year as *malikana.* This suit is brought to recover some arrears of that allowance. The two Lower Courts, in this case, had given a decision in favor of the plaintiff, and the only ground on which we are asked to set that decision aside, is that the Civil Court has no jurisdiction to try the case. The defendant objected to the jurisdiction in the first Court, but took no objection to the jurisdiction in the Lower Court of appeal. Without determining the question whether the Civil Court or the Revenue Court is the proper tribunal in this case, I think that, under such circumstances, we ought not to set aside a decision which we must presume to be correct on the merits. I think that for the purpose of this appeal, we ought to consider the objection to the jurisdiction as waived. Whether or not the defendant can take this objection in any other form, it is not necessary to say. I think the appeal ought to be dismissed with costs.

Jackson, J.—I concur in this judgment.