IN THE MATTER OF THE PETITION OF RAM RAJA, PETITIONER, filed in this court on the 15th September, 1852, praying for the admission of a special appeal from the decision of Mr. S. Bowring, officiating judge of Chittagong, under date the 12th June, 1852, reversing that of Moulvee Unwur Alee, Moonsiff of Chukla Sundeep, under date the 15th January, 1852, in the case of Ram Raja, plaintiff, *versus* Musst. Kalabuttee and others, defendants.

It is hereby certified, that the said application is granted on the following grounds :

The suit is for possession of property ; and the plaintiff in his plaint alleges that he attained majority in 1257, only one year before the suit was instituted, in 1258. The Judge dismisses the claim on the score of lapse of time, the defendants having held possession since 1836, before suit, but he entirely omits to take into consideration the plea of minority. It is evident that if the plaintiff attained majority one year before suit was brought, his suit is not barred by lapse of time, unless there was lapse of time during the incumbency of his father, which is not stated.

We therefore reverse the decision, and remand the case to the Judge that he may pass a new decision on the merits of the case, with due regard to the plea of minority above-mentioned.

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[53] *The 12th January*, 1853.

PRESENT : J. DUNBAR, ESQ., *Judge* AND
A.J.M. MILLS AND R.H. MYTTON, ESQRS., *Officiating Judges*.

CASE NO. 133 OF 1850.

Regular Appeal from the decision of Moulvee Abdool Alee, Principal Sudder Ameen of Rajshahye, dated 14th January, 1850.

MR. W. McIVOR (*Defendant*), *Appellant v.* E. W. HUDSON AND OTHERS (*Plaintiffs*), *Respondents*.

[*Transfer of property—Pottah from gomastah of ijaradar—Grantee of pottah has no title beyond ijaradar's lease—Evidence Primary evidence available—Secondary evidence inadmissible—Possession without title—Disturbance—Peaceful possession—No right to mesne profits.*]

Pottahs from the gomashta of an ijaradar can convey no title beyond the ijaradar's lease ; secondary evidence is inadmissible when primary was available.

It is no answer to a claim to the fruits of land in possession without a sufficient title, that the possession was peaceful.

Vakeel of Appellant—Baboo Ramapersaud Roy.

Vakeel of Respondents—Mr. J.G. Waller.

SUIT laid at rupees 5,381-8-5.

The plaint sets forth that the plaintiffs hold pottahs for 334 beegahs of land from Nujeeb Mundul and other ryots, and that for a further area of 466 beegahs, ryots executed shattyes in their favor ; that Mr. Clark, the proprietor of Bahadoorpore factory, taking a dur-ijara from Bhowanipersaud Roy, disputes arose, which resulted in the magistrate awarding possession to plaintiffs under Act IV of 1840, on the 2nd July, 1847. Ultimately, however, the sessions judge reversed this decision, on 4th December, 1847. Previous to this decision, however, they assert that in October and November, 1847, they had cultivated and sown 125 beegahs.

The suit is for possession of the 334 beegahs alluded to, with mesne profits calculated at the rate of manufactured indigo.

The principal defendant, (McIvor), as the representative of Mr. Clark, after making some objections to the regularity of the suit, pleads in defence that Nujeeb Mundul and other ryots have no right to the lands in dispute; that they belong to turruf Bungsee Kudumpore, which was in farm to plaintiffs' gomashta up to 1252; that from 1253 the zemindar gave a jotedaree pottah to Mr. Malden, of Bangshara, for 3,000 beegahs of khas puteet land from 1253 to 1256. That gentleman transferred the lease to Mr. Clark.

The ijara of the turruf from 1253 was given to Bhowanipersaud Roy, and it being found that in order to make up 3,000 beegahs according to the amulnama granted by the Ranee there was a deficiency in the khas puteet lands, 500 beegahs were marked out in chuck Manick and 150 on the west of the purda, and on the 25th Bysakh, 1253, the ijaradar gave an amulnama for the same. Mr. Clark, however, did not take possession till Assar, 1253; disputes afterwards arising, the Sessions Judge finally awarded possession to [54] defendant. The defendant further denies the cultivation by plaintiffs of any land subsequent to 1252.

Nujeeb Mundul and other defendants, from whom the plaintiffs assert that they derived their title, state that they had ancestorial jote lands which were washed away; but on reformation of lands the zemindar gave a letter to the ijaradar, on the 11th Magh, 1250, directing him to mark out their jote lands from the new formation, which his gomashta did, and gave them chittas for the same; that the amulnama to the defendant is for khas puteet lands and expressly excludes jotedaree land. This defence is confirmatory of the plaintiffs' averments.

The principal sudder ameen considers it proved that the land in dispute was that given by Nujeeb Mundul and others in pottah to plaintiffs and that the title of defendant expressly excludes the jote lands of ryots, which this land in his opinion is proved to be. He gave a decree for 200 beegahs of the land sued for, rejecting the claim to the remainder on the ground that the term of plaintiffs' lease for them had expired. He also awarded the value of (*pukka mal*) manufactured indigo on 123 beegahs for one season.

From this the defendant appeals, and his pleader proposes the following issues:—

First,—Whether the 200 beegahs which have been decreed to the plaintiffs appertain to the jote of Nujeeb Mundul and others; and, if they do, whether they have any vested right left in them in 1254; and, if not, whether the plaintiffs can claim right of possession under them?

Second,—Whether the decision of the principal sudder ameen is not incomplete and defective, inasmuch as it is passed without a close local investigation regarding the identity of the lands in dispute, the question of right thereto, and the extent of the alleged injury done to the crop?

Third,—Whether the proof given by plaintiffs to the fact of their cultivation, and the subsequent injury done by appellant, is sufficient to entitle them to a decree for damages to the extent awarded by the principal sudder ameen.

The court proposes to take the three issues, or in fact, the whole merits of the case, into consideration together.

Babov Ramapersaud Roy for appellant.—The lands in dispute are admitted to be newly formed, and it is also admitted that the plaintiffs, under the name of another, were ijaradars up to 1252. The question is, what title Nujeeb Mundul and others could have had after the expiry of plaintiffs' ijara. The Sessions Judge, in his proceeding of 4th December, 1847, points out that it does not appear that according to the letter of the zemindar of the farmer, which the

magistrate construes as authorizing grant of pottahs, the pottahs were granted. The papers which the magistrate considers chit-pottahs are only terijs, and such as are given by go-[55] mashtas. An ijaradar cannot grant under-leases beyond the period of his lease; any that may have been so given expire with the ijara lease, and the zemindar has a right of re-entry.

The principal sudder ameen has not considered whether the plaintiffs, under pottahs from the ryots holding such titles have any right whatever.

The pleader here reads from one of the chittas; it is dated 20th Bhadoon 1251, and is headed, "*Chit chinnit zemeen jumma turruf Kishenpore*" Deenopara, and is signed "Ram Kishob Dass, gomashta of Taran Chundur Chuckerbuttee, ijaradar." It recites that the lands included therein are giyen to Najeeb Mundul to enjoy and cultivate.

He then reads from the alleged letter of Ranee Soorjmonee, dated 11th Magh 1250, but which is not admitted to be genuine, and is not proved to be so. It states that Nujeeb Mundul and others had complained that their lands of Pochees-Ruphythuk were washed away, and that they therefore could not pay their rent, and that the person to whom it was addressed should make over to them from alluvial lands a portion equal to that broken away, and keep up their jumma as before, and to send in a statement of the land so made over.

The principal sudder ameen considers the letter to be genuine, because he finds the signature tallies with that on the amulnama to defendant, but the court is requested to compare them and judge whether they do so or not.

The genuineness of the letter has been denied in the answer, and the whole case of the plaintiffs rests on that letter, which has not been proved. The letter does not even bear the Ranee's seal. No proof of the original tenure of the ryots being of a permanent nature has been tendered. The lands in question are not in any way recognized *jote*, and therefore the terms of defendant's amulnama do not exclude them. The principal sudder ameen is wrong in stating that no mention is made in his amulnama of Manick chuck.

The plaintiffs have made out no case for a decree, and the most that can be done in their favor is to remand the suit for further investigation.

Mr. J. G. Waller, for respondent.—The Magistrate under Act IV decided, as was proper, in my client's favor, as in possession. The sessions judge mistook the proper issue in appeal, and decided on a consideration of the title. My client sowed the crop. The suit is partly for the value of that crop, and regarding that portion of the suit Baboo Ramapersaud has been silent.

The defendant has not denied the authenticity of the letter of the Ranee. The oral evidence proves it. The mookhtar of the Ranee was examined before the magistrate and proved it. The ryots, defendants, have stated that they are hereditary jotedars, [56] and no new legal title was created on the pottahs from the ijaradar to them under authority of the zemindar. Nothing has been advanced to show that the plaintiffs were in league with the ryots to defraud, or that they were duped by them. The letter of the Ranee is proved to be genuine and the reservation in defendant's amulnama shows that the ryots' jotes, and therefore the lands in dispute, were excepted therefrom. It is clearly proved that the defendant never had possession before the sessions judge's order. The letter of the Ranee is a recognition of the jotedaree right of the ryots, from whom my client holds.

At present the real and only question is, whether my client should obtain the wasilat decreed. He cannot get possession, as the term of his lease is out. He was in possession, and with his money the land was cultivated, and it is a recognized principle that unless the other party tender the outlay, the person making it should reap the profit. No dispute existed at the time the land was sowed.

The pleader here causes to be read the roobukaree of the magistrate of 9th September 1847, to show that the Ranee's sudder mookhtar verified the letter of his mistress alluded to.

The witnesses of the plaintiffs establish the fact that the ryots have old jotes and that they have all along been in possession of the disputed lands. The principal sudder ameen, who had the witnesses before him, is satisfied with it.

The evidence of Himmut Sheikh is here read.

Mr. *J. G. Waller* proceeds.—The other evidence is similar, and establishes that until Assar 1254 there was no dispute. Defendant had not claimed the land, and my client cannot be considered to have been in wrongful possession. Defendant wishes it to be supposed that he got possession in 1253, but the magistrate found that he had not, and the sessions judge does not find to the contrary.

Baboo Ramapersaud Roy here reads a sentence from the sessions judge's roobukaree, to show that Mr. Waller's statement is incorrect. He proceeds in reply.—The lease to plaintiffs expired in Cheyt 1252. Their title then ceased. Their indigo sown by them in 1252 was not touched by my client at the cutting season of 1253. My client sowed the indigo in 1253. In Phagoon 1253, plaintiffs made a dispute, and went to the magistrate, and in Poos 1254 the sessions judge confirmed my client's possession. Plaintiffs wished by some means to retain possession of these lands. Is it not remarkable that all the transactions pleaded by them should have taken place just at expiry of their ijara? They show no previous pottahs. They contend now that the only point is, whether they are entitled to damages or not. This depends on the title to the land, and cannot be separated from it. My client's amulnama is admitted; and under that he must [57] be considered as the rightful possessor from 1253. The letter of the Ranee has not been proved in this suit; and the principal sudder ameen does not reason on what ground he believes it to be genuine. The title of plaintiffs to hold possession has not been proved.

JUDGMENT.

The defendant has expressly denied the authenticity of the letter of the zemindar, Ranee Soorjmonee, and it has not in our opinion been proved as it ought to have been. The secondary evidence relied on by the pleader for respondents is insufficient when the witness whose evidence is quoted might have been produced.

The ryots, from whom the respondent derives his title, are not proved by any documentary evidence to have any permanent interest and title. The chittas which are produced as their title to the land in dispute, are signed by a gomashta of an ijaradar, and do not recite that they were given under authority from the zemindar. The authority of the zemindar relied upon is that contained in the abovementioned letter, which, even if authentic, does not give sanction to the granting of pottahs, but on the contrary, directs that, after the arrangement to make up the deficiency caused by diluvium in the jotes of the ryots had been made, a statement should be submitted to her, thereby reserving to herself the power of confirming it or not.

The chittas therefore stand by themselves, and cannot be considered as confirming a title beyond the period of the ijaradar's lease.

The probabilities are against the justness of the transactions pleaded by plaintiffs. It is remarkable that their lease was just about to expire, and that the ryots from whom they took pottahs had only just received their alleged title from their own gomashta. For these reasons we consider that the principal sudder ameen's decree for possession should be reversed.

It has been argued by the pleader for the respondents, that admitting the invalidity of their title, plaintiffs, being in peaceful possession, had a right to damage for the crops which they had cultivated in 1253, but we do not find it established statisfactorily that the plaintiffs sowed the lands. For this reason, and because if they were in possession it was wrongful, the award of damages cannot be upheld.

The decision of the principal sudder ameen is reversed with costs.

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[58] *The 17th January*, 1853.

PRESENT: SIR R. BARLOW, BART., AND W. B. JACKSON, ESQ., *Judges*.

PETITION NO. 608 OF 1852.

[*Procedure—Supplementary plaints—Power of sudder ameens to receive—Regulation XXIII of* 1814, *section* 25, *clause* 3, *not applicable to sudder ameens.*]

Case remanded; clause 3, section 25, Regulation XXIII of 1814 not applicable to sudder ameens, who can receive a supplemental plaint; the lower court's judgment ruling otherwise reversed.

IN THE MATTER OF THE PETITION OF MAHARAJ DHEERAJ MAHTABCHUND BAHADOOR, filed in this court on the 2nd September 1852, praying for the admission of a special appeal from the decision of Mr. J. H. Patton, judge of East Burdwan, under date the 7th June 1852, confirming that of Mr. J. S. Bell, sudder ameen of that district, under date the 26th December 1851, in the case of Maharaj Dheeraj Mahtabchund Bahadoor, plaintiff *versus* Kurreemoonnissa Bebee and others, defendants.

It is hereby certified, that the said application is granted on the following grounds:

The principal sudder ameen, while *officiating* as sudder ameen admitted a supplementary plaint, including a party among the defendants who had been omitted in the original plaint. The sudder ameen, on relieving the principal sudder ameen, holds the admission of the supplement informal, and rejects it, and nonsuits the plaintiff.

The judge upholds the order.

Now the law cited under which the admission of a supplemental plaint is declared illegal by the sudder ameen, is clause 3, section 25, Regulation XXIII of 1814; and this clause 3 prohibits moonsiffs from receiving supplementary plaints, but has never been extended to sudder ameens. Section 73 of Regulation XXIII of 1814 declares clause 4 section 25 of that Regulation applicable to sudder ameens, but not clause 3 of that section. The order of the sudder ameen and its affirmation by the judge are therefore based on a law inapplicable to the case, as sudder ameens are competent to receive supplementary plaints in the same manner as principal sudder ameens.

We therefore reverse the decisions of the judge and sudder ameen and remand the case to be tried over again.

SIR R. BARLOW.—I would add to the above judgment, in which I concur, that it is for the lower court to declare whether the supplement put in in this case is legally a supplement under section 5, Regulation IV of 1793.