APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877
Nov. 28.

GOGON MANJY (DEFENDANT) *v.* KASHISHWARY DEBY AND OTHERS (PLAINTIFFS).*

Suit for Kabuliat—Enhanced Rate—Presumption of Landlord's willingness to grant Pottah.

In order to entitle a landlord to sue a tenant for a kabuliat at a certain rate of rent, he should either have tendered a pottah to the tenant at the rate of rent mentioned in the kabuliat, or he should be willing to grant a pottah at that rate; and if the Court considers that the rent which he claims is the correct amount, it will presume that he is ready to grant a pottah at that rate, and will give him a decree for the kabuliat.

But this presumption will not hold if the Court thinks that the rate claimed is too high; and in such a case, therefore, the presumption having failed, the landlord will not be entitled to a kabuliat at such lower rate as the Court may think just, but his suit will be dismissed.

Golam Mohomed v. *Asmut Alí Khan Chowdhry* (1) followed, and *Gopeenath Jannah* v. *Jeteo Mollah* (2) dissented from.

THIS was a suit for a kabuliat at an enhanced rent by the owners of a jote against a ryot in occupation of the jote, who paid their share of the rent to each of the plaintiffs. The Court of first instance found that the defendant was a ryot liable to enhancement of rent, and that he had been duly served with a proper notice of enhancement under Beng. Act VIII of 1869, s. 14; that enhancement was sought on the ground that the rent paid by the defendant was below the rate prevailing in adjacent places. It also found that the plaintiffs had not established that ground, and it appeared that the plaintiffs had not tendered a pottah to the defendant at the rate mentioned in the kabuliat, nor had they expressed themselves willing to grant a pottah at that rate and upon these facts dismissed the plaintiff's suit. The lower Appellate Court took evidence as to what was a proper rent to be paid, and granted

* Appeal under cl. 15 of Letters Patent, against the decree of Mr. Justice White, dated the 13th of July 1877, in Special Appeal No. 2158 of 1876.

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the plaintiff a kabuliat at that rate, which was lower than the rate claimed.

From this decree the defendant preferred a special appeal to the High Court on the ground that the plaintiffs having failed to prove that they were entitled to a kabuliat for the enhanced rent claimed by them, their suit should have been dismissed, and that the lower Appellate Court was wrong in giving a decree for a kabuliat for a rent which the plaintiffs had not before suit expressed their readiness to accept.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Sreenath Doss* for the respondents.

The special appeal came on or hearing before White, J., who confirmed the order of the lower Appellate Court, and the defendant thereupon preferred the present appeal under cl. 15 of the Letters Patent.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Grija Sunker Mozoomdar* for the respondents.

GARTH, C. J. (BIRCH, J., concurring.)—We think that this appeal should be allowed. The judgments of the Subordinate Judge, and that of Mr. Justice White, appear to us to be directly opposed to the ruling of the Full Bench in the case of *Golam Mohomed* v. *Asmut Ali Khan* (1).

The grounds upon which that case proceeded, as we understand them, are these: that in order to entitle a landlord to sue a tenant for a kabuliat at a certain rent, he should either have tendered to the tenant a pottah at the rate of rent mentioned in the kabuliat, or he should be willing to grant a pottah at that rate; and when he brings a suit against his tenant for a kabuliat at a certain rent, it must be presumed, that he is ready to grant a pottah at that rate. That presumption would enable him to succeed in his suit, if the Court considers that the rent which he claims is the correct amount. But if the

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Court thinks that he is not entitled to a kabuliat at the rate claimed, but at a lower rate, then it is plain, that no presumption can be made in favor of his having been willing to grant a pottah at that lower rate. On the contrary, the fact that he has attempted by legal proceedings to enforce the payment of the higher rent, raises a presumtion that he would not have been content, when he brought his suit, to accept a kabuliat at the lower rate.

He is, therefore, not entitled to a decree for a kabuliat at the smaller rate, because the Court cannot presume that he would have granted a pottah at that rate.

This is the ground upon which, as we understand it, the judgment of the Full Bench proceeds, and it has since certainly been acted upon in that sense in many other instances.

It appears to us, that the case of *Gopeenath Jannah* v. *Jeteo Mollah* (1), decided by Mr. Justice Kemp and Mr. Justice Glover, is not in accordance with the rule laid down by the Full Bench, and that we are, therefore, justified in dissenting from it.

It has been contended before us, that it is the same thing whether the landlord sues for enhanced rent *simpliciter*, or sues for a kabuliat at an enhanced rate. But that is not so. When a landlord, after notice, sues for enhanced rent, the Court may give him a lower rate of enhanced rent than that which he claims, because in such a suit it is not necessary that the landlord's willingness to grant a pottah at the rent demanded should be proved or presumed, and when in that suit the proper amount of rent has been ascertained and fixed between the parties, the landlord may safely demand from the tenant a kabuliat at that rate, and sue him for it.

This distinction between suits for enhanced rent and suits for a kabuliat at enhanced rent, appears to us to be clearly pointed out by the Chief Justice in the Full Bench case.

For these reasons we consider that the Subordinate Judge was wrong; and we consider that, in a suit of this nature, no distinction can be drawn between cases in which a kabuliat is demanded after notice and cases in which no such notice is

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given. The judgments of both the Appellate Courts will be reversed, and the judgment of the First Court restored, with costs in each Court.

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Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

HEERA LALL PRAMANICK AND OTHERS (PLAINTIFFS) *v.* BARIKUNNISSA BIBEE (DEFENDANT).*

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Evidence Act (*I of* 1872), *ss.* 101, 103, 106—*Onus of Proof.*

In the year 1862, the plaintiff brought a resumption suit against *A*, in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakheraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B*, who derived her title through *A*, to have the rent assessed. *B* pleaded by way of bar to the jurisdiction, that the lakheraj grant, under which *A* claimed, was made previously to 1790. *Held*, that the onus of proving this plea was upon *B*.

Baboo *Gooroodass Banerjee* for the appellants.

Mr. *H. E. Mendies* for the respondent.

THE facts material to the point decided in this appeal were sufficiently stated in the judgment of the Court, which was delivered by

GARTH, C. J.—So far as the merits of this case are concerned we are not called upon here to adjudicate upon them. The Munsif has determined the rate of rent which is payable by the defendant, and the District Judge, in his judgment of the 14th February 1877, says, that as regards the Munsif's decision on remand, in which the merits of the case were discussed and settled, the appellant did not raise any question before him.

The only point, therefore, which could be, or has in fact been, raised on special appeal in this Court is that of jurisdiction,

* Appeal under cl. 15 of the Letters Patent against the decree of Mr. Justice Ainslie, dated the 1st August 1877, in pecial Appeal No. 967 of 1877.