

## APPELLATE CIVIL.

*Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.*

1878  
*Jan'y. 7.*

CHUNDER SEKHUR MOOKERJEE AND OTHERS (PLAINTIFFS) v. THE COLLECTOR OF MIDNAPORE ON THE PART OF THE GOVERNMENT (DEFENDANT).\*

*Kabooleut—Specific Performance of Conditions of—Specific Relief.*

One of the terms of a kabooleut, equally binding on the Government and a zemindar, the parties concerned, was as follows: "The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc., in connection with the salt and sweet (*i. e.*, not saline) lands of the said parganna, shall be made by the Government of the Honorable Company." In a suit brought by the zemindar to obtain an order upon the Government to re-excavate and clear the water-passage of a particular khal situate within the parganna, the subject of the kabooleut, *held*, that the case was not one in which the Court would decree specific performance.

THIS was a suit instituted for the purpose of compelling the defendant to re-excavate and clear the water-passage of a certain khal known as the Protabhali Khal. The plaintiff alleged, that the khal in question, which formed the connecting link between two rivers, had, from the time of the decennial settlement, at which period the plaintiffs' zemindari had been created, been used as the outlet for all the water which accumulated on the plaintiffs' lands, and that the defendant had hitherto excavated the said khal when necessary, in order to keep free the water-passage for such purpose. That, owing to the neglect of the defendant, the khal had become choked with silt, and the flow of water being thereby interrupted, considerable injury had accrued to several mouzas on the plaintiffs' zemindari. The plaintiff further stated, that the defendant had let out in *ijara* the khal, together with the lands bordering its banks; that the *ijaradar* had completely stopped the khal and had grown crops thereon. Failing

\* Regular Appeal, No. 100 of 1876, against the decree of Baboo Jodu Nath Roy, Subordinate Judge of Zilla Midnapore, dated the 21st of December 1875.

to obtain redress from the Settlement Officer, who, on the 16th October, 1873, disallowed the objections made by the plaintiffs and confirmed the ijara, the present suit was instituted on the terms of an agreement entered into between the predecessors of the plaintiffs and the defendant, and embodied in the potta and kabooleut exchanged between the parties. The plaintiffs did not produce the potta, but obtained the kabooleut from the defendant, which was put in as evidence on behalf of the plaintiffs. The material parts of this kabooleut, which was dated the 15th July, 1795, are as follows:—"The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc., in connection with the salt and sweet (*i.e.*, not saline) lands of the said parganna, shall be made by Government of the Honorable Company."

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The defendant contended that, under the provisions of Bengal Act VI of 1873, the Government are only bound to maintain those embankments which are included in Schedule D. of the Act, and in seeking for a remedy, the only procedure open to the plaintiffs was that afforded in cl. 7, s. 4 of that Act. The Protabhali Khal, the subject of the suit, was not mentioned specifically in the kabooleut, nor was there anything in the terms of the kabooleut itself to prevent the operation of the above-mentioned Act in respect of the plaintiffs' zemindari. The defendant further alleged in his written statement that long before the permanent settlement, the Protabhali Khal was used as a canal for the purpose of conveying salt, and salt golas stood on both banks of the khal. When the Government gave up the salt manufacture in the said parganna, the question whether it was necessary to re-excavate the khal aforesaid was taken into consideration by the Department of Public Works, and the Lieutenant-Governor in his letter dated 15th December, 1863, held that the khal should be left to silt up. In the face of this finding, the defendant contended that the plaintiffs had no cause of action. The defendant also pleaded limitation.

The Court of first instance found on the evidence that the Protabhali Khal had been in existence for a long time, and was main-

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tained by the Government for the passage of boats carrying salt which was made at their salt manufactory. The plaintiffs admitted that they did not base their present suit on any prescriptive right, and even if this contention had been raised, it was barred by limitation, two years having elapsed from the date of the first encroachment made on such right by the defendant. After careful consideration of the clause of the kabooleut already quoted, the Court was of opinion that the terms of such clause were too general to be construed strictly against the defendant. Part of the judgment was as follows :—“ Government, as the paramount power responsible for the life and property of its subjects, can at any time determine whether the construction of any khals and embankments is conducive to their interests, and they have this general power extending all over the country, and I believe the general power was accorded to Government by the terms of the kabooleut. I do not think that under the terms of the kabooleut every embankment or khal for the drainage of this zemindari must be constructed or maintained by the Government. It was no doubt intended that Government will determine which khal to maintain, or which not to maintain, on consideration of the existing state of the country and all the circumstances which may be brought to its notice; but if the Government chose, on consideration of all matters and the then state of the country, not to maintain the khal, I do not think it can be compelled by a Court of Justice to re-excavate it, merely because it has now turned out a fact, that it would have been more beneficial to the zemindari and its subjects if it were not closed. To my mind it appears that with the determination of Government, who acted with the advice and opinion of its responsible officers with regard to this khal, the Court ought not to interfere; the Court should only see whether there was an agreement between the plaintiffs and defendant, binding the latter to maintain this khal or to excavate it; but I do not see any such agreement. The general terms relied upon by the plaintiffs do not, I think, give them any right which may be awarded to them, for compelling Government to re-excavate the khal which was hitherto maintained by it only for its own purposes. The evidence of the plaintiffs' witnesses,

which remains un rebutted, proves, it is true, that since the bed of the khal has silted up, the ryots have suffered much both in their health and their property : if that be the fact, which I dare say it is, the plaintiffs ought to move the Government through the proper channel to make necessary arrangements for the drainage of the surplus water of the zemindari, and their application, if made, must receive due and proper consideration at its hands ; but their present suit to compel Government to excavate this khal in the absence of any agreement must fail."

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The plaintiffs appealed to the High Court.

Baboo *Gopal Lall Mitter* and Baboo *Sham Lall Mitter* for the appellants.

Baboo *Unnoda Persaud Banerjee* for the respondent was not called upon by the Court.

The judgment of the Court was delivered by

JACKSON, J.—We do not think it necessary to call upon the Government vakeel in this case, because we are of opinion that the judgment of the Court below is substantially correct. The terms of the kabooleut, which were read to us from page 7 of the paper-book, and which, it may be admitted, are binding on the Government as well as the zemindar, are extremely vague, and it would be dangerous to impose upon the Government, on the strength of such terms as "the excavation of the silt of khals, the closing of the mouth of khalsai," so extremely onerous an obligation as the plaintiffs seek to impose in the present case. But in addition to that there is an objection on principle to requiring the Government, or any person whom it is sought to bind by such words, not to do that, which may, upon a proper consideration of the whole subject, carry out the purpose obviously intended, but to do a particular thing, because that particular thing was once done in view of that same object. The Government, no doubt, undertook in this agreement between it and the zemindar to retain in its own hands the construction of certain khals and other things, and partly in consideration of that agreement, and partly in consideration of its duty as paramount

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power, the Government would, no doubt, be desirous of taking all steps that may be necessary for the object with a view to the comfort and health of the population. But it is a very different thing to seek to compel Government by a plaint filed in Court to maintain a particular khal in a certain position. Nor has the Court before it, as it seems to me, any materials upon which it could make any specific order such as it would have to make in order to be of use to the plaintiffs, because the Court has no means of ascertaining at what depth and width it would be necessary to maintain this khal for the purpose of effectual drainage of the plaintiffs' estate. These are general observations which appear to me necessary to be made; but it also seems to me, that the policy of the law, even before the Specific Relief Act, was against the enforcement of specific performance of contracts of this nature. It is not necessary for us to say what relief, if any, the plaintiffs would be entitled to. Under the circumstances, I think it quite clear that they could not succeed in the present suit, and that the suit was properly dismissed by the Court below. The appeal is dismissed with costs.

*Appeal dismissed.*

## ORIGINAL CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.*

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31.*

CHUNDER CAUNT MOOKERJEE (DEFENDANT) v. JODOONATH  
KHAN AND ANOTHER (PLAINTIFFS).

*Costs—Tender—Difference between a Tender made on account of separable Claims and one made on reference to part of a single inseparable Claim—What is not an unconditional Tender.*

In a suit to recover Rs. 1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of Rs. 1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial, the plaintiff obtained a decree for the full amount claimed by him. *Held*, both in the Court below and on appeal, that the tender was bad, and therefore the plaintiffs were entitled to their costs.

*Held per KENNEDY, J.*—That the tender was bad, being a tender of part of an entire debt.