

(1869) 05 CAL CK 0032

Calcutta High Court

Case No: Special Appeal No. 3257 of 1868

Sheikh Baharulla alias Baromia

APPELLANT

Vs

Sheikh Magan

RESPONDENT

Date of Decision: May 14, 1869

Judgement

Bayley, J.

We think that the judgment of the lower appellate Court must be reversed, and the case remanded for re-trial. The plaintiff sued the defendant (ryot) for a kabuliat. The defendant admitted the plaintiff's right to the kabuliat sued for. An intervenor appeared on the allegation that he was in actual receipt and enjoyment of the rents bona fide.

2. The first Court, taking all the evidence into consideration, considered that the intervenor had proved actual receipt and enjoyment of the rent bona fide as required by section 77, Act X of 1859, and dismissed the plaintiff's suit.

3. The plaintiff appealed before the lower appellate Court, and the substance of his petition of appeal was, that the first Court was wrong in point of law in dismissing his suit when the intervenor had failed to prove actual receipt and enjoyment of rent by him, and when he (plaintiff) had given sufficient proof of his having been in actual receipt and enjoyment of the rents.

4. By this pleading in appeal, the lower appellate Court had distinctly brought before it the question of the adjudication of the claim of the intervenor; but instead of requiring the intervenor to prove his special plea as required by the law, viz., "the question of the actual receipt and enjoyment of rent by such third person shall be enquired into," &c., the enquiry of the lower appellate Court seems to have been confined to the right of the plaintiff to possession. The lower appellate Court thus seems to have cast the onus of proof on the plaintiff; and finding from the award u/s 318, Civil Procedure Code, and other circumstances that the plaintiff was not in possession, the lower appellate Court dismissed the plaintiff's suit. The lower appellate Court further seems to have paid no regard to the fact that the party,

against whom the suit for the kabuliat was brought, actually admitted the plaintiff's right, and that but for the intervener's coming in the plaintiff's case would have been thereby proved. The case was distinctly one in which under the law cited (section 77, Act X of 1859), it was for the intervenor to prove the fact of the actual receipt and enjoyment of the rents bona fide by him, and as the lower appellate Court seems to have misplaced the onus on the plaintiff, we remand the case to that Court to re-try the case, putting in issue whether the intervener was in actual receipt and enjoyment of the rents bona fide before and up to the institution of the suit. Costs will follow the result.