

(1877) 11 CAL CK 0004
In the Calcutta High Court

Kashishwary Deby and Others

APPELLANT

Vs

Gogon Manjy

RESPONDENT

Date of Decision : 28-11-1877

Acts Referred:

Citation : (1878) ILR (Cal) 498

Hon'ble Judges : Richard Garth, C.J; Birch, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—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 Mohamad v. A smut Ali Khan* 10 W.R. F.B. 14.

2. 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 kabuliati at a certain rate, he should either have tendered to the tenant a pottah at the rate of rent mentioned in the kabuliati, or he should be willing to grant a pottah at that rate; and when he brings a suit against his tenant for a kabuliati at a certain rate, 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 Court thinks that he is not entitled to a kabuliati at the rate claimed, but at a lower rate, then it is plain that no presumption can be made in favour 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 presumption that he would not have been content, when he brought his suit, to accept a kabuliati at the lower rate.

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

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

3. It appears to us, that the case of Gopeenath Jannah v. Jeteo Mollak 18 W.R. 272 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.

4. 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 pottali 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.

5. 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.

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