

*Privy Council Appeal No. 14 of 1930.  
Bengal Appeals Nos. 8 and 9 of 1929.*

Jogesh Chandra Roy - - - - - *Appellant*

*v.*

Emdad Meah - - - - - *Respondent*

Same - - - - - *Appellant*

*v.*

Same - - - - - *Respondent*

*(Consolidated Appeals)*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN  
BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 20TH NOVEMBER, 1931.

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*Present at the Hearing :*

LORD THANKERTON.

LORD SALVESEN.

SIR GEORGE LOWNDES.

*[Delivered by LORD THANKERTON.]*

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These are two consolidated appeals from two decrees of the High Court of Judicature at Fort William in Bengal, dated the 12th June, 1928, which reversed a decree of the District Judge of Chittagong, dated the 27th June, 1925, modifying a decree of the Subordinate Judge of Chittagong, dated the 14th June, 1924, and dismissed the suit, in which the appellant was plaintiff, with costs.

The appellant is the owner of a Noabad *taluk* in the District of Chittagong. At the time of the Cadastral Survey operations

of 1895 Homar Ali, the father of the respondent, was recorded as holding the tenancy of two *Jotes*, Nos. 83 and 98, in the survey records. Homar Ali died in 1902, leaving a widow, a son (the respondent) and four daughters.

In the present suit, which was instituted on the 15th April, 1920, the appellant seeks to recover from the respondent rent for the year 1326 B.S. (1919-1920) under a *kabulyat* dated the 11th October, 1917, which related to part of *Jote* No. 83, but it will be necessary to relate the events which led up to the execution of the *kabulyat* by the respondent.

In 1910 the appellant instituted a suit for possession of *Jote* No. 83 against Homar Ali's widow and the respondent and obtained a decree in his favour in 1912. He executed this decree in 1913.

In 1916 he brought a similar suit for possession of *Jote* No. 98 against not only the widow and the present respondent, but also against Homar Ali's four daughters as well. In October, 1917, this suit was compromised as between the appellant and Homar Ali's widow and the respondent, the daughters being first excluded from the category of defendants on the petition of the appellant; a *solehnama* was then executed by the appellant, the widow and the respondent, under which, out of the 20 *drones* odd of which the holding consisted, the widow and the respondent were to hold 11 *drones* odd under the appellant at a rent thereby fixed and the appellant was to get *khas* possession of the balance of 8 *drones* odd. The respondent further agreed to pay a sum of Rs. 1,400 in respect of the appellant's costs and mesne profits by instalments and executed a mortgage therefor. In conformity with the compromise the appellant obtained a decree dated the 5th December, 1917. It was part of the settlement of that suit, which related to *Jote* No. 98, that the respondent should execute the *kabulyat* relative to *Jote* No. 83, dated the 11th October, 1917, already referred to, which forms the basis of the present suit.

By this *kabulyat* the respondent took a *be-kaemi* (non-permanent) settlement as a yearly tenant of 10 *drones* odd out of the 14 *drones* 5 *kanis* odd, which made up *Jote* No. 83 and which were stated to be in the *khas* possession of the appellant, and agreed to pay an annual rent of Rs. 50 and 1,858 *arhis* 9½ *seers* of paddy or Rs. 1,239-1, the price thereof.

In January, 1920, the respondent's sisters brought a suit against the present appellant and respondent for a declaration of their right and confirmation of their possession, to the extent of their share as co-heirs of Homar Ali in *Jote* No. 83.

The present suit was brought in April, 1920, and the relief claimed by the appellant is a decree for Rs. 2,048-14-0, made up of (1) the market price of 1,858 *arhis* 9½ *seers* of paddy, with damages thereon at 25 per cent., and (2) cash rent of Rs. 50, with damages at 25 per cent., and he further claims all other or further reliefs which the Court may think fit and proper. The leading defence was that the *kabulyat* was obtained by the appellant from

the respondent by fraud and undue influence ; this defence was rejected by the Subordinate Judge and the District Judge and is no longer in issue.

The remaining defences were that the appellant had failed to put the respondent in possession of the subjects let and was therefore not entitled to rent, and that, in any event, the appellant was not entitled to the paddy rent at market price, but only at the price fixed by the *kabulyat*, and was not entitled to damages.

The suit by the respondent's sisters and the present suit were before the same Courts. On the 13th June, 1924, the Subordinate Judge gave decree in favour of the plaintiffs in the former suit, and on the 14th June he gave the appellant decree in the present suit for Rs. 50 cash rent and Rs. 1,589-4-0, the market price of the paddy, with damages at the reduced rate of 6½ per cent. He held that the respondent knew, when he executed the *kabulyat*, that the whole 16 annas would not be available, and that he could not turn round and say that because the appellant could not put him in possession of the whole 16 annas he was not liable to pay rent or that the *kabulyat* was not binding on him. The appellant appealed against the decree in the sisters' suit, and both parties appealed against the decree in the present suit, to the District Judge.

The District Judge delivered judgment on the appeals in the present suit on the 27th June, 1925. The learned Judge held that the onus was on the respondent to prove that he did not get actual possession of any portion of the land and he declined to accept the respondent's evidence without corroboration ; he therefore held that the respondent got possession of all the land of the *kabulyat*. Differing from the Subordinate Judge he held that the paddy rent was fixed at the price in the *kabulyat*, and he increased the rate of damages to 25 per cent. Subject to these modifications, he decreed in the same terms as the Subordinate Judge.

On the 19th August, 1925, the District Judge affirmed the decree of the Subordinate Judge in the sisters' suit, against which decision the present appellant appealed to the High Court. In the present suit both parties appealed to the High Court. The appeals in both suits were heard together and one judgment dealing with both suits was delivered by the High Court on the 12th June, 1928. In the sisters' suit the judgments of both lower Courts were affirmed, but in the present suit the judgments of the lower Courts were reversed and the appellant's suit was dismissed on the ground that the onus was on the appellant as landlord to prove that he had put the tenant in possession—therein differing from the District Judge—and that, in view of the decision in the sisters' suit, it was not possible for the appellant to show that he had put the respondent in possession of the share in which the possession of the respondent's sisters had been confirmed, there being no suggestion anywhere that the latter

had at any time been actually dispossessed in respect of that share.

The decree of the High Court in the sisters' suit has not been appealed from, and is now final, but the appellant has appealed against the decree of dismissal of the present suit.

The appellant maintained that the decision of the District Judge was right; he did not press his claim for the market price of the paddy rent. He contended that the District Judge rightly put the onus on the respondent of proving non-delivery of possession, and claimed that the District Judge had found as a fact that the respondent was in actual possession of all the land of the *kabulyat*, such finding being final and binding under Section 100 of the Civil Procedure Code. The passage founded on in the judgment of the District Judge is as follows:—

“The question is whether the appellant” (*i.e.*, the present respondent) “was given actual possession so as to enable him to cultivate it. Such possession is quite distinct from the constructive possession of a female co-sharer, which was all that was necessarily in issue in the other suit. The onus is on the appellant to show that he did not get actual possession of any portion of the land. On this point there is only defendant's uncorroborated evidence. He says: ‘My father's heirs did not allow me to take possession of the lands covered by the *patta*. We went to Bharat Babu and Jogesh Babu and told them that I could not get possession of the lands. The lands were in possession of myself and my father's other heirs. I got no possession of lands outside those which were already in my possession.’ If he had stated that there had been partition among himself and his sisters and that they remained in possession of their shares, his case would have been at least intelligible, but he does not say so, and, if he had, I should not have believed him without corroboration. I hold that he got possession of all the land of the *kabulyat*.”

It is clear that the finding in the concluding sentence is based on the failure of the present respondent to discharge the onus of proof which the District Judge held to be incumbent on him, and is not a finding on positive evidence. Their Lordships are unable to agree that the onus was on the tenant in the present case. In their opinion, where there is no dispute as to the identity of the subjects let, but the tenant denies that he has ever got possession of the subjects, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. The cases cited by counsel for the appellant were either cases where the tenant had already paid rent under the lease or where the tenant claimed that certain subjects, of which he had not got possession, were within the subjects let, which the landlord denied. In these cases the onus would primarily be on the tenant. (*Durga Prasad Singh v. Rajendra Narayan Bagchi* (1913), 40 Ind. App. 223; *Kumar Arun Chandra Singha v. Bhagaban Chandra Roy Choudhury* (1931), 35 Cal. W.N. 1011.) It was not proved in the present suit that the respondent had paid a previous year's rent.

But, further, their Lordships are of opinion that the District Judge erred in treating the constructive possession of a female

co-sharer as irrelevant. The landlord must not only show that the tenant is in possession of the subjects of the lease, but that such possession was attributable to the lease, or might be so. But in the present case it is now certain that possession of the subjects must be attributed—to the extent of their 9 annas 4 pies share—to the sisters' possession, for the decree in their favour declares their right and confirms their possession thereof, and, if they were not in possession and required an order for possession, a claim to a mere declaration would not be competent, in view of the proviso to Section 42 of the Specific Relief Act. Even if they were not in actual possession, the sisters' right to such share in the subjects is established, and the appellant could not have given possession to the respondent of any part of the sisters' interest, which was an undivided share and affected the whole of the holding.

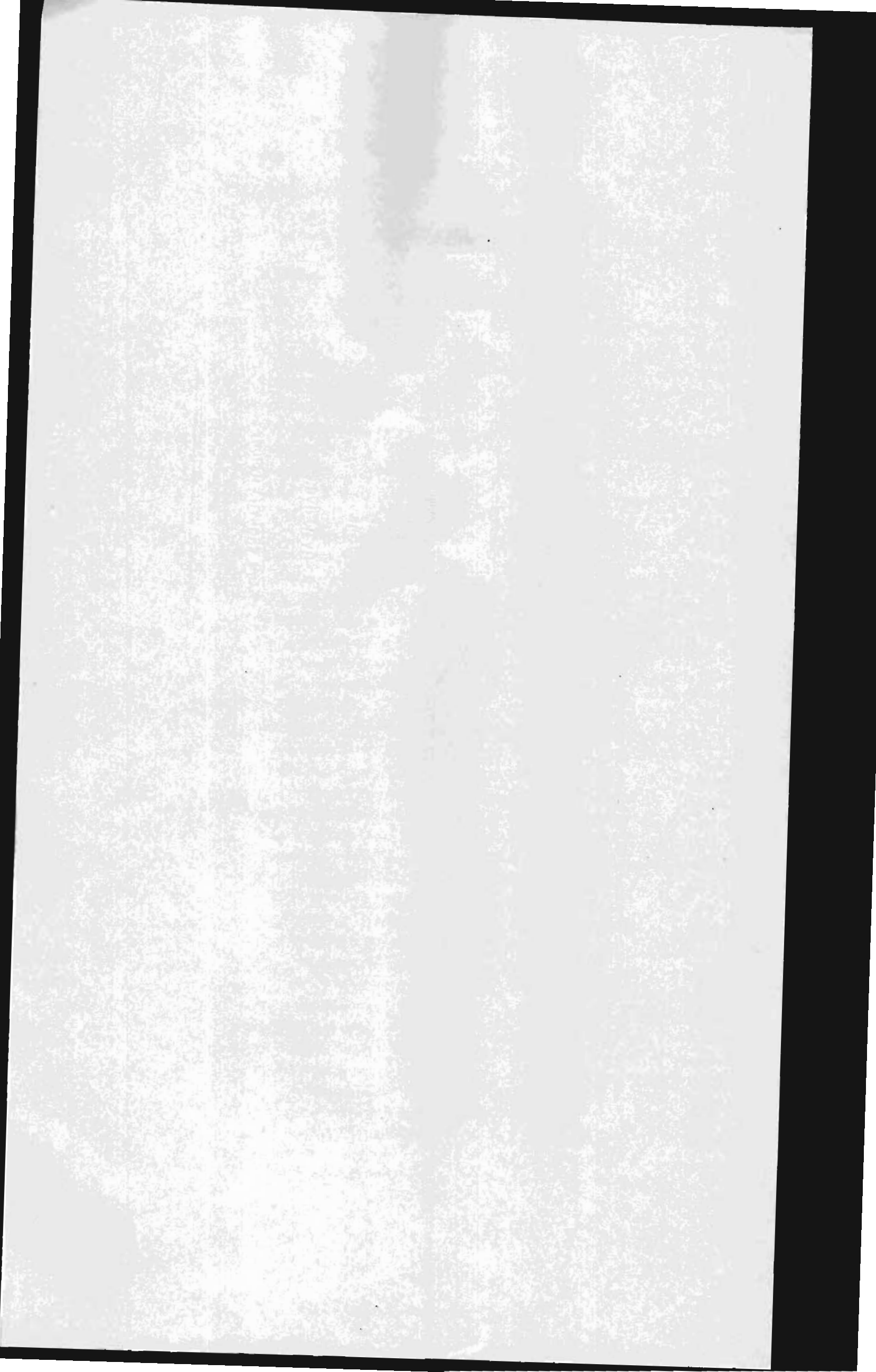
Their Lordships are therefore of opinion that the respondent has not been given possession under the *kabulyat* of the land thereby let, and that the appellant is not entitled to recover the rent as claimed. But the appellant maintained alternatively that he was entitled to the rent claimed, subject to an abatement in respect of the sisters' share, of which he was unable to give possession under the *kabulyat*. Admittedly such a claim was made for the first time by the appellant at the hearing of this appeal. It is incidentally referred to by the respondent in ground No. 20 of his memorandum of appeal to the District Judge, and is nowhere else referred to, not even in the appellant's case.

Their Lordships agree with the conclusion of the Subordinate Judge on the evidence that the respondent got possession of that share of the land that was available for possession apart from the sisters' share; indeed, this admission is involved in the respondent's own evidence. While this case for an abated rent should have been raised and investigated along with the other questions in the case, their Lordships are of opinion that it would be an injustice, if the appellant is prepared to submit to the penalties of his failure to raise it earlier, that the respondent should escape from payment of rent in respect of the possession which he can alone attribute to the *kabulyat*.

The position is somewhat unusual. *Jote* No. 83 consisted of 14 *drones* odd; of the 16 annas interest therein the respondent's sisters are entitled to a 9 annas 4 pies share under the decree of 1928, whereas under the decree of 1912 the respondent and the widow, though equally heirs of Homar Ali, have no share as such in the *Jote*, and the appellant has right to the balance of the 16 annas. The *kabulyat* dealt with 10 *drones* odd out of the 14 *drones* odd, and one Asadali has obtained settlement of the remaining 4 *drones* odd from the appellant. Their Lordships are not satisfied that they have before them all the material on which to decide on the proper amount of the abatement. For instance, it may depend on the circumstances whether the rent under the *kabulyat* should be apportioned as if the sisters had a

9 annas 4 pies interest in the land of the *kabulyat*, or whether the 16 annas interest in the whole 14 *drones* of the *Jote* should be apportioned and the whole 4 *drones*, which were reserved by the appellant from the *kabulyat*, should be treated as part of the appellant's share of the 16 annas interest in the whole *Jote*. If this were so, it might be that the sisters would be entitled to a larger share in the 10 *drones*. Accordingly, their Lordships are unable to dispose of the appellant's claim for an abated rent, and, in accordance with the appellant's request, if their Lordships should take that view, the case will be remitted for the purpose of investigating and deciding what is the proper abatement to make on the rent under the *kabulyat* for the year 1919-1920 in respect of the sisters' interest as heirs of Homar Ali in *Jote* No. 83, and for a decree for the rent after deduction of such abatement.

Accordingly the appeal should be allowed, but the appellant must pay the costs of the appeal, as he has failed in the issues raised in the case on appeal. The decrees of the Courts below should be set aside, and the case should be remitted to the High Court as above stated, leaving the costs already incurred below to be dealt with by that Court. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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JOGESH CHANDRA ROY

v.

EMDAD MEAH.

SAME

v.

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*(Consolidated Appeals.)*

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DELIVERED BY LORD THANKERTON.

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