

FULL BENCH REFERENCE.

1896
May 2.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice O'Kinealy,
Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose,
Mr. Justice Beverley, Mr. Justice Banerjee.

KUNJO BEHARY SINGH (PLAINTIFF) v. MADHUB CHUNDR
GHOSE (DEPENDANT). *

Appeal—Second appeal—Suit for mesne profits where the value of the subject-matter in dispute is less than Rs. 500—Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 31.

Held by the Full Bench (GHOSE and BANERJEE, JJ., dissenting) :—That no second appeal lies from a suit for mesne profits, where the value of the subject-matter in dispute is less than Rs. 500.

Sriram Samanta v. Kali Das Dey (1) overruled.

THE facts of the case appear sufficiently from the order of reference of O'Kinealy and Trevelyan, JJ., which was as follows :—

“ In this case Kunjo Behary Singh sued Madhub Chunder Ghose, in the Munsif's Court, for the sum of Rs. 86-8 annas, as mesne profits. In the plaint it was set out that the defendant had dispossessed the plaintiffs; and it was against the defendant in possession that the mesne profits were claimed.

“ The Judge of the first Court, namely, the Officiating Additional Munsif of Howrah, gave the plaintiff a decree to recover mesne profits at Rs. 8 a cotta in respect of 14½ annas' share of 4 cottas from Srabun 1295 to Pous 1297, and in respect of 2½ cottas from Magh 1297 to Cheyt 1298.

“ On appeal before the Subordinate Judge it was argued that no such suit would lie against the defendant alone; and the Judge, accepting the argument, dismissed the plaintiff's suit with costs.

“ A second appeal has been preferred to this Court, and at the hearing the respondent raised the objection that no second appeal

* Reference to a Full Bench, in appeal from Appellate Decree No. 1866 of 1893, against the decree of Babu Kedar Nath Chatterjee, Subordinate Judge of Hooghly, dated the 20th of July 1893, reversing the decree of Babu Lalit Mohan Dass, Munsif of Howrah, dated the 28th of December 1892.

will lie in this case, as it is a suit in the nature of a Small Cause Court suit; and it is obvious that until this point is decided, we are not in a position to determine whether we agree or disagree with the point of pleading raised by the Subordinate Judge.

“In the case of *Makhan Lall Dutta v. Goribullah Sardar* (1), it was held that a suit for the recovery of damages, on account of the use and occupation of the land of which the defendant unlawfully put the plaintiff out of possession, was cognizable by the Small Cause Court. In the case of *Krishna Prosad Nag v. Maizuddin Biswas* (2), the plaintiffs brought an action for damages for cutting grass growing on the plaintiffs' land; and it was urged that such a suit was not cognizable by the Small Cause Court, inasmuch as it was prohibited by clause 31 of the second Schedule attached to the Small Cause Court Act (IX of 1887). This contention was overruled; but the Judges seem to have been of opinion that a suit for mesne profits was not cognizable by the Small Cause Court. These two cases are referred to in the case of *Sriram Samanta v. Kali Das Dey* (3), and there it was held that a suit for mesne profits for the period during which the plaintiff was kept out of possession of the land was not in the nature of a Small Cause Court suit, but it was a suit in which a second appeal lay.

“We doubt the correctness of the decisions which hold that suits for mesne profits are not of a Small Cause Court nature and governed by section 586 of the Civil Procedure Code. Clause 31, second schedule, of the Small Cause Court Act (IX of 1887), states: ‘Any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.’ We do not think that ‘a suit for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendant,’ is a suit for mesne profits, in which the defendant may be held liable for more than the actual profits received.

“We are inclined to think that the ‘suit’ referred to in

(1) I. L. R., 17 Calc., 541.

(2) I. L. R., 17 Calc., 707.

(3) I. L. R., 18 Calc., 316.

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Article 31, Schedule II, Act IX of 1887, is a suit of the nature described in the case of *Gurudas Pyne v. Ram Narain Sahu* (1), and that the 'other suits' mentioned in the article in which this sentence is placed, being equitable suits, seems to add force to this opinion.

"We, therefore, refer this appeal for the decision of the Full Bench, the question which has arisen being whether a second appeal lies from a suit for mesne profits where the value of the subject-matter in dispute is less than Rs. 500."

Babu Saroda Churn Mitter (with him Babu Shib Prosonno Bhattacharjee) for the appellant.—A suit for mesne profits is not a suit cognizable by a Small Cause Court. Article 31, Schedule II of the Provincial Small Cause Courts Act, exempts such a suit from its operation. Under the old law (Act XI of 1865), suits cognizable by a Small Cause Court were mentioned in section 6; but in the new Act (IX of 1887) there has been a departure to the effect that all suits are cognizable by a Small Cause Court, excepting those which are exempted. Under the old Act, suits for rent were cognizable by a Small Cause Court; but under the new Act, they are not. Suits for rent for homestead land under the old Act were cognizable by a Small Cause Court, but there is nothing in the new Act about it. Mesne profits have been defined in the Code of Civil Procedure to be profits which the person in wrongful possession of property actually received or might with ordinary diligence have received; therefore in a suit for mesne profits the plaintiff may ask for an account from the defendant. No doubt, under the old Act, suits for mesne profits were cognizable by a Small Cause Court. Questions of title having been raised, incidentally, in a suit for mesne profits, it was held that it did not oust the jurisdiction of a Small Cause Court: See *Mohesh Mahto v. Sheik Peru* (2), *Manappa Mudali v. McCarthy* (3). But the Bombay High Court, in the case of *Jamma Das v. Bai Shivkor* (4), has taken a different view. That was a case where the suit was brought in a Small Cause Court for damages for wrongful dis-possession from a house, and that Court regarded the suit as one

(1) I. L. R., 10 Calc., 860; L. R., 11 I. A., 59, (2) I. L. R., 2 Calc., 470.

(3) I. L. R., 3 Mad., 192.

(4) I. L. R., 5 Bom., 572.

for use and occupation ; but the learned Judges held that it was an action of trespass brought to try a question of title, and that the plaintiff's proper remedy was by an action of ejectment in the Civil Court, to which he might add a claim for mesne profits. Under the Code of Civil Procedure, in a suit for recovery of immoveable property, a claim for mesne profits may also be added. Under the old Act (XI of 1865), it will be seen that the only class of suits for account, which was exempted from the cognizance of a Small Cause Court, was partnership account, but in the new Act there has been a considerable departure in that respect. Article 31 of the Provincial Small Cause Courts Act runs thus : " Any other suit for an account, including a suit, after the mortgage has been satisfied, to recover surplus collections by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant."

On a reference to Articles 105 and 109 of the Indian Limitation Act, it will be seen that neither a suit by a mortgagor to recover surplus collections, nor a suit for recovery of profits of immoveable property belonging to the plaintiff wrongfully received by the defendant, is treated as one for account ; but such suits under the Provincial Small Cause Courts Act are considered as suits for accounts. A suit for mesne profits is one for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendant, and therefore not cognizable by a Small Cause Court. When the defendant is in possession, and a suit is brought against him for mesne profits, it is not cognizable by a Small Cause Court : See *Sriram Samanta v. Kali Das Dey* (1). No doubt the case of *Makhan Lal Dutta v. Goribullah Sardar* (2) is against my contention. While the plaintiff is in possession, and a suit is brought for value of the crops illegally carried away by the defendant, it is cognizable by a Small Cause Court : see *Annamalai v. Subramanyan* (3).

Babu *Baikunt Nath Das* for the respondent.—There can be no question that, under the old Act, suits for mesne profits were

(1) I. L. R., 18 Calc., 316.

(2) I. L. R., 17 Calc., 541.

(3) I. L. R., 15 Mad., 298.

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cognizable by a Small Cause Court. If, under the new law, such suits are exempted from its cognizance, the Legislature would have expressly mentioned that in Article 31. There is a broad distinction between a suit for mesne profits and a suit for the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant. A suit for mesne profits cannot be said to be a suit for an account. The class of cases contemplated in Article 31 is of the nature described in the case of *Gurudas Pyne v. Ram Narain Sahu* (1).

The following opinions were delivered by the Full Bench (PETHERAM, C.J., and O'KINEALY, MACPHERSON, TREVELYAN, GHOSE, BEVERLEY and BANERJEE, JJ.) :—

PETHERAM, C.J.—My answer to the question referred to this Bench is that no second appeal lies from a suit for mesne profits, where the value of the subject-matter in dispute is less than Rs. 500. In other words, I think that such a suit is cognizable in Courts of Small Causes and is within the provisions of section 586 of the Civil Procedure Code.

By the Provincial Small Cause Courts Act (IX of 1887), section 15, jurisdiction is given to Courts of Small Causes to take cognizance of all suits of a civil nature of which the value does not exceed Rs. 500, except such suits as are specified in the second schedule of the Act; and the question to be determined by this Bench is whether a suit for mesne profits is one of the suits specified in the schedule. A suit for mesne profits is not mentioned in the schedule by name, but it is said that it is included in the description of a suit in the latter part of Article 31 of the schedule. That description is “a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.” In order to ascertain whether a suit for mesne profits is within this definition, it is necessary to consider carefully what a suit for mesne profits really is.

If any person, by force or fraud, takes possession of immoveable property which belongs to another and deprives the true owner of the possession of his property, he commits a trespass, for which trespass the owner of the property may compel him by civil suit

(1) I. L. R., 10 Calc., 860 : L. R., 11 I. A., 59.

to pay him damages in the nature of mesne profits, the measure of such damages being as described in the Civil Procedure Code, section 211 (explanation), "mesne profits of property mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom, together with interest on such profits." So that a suit for mesne profits is an action for damages for a trespass to immovable property in which the measure of the damages may, or may not, be the amount of the profits which the wrong-doer has actually received from the property.

This is not a suit to recover the profits of the immovable property, but is a suit for damages of which the profits of the property actually received by the wrong-doer may not even be the measure.

In what I have said I have assumed that the latter part of Article 31 may be read alone, but this I do not think ought to be done; and if the whole article is read, it becomes, I think, quite clear that it cannot include a simple action for damages for a trespass to property. The whole article is, "Any other suit for an account, including a suit by the mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant."

The article, I think, clearly contemplates cases in which the plaintiff claims an account of monies which the defendant has received, and to an account of which the plaintiff is entitled, because the monies received belong to him. This is not the case in a simple action for damages, and what is called an action for mesne profits is nothing more. It may be objected that in many suits for damages in the nature of mesne profits, a question of title, which a Court of Small Causes cannot finally decide, may arise, and this is no doubt true; but the appropriate remedy is provided by section 23 of the Provincial Small Cause Courts Act.

I think that the case of *Sriram Samanta v. Kali Das Dey* (1) was wrongly decided, and my answer to the question referred is that which I have already indicated.

(1) I. L. R., 18 Calc., 316.

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MACPHERSON, J.—I concur.

O'KINEALY, J.—I agree with the Chief Justice.

TREVELYAN, J.—The question in this case is whether a Small Cause Court has jurisdiction to make a decree for mesne profits. The decision of this question depends upon the construction which should be placed upon Article 31, Schedule II, of the Provincial Small Cause Courts Act. That article excludes from the jurisdiction of the Small Cause Court "any other suit for an account including a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." It has been argued that a suit for mesne profits is a suit "for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." It may be so; but the jurisdiction of the Small Cause Court is, in my opinion, only excluded by the Act where such suit is a suit for an account, that is, a suit which seeks for a decree, not for a definite sum of money but ordering the defendant to account to the plaintiff for monies received by him. The machinery necessary for the putting in force of that decree is of a kind with which Small Cause Courts have never been supplied, and it has always been the object of the Legislature to confine Small Cause Courts to simple suits which are concluded by the first decree. A suit for an account is a suit which seeks for discovery in pursuance of the decree. No such right of discovery is given to a person who is merely asking for mesne profits. Mesne profits are only damages and were recognized as such by the decisions of this Court in construing the Small Cause Courts Act (XI of 1865), the place of which has been taken by the present Act. Before this Act came into force, there is no doubt that suits of this kind could be tried by the Small Cause Courts. The scheme of this Act is different from the scheme of the Act which it replaced. In the present Act, suits excluded from the jurisdiction of the Small Cause Courts are detailed; whereas in the earlier Act, suits the jurisdiction over which was given to it were set forth. I cannot think that Article 31 is a sufficient indication of the intention of the Legislature to exclude from the jurisdiction of the Small Cause Court a class of suits which were, according to many decisions of the Courts, included in that jurisdiction up to the passing of the present Act.

For the reasons I have given, Article 31 has, in my opinion, no application to a suit like the present ; and I would answer the question referred to us by holding that no second appeal lies, and would dismiss this appeal with all costs.

GHOSH, J.—The question that has been referred to the Full Bench for decision is, whether, in a suit for mesne profits, where the value of the subject-matter in dispute is less than Rs. 500, a second appeal lies to this Court.

The solution of the question depends upon another question, which is, whether a suit for recovery of mesne profits is cognizable by a Small Cause Court. If it is, then, no doubt, under the provisions of section 586 of the Code of Civil Procedure, no second appeal lies ; if, however, it is not so cognizable, there can be no question that a second appeal does lie.

The Provincial Small Cause Courts Act (IX of 1887) declares that all suits of a civil nature, of which the value does not exceed Rs. 500, shall be cognizable in the Court of Small Causes, subject however to the exception of such suits as are specified in the second schedule annexed to the Act ; and the contention for the appellant is that a suit for mesne profits falls within Article (31) of that schedule, and is not, therefore, cognizable by the Small Cause Court.

The old Act, which was repealed and substituted by Act IX of 1887, was XI of 1865. The classification of suits given in that Act as cognizable by the Small Cause Courts, and as not cognizable by that Court, was rather unsatisfactory ; and this led to some conflicting decisions of the different High Courts ; and one of the objects which Act IX of 1887 had apparently in view was to make it clear as to the suits which should not be cognizable by the Small Cause Court.

Section 6 of Act XI of 1865 was as follows :—

“The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise ; provided that no action shall lie in any such Court :

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(1) On a balance of partnership account, unless the balance shall have been struck by the parties or their agents.

(2) For a share or part of a share under the intestacy, or for a legacy or part of a legacy under a will.

(3) For the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

(4) For any claim for the rent of land or other claim for which a suit may now be brought before a Revenue officer, unless, as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears."

And it was held in several cases by this Court that a suit for mesne profits should be regarded as a suit for damages falling within that section, though a question of title to immoveable property might in such a suit be raised. But the Bombay High Court seems to have expressed a different view upon the matter. In the case of *Jamna Das v. Bai Shivkor* (1), where in a suit brought in the Small Cause Court for damages sustained by the plaintiff owing to the wrongful dispossession from a house, and where that Court regarded the suit as one for use and occupation, the learned Judges held that the suit could not rightly be viewed as one for use and occupation; that it was an action of trespass brought to try a question of title; and that the plaintiff's proper remedy was by an action of ejectment in the Civil Court, to which he might add a claim for mesne profits for the period during which the defendant had been in occupation. And they accordingly reversed the decree of the Small Cause Court.

It will be observed, on a reference to section 6 of Act XI of 1865, that the only class of suits for account which was then expressly exempted from the cognizance of a Small Cause Court was partnership account. The Provincial Small Cause Court has, however, made a considerable departure in that respect: we have there introduced other cases of account (see Articles 29 and 30); and Article (31) of the second schedule adds:—

(1) I. L. R., 5 Bom., 572.

“Any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.”

It has been said that a suit for mesne profits is not a suit for account, but a suit for damage caused by the trespass committed by the defendant; and, therefore, notwithstanding the use of the words “profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant,” such a suit is not excepted from the cognizance of the Small Cause Court.

No doubt a suit for mesne profits is not a suit for account, properly so called, nor is also a suit by a mortgagor to recover surplus collections received by a mortgagee a suit of that description. They are, however, akin to it. In such suits, accounts have, more or less, to be gone into; and when accounts are produced by the defendant, either at the requisition of the plaintiff, or at his own instance, they have to be examined for the purpose of determining what was received by the defendant during the period of his possession.

It seems to me that, if the Legislature had really intended that a suit must be a suit for account properly so called, in order to bring it within the words “including a suit, &c.,” as occurring in Article (31), they would have stopped with the words “any other suit for account,” and would not have *added* those words. The addition of the words indicates, to my mind, that the Legislature meant to bring in other cases, which, though not strictly speaking cases for account, are akin to them.

In this connection it may be useful to refer to the Indian Limitation Act. There are various cases of account provided therein (see Articles 85, 88, 106); but the suit of a mortgagor to recover surplus collections received by the mortgagee is not treated as one for account (see Article 105), nor is a suit for recovery of profits of immoveable property belonging to the plaintiff wrongfully received by the defendant (Article 109); and yet these are the two classes of suits which are specially mentioned in Article 31 of the Small Cause Courts Act. Indeed, the words in that article have been taken almost *verbatim* from Articles 105 and 109 of the Limitation Act. A claim for mesne profits in respect

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of immoveable property has always been understood as one falling within Article 109 of the Limitation Act, and there can, I think, be no doubt as to this, as the words in the last column of that article clearly indicate : for a *dispossession* is therein contemplated.

A distinction, and, I think, a proper distinction, has been drawn in some cases between a suit for recovery of value of crops wrongfully carried away by a defendant while in plaintiff's possession, and a suit for profits realized by the defendant after the plaintiff has been dispossessed. The former has been regarded as a suit for damage cognizable in the Small Cause Court; and the latter for mesne profits cognizable only in the ordinary Civil Courts; see the cases of *Krishna Prosad Nag v. Maisuddin Biswas* (1) and *Sriram Samanta v. Kali Das Dey* (2); and these cases were approvingly quoted by the Madras High Court in the case of *Annamalai v. Subramanyan* (3).

In a suit for mesne profits, a question of title to the immoveable property, in respect of which such mesne profits are sought to be recovered, is often raised, and it is not desirable that such a question should be, though incidentally, decided by that Court; and the Provincial Small Cause Courts Act has, in section 23, provided that when the right of a plaintiff and the relief claimed by him depend upon the proof of title to immoveable property, and the Small Cause Court cannot finally determine it, the Court may return the plaint for presentation to the Civil Court.

I should here add that the words in Article (31), "and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant," might also include suits other than suits for mesne profits; but I need hardly say that *that* is no reason to hold that a suit for mesne profits does not fall within those words.

With reference to Article (31), the question, to my mind, is not so much, whether a suit for mesne profits is a suit for *account* properly so called, as it is, whether such a suit falls within the words "a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant;" I think, it does.

(1) I. L. R., 17 Calc., 707.

(2) I. L. R., 18 Calc., 316.

(3) I. L. R., 15 Mad., 298.

For these reasons I would answer the question referred in the affirmative.

BEVERLEY, J.—Although I adhere to the opinion I expressed in the case of *Sriram Samanta v. Kali Das Dey* (1), that by the concluding words of clause 31, Schedule II of the Provincial Small Cause Courts Act, the Legislature intended to withdraw suits for mesue profits from the jurisdiction of Courts of Small Causes, still I am bound to admit that the wording of that clause is not so explicit as to justify me in dissenting from the decision of the majority.

BANERJEE, J.—The question that arises for determination in this case is, whether a second appeal lies from a suit for mesue profits where the value of the subject-matter in dispute is less than Rs. 500. If this question is answered in the negative, the appeal must be dismissed. If it is answered in the affirmative, the appeal will have to be heard and determined on the merits.

The answer to the question depends upon the construction to be put on Article 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887). If the suit comes within that Article, it is excepted from the cognizance of a Court of Small Causes, and so the second appeal is not barred. If, on the other hand, the suit does not come under that Article, then, as there is no other Article under which it can come, it is a suit of the nature cognizable in the Small Cause Court by section 15, sub-section (2) of Act IX of 1887, and a second appeal in such a suit is barred by section 586 of the Code of Civil Procedure.

Article 31 of Schedule II of Act IX of 1887 runs thus :—

“ Any other suit for an account, including a suit by a mortgagor, after the mortgage had been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendants.”

Now a suit for mesue profits is, in most cases, a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant, though the term mesue profits as defined in the explanation to section 211 of the Code of Civil Procedure includes not only the profits which the

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person in wrongful possession of such property actually received, but also those which he might, with ordinary diligence, have received therefrom. And as regards the former, the amount has to be ascertained by taking an account of what the defendant has realized from, and spent for, such property, though, as regards the latter, the taking of an account may be unnecessary. Thus, though a suit for mesne profits is, strictly speaking, not a suit for an account, it is a suit in which in most cases an account has to be taken of profits received from, and expenses incurred in the management of, immoveable property.

The words "any other suit for an account including a suit, &c.," in Article 31 quoted above, mean, in my opinion, "any other 'suit for an account,' taking the expression 'suit for an account' as comprehending also a suit, &c." For if the word 'including' was meant to exclude every thing that did not come within the strict sense of the expression 'suit for an account,' then the specification of the two distinct classes of suits that follows would be unnecessary.

In my opinion, therefore, a suit for mesne profits comes under the last clause of Article 31, Schedule II of Act IX of 1887, and is excepted from the cognizance of a Court of Small Causes, and so a second appeal lies in such a suit, although it may be valued at less than Rs. 500.

S. C. G.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice O'Kinealy and Mr. Justice Banerjee.

ABDUL GAFUR AND OTHERS (PETITIONERS) v. QUEEN-EMPRESS
 (OPPOSITE PARTY). *

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Warrant of arrest—Criminal Procedure Code (X of 1882), sections 75 and 80—Signature of Magistrate—Initials—Notification of substance of warrant—Penal Code (XLV of 1860), section 136—Discharge of public functions.

A public servant executing a warrant of arrest which is not signed by the Magistrate as required by section 75 of the Criminal Procedure Code,

* Criminal Revision, No. 301 of 1896, against the order passed by J. Lang, Esq., District Magistrate of Hooghly, dated the 1st of May 1896, modifying the order passed by Babu Kadernath Banerjee, Sub-Deputy Magistrate of Jahanabad, dated the 8th of April 1896.