

Mr. *Conlan* and *Shah Asad Ali*, for the respondent.

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The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows :—

NAUBAT
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SINGH.

OLDFIELD, J.—The appellant urges that the lower Court should not have given a decree for the property by pre-emption conditional on plaintiff's paying the full amount required within a certain time, as he claimed the property on payment of a smaller sum and did not allege in his plaint that he was ready to pay a price which the Court might find to be payable, and we are referred to a decision of this Court,—*Durga Prasad v. Nawazish Ali* (1). There is this distinction between that case and the one before us that in the former the Court below had refused in its discretion to permit plaintiff to obtain the property by paying a larger sum than he had expressed himself in his plaint willing to pay, and the High Court observed that they could not hold as a matter of law that the Court below was bound to allow the plaintiff to amend his plaint and to bring in the very much larger sum which he should have offered to pay when he brought his suit. In this case the Judge has acceded to the prayer of the plaintiff, and it is not necessary that we should interfere with the exercise of his discretion in the matter, particularly as the objection was not taken in the written memorandum of appeal. The objections urged by the respondent are without force. The appeal is dismissed but without costs.

Appeal dismissed.

Before *Mr. Justice Spankie* and *Mr. Justice Oldfield*.

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April 19.

SURAJ DIN (PLAINTIFF) v. CHATTAR (DEFENDANT)*

Disposal of suit on preliminary point—Reversal by Appellate Court of decree on such point and irregular remand of case under s. 562 of Act X of 1877 (Civil Procedure Code) for trial of a certain issue—Power of succeeding Judge of Appellate Court to re-try such point.

A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court the then Judge of the

* Second Appeal, No. 1036 of 1880, from a decree of G. E. Knox, Esq., Judge of Banda, dated the 29th June, 1880, reversing a decree of H. M. Bird, Esq., Assistant Collector of the first class, Kirwi, dated the 13th May, 1880.

(1) I. L. R., 1 All. 591.

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appellate Court, Mr. B, reversed the decree upon such preliminary point, and remanded the suit under s. 562 of Act X of 1877 for the trial of a certain issue. The Court of first instance tried such issue and made a decree in accordance with its finding thereon. On appeal against the decree of the Court of first instance the defendant again raised such preliminary point. The then Judge of the appellate Court, Mr. K, dismissed the suit upon such preliminary point. *Held* that, as, although Mr. B had irregularly remanded the suit under s. 562 of Act X of 1877, his decision disposed of such preliminary point and only left open for trial the issue which he had directed to be tried, Mr. K was not competent to re-try and decide such preliminary point.

The facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case for the trial of the issue set out in the order of remand.

Babu *Oprokash Chandar Mukarji*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The High Court (SPANKIE, J., and OLDFIELD, J.,) made the following order of remand:—

OLDFIELD, J.—The plaintiff brought this suit as ex-lambardar to recover rent for a certain holding from the defendant, Chattar, whom he alleges to be mortgagee of the original tenant, Patiya. The Assistant Collector in the first instance held that Chattar had nothing to do with the holding; that his father Kamta had taken it when relinquished by Patiya and held it as sir; plaintiff might, if so advised, sue him for profits; and he dismissed the suit. The Judge, Mr. Barstow, held that Chattar and Kamta were joint tenants of the holding, and Chattar was liable to plaintiff for the recorded rent, but could plead to set-off any sum due to him as share-holder for profits; and he reversed the decree of the Assistant Collector, and remanded the case under s. 562 of Act X of 1877 for the determination of the amount which should be deducted from the sum claimed by the plaintiff on account of profits due to the defendant and for re-decision. The Assistant Collector accordingly determined the amounts of profits to be set-off from the rent due, and decreed the balance. Chattar, defendant, appealed, and the appeal was heard by Mr. Knox, Judge. One of the grounds of appeal was that defendant is not a tenant and not liable for rent to plaintiff. The Judge held this contention to be correct, and on this ground reversed the decree of the Assistant Collector and

decreed the appeal. It is urged in appeal before us that the Judge Mr. Barstow's decision on the question of tenancy and liability for rent is final. This objection is valid. It was no doubt irregular for Mr. Barstow to remand the case for re-decision under s. 562, but his judgment disposed of the issue between the parties whether or not defendant Chatter was liable to pay rent to plaintiff on the holding, and it only left open for determination the amount of that rent after deduction of defendant's share of profits due to him by the plaintiff. It was not in Mr. Knox's power to re-open and decide again the question of liability for rent, nor can we say that Mr. Barstow's decision that Chatter and Kamta, although share-holders, took this land with liability to pay rent on it to the body of share-holders represented by the lambardar is wrong or open to any objection which may be entertained in second appeal. The case will go back in order that the Judge may determine whether the amount now decreed by the Assistant Collector is correct. Ten days will be allowed for objections and a day be fixed for hearing by the Registrar.

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CHATTAR*Issue remitted.**Before Mr. Justice Oldfield and Mr. Justice Straight.*MAINATH KUARI (JUDGMENT-DEBTOR) v. DEBI BAKHSH RAI
(DECREE-HOLDER.)*1881
April 20

Execution of decree—Limitation—Application by decree-holder for postponement of sale—Application for execution, or to take some step in aid of execution, of decree—Act XV of 1877 (Limitation Act), sch. ii, No. 179.

An application by a decree-holder for the postponement of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time is not "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of No. 179, sch. ii, Act XV of 1877, and limitation cannot be computed from the date of such an application.

THE decree-holder in this case applied for execution of his decree on the 19th July, 1876. In pursuance of this application certain property belonging to the judgment-debtor was attached and was notified to be sold on the 21st August, 1876. On the day fixed for the sale to take place the decree-holder applied to

* Second Appeal, No. 7 of 1881, from an order of W. Kaye, Esq., Judge of Gorakhpur, dated the 10th November, 1880, reversing an order of Maulvi Muhammad Kamil, Munsif of Basti, dated the 14th April, 1880.