

1869

MUSAMAT
KHEPDU
v.
KALU SAHU

It is contended by the pleader for the respondent that the Courts below had no jurisdiction in this case, and that before execution could have been taken out upon the kistibandi, it was necessary to bring a suit on the kistibandi, and that without such a suit the decree-holder had no right to recover. We do not feel inclined to allow this objection to be taken, inasmuch as it was never a part of the judgment-debtor's case at any stage of the proceedings in either of the Courts below. On the contrary, the judgment-debtor's case was that, assuming the kistibandi to be a proper ground on which to bring an application for execution of decree, the decree-holder's remedy was barred, he not having brought it within proper time; and we are the less inclined to allow this objection now, inasmuch as all the equities in the case are in favour of the decree-holder. The judgment-debtor has had great indulgence shown him; instead of having his property sold up at once in satisfaction of the debt, he has had time and opportunities given him for paying it off, and has moreover received, in consequence of the neglect of the decree-holder in bringing his suit before, the advantage of being released from payment of a sum of 451 rupees which he was clearly bound to pay, but which he cannot now be made to pay by reason of the Statute of Limitation.

The case of *Harro Nath Roy v. Maherulloh Mollah* (1), which has been brought to our notice by the pleader for the special respondent, appears to us to have nothing in common with this suit. In that case there was no fresh agreement, and the suit was on the original instalment-bond whilst in this case the kistibandi was a fresh arrangement making fresh terms and creating fresh liabilities.

We think therefore that the decree of the lower Court is erroneous, and should be reversed with costs, and that the decree-holder should be allowed to take out execution in the usual way.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

1869
June 28.

SRIMATI SAUDAMINI DASJ, MOTHER AND GUARDIAN OF SHAMA CHARAN MITTER (ONE OF THE DEFENDANTS) v. SRIMATI THAKOMANI DEBI (PLAINTIFF).*

Suit for Money paid as Rent—Jurisdiction of Civil Court.

The plaintiff sued to recover money, which she had paid as rent to the zemindar under a decree of the Revenue Court, after she had already paid her rent to his Gomasta.

Held, that the suit was not cognizable by the Civil Court.

Baboos *Ashutash Chatterjee* and *Ashutosh Dhar* for appellant.

Baboos *Gopinath Mookerjee* and *Hem Chandra Banerjee* for respondent.

* Special Appeal, No. 3325 of 1868, from a decree of the 1st Subordinate Judge of Hooghly, dated the 27th November 1868, reversing the decree of the Moonsiff of that district, dated the 23rd of July 1868.

(1) Reference from the Small Cause Court of Kooshtea, January 8th, 1867.

JACKSON, J.—This case is very clear. The plaintiff alleges that she had paid the rent to the zemindar's gomasta or agent. Subsequently a suit was brought against her by the zemindar, and she was compelled to pay over again the rent which she had already paid. The present suit is, in fact, to recover, by decree of the Civil Court, the money which she has had to pay under the Revenue Court's decree. It seems to me that the decision of the Moonsiff, who held that the suit could not lie, is quite correct. The Principal Sudder Ameen was wrong in thinking that the suit was cognizable in the Civil Court, and I think, also, that the precedent, *Gocool Chunder v. Ali Mohamed* (1) referred to by him, is quite inapplicable. It relates to a different subject. I think therefore that the decision of the Subordinate Judge must be set aside, and that of the Moonsiff restored with costs.

MARKBY, J.—I am of the same opinion.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

SHAMA CHARAN GHOSE (ONE OF THE DEFENDANTS) v. TARAK NATH MUKHOPADHYA AND OTHERS (PLAINTIFFS.)*

1869
June 30.

Error in Description of a Defendant as a Minor—Discretion of Lower Appellate Court.

The father of a defendant filed an appeal from the judgment of the first Court, describing his son as a minor. It afterwards appeared that the defendant was not a minor; and the lower Appellate Court refused to pass an order allowing the appeal by the father to stand as an appeal by the defendant.

Held, that the lower Appellate Court could, in the exercise of its discretion, allow the appeal to stand as an appeal by the defendant, but the High Court could not interfere with the order in special appeal.

Baboo Bama Charan Banerjee and Barada Prasad Shome for appellant.

Baboo Srinath Banerjee for respondent.

THE judgment of the Court was delivered by.

JACKSON, J.—In this case the suit was brought against one Shama Charan, who, it appears, is the son of Prem Chand. Judgment being given for the plaintiff, Prem Chand came to the Judge's Court, and preferred an appeal describing himself as appellant on behalf of his minor son, Shama Charan. When the appeal came on for hearing before the Subordinate Judge, to whom it had been referred, it was found that the defendant Shama Charan was not a minor, but that he was of full age, and had defended the suit in person, and had in person applied to the Court below for a review of judgment. It appears that Shama Charan had, after the filing of the appeal, put in a petition, stating that the

* Special Appeal, No 3045 of 1868, from a decree of the Subordinate Judge of Hooghly, dated the 13th July 1868, affirming a decree of the Moonsiff of Serampore in that district, dated the 9th December 1867.