

1869
 BHOLAI
 MANDAL
 v.
 JARIF GAZI.

The Judge in appeal has found that the plaintiffs held possession for not less than 10 years, and the Judge says that "as the defendants have failed to justify the dispossession of the plaintiffs of their own authority, and as they did not obtain the eviction of plaintiffs by process of law, the plaintiffs are entitled to be replaced in possession"

The Judge goes on to say "it does not lie with the Court to determine in this suit the terms on which the plaintiffs are entitled to hold the lands or whether they are entitled to hold the lands for a further period; and he gave the plaintiffs a decree for possession."

In special appeal it is urged that the plaintiffs coming in upon a specific title, that is holding from the defendants under a mowrasi patta, were bound to prove their title; and we think that this contention is correct. The plaintiffs made the landlords parties to this suit, and we think that they cannot recover unless they prove the existence of their lease, and it is not sufficient for them merely to prove occupation for 10 years, the Judge not having found more than that period in their favor; and there is no proof of mowrasi tenure.

It would be useless to remand the case, we therefore reverse the decree of the lower Appellate Court, and affirm the decree of the Court of first instance, and the appellant will get his costs of all the Courts.

1869
 June 8.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

NILAMBAR SEN (JUDGMENT-DEBTOR) v KALI KISHOR SEN (DECREE HOLDER)*

Improvement of Joint Property—Contribution—Revival of Decree—Jurisdiction.

In a suit for recovery of a sum of money expended towards improvement of a joint property, the Court passed a decree that if the defendant would contribute toward payment of the expenses for the improvement, he would be entitled to a proportionate share of the profits. No steps were taken by the plaintiff from 1863 to revive the decree, but on the application of the defendant tendering the amount due from him, and praying to be put in possession, the lower Court restored the decree and passed an order in his favor.

Held, that the lower Courts had no jurisdiction to revive a decree at the instance of the judgment debtor.

Baboo Nilmadhab Bose for appellant.

Baboo Hem Chandra Banerjee for respondent.

THE judgment was delivered by

BAYLEY, J.—In this case it appears that the appellant, Nilambar Sen, was co-sharer of certain property with his brother Pitambar Sen, and was sued by him (Pitambar) for certain money expended in the improvement of that property. The Court in that case passed a decree in favor of Pitambar, or

*Miscellaneous Special Appeal, No 157 of 1869, from a decree of the Officiating Judge of Dacca, dated the 22nd January 1869, affirming a decree of the Moorsiff of that district, dated the 23th July 1868.

rather in favor of his son Kali Kishor Sen, to the effect, that should the defendant, Nilambar, judgment-debtor, contribute towards the payment of the expenses of "Bharati" or improvement of the soil, by filling up cavities, he would be entitled to a proportionate share of the profits, but that if he did not, he should pay rent in proportion to the extent of land previously held, and of rent before paid by him, and that the decree-holder, Pitambar, would continue to get the whole extra profit derived from the improvement above referred to. This decree was struck off in the year 1863, and has never since been revived by the decree-holder; and it may be here noticed that with the exception of this decree of the Moonsiff, there was no other decree given to the judgment-debtor, Nilambar Sen.

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SEN.

The present appellant, Nilambar, now in miscellaneous special appeal asks from us, firstly, that the decree obtained by the decree-holder, Pitambar, against him and struck off in 1863, as above stated, may be restored to the file; and, secondly, that after paying the Ameen's fees and the share of expense of the "Bharati," he the petitioner may be put in possession of the homestead of Kandarpa Khan. The Moonsiff and the Judge have both rejected this prayer. The Judge has held that under no circumstances could the judgment-debtor be put in possession of the lands, as the decree does not provide for such possession, but only for a share in the extra profits.

The judgment-debtor appeals against this order, and urges that he is so far a decree-holder as that by the decree it has been ordered that he shall participate in the profits of the property if he paid a certain sum of money, and that therefore on payment of that sum, which he is ready to pay, he is entitled to be put in possession.

Now, in the first place, we cannot allow that when a decree-holder himself allows his decree to be struck off, and does nothing to revive it, the decree should be revived on the motion of the judgment-debtor; and in the next place, as the judgment-debtor in this case can shew us no cross suit or decree in which any order has been passed in his favor for the possession he seeks for, we cannot grant his prayer for possession. But we think that the whole proceedings taken in this case from the date of the revival of the execution of the decree up to the present moment have been taken without jurisdiction. No application of the judgment-debtor could restore a decree of the judgment-creditor which that creditor, for reasons best known to himself, refused to execute, and no Court could revive a decree abandoned by the only person who could execute it, *viz.*, the decree-holder, or one precisely in his place.

We therefore quash the whole proceedings of the lower Courts subsequent to the revival of the execution of the decree as being without jurisdiction. As the special appellant however, had no reason to come to this Court to revive a decree of which he was not the holder, we think that he must pay the costs in this Court.