Before Mr. Justice Norman and Mr. Justice E. Jackson.

RAMTANU ACHARJI (DEFENDANT) v. KOMAL LOCHAN ROY AND HIS ADOPTED SON, RADHA GOBIND ROY (PLAINTIFFS)* 1869 *April* 30.

Suit against Surety of Defaulting Tenant—Res-Judicata.

A landlord sued his tenants and his tenants' surety in the Collector's Court for arrears of rent, the surety being merely treated as a nominal party, and the decree being given against the tenants. He afterwards sued the surety in the Civil Court on the bond given by him, and in the lower Court obtained a decree not only for the arrears of rent, but also for the costs in the Act X. suit.

Held, on special appeal, that the suit was as regards the arrears of rent not barred by section 2, Act VIII. of 1859, but that the costs in Collector's Court could not be recovered.

The decision in case of *Bhobun Mohun* v. *Bhobosundari Debi*(1) dissented from.

Baboo *Anand Chandra Ghosal* for appellant.

Baboo *Grija Sunkar Mazumdar* for respondent.

THE following judgment sufficiently explains the facts which was delivered by

NORMAN, J.—One Komal Lochan Roy gave an ijara to Balaram Biswas, and at the time of executing the lease the present defendant, Ramtanu Acharji executed a bond as surety for the rent to Komal Lochan Roy. The rent not having been paid by Balaram, Komal Lochan now sues Ramtanu Acharji upon the bond, and has obtained a decree for the amount due, and a declaration that the property pledged by the bond is liable to be sold to realize the amount due. It is quite clear that the decision is right in the main.

It has been objecetd in special appeal that Komal Lochan Roy cannot maintain the present action, because in a former suit against Balaram Biswas for rent, Ramtanu Acharji was named in the Collector's Court as a second defendant, and it is contended that the decree in that suit being a decree for the amount of rent now sought to be recovered, was enforceable against Ramtanu Acharji; and consequently this second suit is upon the same cause of action within section 2 Act VIII, of 1859. We need not go into the question as to whether or not a suit will lie in the Collector's Court against the surety, joining him with the principal, for arrears of rent. For myself, I cannot assent to the doctrine laid down in *Bhobun Mohun* v, *Bhobosundari Debia* (1). It is unnecessary to consider the question here, because on examining the plaint, the decree, and the proceedings in the Collector's Court, it is clear that Ramtanu Acharji was treated, and I think he could only have been treated, as a mere nominal party. No issue was raised as to his liability, and no decree was pronounced against him. Komal Lochan's present suit is upon a bond which has not been before any Court on any previous occasion.

*Special Appeal No. 2884 of 1868, from a decree of the Officiating Judge of Dinagepore, dated the 9th June 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 16th December 1867.

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Another objection has been taken by the appellant. It is that the lower Appellate Court has given to the plaintiff the costs of the suit against Balaram Biswas in the Collector's Court. This is clearly a mistake. The defendant by the bond makes himself liable for the due payment of several kists of rent on the days on which they were to become due. He does not in terms render himself liable for any costs the plaintiff incurred in endeavouring to recover that rent by suit against Balaram Biswas. It was his own act that he sued Balaram, and not the defendant, and if it was an unwise act to sue a person who could not pay instead of the surety, he must take the consequences. We cannot cast those consequences upon the surety. The decree will be modified by disallowing the costs of the Act X suit. The parties will get their costs in this Court and the lower Courts in proportion to the amount of the claim decreed or disallowed.

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

ANURUP CHANDRA MUKHOPADHYA AND OTHERS (PLAINTIFFS) *v.* HIRAMANI DASI AND ANOTHER (DEFENDANTS)*

1869 *May* 1.

Application for Summons to cite Witnesses—Practice—Error.

A party is entitled, at any stage of the case before hearing to apply for a summons to cite witnesses, without reference to the number of such applications which he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause.

The errors of procedure of the Court of first instance are not to be remedied when they have not been made a ground of complaint before the lower Appellate Court.

Mr. Money and Baboo *Ramanath Bose* for appellant.

Baboos *Srinath Das* and *Mahini Mohan Roy* for respondents.

JACKSON, J.—The first and principal ground of appeal which the learned counsel has relied upon in this case, is the refusal of the Court of first instance to summon the witnesses who were named by the plaintiff, and against whom the plaintiff applied for summons before the case came on for hearing. I think it quite clear that the plaintiff was entitled, at any stage of the case before hearing, to apply for such summons, without reference to the number of such applications which he might have previously made, and that it is the duty of the Court to comply with such application if any time be left before the hearing of the cause. But this is not the Court in which errors of procedure of the Court of first instance are to be remedied where error has not been made the ground of complaint in the the lower Court and first Appellate Court.

* Special Appeal. No. 2850 of 1868, from a decree of the Additional Judge of Hooghly, dated the 19th June 1868, affirming a decree of the first Principal Sudder Ameen of that district, dated the 7th January 1868.