

Before Mr. Justice Loch and Mr. Justice Mitter.

BHUBANESWARI DEBI (DECREE-HOLDER) v. MAHENDRA NATH CHOWDHRY, LEGAL REPRESENTATIVE OF NABAKRISHNA CHOWHDRY, DECEASED, & MINOR (JUDGMENT-DEBTOR)*

1869
April 28.

Limitation—Act XIV, of 1859, s 20—Appeal—Review—Execution of Decree.

If after a decree upon an application for review of judgment or petition of appeal, the person in whose favour the original decree was given, appears in person (whether voluntarily or upon service of notice) to oppose the application, and files a vakalatnama, or does any thing for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, such an act being an act of the person in whose favour the judgment has been given for the purpose of preventing it being set aside, is an act done for the purpose of keeping the judgment in force.

BHUBANESWARI Debi made an application, on the 15th April 1868, to the Sudder Ameen of the 24-Pergunnas, to execute a decree passed by that Court in her favour on the 31st March 1863.

That decree was confirmed by the Appellate Court, on 8th April 1864 and by the High Court in special appeal on the 28th November 1864. The special appeal of the defendant, the judgment-debtor, was dismissed for default. Afterwards the judgment-debtor applied to the lower Appellate Court for a review of its judgment, but the application was rejected on the 18th July 1865. The first Court, on the 12th September 1868, held that the application for execution of its decree was within time, and ordered execution to proceed. On appeal to the Judge of the 24-Pergunnas by the judgment-debtor, the application for execution of the decree was rejected, on the ground as stated by that Judge "that the rule of limitation, which is applicable to the decree of the High Court, does not cover the decrees of the subordinate Court, by reason of an order of the High Court dismissing the special appeal: and proceedings taken to oppose an application for review cannot be said to be proceedings taken to keep the decree in force."

The decree-holder appealed to the High Court, on the following ground, that the striking off the original special appeal for default was not a termination of the proceedings in the lower Court, for after the striking off the appeal the lower Court entertained a petition of review, and caused the decree-holder to show cause in the usual way, and it was not until the review argument was rejected that the decree-holder was in a position to enforce her decree of 8th April 1864; and that, therefore, limitation did not apply to prevent execution of her original decree, which was in abeyance until the result of the review was ascertained.

Mr. R T Allan and Baboo *Bhawani Charan Dutt* for appellant.

Baboo *Mahes Chandraz Chowdhry* for respondent.

* Miscellaneous Special Appeal, No. 72 of 1869, from a decree of the Judge of 24-Pergunnas, dated the 30th January 1869, reversing a decree of the Sudder Ameen of that district, dated 12th September 1868.

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The judgment of the Court was delivered by

BEUBANES-
WARI DEBI
v.
MAHENDRA
NATH CHOW-
DHRY.

LOCH, J.—We think the order passed by the Judge is not correct. The question has been determined by a Full Bench in the case of *Bipro Das Gossain v. Chunder Sekhar Bhuttacherjee* (1) in which it is held that “if upon the application for review or the petition of appeal, the person in whose favor the original decree was given, appears in person or by wakil (whether voluntarily or upon service of notice) to oppose the application, and files a vakalatnama for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, we think that within the fair interpretation of the words, such act being an act of the person in whose favor the judgment has been given for the purpose of preventing it from being set aside, is an act done for the purpose of keeping the judgment in force.”

The facts in this case are similar to those set forth in the judgment just quoted. We, accordingly, set aside the order of the lower Appellate Court, and restore the order of the Moonsiff.

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

1869
April 28.

GOPAL CHANDRA ROY (PLAINTIFF) v NABIN CHANDRA BHAN-
DARI AND OTHERS (DEFENDANTS)*

Kabuliat Res-Judicata.

In a previous suit, the plaintiff sought to obtain a kabuliat from the defendant in respect of land held by him, alleging the quantity to be 8 bigas and 17 katas. It was therein determined that the defendant held only 7 bigas, and no more. In the present suit brought to eject the defend from 1 biga 17 katas of land, *Held*, that it was not maintainable, as it was for the determination of a question decided in the former suit.

Bahoo Naba Krishna Mookerjee for appellants.

Baboos Jagadanand Mookerjee Ramanath Bose for respondents.

JACKSON, J.—I think it quite clear that the plaintiff cannot maintain this suit. He had previously brought a suit against the defendant to obtain a kabuliat from him in respect of the land which he held under the plaintiff, alleging that land to be 8 bigas 17 katas, and in that suit it was conclusively determined by the Revenue Court and in the appeal from that Court that the land held by the defendant was 7 bigas, and no more. The plaintiff now brings this suit to eject the defendant from 1 biga and 17 katas. It is not alleged that the defendant has got possession of any land of the

* Special Appeal, No. 2175 of 1868, from a decree of the Principal Sudder Ameen of Hooghly, dated the 21st May 1868, affirming a decree of the Moonsiff of that district, dated the 24th February 1868.

(1) Case No. 583 of 1866 ; May 31st 1867.

See B. L. R. Sup. Vol. F. B. E.