

Before Mr. Justice Kemp and Mr. Justice Glover.

LALA PARSADI LAL (PLAINTIFF) v. LALA AMBIKA PRASAD
AND OTHERS (DEFENDANTS).*

1869.
April 1.

Act XXIII of 1861, s. 2—Cost of Service of Process.

A plaintiff in the Moonsiff's Court filed a list of witnesses, but failed to deposit talabana or cost of the service of summons, for their attendance. The Court failed to fix a time for the service of talabana. The processes were not served, and the Court dismissed the suit, because the plaintiff had produced no evidence in support of his claim.

Held, that under Act XXIII. of 1861, section 2, the lower Court should first have fixed a time for the deposit of talabana. Case remanded.

THIS was a suit brought in the Court of the Sudder Ameen of Sarun for recovery of rupees 471 principal, and rupees 266.4-0½ interest, from Aswijn 1270 to 15th Jaisti 1274 Fusli, under a deed of zuripeshgi of the 31st March 1857.

On a reference to the papers on the record, it appeared that, from the 30th July 1867 up to 14th December 1867, the suit was continually brought up before the Court, and the date for the decision and attendance of witnesses was fixed on every occasion, till on the 14th of December 1867, it being brought up for hearing, it was ordered that the suit should be heard and decided at the next sitting. Afterwards, on the 16th December 1867, a list of witnesses on behalf of the plaintiff was filed, and thereupon summonses in the names of the witnesses, were made over to the sherista of the Nazir. But in consequence of the plaintiff having failed to deposit the talabanas of the peon, the Nazir filed report to that effect, which was placed on the record, and the suit was dismissed by the Sudder Ameen on the 28th December 1867, on the ground that the plaintiff had filed no evidence in support of his claim. The Subordinate Judge, on appeal, supported the decision of the first Court because, "according to section 23, Act VIII. of 1859, the plaintiff was bound "to deposit the amount of talabana, which was necessary for the service of "summons, and to produce his witnesses on the day appointed for the hear- "ing and decision of the case by serving a summons upon them. But he "failed to do so."

On the appeal to the High Court, the point mainly relied on, was that the Court of first instance should have fixed a time for the issue of the summons, under section 2, Act XXIII. of 1861, and should not have dismissed the suit, because no talabana was given for the service thereof.

For the respondents it was urged that the plaintiff ought to suffer for his own negligence in not having taken proper measures for securing the attendance of witnesses on his behalf.

Baboos *Khetra Mohan Mookerjee* and *Tarak Nath Dutt* for appellants.

Baboo *Kali Krishna Sen* for respondents.

*Special Appeal, No. 3010 of 1868, from a decree of the Subordinate Judge of Sarun, dated the 27th August 1868, affirming a decree of the Moonsiff of that district, dated the 28th December 1867.

1869

LALA PRASA-
DI LAL
v.
LALA AMBIKA
PRASAD.

The judgment of the Court was delivered by

GLOVER, J.—The point taken in this special appeal is, that the Courts below ought to have carried out the provisions of section 2 of Act XXIII. of 1861, and have fixed a period for issuing the process asked for by the plaintiff. There appears to be no doubt, on referring to the record, that no such time was fixed; but that on a return of the Nazir to the effect that the plaintiff had not deposited the talabana required by the Court, the case was dismissed, on the 28th December 1867, without any further action being taken on the part of the Court. It is contended, on the other side, that the plaintiff ought to be made to suffer for his own laches; that the case was pending for more than four months, during which the plaintiff took no effectual steps to secure the attendance of his witnesses, and that even from the date on which he was directed to deposit talabana, a further period of twelve days elapsed before the decision was given, during which time he could easily have paid in the money to procure the attendance of the witnesses. It appears to us that we have no other resource but to remand this case; the question involved is a dry point of law; and whether the plaintiff had, or had not, ample opportunities to deposit talabana, it is quite clear that, under the provisions of the section above quoted, the Court was bound to fix a period within which the talabana was to be deposited.

This section, we may remark, repealed the old law, section 22 of Act VIII. of 1859, which contained no provisions for the fixing of any time within which to deposit talabana.

It is, therefore, clear that the Legislature, in enacting section 2 of Act XXIII. of 1861, had in view the particular object of making the Courts fix a time for depositing talabana, and giving to the plaintiffs or defendants, as the case might be, an opportunity of knowing within what period they were bound to make that deposit.

The case must go back to the Court of first instance, in order to carry out the provisions of the law, and fix a time within which talabana is to be paid into Court, and if the special appellant pays the talabana within that time, the Court will take the usual measures for securing the attendance of the witnesses, and dispose of the case on their evidence.