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been, under section 77 of the Act. There was no enquiry as to whether the intervenor had been in the receipt and enjoyment of the rent; and his objection being thrown out in that case would be clearly no ground for preventing his making a similar defence when another suit is brought by the plaintiff for the same trees against the same defendant. What the Judge ought to have done, I think, was to have taken up the case under section 77, and have decided it on the evidence as to whether there had been any receipt of rent on the part of the intervenor before and up to the time of the institution of this suit.

This being our opinion, it is unnecessary to take any notice of the second objection further than to say that the mere fact of the plaintiff's putting in the old decree, and alleging it to cover the trees in suit, was not sufficient to prove the plaintiff's case, unless there was something in that decree which marked down the position of the trees, and showed, without the least doubt, that they were the very trees the rents of which are now claimed. The mere putting in of the decree and the mere allegation of the plaintiff would not excuse him from giving that proof which every plaintiff must give before he can succeed, especially when the defendants clearly raised the objection that the trees were not the same. The case must be remanded to the Judge, in order that he may pass a fresh decision. Costs will follow the event.

MACPHERSON, J.—I concur.

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*Before Mr. Justice Kemp and Mr. Justice Markby.*

NABAKUMAR HALDAR (ONE OF THE DEFENDANTS) *v.* BHABASUNDARI DEBI (PLAINTIFF) AND ANOTHER (DEFENDANT.)*

1869 *Aug.* 25.

*Hindu Widow—Alienation by Sale or Mortgage.*

There is no rule of Hindu law which compels a widow alienating any portion of her late husband's prope ty to have recourse to a mortgage, instead of to a sale, to raise funds for her maintenance. The question whether she has exceeded her powers or not, depends upon the necessities of the case.

* Special Appeal, No. 1250 of 1869, from a decree of the Judge of Hooghly, dated the 5th February 1869, reversing a decree of the Moonsiff of that district, dated the 25th July 1868.

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Baboos *Ashutosh Chatterjee* and *Gupi Nath Mookerjee* for appellant.

Baboos *Mahini Mohan Roy*, *Nilmadhab Sen*, *Tarini Charan Bhuttacharjee*, and *Bepin Bihari Dutt* for respondent.

MARKBY, J.—I think there is no ground for this special appeal. It seems that the plaintiff sued to recover possession of property purchased by her husband from a Hindu widow named Dinamayi. The person who contested the validity of that sale is the brother-in-law of Dinamayi. It seems that for sometime after her husband's death, Dinamayi lived with her brother-in-law, but after a time he ill-treated her and turned her out, remaining in possession of her property.

She then went to the house of her father, who maintained her for some time, but who afterwards finding it difficult to do so any longer, and naturally enough thinking that this burden should not be unnecessarily cast upon him, refused to maintain her any longer. She then, on the grounds that she was otherwise unable to discharge the debts of her husband, to provide for his funeral ceremonies, and to maintain herself in any other way, sold this property to the plaintiff's husband. That allegation has been found by the Judge in the lower Appellate Court upon good and sufficient grounds to be true, and the only objection now made before us in special appeal is that she ought not to have parted with the property out-and-out, but should have endeavoured to raise money upon it by mortgage or otherwise, she having no power to alienate the property altogether. Now I feel almost certain that this point has been already disposed of by some of the Benches of this Court, but whether it is so or not, I have no doubt whatever that in such a case as this there is no precise rule of law which obliges a widow to proceed in any particular way, and the only question for the Court to consider is whether she has exceeded her powers, and these are always to be measured by the necessities of the case; but whether or no a sale or mortgage was the proper mode of proceeding is a question of fact depending on all the circumstances, and not one of law for us to con-

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sider in special appeal. I think therefore that this special appeal must be dismissed with costs, including the costs of appearance of the second respondent.

KEMP, J.—I am of the same opinion.

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*Before Mr Justice Bayley and Mr. Justice Hobhouse.*

SUDUKHINA CHOWDRAIN AND OTHERS (DEFENDANTS) *v.* RAJ MOHAN BOSE AND ANOTHER PLAINTIFFS.)*

1869 *Aug.* 26.

*Endorsement—Thakbust Map—Act of Agent—Remand.*

In a suit for possession of certain lands, for rectification of a Thakbust Map, and reversal of an Act X decision, the plaintiffs obtained a decree in the Court of first instance, the lower Appellate Court, and subsequently in the High Court on appeal. It appeared that the lower Courts had before them an incorrect copy of the Thakbust Map, the original forming part of the record of another suit. The High Court on appeal refused to send for this Map; but subsequently, on review, it was sent for. There was an endorsement on the back, which did not appear on the copies originally before the Court, to the effect that the lands in dispute were pointed by one T. C. acting as agent for the plaintiffs, to be measured as belonging to defendant's talook.

*Held*, the case must be remanded to the lower Appellate Court to determine (1) whether T. C. was the agent of the plaintiff; (2) whether, acting within the scope of his authority as such agent, he did sign the map as a correct map, and pointed out the lands as belonging to the defendant; (3) and if so, how far these acts of the agent were binding on the plaintiffs.

THE plaint in this case, filed 28th July 1866, related to 89 bigas 16 katas of land of Mauza Galkandi Beliahati, in a certain talook called throughout the case talook Rajaram, appertaining to plaintiff's estate, No. 18. It asked, first, as to 43 bigas 7 katas 8 gandas, for rectification of the Thak map, and for restoration to possession; second, as to 17 bigas 13 katas, for the setting aside of an Act X. decision, as well as for rectification of the Thak map; third, as to 4 bigas 9 katas 8 gandas, for rectification of the Thak map; and fourth, as to 24 bigas 7 katas 4 gandas, for the setting aside of an Act X. decision. The plaint states that the

* Application for Review, No. 176 of 1869, against the judgment of the Hon'ble H. V. Bayley and the Hon'ble Sir C P. Hobhouse, Bart., two of the Judges of the High Court, passed on the 13th April 1869, in Special Appeal, No. 2854 of 1868.