Before Mr. Justice Macpherson and Mr. Justice Glover.

BHAIRO AND OTHERS (DEFENDANTS) *v.* SHEIKH UZIRALI (PLAINTIFF.)* 1869 *Aug.* 23.

Act X. of 1859 s. 77—Intervention—Previous Suit.

The fact of an intervention under section 77, Act X. of 1859, having been disallowed in a former suit, cannot exclude the party from intervening in a subsequent suit, if he can show that he had been in the *bona fide* enjoyment of the rent previous to the institution of the suit.

Mr. *R. E. Twidale* for appellant.

Baboo *Krishna Sakha Mookerjee* for respondent.

GLOVER, J.—This was a suit by the plaintiff to recover the rent of certain tar and date-trees. The special appellant intervened in the case under section 77, Act X. of 1859, on the ground that he had been before and up to the time of suit in the receipt and enjoyment of that rent; and one of the defendants appeared and supported the intervenor's contention.

The Court of first instance dismissed the plaintiff's suit, on the ground that the intervenor had proved that he had been and was in the receipt of the rent. There was a question, apparently, before the Deputy Collector, with regard to the amount of the share which each party claimed; but on the question, under section 77, the Deputy Collector found that the intervenor had been in the receipt of the rent which the plaintiff claimed.

The Judge on appeal held, that, as in a previous suit for rent between these parties in 1860, the present special appellant had intervened under section 77, and had failed in his intervention, and had been referred to the Civil Court, he was now concluded from intervening again in the same litigation, as no change was shown to have taken place in the *status* of the parties. He likewise found, with regard to an objection made by the special appellant as to the identity of the trees of which rent

* Special Appeal, No. 1150 of 1869, from a decree of the Judge of Patna, dated the 19th February 1869, reversing a decree of the Deputy Collector of that district, dated the 1st December 1863.

1869

BHAIRO v. SHEIKH UZIBALI.

was claimed, that as the plaintiff had filed the former decree, and alleged that it covered all the trees in the 6-anna share, it was for the defendant to give some evidence to the contrary, and as he did not give that evidence, he considered a decree should pass for the plaintiff.

It appears to me that the Judge's decision in this case is wrong, and should be reversed. Even if we were to admit, for the sake of argument, that the decree, which was passed in December 1860, did decide against the intervenor, on the ground that he was not at that time in the receipt and enjoyment of the rent, it does not follow that the intervenor should not at some subsequent period be able again to come into Court, and make substantially the same defence. The words of the section only make it necessary that the party who intervenes should prove that he "had in good faith received and enjoyed the rent, before and up to the time of the commencement of the suit;" but there is no specific time mentioned in the section within which such enjoyment is to be proved. It is quite possible, therefore, that although the intervenor might not have been in the receipt and enjoyment of the rent of these trees in 1860, he might have been so in subsequent years, in 1866 or 1867 for instance; and there is nothing in the section, as it appears to me, to prevent him from proving in a subsequent suit the fact that he had been in such possession and enjoyment.

But as a matter of fact this objection does not arise in the case, because, on turning to the record of the Act X. suit decided in December 1860, I find that although the intervenor objected in that case on the same ground as he does now, namely, that he had been in the receipt and enjoyment of the rent, his objection was not thrown out, on the ground that he had not proved such enjoyment or in fact upon any ground at all. So far as we can discover, the judgment proceeded on the fact that the plaintiff was proved to be the proprietor, and the ryot, the defendant, was proved to be his tenant; and that therefore the latter was bound to pay rent to the former, and that the claims of the intervenor were not fit to be considered in the case, but properly belonged to the Civil Court. It is quite clear from this decision that there was no finding, as there ought to have

1869

BHAIRO v. SHEIKH UZIBALI.

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.

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.