

“ without the consent in writing of the zemindar or superior
“ tenant.”

The decree of the lower Appellate Court must be reversed,
and the plaintiff's suit decreed with costs in all the Courts.

1869

UPPENDRA
MOHAN
TAGOR
”

THANDA DACE.

Before Mr. Justice Kemp and Mr. Justice Markby.

HIRA CHAND BANERJEE (ONE OF THE DEFENDANTS) v. SHAMA
CHARAN CHATTERJEE (PLAINTIFF) AND OTHERS (DEFENDANTS).*

1869

• Aug. 4.

Jurisdiction—Suit for closing a New Road and opening an Old One—Onus.

In a suit for closing a new road opened by the defendants through the land of the plaintiff, and for opening an old road which had been closed by the defendants, *held*, by MARKBY, J., that the question of opening or closing a public road belongs to the Criminal Court, and not to the Civil Court.

Held, that the only question which can be tried in the suit is whether the defendants have trespassed on the land of the plaintiff by opening a road. The *onus* is upon the plaintiff to prove that the land belongs to him.

Baboo *Girija Sankar Mozoomdar* and *Nabakrishna Mookerjee*
for appellant.

The respondent did not appear.

MARKBY, J.—In this case the plaintiff alleged in his plaint that the defendants had closed an old road which had been used for men and cattle, and had opened a new road through lands belonging to the plaintiff; and he prays that the old road may be re-opened and the new road closed. The defendants in answer to this say, that the land in which the new road has been opened belonged to them, and that no one is injured by the diversion of the road. The first Court dismissed the suit, but the second Court made a decree declaring the new road to be within the appellant's premises, that is the plaintiff's premises, and directing that it should be closed, and that the old road should be restored to its former condition. What exactly is meant by this part of the decree I do not understand. Who was to open the old road and who was to close the new one, is not said. But I am quite

* Special Appeal, No. 284 of 1869, from a decree of the Officiating Deputy Commissioner of Manbhoom, dated the 9th November 1868, reversing a decree of the Officiating Moonsiff of that district, dated the 11th June, 1868.

1869

HUDA CHAND
BANBUJEE
v.
SHAMA
CHARAN
CHATTERJEE.

clear that the only question, which could be raised in a Civil Court between these parties upon this plaint, would be whether or not the defendants had done an injury to the plaintiff by trespassing upon his land and making a road thereupon. Any question as to the opening or closing of a public road seems to me to belong to the Criminal Court, and not to the Civil Court; and as we said in a case decided by Mr. Justice L. S. JACKSON and myself, that question can only be inquired into in a Civil Court as ancillary to the question whether or not any damage has been done to the plaintiff. No such damage is alleged here, but upon the question whether or no the defendant has trespassed upon the land of the plaintiff by making a road upon it, I think the finding of the lower Court is conclusive in point of fact, and good in law. The only objection made to it in the first ground of appeal is, that the *onus* of proving that the land was the land of the plaintiff lay upon him, inasmuch as he complained of an injury done to him. That was undoubtedly the case, and I see nothing which gainsays it in the judgment of the Court below. That Court says, the defendant should be able to produce evidence in support of his claim to land which lies outside his apparent boundaries; there was other and conflicting evidence, that, in the Judge's opinion, was sufficient to turn the scale, and raised the presumption in favor of the plaintiff that the land belongs to him. I do not see that there has been any violation of the law in the finding of the lower Court. The second ground of special appeal is that the Judge should not have decreed the re-opening of the old road at the instance of the plaintiff alone, when the first Court found that the new road opened by the petitioner was much more convenient to the public than the old in its former state was, the more so as the plaintiff has neither alleged nor proved any special damage to himself. Now, as I have already stated, I am not at all certain that the Judge has decreed the re-opening of the old road by way of a public declaration of right; the decision is certainly not very intelligible. He says that the old road is to be restored to its former condition, but he does not say why or what is to be the effect of his order; and therefore I am not sure by any means that the lower Appellate Court, in the decree which it has

passed, has gone beyond its jurisdiction. But even if it has, it would not be necessary for us to consider that point, as it was not taken below, and I think that no harm has been done to any body by that paragraph in the lower Court's decree, as I understand that decree is only in the nature of a declaration that the act of the defendant was a trespass, inasmuch as the land on which the new road was constructed was the plaintiff's private property. All questions as to whether the new or the old road was most convenient are altogether immaterial.

KEMP, J.—I am of the same opinion, and concur in dismissing the special appeal; but I do not wish to commit myself at present to any opinion with reference to the question of the Civil Court's jurisdiction in cases of public roads, as the point is not taken in special appeal before us, nor raised in the Court below.

1869
 HIRA CHAND
 BANERJEE
 v.
 SHAMA
 CHARAN
 CHATTERJEE.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

COURT OF WARDS (PLAINTIFF) v. NITTA KALI DEBI
 AND ANOTHER (DEFENDANTS)*

Vendor and purchaser—Refund of Purchase-Money—Set-off—Registration.

1869
 Aug 7.

The plaintiff agreed to purchase land and paid down the purchase-money taking from the vendor an agreement that if he did not register the conveyance, he would return the purchase-money. The plaintiff entered into possession; but the vendor failing to register the conveyance, he sued to recover back his purchase-money. *Held*, that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the occupation of the land; but when no set-off is pleaded, the vendor could only claim such amount by a separate action.

THIS case was referred to the High Court by the Judge of the Small Cause Court of Jessore under the circumstances stated in the following order of reference.

This is an action brought by the Court of Wards to recover from the defendants rupees 156-5-6, under the circumstances mentioned in the plaint, which runs as follows:—

For the recovery of rupees 156-5-6 due on an *ikrar*, or agreement, dated the 21st Chaitra 1272, which Braja Lal Banerjee,

* Reference from the Judge of the Court of Small Causes at Jessore.