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of six years, I think he is not in a position to maintain a suit to re-establish it.

I think, therefore, that the decision of the Moonsiff in this case was reasonable and right, and that the Subordinate Judge has reversed it on insufficient and invalid reasons. I think the decision of the lower Appellate Court must be set aside with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
 July 23.

MAHES CHANDRA MOOKERJEE (PLAINTIFF) v RAMUTAM PALIT
 AND OTHERS (DEFENDANTS).*

Highway—Criminal Procedure Code, (Act XXV of 1861) s. 320—Civil Court Jurisdiction.

The Magistrate had, on the complaint of the defendant, passed an order, under section 320 of the Criminal Procedure Code, forbidding the plaintiff to retain possession of a piece of land to the exclusion of the public, until he had obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff, accordingly, brought his suit in the Moonsiff's Court to recover possession, of the land. The Moonsiff gave him a decree for exclusive possession of the land. On appeal, the Judge held that the Moonsiff had no jurisdiction to try the question whether the public had a right of way over the land. The Judge's decision was reversed in special appeal, and the case remanded to the Judge to try the issue, whether the plaintiff was entitled to the exclusive use of the land. *Rooke v. Pyari Lall* (1) distinguished.

Baboo *Bhvirab Chandra Banerjee* and Mr. J. S. Rochfort for the appellant.

Baboo *Rash Bekari Ghose* and *Debender Chandra Ghose* for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—This suit is brought by the plaintiff against Ramutam Palit and others to recover possession of a small piece of land belonging to the lakhiraj homestead of the plaintiff.

It appears that the defendant had complained in the Magistrate's Court against this plaintiff in respect of the right of use of this piece of land; and the Magistrate having enquired into the matter, under the provisions of section 320 of the Code of Criminal Procedure, made an order forbidding the plaintiff to retain possession thereof to the exclusion of the public, until he should have obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff being dissatisfied with that order, brought his suit in the Moonsiff's Court. The Moonsiff took evidence and found that the land formed part of the plaintiff's homestead. He also found that a private path (over that

* Special Appeal, No. 539 of 1870, from a decree of the Additional Judge of Jessore, dated the 30th December 1869, reversing a decree of the Sudder Moonsiff of that district, dated the 14th August 1869.

(1) 3 B. L. R., App 43; S. C on review, v. *Shama Charan Chatterjee* ib A.C. 351. ib. A. C., 305; see also *Hira Chandi Banerjee*.

land, I suppose) had been used by the members of the family only, but he observed that "it could not therefore be admitted that it was a public road;" he was therefore of opinion that the plaintiff was entitled to this land, but not to damages, and gave him a decree for possession of this land accordingly.

The defendant appealed to the Zilla Court, and the Additional Judge observed that the Moonsiff had based his decision upon a wrong ground. He says:—"I do not think it was competent for him to reverse a decision of the Faujdari Court on a point of fact which was not appealable to his Court. If plaintiff was dissatisfied with the Faujdari decision, and wished to test further the fact of the path being a private, and not a public one, he should have appealed to the proper Court; but if he laid his claim to close the path and take possession of the land, on the ground of his right to it as his private property, then he was right in applying to the Civil Court, but there also he must prove his right to close the road, whether it be public or private; and the Moonsiff should only have decided an issue, whether plaintiff had a right to close a path decided by competent authority to be a public path. He had I conceive, no power to re-open the question of publicity, and give it a second trial and investigation when it was a point decided by a Court, whose decision was not appealable, and not under appeal to him."

It is extremely difficult to follow the reasoning of this judgment, because in one place it points out that the plaintiff could have contested the Magistrate's decision by appeal to the proper Court, and, in another place states that the decision was not appealable.

In point of fact there is no appeal from a decision of the Magistrate under section 320 of the Code of Criminal Procedure, and the decision of the Additional Judge appears to have been passed without considering what the real nature of the Magistrate's decision was.

By the provisions of section 320, the Magistrate did not adjudicate upon the question of this being a public road, but he tried the issue whether it appeared, or did not, that the subject of dispute was open to the use of the public, and upon that he made the only order he was competent to make, namely, that the party claiming the exclusive use of it, should not retain exclusive possession, until he obtained the decision of a competent Court adjudging him to be entitled thereto. There was, therefore, no final adjudication by the Magistrate; and the law, as well as the Magistrate's decision, expressly reserved to this plaintiff the right of bringing the suit, in order to establish his right to exclusive possession. The Moonsiff does not in this case, I think, pretend to reverse or set aside the decision of the Magistrate. There was no occasion for him to do so.

The case is quite distinct from the case of *Rooke v. Pyarilal* (1) see the same case on review (2). There the decree of the Civil Court was of a very different character from that which the plaintiff applied for, or the Moonsiff has given, in this case.

(1) 3 B. L. R., App., 43.

(2) 3 B. L. R., A. C., 305.

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I think, therefore, that the decision of the Judge must be set aside, and the case must go back to him, in order that he may try that issue which arises, and which the Courts were bound to try in the case, namely, whether the plaintiff was, as he alleged, entitled to the exclusive use of this piece of land. If he was so, the plaintiff was entitled to a decree, the Magistrate's order notwithstanding.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

IN THE MATTER OF CHANDI CHARAN CHATTERJEE v. CHANDRA
 KUMAR GHOSE AND ANOTHER.*

1870
 July 23.

*Criminal Procedure Code—Acts XXV of 1861 and VIII of 1869—Counsel—
 Pleader—Prosecution.*

A Counsel or Pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts.

THE Sessions Judge of the 24-Pergunnas referred the following case for the opinion of the High Court :

“In a criminal case, which has come before me in appeal, I find that the Deputy Magistrate has ruled that, in consequence of the repeal of Act XXXVIII of 1850, he cannot allow the complainant in a case before him to employ a pleader or a Mooktear to conduct the prosecution.

“The law which regulated the employment of agents in the prosecution of criminal cases was section 3, Regulation III of 1812; but that has also been repealed, and there is now no specific law on the subject. But I am not aware of any law or practice which is intended to deprive the complainant and the Court of the aid which may be given by the employment of a professional agent; and it appears clear to me that every facility ought to be given for the employment of such persons by the complainant as well as by the accused person. The employment of a pleader to conduct the prosecution would not of course excuse the presence of the complainant as a witness in support of his complaint, but it ought to assist the Court materially, and to ensure the production of all the evidence requisite for the due elucidation of the facts. Moreover, it is unjust to permit the employment of counsel on one side, and not on the other side; and in the case now before me, I might have felt that the refusal to allow the complainant's vakeel to examine the witnesses would sufficiently explain the absence of evidence or other defects in the prosecution.

“It appears to me unnecessary to argue the point at any length. But as it has been raised, I have the honor to suggest that the High Court should issue a rule regulating the practice.”

* Reference from the Sessions Judge of the 24-Pergunnas; by his letter No. 66 dated the 26th of May 1870.