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should have taken place ; why the Judge should have refused either to countersign the requisition of the Small Cause Court, or to point out the true course to be taken, seems quite inexplicable. I think we must answer the letter of the Judge of the Court of Small Causes, by desiring that he issue his warrant to the jailor to have the prisoner, confined under his previous warrant, brought before him for the purpose of making his defence, or of retaining proper counsel.

I think we should also direct that this case should be disposed of as speedily as possibly, and looking at the character of the proceedings which have taken place, I think that as soon as the case has been decided the proceedings ought to be sent to this Court for inspection ; and I think that a copy of the judgment of this Court should be sent to the Judge of Backergunge.

1870
April 14.

Before Mr. Justice Bayley and Mr. Justice Markby.
(HANNU LAL SAHU (PLAINTIFF) v. MANU LAL AND OTHERS

(DEFENDANTS).*

Act VIII of 1859. s. 2—Res-Judicata—Cause of Action.

In execution of a decree, the right, title, and interest of A. in a certain property was sold and purchased by B. In execution of another decree, the right, title, and interest of A. and C. in the same property were sold and purchased by D. In a suit by A. the sale to B. was set aside, but on appeal the decision of the Court of first instance was, upon consent of the parties, set aside and the sale allowed to stand good. D. sued for possession of the share of A. and C. in the property purchased by him, and obtained a decree for possession of the share of C. only. D. now sued to set aside the sale to B. and for possession of the share of A. *Held*, that the suit was not barred by section 2, Act VIII of 1859.

Umatura Debi v. Krishna Kamini Dasi (1), and Abhiram Dos v. Sriram Das (2), distinguished.

On the 7th June 1858, Manu Lal, defendant No. 1, purchased, at a sale held in execution of a decree, the right, title, and interest of Krishna Prasad Sing, Rameswar Sing, and Thakur-Prasad Sing, of and in certain property. On the 5th March 1860,

* Special Appeal, No. 1487 of 1869, from a decree of the first Subordinate Judge of Shahabad, dated the 10th March 1869, affirming a decree of the Moonsiff of that district, dated the 15th July 1868.

(1) 2 B. L. R., A. C., 102.

(2) 3 B. L. R., A. C., 421

the right, title, and interest of the said Krishna Prasad Sing, Rameswar Sing, and Thakur Prasad Sing, and of Govind Prasad and Raghunath Prasad, of and in the same property, was sold in execution of another decree and purchased by Channu Lal, the present plaintiff, with full notice of the previous sale. Krishna Prasad, Rameswar, and Thakur Prasad, brought a suit for, and on the 7th March 1861 obtained, a decree setting aside the sale of 7th June 1858. On appeal, the decree of the Court of first instance was, by consent of the parties, allowed to be reversed, and the sale was confirmed. On the 7th of April 1866, Channu Lal brought a suit for possession of the shares of Krishna Prasad, Rameswar, Thakur Prasad, Govind Prasad, and Raghunath Prasad, in the property purchased by him, and a modified decree was passed in his favor declaring him entitled to obtain possession of the shares of Govind Prasad and Raghunath Prasad only. On appeal, this decree was set aside. But on the 1st February 1867, the decision of the lower Appellate Court was reversed by the High Court, and the modified decree in favour of Channu Lal was confirmed.

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This was a suit by Channu Lal to obtain possession of the shares of Krishna Prasad, Rameswar, and Thakur Prasad, which had been disallowed in the former suit by setting aside the sale of 7th June 1858. The defence was that the suit was barred by section 2, Act VIII of 1859. The Subordinate Judge held that the suit was barred by section 2, Act VIII of 1859.

On appeal, the Judge confirmed the decision of the lower Court.

The plaintiff appealed to the High Court.

Mr. *Paul* (Baboo *Tulsidas Seal* with him) for the appellants, contended that section 2, Act VIII of 1859, did not apply.

Baboo *Mahesh Ghandra Chowdhry* (Baboo *Kalikrishna Sen* with him) for the respondent, contended that the subject-matter of both the suits was the same, and the cause of action, *viz.*, the withholding of possession from the plaintiff of the property purchased by him at auction was the same in both the suits. Section 2, Act VIII of 1859, barred the present suit. *Abhiram*

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Das v. Sriram Das (1), and Umctara Debi v, Krishna Kamini Dasi (2), were in point.

The judgment of the Court was delivered by

MARKBY, J.—It appears in this case that on the 7th June 1858, the defendant No. 1 purchased the share of Krishna Prasad Sing and others in certain property. On the 5th March 1860, the plaintiff purchased the share of Krishna Prasad Sing, Raghu Nath Prasad Sing and some other person, that is to say, purchased the same shares as the defendant No. 1 did, and also some other shares. On the 2nd March 1861, the sale to the defendant No. 1 was set aside, but on appeal to the Judge by a compromise between the defendant No. 1 and Krishna Prasad Sing, the decision of the first Court was allowed to be reversed. Subsequently, the plaintiff brought a suit to recover the whole of the property which he purchased on the 5th March 1860 wholly ignoring the sale made on the 7th June 1858, to the defendant No. 1. As to so much of the property as was in excess of Krishna Prasad's share he succeeded, but failed as to the rest, because the Court thought that so long as the sale to defendant No. 1 of the 7th June 1858 stood unreversed, he could not recover Krishna Prasad's share. The present suit is represented to us to be brought in effect to have it established that that sale has been reversed, and the effect of succeeding in this suit would be to get rid of that sale.

The lower Appellate Court has refused to go into the appeal, on the ground that the present claim has been barred under Section 2, Act VIII of 1859, the cause of action of the plaintiff having been heard and determined in the suit just alluded to.

The pleader for the respondent has relied upon two decisions of this Court, the one in *Abhiram Das v. Sriram Das (1)*, and the other in *Umatara Debi v. Krishna Kamini Dasi (2)*. It seems to us that the present case stands clear of both those decisions. In both those cases the plaintiff had, at the time when the suit was first brought, a complete title to recover the property he sued for, the only difference was a difference in the

(1) 3 B. L. R., A. C., 42.

(2) 2 B. L. R., A. C., 104.

way in which that title was to be established. Here the decision or order, by which the plaintiff's suit, as to Krishna Prasad's share was dismissed, was in effect that so long as the defendant, No. 1, held the sale certificate of the 7th June 1858, no other person could get a title to that property. It is to get rid of that very sale, that the plaintiff brings this present suit. This seems to us, therefore, a different suit than the one previously brought by the plaintiff upon a title of his own which then existed.

The result will be that the judgment of the lower Appellate Court is reversed, and the case sent back to that Court to be tried, and determined on the merits, the suit not having been barred under the provisions of section 2, Act VIII of 1859.

[FULL BENCH.]

Before Mr. Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp,

Mr. Justice L. S. Jackson, and Mr. Justice Mitter.

GUNAMANI DASI (DEFENDANT) *v.* PRANKISHORI DASI (PLAINTIFF).*

1870
May 11.

Act VIII of 1859, s. 206—Act XXIII of 1861, s. 11—Payment out of Court—Satisfaction of Decree not certified—Suit to recover Money paid out of Court.

A., a judgment-debtor, paid to B., the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B. failed to certify this payment to the Court, and afterwards executed her decree for the full amount.

In a suit by A. against B. for recovery of the amount previously paid out of Court in satisfaction of the decree, *held* that, notwithstanding section 11 of Act XXIII of 1861, the suit was maintainable.

THIS was a suit to recover the amount of rupees 930-12-6. The plaintiff alleged that the defendant had a decree against her; and in satisfaction, she (the plaintiff) had paid and delivered to the defendant cash and ornaments to the amount of rupees 930-12-6 by way of compromise. That the defendant afterwards sued out execution of the said decree, when the plea of payment

* Special Appeal, No. 2298 of 1869, from a decree of the Judge of Dinagopore dated the 3rd August 1869, reversing a decree of the Moonsiff of that district, dated the 1st June 1869.