

1871
 MUSSAMAT
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question of possession, as well as of title, should be enquired into, and the suit decided according to the result of that enquiry. Both parties should be allowed the fullest opportunity of adducing any evidence that they think fit to adduce in support of the issues fixed by the Court.
 Costs of this appeal will abide the final result.

Before, Mr. Justice Kemp and Mr. Justice Glover.

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 Mqg S. SRIMATI JADUMANI DASÍ (PLAINTIFF) v. SRIMATI FUDU BIBI AND OTHERS (DEFENDANTS).*

Power of the Court of appeal under section 337 of Act VIII of 1859, to reverse the whole of the decree of the Court below upon the appeal of one only of the parties against whom the decree was passed.

This was a suit to recover Rs. 58-14 from the defendant by sale of a piece of land measuring about one biga mortgaged to the plaintiff, on the ground that the defendants Dwarkanath and Jadunath had borrowed Rs. 16 from the plaintiff's late husband, and had executed a bond whereby the possession of the land in dispute was assigned to the plaintiff's husband; that after the death of her husband the plaintiff remained in possession and cultivated the same; that in Aghran 1276 (1865) Dwarkanath and Jadunath and the defendant Fudu Bibi, to whom they had sold the land in dispute, had cut and carried away the crops raised by the plaintiff; hence the suit to recover the amount secured by the bond, and damages for the crops cut and carried away by the defendant by sale of the mortgaged premises.

The defendants Dwarkanath and Jadunath stated that they had not executed the mortgage bond, and that they had sold the property in dispute to Fudu Bibi.

Fudu Bibi stated that she had purchased the property from the other defendants, and that the suit had been instituted by the plaintiff in collusion with the other defendants on a false and fraudulent bond.

The Moonsiff held that the bond was genuine, and passed a decree in favor of the plaintiff, ordering that the amount in suit be realized by sale of the mortgaged premises if the amount be not paid before such sale.

On appeal by Fudu Bibi (the defendants Dwarkanath and Jadunath did not appeal), the Subordinate Judge held that the bond was not proved; that the claim of the plaintiff was not established, and that the plaintiff was not entitled to enforce his alleged lien. That although the defendants Dwarkanath and Jadunath did not appeal, yet as the decree was prejudicial to the interests of Fudu Bibi, it should be set aside. He accordingly reversed the decree passed by the Moonsiff.

* Special Appeal, No. 1 of 1871, from a decree of the Subordinate Judge of Midnapore, dated the 22nd September 1870, reversing a decree of the 1st Moonsiff of that district, dated the 22nd March 1870.

The plaintiff appealed to the High Court on the ground (*inter alia*) that as the decision of the first Court did not proceed on a ground common to all the defendants, the lower Appellate Court was wrong in reversing the whole decree on the appeal of Fada Bibi alone, and in allowing the question of the genuineness or otherwise of the bond to be opened when the parties who had executed the bond did not take exception to the judgment of the Moonsiff.

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 v.
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 BIBI.

Bahoo Hari Mohan Chuckerbutty for the appellant.

Baboo Bamachurn Banerjee for the respondent.

KEMP, J. (after stating the facts, continued)—The Subordinate Judge has found for reasons given in his decision that the bond on which the suit is based was a fraudulent transaction. This is a finding of fact which we cannot touch in special appeal, but it is contended that under section 337 of the Code of Civil Procedure the Subordinate Judge was not competent to reverse the decision of the first Court, in favor of the defendants Nos. 1 and 2, who did not appeal. Referring to that section, we find that an Appellate Court may reverse or modify a decree in favor of all the plaintiffs or defendants, if the decision of the lower Court proceed on any ground common to all. Now there can be no doubt that the basis of this suit and the ground upon which the defence of the parties in the suit, the defendants Nos. 1, 2, and 3, rested, was whether this bond was genuine or not. If the bond was not genuine, the defendants Nos. 1 and 2 were not liable for the money covered by that bond, and the lien of the defendant No. 3 would stand. Therefore they were all interested in the question whether that bond was good or bad. Moreover, the decree of the first Court is not one which can be divided. The first Court does not say that the plaintiff is entitled to recover this money as a personal debt against the defendants Nos. 1 and 2, leaving the mortgaged premises not liable, but the decree of the first Court is to the effect that the property is liable for the sum decreed, and therefore we think that the defendant No. 3, the party most interested in supporting her lien and showing that this bond was a collusive one, was entitled to open out the whole case, and the Subordinate Judge having found as a question of fact that this bond was a fraudulent transaction, we think that we cannot interfere in special appeal.

We therefore dismiss the appeal with costs.