1872

MUKANDILAL DUBEI v. CROWDY.

proved that, in the intervals between the ticca leases, the defendants entered into possession under new arrangement with the zemindar. They appear to have continued in possession as a matter of course, and on the expiry of each ticca lease to have resumed, without any question, the position they were holding at its commencement. No doubt the defendants as farmers could not, by their own neglect to exercise the powers of the landlords, create for themselves any title as ryots against the zemindar. But on the other hand, they lost no title or interest that they had as ryots. If their ryoti interest be taken as suspended during the whole period of the existence of the leases, we still find that they have been holding for a period of twenty-one years, and that in the whole term of forty-seven years, commencing in 1231 F. S. (1824), their occupation has never been interrupted by the holding of any other ryot.

I therefore concur in dismissing these two appeals.

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

1872
April 3.

MUSSAMAT PARBATI AND OTHERS (PLAINTIFFS) *v.* MUSSAMAT BHIKUN AND OTHERS (DEFENDANTS.)*

Judgment—Irregularity—Special Appeal.

A Subordinate Judge wrote out his judgment in a case which had been heard before him, after he had been relieved from his office, and left the judgment to his successor to be pronounced in open Court. The judgment was pronounced in Court by the succeeding Subordinate Judge. On objection being taken in special appeal that the judgment read out by the succeeding Subordinate Judge was not a judgment according to Act VIII of 1859,

Held, that the judgment was valid.

Baboo *Gopal Lal Mitter* for the appellant.

Baboo *Mahesh Chandra Chowdhry* for the respondents.

JACKSON, J.—The facts of this case are a little peculiar. The suit was brought by a certain Hindu widow, named Hulas Kooer, who had taken the estate of her husband, against Fuzl Hossain and Mussamat Bhikun, alleging that Fuzl Hossain had, while in occupation as farmer of some of the immoveable property belonging to her estate, executed a deed in favor of Mussamat Bhikun, with the view of ousting the plaintiff; and the suit, therefore, was to recover possession of this property.

During the pendency af the suit, Hulas Kooer died, and the present special appellant, Mussamat Parbatti, applied to the Court, on the strength of a will executed by Hulas Kooer, to be substituted for her as plaintiff.

* Special Appeal, No. 1231 of 1871, from a decree of the Additional Judge of Patna dated the 2nd August 1871 reversing a decree of the Subordinate Judge of that district, dated the 25th April 1871.

An order to that effect was made by the Court; but afterwards another person, named Buldeo Sing, appeared, alleging himself to be the heir of Hulas Kooer's deceased husband, and applying that he also might be put upon the record as plaintiff.

No objection appears to have been taken by the defendants; and the Court, accordingly, declining to go into the question whether Mussamat Parbatti or Buldeo Sing was the legal representative of Hulas Kooer put them both on the record, and made them co-plaintiffs.

In that way the suit went to trial, and judgment was given for the plaintiffs. The defendants appealed to the Zilla Court, and the appeal was heard by Mr. Henderson, the Additional Judge.

Another circumstance to be mentioned is that the trial took place before Baboo Bolak Chand, who was at that time the officiating Subordinate Judge of Patna, and who was relieved in his tenure of that office before he had time to deliver the judgment. He wrote his judgment and handed it over to the officer who succeeded him in the office of Subordinate Judge, who, accordingly, pronounced that judgment for him in open Court, a few days after the hearing.

The Judge holds that, in the first place, the Court below was not competent to proceed with the suit with the two parties I have named as co-plaintiffs, and he considers all that was done in their presence to have been a nullity or "useless," and he also holds that Bolak Chand, being *functus officio*, at the time when the judgment was pronounced, that judgment was good for nothing.

The co-plaintiff, Parbatti, appeals specially to this Court, and it is contended that the Judge was wrong in both these points: but for the special respondent it has been argued that the Judge was right; that, inasmuch as the cause of action did not survive to Parbatti, she not being, as I understand it to be contended, the heir-at-law of the deceased husband of Hulas Kooer she was not entitled to carry on the suit, and that the suit, therefore, abated.

This is not quite the ground, I think, taken by the Additional Judge; but I do not think it will bear argument any more than the ground which the Judge has taken. It seems to me clear that the cause of action was one which, from its very nature, did survive upon the death of the plaintiff, and therefore the suit would not abate. Whether the proper representative of the deceased plaintiff is before the Court is another question. I am not prepared to say that the course taken by the Subordinate Judge in allowing the two claimants to come upon the record as co-plaintiffs, was strictly regular, or one which ought to be taken in ordinary circumstances; but that which is in itself unusual and irregular may often be cured by the consent of the parties, and in this case it appears that every one did agree to the course taken, and it is clear that, such agreement having taken place, it was a more convenient course for every one, that the trial should proceed and a decision be given, than that the suit should either be dismissed or be allowed to remain in abeyance for an indefinite time, while the question between the claimants as

1872

MUSSAMAT PARBATTI v. MUSSAMAT BHIKUN.

to who was to succeed the deceased plaintiff in the suit was being determined. It was for the advantage of the parties that the case should go on to trial, and that the co-plaintiffs should be left in possession of any decision of the present suit which they might obtain against the defendants, and should be left to settle the questions arising between themselves in other proceedings. I think, therefore that the Judge was wrong in setting aside the decision of the Subordinate Judge on this ground.

Then as to the other question it appears to me that there is really nothing in it. Baboo Bolak Chand, when he heard the suit, and apparently when he made up his mind as to the judgment which he would give, was actually Subordinate Judge of the district, and the circumstances that he had not time to write out, as required by the Code, the judgment which has to be delivered in Court, before he was relieved in his office, does not I think affect the validity of that judgment. He heard, and to all intents and purposes determined the suit and gave judgment, but his tenure of that particular judicial office having expired before judgment could be pronounced, that judgment, which was the judgment of the Judge who heard the case, was pronounced as a matter of form by his successor in open Court. That judgment therefore appears to me to be unimpeachable on any such ground.

The case will have to go back to the lower Appellate Court for re-trial on the merits.

MARKBY, J.—I also think the case must go back. It appears to me to be an error to suppose that the judgment delivered by the Full Bench in *Mahomed Akil* v. *Asadun Nessa Bibi* (1) and *Mutty Lal Sen Gywal* v. *Deshkur Roy* (2) has no bearing whatever upon the question last disposed of in Jackson, J.'s judgment. The question there was of a totally different character. The acts which were under consideration were acts done by the Judges while they were Judges of the Court; and the only question there to be considered was what the effect of those acts was. It was a mere accident that those Judges afterwards left the Court before the case was finally disposed of, and that circumstance had no bearing on the matter at all, except it rendered the matter irremediable. What was held in that case was, that where there are several Judges who had to give their opinion in a case, the mere handing into the Registrar by a Judge of his own opinion, without there having been any final consideration by all the Judges as to what their final decision was to be, was not a judgment. The decision in that case proceeded upon this, that in order to there being a final judgment of the Court, there must have been a final meeting and consideration by all the Judges who heard the case as to what their judgment was to be (3).

(1) Case No. 253 of 1863.

(2) Case No. 1116 of 1862; 14th December 1863.

(3) See also *per* Peacock, C. J., in *Watson* v. *The Government*, B. L. R., Supl. Vol., 192.