

## [APPELLATE CIVIL.]

*Before Mr. Justice Kemp and Mr. Justice Ainslie.*

DAYAL CHAND SAHOY (PLAINTIFF) *v.* NABIN CHANDRA ADHIKARI (INTERVENOR DEFENDANT).\*

1871  
Sept. 5.

*Act VIII of 1869 (B. C.), s. 102—Act VIII of 1859, s. 73—Intervenor—Act XVI of 1868—Act VI of 1871—Appeal—Landlord and Tenant.*

D. C. S., the zemindar, brought a suit against B., a ryot, for recovery of arrears of rent valued below Rs 100. B. set up in defence that the rent was not payable to D. C. S. but to N. C. A., the mokurraridar N. C. A. who claimed under a mokurrarri title, and alleged that he was in receipt of the rents from the ryots, was made a party under section 73, Act VIII of 1859. The Moonsiff passed a decree in favor of the plaintiff. On appeal by N. C. A. which was heard and decided by the Subordinate Judge on reference by the District Judge, the decree of the first Court was reversed, and the suit dismissed: On appeal to the High Court,—

*Held* that N. C. A. was properly made a party defendant to the suit, and that he could prefer an appeal from the decree of the Court of first instance, and that the Court of Appeal could, on his appeal, set aside the whole decree.

A special appeal lay to the High Court; the words "District Judge" in section 102 of Act VIII of 1869 (B., C.) do not include a Subordinate Judge to whom, under Act XVI of 1868, or Act VI of 1871, the District Judge may make over appeals filed in his Court.

The only issue to be tried was whether the relation of landlord and tenant subsisted between D. C. S. and B.

THIS was a suit to recover Rs. 34-2-3, being the arrears of rent due for the year 1275 (1868-69), on the allegation that the defendant was a ryot of the talook Nuskarabad, purchased by the plaintiff at an auction-sale on 26th September 1868.

The defence was that the defendant was not liable to pay the rent to the plaintiff as there was an intermediate estate; that the plaintiff was not in *khas* possession; and that the rent sued for had been paid by the defendant to Nabin Chandra Adhikari.

Nabin Chandra Adhikari applied to be made a defendant, setting up his title as a mokurraridar. He was made a defendant under section 73, Act VIII of 1859.

\* Special Appeals, Nos. 445, 446 and from No. 400 to No. 407 of 1871, from the decrees of the Subordinate Judge of Beerbhoom, dated the 20th February 1878, reversing decree of the Moonsiff of that district, dated the 23rd July 1870.

The Moonsiff held that the plaintiff was in possession of the talook Nuskarabad; that he was entitled to receive rent, and that there was due to the plaintiff a sum of Rs. 2-4 only. He accordingly passed a decree for Rs. 2-4 in favor of the plaintiff.

Nabin Chandra Adhikari appealed to the Judge.

The Judge made over the appeal to the Subordinate Judge for hearing and determination. The Subordinate Judge held that neither the plaintiff nor his ancestors held *chas* possession of the property, and that Nabin Chandra had been in possession as a mokurraridar from the year 1271 (1864-65). He accordingly reversed the decree passed by the lower Court, and dismissed the suit, stating that so long as the plaintiff did not get the mokurrari right of Nabin Chandra set aside in a regular suit he was not entitled to receive rent direct from the tenants.

The plaintiff appealed to the High Court.

Baboo *Nilmadhab Sein* (with him, Baboo *Rashbehari Ghose*), for the respondent took a preliminary objection that under section 102, Act VIII of 1869, B. C. (1), no special appeal lay to the High Court. The suit was valued below Rs. 100, and the case having been decided in appeal, no appeal lay to the High Court.

Baboo *Hem Chandra Banerjee* (with him Baboo *Amerender Nath Chatterjee*), for the appellant, contended that the appeal had not been "tried and decided by a District Judge" within the meaning of section 102 Act VIII of 1869, B. C.: the case had been decided by the Subordinate Judge, made over to him by the District Judge under Act XVI of 1868. There is no provision in that Act or in Act VI of 1871, that judgments passed by a Subordinate Judge on appeals made over to him by the District Judge, shall have the same effect as regards special

(1) Act VIII of 1869 (B.C.) sec. 102. dred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

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appeals as the judgments of the District Judge. Under section 372, Act VIII of 1859, a special appeal would lie from any order passed in appeal, unless such order had been declared to be final. There is no provision either in Act XVI of 1868 or in Act VI of 1871, which declares that orders passed by a Subordinate Judge in appeal of cases mentioned in section 102, Act VIII of 1869, B. C., would be final, and the words in the section being "District Judge," a special appeal would lie to the High Court.

Baboo *Nilmadhab Sen* in reply.

The objection was over-ruled.

On the merits Baboo *Hem Chandra Banerjee*, for the appellant, contended that Nabin Chandra Adhikari was not properly made a party to the suit; the suit was for arrears of rent. The only issue which could arise was whether or not the rent was due to the plaintiff—*Jaggadanand Misser v. Hamid Rasul* (1). Since Nabin Chandra was allowed to intervene, the *onus* was upon him to make out his case—*Jaggadanand Misser v. Hamid Rasul* (1) and *Rajah Sahib Prahlad-*

(1) *Before Mr. Justice Bayley and Mr. Justice Macpherson.*

*The 12th June 1868.*

JAGGADANAND MISSER (PLAINTIFF.) *v.* HAMID RASUL AND OTHERS (DEFENDANTS.)\*

Baboo *Nilmadhab Sen* for the appellant.

Baboo *Ramesh Chandra Mitter* for the respondents.

THE facts of the case are fully stated in the judgment of the Court, which was delivered by

MACPHERSON, J.—The plaintiff in this case sues to recover possession of certain property from Hamid Rasul, from whom he alleges that he purchased it.

Hamid Rasul appeared in the Court of first instance, but has not substantially resisted the plaintiff's claim. But Bani Khanum, his mother, has come forward and claimed the property as her own, contending that Hamid Rasul has no interest in it, and therefore could not pass any title in it.

We think it much to be regretted that Bani Khanum was made a defendant in this way. The plaintiff sought no relief as against Bani Khanum, and could not have obtained any decree which would have been binding upon her. Having been admitted as a defendant she must remain there. But the fact of her having caused herself to be introduced as a defendant must not change the *onus* of proof so far as she is concerned, and in our opinion the *onus*, as against the plaintiff,

\*Special Appeal, No 2526 of 1867, from a decree of the Principal Sudder Ameen of Gya, dated the 22nd June 1867, affirming a decree of the Sudder Moonsiff of that district, dated the 8th December 1866.