defendants, from whom the plaintiffs were not entitled to recover any thing.

The plaintiff Magju Pandaen appealed to the High Court against the decree of the Court below.

Mr. *Sandel* (with him Baboo *Raghubans Sahay*), for the respondents Lachman Kowar and Ramona Tewareen, objected that as the suit was to recover only 75 rupees and 9 annas, no appeal would lie to this Court, and that the Court below had no jurisdiction, there being a Small Cause Court in the district. The declaratory decree asked for was based on no cause of action, so that the suit must be limited to the recovery of 75 rupees and 9 annas.

Baboo *Mahesh Chandra Chowdhry* (with him Baboo *Ramesh Chandra Mitter*) for the appellant.—The Court below had misconceived the object of the suit. The plaint is not clear in its wording, but the parties knew what was the matter in dispute, as is apparent from the issues fixed. The plaintiff seeks simply to establish her right, under certain deeds of sale, to receive from the defendants a share of fees received by the latter under circumstances described in the deeds, and not to restrain worshippers in selecting their own priests as supposed by the Court below. The cases of *Khedroo Ojha* v. *Mussamut Deo Ranee Koomar* (1), *Becharam Banerjee* v. *Srimati Thakurmani Debi* (2), *In the matter of the petition of Shewan Misrain* (3)

(1) 5 W. R., 222.

(2) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

The 6th July 1868.

BECHARAM BANERJEE (ONE OF THE DEFENDANTS) *v.* SRIMATI THÁKUR MANI DEBI (PLAINTIFF).*

Baboo *Abhai Charan Bose* for the appellant.

Baboo *Tara Prasanna Mookerjee* for the respondent.

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

KEMP, J.—This is a somewhat peculiar case. The plaintiff sued on the allegation that her husband, as one of four brothers, had a right, in turn with his brothers, to perform certain ceremonies consisting of reciting *mutras* at a particuler ghat on the occasion of the

(3) S. D. A. for 1852, 405.

* Special Appeal, No. 230 of 1868, from a decree of the Principal Sudder Ameen of Hooghly, dated the 11th January 1868, reversing a decree of the Sudder Ameen of that district, dated the 26th August 1867.

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Thakoor Pandey v. *Rughoo Nath* (1) and *Jowahur Misser* v. *Bhagoo Misser* (2) were in point.

With regard to the 75 rupees and 9 annas, the claim is not on account of personal service, but based upon the contract put forward, the fees being received by Ramdyal, through the female defendants. A suit for this amount had been brought in the Small Cause Court, but was dismissed for want of jurisdiction, because the defendant Ramdyal had disputed the validity of the kabalas, which gave rise to a question of title which the Court could not decide. The plaintiff is consequently right in bringing a suit for a

burning of Hindu bodies. The turn claimed was for seven days in the month. The plaintiff states that her husband enjoyed this right during his life-time, and she also after his decease, until she was prevented from exercising that right by the defendant Becharam.

Some of the defendants admit her right, and the contest is mainly as between her and Becharam.

The Principal Sudder Ameen, a Hindu gentleman, and a Brahmin in a carefully considered judgment, has found that the right of the plaintiff's husband to a *pála*, or turn, in performing the ceremonies, claimed by the plaintiff, is not denied by the defendants. He also found on the evidence that the accusation made by the defendant that the plaintiff was not a chaste woman, was unfounded. He decreed the plaintiff's case, and. as the defendant did not file his account book, the Principal Sudder Ameen fixed the mesne profits at 60 rupees, instead of 240 originally claimed by the plaintiff.

In special appeal it is contended that the decision of the Principal Sudder Ameen is wrong, first, on the ground that the suit was one which was not cognizable by the Civil Courts; and, secondly, that the Principal Sudder Ameen has come to a wrong finding on the question of mesne profits.

A decision of this Court, dated the 22nd of October 1862, *Roodurmun Misser* v. *Damoodur Misser* (*a*), has been quoted by the pleader for the special appellant. That decision laid down this principle, that the obligation upon *jujmans* to employ a particular *purohit* is a simple matter of conscience, and not an obligation that a Court of Law can enforce. We are not prepared to dissent from that proposition, but in this case it is not denied that the four brothers, amongst whom was the plaintiff's husband, had a joint right in the performance of the ceremonies alluded to above, and in the profits thereby accruing to them. The parties frequenting a ghaut for the purpose of burning their dead, could not perhaps be obliged to employ a particular *purohit*; but that has nothing to do with the question of the right to enjoy the joint profits accruing from the performance of these ceremonies. We are therefore of opinion that the first ground of special appeal is untenable.

On the question of mesne profits, the defendant having failed to produce his *jumma khurch* accounts, the Principa Sudder Ameen made the best estimate he could of those profits from the oral evidence, and his estimate does not appear to us to be an excessive one, it being about four annas in the rupee of the amount claimed.

We dismiss this special appeal with costs.

(1) S. D. A. for 1855, 2.
(2) S. D. A. for 1857, 362.

(*a*) 1 Hay's Rep., 365.

declaratory decree of his rights under the kabalas generally, as also for the 75 rupees and 9 annas.

Mr. *Sandel* for the respondents.—The plaint is vague and indistinct. It does not disclose any cause of action against the several defendants. There is no ground assigned for asking for a declaratory decree. The only consequential relief prayed for is the recovery of 75 rupees and 9 annas based upon a contract which is triable by a Small Cause Court; the suit ought therefore to be dissmissed. The suit in fact is to restrain a *jujman* from employing any priest he liked, a relief which the Civil Court cannot grant. See *Hurgobind Surma* v. *Bhowanee Persaud Shah* (1), *Rama Kant Surma* v. *Gobind Chunder Surma* (2) *Gourdas Byragee* v. *Anundmohun Chuckerbutty* (3), and *Nobeen Chunder Dutt* v. *Madhub Chunder Mundle* (4). Further the kabalas on the face of them are not valid contracts. They deal with an uncertain future event which cannot form the subject of a sale. Lastly the respondents should not have been made parties. There was no ground of complaint in the plaint against them. The suit as against them at least ought to be dismissed.

Baboo *Mahesh Chandra Chowdhry* in reply.—The validity or otherwise of the contracts had not been gone into. The case should be remanded for trial on the merits.

MOOKERJEE, J. (After stating the facts)—The plaint is not very full and explicit, but there appears to be no doubt whatever that one of the objects of this suit is to have a declaration from the Court that the purchasers are not nominal but *bona fide*. I am of opinion that it is quite competent to a Civil Court to entertain a suit of this nature. The simple question to be determined in such a case is the question which the Subordinate Judge has laid down for decision in the 1st issue of fact (1).

(1) S. D. A. for 1850, 296.
(2) S. D. A. for 1852, 398.
(3) S. D. A. for 1849, 428.
(4) 5 W. R., 224.
(1) *Ante*, p. 52.

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The other prayer contained in the plaint is also, I think a matter cognizable by the Civil Court, though it may be all cognizable by the Court of Small Causes. The plaintiffs alleged that, although the defendants have sold to them a moiety of their right to share in the ministrations at a particular place of the river bank, the defendants have taken the whole of the offerings, and would not give the plaintiffs their legitimate and proper share of them, which they had expressly covenanted and agreed for a valuable consideration to give to them, by the several kabalas executed by the defendants in plaintiffs favour. This would be a matter of simple contract, and the only material points that would arise for determination would be, whether by the terms of the deed the defendants have agreed to allow the plaintiffs to share in the profits arising from the ministrations in the ghat, and whether the defendants, having obtained articles of a certain value on account of these ministrations, have refused to give the plaintiffs their share of those articles.

I think the Subordinate Judge was wrong in holding that If "the plaintiff's alleged right on person be recognized on ground "of her being a hereditary priestess, it will be improperly inter- "fering with the liberty of men who have an interest and in- "alienable right to choose their own priests for performance of "ceremonies which the Hindu law, which governs their case," "prescribes." This is not a suit by a priest to enforce any right as against *jujmans*, but is one for a share of the fees obtained by the members of a family of *purohits*, one of whom had transferred his share to the plaintiff for a valuable consideration, the plaintiff being also a member of that family.

Suppose A was a *purohit* of a family, and was in receipt of all the fees paid by that family on occasions of religious ceremonies. Suppose A died leaving two sons, one a major and other a minor, and the *jujmans* being still anxious to employ the decendants of their late priest, call in the adult member to officiate at the ceremonies in their family, because he was a son of their priest and with a view that the members of the family of his late priest be supported by the fees given on such occasions to the officiating

priest, showing no inclination to prefer the one member to the exclusion of the other; I apprehend that under such circumstances the minor son of A will be entitled to share with his brother the offerings received by him at these ministrations. This will not be interfering with the liberty of the *jujman* to employ whomsoever they like, but will be furthering the object the *jujmans* had in view. In the present case if Ramdyal had, as a matter of contract, agreed and stipulated to share with the plaintiff the fees that would be received by him from persons who have to perform certain ceremonies at a particular place, he would, I think, be bound to fulfil his part of the contract, and give the plaintiff the share he has covenanted to give for a valuable consideration, supposing the first issue is decided in the plaintiff's favor.

The decisions in the *Khedroo Ojha* v. *Mussamat Deo Rane e Koomar* (1), *Becharam Banerjee* v. *Srimati Thakurmani Debi* (2) *In t he matter of the petition of Shewan Misrain* (3), *Thakoor Pandey* v, *Rughoonath* (4), and *Jowahur Misser* v. *Bhagoo Misser* (5), are in point, and show that a suit brought against a defendant on the ground of inheritance or contract, will lie in the Civil Court though it be for fees paid by a *jujman* to the defendant as the officiating priest. I wish it to be clearly understood that I perfectly agree with the decisions quoted by the respondent's pleader that a suit will not lie against the *jujman* for fees paid by him to the officiating priest, either on the ground of hereditary right of priesthood, or of any contract entered into with the plaintiff by the priest who officiated; the right of a *purohit* to officiate at the ceremonies of a family, because his ancestors had performed the ceremonies before, has been justly held to be a right not enforceable at law; no one can compel another to employ him as a *purohit* against his will, and a Court of Justice has no power to enforce its order against the conscience of the party. But I hold that a suit will lie against priests if the suit is brought "on the ground that "a partnership existed between the defendants and himself (plain-"tiff) or that they are bound by a contract, express or implied,

(1) 5 W. R., 222.
(2) *Ante* p. 53.
(3) S. D. A., 1852, 405.
(4) S. D. A. 1855, 2.
(5) S. D. A, 1857, 362.

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"to give him (plaintiff) a certain share of their earnings:" where there is no such partnership or no such contract, a suit will not lie even against a priest who has been but newly appointed by the *jujman*, by any member of the family of the old priest, that simply on the ground of a hereditary right to perform ceremonies of a particular family, because the fees paid by a *jujman* to the priest who officiates at ceremonies performed by him are, according to the custom prevailing in Hindu families, and also according to the Hindu law, voluntary gifts paid for work actually done, or for the sake of spiritual benefit supposed to flow to the donor when his gifts are accepted by pious and holy Brahmins. These gifts can never ordinarily be subject to partition either by the Hindu law or any other system of law.

As regards the claim of the plaintiffs against the other members of the family of his vendors who are no parties to the contract and who are under no obligation to share with the plaintiffs, the rule laid down in *Jowahur Misser* v. *Bhagoo Misser* (1) seems to me to be the proper rule which the subordinate Judge ought to follow. At page 366, Mr. Trevor says that "it appears to me "that if a *jujman* or a party in the exercise of the liberty "allowed to him, pays a sum as fees to an individual, so as to "show that they were intended for the individual, no claim can, "be perferred by others, though they may be joint heirs in the "family Purohitship, to the property so received, but that if "the fees be paid to a person only as a member of the collec- "tive body of which he is an unit, the claim is admissible "and should be decided in accordance to the rules by which "ordinary cases of inheritance are decided." In the present case if the Subordinate Judge finds that the fees paid at Kullu Misser's shradh, had been paid by the heirs of Kullu Misser to the collective body of priests, the plaintiff would be entitled to share in the offerings in proportion to his share in the rights of that collective body, but if, on the other hand, it is proved that the party who made the gift gave it only to one member of the family for services done by him for his individual benefit, the plaintiff will not be able to recover from them any portion of the fees so paid.

(1) S. D. A., 1857, 362.

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The case must go back to the Subordinate Judge for trial on the merits.

MACPHERSON, J.—I agree in thinking that this suit will lie so far as it seeks to establish, as against the defendants, the right of the plaintiff to share in the ministrations at the ghat in question. But the persons who use the ghat will not be affected by any decree which may be made in this suit. The decree can affect those only who are defendants and contest with the plaintiff the right to share in the performance of ceremonies and receipt of fees: there can be no decree directing any person or class of persons to employ the plaintiff or to pay fees to her.

I do not think that the proceedings in the Small Cause Court are any bar to the present suit, even so far as it seeks to recover the Rs. 75 which are claimed as the plaintiff's share of fees actually received. The matters in dispute between the parties might doubtless have been inquired into and decided in the Small Cause Court in the suit for Rs. 75. They were not however in fact inquired into or decided. The total value of the right which the plaintiff claims and now seeks to establish, is quite beyond the jurisdiction of the Small Cause Court; and under the circumstances it appears to me that the plaintiff is entitled to bring this suit to have her rights ascertained and declared, based as they are, partly on the kabalas which are contested, and partly on the right of succession.

The case is remanded. The lower Court must go fully into the merits, and must decide whether, under the kabalas on which she relies, the plaintiff has any (and if any, what) right to share in the ministrations at this ghat as against the defendants, or as against any (and which in particular) of them. If the Court shall be of opinion that the plaintiff has the right, the issue as to the Rs. 75 must then be gone into and decided.

The costs of this appeal will follow the result of the remand.

Case remanded.