

Moonshee *Mahomed Yusoof* for the respondent was not called upon.

The judgment of the Court was delivered by

PHEAR, J.—It appears to us that the decision of the Court below is correct. The plaintiffs sue to eject the ryot from his holding admitting that he is a ryot but alleging that he held only for a limited term of years under a *stotta*, and that that term had come to an end. The defendant totally denies having given the *kabuliat* which the plaintiffs state that he had given and sets up that he had acquired a right of occupancy. It appears that the plaintiffs failed to prove the *kabuliat*; and on that ground the lower Appellate Court has come to the conclusion that the plaintiffs' claim fails.

It has been urged before us very forcibly that the defendant also failed to prove his right of occupancy, and that because he had set up this right against the plaintiffs' claim, and had failed to prove it, therefore the plaintiffs were entitled to recover immediate possession of the land. It appears to me that there is no authority for this position. Neither the case of *Ramdhan Khan v. Haradhan Paramanick* (1), nor *Raja Sahib Pahlad Sen v. Baboo Budhu Sing* (2), seems to be in point. It is nowhere, as far as I know, laid down that a zemindar coming into Court and admitting that the defendant has been his tenant can succeed in ejecting him upon any other ground than that the period of tenancy has elapsed, or in some way terminated. The plaintiffs here only sought to prove one mode of termination of the tenancy and in that they failed. It seems to me that there is nothing whatever in the case to afford even a suggestion in favor of the plaintiffs upon any other ground. The defence set up was not such as to relieve them from the obligation of proving their case because it admitted the tenancy. I think the appeal must be dismissed with costs.

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SHEIKH WAL-
LAH ALLEE
v.
SHEIKH
GOLAM GOUS,

Before Mr. Justice Phear and Mr. Justice Glover.

1873
April 18.

NEPOOR AURUT v. JUKAI.*

Maintenancce, Order for—Criminal Procedure Code (Act X of 1872), ss. 536, 537—Mahomedan Law—Divorce.

THE following case was referred under s. 296 of the Code of Criminal Procedure by the Magistrate of Pubna:—

"Nepoor Aurut prayed for and obtained an order for maintenance, on the 18th May 1872, in the Court of a full-powered Magistrate, Moulvie Amiruddin, who at that time declared that the plea of divorce set up by the husband had not been proved.

"On the 20th June following, the woman petitioned saying, that the husband had failed to carry out the orders of the Court, and the case was made over

* Reference under s. 296 of the code of Criminal Procedure by the Magistrate of Pubna.

(1) 9 B. L. R., 107, note.

(2) 2 B. L. R., P. C., 111.

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to Moulvie Abdool Karim for needful orders with regard to the realization of the money due. On the 23rd July the Moulvie declared that, as the husband had divorced his wife, she was not entitled to maintenance, and that maintenance for the child could only be granted till he was 2½ years of age. This order has only lately come to my knowledge, and I called on the Moulvi for any explanation he might wish to make. In his explanation he has stated his views, but as it seems to me they are erroneous, and his order contrary to law, I forward the records for the perusal of the Court.

“In the first place, the case was sent to the Moulvi for realization of the money, and not for enquiry into any objections raised by the man on any subject not connected with payments already made; secondly, even had the Deputy Magistrate been authorized to enquire into any objections filed, it was not within his power to decide on the question of the alleged divorce, inasmuch as that had been already disposed of by a competent Court,

“The Deputy Magistrate in his explanation states that he did not look to the divorce alleged to have taken place previous to the order of Moulvi Amiruddin, but to that which the husband in his presence gave to the woman, and which, according to the Mussulman law, was good and sufficient, and amounted to a change of circumstances which authorized a fresh order from him.”

The judgment of the Court was delivered by

PHEAR, J.—It does not appear very clear upon the the papers which have come up to us in this reference what precisely was the order that was made by the Deputy Magistrate on the second occasion. We understand that an order for maintenance under the legislative provisions, which are found in s. 536 of the existing Criminal Procedure Code, was originally made, and that it came before the Deputy Magistrate for the purposes of being enforced. It appears from the Deputy Magistrate's letter of explanation that he called the husband before him to show cause why the order should not be enforced, and that the husband thereupon, in his presence, divorced his wife. And we cannot gather from the Deputy Magistrate's statement what course he took at this stage. He tells us that he considered the divorce so effected by the husband was sufficient to relieve the husband from the Duty of compliance with the order of maintenance. As I have already said, however, the Deputy Magistrate does not state in words what formal order he passed. Now, it is clear I think that, as long as any order duly made under s. 536, or its former equivalent, is existing unaltered by any subsequent proceeding, it is operative, and it would be the duty of the Deputy Magistrate, when called upon by the wife in whose favor the order was made, to enforce it. The following section, 537, provides a mode in which the person against whom the order is made can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband in his presence divorced his wife. such an alteration of circumstances

did occur which would justify the Deputy Magistrate upon the application of the husband in altering the order for maintenance in favor of the wife.

At the same time it appears to me quite clear that that change of circumstance, even if it were such as to justify the withdrawal of the order of maintenance against the wife altogether, would not relieve the husband from the necessity of obedience to the order during the time which had elapsed up to the date when and until that change of circumstance had occurred; in other words, that the husband was at any rate strictly bound to pay the maintenance-money according to the terms of the order up to the date when in the Magistrate's presence he divorced his wife, as the Deputy Magistrate says he did.

With these remarks, which may serve as some guidance to the Deputy Magistrate, we direct that the record be returned to him, in order that he may take the requisite steps in the matter and pass the proper orders.

1873

NEPOO
ACRUT
v.
JURAL.

Before Mr. Justice Macpherson,

MODOOSOODUN PAUL v. DOYAL CHUND MULLICK,

1873
May 15.

Suit on Decree of Calcutta Small Cause Court—Costs.

THIS was a suit to recover Rs. 777-8, due under a judgment and decree of the Calcutta Court of Small Causes, which had been obtained by the plaintiff against the defendant, as executor of the estate of Cowar Cally Coomar Mullick Roy, deceased. The defendant had appeared in the suit in the Small Cause Court, and had denied assets of the deceased; and the decree was wholly unsatisfied as appeared by the certificate of the first Judge. The plaintiff alleged and proved by the evidence of the defendant himself that the latter was in possession of immoveable property belonging to the deceased out of which the plaintiff's claim could be satisfied.

The plaintiff prayed that the defendant as such executor might be decreed to pay to him the amount due under the decree of the Small Cause Court together with interest thereon and the costs of the present suit, and if the defendant should deny assets, for the administration of the estate of the deceased.

Mr. Lowe for the plaintiff:

The defendant did not enter appearance, but was called as a witness on behalf of the plaintiff.

MACPHERSON, J., granted a decree for the sum claimed, with interest from the date of decree at the rate of 6 per cent. and costs on scale No. 1. In default of payment for six months from date of decree, the estate to be administered in due course.

Attorney for the plaintiff: Baboo G. C. Chunder.