Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Phear.

1867
Sept. 5.

KHETTRAMOHAN CHATTERJEE, APPELLANT, *v.* KISORIMOHAN BOSE, RESPONDENT.

Mortgage—Debt—Costs—Act XXVI. of 1864, *s.* 9.

In a suit by a mortgagee, the prayer of the plaint was for a decree for Rs. 300 with interest, and for foreclosure or sale in default of payment,—*Held* that it was an action within section 9 of Act XXVI. of 1864, and, therefore, the plaintiff was not entitled to costs.

THIS was a suit to recover the sum of Rs. 300, with interest at the rate of 12 per cent. per annum, which the plaintiff alleged to be due to him on a mortgage, dated 31st May 1866; and in default of payment, the plaint prayed for foreclosure or sale of the mortgaged property.

The defendant did not appear, and a decree was made for the plaintiff in the terms of the plaint.

Mr. *Woodroffe* for the plaintiff, then applied for costs, and contended, that the Small Cause Court had no jurisdiction in the suit; and that it, therefore, did not come within section 9 of Act XXVI of 1864.

The judgment of the lower Court was delivered by

NORMAN, J.—I am of opinion that the plaintiff is not entitled to costs. This is really an action of debt. Possibly, if it had been solely and simply a suit for foreclosure, the plaintiff might have sought a remedy, which the Small Cause Court could not give. But here foreclosure is merely asked for as an alternative remedy. The debt claimed is under 500 rupees; and, therefore, under the 9th section of Act XXVI. of 1864, the plaintiff is not entitled to costs. The word 'action' in the 9th section is not confined to action at law, which was the construction put on section 101 of Act IX. of 1850. The case of *Mrityunjoy Dutt* v. *Kamini Dasi* (1) is very shortly reported; it seems opposed to the decision of Sir Lawrence Peel, in the case of *Radhamani* v. *Anandamayi Debi* (2).

(1) 1 Ind. Jur. N. S., 95. (2) 1 Gasper's S. C. C. R., 51

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The plaintiff appealed on the following grounds: 1*st*, that the learned Judge was wrong in holding that the plaint did not seek for equitable relief as between mortgagor and mortgagee by way of foreclosure or sale, which could be only granted by this Court. 2*nd*, that the learned Judge was wrong in holding that the relief sought for by the plaintiff in this suit could have been granted by the Court of Small Causes.

Mr. *Woodroffe* for appellant.

The judgment of the Court was delivered by

PEACOCK, C. J.—I think there is no reason for interfering with the judgment. The plaintiff might have brought his suit in the Small Cause Court for the sum due on the mortgage, or he might have exercised the power of sale under it.

Judgment affirmed.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Phear.

1867
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MANOHAR DAS AND OTHERS, APPELLANTS, *v.* BHAGABATI DASI, RESPONDENT

Hindu Widow—Execution of Deed—Fraud—Parol Evidence.

See also 15 B. L. R. 183

In a suit by a Purda lady to set aside a bill of sale, execution of which by her had been obtained by collusion and fraud, the Court admitted parol evidence to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for.

THE plaintiff in this suit prayed, that the defendants might be directed to bring the bill of sale, or agreement for sale, of certain premises in Zig-Zag Lane, in Calcutta, into Court, and that the document might be declared to be a security only for the sum of Rs. 8,000; and that the defendants might account for the rents and profits of the premises, and the plaintiff might be charged in account on the sum of Rs. 8,000, with interest at 12 per cent. only, and on payment of what might be a found due from her, might have the premises re-conveyed to her and possession thereof.