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SONATAN ROY v. ANANDA KUMAR MOOKERJEE.

On appeal, the Judge reversed the decision, on the ground, that the onus of proof had been wrongly thrown on the defendant, and that the plaintiff evidence was insufficient to prove his case.

The plaintiff appealed to the High Court.

Baboo *Banshidar Sen* for appellant.

Baboo *Khettra Mohini Mookerjee* for respondent.

The judgment of the Court was delivered by

JACKSON, J.—This was a suit by Sonatan Roy and others, who occupied some parcels of land, to set aside a judgment of the Deputy Collector, by which they were ordered to execute a kabuliat in favor of the defendant, Ananda Kumar Mookerjee, and to have it declared that the lands in question belonged to an estate called Kistobati, and not to an estate called Ramchandrapur. This suit appears to have been entertained bythe Courts below, and to have been decided by the lower Appellate Court, on the merits, in favor of the defendant.

The plaintiff now appeals specially to us upon a ground which it seems to me it is unnecessary to go into, because, I am of opinion, that this suit could not be maintained in the Civil Court. The decision of the Deputy Collector, which it is sought to set aside, was a decision in a suit brought by a zemindar against his ryot to obtain a kabuliat, that is a suit of which the exclusive cognizance is reserved by clause 1, section 23, Act X. of 1859 to the Court of the Collector, and except by way of appeal as provided by that Act is declared to be not cognizable by any other Court, by any other officer, or in any other manner. That appears to me effectually to bar the cognizance of the Civil Court for the purpose of setting aside the decision.

I can easily conceive a case in which a neighbouring zemindar might find himself aggrieved by a decision of the Collector adjudging that a particular ryot is to execute a kabuliat in respect of lands held by him in favor of the zemindar of another estate, and in that case probably an action would be maintainable by the zemindar so aggrieved, in order to declare his title to the lands in question. That is not the present suit. I think this suit ought therefore, to have been dismissed, and that, consequently, the special appear must fail on this ground. The appeal, therefore, is dismissed with costs.

MARKBY, J.—I also think that this suit is not maintainable.

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Before Mr. Justice Bayley and Mr. Justice Hobhouse.

MIR HABIB SOBHAN (PETITIONER) *v.* MAHENDRA NATH ROY (OPPOSITE PARTY)*

Superintendents—Arrears of Rent—Revival of Suit—Act X. of 1859, s. 58.

A suit for arrears of rent was dismissed by the Deputy Collector for default under section 54, Act X. of 1859.

* Motion, No. 124 of 1868 against the order of the Additional Judge of Jessore, dated the 3rd August 1868.

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Thereupon a fresh suit was brought by the same plaintiff for the recovery of the said arrears, and a decree was obtained. On appeal, the Judge reversed the decision of the Deputy Collector, and dismissed the suit.

The plaintiff then applied, under section 58, Act X. of 1859, for revival of the former suit, but the Deputy Collector rejected the application. On appeal, the Judge held that the suit might be revived, and remanded the case for trial.

The High Court, under its general power of superintendence, set aside the order of the Judge as passed without jurisdiction, holding, that, although the Deputy Collector had formerly struck off the case under section 54, yet it was, in fact, an order under section 55, and, therefore, under section 58, Act X. of 1859, no appeal lay to the Judge.

Baboo *Bawani Charan Dutt* moved to make absolute a *rule nisi* issued upon a petition by Mir Habib Sobhan, which stated :—

THAT Mahendra Nath Roy had instituted a suit against him for arrears of rent for the years 1271 and 1272, in the Deputy Collector's Court of Zilla Jessore; and that on the day of hearing, viz., the 23rd of April 1866, the suit had been dismissed for default; that Mahendra Nath Roy had, therefore, on the 18th May, brought a fresh suit for the recovery of the same rent, and obtained a decree in the first Court on the 30th June 1866, which was on the 4th April 1867 reversed on appeal by the Zilla Judge of Jessore, who held that plaintiff's former suit having been dismissed for default under section 55, Act X. of 1859, his proper remedy was, by an application for the revival thereof under section 58, Act X. of 1859.

That, subsequently, on the 18th April 1867, the plaintiff applied for the revival of the former suit; and that his application was on the 6th May 1867 dismissed by the Deputy Collector, which order was set aside by the Additional Judge of the district of Jessore, and the suit revived on the 3rd August 1868,

The petitioner submitted that, when the plaintiff, according to the provisions of section 58, Act X. of 1859, failed to apply for revival of his suit, within 15 days, from the date of the Collector's order, the Additional Judge of the Jessore district had no jurisdiction to entertain his application. Moreover, when the Deputy Collector did not try the case under section 58, Act X. of 1859, the order passed by him was final, and not appealed to the Judge.

A rule was issued on the 13th November 1868, "calling on the other side to shew cause (within 15 days of service) why the order of the Additional Judge, dated the 3rd August last, should not be set aside for defect of jurisdiction."

Baboo *Ashutosh Chatterjee* (Baboo *Chandra Madhab Ghose* with him) shewed cause.

The judgment of the Court was delivered by

HOBHOUSE, J. (After stating the facts).—We think this rule must be made absolute. Mahendra Nath has now shewn cause, but, we think, ineffectually. His pleader contends that, although the order of the Deputy Collector of the 23rd

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April 1866 was an order which the Deputy Collector had jurisdiction to pass, yet that it was expressly an order passed under the provisions of section 54, Act X. of 1859; and that being an order passed under that section, either he had liberty, with reference to the provisions of that section, to bring a fresh suit, or, at the least, it was an order which, by its terms, misled him, and that, therefore, we ought not to exercise our extraordinary jurisdiction by setting aside the judgment which necessarily, in his opinion, followed on that order.

We remark that the terms of sections 55 and 58 of Act X. of 1859 are absolute and unmistakeable. Section 55 says, that "if, on the day fixed for the appearance of the defendant, the defendant only appears, then the Collector shall pass judgment against the plaintiff by default." Section 58 declares that no appeal lies against a judgment passed against a plaintiff by default; but in such a case, if the party against whom judgment may be given shall appear, within 15 days from the Collector's order, and if the plaintiff shew good and sufficient cause for his previous non-appearance, then the Collector may revive the suit.

It is quite clear, therefore, that, although the Deputy Collector may have misquoted the law (in fact, he did so), and may have fancied that he was proceeding under section 54 of the Act, yet, as a matter of fact and law, he could only have proceeded under the provisions of section 55 of that Act; and when he had so proceeded, no appeal lay to the Judge, nor could any fresh suit be instituted, but the plaintiff's only remedy was to apply for the revival of the case, within 15 days from the date of the Deputy Collector's order, that is to say, within 15 days from the 23rd April 1866; and upon the admitted facts of the case, it is clear that the plaintiff did not appear at all within the 15 days referred to This being so, it is clear that when, on the 6th May 1867, the Deputy Collector rejected the plaintiff's application to revive the case, he was quite right in so rejecting it, and the Judge's order of the 3rd August 1868 directing the revival of the case was passed without Jurisdiction. But the pleader for Mahendra Nath Roy contends that, although we ought probably to set this decision aside, yet we ought, in justice, because the Deputy Collector misled his client, in the first instance, to restore the parties to their original position.

We do not think that we can do this; because if we do so, that would be in effect to say that, although, by reason of the plaintiff not appearing to revive the case within 15 days of the 25th April 1866, the Deputy Collector had no jurisdiction to revive it, yet we ought to say now he might revive it. This, clearly, we cannot say. We can only say that the Judge's decision of the 3rd August 1868 was passed without jurisdiction, and must be set aside.

We think that the petitioner must get his costs of this application.