

1869
 Jany. 9.

Before Mr. Justice Kemp and Mr. Justice Glover.

DHANPAT SING AND ANOTHER (DECREE-HOLDERS) v. LILANAND SING

(JUDGMENT-DEBTOR.)*

Execution—Procedure.

An application for execution of a decree need not be accompanied by a copy of the decision of the first Court.

An application for execution was made by a mooktear, and admitted by the Judge, who ordered a notice to issue to the judgment-debtor: *Held*, that such application cannot afterwards be set aside for irregularity, and that it is sufficient to keep the decree alive.

Baboo Krishna Dayal Roy and Nalit Chandra Sen for appellants.

Mr. R. E. Twissale for respondent.

GLOVER, J.—This was a suit for execution of a decree. The first application for execution, the only one we have to deal with, is dated the 13th August 1864. The present application for execution was taken out on the 4th July 1867, so that if the first application for execution preferred in August 1864, was sufficient to keep the decree alive, the decree-holder (applicant) is undoubtedly in time.

The Judge affirming the order of the Principal Sudder Ameen, has considered the application of August 1864 not to have been a *bond fide* one, for two reasons; *first*, because the application was irregularly made through a mooktear; *secondly*, because a copy of the Civil Court's decision was not filed with the application.

The second objection appears to us altogether untenable under the provisions of section 212 of Act VIII. of 1859. That section nowhere makes it necessary that an application for execution of a decree should be accompanied by a copy of the decision of the first Court, and that principle has been repeatedly upheld in decisions of the High Court, and notably in the case of *Gunga Gobind Gupta v. Makhun Lall Hattee* (1).

The other ground, namely that the application was made by a mooktear, and is therefore irregular, appears to us equally worthless; for whatever irregularity there might have been in that application, we think that the former Judge condoned it by afterwards issuing notice on the judgment-debtor, and that the present Judge cannot now interfere to set aside the order of his predecessor. It has been urged upon us by the pleader for the special respondent that the Judge, after looking to the whole of the circumstances of the case, has decided it upon the evidence before him, and that his decision is based on findings of

* Miscellaneous Appeal, No. 455 of 1868, from an order of the Judge of Purnea, dated the 27th May 1868, affirming an order of the Subordinate Judge of that district, dated the 12th September 1867.

facts with which no interference is possible in special appeal; but it appears to us that, as the Judge had no power to interfere with the order issuing notice on the judgment-debtor, his decision is not in reality one of fact at all, and cannot debar this Court, in special appeal, from allowing the judgment-creditor to execute his decree.

We think that the application of the 13th August 1864 was sufficient to keep the decree alive, and that the present application being within three years from the application preferred on the 13th August 1864, is in time, and that the decree ought to be executed accordingly.

The decision of the lower Appellate Court is therefore reversed, and the appeal decreed with costs.

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Before Mr. Justice Kemp and Mr. Justice Glover.

SHEIKH RAMZAN ALI (DEFENDANT) v. SYED ANWAR ALI (PLAINTIFF).—
Jurisdiction—Act X. of 1859, s. 23, cl. 6.

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A suit for the declaration of the right of the plaintiff to a share in the produce of certain trees, on the allegation that these trees were planted by a person, whose rights had passed to the plaintiff by a bill of sale, is cognizable by the Civil Courts, and does not come within the meaning of clause 6, section 23 of Act X. of 1859.

Moulvie *Murhamut Hossein* for appellant.

Mr. *R. E. Twidale* for respondent.

The judgment of the Court was delivered by

KEMP, J.—In these two special appeals, the same parties were plaintiffs and defendants in the Court below.—The Judge has given the plaintiff a decree, in confirmation of the decree of the first Court. One point taken in special appeal in the two cases is, that the suit is not cognizable by a Civil Court, and that it ought to have been brought under clause 6 of section 23 of Act X. of 1859. This objection was not taken below; but as it is a question of jurisdiction, we shall notice it. The suit was not to recover the occupancy or possession of any land, farm, or tenure from which the ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same. It was a suit for a declaration of the right of the plaintiff to a half share in the produce of certain trees, on the allegation that these trees were planted by the person, whose rights had passed to the plaintiff by a bill of sale.

This ground of special appeal is clearly untenable.

Special Appeals, Nos. 2120 and 2125 of 1868, from the decrees of the Judge of Patna, dated the 26th December 1868, affirming the decrees of the Moonsiff of that district, dated 3rd December 1867.