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HARISH CHANDRA CHUCKERBUTTY v. TARA CHAN SHAHA.

trate in particular. Copies of the depositions of two witnesses before the Magistrate, who deposed to the pledging of those articles, were produced as evidence in the Civil Court, but the witnesses being still alive, those copies of the depositions were not admissible. Plaintiff ought to have produced those witnesses to prove the fact. Plaintiff, therefore, did not support his case by proper evidence in the Court below.

We are asked by the respondent to remit the case to lower Court in order that plaintiff may have an opportunity of giving further evidence. I do not think that we ought to do so. This was a suit for damages, and the plaintiff ought to have made out his case at the trial.

I think that the appeal must be decreed, and the judgment of Principal Sudder Ameen must be reversed with costs.

GLOVER, J.—I concur.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

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Dec. 15.

MUKTAKESHI DEBI CHOWDHRAIN (PLAINTIFF) *v.* SAJED SHEIKH AND ANOTHER (DEFENDANTS.)*

Act X. of 1859, s. 17, c. 3.

When a zemindar sued a ryot for enhancement of rent, on the ground that he was holding more land than he paid for, the land in excess not being included in any potta which had been granted to the ryot, but was within his "jote," *Held*, that the zemindar could properly sue for enhancement of rent under Act X. of 1859, section 17, clause 3, and the Court would grant such relief, notwithstanding that the plaint also asked that execution of a kabuliat might be ordered after determining the rate of rent.

Baboo *Mohini Mohan Roy* for appellant.

Baboo *Anand Gopal Palit*, for respondent.

The judgment of the Court was delivered by

JACKSON, J.—This was a suit by the zemindar, against the defendant, who held certain jotes under him, praying the Court to fix an enhanced rate of rent, upon the ground that the defendant was holding more land than he paid for, and to order defendant to execute a kabuliat at such rate. The Judge considered that the defendants must be regarded as a trespasser in respect of the excess land, inasmuch as the land was not included in any potta granted to him; and he, the Judge, therefore, thought the suit would not lie, and dismissed it in *toto*.

I think that the Judge was mistaken in considering that the suit fell within the ruling in *Rashum Bibi's* case (1), where it was held that a ryot occupying land not included within the limits of the jote or holding, must be looked upon

Special Appeal, No. 2095 of 1868, from a decree of the Judge of Beerbhoom reversing a decree of the Deputy Collector of that district.

(1) 6 W. R., Act X. Rul., 57.

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as a trespasser in respect of such land, and that a suit to enhance would not lie. It is clear that when the land lies within the limits of the jote, and the zemindar sues for enhancement, on that ground, the case clearly falls within the provisions of clause 3, section 17, Act X. of 1859.

The case must go back to the Judge, in order that he may determine whether the land actually had been held by the defendant, and to assess fair and equitable rates.

Then it is contended that as this is a suit for a kabuliat, the suit ought to have been dismissed. This, however, was not purely a suit for a kabuliat, but the Court was asked to order the execution of a kabuliat after determining the rate of rent. We think, therefore, that the Court was at liberty to comply with that portion of the plaint which asked for the ascertainment of a fair and equitable rate, without granting a kabuliat.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

KASIMUNNISSA BIBI AND OTHERS (DEFENDANTS) v. HURANNISSA BIBI, (PLAINTIFF.)*

1868
Dec. 17.

Mortgage—Lien—Decree.

A executed in favor of B a simple mortgage of certain property. He afterwards executed in favor of C a mortgage by bye-bil-wafa, or conditional sale, of the same property. C obtained a decree for foreclosure, and got possession thereunder. B then obtained a money decree against A, and in execution seized and sold and became the purchaser of the said property, and was put into possession of it. On C suing B to recover possession, B claimed to be entitled to hold the property by reason of the prior lien which he had under the simple mortgage. *Held*, that as B had only got a money decree and no declaration of his rights as mortgagee, he could not set up a prior lien against C.

IN 1859, one Momtaz Hossein executed a tamassook, or bond, thereby pledging certain property, the subject of the present suit, in favor of the defendants. Sometime afterwards the plaintiff, in consideration of a sum of money advanced by them, obtained from the said Momtaz Hossein a bye-bil-wafa, or bill of conditional sale, of the property so pledged to the defendants. The plaintiff obained a decree for foreclosure against Momtaz Hossein, and obtained possession of the property.

The defendant brought a suit for recovery of the amount advanced by him to Momtaz Hossein, and obtained a decree for recovery of the debt due to him. In execution of this decree they caused the property in dispute to be sold, and, having purchased the same, was put into possesison thereof.

The plaintiff instituted this suit for recovery of possession of the property.

The defendants set up that as they had a prior lien upon the property in dispute, they were entitled to hold the same against the plaintiff.

* Special Appeal, No. 1200 of 1868, from a decree of the Judge of East Burdwan, affirming a decree of the Sudder Ameen of that district.