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SARAT CHANDRA ROY KA... NUNGO v. THE COLLECTOR OF CHITTAGONG.

Now, undoubtedly, in disputed cases of title, it is advisable that the witnesses who are to prove the defendant's or the plaintiff's case should be examined in open Court. At the same time the report of an Ameen and the evidence recorded on a local enquiry by an Ameen, are evidence, and, if, as we can gather in this case, the parties choose to agree that the evidence shall be taken before the Ameen, and that the matters in dispute shall be referred to an Ameen for enquiry, there is no legal objection to such a course, and the Judge ought, therefore, in this case to have referred to the evidence taken by the Ameen and also to his report, and if he thought that the witnesses named by the plaintiff ought to have been examined in Court, he should have sent the case back to the Sudder Ameen with directions accordingly. We, therefore, reverse the order passed by the Additional Judge on this appeal, and remand the case to his Court, in order that it may be retried as directed.

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

1868 Dec. [illegible]

HARISH CHANDRA CHUCKERBUTTY (DEFENDANT) *v.* TARA CHAND SHAHA (PLAINTIFF.)*

Evidence—Depositions.

Secs. [illegible] and [illegible]3, Act I. of 1872.

Depositions of witnesses in a former suit are not admissible in evidence when those witnesses are living, and their oral evidence is procurable.

Baboo *Umesh Chandra Banerjee* for appellant.

Baboo *Girija Sankur Mosoomdar* for respondent.

JACKSON, J.—I think that the plaintiff did not give the evidence in this case which could entitle him to a verdict. He alleged that defendant had brought against him a false and malicious charge, and he, therefore, sued for damages, the facts alleged being that the defendant had laid information before the Police respecting a theft stated to have been committed in his house, which had caused the Police to search the house of the plaintiff; that on such search, property was found, which the defendant claimed as his, and stated that it had been stolen from his house; that, in fact, the property in question had been previously pledged by the defendant to the plaintiff; and that, in consequence of such pledge being established to the satisfaction of the Magistrate, plaintiff was, accordingly, discharged, and the property restored to him. If those facts had been proved in the Civil Court as alleged, there can be no doubt that the Court might have justly inferred malice, and have given plaintiff a decree. It seems that the plaintiff gave no evidence of the facts which were relied upon as raising the presumption of malice, and did not prove the previous pledge, but seems to have adduced, for the purpose of proving the principal facts, copies of the proceeding before the Magis-

* Special Appeal, No. 1858 of 1868, from a decree of the Subordinate Judge of Furreedpoor, in Dacca, reversing a decree of the Moonsiff of that District.

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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.

1868
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.