APPENDIX.

Before Mr. Justice Loch and Mr. Justice Glover.

NURUNNISSA (DEFENDANT) *v.* BIBI ROUSHAN JAN (PLAINTIFF.)*

1868
Nov. 23.

Bond—Parties,

A, B, and were C uterine brothers, Mahomedans, to whom jointly a sum of money was due on a bond. A, the elder brother, sued the debtor for recovery of the debt, and after successfully resisting the claim of B's widow to be made a party to the suit, obtained a decree for the principal, and interest to the date of decree, together with subsequent interest and costs. A realised the decree for the principal and interest to the date of decree only. B's widow, on behalf of herself and two minor sons, sued A for the share of the decretal monies which belonged to her husband's estate. She refused to join her daughters as parties. *Held*, that she was entitled to recover a third share of the amount realised under A's decree, minus the share of her two daughters.

THIS was a suit to recover Rupees 6 927 13-7, the third part of a bond debt alleged to be due by one Kurban Ali to three uterine brothers, forming a joint family, named Ala Baksh, Kadir, and Ilahi; and on which a decree had been obtained, and execution taken out, by Ala Baksh, the elder brother, and managing member, after a separation had taken place among the brothers.

The plaintiff was the widow of the second brother Kadir, and she, on her own behalf, and on behalf of two minor sons of Kadir, sued for the share of the decretal monies, which belonged to her husband's estate.

The sum decreed to Ala Baksh, and obtained by him in execution, was Rupees 12,919. This was exclusive of costs and interest subsequent to decree, the amount of which did not appear to have been realised from the estate of the judgment-debtor.

Plaintiff had applied to be made a party to the suit by Ala Baksh, but her claim was rejected at the instance of Ala Baksh, and she was referred to a separate suit. Under these circumstances, the lower Court thought plaintiff was entitled to sue for a third of the whole debt, even though only part had been realised, because if any part of the debt were not recovered, this was presumably due to defendant's proceedings who had excluded plaintiff from exercising any control over his proceedings in that suit.

It appeared further that, besides the two sons whom plaintiff had joined with her in the present suit, she had two daughters who were not made parties. Defendants objected that they were material parties, and the plaint was invalid as it stood. The lower Court, however, held, that they were not material parties.

* Regular Appeal No. 142 of 1868, from a decree of the Subordinate Judge of Zilla Purneah.

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There was, practically, no defence on the merits in the Court below, and the Principal Sudder Ameen gave the plaintiff a decree for the whole amount claimed.

The defendant appealed.

Two objections were taken in appeal—1*st*, that the plaintiff could not maintain this action in its present shape—2*ndly*, that in any case she was only entitled to a share of the decretal money actually recovered, and that only in proportion to her own and her minor son's shares.

Mr. *O. Gregory* for apellant.

Mr. *R. T. Allan* and *Munshi Mohammed Yusoff* for respondent.

The judgment of the Court was delivered by

GLOVER, J. (After stating the facts, continued):—The first objection appears to us untenable. It is clear from the record, that the plaintiff did endeavour to be made a party to the original suit against Kurban Ali, under section 73 of Act VIII. of 1859, and failing in that, her only course was to do as she now has done, and to sue for her share of the money received under the decree. She might, no doubt, as insisted upon by the appellant, have brought the suit to have herself declared a sharer in the decree; but as the principal of the debt under the decree has been realised by the sale of the debtor's property, her present form of action raises all the necessary issues between the parties, and gives the defendant every opportunity of refuting her claim to partnership; and we think the objection raised to the form of action is merely technical. As to the cause of action not having accrued, because the decretal money had not been all paid, it appears that the entire sum due on Kurban Ali's bond, together with the penal-interest of Rupees 2-4 per cent. per mensem, up to date of decree, has been recovered; and that the only balance is for interest subsequent to decree and costs. So that the plaintiff's cause of action, *quoad* the bond, has fully and completely accrued; but even were it otherwise, we think that, under the circumstances of the case, the plaintiff would be entitled to maintain an action for a share of such sums as had been recovered under the decree, inasmuch as she had been prevented by the defendant from being included amongst the original parties to the suit.

With regard to the 2nd objection, we think that the plaintiff can only recover her share of the monies actually recovered, and cannot insist on the defendant's paying her what they may never get from the judgment-debtor's estate; should any thing be hereafter realized in the shape of costs, the plaintiff will be entitled to share therein, but not until then.

We have, moreover, no doubt that, in this case, she can only recover to the extent she has declared herself interested; and that the share of her two daughters, who have not been made parties to the suit, cannot be added to her own and that of her two sons who have been made parties. The plaintiff, we observe, had every opportunity given her of making her daughters co-plaintiffs,

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but deliberately refused to do so on account of a possibility of having to pay their costs, and she must take the consequence of her own *laches*. Moreover, the Court has no knowledge as to the *status* of these ladies whether or no they are minors, married or unmarried.

The Subordinate Judge's decree will, therefore, be amended. The plaintiff will recover a third share of the amount collected under Ala Baksh's decree, *minus* the share of her two daughters, which amount will be ascertained and determined in the execution of this decree. The amount so recovered from the plaintiff will be returned to the Collector, and added to the sum already in deposit on account of Ala Baksh's decree. The costs of this appeal will be assessed proportionately.

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

1868
Dec. 6.

SARAT CHANDRA ROY KANUNGO (PLAINTIFF) *v.* THE COLLECTOR OF CHITTAGONG (DEFENDANT.)*

Evidence—Local Enquiry by Ameen.

The report of an Ameen and evidence recorded on a local enquiry are evidence in the suit, and there is no legal objection to the parties to the suit agreeing that the evidence should be taken before the Ameen, and that the matters in dispute should be referred to him for enquiry.

Baboos *Chandra Madhab Ghose* and *Srinath Banerjee* for appellant.

Baboo *Jagadanand Mookerjee* for respondent.

The judgment of the Court was delivered by

JACKSON, J.—The decision of the lower Appellate Court is clearly erroneous. Plaintiff sued to recover possession of some lands from which he had been dispossessed in execution of a decree made in favor of the defendant against a third person, under section 15 of Act XIV. of 1859. In the course of the proceedings, the plaintiff filed a list of witnesses which is tantamount to an application for summons, and by order of the Court an Ameen was deputed to hold a local enquiry, and report.

It seems that the main point in dispute was, whether that which the plaintiff sues to recover was really land or water. Witnesses were not summoned, and, consequently, no oral evidence was taken by the Court; but the Ameen examined witnesses on the spot, and made a report which was taken into consideration by the Court. On that report, and on certain papers put in by plaintiff, the Sudder Ameen gave him a decree.

The Judge in his decision says, "The Sudder Ameen ordered a local enquir "before examining any witnesses in the Court, and it appears he examined none "at all in Court at any time. This was not a proper course. Plaintiff raised "no objection however, nor did his Counsel in appeal until this Court pointed "out the omission."

* Special Appeal, No. 866 of 1868, from a decree of the Additional Judge of Chittagong, reversing a decree of the Sudder Ameen of that district.