

1860

BURGARAM
ROY
v.
RAJA NARSING
DEB.

anything on that point. Upon the second point, so far as regards the construction which is to be put upon section 246, Act VIII. of 1859, I should wish for further opportunity of consideration before concurring in the opinion which has been expressed by Mr. Justice Jackson, and in this case it does not seem to me necessary to express any final opinion upon that point, because upon another ground the objection taken by the appellant, I think, fails. The two applications of the defendants, and the plaintiffs, respectively, were disposed of by two different orders, but the order which disposed of the application of the plaintiffs referred to the order which disposed of the application of the defendants for the ground upon which it was based. Upon turning to that order, it appears that the Moonsiff, after reciting a number of facts which had transpired with reference to these proceedings, and in which the plaintiffs were more or less concerned, goes on to say:—"All these disputes cannot be settled in one suit;" and then he disposes of the application of the defendants, without any further allusion whatever to the application of the plaintiff. It seems to me quite clear, therefore, that the Moonsiff has distinctly abstained from adjudicating in any way upon the claim of the plaintiff, and therefore, in accordance with the cases of *Monohur Khan v. Troyluckhonath Ghose* (1), and *Rutnessur Koondoo v. Majeda Bibee* (2), it seems to me clear that whatever be the construction put upon section 246, the limitation of one year does not apply to this case. I, therefore, concur in thinking that the special appeal ought to be dismissed.

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

1869
Feb'y. 17.

AMBIKA CHARAN DUTT AND OTHERS, (DEFENDANTS) v. NADIR
HOSSEIN (PLAINTIFF.)*

Special Appeal—New Title.

The defendants in the Court below unsuccessfully claimed to retain possession of some land under a kabala from a Mohammedan widow, who was alleged by them to have been absolutely entitled thereto under her right of dower.

Held that the defendants could not, in special appeal, set up for the first time that the widow was entitled to a share by inheritance, if not as denmohur, no case

* Special Appeal, No. 1936 of 1868, from a decree of the Judge of Hooghly, dated the 9th April 1868, reversing the decree of the Second Principal Sudder Ameen of that district, dated the 14th November 1867.

(1) 4 W. R., 33.

(2) 7 W. R., 252.

of that kind having been made in the Courts below, and no enquiry asked for into the state of the family, or whether any and what share came to the widow.

1869

AMBIKA CHA,
RAM DUTT
v.
NADIR
HOSSEIN,

Baboo *Ashutosh Chatterjee* for appellants.

Baboo *Srinath Doss* for respondents.

THE facts of the case sufficiently appear in the judgment delivered by

JACKSON, J.—The plaintiff in this case sued to recover possession of lands, which he had purchased from certain persons who are the heirs of Yatam Ali, under a kabala, dated 28th Kartik 1273, (1866.) The defendants claim to be entitled to the same lands under various kabalas of prior dates, two of which have been specifically brought to our notice, namely, one dated 17th Sraban 1269 (1862), which is from Baxu Bibi, who was the widow of Yatam Ali, and Maka Mea, her son. It relates to 32 bigas and 10 katas of land. Baxu Bibi sets forth the land as hers by right of dower, and in virtue of that right she sells it. Maka Mea appears to have joined in the execution of the deed. The second kabala bears date the 19th Jaishtha 1268 (1861). It relates to two bigas and four katas of land, and purports to be executed by all the heirs of Yatam Ali. The defendant appears to have relied, in the case which he made, on the title, the absolute title of Baxu Bibi, under her right of *Den mohur*. But the lower Appellate Court reversing in this respect the decree of the Court of first instance, came to the conclusion that the land in question was part of the estate of Yatam Ali, and that Baxu Bibi was not entitled to it, as *Den mohur*, and declared the plaintiff to be entitled to the lands.

It has been contended before us in special appeal that whatever may be the fact as to the dower-rights of Baxu Bibi, the defendants, at all events, were entitled to retain possession of the land as far as the shares of Baxu Bibi and Maka Mea were concerned, in regard to the 32 bigas, they being at all events two of the heirs; and were also entitled to the whole of the lands specified in the second kabala, which had been conveyed to them by the heirs collectively.

1869

AMBIKA CHA-
 RAN DUTT
 v.
 NADIR
 HOSSEIN

As to the first of these questions, it seems to me, that the defendant has made no such case in the Court below. He did not ask either of the Courts to determine what the rights or shares of Maka and Bazu were, and to allow him to retain possession of the land to that extent ; but he relied entirely on the *Den mohur* right of Baxu Bibi, and by that right, I think, he elected to stand or fall. I do not think, therefore, he is entitled now to ask us, in special appeal, to give him a decree to the extent of the rights of these two parties.

MARKBY, J.—I am of the same opinion. I think it is impossible for the defendants to set up, for the first time, in the argument on the special appeal, a case which involves an inquiry into facts not ascertained in the Courts below. Throughout this case, until now, they have maintained their absolute right as purchasers from an absolute owner. They now admit that their vendor was not absolute owner, and say that by inheritance she was entitled to a share. But there has until now been no enquiry asked for, as suggested, into the state of the family, so as to ascertain whether any, and if any, what share came to this lady. And in my opinion we ought not to commence that inquiry at the present stage of this suit.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

1869
 Feby. 18.

RAMBHANJAN BHAKAT (DEFENDANT) v. SRIKRISHNA
 BHAKAT (PLAINTIFFE.)*

Arbitration—Award—Appeal—Act VIII. of 1859, s. 327.

In an arbitration case between a mahajan and his gomasta, an award was made to the effect that rupees 725 were outstanding and due to the *kuli*, of which rupees 483 were due to the mahajan, and rupees 241 to the gomasta ; that the gomasta should point out the parties owing the rupees 483 ; or in default make good the amount. The mahajan applied to the Subordinate Judge of Bhagulpore, under Act VIII. of 1859, section 327, to file the award. The Subordinate Judge held that it was not proved that the gomasta had done as required by the award, and ordered

* Miscellaneous Regular Appeal, No. 416 of 1868, from an order of the Judge of Bhagulpore, dated the 24th June 1868, affirming an order of the Subordinate Judge of that district, dated the 17th September 1867.