

Ameen of that District, dated the 10th October 1863.

Joy Kishen Mookerjee and others (Defendants), *Appellants*,

versus

Jodoonath Ghose (Plaintiff), *Respondent*.

Baboos Bane Madhub Banerjee, Mohindro Lall Shome, and Pearee Mohun Mookerjee for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

A suit by one ryot against another for damages on account of illegal appropriation of the produce of the land, including the ryot's profits, by the defendant during certain years, is not a suit for mesne-profits, and is, therefore, unaffected by section 11, Act XXIII. of 1861. The question regarding amount cannot be settled in execution, but by separate suit.

PLAINTIFF first brought a suit for possession with mesne-profits of certain land of which he had been dispossessed by the defendant, Joy Kishen Mookerjee.

The Courts gave him a decree for possession and wasilat for 1266. He now sues for what he calls the mesne-profits of 1267, 1268, and 1269, that is, from the date of the former decree to the date of his acquiring possession under it.

Both the lower Courts gave plaintiff a decree, though the sum decreed by both Courts was not the same in amount.

The defendant now appeals specially, urging that the present separate suit for mesne-profits between the date of the previous decree and possession acquired under it will not lie; that the question regarding their amount should have been settled under section 11, Act XXIII. of 1861, in execution, and not by separate suit; and that, consequently, the order of the lower Courts should be reversed, and the plaintiff's suit dismissed with costs.

We do not look upon the present suit as one for mesne-profits at all. It is a suit by one riot against another tenant for damages on account of the illegal appropriation of the produce of the land, including the ryot's profits by defendant during certain years, and it is measured at the value of that produce with certain deductions on account of expenses of cultivation. Such a suit, we think, is unaffected by the terms of section 11, Act XXIII. of 1861; and though, doubtless, the words "mesne-profits" have been used incorrectly, such incorrect usage will not affect the plaintiff's right to bring an action of this nature. We see no reason,

therefore, to interfere in special appeal, but reject the application with costs.

The 10th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Decision (Effect of, in one appeal by High Court on two others before Judge).

Case No. 3356 of 1864.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th December 1859.

Mr. G. Gregory, executor to the estate of Mr. Catherina Arratoon (Plaintiff), *Appellant*,

versus

Huree Kishore Roy and others (Defendants), *Respondents.*

Mr. C. Gregory and Baboo Kalee Mohun Doss for Appellant.

Baboos Kishen Kishore Ghose and Hem Chunder Banerjee for Respondents.

Of three suits by different parties against the same defendant, the appeal lay in one to the High Court, and in the other two to the Judge. The Judge postponed the two cases before him until the decision of the High Court, when, taking it as a precedent, he decided, accordingly, in favour of the defendant. HELD that the decision of the one case, though not strictly a pre-adjudication binding on the other two plaintiffs, was, nevertheless, a good guide to enable the Judge to arrive at a correct finding on the facts.

THREE cases brought by three parties claiming shares in the same land as against a neighbouring zemindar were tried together. In one, the amount being beyond the limit, the appeal lay to the High Court; in the two others, the appeal lay to the Judge. The two cases before the Judge were postponed to await the decision of the High Court; and, that being given in favour of the respondent, the Judge on that 'precedent' decided the other two cases in his favour. Strictly, the decision of one case was not a pre-adjudication binding in law on the other two claimants, as the Judge would seem to put it; but it would, on evidence, go so far to guide his finding on the facts that we cannot doubt that practically his finding is right, and was meant to be a concurrent judgment on the facts, and that substantial justice does not require our interference. We dismiss the appeal with costs.

The 10th May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath
Pundit, *Judges.*

Re-sale in execution of decree (consequent on non-deposit)—Liability of purchaser to damages—Appeal.

Case No. 126 of 1865.

Special Appeal from a decision passed by Mr. P. E. Taylor, Judge of East Burdwan, dated the 26th August 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th May 1864.

Sree Narain Miiter, *Appellant,*
versus

Maharajah Mahtab Chand Bahadour and others, *Respondents.*

Baboo Prosunno Coomer Sein for Appellant.
Baboo Juggadanund Mookerjee for Respondents.

A purchaser at a sale in execution of a decree is liable for damages caused by a re-sale consequent on his not making the required deposit. An appeal lies to this Court from the order of the lower Courts absolving the purchaser from liability.

THE first Court disallowed the damages arising out of the re-sale (in which the property was sold for less than it had fetched in the first sale) on the ground that the mooktear of the purchaser had not made a deposit, and had not signed the proceedings of sale. The Lower Appellate Court upheld the order on the ground that the provisions of sections 253 and 254 had not been observed, and that there was some irregularity in the sale. It is shown to us from a copy of the petition of the purchaser that he admits that his mooktear had signed the sale proceedings. We know of no irregularity, and the sale was not set aside for any. The non-deposit of a portion of the consideration on the first day of the sale, and the remainder within the time allowed by law, led to the re-sale. It is clear that the fact of the deposit not being made cannot, as the lower Courts think, absolve the purchaser from the liabilities attached to the purchase made for him by his mooktear. The contract was completed, and, if the purchaser fail to pay the consideration, a re-sale must take place, and the purchaser in the first sale must abide by the results of his acts in abandoning the purchase.

It is true, the law of 1861 allows an appeal in matters of dispute arising only between the parties; but section 254 enacts that the damages payable by the first purchaser may be realized under the proceedings allowed for execution of decrees. It, therefore, follows that for all the purposes of enforcing payment of these damages, the original decree-holder has all the rights of a decree-holder to enforce his claim against the defaulting purchaser, and so appears to have a right to appeal in all matters appealable.

We think, therefore, that an appeal lies to this Court; and that may be the reason why no objection was taken by the purchaser to the appeal to the Lower Appellate Court. As the order of the lower Court is evidently wrong, we reverse them with costs, and decree the appeal of the appellant, declaring that the appellant is entitled to recover the difference by way of damages.

A copy of this order is to be sent to the Court of first instance to enable the decree-holder to recover the sum adjudged to him by this order.

The 10th May 1865.

Present :

The Hon'ble W. Morgan and Shumbhoonath
Pundit, *Judges.*

Limitation—Acknowledgment of title of Mortgagor (made by Mortgagee to third party).

Case No. 118 of 1865.

Special Appeal from a decision passed by Moulvie Etrat Hossein, Principal Sudder Ameen of Sarun, dated the 18th November 1864, affirming a decision passed by the Moonsiff of that District, dated the 8th June 1864.

Dur Gopal Singh (Plaintiff), *Appellant,*
versus

Kasheeram Pandey and others (Defendants),
Respondents.

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Madhub Chunder Banerjee and Chunder Madhub Ghose for Respondents.

A written acknowledgment by the mortgagee of the title of the mortgagor or of his right of redemption is