On looking at the record of the suit which terminated in the decree of May 1862, we observe that the plaint asked for the realization of the mortgage, and, although the judgment did not in terms order the sale of the mortgaged property, it directed that the plaintiff's claim should be granted ; we have, therefore, no hesitation in holding against the defendants that the sale which followed in execution of the decree passed to the plaintiffs the actual property which was mortgaged. Next, the defendants say that the plaintiffs, mortgagors, are bound by the compromise of February 1862, which set up the transaction of 1856; and that the plaintiffs who take under them cannot be in a better position. This would be so, no doubt, if the transfer to the plaintiffs of the mortgagor's interest dated after the making of the ikrar. But this is not the case as between the plaintiffs and the makers of the mortgage bond in question ; the title of the former goes back to the date of the bond in April 1861, while the ikrar was not effected at earliest till December 1861. Under all the circumstances of the case, we think that the plaintiffs are entitled to avail themselves of the judgment of the 4th January 1862, for they would have been bound by it had it gone against the interests of their so-called mortgagors, inasmuch as the suit in which it was made was instituted before the bond was executed; and, as we have already said, these mortgagors have no authority to bind them by the ikrar. The plaintiffs' special appeal is upheld, and that of the defendants is dismissed in each case with costs, and the decree in the original suit must be given with costs in favor of the plaintiffs.

The 4th September 1865.

Present :

The Hon'ble C. Steer and J. B. Phear, *Puisne Judges.*

Judgment of Lower Appellate Court—Reasons for reversing judgment of first Court.

Case No. 1516 of 1865.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 13th December i86/f.,affirming a decisionpassed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of that District, dated the 2jth August 1862.

Moolchand Shah (Defendant), *Appellant,*

versus

Baboo Thakoor Doss Dutt (Plaintiff), Respondent.

Baboo Sreenath Banerjee for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

The remand of a case to a Lower Appellate Court, for the purpose of stating good and substantial reasons for reversing a careful and clear judgment of the first Court, is no warrant to the Lower Appellate Court to suppose that the case was remanded to it for the purpose of confirming the judgment of the first Court.

THE plaintiff sued the defendant for a balance due to him on an account.

The defendant's pleas were hot indebted, a partnership by which a balance was claimed in favor of the defendant, and a denial of. the authenticity of the accounts filed by the plaintiff.

The Principal Sudder Ameen found that the account had been proved by the evidence of the writer, and showed a balance in favor of the plaintiff. He found from the fact of an arbitration, which took place subsequent to the filing of the suit, that the defendant, admitting the balance, had agreed to pay it by instalments, and had agreed to file a deed of compromise, which fact, proved by the evidence, he thought was corroborative of the truth of the claim. On these grounds he decreed the suit in favor of the plaintiff.

The Judge in a short decision reversed the order of the Lower Court. He first found that the accounts put in by the plaintiff having been removed from the Court of the Principal Sudder Ameen before the writer was called as a witness to prove them, the investigation into these accounts had been defective. Any further enquiry, however, he thought unnecessary, inasmuch as the plaintiff had alleged that there had been an arbitration on the matter of the debt, and that the defendant admitting it had given a kistbundee. Why, the Judge asks, was not this kisbundee filed when all the other documents were filed ? Distrusting the existence of any such document, he distrusted the claim altogether, and dismissed theplaintiff's suit.

This judgment, this Court in special appeal, on 31st May 1864, characterized as a singular one. The Court observed that the Judge, whilst he admitted that the examination of the L'ower Court into the accounts (and the suit was on the accounts) had been defective in the Lower Court, took no steps to supply the defect in the appeal by th'e examination of the books himself. In respect to the Judge's decision on the merits of the claim, and his reasons for it, this Court remarked as follows: "Now, "the Judge must have overlooked the fact " that it was not obligatory on the plaintiff to " file this document (the kistbundee), *as it did " not exist until after the filing of the plaint.* "Again, it is not pleaded by the defendant " that this deed forms any bar to the plaint- " iff£ righf to continue the suit and to recover, " and that is not his defence. The defendant «* wholly sets aside any reliance on the kist- " bundee, and denies that it was ever execut- " ed by him, *vide* his grounds of appeal to the "Judge. Therefore, we utterly fail to see " why the Judge was to give the defendant " relief, and free him from the decree of the "first Court, because the plaintiff had not " filed this document. We require the Judge " to take up this appeal again, and to pass a " judgment upon the merits of the case, and, " if he has any solid reasons for reversing the "clear judgment of the first Court, to state " those reasons and the legal ground on which " he puts his judgment, holding that the de- " cree cannot be supported."

The decision of the Judge on the remand, if it can be called the decision of the Judge at all, is in these words :—

"The reasons for not upholding the de- " cree were given in the former decision. "**The** Appellate Court deems those reasons " insufficient, and considers the decision of the " Principal Sudder Ameen good and correct. '" In plain words, the superior Court would " confirm the decision of the Principal Sud- "der Ameen. As this Court has no other " reasons for not upholding the original de- "cree than those already stated, it only re- " mains to give effect to the expressed opinion " of the higher Appellate Court. The "decree of the Lower Court is accordingly "affirmed, and the appeal dismissed with " costs and interest."

Of course, there is another appeal against this order of the Judge, on the obvious ground that the Judge has not carried out the order of the High Court.

The first judgment of the Judge, Mr. Brodhurst, was a singular one, but this second order is infinitely more remarkable. We will not suppose, as we no doubt might from the tone and tenor of the decision, that the Judge has acted in a contumacious and petulant spirit in disposing of the case in the way he has done. Nor can we take the Judge at his word, and suppose that he is really unable to give any better reasons for his decision than those which this Court showed to be so inconsistent and unsound. The Court would rather not suppose that the Judge is so incompetent as he avows himself to be; and, under any circumstances, we think the Judge was bound to make some endeavour to comply with the order of the Court on remand, and justify his original decision on good and substantial reasons.

This Court never said that it considered the judgment of the first Court was good and correct. All that was said in regard to this judgment was, that the Principal Sudder Ameen had, in a careful and clear judgment, given a decree in favor of the plaintiff. A careful and clear judgment may still not be a good or a sound judgment; and certainly, whatever our judgment might have been as to the merits of the judgment, there was no warrant from our remarks to suppose that we sent the case back, intending that the Judge should confirm the judgment. The case was sent back that the Judge might, as he was bound to do, exercise an independent and unfettered judgment as to whether or not the defendant was indebted to the plaintiff in the sum claimed, or in any part of it. In now remanding the case for a second time, we hope the Judge will pass such a well-considered judgment as will do justice to the parties, and save them from the grievous burden of any further unnecessary litigation.

The 6jh September 1865.

Present:

The Hon'ble Shumbhoonath Pundit and G. Campbell, *Puisne fudges.*

Limitation—Suit to recover possession of property attached for sale.

Case No. 513 of 1865.

Special Appeal from a decision passed by Mr. R._ Alexander, Officiatingfudge of Cuttack, dated the 2nd December 1864, affirming a decision passed by the Moonsiff of that District, dated the 1st April 1864.