Now, the matter in dispute is whether or not the summons was served on the defendant in a suit filed about six years ago. The present applicants have no ground to stand upon unless in fact that summons *was* served, because a Court competent to determine that point between them and the defendant has judicially decided that the summons was *not* served. But the petitioners entirely omit in the affidavit of the facts on which they come before this Court, to swear that notwithstanding the finding of the Moonsiff to the contrary, the summons *was* served on the defendant. No one apparently thinks fit to vouch on oath for the truth of their case.

It does not appear to us, therefore, that there is sufficient reason for our exercising the extraordinary powers of this Court in favor of the petitioners, and we accordingly reject this application.

Mitter, J.—I concur.

The 1st June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

High Court's power of superintendence.

In the matter of

Khenumkuree Dabee and another, *Petitioners,*

versus

Ranee Shurut Soonduree Dabee, *Opposite Party.*

Mr. J. S. Rochfort for Petitioners.

Baboo Gopal Lall Mitter for Opposite Party.

Where a Deputy Collector who had passed an informal decree refused to execute it on application, the decree-holder was held to be entitled to an order from the High Court, in the exercise of the powers it possesses under Section 15 of the Charter Act, directing the Deputy Collector to do his duty.

Phear, J.—THE petitioner in this case is one of several defendants in a suit. The respondent is the sole plaintiff. In that suit a decree was passed in these terms:—"Suit dismissed with costs;" and appended to the decree was a schedule specifying the plaintiff's costs and the costs of each of the defendants. The petitioner applied to the Deputy Collector in whose Courts the decree was passed for execution of the decree for costs against the plaintiff.

The Deputy Collector said that he saw no decree for costs, or for payment by the plaintiff of costs to the petitioner, defendant.

Thereupon, a rule *nisi* was granted, calling upon the respondent to show cause why the Deputy Collector should not be directed to execute the petitioner's decree for costs.

It cannot, we think, be seriously questioned but that the decree to which we have referred really was a decree ordering the plaintiff to pay the petitioner the costs which were specified in the schedule to the decree, as the costs of the petitioner.

The decree was no doubt informal, but this was obviously the effect of it; and the Court which passed that decree was bound in law to execute it on the application of the petitioner.

It is, however, urged in argument before us that the decision of the Full Bench, reported in 5 Weekly Reporter, page 25, Miscellaneous Rulings (DaCosta *versus* Hall), lays down that in a case like this the parties must abide by the decision of the Deputy Collector, and that this Court cannot interfere by the exercise of the powers granted to it by Section 15 of the Charter Act.

It appears to me that the decision of the Full Bench by no means goes to the extent which is contended for. There, the Sudder Ameen having sold certain moveable property in execution of a decree afterwards set aside that sale and made a re-sale. The purchaser, a third party, and not one of the parties to the suit, appealed against this order of the Sudder Ameen to the Judge, and it was held, both by the Judge and by this Court on special appeal, that no appeal lay against the order of the Sudder Ameen at the instance of a third party; and the judgment of this Court given by the Full Bench also said that in such a case this Court could not interfere under the powers given to it by Section 15. The parties to the suit made no complaint. So far as they were concerned, there was nothing to indicate that the Courts below had not done their duty, and we think it is obvious that the Court could not, on the

application of a third person, rightly interfere by virtue of its extraordinary powers with the proceedings in a suit between parties who did not complain. The remedy of the purchaser was by a separate suit.

There is another case in Volume 7 Weekly Reporter (Gobind Koomar Chowdhry *versus* Kristo Koomar Chowdhry), in which a Full Bench held that an application very similar to the present application made by a party to the suit could be entertained by this Court.

In that case, the Deputy Collector had made a decree for arrears of rent. Subsequently, the Lower Appellate Court, and this Court on special appeal, modified that decree, declaring the plaintiff entitled to something less than the amount originally decreed. Meanwhile, the plaintiff had executed his original decree against the defendant for the full amount. After the judgment of this Court on special appeal, the defendant went to the Deputy Collector and asked the Deputy Collector to order the plaintiff to refund to him (defendant) the excess which he had paid beyond the amount finally awarded. The Deputy Collector refused this application, referring the defendant to his remedy by a separate civil suit.

The Full Bench, on this, held that the Deputy Collector was refusing to do his duty on the application of a party to the suit who was entitled to require him to make the order in question.

So here, the petitioner appears to us to be entitled to have the Deputy Collector ordered to do his duty, and to execute the decree which he has wrongly understood not to be a decree.

We think that there really is no collision between the case of DaCosta and the case reported in 7 Weekly Reporter.

There is no doubt a third class of cases with which we are familiar—more than one has come under our notice to-day—in which a subordinate Court having exercised its judicial discretion on the matters and the facts involved in the suit between the parties, and the Legislature having forbidden an appeal, the party aggrieved by the decision seeks a remedy by applying to this Court to exercise its extraordinary powers for the purpose of setting the lower Court right. In such a case as that the argument of the present respondent's pleader is, we think, good.

This Court will not allow the powers which it possesses under Section 15 of the Charter Act to be made use of simply for the purpose of obtaining an appeal in cases where the Legislature has expressly forbidden an appeal. But, as we have endeavoured to explain, the present case lies outside that class of cases altogether. The Deputy Collector has, in our opinion, refused to do that which it was distinctly his duty to do. The matters on which he exercised his judgment—if he did exercise any—were not matters and facts remaining in issue between the parties, but were the circumstances of an act done by his own Court.

It seems to us that no cause has been shewn against the rule, and therefore it must be made absolute with costs, which we assess at 32 rupees.

The 1st June 1870.

Present :

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Onus probandi—Transfer of title—Section 36 Act XI of 1859—Section 260 Act VIII of 1859—Section 21 Act I of 1845.

Case No. 157 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 29th September 1869, *affirming a decision of the Moonsiff of Kishengunge, dated the 8th July* 1869.

Shaikh Johur Ali (Plaintiff) *Appellant,*

versus

Brindabun Chunder and others (Defendants) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.
Mr. R. E. Twidale for Respondents.

In a suit to recover possession by the ostensible purchaser of an estate sold for arrears of revenue under Act I of 1845, where it was found that plaintiff had stood by ever since his purchase and had for 11 years allowed defendants to remain in possession and enjoy the usufruct as proprietors :

HELD, that the burden of proof was rightly thrown on the plaintiff.