the order of this Court directing her name to be struck off, she had no further interest in the case and could not know whether her name had or had not been entered in the decree, and no doubt, before the defendant can take advantage of the fact of her name appearing in the decretal order, he must be prepared to show us in what way the plaintiff came again on the record as a defendant notwithstanding the absolute prohibition by this Court. Of course it may be, as suggested, that the Principal Sudder Ameen had taken new evidence to the effect that notwithstanding the original statement of facts she was in possession, and on the strength of that new evidence had made her a party to the suit, but it would be necessary to show this distinctly. The petition praying that she be made a party and the order passed upon that petition should have been filed. As it is, we have on the one side the most distinct order of this Court directing her name to be struck off from the record, and on the other side we have nothing but the bare fact of her name appearing some two years afterwards in the decretal order of this Court. There was, moreover, it appears in 1869, some action taken by the plaintiff with regard to her name being still on the record. She applied to the Subordinate Judge of Dacca setting forth the circumstances and declaring that she had had nothing to do with the case and had not interfered with it since the order of the High Court directing her name to be expunged. Upon this, the Sudordinate Judge having called for a report from his office passed an order to the effect that the fact of her name still remaining on the record should not be allowed to prejudice her, inasmuch as it appeared that her name had been allowed to remain there by some error on the part of the transcribers of the decree; and although the learned Judges of this Court, who passed the order dated January 1870, remarked that this order of the Subornimate Judge was passed without authority, and no doubt it was so, still it shows that the plaintiff was not, as it has been endeavoured to be made out, sleeping over her possible rights, but that the moment she knew that notwithstanding the order of this Court directing her name to be expunged, she still appeared in the decretal order, she at once took measures to have the mistake remedied. We think that in the face of the order of this Court, directing the plaintiff's name to be removed from the list of defendants, the *onus* of showing that, notwithstanding that order, she was for some cause or other put back upon that list and that the suit was decided in her presence, lay upon the defendant, special appellant, and he has certainly given no evidence to prove that fact. No doubt, we have been shown that her name appears in the decree of 1867, but, under the circumstances, we think that is not sufficient.

We see no reason, therefore, for interfering with the order of the Subordinate Judge which directs this case to be tried upon the merits. The special appeal is dismissed with costs.

The 30th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Estoppel—Decree (on the strength of a kubooleut still in contest).

Case No. 1298 of 1871.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 5th August 1871, modifying a decision of the Moonsiff of that district, dated the 10th April 1871.

Ram Dhun Ghose (Defendant), *Appellant,*

versus

Ishan Chunder Ghose and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Taruck Nath Dutt for Respondents.

The Lower Appellate Court was held to have been wrong in ruling that a decision of the Collector in a distraint case was conclusive and binding against the defendant as to the genuineness of a *kubooleut* when the *kubooleut* was not put in issue in that case, nor its validity or genuineness determined so as to conclude the parties; and in giving the plaintiff a decree on the strength of a *kubooleut* the genuineness of which was still in contest in a regular suit pending determination in the Civil Courts.

Kemp, J.—The defendant, the ryot, is the special appellant. The suit was for rent of 15 beegahs 13 cottahs of land on the basis of a *kubooleut*, dated the 6th of Jeyt 1263. The arrears claimed were for the years 1275 to 1277. The defendant, the ryot, special appellant, denied the execution of the *kubooleut,* and alleged that he held a much larger plot of land than that covered by the *kubooleut,* under a *mokurruree* pottah of the year 1161, confirmed by a subsequent *amulnamah* of the year 1216.

The first Court, the Moonsiff of Ghattal, gave the plaintiff an amended decree, that decretal order being that, out of the sum claimed, Rs. 22-3 annas be decreed in favor of the plaintiff on the admission of the defendant with costs in porportion; excess costs payable by the plaintiff. The plaintiff, the *talookdar*, then appealed to the Judge. The Judge, Mr. Bright, observed that the question to be determined in the case was the validity of the *kubooleut* upon which the plaintiff sues. The Judge then refers to the previous distraint case in which the plaintiff, the *talookdar*, distrained the defendant's crops for the arrears of 1276. The ryot defendant sought to set aside the distraint as illegal. The *kubooleut* in question was filed in that case, and the Judge found, and erroneously found, that the question of the genuineness of that *kubooleut* was adjudicated upon in the distraint suit, and that the Collector finding that the arrears were due to the *talookdar* dismissed the suit of the plaintiff, present defendant. The Judge then says that the present defendant instituted proceedings in the Civil Court to establish the genuineness of his pottah.

This is not a perfectly correct statement of the facts, for we find that the suit in the Civil Court which, we may observe, was instituted in June 1870, or prior to the present suit which was instituted in September 1870, was not only to establish the genuineness of the pottah, but also and most distinctly to set aside the *kubooleut* dated the 6th Jeyt 1263 which had been filed in the distraint case. The Judge then proceeds to state that the former case before the Collector was a decision upon the genuineness of the deed, and as the defendant, the ryot, had never sued to have it declared that the *kubooleut* was a false document, he, the ryot, would be bound by the Collector's decision. The Judge then proceeds to say that in the present case the plaintiff has satisfactorily proved that the *kubooleut* in question was executed by the defendant. The Judge seems to think that the oral evidence for the plaintiff was trustworthy, and that it has not been refuted by the oral evidence for the defendant; that there was no improbability in the defendant having given such a *kubooleut*; and taking the evidence in the present case into consideration with the fact that the Collector had upheld the *kubooleut*, the Judge was of opinion that the plaintiff was entitled to have it declared that the *kubooleut* was executed by the defendant. With reference to the plea of payment, the Judge held that the defendant was unable to prove that he had paid the arrears. The decision of the first Court was therefore modified, and the plaintiff was declared entitled to recover the whole of the arrears claimed with all costs of both Courts.

In special appeal, it is contended that the Lower Appellate Court was wrong in law in holding that the decision of the Collector in the distraint case was conclusive and binding against the defendant as to the genuineness of the *kubooleut*, inasmuch as the *kubooleut* was not put in issue in that case, nor was its validity or genuineness determined so as to conclude the parties; that the Lower Court was wrong in holding that the ryot, special appellant, had not sued to have it declared that the *kubooleut* was a forgery, whereas his suit No. 617 was expressly instituted to set aside this *kubooleut* upon which the present case is based; and that as that suit No. 617 is still pending on remand by this Court, it was improper for the Appellate Court to give the plaintiff a decree on the strength of a *kubooleut* which is still in contest in a regular suit; and there is also another ground that as the Court of first instance before whom the plaintiff's witnesses were examined, distinctly found, for reasons stated at length in its judgment, that they were untrustworthy and rejected the *kubooleut* on various grounds, the Lower Appellate Court was wrong in reversing that judgment and holding the *kubooleut* to be proved without in any way considering or meeting the various reasons set forth by the first Court.

We have referred to the proceedings in the distraint suit, and we are of opinion that the Judge has taken an entirely erroneous view of the decision in that case. We do not find that the genuineness of this *kubooleut* was put in issue, or that there was any trial whatever of that question. It appears that in the first instance the ryot's suit contesting the distraint was successful, and on appeal to the Collector all that the Collector found was that the ryot has not been able to prove satisfactorily his plea of payment, and the distraint was upheld. The Judge was, therefore, clearly wrong in using the decision of the Collector as conclusive and binding upon the defendant on the question of the genuineness of this *kubooleut*. There is, as contended by the pleader for the special respondent, a finding by the Judge that there is oral evidence in this case which appears to the Judge to be trustworthy and which evidence proves the *kubooleut*. How far the

Judge may have been influenced in this opinion by his erroneous finding upon the question of the fact of the *kubooleut* having been decided to be genuine in the former suit by the Collector, we are unable to say; but we do not base our decision upon this alone. We find that in the suit brought, as already observed, in the civil Court previous to the present suit for rent, the ryot defendant, special appellant, sued not only to establish his *mokurruree* pottah but also to have it declared that the *kubooleut* which was filed by the *talookdar* in the distraint proceedings was a spurious *kubooleut*. It is admitted that that case is still pending on remand from this Court, and that the question of the genuineness of this *kubooleut* has not yet been determined by a competent Court. Now it appears to us clear that, if the defendant succeeds in that case, all that the plaintiff will be entitled to will be to retain the decree which has been passed by the first Court giving him the rent admitted by the defendant. If it should so happen that the ryot's case fails, even then we do not think that the plaintiff's remedy is in any way barred, for in the event of the ryot's suit failing, the position of the ryot defendant as holding under the *kubooleut* will be restored and the plaintiff will be entitled to claim the rent under that *kubooleut*, and any plea as to the suit being barred will be met, and we think successfully met, by the fact that the question as to whether the *kubooleut* was genuine or not was a question which was pending in the Civil Courts.

We, therefore, think that the plaintiff is not entitled to the decree which he has obtained from the Judge and that the decision of the first Court must be restored. The decision of the Judge is reversed with costs payable by the special respondent.

The 1st May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law of Succession—Joint family—Sons of Surviving brothers—Per Capita—Presumption—Partition Deed—Bill of Sale.

Case No. 1268 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 1st July 1871, affirming a decision of the Moonsiff of Manickgunge, dated the 14th January 1871.

Ruttun Kristo Bosoo (one of the Defendants), *Appellant,*

versus

Bhugoban Chunder Bosoo (Plaintiff), *Respondent.*

Baboo Nulit Chunder Sen for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

By the rules of Hindoo succession, on the death of brothers of a joint family without issue, the sons of surviving brothers take *per capita* and not *per stirpes*.

Because in a partition deed of 1260, in the column showing the shares of the different members of the family, the name of N's son is inserted instead of N's own, it does not follow that N was dead in 1260 or that a sale alleged to have taken place in 1262 by N must necessarily be false.

Kemp, J.—The plaintiff in this case sued to recover possession of a one anna share in six talooks, claiming that one-anna share as his ancestral right; also of a 10-gundah share of the same talooks as the heir of Ashanund and Krishnanund, and of a further share of 6 gundahs 2 cowries 2 krants by purchase from Nityanund Bose, under a deed of sale dated the 20th of Srabun 1262. Total claim, 1 anna 16 gundahs 2 cowries 2 krants. The plaintiff alleges that he applied to the Collector under the Butwarah Law for a division of the estate, but that his co-sharers objecting, the Collector refused to make a partition and referred the plaintiff to a Civil Court to establish his right. Hence the present suit.

The defence is that neither the plaintiff nor his father Ramessur had any title as heir-at-law to any portion of the estate of Krishnanund and Ashanund, inasmuch as Ramessur, the father of the plaintiff, was not adopted by Surbessur during the lifetime of Ashanund and Krishnanund.

With reference to the purchase from Nityanund, the allegation of the defendants was that a plea of purchase was a false plea and that the defendants were in possession under a Meeras right. With reference to the 1st share claimed by the plaintiff as ancestral right, no objection was made by defendants.

Both Courts have given the plaintiff a decree.

Before entering into the questions raised in special appeal, we think it right to mention that from the genealogical tree filed in the case and which is not disputed, it appears that Gunga Pershad, the head of the family, had six sons, Kebul Kristo Bosoo, Raj Kri