

The 30th April 1872.

Present:

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

**Res-adjudicata—Act VIII. of 1859, s. 2—Onus
Probandi.**

Case No. 831 of 1871.

*Special Appeal from a decision passed by
the Subordinate Judge of Dacca, dated
the 13th June 1871, reversing a deci-
sion of the Moonsiff of Manickgunge,
dated the 31st December 1870.*

Kalee Coomar Dutt Roy (Defendant),
Appellant,

versus

Pran Kishoree Chowdhraim (Plaintiff),
Respondent.

*Baboos Bama Churn Banerjee and Kishen
Dyal Roy for Appellant.*

*Baboos Sreenath Doss and Doorga Mohun
Doss for Respondent.*

Section 2, Act VIII. of 1859, was held not to apply to a case where the present plaintiff's name was ordered by the High Court to be expunged from the list of defendants in a former suit, but, notwithstanding that order, her name by some mistake still appeared some two years afterwards in the decretal order, the onus being on the present defendant to show how that happened, and that the former suit was decided in her presence.

Glover, J.—THE plaintiff in this case sues to recover possession of a 10-gundah share of a zemindaree which belonged originally to one Hur Narain Roy. Hur Narain Roy had a son Prosunno Coomar, who died and was succeeded by his maternal uncle Dino Bundho Roy. The plaintiff purchased from Dino Bundho Roy. There was a suit brought by Kalee Coomar Dutt, the defendant in this case, against Jugodessuree, the widow of Hur Narain, for possession of the property after foreclosure of a mortgage. In that suit, the plaintiff in this case intervened and was made a party to the proceedings by the Lower Court. The case came up eventually to the High Court on appeal, and the High Court remanded it directing that the name of the present plaintiff should be removed from the category of defendants, the case not being one which ought to be decided in her presence, but on the contrary that the case was very much complicated from the fact of her having been allowed to put in a defence.

This order was dated the 18th of July 1866. We are not shown what proceedings were taken by the Court below with reference to this order of the High Court; but when the case was again decided after the remand in September 1867, in favor of the present defendant, and which decision was afterwards confirmed in special appeal on the 14th of August 1868, we find that the plaintiff's name was then entered in the decree as one of the defendants notwithstanding the order of this Court of July 1866. After that decision, the plaintiff in that suit, the present defendant, applied to take possession of the property decreed to him, when the present plaintiff put in a petition of intervention under section 230 of Act VIII. of 1859. This petition was rejected by the Courts below and eventually, in special appeal, by this Court in January 1870, on the ground that the plaintiff was a party to the suit and therefore had no right to intervene under section 230. On this the plaintiff brought the present suit.

The defendant contends that the hearing of the suit is barred by section 2 of Act VIII. of 1859, the point having already been heard and determined in a previous suit between the same parties, and it is also contended that the suit is barred by section 231 of the same Act.

The first Court dismissed the plaintiff's suit on both these grounds, but the Subordinate Judge reversed that decision and sent the case back to the Moonsiff for trial on the merits.

The only question argued before us in special appeal is whether the plaintiff's suit was or was not barred by section 2 of Act VIII. of 1859. There can be no doubt whatever that her name was ordered to be expunged from the list of defendants by the order of this Court of the 18th of July 1866. The order was couched, we may remark, in particularly strong language and very many weighty reasons why it was that she should not be allowed to remain a defendant were given. No doubt, her name, notwithstanding this prohibition, does appear some two years afterwards in 1868 in the decretal order which was passed in that case after remand, and some stress was apparently laid upon the neglect of the plaintiff to take steps when that case was heard, to have the decree altered and to have her name expunged from the list of defendants according to the High Court's order; but it was explained to us, and we think reasonably enough, that after

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 Subordinate 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 Subordinate 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 *kuboolut* 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 Diun 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 *kuboolut* when the *kuboolut* 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 *kuboolut* 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 *kuboolut*, 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 *kuboolut*, and alleged that he held a much larger plot of land than that covered by the *kuboolut*, under a *mokurruree* potah of the year 1161, confirmed by a subsequent *amul-namah* of the year 1216.