The defendant No. 1 appeared by his pleader, denied the demand, and pleaded (1) that under the provisions of section 11, Act VIII. of 1869 (an Act to amend the procedure in suits between landlords and tenants) if the sum which is alleged by the plaintiff to have been paid by him on account of rent has not been credited to him as rent or a receipt for the same withheld from him, he could bring an action for its recovery in the Moonsiff's Court; (2) that the suit cannot be entertained in the Small Cause Court; (3) that the defendant has never received the sum in question from the plaintiff; (4) that the rent has in no case been paid by the plaintiff without issuing out execution of decree against him; (5) and that the money which is alleged to have been given as *burrat* on the deceased Gopal Chunder Mookerjee had been duly carried to the plaintiff's credit on a previous occasion for arrears of rent.

The points for determination which arise in this case therefore are—

1st.—Whether a suit of this nature is cognizable by the Small Cause Court?

2ndly.—If the case is maintained in this Court, whether the plaintiff's claim for money said to have been paid to the defendant as rent is just or not?

3rdly.—Whether the money said to have been given as *burrat* on Gopal Chunder Mookerjee has been duly credited on a former occasion to the plaintiff in account as arrears of rent or not?

In this case the claim is for the recovery of money alleged to have been paid by the plaintiff to the *ijaradar* defendant on account of arrears of rent; if the same has not been applied to the purpose for which it was given or a receipt withheld from the plaintiff, the only course left to the plaintiff is to seek redress in the Court of a Moonsiff under the provisions of the aforesaid section 11 of Act VIII. of 1869. I think a claim of this nature cannot be entertained by a Court of Small Causes as it does not appear to fall under any description of cases cognizable by the Small Cause Court as laid down under section 6, Act XI. of 1865.

I am, therefore, of opinion that the present suit is one over which I have no jurisdiction and would accordingly dismiss the plaint with half costs subject to the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Kemp, J.—We think that the view taken by the Small Cause Court Judge is correct.

The 27th April 1872.

Present:

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

Appeal (by one Defendant)—Reversal of Decree (as to other Defendants)—Act VIII. of 1859, s. 337.

*Application for review of judgment passed by the Hon'ble Justices E. Jackson and Onoocool Chunder Mookerjee on the 15th July 1871, in Special Appeal No. 294 of 1871.**

Ram Chunder Paul and another (Plaintiffs) *Petitioners,*

versus

Omora Churn Deb and others (Defendants), *Opposite Party.*

Messrs. J. T. Woodroffe and *M. M. Ghose* and *Baboos Doorga Mohun Doss* and *Rajendronath Bose* for Petitioners.

Baboos Romesh Chunder Mitter, Romanath Bose and *Grish Chunder Ghose* for Opposite Party.

Where one of several defendants appeal not against the whole decree but only against that portion of it which affects him, and his defence in the Lower Court is not a defence common to the other defendants, the decree of the Lower Court cannot be reversed in favor of those defendants who have not appealed.

Kemp, J.—This is an application to review the decision of this Court, dated the 15th of July last. Of the learned Judges who passed that decision one is dead and the other is absent, and is likely to be absent for a period of more than six months. We may, however, remark that the learned Judge who wrote the decision, Mr. Justice Elphinstone Jackson sitting with Mr. Justice Kemp, was of opinion that the learned Counsel for the petitioners has made out a sufficient case to admit this review. The review was therefore admitted, and the case has now been thoroughly argued.

It appears that the plaintiffs, who are represented by Mr. Woodroffe, are the purchasers of a talook at an auction for arrears of Government revenue, the two plaintiffs having purchased a 7-anna share of which Ram Chunder Paul took 6 annas and Nubo Kishore Sein the remaining one-anna share. On proceeding to take possession of this

* 16 W. R, page 155.

Talook, they were opposed by the defendants, and the conduct of the defendants was such that the plaintiffs very wisely abstained from attempting to take possession by force and sought redress in the Civil Courts. The defendants are very numerous, some 134 in number. Many of them did not defend the suit at all, others put in appearance in the first Court, but their defence was not a common defence. Some of them pleaded that they had no *elaka* or connection with the talook in dispute, others that they had relinquished the lands held by them in that talook, and others again that they held *mirass* rights. In short, their defence was a varying one and not in any way a common one.

The Subordinate Judge, after going into the defences of the different groups of defendants, found that their allegations had not been proved, and that they all had wrongfully combined together to resist the plaintiffs obtaining possession of their auction-purchased talook. A decree was therefore passed against the defendants in favor of the plaintiffs. With this decision all the defendants were content with the exception of one, namely, Ooma Churn Dey, and he appealed to the Judge not against the whole of the decision but against that part of it only which affected him. His allegation was that no witnesses had identified him as having taken part in the common object of the defendants to resist the plaintiffs in their attempt to take possession of their purchased talook. The Judge without going into the question whether Ooma Churn was a *mirassdar* or not, which would have materially affected the case, in asmuch as, if he had been a *mirassdar*, it would have been a fact corroborating the evidence as to his having joined in the common object, found that there was not sufficient evidence to identify Ooma Churn Dey as having taken part in the combination. As stated by the learned Counsel, Mr. Woodroffe, it would have been well if his clients had let well alone and had not appealed against the decision in favor of Ooma Churn Dey. However, being dissatisfied with the decision of the Judge, they appealed to this Court, and unfortunately for them the result was that the decision of the first Court with which all the other defendants had rested content was reversed not only in favor of those defendants who appeared and defended the suit in the first Court, but also as regards those defendants who had not appeared at all, and the plaintiff's suit was dismissed *in toto*. To add to their misfortunes, an order was also made that they were to pay separate sets of costs to all these numerous defendants.

We think that the decision of the Division Bench of which review is now sought was wrong in law. The appeal of Ooma Churn Dey, although he was one of the defendants, was not an appeal against the whole of the decision of the Court of first instance. Section 337 enacts that if there be two or more plaintiffs, or two or more defendants, in a suit and the decision of the Lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favor of all the plaintiffs or defendants. Ooma Churn Dey did not appeal against the whole decree; he only appealed against that portion of it which affected him, and his defence in the first Court was not a defence common to the other defendants. We, therefore, think that the learned Judges were wrong in law in reversing the decree of the first Court in favor of those defendants who had not appealed.

We, therefore reverse the former decision of this Court and restore that of the first Court with costs payable by the defendants. With reference to Ooma Churn Dey, the learned Counsel admits that he has no case as against him, and that he did not wish to take out notice against that party. It appears, however, that he has been made a party to this application, and he is therefore entitled to his costs which he will obtain from the plaintiffs including one gold mohur as pleader's fees.

The 29th April 1872.

Present:

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

Jurisdiction—Act VIII. of 1859, s. 81—Attached Property made away with—Criminal Prosecution.

Reference of the High Court by the Judge of the Small Cause Court at Goalando, dated the 17th February 1872.

Choitunno Paramanick and another,
Plaintiffs,

versus

Zumeerooddee Shaikh and others,
Defendants.