

The 27th April 1872.

Present :

The Hon'ble Louis S. Jackson and W.
Markby, *Judges.*

Land (Described in plaint by Quantity and Boundaries) — Decree—Excess — Possession according to boundaries).

Case No. 49 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 22nd June 1871, affirming an order of the Moonsiff of Fultickchery, dated the 20th May 1871.

Zeenut Ali and others (Judgment-debtors),
Appellants,

versus

Ram Doyal Poddar (Decree-holder),
Respondent.

Baboo Bhowanee Churn Dutt for
Appellants.

Mr. R. E. Twidale and Baboo Aukhil
Chunder Sein for Respondents.

Where a plaintiff describes land which he claims as amounting to a certain quantity and as lying within certain boundaries, if he is found entitled to the land, and the decree which he has obtained gives those boundaries, the boundaries must prevail even if the land exceeds the quantity stated in the plaint.

Jackson, J.—THIS Court is always extremely reluctant to disturb an order made by the Judge below after a patient hearing of the parties, and after pains have been taken to come to a right decision. But it does happen that in this appeal both parties are agreed that possession has not been given according to the boundaries specified in the decree. This complaint is made in the petition of appeal, and it is also the subject of an objection by the respondent; and the contention is further borne out by the words of the Judge in his judgment. He says: "the decree-holder asks certain land in excess of the total quantity given him by the decree; as there is no mention of the *gunzaish* or excess, he can have, but the bare quantity given him by the decree."

The Judge appears to have acted on the view which he took of the matter, and that view, we think, was erroneous. If the land which the plaintiff claimed is described as amounting to a certain quantity, and also is described as lying within certain boundaries, and if the plaintiff is entitled to the

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land, and the decree which he has obtained gives those boundaries, the boundaries must prevail even if the land exceeds the quantity stated in the plaint.

The case must go back to the Judge in order that possession may be given according to the boundaries specified in the decree.

The 27th April 1872.

Present :

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

Jurisdiction (of Small Cause Court)—Suit for recovery of rent (paid to but misapplied by *Ijaradar*)—Act VIII. of 1869, B. C., s. 11.

Reference to the High Court by the Judge of the Small Cause Courts at Hooghly and Serampore, dated the 19th February 1872.

Brojonath Dey, *Plaintiff,*
versus

Shumboo Chunder Chatterjee and another,
Defendants.

A suit for the recovery of money alleged to have been paid by the plaintiff to an *ijaradar* on account of arrears to rent, when the same has not been applied to the purpose for which it was given or when a receipt for it is withheld from the plaintiff, is not cognizable by a Small Cause Court, but by a Moonsiff under section 11, Act VIII. of 1869, B. C.

Case.—ON the application of the plaintiff in suit No. 977 of 1871, in which a question of law has arisen, I have the honor to draw up a statement of the case and to refer it under section 22 of Act XI., 1865, with my own opinion, for the decision of the High Court.

The plaintiff sued the defendant for the recovery of Rs. 331 as principal and Rs. 78-10 interest thereon, in all Rs. 409-10, on the allegation that, notwithstanding the plaintiff has paid the following amounts to the defendant No. 1, who is an *ijaradar* of the ten annas share zemindars of the village of Mohesh, in part-payment of rent due by him for 1275, B. S., *viz* :—

On 25th Assat 1276, B. S.	...Rs	26	0	0
" 30th " " "	...	"	"	"
A Barrant on Gopal Chunder Mookerjee of Ackra.	... "	300	0	0
On 1st Bhadro 1277, B. S.	... "	5	0	0

Total Rs. 331 0 0

the sum so paid by him has not been carried to his credit in account, and the rent has been exacted from him in excess of the aforesaid amount.

The defendant No. 1 appeared by his pleader, denied the demand, and pleaded (1) that under the provisions of section II, 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 II 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 Komesh 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.