[43] *The 11th January*, 1853.

PRESENT: J. DUNBAR, ESQ., *Judge*, AND A.J.M. MILLS AND R.H. MYTTON, ESQRS., *Officiating Judges*.

CASE NO. 99 OF 1851.

Regular Appeal from the decision of Baboo Hurrochundur Ghose, Principal Sudder Ameen of 24-Pergunnahs, dated 19th August, 1850.

RADHIKA CHOWDRAIN (*Defendant*), *Appellant v.* DAYAMOEE CHOWDRAIN AND JUGDUMBA CHOWDRAIN (*Plaintiffs*), *Respondents*.

[*Procedure—Boundaries not stated in plaint—Boundaries given only in reply—Defect not remedied thereby—Non-suit.*]

It is not sufficient to state the boundaries in the reply. Case non-suited for want of boundaries in the plaint.

Vakeel of Appellant—Mr. J. G. Waller.

Vakeel of Respondents—Baboo Kishen Kishore Ghose.

SUIT laid at rupees 9,719-8.

The plaintiffs sued for possession of certain lands in a talook sold at a public sale and purchased by them, from which, after possession had, they alleged that they had been ousted by the defendant (appellant) and her husband, the former of whom claimed a right to hold the lands in virtue of a *theeka* tenure which had no existence. The plaint also embraced claims for balance of rent due by ryots who had run away from fear of the defendant, and of paddy forcibly carried away by them.

The defendant (appellant) alleged the validity of the *theeka* tenure, which she had purchased from the previous holder on the 23rd Kartick, 1249 B. S. She denied the other allegations of the plaintiffs.

The principal sudder ameen found that the validity of the alleged *theeka* tenure was not proved; he therefore gave a decree for possession, but rejected the claims for wasilat and damage as not satisfactorily established.

In appeal, the following issues are entered by the pleaders for the respective parties:—

Issue on behalf of the appellant:

Whether the *theekadarce* title of the appellant has not been proved to the satisfaction of the Court, and whether, with reference to the papers on the file and the circumstances of the case, the principal sudder ameen's order for giving possession to the plaintiffs is right?

[44] *Issue on behalf of the respondents*:

The plaintiffs sued the defendant for possession of 354 beegahs and 10 cottahs of land, appertaining to their zemindaree, and obtained a decree. The defendant Radhika Chowdrain sued the plaintiffs (in the present case) for 288 beegahs out of the above land, upon allegation of the same being her *theeka* property, and the case has been dismissed. It is, therefore, a point for consideration whether now, in the present case, the defendant's plea of her *theeka* right, in spite of the final decision, is entitled to a hearing?

The pleader for the respondents wishes the Court to consider, first, whether under the circumstances set forth in the issue drawn by him, the case for the defendant (appellant) can be heard at all.

The Court are of opinion that the plea put forward on that issue cannot bar the appeal, and that the pleader for the appellant must first be heard on the issue laid down by him.

Mr. Waller, for the appellant.—Before going further I wish to propose an issue of law, to this effect,—that neither the plaint nor any part of the pleadings discloses any boundaries whatever of the lands sued for, the said lands consisting not of any defined estate, but merely of a parcel of land comprising so many beegahs and cottahs. The whole of the precedents in such cases are clear against the admission of such a plaint, nor could the defect now be remedied by a supplement, as the record shows that a supplement has already been put in long after answer was filed, and the law does not allow of a second supplement; further, the decree, which is passed to give possession of the lands sued for, is incapable of execution, as it does not define the boundaries. This omission and the defect in the plaint escaping attention when filing the issues, but being an issue of law, it is open to me to bring it forward now. It was brought to my notice by my client after I had filed the issue on the merits.

Baboo Kishen Kishore Ghose, for the respondents.—The pleader for the appellant in first filing his issue on the merits, made no mention of the point he now urges. I admit the power of the Court to take such an objection to the plaint but it is quite unusual to allow the pleader of either party at this stage to prefer such an issue. If such a practice be allowed, it will always be open to the other party to plead that he had been taken unawares, and was not prepared to go on.

The Court are of opinion that it can take up an issue of law at any stage of the proceedings. In respect to that now brought forward, it is incumbent on the Court to entertain it, inasmuch as it is one which involves the practicability of executing the decree. We also observe that the objection was taken in *the moojebat*, or grounds of appeal, though omitted in the issue prepared by the pleader.

[45] *Baboo Kishen Kishore Ghose*, in continuation.—The defendant, in the 5th article of his answer, observes that although the plaintiffs had sued for possession of 354 beegahs, 10 cottahs, they had not described the boundaries. In the reply the plaintiffs referred to this, and stated that they could not give the boundaries before, in consequence of the rains, but that they now begged to define the lands parcel by parcel. In the rejoinder the defendant objected that the defect in the plaint could not be cured by importing the omission into the reply, and that it ought to have been remedied by a supplemental plaint. I have shown that the assertion of the pleader for the appellant, that there are no boundaries, will not stand. If he says that the form in which I have given the proof be insufficient, I am prepared to answer.

Mr. J. G. Waller.—Regulation IV of 1793, Section III, lays down the manner in which a plaint should be drawn up, and enjoins precision; Section V shows how the rest of the pleadings are to be conducted, and provides that any omission in the plaint may be remedied by a supplemental plaint, to be filed with the permission of the Court. This was clearly pointed out by my client, in her rejoinder; but the plaintiffs took no steps to put themselves right.

JUDGMENT.

The plaint in this case must, under the provisions of the law (Section III, Regulation IV of 1793), be considered defective in precision. The law enacts that if from mistake, inadvertence, or other cause, the plaintiff shall have omitted to insert in his complaint anything material to the suit, the Court, on the omission being represented, either by the plaintiff or his vakeel, is to allow the plaintiff to prefer a supplemental complaint, in which he is to state the

matter omitted. No steps of the nature here referred to were taken by the plaintiff, notwithstanding that the non-specification of boundaries in the plaint was objected to in the answer of the defendant, and we cannot regard the subsequent mention of the boundaries in the reply of the plaintiffs as in any way remedying the original defect in the plaint, as under the law, Section V, Regulation IV of 1793, a plaintiff is not permitted to introduce into his reply any matter not contained in his plaint. We must therefore treat the specification of boundaries given in the reply as a nullity. The decree of the lower Court (which we observe gives no specification of boundaries, and would not therefore, under any circumstances, have been capable of execution,) is accordingly reversed, and the plaintiffs non-suited with costs.

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[46] *The 11th January*, 1853.

PRESENT: J. DUNBAR, ESQ., *Judge* AND A. J. M. MILLS AND R. H. MYTTON, ESQRS., *Officiating Judges.*

CASE NO. 307 OF 1851.

Regular Appeal from the decision of Moulve Mahomed Nazim Khan, Additional Principal Sudder Ameen of Dacca, dated 17th May, 1851.

MRS. CATHERINA ELLIAS AND ANOTHER (*Defendants*), *Appellants v.* RAM KISHEN DASS AND OTHERS (*Plaintiffs*), *Respondents.*

[*Procedure—Legal representatives—Suit for debt due by deceased debtor—Heirs of deceased being minors without any guardian—Proper parties to suit—Decree against estate alone irregular.*]

A decree for money against property alone will not stand.

Suit on a bond due by a deceased leaving as heirs his minor sons, no guardian being appointed, *held* that a suit against the nearest of kin in conjunction with the minors will lie.

Vakeel of Appellants—Mr. J. G. Waller.

Vakeel of Respondents—Baboo Ramapersaud Roy.

SUIT laid at rupees 9,187-15-3, being a bond-debt.

This is a suit on a bond for the recovery of Company's rupees 9,187-15-3, principal and interest, and is laid against the minor sons of Alexander Ducas, the debtor, deceased, against Mrs. Catherina Ellias, as their *mahafiz* or guardian, and against herself and Mr. Mavrody Mitchoo and Mrs. Knott, as possessors of the property of the deceased.

The defendants all denied their personal liability, and Mrs. Catherina Ellias alleged that she is not, and never was, the guardian of the minor sons, nor the representative of the deceased.

The principal sudder ameen decreed the sum of rupees 6,425-2-6, and directed that the decree be enforced against Mr. Mavrody and Mrs. Catherina Ellias as in possession of the property, and that the property left by the deceased shall be sold, after an inquiry shall have been made as to its liability to be sold for the debts of the deceased, and the amount of the decree realized from the proceeds. He released Mrs. Knot, the defendant, from responsibility.

The issues proposed by the appellants are as follows:—

First.—The defendant Mrs. Ellias, denying her having concern with the property, left by, and being the guardian of the minor sons of, the deceased, can the present suit, which is instituted against the defendant upon strength