[962] *The 3rd June*, 1857.

PRESENT: H. T. RAIKES, B. J. COLVIN AND J. H. PATTON, ESQRS., *Judges.*

CASE NO. 560 OF 1856.

Special Appeal from the decision of Mr. J. H. Young, Judge of East Burdwan, dated 26th November 1855, affirming a decree of Moonshee Nazirooddeen Mahomed, Additional Principal Sudder Ameen of that district, dated 30th May 1854.

ONOOPCHUNDER ADHIKAREE AND OTHERS (*Defendants*), *Appellants v.* PURESH MUNDUL (*Plaintiff*), AND SHEO MULLICK AND OTHERS (*Defendants*), *Respondents.*

[*Special appeal—Lower court's decision based on careful consideration of case—Dismissal of appeal.*]

Special appeal dismissed, as the value of the grain as well as damages had been taken into consideration by the judge.

Vakeel of Appellants—Baboo Kishenkishore Ghose.

Vakeels of Respondents—Baboos Jugdanund Mookerjea and Sumbhoonath Pundit.

THIS case was admitted to special appeal on the 22nd November 1856, under the following certificate recorded by Messrs. A. Sconce and J.S. Torrens :—

"The suit was brought to recover damages for property alleged to have been carried away from plaintiff's store on pretext of a distraint under Regulation III of 1812. The principal sudder ameen decreed damages to the amount of rupees 1,000. The judge on an appeal from defendant remarks in his decision 'as far as I can see from the papers in the case, the principal sudder ameen might as well have assessed the damages at rupees 10,000 as at rupees 1,000,' and considering the investigation on this point incomplete, he deputed a moonsiff to the spot to make inquiry as to the actual value of the property. According to the moonsiff's report the value taken was assumed by the judge to be rupees 622, on which in his decision, without assigning any reasons for doing so, he reverts to the rupees 1,000, as fixed by the principal sudder ameen, and gives a decree for that amount. We admit the special appeal to try whether the decision given by the judge is not defective, and whether his orders should not be modified."

JUDGMENT.

On referring to the judge's decision, we find the suit was laid at rupees 1,229-15-9, as compensatory damages for the plunder and loss of rice contained in four golahs. The judge at first considered [963] the principal sudder ameen had assessed the damages on indefinite data, and directed an inquiry by the moonsiff of the locality. The moonsiff reported that four golahs of rice had evidently been plundered, and this accorded with the plaintiff's statement in his plaint. The judge then observes that the moonsiff has valued the grain at rupees 622. 'This being the case, and the plunder and forcible carrying off having been proved, I do not think that the damages given by the additional principal sudder ameen can be looked upon as excessive.'

The reasons therefore assigned by the judge for upholding the first court's finding are drawn from a consideration of the facts before him, and there seems to us nothing inconsistent in his judgment, while the assessment of damages

is clearly a matter within the competency of the lower courts, and is not a point to be raised in special appeal.

We confirm the judgment of the lower court with costs of the appeal on the appellant.

The 3rd June, 1857.

PRESENT: A. SCONCE AND J. S. TORRENS, ESQRS., *Judges*.

PETITION NOS. 153 AND 154 OF 1857.

[*Lower Court—Decision based on error of fact—Omission to try issue in suit—Remand.*]

Case remanded as decree of lower appellate court was based on an error of fact and on the omission to try an issue raised in the suit.

Vakeels of Petitioner—Baboos Kishenkishore Ghose and Shumboonath Pundit.

Vakeel of the Opposite Party—Baboo Unokoolchunder Mookerjea.

IN THE MATTER OF THE PETITION OF MUDDOOSOODUN BOSE, filed in this court on the 20th February 1857, praying for the admission of a special appeal from the decision of Mr. E. Jenkins, officiating judge of Jessore, dated the 20th November 1856, amending that of Baboo Opender Chunder Nyaruttun, principal sudder ameen of that district, dated the 22nd March 1852, in the case of Muddoosoodun Bose, plaintiff, *versus* Sharodapershad Roy and others, defendants.

It is hereby certified that the said application is granted on the following grounds:—

This action was brought to recover possession of 4-annas share in four villages in a resumed mehal, plaintiff's title being asserted under a joint purchase of four co-sharers. The principal defendant lays claim to 10 annas in the mehal as purchaser under a decree against one of the above co-sharers purchasers.

[964] The principal sudder ameen gave a decree for the 4 annas sued for, but the judge in appeal has reduced this to 3 annas and a fraction, or one-fifth instead of one-fourth of the mehal. In his judgment he says, "that on the principle the lower court had taken up, that in undefined property all share-holders are to be considered as possessing equal rights, the claim for 4-annas share cannot be entertained for the benefit of a party who is representative of only one of five original share-holders;" and on this assumption of there having been five co-sharers purchasing in equal shares, he has modified the decree of the lower court. Defendant had pleaded the statute of limitation as having held adverse possession for more than 12 years before the suit was brought. We have now before us two special appeals, one from the plaintiffs, asserting that the judge is in error in assuming that there were five separate co-sharers purchasing; that the kubala in fact only contains the names of purchasers of four shares, but the judge had supposed one share which belonged to two parties to be held separately by two different persons, thus making a fifth share purchased, whilst if the names had been read correctly, they would have been found only to represent four shares. This error in the reading of the kubala is not contested it appears on part of the defendants, special respondents, in the one appeal, and special appellants in the other. Their special appeal is preferred on the ground that the judge had failed to determine the plea on the statute of limitation, having merely assumed the date of dispossession to be that stated in the plaint without any enquiry thereon, whilst defendants state that it was prior thereto. It appears to us from reference to the kubala that there were

only four shares purchased by the whole of the purchasers whose shares were to be disposed of accordingly, and likewise that the judge has not determined the plea of limitation on the objections taken out. We therefore admit both special appeals and remand the case to the judge for re-trial with reference to the foregoing remarks.

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[965] *The 4th June*, 1857.

PRESENT: H. T. RAIKES, B. J. COLVIN AND J. H. PATTON ESQRS., *Judges*.

" CASE NO. 587 OF 1856.

Special Appeal from the decision of Mr. M. S. Gilmore, Judge of Cuttack, dated 4th December 1855, confirming a decree of Gopeenath Dass, Sudder Ameen of that district, dated 28th June 1855.

JOOGULKISHORE KUR (*Defendant*), *Appellant v.* MUDHOOSOODUN DEY (*Plaintiff*,) *Respondent*.

[*Act XIX of* 1853, *section 24—Court's power to apprehend absent witnesses—Discretion of Court.*]

Construction of section 24, Act XIX of 1853. It is not obligatory upon the courts before apprehending absent witnesses to satisfy themselves that their evidence is material to the case.

Vakeel of Appellant—Baboo Sumbhoonath Pundit.

Vakeel of Respondent—Baboo Meherchunder Chowdree.

THIS case was admitted to special appeal on the 28th November 1856, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens:—

" The judge has decided that section 6, Regulation IV of 1793 is in no wise superseded or modified by section 24, Act XIX of 1853, which lays down rules for enforcing the attendance of witnesses, and that no compulsory process can issue under that section without the party summoning the witness, shall prove to the satisfaction of the court on oath, that the evidence sought was material to the case.

" Petitioner in special appeal urges that there has been a failure of justice in his case, owing to the court of first instance not having enforced the attendance of the witnesses prayed for and that the judge's decision on the point is opposed to law. We admit the special appeal to try the question."

JUDGMENT.

We find that the sudder ameen required petitioner to depose on oath to the necessity of the evidence of the absent witnesses, which he failed to do. Section 24, Act XIX of 1853, certainly does not prescribe an oath for this purpose, but as the sudder ameen had authority to satisfy himself of the necessity of the attendance of any witnesses, and he was not satisfied by petitioner, on this point he had full discretion not to take steps for the apprehension of the absent witnesses. Section 24 says that the court shall have full power and authority to apprehend witnesses not attending after service of summons, but it does not render it obligatory upon the court to take such a step in all cases without consideration of the **[966]** propriety or necessity of it. At the same time if a court were in its discretion to order apprehension of an absent witness without the oath of the party naming him as to the necessity of his appearance, it would not be acting illegally. We reject the appeal with costs.