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KRISHNA KISHORE SHAHA v. BIRESHUR MOZOOMDAR.

the facts of this case, the principle there laid down will equally apply to the decision of this case. In that case the Chief Justice, Sir Barnes Peacock, in delivering the judgment of the Court, says:—"The tenant might have contested his liability to pay that amount, and might have demanded a summary investigation as to the amount due, and he might have stayed the sale of the tenure by depositing the amount claimed. Instead of doing so, however, he paid the amount claimed to the zemindar. The zemindar having recovered the amount under a proceeding prescribed by law, the question is, whether that is an undue exaction. He possibly might have demanded more than was due, after allowing for the rice supplied; but the plaintiff, instead of demanding an investigation, paid the amount claimed with knowledge of all the facts. Can this be said to be an illegal exaction of rent within s. 23, cl. 2, and s. 10 of Act X of 1859? We think that it is not an illegal exaction of rent within the meaning of that Act."

This case clearly supports the view which we take of the nature of the claim in the present case; and we think that the suit is clearly cognizable by the Court of Small Causes, and, therefore, the special appeal to this Court is barred by the provisions of s. 27, Act XXIII of 1865.

The special appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

LUCHMESSUR SINGH (DEFENDANT) *v.* LEELANUND SINGH (PLAINTIFF).*

1878
July 22.

Ferry Rights, Infringement of—Right to restrain Party starting a second Ferry.

A, the owner of a ferry granted him under a Government settlement, brought a suit to restrain *B* from running another ferry over the same spot where *A's* ferry plied for hire. It appeared on the evidence, that *B* levied no tolls on his ferry, but it was not shown that it was used only for the conveyance of his own servants and ryots. *Held*, that such suit was maintainable.

* Regular Appeal, No. 308 of 1876, against the decree of S. Wright, Esq., Subordinate Judge of Zilla Purneah, dated the 31st of July 1876.

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LUCHMESSUR SINGH v. LEELANUND SINGH.

THIS was a suit for the removal of certain ferry-boats established by the defendant on the river Kosi, and for an injunction to restrain the defendant from permitting the use of such ferry to his own ryots and to travellers seeking a passage across the river. The plaint alleged that the riparian right of the river Kosi, and the ferry known as the Chunapore Ferry, had been granted to the plaintiff at the time of the settlement with the plaintiff of a certain mouza, Madhubani; that many years after such settlement, the defendant had, in Chait 1282, B. S. (March 1875), established a second ferry on the same spot as that occupied by the plaintiff's ferry, and permitted its use to the defendant's own ryots and other travellers, causing thereby damage to the plaintiff.

The defendant in his written statement denied that the plaintiff had any ferry rights of the kind and in the situation claimed in the plaint; that a public road, which runs between Purneah and the village of Polhia, was intersected by the river Kosi, and the ferry rights at this spot had been granted to the plaintiff by the Government; that the corner, on the eastern bank of the river, where the ferry established by defendant was situate, was not in Mouza Madhubani, but in Baijnathpore Durgadas, otherwise called Gowasi, the property of the defendant; that the plaintiff had, since the settlement, removed the landing place on the western bank, further down the river, beyond the spot authorized by the settlement, and had thereby encroached on the lands known as Mouza Baijnathpore Durgadas, the property of the defendant, and which at that spot formed the western bank of the river Kosi. The defendant further claimed the right of plying ferry-boats on that part of the river Kosi which passed through his own village, and alleged the exercise of such rights in the years 1852, 1853, 1867, and at the present time. He further stated that no tolls were taken, but that the boats were kept only for the convenience of his servants and ryots.

The Court of first instance found on the facts that the part of the river Kosi which flowed between the Mouzas Madhubani and Baijnathpore Durgadas, appertained solely to the former; that the ferry ghat on the eastern side of the river was

situate in the plaintiff's mouza of Madhubani. It found also, in respect of the landing place on the western side, that the spot now in use was not that allotted to the plaintiff under the settlement, but was situate on the defendant's lands; but inasmuch as this alteration had existed for upwards of twenty years, and had never before been questioned by the defendant, the latter was not now in a position to take exception to the change. For these reasons the Court decreed the plaintiff's claim, and ordered the defendant to remove the ferry he had established.

The defendant thereupon appealed to the High Court.

Baboo *Annoda Prosad Banerjee* for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Twidale*, and Moulvie *Mahomed Yusoof* for the respondent.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts, proceeded as follows):—In the Court of the Subordinate Judge a question of fact was raised,—*viz.*, whether the ferry, as now existing, touched on the eastern side upon the defendant's village or plaintiff's. Upon the evidence, and after personal inspection, the Subordinate Judge was of opinion that the land at that particular spot belonged to the plaintiff. He observed, that although the defendant had called witnesses to show that the spot of land in question belonged to him, no document whatever was produced in support of what they said, and, in short, he did not believe those witnesses. Far from that being the case, it seems that a good many documents, and some of them of an altogether unimpeachable kind, were produced by the defendant, and it appears that there was no particular reason why the witnesses should be disbelieved. But in our opinion that point is not really material, if we assume that the point of debarcation at the ferry on its eastern side has been shifted from within the plaintiff's mouza to a point within that of the defendant. In the first place, if it has happened, it happened many years ago, and has been without objection from the defendant. There can be no doubt that the ferry has been car-

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ried on in the same manner as it is now, for nearly, if not quite, twenty years; and the ferry in our opinion is therefore substantially the same ferry that the plaintiff has owned ever since 1846, and it seems to us too late to contend that in the Courts of this country a zemindar cannot have such a right of ferry arising out of a grant of settlement, as that the infringement of that right by reason of the establishment of another ferry at a short distance from it will not give a right of action. Such cases constantly occur—see *Kishoree Lall Roy* v. *Gokool Monee Chowdhrain* (1). The plaintiff's ferry, as I have already stated, is substantially the same ferry as he had years ago. The defendant in his written statement says, that he maintained boats for the conveyance of his own servants and ryots, but the evidence clearly shows, we think, that those boats were also permitted to transport passengers of other kinds, and more especially passengers of the poorest sort. That the defendant took no tolls for the conveyance of such passengers makes no difference, as although the defendant does not gain, the plaintiff loses, for if these persons were not gratuitously taken by the defendant, they would have to pay to the plaintiff, and so far the plaintiff would suffer damage. Mr. Advocate-General, who appears for the plaintiff, does not now contend that the defendant would not be at liberty to keep his own boats for the purpose of conveying his own servants and other persons coming upon his business, and if the defendant proved that the service of the boats which he maintained was limited to that purpose, the plaintiff would have no ground of action. But the fact is otherwise. One cannot help seeing that assertions of his right to carry passengers have been somewhat vaguely, but repeatedly, set up within the last twenty years. It is quite possible that if the plaintiff neglected to notice such infractions of his rights, those might assume very serious proportions. We think, therefore, although not for the reasons stated by the Subordinate Judge, that the plaintiff's suit was well founded, and that he was entitled to a decree, and to an injunction restraining the defendant from carrying over the ferry in that place in his boats, whether for hire or otherwise, persons other than his own ser-

(1) 16 W. R., 281.

vants or persons lawfully engaged upon his business or going to his premises. We think the judgment of the Court below should be accordingly modified, and a decree drawn in the terms stated above. The plaintiff will be entitled to his costs of this appeal.

Decree modified.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS *v.* ACHIRAJ LALL AND ANOTHER (PETITIONERS).*

1878
Aug. 13.

Information to Police—Agent of Owner of Land—Criminal Procedure Code (Act X of 1872), s. 90.

Per MARKBY, J.—A khazanchi is not an "agent" within the meaning of s. 90 of the Criminal Procedure Code. A dewan may be an "agent" if his master is absent, but the provisions of s. 90 do not apply to a dewan who is acting only under the orders of his resident master.

Per PRINSEP, J.—*Quære.*—Whether, according to s. 90, an agent is only responsible for giving information of the occurrence of any sudden or unnatural death?

Mr. *Branson* and Mr. *Evans* (with them Baboo *Doorga Pershad Dass*) for the petitioners.

The *Assistant Legal Remembrancer* (Mr. *Kilby*) for the Crown.

IN this case the khazanchi and dewan of the zemindar of a certain village had been tried and convicted under s. 90 of the Criminal Procedure Code for not giving information to the police of a theft committed in the village.

The prisoners appealed to the High Court.

MARKBY, J. (after noticing certain irregularities in the Magistrate's procedure, continued as follows):—But I also think that neither of these two persons would come within s. 90 of the Code of Criminal Procedure. With regard to the person who

* Criminal Motion, No. 129 of 1878, against the order of J. B. Worgan, Esq., Sessions Judge of Gya, dated the 28th of June 1878.