1893

LEP SINGH KHASIA *v.* NIMAR KHASIA.

before and up to the date of institution of this suit, and *secondly* that the defendants have failed to make out a better title to the garden than the plaintiffs. Upon these two points, however, we do not think that the judgment of the Lower Appellate Court is at all clear. The Lower Appellate Court has not determined the second point, and as to the first, all that it finds is that the plaintiffs have proved that they made the garden and possessed it, but possessed it down to what date the judgment does not show. If the first point is decided in favour of the plaintiffs, they will be entitled to a decree, unless the defendants make out a better title; and if the first point is decided against the plaintiffs, they will not be entitled to a decree unless they make out their title to the garden in dispute.

The decrees of the Courts below will therefore be set aside, and the case remanded to the Lower Appellate Court for a fresh decision, in accordance with the directions contained in this judgment. Costs will abide the result.

Case remanded.

J. V. W.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1893 *Aug.* 7.

SURESH CHUNDER MAITRA, CHAIRMAN OF COMMISSIONERS, RAMPUR BOALIAH MUNICIPALITY (DEFENDANT), *v.* KRISTO RANGINI DASI (PLAINTIFF).*

Second appeal—Jurisdiction—Provincial Small Cause Courts Act (*IX of* 1887), *s.* 16—*Civil Procedure Code* (*Act XIV of* 1882), *ss.* 586, 646*B*.

Notwithstanding section 16 of the Provincial Small Cause Courts' Act, the High Court has, on a case being submitted to it under section 646B, Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial.

Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *Held* on a second appeal to the High Court that section 646B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts' Act, so as to modify its full effect in a case wrongly tried by an

* Appeal from Appellate Decree No. 964 of 1892, against the decree of Alfred F. Stanbery, Esq., District Judge of Rajshahi, dated the 1st April 1892, modifying the decree of Babu Fani Bhooshun Mukerjee, Munsif of Boaliah, dated the 19th of May 1891.

1893

SURESH CHUNDER MAITRA v. KRISTO RANGINI DASI.

ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void.

THE plaintiff purchased at a public auction sale a certain house with the land appertaining thereto within the limits of the Rampur Boaliah Municipality. The Municipality closed one of the drains which flowed past the house, with the result that it flowed over and injured the plaintiff's property, bringing down the western wall and a privy. The plaintiff then gave the Municipality notice to reconstruct the wall or to pay Rs. 125 in damages. As no notice was taken of this demand, the plaintiff filed a suit in the Munsif's Court asking to have the wall reconstructed or for damages as demanded. The Munsif dismissed the plaintiff's suit. From this decision the plaintiff appealed to the Judge of Rajshahi, and the learned Judge, reversing the decision of the Munsif, gave the plaintiff a decree, but assessed the damages at Rs. 90.

From this decision the defendant appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Monmotho Nath Mitter* for appellant.

Babu *Akhil Chunder Sen* for respondent.

The arguments for the purposes of this report are sufficiently set out in the judgment of the Court (PRINSEP and BANERJEE, JJ.), which was as follows:—

This suit as brought was cognizable by a Small Cause Court, and inasmuch as there was a Small Cause Court having jurisdiction in that particular locality, it should have been brought in that Court. Nevertheless the Munsif without any objection being raised tried the suit and dismissed it. The plaintiff appealed, and in the Court of the District Judge also no objection of this kind was raised; but the order of the Munsif was set aside and a decree was given for the plaintiff for damages, but in a sum smaller than that claimed.

The defendant has now preferred a second appeal against the appellate decree. An objection is raised by the plaintiff that a second appeal would not lie by reason of section 586 of the Code of Civil Procedure, the subject-matter of the original suit not exceeding 500 rupees. To this the defendant-appellant replies

1893

SURESH CHUNDER MAITRA v. KRISTO RANGINI DASI.

that the Courts below had no jurisdiction at all over the subject-matter of the suit, inasmuch as this suit should have been brought in a Small Cause Court, and therefore a second appeal lies in a matter of jurisdiction, on the authority of the case of *Dyebukee Nundun Sen* v. *Mudhoo Mutty Gupta* (1). The law has, however, been altered since the passing of that decision, and it seems to us to stand at present on entirely different ground.

Section 16 of Act IX of 1887, the Provincial Small Cause Courts' Act, declares that a suit cognizable by a Small Cause Court shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. So that under that section the suit could not have been tried by the ordinary Courts as it has been. But Act VII of 1888, section 60, has introduced section 646 B into the Code of Civil Procedure which modifies the operation of section 16 of the Small Cause Court Act, and introduces an entirely different principle. Under that section, in a case such as that now before us, properly triable only by a Small Cause Court but tried by an ordinary Civil Court, on an appeal preferred the District Court may, and, if required by a party, shall, submit the record to the High Court, with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous: and it is further enacted that "on receiving the record and statement, the High Court may pass such an order in the case as it thinks fit." No doubt under this last clause if standing alone it might be held that the decision of the High Court should be limited only to the question of jurisdiction, but the previous clause shows that this was not the intention of the Legislature. If the question of jurisdiction were alone involved, it could be dealt with by the District Court on appeal. But such action of the District Court is restrained. If no objection as to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or to submit the case to the High Court. If, however, the parties so require it, the District Court has no discretion at all: it is bound to submit the case for the orders of

(1) I. L. R., 1 Calc., 123; 24 W. R., 478.

1893

SURESH CHUNDER MAITRA *v.* KRISTO RANGINI DASI.

the High Court. So that, as we read the law, on a case so submitted the High Court has full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial. Unless this is the intention of the Legislature, the enactment of section 646B seems to be without any meaning or object. Consequently section 646B must be read with section 16 of the Provincial Small Cause Courts Act so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court. In this view of the law we are of opinion that the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, it is not competent to either of them on second appeal to plead the want of jurisdiction in those Courts so as to render all proceedings taken in the suit void. The defendant, however, contends that he is entitled to a second appeal, and to ask for judgment on points other than that of the special jurisdiction. But the suit is of the nature cognizable by a Court of Small Causes, and the amount of the subject-matter does not exceed five hundred rupees, so that a second appeal is barred by section 586 of the Code of Civil Procedure. The second appeal must, therefore, be dismissed with costs.

C. S. *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1893 *Aug. 7.*

JIBAN DAS OSWAL AND ANOTHER (PLAINTIFFS) *v.* DURGA PERSHAD ADHIKARI AND OTHERS (DEFENDANTS).*

Res judicata—Suit for possession and mesne profits—Ex-parte decree for possession without mention of mesne profits—Subsequent suit for same mesne profits and for subsequent mesne profits—Civil Procedure Code (Act XIV of 1882), *s.* 13.

A suit was instituted for recovery of possession and for mesne profits. An *ex-parte* decree for possession only was made, but the decree was silent as regarded the mesne profits. Subsequently a second suit was instituted

* Appeal from Appellate Decree No. 711 of 1892, against the decree of Babu Hurro Gobind Mukerjee, Subordinate Judge of Jalpaiguri, in Rungpore, dated the 17th of February 1892, modifying the decree of Moulvie Ibrahim Ahmed, Munsif of Jalpaiguri, dated the 30th of November 1891.