necessary; but this was not so. If the plaintiff was ready and willing to perform his part of the contract, that is to say, if he was in a position to transfer the securities on the 2nd of September, and did his best to inform the defendant by going to his place of business, that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness.

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If the plaintiff had the stock in his possession, as he says he had, there would seem every reason to suppose that he would be prepared to carry out the transaction.

No man, one would think, would ordinarily find any difficulty in completing such a lucrative bargain.

As this point however has not been decided by the Court below, the case must go back for that purpose.

The costs in this Court will abide the result of the judgment of the Court below.

PRIVY COUNCIL.

RADHAPERSAD SINGH (PLAINTIFF) *v.* RAM PARMESWAR SINGH AND OTHERS (DEFENDANTS).

P. C.* 1882 *December* 1.

[On appeal from the High Court at Fort William in Bengal.]

Costs—Set-off of costs ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal.

It is not the usual practice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later.

Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs.

* *Present*: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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RADHAPERSAD SINGH v. RAM PARMESWAR SINGH.

APPEAL from a decree of a Divisional Bench of the High Court (24th February 1879), reversing a decree of the Judge of the Shahabad District (3rd August 1878.)

A suit (for land) dismissed by the Subordinate Judge of the Shahabad district, upon the defence of limitation, was remanded (26th April 1869) for hearing on the merits; and it was ordered in the same decree that the defendants, respondents, should pay to the plaintiff, appellant, a certain sum for costs, with the costs incurred in the lower Court. The result of the hearing having been a decree in favour of the plaintiff as to part only of his claim, with proportionate costs to each party, another remand was obtained from the High Court, on this occasion to the District Judge, who also decreed partly in favour of the plaintiff, directing that each party should recover costs from the other in proportion to the success of each. To that decree was annexed a schedule of costs, including the costs recoverable by the plaintiff under the High Court's decree of 26th April 1869. The defendants then appealed successfully to the High Court, and on the 10th January 1874 the High Court reversed the decree of the District Judge, ordering that the plaintiff, then respondent, should pay to the defendants, then appellants, a certain sum for costs, and also costs incurred in the lower Court. Upon a further appeal to Her Majesty in Council, although the decree of 1874 was in part modified, this order for costs was in effect confirmed; the order in Council setting forth the amount of the costs of the appeal.

On the defendants' petition for exemption as to all costs, the plaintiff objected that he was entitled to set-off the sum decreed to him by the High Court on the 26th April 1869; and by the District Judge of Shahabad, Mr.. A. C. Brett, this set-off was allowed. But the High Court (AINSLIE and BROUGHTON, JJ.) held that the decree of 1874 had dealt with the whole question of costs in the suit as an open one; and on the construction of that decree, held that costs generally, and in the whole suit, had been given to the defendants. They, therefore, disallowed the set-off.

The present appeal was accordingly preferred.

The orders of the Indian Courts, necessary to be referred to in this report, fully appear in their Lordships' judgment.

Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *C. W. Arathoon* for the respondents.

The argument for the appellant traced the orders as to costs throughout the present litigation, and it was contended that the order of 26th April 1869 never having been reversed, required that effect should be given to it. Reference was made to s. 360 of Act VIII of 1859, the Code of Civil Procedure in force in 1869.

For the respondents reliance was placed on what had been done, and the orders made in the suit on and since the 10th June 1874. The construction placed on the decree of 1874 by the judgment now under appeal was correct.

Mr. *J. F. Leith, Q.C.*, replied.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—In this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the appellant and respondents as if there was no change. So speaking of them, the appellant has been ordered to pay to the respondents the costs of a litigation with them. He now seeks to set-off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the appellant was the plaintiff and the respondents were the defendants. The suit was for the recovery of certain lands; and the respondents set up a defence of the law of limitation. That issue was decided in their favour by the Subordinate Judge on the 31st July 1868, and in consequence the appellant's suit was dismissed. An appeal was presented to the High Court, who delivered judgment thereon on the 26th of April 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the respondents should pay to the appellant the sum of Rs. 2,499-13-5, being the amount of costs incurred by

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him in the High Court with interest; and further ordered that the respondents should pay to the appellant the costs incurred by him in the lower Court with interest. With that order the suit was remanded. The litigation was then carried on with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the respondents. That decree was pronounced upon the 10th June 1874, when the appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it is not in any way altered by that affirmation.

The respondents applied to the Subordinate Court for execution for their costs, and the appellant then claimed to set-off against the costs claimed by the respondents the costs which were due under the decree of the 26th April 1869. It may be well to mention that an application had been made by the appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the appellant were, first, the sum found by the High Court itself on the 26th April 1869 to be due for expenses in that Court; and, secondly, an amount of Rs. 5,806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the Subordinate Judge on the 31st July 1868. Mr. Brett, the Judge of Shahabad, allowed those amounts to be set off by the appellant against the claim of the respondents, and he made an order to that effect on the 3rd August 1878. The respondents presented an appeal to the High Court, and on the 24th February 1879 the High Court reversed the order of the Subordinate Judge, and disallowed the claim of the appellant to set off the costs awarded to him in the decree of the 26th April 1869; and they gave to the respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th June 1874, giving the whole costs of the suit, overrode the decree of the 26th April 1869, which gives the costs

of a portion of the suit in which the respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of April 1869 was not before the Court in 1874 ; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any mistake in the prior order it ought to have been the subject of some review or rehearing, in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th June 1874 to interfere with the costs awarded by the order of the 26th April 1869.

It has been mentioned that there were two amounts claimed by the appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships consider that the appellant is entitled to set those off against the costs now claimable by the respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs. 3,245, which is the Court-fee. The Court-fee applies not only to the hearing in 1869 but to the whole of the ligitation ; and, inasmuch as the general costs of the suit are awarded to the respondents, it would be improper that they should have to pay the Court-fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs. 2,490 for pleader's fee ; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be : To discharge the order of the 24th February 1879 ; to declare that the appellant is entitled to the costs properly recoverable under the decree of April 1869 ; to declare that those costs consist of the sum of Rs. 2,499-13-5 mentioned in the decree of April 1869, and also such costs in the Court below as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing

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thereon, and of the decree of the 31st July 1868; that it be referred to the Court of the Subordinate Judge of Shahabad to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs. 2,499-13-5, are to be set off against the costs found due to the respondents. Interest should be charged as ordered by the decree of the 26th April 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the appellant does not wholly succeed; but having regard to the fact that the whole of the appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They, therefore, think it right that the appellant should have the costs of this appeal, and also the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart,* and *Burton.*

Solicitors for the respondents: Messrs. *Henderson & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

1883 *March* 19.

MOHINY MOHUN DAS (PLAINTIFF) *v.* KRISHNO KISHORE DUTT AND OTHERS (DEFENDANTS.)*

Onus probandi—Suit for possession of land—Presumption of possession and ownership.

If, in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to

* Appeal from Appellate Decree No. 698 of 1881, against the decree of Baboo Nobin Chunder Ganguli, Second Subordinate Judge of Furreedpore, dated the 31st January 1881, reversing the decree of Baboo Rosik Chunder Roy, Second Munsiff of Moolputgunge, dated the 11th March 1880.