

*Before Mr. Justice McDonell and Mr. Justice Field.*

1882  
July 4.

GOPAL CHUNDER MITTER (PLAINTIFF) v. MOHESH CHUNDER  
BORAL AND OTHERS (DEFENDANTS).\*

*Suit for Possession—Civil Procedure Code (Act VIII of 1859), s. 246—  
Limitation Act (XV of 1877), sched. ii, art. 11.*

Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, s. 246, a suit is [since the Limitation Act (XV of 1877) came into force] instituted to establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of art. 11, sched. ii of Act XV of 1877, but by the general limitation of twelve years.

*Koylash Chunder Paul Chowdhry v. Premnath Roy Chowdhry (1), Matongingy Dasse v. Chowdhry Jumnunjoy Mullick (2), Joyram Loot v. Panirum Dhoba (3), and Raj Chunder Chatterjee v. Shema Churn Garai (4) cited.*

THE judgment of the Court of first instance in this case was as follows:—“This is a suit to establish the plaintiff's right to certain property and to obtain possession thereof jointly with the defendant No. 2. The property was attached in execution of a decree against the defendant No. 3, and the plaintiff preferred a claim under s. 246 of Act VIII of 1859, which was disallowed on the 7th of September 1876. The limitation law which is applicable to this case is Act XV of 1877. The suit is one to establish the plaintiff's right to certain property and to recover possession thereof, not to set aside a summary order. It has been held that, for such a suit, the period of limitation is twelve years in cases in which Act IX of 1871 applies—*Koylash Chunder Paul Chowdhry v. Premnath Roy Chowdhry (1)*. But under cl. 11, sched. ii of Act XV of 1877 the period is only one year. Before Act IX of 1871 came into operation,

\* Appeal from Appellate Decree, No. 317 of 1881, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 15th December 1880, affirming the decree of Baboo Jogesh Chunder Mitra, Munsif of Alipore, dated the 23rd January 1880.

(1) 1. L. R., 4 Calc., 610; S. C., 3 C. L. R., 25.

(2) 25 W. R., 513.

(3) 8 C. L. R., 54.

(4) 10 C. L. R., 495.

the period was only one year by reason of the last twelve words of s. 246 of Act VIII of 1859. The cases of *Brijo Kishore Nag v. Ram Dyal Bhudra* (1) and *Kaminee Debia v. Issur Chunder Roy* (2) support that view. Be that as it may, the period of limitation prescribed by Act XV of 1877 being shorter than the period of limitation prescribed by Act IX of 1871, this suit, if instituted within two years from the 1st of October 1877, would, under s. 2 of Act XV of 1877, have been saved from limitation. But I find that this suit was instituted on the 9th of October 1879; it is therefore barred by limitation. The suit is accordingly dismissed with costs." The plaintiff appealed to the District Judge, who dismissed the appeal with costs, saying merely that it seemed quite clear that the suit was barred by limitation.

The plaintiff appealed to the High Court, on the grounds: (i) "that art. 2 of the second schedule of Act XV of 1877 cannot be applicable to the present case, as in the present case no order has been passed against the plaintiff under s. 280, 281, 282, or 355 of Act X of 1877; (ii) that the Courts below ought to have construed the Limitation Act most strictly, and as such ought to have held that the Act in question makes no provision for a regular suit brought by a party defeated in a claim under s. 246 of Act VIII of 1859. There is no authority for substituting the section of the old for those of the new Civil Procedure Code in the schedules to Act XV of 1877."

*Baboo Pran Nath Pundit* for the appellant.

*Baboo Byddo Nath Dutt* for the respondents.

The judgment of the Court (McDONNELL and FIELD, JJ.) was delivered by

FIELD, J.—The property which forms the subject of this suit was attached in execution of a decree against the defendant No. 3. The plaintiff preferred a claim under s. 246 of Act VIII of 1859 in respect of this property. This claim was disallowed on the 7th of September 1876. The plaintiff now seeks

(1) 21 W. R., 133.

(2) 22 W. R., 39.

1882

GOPAL  
CHUNDER  
MITTAL  
v.  
MOHESH  
CHUNDER  
BOBAL.

1882  
 GOPAL  
 CHUNDER  
 MITTER  
 v.  
 MOHESHI  
 CHUNDER  
 BORAL.

to establish his right to, and obtain possession of, the property which formed the subject of that claim. The present suit was instituted on the 9th of October 1879, that is more than three years after the order disallowing the claim, which order was made under s. 246 of Act VIII of 1859.

The Munsif was of opinion that the limitation law applicable to this case is Act XV of 1877, and he refers to art. 11 of sched. ii of that Act. Applying that article, he was of opinion that this suit ought to have been brought within one year from the 7th of September 1876, and that, having been brought more than a year after the date of the order disallowing the claim, it was barred by limitation under the article just mentioned.

It is now contended before us in appeal that art. 11 cannot be read as applicable to s. 246 of Act VIII of 1859. Article 11 is as follows:—"By a person against whom an order is passed under s. 280, 281, 282, or 335 of the Code of Civil Procedure, &c." The Code of Civil Procedure here referred to was the Code which was in force when Act XV of 1877 was passed, that is Act X of 1877. Section 3 of Act X of 1877 provides as follows:—"When in any Act, Regulation, or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the Code of Civil Procedure, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof." There is, however, no provision that when, in any Act passed after the passing of Act X of 1877, reference is made to Act X of 1877, or the Code of Civil Procedure, that reference shall be read as applying to the old Code, Act VIII of 1859, or the corresponding part thereof; and in order to make art. 11 of the Limitation Act applicable to the present case, we would have to import into the law such a provision as that which has been just mentioned, and which has not been specifically made by any Act of the Legislature. We think that we cannot import a provision of this nature, more especially in construing the Limitation Act, to which the rule of strict construction is applicable according to

the practice of the Courts. The result is, that art. 11 of the present Limitation Act is not applicable to the present case.

Then arises the question, what period of limitation is applicable? It has been decided in the case of *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (1), that, in consequence of the repeal of the last twelve words of s. 246 of Act VIII of 1859 by Act IX of 1871, the period of limitation applicable to a suit such as that which the plaintiff has here brought is twelve years. The decision in that case has been followed in a number of cases decided by other Benches of this Court. See *Malonginy Dussee v. Chowdhry Jummunjoy Mullich* (2), *Joy Ram Loot v. Paniram Dhoba* (3), and *Raj Chunder Chatterjee v. Shama Ohurn Gurai* (4). It has been contended before us by the vakil for the respondents that these decisions are not correct, and that, upon the true construction of the law, the period of limitation is one year; and that it has been so decided by the Bombay High Court and the Madras High Court (5). Having regard to the fact that this question was not raised in the Courts below, that it was there assumed that, unless art. 11 of the second schedule of Act XV of 1877 is applicable, the period of twelve years would apply, which is in accordance with several decisions of this Court, and that no cross-objection has been taken on appeal to this Court, we think it unnecessary to enter into this question upon the present occasion. We think, therefore, that this appeal must be decreed with costs, and the case must be remanded for trial on the merits.

*Case remanded.*

- (1) I. L. R., 4 Calc., 610; S. C., 3 C. L. R., 25. (5) See *Krishnaji Vithal v. Bhaskar Rangnath* (I. L. R., 4 Bom. 611);  
 (2) 25 W. R., 513. *Vaukapa v. Chenbasapa* (I. L. R.,  
 (3) 8 C. L. R., 54. 4 Bom., 21); *Jetti v. Sayad Husein* (I.  
 (4) 10 C. L. R., 435. L. R., 4 Bom., 23).

1882

GOPAL  
CHUNDER  
MITTER  
v.  
MOHESI  
CHUNDER  
BORAL.