

1884
 THE
 SECRETARY
 OF STATE
 FOR INDIA
 v.
 NUNDUN
 LALL.

is used in the same sense in which it is used in the *butwara* law, Beng. Act VIII of 1876. But this contention does not seem to us to be correct. The definition of "estate," as given in the *butwara* law, seems to be defective; for instance, it excludes definite lands held jointly by owners of estates recorded in the Collector's *tozji* in separate numbers. There is no reason suggested why this restricted meaning of the word should be adopted in construing this word used in s. 265 of the Code of Civil Procedure. On the other hand, it will facilitate the ends of justice in many cases if we construe the word "estate" here in its ordinary signification. In *Chundernath Nundi v. Hur Narain Deb* (1) this Court adopted this construction of s. 265 of the Code of Civil Procedure.

The result is that, although the appellant was unnecessarily made a defendant, yet the decree that has been awarded is correct, except as to costs payable by him. But under the circumstances, he is not entitled to recover costs against the (plaintiff) respondent; because the revenue authorities, by entertaining the application for *butwara*, put the latter to unnecessary costs. We accordingly modify the decrees of the lower Courts by reversing those portions of them which award costs against the appellant who will be entitled to recover costs of this appeal from the respondent.

Appeal allowed and decree modified.

Before Mr. Justice Tottenham and Mr. Justice Norris.

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 February 7.
 HARRINGTON, DEFENDANT (APPELLANT) v. GONESH ROY, PLAINTIFF
 (RESPONDENT).*

Limitation—Absence of Defendant from British India—Act XV of 1877, s. 13.

Section 13 of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, does not apply to a case when, to the knowledge of the plaintiff, the defendant, though not residing in British India, is represented by a duly constituted agent and mookhtar.

* Appeal from Appellate Decree No. 223 of 1883, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 7th May 1883, reversing the order of Hafez Abdul Kurim, Khan Bahadoor, Second Subordinate Judge of that district, dated the 17th March 1882.

(1) I. L. R., 7 Calc., 163.

THIS was a suit to recover possession of 91 bighas 8 cottals 18 dhurs of land, being a portion of some 190 bighas which the plaintiff held in the defendant's zemindari as *mourasi kademi-jote*. The allegation in the plaint was that in the cultivation season the defendant demanded a termor *kabuliat* with an enhanced rate of rent, and as the plaintiff would not agree, the defendant on the 17th Jait 1287 F., corresponding with the 10th June 1880, dispossessed him.

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The suit was instituted on the 25th May 1881 against a Mr. Crowdy, who was the manager and mookhtar of the defendant and in charge of the Bhugwanpur Concern, and a summons was issued to him, and the 14th June fixed for hearing the case. On that date Mr. Crowdy presented a petition stating that Mr. E. T. Harrington was the proprietor of the Bhugwanpur Concern, and that the land claimed by the plaintiff was situate in that concern; that as the proprietor was in England, and he was simply the manager, he could not personally be made a defendant; and that the suit should have been brought against Mr. Harrington. The plaintiff was thereupon asked to state whether he meant to sue Mr. Crowdy as manager and mookhtar or as proprietor, and whether he alleged that Mr. Crowdy dispossessed him in his private capacity or as manager of the factory. In reply on the 16th June, the plaintiff filed a petition stating that he did not know Mr. Harrington, but only knew Mr. Crowdy, and that he meant to make the factory defendant, and he prayed that the plaint might be amended by putting down in the place of the defendant.—“E. T. Harrington, proprietor, by W. S. Crowdy.”

Mr. Harrington was accordingly made defendant on the 16th June 1881.

In his written statement, amongst other pleas raised, he contended that the suit being one governed by s. 27, Beng. Act VIII of 1869, it was barred by limitation as the year allowed since the date of dispossession had expired before he was sued.

In answer to that plea the plaintiff contended that as Mr. Harrington was in England, under s. 13 of the Limitation Act no limitation could run.

The Original Court, without going into the other issues raised, dismissed the suit, holding that it was barred.

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On appeal the lower Appellate Court, while agreeing with the Court below that the period of limitation which governed the case was one year, and that it must be taken that the suit was instituted against Mr. Harrington on the 16th June 1881, said however that s. 13 of the Limitation Act applied, and reversing the decree of the lower Court remanded the case for trial on its merits.

Against this order of remand the defendant now specially appealed to the High Court.

Mr. *R. E. Twidale* appeared on behalf of the appellant.

No one appeared on behalf of the respondents.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J.—It is unfortunate that in this appeal nobody has appeared for the respondent, and therefore no arguments have been put before us in favour of the District Judge's order.

It appears to us that the reason given by the District Judge for holding that the suit was not barred by limitation cannot be supported in law. The Judge relies on s. 13 of the Limitation Act, which provides that "in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." He goes on to say "admittedly Mr. Harrington," the defendant in this case, "has been so absent from the date of dispossession till now." It seems, however, that Mr. Harrington is represented in this country by Mr. Crowdy, who, in the first instance, was made a defendant in the case as manager and mookhtar of the Bhugwanpur Factory.

If the Judge's interpretation of s. 13 were correct, there would be no limitation at all as against a proprietor residing in England, although suits might be conducted for and against him through his agent in this country. It is impossible to believe that this was the intention of the law. Mr. Harrington, the proprietor, was not made a defendant until the 16th June 1881, and by s. 22 of the Limitation Act a suit as against him is to be taken to be instituted on that date. That was more than one year after the alleged dispossession. It seems a hard case that the plaintiff should be shut out from relief by his ignorance that Mr. Harrington was the real proprietor; but, as observed by the

Subordinate Judge, he was clearly aware that Mr. Crowley was not the proprietor in that he sued him merely as "manager and mookhtar." It was, therefore, within his power to ascertain against whom the suit ought to have been brought.

Upon a strict interpretation of the law we think that the Subordinate Judge was right in holding that the suit was barred.

We must, therefore, set aside the order of the lower Appellate Court, and restore that of the first Court with costs, one gold mohur.

Appeal allowed.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.
KANNIE LOLL SEIT AND ANOTHER (PLAINTIFFS) v. NISTORINY DOSSEE AND ANOTHER (DEFENDANTS).*

1884
 March 6.

Mortgage of leasehold property—Mortgagee in possession—Liability for rent—Transfer of Property Act—Act IV of 1882, ss. 65, 76.

Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent; but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent.

THE plaintiffs in this case were the owners of certain land, No. 8, Juggo Mohun Mullick's Place, and some time back let out to the defendant Toolamoney three plots out of the land above-mentioned, on which the latter built some tiled huts which she let out to tenants. Subsequently on the 10th Assar 1282 (June 1875), Toolamoney mortgaged the tiled huts on this land to one Nistoriny Dossee. Nistoriny then entered into possession and repaired and built other huts thereon.

This mortgage and the fact of Nistoriny being in possession coming to the knowledge of the plaintiff, his agent induced Nistoriny to have her name entered in the landlord's books as the tenant of the property, and received rent from her at the rate of Rs. 59 a month and also a *salami* of Rs. 150.

In 1879, Toolamoney brought a suit against Nistoriny to redeem the property mortgaged and for an account, and obtained a

* Small Cause Court Reference under s. 69 of Act XV of 1882 and s. 617 of the Civil Procedure Code, by Baboo Koonjo Lall Banerjee, Second Judge of the Calcutta Court of Small Causes.