1886

SITANATH DASS v. MOHESH CHUNDER CHUCKER-BATI.

interest of the present plaintiff; and if he had been a party to the former suit, his deposition would no doubt have been admissible. But he was no party to that suit, and the fact that Eshan subsequently acquired an interest in the property will not avail to make the evidence taken in that suit admissible in the present suit. We think that, in order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding, and the evidence is given.

The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

INSOLVENT JURISDICTION.

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

IN THE MATTER OF R. BROWN, AN INSOLVENT.

(CLAIM OF DWARKA NATH MITTER.)*

1886 *February* 24.

Insolvent Act (11 & 12 *Vic., c.* 21), *ss.* 23, 73—*Order and Disposition—Reputed Ownership—Form of petition of appeal under Insolvent Act—Civil Procedure Code*, 1882, *s.* 590.

In 1883 *B.* mortgaged to one *D.* certain furniture standing in a house leased by him from one *V.* The mortgage deed provided that until default the mortgagor should have free use of the mortgaged property; that the mortgagee should be at liberty to place a durwan in charge of the furniture; and that on default by the mortgagor the mortgagee should have power to enter the premises and deal with the goods as his own. A durwan was placed in charge, and in January 1884 the mortgagor defaulted and was pressed for payment at different times previous to August 1884.

On the 1st August the mortgagee sent to the premises people from Messrs. Mackenzie, Lyall & Co. for the purpose of lotting and cataloguing the furniture. Admittance into the house was refused to them by *B*, although they were admitted into the compound by the durwan of the mortgagee.

At about this date (but whether before or after the 1st August was not clear) *B* asked for further time for payment, which was granted. On the 4th August the furniture was attached by *V* in execution of a decree for rent. On the 6th August *B* filed his petition in insolvency, and on the 15th September the furniture was sold by the Official Assignee.

On a hearing of the claims put in by the mortgagee, and *V*, *held*, that on the 6th August, the furniture was not in the possession, order or

* Appeal No. 20 of 1885, against the decree of Mr. Justice Cunningham, the Commissioner of the Court for Insolvent Debtors, dated the 13th April 1885.

1886

IN THE MATTER OF R. BROWN.

disposition of *B* as reputed owner with the consent of the true owner; that under the circumstances brought out in evidence, the fact that further time for payment was granted had not the effect of a fresh consent on the part of the mortgagee to the goods being in the possession of *B* as reputed owner; that even if this had been so the attachment under *V's* execution took the goods out of the order and disposition of *B*, and that the mortgagee was entitled to the benefit of that circumstance.

In re Agaleg (1) questioned.

The procedure as to appeals from orders under the Civil Procedure Code, 1882, is not made applicable by s. 590 to appeals from orders under the Insolvent Act. No particular form is prescribed for petitions of appeal under the latter Act. In this case the so-called memorandum of appeal was held to be a good petition of appeal under the Act

THE principal question raised in this case was whether, at the date of the insolvency of one Robert Brown, certain furniture was in the possession, order or disposition of the insolvent as reputed owner with the consent of the true owner, so as to defeat the title of the true owner.

The facts of the case were as follows:—

Robert Brown was a boarding-house keeper, carrying on business at 15, Loudon Street, holding the house under a lease from one Arabella Vardon.

On the 6th November 1883, Brown mortgaged the furniture in that house to one Dwarkanath Mitter, to secure a sum of Rs. 7,600 with interest.

The mortgage deed contained the following stipulations, that the mortgagee should have the right to enter upon the premises at will for the purpose of inspecting and taking inventories, the mortgagor retaining and keeping possession of the furniture, and using it until such time as default be made in the payment of principal or interest; that upon default in payment of the principal or interest the mortgagee should be at liberty to enter upon the premises and take, seize and carry away the mortgaged property, or otherwise to remain upon the premises for the purpose of selling, and should have the power to sell the mortgaged properties; that the mortgagee might, during the continuance of the security, keep a durwan on the premises, whose wages should be borne by the mortgagor; that such durwan should be in charge of the mortgaged properties, and that notwithstanding

(1) 2 Ind. Jur. N. S., 340.

anything before provided in the deed, as to the mortgagor retaining possession of the property until demand made for payment of principal, or default made in payment of principal and interest, the possession of the mortgaged property by the mortgagor in charge of the said durwan should be deemed and treated as if the said property was in the possession and custody of the mortgagee.

Under the power contained in the mortgage deed, the mortgagee on his own behalf placed a durwan in charge of the mortgaged properties.

Interest on the mortgage money was duly paid up to the 15th January 1884, but it appeared from the evidence that, after that date, no further payment was made on account of interest, or on account of the wages of the durwan, after May 1884, and that the mortgagee on one or more occasions previous to August 1884 (although no exact dates were spoken to) had pressed the mortgagor for payment.

On the 8th May 1884, Arabella Vardon sued Brown (the mortgagor) in the Small Cause Court for rent which had fallen due for the months of January, February, March and April 1884, and on the 11th June obtained a decree against him for the amount claimed.

On the 1st August 1884, the mortgagee gave instructions to Mackenzie, Lyall & Co. to take the necessary steps for selling, and to put up for sale the mortgaged property, and on that day, in compliance with such instructions, an assistant of the firm of Mackenzie, Lyall & Co., a sircar of the mortgagee's, and Mr. Linton went to No. 15, Loudon Street, for the purpose of taking an inventory preparatory to a sale; they were, however, refused admittance into the house by the mortgagor, though they succeeded in entering the compound, being admitted so far by the durwan of the mortgagee.

At or about this time (but whether before or after the 1st of August was not clear from the evidence) a conversation took place between the mortgagor and mortgagee, which is referred to in the evidence of Dwarkanath Mitter, as follows:

"From 15th January 1884 up to the insolvency I received no interest. I paid a durwan for these premises in order to keep possession of the furniture. I would not have allowed Mr. Brown

1886

IN THE MATTER OF R. BROWN.

to deal with the furniture without reference to me. When I did not get the durwan's wages, I made out a list of the furniture. I delivered the list to Mr. Linton and Bhojohurry Sircar with certain instructions. The day after, Mr. and Mrs. Brown came to me, Mr. Brown asked me to give him four or five days further time, and that he would put himself in a position to pay me my money. He begged of me to give him the time, and said that if within the time I gave him, the money was not paid, he would accompany me to Mackenzie, Lyall, and arrange for the sale of the furniture. Before this occasion Mr. Brown had come to me and said, that as he was not in position to pay me, I should have the furniture sold by Mackenzie, Lyall, and pay myself out of the proceeds. I did take steps with reference to the sale of the property. I have already stated what they were, and it was after this that the second conversation took place, when he said if he did not pay me in four or five days he would go with me to Mackenzie, Lyall & Co. He did not pay me in four or five days, but came again and asked for a further extension of a day or two. I agreed. He did not pay, and it was after this that the seizure took place, when Brown took the benefit of the Insolvent Act. I had communicated with Mackenzie, Lyall & Co. about eight or ten days before I heard of the insolvency."

On the 4th August 1884 the mortgaged property was attached in execution of Arabella Vardon's decree, and on the 5th August 1884 Arabella Vardon filed a second suit against Brown for rent; on the 6th August the mortgagor presented his petition in insolvency, and the usual vesting order was made; and on the 15th September the mortgaged property was sold by order of the Official Assignee.

The mortgagee then filed his claim in the Insolvent Court claiming the benefit of his mortgage; and Arabella Vardon also filed a claim in which she claimed a preferential right over the mortgaged property, or its proceeds, in respect of the amount of her attachment, and of the amount of a subsequent decree for rent which she had obtained on the 4th February 1885, and of rent said to have accrued due after the insolvency. These claims were heard together, and after argument the learned Commissioner of the Insolvent Court, Mr. Justice Cunningham, disallowed the

claim of the mortgagee, on the ground that the furniture was in the reputed ownership of the insolvent at the date of his petition in insolvency; holding that the position of the durwan was precisely similar to that described by Phear, J., in *In re Agabeg* (1).

With regard to the question whether the fact of the property being under attachment in execution of a decree of the Small Cause Court operated to prevent the operation of the section of the Insolvent Act, the learned Commissioner held that the property was, at the time of the petition in insolvency, in the possession, order or disposition of the insolvent, notwithstanding that it was under attachment in execution of the Small Cause Court decree. He further allowed the whole of the claim of Arabella Vardon with costs to be added thereto.

Against this order Dwarkanath Mitter appealed.

Mr. *T. A. Apcar* and Mr. *O'Kinealy* for the appellant.

Mr. *Pugh* and Mr. *Allen* for Mrs. Vardon.

Mr. *Bonnerjee* and Mr. *Sale* for the Official Assignee.

A preliminary objection was taken by Mr. *Pugh* that the appeal proceedings had been taken in the form provided by the Code of Civil Procedure, instead of in the form directed by s. 73 of the Insolvent Act.

The decision on the preliminary objection was as follows:—

WILSON, J.—The objection that has been raised in this case is, that the appeal proceedings in an intended appeal against an order made in insolvency, have been taken in the form provided by the Code of Civil Procedure, instead of in the form directed by s. 73 of the Insolvent Act.

We think it is correct to say that the matter is governed by s. 73 of the Insolvent Act, and that appears in this way. This is an appeal against an order. The section dealing with the procedure in appeals against orders, contained in the Code of Civil Procedure, is s. 590; and that section says that the procedure prescribed in chapter XLI, the chapter giving the mode of procedure in cases of appeals against original decrees, shall, so far as may be, apply to appeals from orders under this Code or under any special or local law in which a different procedure is not provided.

(1) 2 Ind. Jur. N. S., 340.

1886

IN THE MATTER OF R. BROWN.

Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which a different procedure is provided. It follows, therefore, that the provisions of chapter XLI are not applied to those orders by s. 590; and we must, therefore, in order to see whether this appeal is properly brought, have recourse to s. 73 of the Insolvent Act.

That section provides that the appeal is to be by petition, and what we have to see is, whether this appeal is properly brought by petition.

Now, in the Insolvency Act, there are several cases referred to in which the procedure is to be by petition. In some of these the form of the petition is given in the schedule, and the requirements which must be satisfied in order to make the petition a good petition are provided in the statute itself. In other cases, it is simply said that the procedure is to be by petition, but no form of petition is given, and no specific requirements to give validity to the petition are mentioned. The present case is one of the latter. The simple enactment is, that the proceeding is to be by petition.

Rules have been framed in this Court governing many matters connected with insolvency; but, so far as we have been able to ascertain, there is no rule prescribing the form of a petition of appeal, or laying down what specific requirements must be complied with to make the petition of appeal a good one. We are, therefore, to say, in the absence of any enactment, in the absence of any rule, and in the absence of any form prescribed, whether, in substance, this document contains sufficient to make it a good petition within s. 73 of the Act.

The mere fact that it is called, in its own language, a "Memorandum," cannot make it the less a good petition, if it is so in substance. The petition in question refers to the Court against whose order the appeal is to be brought, and the order appealed from it properly describes the Court to which the appeal is made; it describes the party from whom relief is sought; it states the grounds on which it seeks relief; and it states the relief. That appears to us to be, in substance, a good petition, within the meaning

1886

IN THE MATTER OF R. BROWN.

of s. 73 of the Insolvent Act. The appeal must therefore proceed.

On the main questions arising on the appeal Mr. *T. A. Apcar* contended that Dwarkanath, the appellant, was in possession and not Brown. The consent of the true owner was determined when Mackenzie, Lyall & Co. went down to value the furniture; he never resiled from that position, and held his hand at the request of Brown until a few days before the sale. [WILSON, J.—What did Linton and the others go to the house for on the 1st of August? Supposing all had gone as Dwarkanath intended it to go, at what point of time did the possession change?] At the time when they actually went there for the purpose. When we went on the 1st August we took real possession, and this is sufficient to exclude the operation of the reputed ownership clause. On that day our possession assumed a totally different aspect. See *National Guardian Assurance Co.* (1).

The lower Court held that the mortgagee had lost his priority as he had no possession previous to the insolvency. Mrs. Vardon had attached previous to the insolvency, and therefore has priority to the general body of creditors. So, even assuming that the furniture was in possession of Brown after the 1st August, the seizure by Mrs. Vardon would take it out of the order and disposition of Brown, and I am entitled to the benefit of that circumstance. Mrs. Vardon's decree and attachment were prior to the sale by the Official Assignee. As to this part of the case, see *Anand Chandra Pal* v. *Panchilal Sarma* (2), and *Shibkristo Shaha Chowdhry* v. *A. B. Miller* (3). The attaching creditor under the present law is in a much better position on account of the insolvency. The insolvency cuts the ground away from under the feet of all the other creditors for they are unable to attach.

Mr. *O'Kinealy* on the same side referred to the section of the Code relating to attachment, and contended that the attachment and seizure by the bailiff took the case out of s. 23 of the Insolvent Act; and that the English cases did not apply, as in India the

(1) L. R., 10 Ch. D., 408.
(2) 5 B. L. R., 691.
(3) I. L. R., 10 Calc., 150.

1886

IN THE MATTER OF R. BROWN.

sheriff could attach an equitable interest. See *Ex parte Edey* (1), *Barrow* v. *Bell* (2), *Fletcher* v. *Manning* (3), *Ex parte Foss* (4).

Mr. *Pugh*, for Mrs. Vardon, cited and relied on *In re Agabeg* (5), and contended that the conversation set out between Brown and the mortgagee, of which the appellant gave evidence, showed a fresh consent to the goods being in the possession of Brown as reputed owner, and thus re-established the state of things existing before the 1st of August; and cited the following cases: *In re Marshall* (6), as showing the effect of placing a durwan on the premises; and *Callisher* v. *Bischoffsheim* (7), and *Ex parte National Guardian Assurance Co.* (8), *Ex parte Wingfield* (9).

Mr. *Bonnerjee* and Mr. *Sale* for the Official Assignee.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J., who (after setting out the facts and stating that it was unnecessary to consider the facts of Mrs. Vardon's claim except so far, if at all, as they affected the position of Dwarkanath Mitter) continued.—In order to see whether on the 6th August the goods were in the possession, order or disposition of Brown as reputed owner with the consent of the true owner, it is necessary first to consider how things stood down to the 1st August.

The provisions of the deed as to possession are difficult to understand, for the reason that they are to a large extent obviously dealing rather with words than with things. The only things that seem clear are, that until default the mortgagor was to have the free use of the goods on the premises; but that the mortgagee was to have a durwan on the premises who should in some sense have the custody of the goods, which custody must at least, we think, have extended to preventing the removal of the goods, if the mortgagor attempted such a thing. And this

(1) L. R., 19 Eq., 264.
(2) 5 Ell. & Bl., 540.
(3) 12 M. & W., 571.
(4) 2 De. G. & J., 230.
(5) 2 Ind. Jur. N. S., 340.
(6) I. L. R., 7 Calc., 421; 10 C. L. R., 591.
(7) L. R., 5 Q. B., 449.
(8) L. R., 10 Ch. D., 408.
(9) L. R., 10 Ch. D., 591.

1886

IN THE MATTER OF R. BROWN.

arrangement was carried out. After default the mortgagee was to have the right to step in and deal with the goods as his own.

But down to the 1st August no attempt was made to exercise this right; so that down to that date things remained unchanged so far as regards the point we are now considering.

Possession, order or disposition by an insolvent, to defeat the title of the true owner, must be actual possession; apparent possession is not sufficient. This is very clearly shown by the case of *Ex parte National Guardian Assurance Company* (1).

And it may well be open to question, whether enjoyment of the use of goods, but without the power of removal (the latter being prevented by the presence of the servant of the true owner placed for the purpose) is possession within the meaning of the section. It is not easy to see any material difference in point of fact between the position of a man placed in possession, and remaining in the back premises of a house, as in the case just cited, and that of a durwan placed upon the premises as in the present case.

In each case the enjoyment of the goods is undisturbed; in each their removal is provided against. But on the other hand, the placing a man in possession is in England a proceeding long familiar, the meaning and intention of which is well understood. It can hardly perhaps be said that in this country the putting a durwan in charge is an equally unambiguous act. We think it unnecessary to express an opinion as to whether prior to the 1st August these goods were in the possession, order or disposition of Brown as reputed owner; we assume that, as has been held by the learned Judge, they were so.

We have then to consider the effect of what took place on the 1st August. Those who went to the house went clearly on behalf of the appellant and in opposition to Brown. On that day the durwan openly acted as the servant of the appellant; he admitted the appellant's representatives within the gate adversely to Brown, and, as the latter complained to the appellant in his letter of the same date, "degraded him to his servants." Had the persons who went to the house been permitted to carry out their intention of cataloguing and lotting the goods for sale,

(1) L. R., 10 Ch. D., 408.

1886

IN THE MATTER OF R. BROWN.

they would have openly asserted and acted upon the rights of ownership of the appellant, and dealt with the goods as his. If this had taken place, it would have been difficult to contend that the goods were any longer in the possession, order or disposition of Brown. It would, we think, have been impossible to say that they were in his possession, order or disposition as reputed owner, that is to say, under such circumstances as fairly to lead to the supposition that he was the true owner. If what it was attempted to do on that occasion would, had the attempt succeeded, have taken the goods out of the possession, order or disposition of Brown as reputed owner, it follows that the attempt prevented their being any longer in that position with the consent of the true owner. The cases in which it has been held that a demand of the goods, or an attempt to put an end to the reputed ownership, is sufficient to terminate the consent are numerous. It is sufficient to refer to *Smith* v. *Topping* (1), *Brewin* v. *Short* (2), *Ex parte Harris* (3), *Ex parte Ward* (4), *Ex parte Montagu* (5), *In re Eslick* (6).

The case of *Reynolds* v. *Hall* (7) throws an instructive light upon this case. In that case Bate, a wine and spirit merchant, executed a bill of sale of all his goods to the defendant on the 15th May, but remained in possession of the goods as before. It was arranged between Bate and the defendant that the defendant, who was an auctioneer, should sell the goods on the 17th June. The sale was advertised; and on the 17th June the defendant attempted to sell, but found no bidders, and went away again. On the 22nd June Bate committed an act of bankruptcy. The facts were stated in a special case, and the second question asked was this: "Was the attempted sale of the 17th June a withdrawal by the defendant of his consent to the goods being in the order and disposition of Bates." The Court decided in the negative. The report is short, but the ground of decision very clearly appears. In the course of the argument, at p. 522, Martin, B., is reported as saying "what did the hand bills say?

(1) 5 B. & Ad., 674.
(2) 5 E. & B., 227.
(3) L. R. 8 Ch., 48.
(4) L. R. 8 Ch., 144.
(5) L. R. 1 Ch. D., 554.
(6) L. R. 4 Ch. D., 496.
(7) 4 H & N. 519.

If they stated that the goods were to be sold as the defendant's goods, that put an end to the bankrupt's reputed ownership."

In giving judgment Bramwell, B., says on this point: "If the hand bills had announced that the goods were the property of the defendant, the fact would have been stated. The case only states that the sale was advertised. If the advertisement simply announced that the goods were to be sold, it would have no effect. Neither party has desired to have it set out, and therefore we must assume that it does not affect the question." And Channell, B., says: "The advertisement of the sale did not destroy the apparent ownership, and was no withdrawal of the defendant's consent to its continuance. We can see no substantial distinction between what was done in that case and what was attempted in this. In each case the true owner endeavoured to sell, and went as far as he could to carry out that intention. But there is this essential difference, that in this case everything done or attempted was done or attempted openly and unmistakeably on behalf of the appellant, in the exercise of his rights, and adversely to Brown.

The case of *In re Agabeg* (1) referred to by the learned Judge who heard this matter, was much pressed upon us in argument on behalf of the respondents. In that case Phear, J., held, upon the evidence before him, that the goods then in question were in the order and disposition of the insolvent. Questions of order and disposition are questions of fact; and the decisions in any two cases upon such questions cannot be said to be in conflict in the same strict sense as if they turned upon pure points of law. But having regard to the more recent decisions in England already referred to, we think it very doubtful whether that case could now be decided as it was decided. We find it difficult to see what the true owners in that case could have done to assert their title more than they did do.

It was contended, however, on the part of the respondents that the conversation already referred to, of which the appellant himself gave evidence, showed a fresh consent on the part of the appellant to the goods being in the possession of Brown as

(1) 2 Ind. Jur. N. S., 340.

1886

IN THE MATTER OF R. BROWN.

reputed owner, and so re-established the state of things existing before the 1st August. But as has been pointed out*, it is by no means clear whether that conversation took place before or after the 1st August. It lay upon those who now rely upon it to fix its date, and they have made no attempt to do so. And supposing the conversation to have taken place after the 1st August we do not think, on the evidence as it stands, it had the effect attributed to it. The appellant had on the 1st August attempted to assert his right. He was not bound to do more in order to protect his title; he was not bound to make a second attempt by force, at the risk of a breach of the peace; he was not bound to bring a suit. The only other thing he could have done was to try to sell the furniture without catalogue or lotting, a matter probably impossible. If in this state of things Brown asked him to give him four or five days, which seems to mean to do nothing for four or five days, promising, if the money were not paid within that time, to go to Mackenzie, Lyall's and facilitate the sale, and if he assented, we do not think that necessarily amounted to a fresh consent to the goods being in the possession, order or disposition of the bankrupt. And it lay upon those who assert that the conversation had such an effect to make it clear.

We think therefore that the furniture in question was not in the possession, order or disposition of Brown as reputed owner with the consent of the appellant on the 6th August when the insolvency petition was filed.

Assuming, however, that the view we have expressed is incorrect, and that the goods were, after the 1st August, still in the order and disposition of Brown within the meaning of the section, so far as any action of the appellant affects the matter, it was argued that the seizure of them under Mrs. Vardon's execution took them out of that order and disposition, and that the appellant is entitled to the benefit of that circumstance; and we think it

* In setting out the facts and alluding to the transactions given in the evidence of the mortgagor, the learned Judge expressed his opinion "that the evidence left it very obscure when it was that Brown asked for four or five days further time; no attempt being made in cross examination to clear up the difficulty, and no witness being called on the subject by Brown."

difficult to resist this contention. The duty and liability of the officer executing a decree against moveable property in the possession of the judgment-debtor are defined by s. 269 of the Civil Procedure Code. "The attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof." The bailiff of the Small Cause Court, in executing Mrs. Vardon's decree, appears to have followed this provision. It is difficult to see any distinction between the position of goods so attached and that of goods seized by the sheriff under an English writ of *fieri facias*. There is some difficulty in reconciling the English decisions upon the question, whether the seizure of goods in the possession of the debtor, but of which another is the true owner, terminates the reputed ownership. The authorities in favour of the affirmative view are *Fletcher* v. *Manning* (1) and the judgment of Turner, L.J., in *Ex parte Foss* (2).

Those in favour of the other view are *Barrow* v. *Bell* (3), and *Ex parte Edey* (4). But the only ground suggested in any of those cases for saying that an actual seizure by the sheriff does not put an end to the reputed ownership is that the sheriff is in such a case a mere wrong-doer; his only authority being to seize the seizable goods of the judgment-debtor, and goods under mortgage, in which his interest is only equitable, not being liable to seizure under a *fieri facias*. In this country there is no distinction between legal and equitable titles for the purpose of execution, and the officer executing process by seizure is not a mere wrong-doer in a case like the present. The considerations therefore upon which it has been thought in England that seizure by the sheriff does not take goods out of the order and disposition of the judgment-debtor, do not seem to apply in this country. Upon this point, however, it is not necessary to give any actual decision.

In our opinion the appellant's claim has been established. He is entitled to have the sale proceeds applied towards satisfaction of his debt, and to rank as a creditor for the balance.

(1) 12 M. & W., 571.
(2) 2 De G. & J., 230.
(3) 5 Ell. & Bl., 540.
(4) L. R., 19 Eq., 264.

1886

IN THE MATTER OF R. BROWN.

Mrs. Vardon, who is the appellant's real opponent, must pay her costs in both Courts. The costs of the Official Assignee will come out of the estate.

Appeal allowed.

Attorney for the appellant: Messrs. *Ghose & Ghose.*

Attorney for the Official Assignee: Messrs. *Dignam & Robinson.*

Attorney for Mrs. Vardon: Messrs. *Swinhoe & Chundra.*

T. A. P.

APPEAL FROM ORIGINAL CIVIL.

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

1886
March 19.

THE ORIENTAL BANK CORPORATION (PLAINTIFFS) *v.* J. A. CHARRIOL AND OTHERS (DEFENDANTS.)*

Limitation—Civil Procedure Code (Act XIV of 1882), *ss.* 32, 363, 364—*Adding defendant.*

No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit.

THIS was an appeal against an order made by Mr. Justice Pigot, directing upon the petition of the Banque de la Reunion that that Bank should be added as a defendant to the suit.

The suit was brought by the plaintiff Bank on the 18th January 1882. The original defendants were the members of a Calcutta firm, Robert and Charriol; the Official Assignee as assignee of the estate of two members of that firm who were insolvent; Lucian Lebeaud of Paris, described as trading in Paris under the name of Lebeaud, and at St. Denis in Reunion under the style of Lebeaud *père et fils*, and also trading in rice at Calcutta and Chittagong in partnership with Robert and Charriol, and L. de St. Hilaire of Chittagong.

The nature of the case made in the plaint was as follows: That a joint venture had been undertaken by Lebeaud, under both his firms, and Robert and Charriol, under which a cargo of rice was to be shipped by the ship "National," on joint account from Chittagong to Reunion, and there consigned to Lebeaud *père et fils* for sale; that, to provide funds for this venture, an arrangement was entered into between Lebeaud on behalf of all those interested in the venture, and the plaintiff

* Appeal No. 1 of 1886 against the order of Mr. Justice Pigot, dated the 25th January 1886, made in suit No. 29 of 1882.