

Before Sir Richard Garth, Knight, Chief Justice and Mr. Justice Beverley.
 SITANATH DASS (PLAINTIFF) v. MOHESH CHUNDER CHUCKERBATI
 AND ANOTHER (DEFENDANTS). *

1886
 March 5.

Evidence Act (1 of 1872), s. 33—Representatives in interest.

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.

In this suit brought on the 6th January 1883 the plaintiff sued to recover a certain property on the strength of his title as auction-purchaser at an execution sale held on the 13th June 1881 of the rights of one Gobind Chunder Bhattacharjea and his sons Koylash and Eshan. The defence was that the property never belonged to Gobind or his sons, but that it formerly belonged to one Sumbhu Nath Sarma, from whom defendant No. 2 purchased it in September 1871.

It appeared that in 1875, eight years prior to this suit, defendant No. 2 sued to eject Eshan, who was then in occupation of the property, although holding it by sufferance under his father Gobind. That suit was dismissed, on the ground that Gobind, who was the person really interested in the property, had not been made a party.

Gobind, however, gave evidence in that suit, and a deed, dated 1830, under which he claimed the property, was put in evidence. Subsequently to this suit of 1875 Eshan left the neighbourhood, leaving a tenant in possession of the property, who was dispossessed in 1880 by the defendant No. 2 putting defendant No. 1 in possession as his tenant. At a date subsequent to this, Gobind died.

In the present case the Munsiff, making use of Gobind's deposition and the deed under which he claimed, found that the plaintiff had taken a good title; that the title of Sumbhu, if any, to the land in dispute had become extinct by more than 12 years'

* Appeal from Appellate Decree No. 2007 of 1884 against the decree of Baboo Mati Lall Sircar, Second Subordinate Judge of Dacca, dated the 11th of September 1884, reversing the decree of Baboo Revati Charan Banerji, Munsiff of that District, dated the 24th of August 1883.

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adverse possession ; that Sumbhu, if he had a title, had never taken possession of the property ; and that the defendant No. 2 had never successfully established his possession under Sumbhu, until he leased the land to the defendant No. 1, and placed him in possession ; he therefore gave the plaintiff a decree.

On appeal the Subordinate Judge held that neither the deposition of Gobind in the suit of 1875, or the deed under which he claimed, were admissible in evidence in the case ; that the plaintiff had failed to make out a good title ; and that for certain reasons (which are immaterial for the purposes of this report) the title of defendant No. 2 under Sumbhu to the property was made out ; he therefore reversed the decree of the lower Court.

The plaintiff appealed to the High Court, contending that the lower Appellate Court was wrong in rejecting the deposition of Gobind and the deed under which he claimed.

Baboo Upendra Nath Mitter for the appellant.

Baboo Baikant Nath Das for the respondents.

The judgment of the Court (GARTH, C.J., and BEVERLEY, J.) after stating the facts, continued as follows :—

Gobind being dead, his evidence in the former suit would be admissible in this suit under s. 33 of the Evidence Act, provided (1) that the former suit was between the same parties or their representatives in interest ; (2) that the adverse party in the former suit had the right and opportunity to cross-examine ; (3) that the questions in issue were substantially the same in both suits.

We think that the first of these conditions was not sufficiently fulfilled. The Subordinate Judge says that the deposition is not admissible, because Gobind was not a party to the former suit. What the Subordinate Judge means to say is probably this : Gobind's son, Eshan, whose interest, as well as that of Gobind, has been purchased by the plaintiff in the present suit, was the ostensible party on the record in the former suit ; but the finding of the Court was that he had at that time no interest in the subject-matter of the suit, the real party interested being Gobind. Gobind, therefore, and not Eshan, was the representative in

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.)*

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.

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February 24.

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.