

previously. It therefore leaves the Married Woman's Property Act of 1874 and the decisions upon it untouched.

Attorney for the defendant: Mr. *Hechle*.

T. A. P.

1886

HIPPOLITE

v.

STUART.

## APPELLATE CIVIL.

*Before Mr. Justice Field and Mr. Justice Macpherson.*

MATHURA NATH KUNDU, ON HIS DEATH HIS SONS DEBENDRA NATH KUNDU AND OTHERS (PLAINTIFFS) v. O. STEEL AND OTHERS (DEFENDANTS).<sup>6</sup>

1886

February 8.

*Bengal Act VIII of 1869, s. 27—Limitation Act (XV of 1877), Sch. II, Art. 69—Suit for money paid in excess of Road Cess.*

In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess: *Held* (reversing the decisions of the Courts below) that the suit was governed not by the special law of limitation contained in s. 27, Bengal Act VIII of 1869, but by Art. 96, Sch. II of the Limitation Act XV of 1877.

THE principal defendants in this suit were the talukdars of the mehal Dhubail, and the plaintiffs were holders of small taluks within the mehal, of which the road and public works cesses were payable to the talukdars of the mehal. The suit was brought on the allegation that these defendants had fraudulently realized from them road and public works cesses from 1280 to 1286 (1873—1879) in excess of what was rightly due, through the principal defendant's authorized agent, the second defendant, by whom the cesses were collected. Some of these cesses were realized by decrees, and some under private receipts. \* The suit was instituted on 11th July 1882 for the excess payments, amounting to Rs. 614-7 annas. The only defence material to this report was that the suit was barred by the one year's period of limitation provided in s. 27, Bengal Act VIII of 1869. Both the lower Courts dismissed the suit on this ground.

\* Appeal from Appellate Decree No. 166 of 1885, against the decree of Baboo Nuffer Chandra Bhutto, Subordinate Judge of Nuddea, dated the 10th of November 1884, affirming the decree of Baboo Bepin Behari Sen, Second Munsiff of Khooshtea, dated 28th of December 1882.

1889

MATHURA  
NATH  
KUNDU  
v.  
DEBENDRA  
NATH  
KUNDU.

Baboo *Nilmadhab Bose* for the appellants.

Baboo *Kali Charan Banerji* for the respondents.

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

FIELD, J.—This was a suit to recover a sum of money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess and public works cess. The Courts below have held that the suit is barred by the one year's rule of limitation contained in s. 27 of the old Rent Act, Bengal Act VIII of 1869. We think that in taking this view they have fallen into error. The Cess Act declares that sums due as cess shall be recoverable as rent, but there is no provision that sums over-paid as cess shall be recoverable as an excessive demand of rent, nor is there any provision, express or implied, which applies to such a suit the special law of limitation contained in the Rent Act. We think that the rule of limitation applicable in the present case is that contained in Art. 96 of the second schedule of the Limitation Act.

In this view the case must go back for trial upon the merits.

We may observe that those sums, which are said to have been recovered under decrees, cannot be obtained back in the present suit. The proper course is to apply for a review of the decrees under which those sums were recovered, that is, if the plaintiffs are so advised, and if they are within time.

As to the other sums which were paid out of Court, the plaintiffs' case is that they were paid under a mistake. It may be quite possible that they may have been voluntarily paid; but the fact of their having been voluntarily paid will not the less entitle the plaintiffs to recover, if they succeed in showing that they paid them under a *bonâ fide* mistake as to the amount which the defendants were entitled to recover from them.

We set aside the decree of the lower Appellate Court and remand the case to that Court for trial upon the merits.

Costs will abide the result.

J. V. W.

*Appeal allowed and case remanded.*