1902 MAY 1. FULL BENCH. 29 C. 610.

The ruling in *Bheka Singh* v. *Nakchhed Singh* (1) seems at first sight to support the decision in *Hara Kumar Nath* v. *Sheikh Nasaruddin* (2), for the head-note says the two-years' rule of limitation applies to a suit brought against a tenant with whom the land was settled by the landlord. But this head-note is misleading. The plaintiff in that suit was found to have been dispossessed by the acts of the servants of the landlord, who in that case was the Secretary of State. The ruling in the case of *Hara Kumar Nath* v. *Sheikh Nasaruddin* (2) therefore stands alone.

As we cannot agree with it, we must refer this case to a Full Bench, which we accordingly do.

The questions we would propound for the decision of the Full Bench are as follows:—

(1) When an occupancy raiyat is dispossessed and the landlord has had no hand in the ouster, what is the period of limitation applicable. Is it twelve years or two years under Article 3, Schedule III of the Bengal Tenancy Act?

(2) Has the case of *Hara Kumar Nath* v. *Sheikh Nasaruddin* (2) been rightly decided?

Babu *Hara Prasad Chatterjee* and Babu *Krishna Prasad Sarvadhicary* (for Babu *Satish Chunder Ghose*) for the appellant.

Babu *Harendra Narayan Mitter* for the respondent.

MACLEAN, C. J. The question referred is. When an occupancy raiyat is dispossessed and the landlord has had no hand in the ouster, what is the period of limitation applicable? Is it twelve **[614]** years or two years under Article 3, Schedule III of the Bengal Tenancy Act? In my opinion the period of twelve years applies, in the state of circumstances mentioned in the question. And if the case of *Hara Kumar Nath* v. *Sheikh Nasaruddin* (2) decides the contrary, in my opinion, with all deference to the learned Judges who take the opposite view, that case was not rightly decided. I notice in that case that the learned Judges say: "And we must take it that the original ouster was, if not in substance, in reality done with the assent of the landlord." That was the finding.

As regards any other points in the present case, the case must go back for their decision to the Divison Bench which submitted it to us, with this expression of opinion upon the point actually referred.

The appellant must pay the costs of this hearing.

PRINSEP, J. I am of the same opinion.

GHOSE, J. I am of the same opinion.

HILL, J. I am of the same opinion.

HENDERSON, J. I am of the same opinion.

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CIVIL RULE.

Before Mr. Justice Stevens and Mr. Justice Harington.

FUZLUR RAHMAN *v.* KRISHNA PRASAD.* [22nd May, 1902.]

Specific Relief Act (I of 1877) s. 9.—Hât—Suit to recover possession of a hât—Delivery of possession—Incorporeal right—Illegal dispossession.

* Civil Rule No. 2585 of 1901 against the order passed by Babu K. C. Mukerjee, Munsiff of Purulia, dated the 27th July 1901.

(1) (1896) I. L. R. 24 Cal. 40. (2) (1900) 4 C. W. N. 665.

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A *hât*, the possession of which is held by collecting tolls or rents, is not an "immoveable property" within the meaning of s. 9 of the Specific Relief Act; and a suit to recover its possession is not therefore maintainable under that section.

***Fadu Jhala* v. *Gour Mohun Jhala* (1) relied upon.**

THIS was a rule obtained by Fuzlur Rahman, the plaintiff, calling upon the defendants, Krishna Prasad and others, to show [615] cause why the judgment and decree, dated 27th July 1901, passed by the Munsiff of Purulia under s. 9 of the Specific Relief Act, dismissing the petitioner's suit to recover possession of a *hât* from which he was alleged to have been illegally dispossessed, should not be set aside.

The petitioner, Fazlur Rahman, obtained a *dur-ijara* settlement of a certain *hât* from one Mr. Mathewson for a term of years, and held possession of it by collecting tolls, rents, and the like. He brought an action in the Court of the Munsiff of Purulia to recover possession of the said *hât*, under s. 9 of the Specific Relief Act, alleging that the defendants had by wrongful show of force collected the rents and dues from the persons, who frequented the *hât* to sell their goods, and thus illegally dispossessed him therefrom. The boundaries of the *hât* were specified in the plaint.

The Munsiff, on the authority of *Fadu Jhala* v. *Gour Mohun Jhala* (1), held that a *hât* was not a specific immoveable property within the meaning of s. 9 of the Specific Relief Act, the plaintiff having only an incorporeal right to collect tolls or dues from the persons who came to sell their goods at the *hât*, and he accordingly dismissed the plaintiff's suit. Against that judgment the plaintiff obtained this rule, which came on for hearing on 22nd May 1902.

Babu *Jogesh Chunder Roy* for the petitioner. The Court below is wrong in holding that a *hât* is not a specific immoveable property within the meaning of s. 9 of the Specific Relief Act. A suit for possession of a *hât*, the boundaries of which have been specified in the plaint, is really a suit for possession of the land on which the *hât* is held, and consequently it would come under the purview of s. 9 of that Act. The Full Bench case of *Fadu Jhala* v. *Gour Mohun Jhala* (1), upon which the Munsiff has relied, is distinguishable from the present one. That case was brought for possession of an incorporeal right, namely, to fish in a *khal*, and the present one is necessarily for the land upon which the *hât* is held.

In *Surendra Narain Singh* v. *Bhai Lal Thakur* (2), it has been held that a *hât* is a benefit arising out of land; and it [616] therefore comes within the definition of 'immoveable property' as given in s. 2, cl. 5 of the General Clauses Act (I of 1868).

Babu *Joy Gopal Ghosh* for the opposite party. Mere discontinuance of payment of rent is not such dispossession from immoveable property as is contemplated by s. 9 of the Specific Relief Act: see *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty* (3), which was referred to in *Fadu Jhala* v. *Gour Mohun Jhala* (1), and in *Dhunput Singh* v. *Mahomed Kazim Ispahain* (4). With reference to the question whether a *hât* is a specific immoveable property, I rely on the Full Bench case of *Fadu Jhala* v. *Gour Mohun Jhala* (1); a mere right to hold a *hât* on a piece of land belonging to another person is not specific immoveable property the possession of which can be delivered as contemplated by the Act. A *hât*

(1) (1892) I. L. R. 19 Cal. 544.
(2) (1895) I. L. R. 22 Cal. 752.
(3) (1887) I. L. R. 14 Cal. 649.
(4) (1896) I. L. R. 24 Cal. 296, 304.

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may be a benefit arising out of land, but such a benefit is not specific immoveable property: see *Surendro Prosad Bhattacharji* v. *Kedar Nath Bhattacharji* (1).

Babu *Jogesh Chunder Roy* in reply. *Hât* comes within the definition of 'immoveable property' as given in the General Clauses Act. [Stevens J. But how is possession of a *hât* to be delivered?] The possession may be given by proclamation.

A right to collect rents is held to be tangible immoveable property: see *Sarbananda Basu* v. *Pran Sankar Roy Chowdhuri* (2). By the settlement of the *hât* an interest in the land on which it is held has certainly been created by the landlord in my favour. A *hât* is therefore an immoveable property within the meaning of s. 9 of the Specific Relief Act.

STEVENS AND HARINGTON JJ. The petitioner sued under s. 9 of the Specific Relief Act for obtaining possession of a *hât* from which, he alleged, he had been illegally dispossessed by the opposite party. He sets forth in his plaint that he held possession in right of a *dur-ijara* for a term of years of a certain *hât* within boundaries specified at foot of the plaint and that the possession which he had held was by collecting tolls, rents, and the like. He alleged that on a certain day the defendant **[617]** had by wrongful show of force realised the tolls from the *hât* in question in spite of his remonstrances and so illegally dispossessed him, and he prayed that under the provisions of s. 9 of the Specific Relief Act possession of the *hât* might be given to him as before.

The Munsiff held, on the authority of the Full Bench case of *Fadu Jhala* v. *Gour Mohun Jhala* (3), that, inasmuch as the *hât* appears on the face of the plaint to be an incorporeal right to collect tolls from persons frequenting the *hât* to sell goods, the suit was not entertainable under s. 9 of the Specific Relief Act.

The present rule was granted to show cause why the judgment of the Munsiff should not be set aside and such other orders made as to this Court might seem fit.

It has been sought by the learned pleader who appears in support of the rule to distinguish the present case from that upon which the learned Munsiff has relied. It has been pointed out that in the Full Bench case (3), the question related to a suit for the possession of a right to fish in a *khal*, the soil of which did not belong to the plaintiff, whereas the present case relates to a *hât* within certain specified boundaries.

We think that the learned Munsiff was correct in the view which he took of the case. In considering how far the present case is affected by the decision of the Full Bench (3) we have to look, not merely to the precise circumstances of that case, but also to the ground of the decision. We cite the following passage from the judgment of the learned Chief Justice at p. 547:—"It is, I think, apparent from the section itself, read as a whole, that the immoveable property intended to be dealt with by it is something of which actual physical possession can be given and taken: in other words, some piece of land or something permanently attached to the land, and that the words as they appear in the section cannot include incorporeal right, which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it." This was the view of the learned Judges of the Court, who with

(1) (1891) I. L. R. 19 Cal. 8.
(2) (1888) I. L. R. 15 Cal. 527.
(3) (1892) I. L. R. 19 Cal. 544.

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[618] the learned Chief Justice comprised the majority of the Full Bench. We will cite further the following passage from the conclusion of the judgment delivered by Ghosh J.—" I am inclined to think that cl. (*a*) in s. 5 is the only clause which provides for the specific relief contemplated by s. 9 of the Act, viz., by taking possession of certain property and delivering it to a claimant."

We think that on the face of the plaint it would be impossible to deliver possession of the *hât* in question to the plaintiff in such a way, and that upon the principles laid down in the judgments of the majority of the Full Bench as to the application of s. 9 of the Specific Relief Act, the present case cannot be brought within that clause. It seems to us that it is nothing to the point that the *hât* was stated in the plaint to be within certain specified boundaries. The question is as to the mode of possession. According to the plaint possession was exercised by the collection of tolls and rent and the like. That appears to us to be, in the words of the learned Chief Justice at p. 547, " an incorporeal right which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it." If the plaintiff is entitled to receive the tolls, rents, and the like from the tenants and persons frequenting the *hât*, he has not been dispossessed of the *hât* merely by the action of the defendants in causing such rents and tolls to be given to them by those persons instead of to the plaintiff. If those tolls, rents, and dues are really payable to the plaintiff, it would be no answer to any claim made by him against the persons liable to pay them that they had paid them to the defendants.

There has certainly been no dispossession which could be remedied in the manner provided by cl. (*a*) of s. 5 of the Specific Relief Act.

The rule is discharged with costs.

Rule discharged.

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29 C. 619.

[619] MATRIMONIAL JURISDICTION.

Before Mr. Justice Stephen.

GEORGUCOPULAS *v.* GEORGUCOPULAS.* [29th April, 1902.]

Husband and wife—Wife's costs, application for—Divorce Act (IV of 1869), s. 7—Foreign domicile—Property of wife.

On an application by the wife for her costs during the pendency of her suit for judicial separation and her husband's suit for divorce:

Held, that a wife, whose property is retained by her husband, is entitled to her costs. That, inasmuch as the parties are domiciled abroad and the law of that country is not before the Court, s. 7 of the Divorce Act applies, and the Court will act on the general principles of English law.

Mayhew v. *Mayhew* (1) followed.

THIS was an application made on behalf of the Petitioner, Angelique Georgucopulas, for an order that the Respondent; John George Georgucopulas, should pay into Court such sum of money as in the opinion of the Court would be sufficient to cover the costs already incurred and to be incurred by her in prosecuting and defending two pending suits, or give sufficient security to the satisfaction of the Registrar of the High

* Suits Nos. 12 of 1900 and 13 of 1900.

(1) (1895) I. L. R. 19 Bom. 293.