1904 MARCH 16. FULL BENCH. 31 C. 643=8 C. W. N. 496.

was not between the plaintiff and the defendants, but between defendant No. 1 and defendant No. 2.

[646] As regards the second question it is too general for an answer. We confine ourselves to saying that, in a suit such as is the present, an appellate Court, when a decree has been given against one defendant only, can alter the decree so as to render liable another defendant, against whom the plaintiff has preferred no appeal.

The consequence is that the appeal must be dismissed with two separate sets of costs payable to the two separate sets of respondents, including the costs of the reference.

PRINSEP, J. I agree.

GHOSE, J. I agree.

HARINGTON, J. I agree.

BRETT, J. I agree.

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31. C. 647 (=8. C. W. N. 446.)

[647] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Harrington and Mr. Justice Brett.

TAMIZUDDIN *v.* ASHRUB ALI.*

[29th March, 1904.]

Suit—Possession—Non-occupany raiyat—Specific Relief Act (1 *of* 1877) s 9—*Limitation Act* (*XV of* 1877), *art.* 120 *and art.* 142.

Held by the Full Bench (Prinsep, J. dissenting)—

The period of limitation applicable to the case of a non-occupancy raiyat, who has been dispossessed from his holding, otherwise than in execution of a decree, is either six or twelve years as provided for in art. 120 or art. 142 of the Limitation Act (XV of 1877).

The remedy indicated in s. 9 of the Specific Relief Act (I of 1877) is not the only remedy which the Legislature has provided for a non-occupancy raiyat, who has been dispossessed otherwise than in due course of law.

Bhagabati Charan Roy v. *Luton Mondal* (1) overruled.

[Ref. 7. C. L. J. 72=12 C. W. N. 899.]

REFERENCE to the Ful Bench by Rampini and Handley, JJ.

The Order of Reference was in the following terms:—

"The plaintiff's bring the suit out of which the Second Appeal arises to recover possession of certain plots of land, from which they allege they have been dispossessed by the defendants. They claim to have a right to the land under a *kabuliat* executed by them in favour of the 5 annas 17½ gundas co-sharer landlords, in which the remaining 4 annas 2½ gundas co-sharers acquiesced about a month after its execution. They aver that they had possession of the land under this *kabuliat*, until dispossessed by the defendants in Bysack 1305, or April 1898. The defendants traverse the plaintiffs' allegations, and allege that they are in possession of the land under a settlement with the landlords.

"The Munsif found in favour of the plaintiffs, and held the defendants to be trespassers.

"The defendants appealed and the Subordinate Judge remanded the case under section 566 for the recording of the evidence of certain witnesses, whom the Munsif had neglected to examine. The Munsif, before whom the case came on remand, found the plaintiffs' *kabuliat* to be genuine, but came to the conclusion that the 4 annas 2½ gundas co-sharers had never agreed to it. The Subordinate Judge, when

* Reference to Full Bench in Appeal from Appellate Decree No. 851 of 1900.

(1) (1902) 7 C. W. N. 218.

1904 MARCH 29.

FULL BENCH.

31 C. 647=8 C. W. N. 446.

the case [648] again came before him, found the plaintiffs' *pottah* to be genuine, but held that as it was for a period of six years from 1290-1304, its term had expired, and so the plaintiffs' title, if any, had come to an end. He observed that the plaintiff, if wrongfully dispossessed, might have sued within six months under section 9 of the specific Relief Act, but as they did not do so (having instituted this suit only on the 5th December 1898) they could only succeed on proof of title, and, as in his opinion they had no title he dismissed the suit. In coming to this conclusion he relied on the ruling of this Court in *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (1) and *Nisa Chand Gaita* v. *Kanchi Ram Bagani* (2)

"The plaintiffs now appeal. On their behalf it had been urged (1) that the rulings on which the Subordinate Judge relies relate to persons claiming to be owners of land, and not to tenants, to which class the plaintiffs belong, and (2) that even if the terms of the lease executed in their favour has expired, they are non-occupancy *raiyats*, whose tenancy has not been determined in any of the ways prescribed by Chapter VI of the Bengal Tenancy Act, and that they have therefore a right to hold over until their landlords put an end to the right as tenants, and that being so, they have a right to recover possession, unless the defendants show that they have a better title to the land, a question which the Subordinate Judge had not considered or decided.

"We think these contentions are well founded. The rulings cited by the Subordinate Judge do not relate to tenants, and even if they do, the plaintiffs, being non-occupancy *raiyats*, who have apparently been allowed by their landlords to hold over after the expiry of the term for which the land was leased to them have a good title to the land, entitling them to recover possession of it against any one, who is not shown to have a better tittle than they.

" The respondents' pleader, however, urges, (1) that the suit is barred by limitation, and (2) that in any case the case must go back to the Subordinate Judge that he may decide whether the 4 annas 2½ gundas co-sharers ever acquiesced in or consented to the lease executed in favour of the plaintiffs by the 5 annas 17½ gundas co-sharers.

"In support of the plea that the suit is barred by limitation the pleader for the respondent quotes the case of *Bhagabati Charan Roy* v. *Luton Mondal* (3), in which it has been held that when a non-occupancy *raiyat* sues for possession, the period of limitation applicable is six months under Article 3 of the 2nd Schedule of the Limitation Act. The learned Judges who decided that case refer in their judgment to the case of *Ramdhan Bhadra* v. *Ram Kumar De* (4), in which Norris and Ghose, JJ. expressed an opinion that the period of limitation in such a case as the present was 12 years, but they object.

(1) that this expression of opinion is a mere *obiter dictum*, and

(2) that it is not a correct view of the law.

" There can be no doubt that, if the case of *Bhagabati Charan Roy* v. *Luton Mondal* has been rightly decided, this suit is barred by limitation, and that the Subordinate Judge's decree dismissing it should be affirmed. [649] But it would appear to us that this case has not been rightly decided, and that the period of limitation applicable to a case such as this is not six months, but either six years under Article 120 or 12 years under Article 142, Schedule II, Act XV of 1877. The learned Judges who decided the case of *Bhagabati Charan Roy* v. *Luton Mondal* seem to have held that a non-occupancy *raiyat* when ejected from his holding otherwise than in execution of a decree must sue under Article 9 of the Specific Relief Act and cannot take advantage of any other article of the 2nd Schedule of the Limitation Act. We think this is not the case. We consider that a non-occupancy *raiyat* ejected otherwise than in execution of a decree, if, as in this case, his tenancy has not been legally determined, has a title in him (*viz.*, the title of a tenant, who is allowed to hold over), which entitles him to bring a suit to recover possession otherwise than under the provisions of section 9 of the Specific Relief Act, and that accordingly he can bring his suit either within 6 years or 12 years as provided for in Articles 120 and 142 of the 2nd Schedule to the Limitation Act.

We have noted that in the case of *Bhagabati Charan Roy* v. *Luton Mondal* the plaintiff had been ejected by his landlord, while in this case the plaintiffs allege that they have been ejected by third persons. But we do not think that this fact distinguishes the present case from that of *Bhagabati Charan Roy* v. *Luton Mondal*(3) because in a case of ejectment of a non-occupancy *raiyat* it seems to make no difference, who dispossesses him, and (2) because the learned Judges who decided

(1) (1889) I. L. R. 17 Cal. 256.
(2) (1899) I. L. R. 26 Cal. 579.
(3) (1902) 7 C. W. N. 218.
(4) (1890) I. L. R. 17 Cal. 926.

1904 MARCH 29.

FULL BENCH.

31 C. 647=8 C. W. N. 446.

that case seem to have intended to lay it down as a general principle that section 9 of the Specific Relief Act and Article 3 of the 2nd Schedule of the Limitation Act apply to all non-occupancy *raiyats* who have been ejected otherwise than in execution of a decree, by whomsoever they may have been dispossessed.

"As for these reasons we do not consider that we ought to follow the ruling in the case of *Bhagabati Charan Roy* v. *Luton Mondal*, we are constrained to refer this case to a Full Bench, which we accordingly do.

The questions we would propound for their consideration are—

(1) Whether the case of *Bhagabati Charan Roy* v. *Luton Mondal* has been rightly decided.

(2) If not, what is the period of limitation applicable to the case of a non-occupancy *raiyat*, who has been dispossessed from his holding otherwise than in execution of a decree ?"

Maulavi *Sirajul Islam* for the appellant. The scope and object of s. 9 of the Specific Relief Act is—

(1) to prevent people from taking the law into their own hands,

(2) to discourage breach of the peace, and

(3) to give a summary remedy to persons, who are dispossessed otherwise than according to the provisions of the law, but it reserves the right to institute suits founded upon title.

[650] *Wali Ahmad Khan* v. *Ajudhia Kandu* (1), *Ismail Ariff* v. *Mahomad Ghous* (2), *Krishnarav Yash Vant* v. *Vasudev Apaji Ghotikar* (3).

[PRINSEP, J. A non-occupancy raiyat has no title.]

I rely upon the Bengal Tenancy Act, which recognizes that a non-occupancy raiyat has a limited proprietary right—s. 4 and s. 5 of the Bengal Tenancy Act—Non-occupancy raiyats are classed as tenants—Ch. VI and s. 43 and s. 44 of the Act. He has a right to sublet, to transfer according to custom and local usage and to make improvements and his holding is heritable—s. 45, s. 79, s. 85 s. 160 (*e*) and s. 183 of the Act. From these sections it is quite clear he has got some title—S. C. Mitra's Tagore Law Lectures, 1895, p. 345—*Goburdhone Saha* v. *Karuna Bewa* (4). An occupancy raiyat has only two years from the date of dispossession to bring a suit for recovery of possession, and it may be said it would be anomalous, if a non-occupancy raiyat has a longer period. But there are several such anomalies, *e.g.*, a landlord who is the proprietor of the whole sixteen annas share has three years only to execute a decree for rent, but a co-sharer has 12 years.

Babu *Akhay Kumar Banerji* for the respondent. The finding is that the plaintiff's lease was for a term which expired in 1898, and immediately after that my client dispossessed him. There is nothing in the Bengal Tenancy Act to show what the position of a non-occupancy raiyat is after the expiry of the term. He has a right to be in possession during the term of the lease and nothing more. After expiry of the term of the lease, if he wished to contend that the defendant had been in possession wrongfully, and that he was entitled to recover possession on the strength of his previous possession without entering into a question of title at all, he ought to have brought his action within six months, but he did not do so—*Wise* v. *Ameerunnessa Khatoon* (5).

[MACLEAN, C. J. What is the position of your client?]

There is a finding that he is a trespasser; he has no title. The following cases were also cited:—*Janardun Acharjee* v. *Haradhun*

(1) (1891) I. L. R. 13 All. 537, 558.
(2) (1893) I. L. R. 20 Cal. 834.
(3) (1884) I. L. R. 8 Bom. 371.
(4) (1897) I. L. R. 25 Cal. 75.
(5) (1879) L. R. 7 I. A. 73, 80.

1904 MARCH 29.

FULL BENCH.

31 C. 647=8 C. W. N. 446.

[651] *Acharjee* (1), *Ramgati Mandul* v. *Shyama Charan Dutt* (2), *Administrator-General of Bengal* v. *Asraf Ali* (3), *Ertaza Hossein* v. *Bany Mistry* (4), and *Kawa Manji* v. *Khowaz Nussiv* (5).

MACLEAN, C. J. I regret that in this case I am unable to follow the ruling in *Bhagabati Churn Roy* v. *Luton Mondul* (6). I do not think the case is governed by article 3 of the second schedule to the Limitation Act. The suit is one for the establishment of title and recovery of possession: it cannot be regarded as merely a suit for possession under section 9 of the Specific Relief Act. I agree with the referring Judges 'that the plaintiffs being non-occupancy raiyats, who have apparently been allowed by their landlords to hold over after the expiry of the term for which the land was leased to them, have a good title to the land, entitling them to recover possession of it against any one, who is not shown to have a better title than themselves.' Here the defendants are mere trespassers. As I concur in the reasoning and conclusion of the referring Judges, I do not think it necessary to say more. I may also say I have read Mr. Justice Ghose's judgment, in which I also concur. I answer the first question in the negative; the second question in the circumstances of the case becomes unimportant and does not practically arise.

PRINSEP, J. This is a suit brought by a non-occupancy raiyat for possession of land, of which he has been illegally dispossessed by the defendant, who is found to be a trespasser.

The point referred to this Full Bench is what is the limitation for such a suit, and a reference has been made because the referring Judges do not agree with *Bhaghabati Charan Roy* v. *Luton Mandal* (6), in which it was held that such a suit is under section 9 of the Specific Relief Act and must be brought within six months from the alleged illegal dispossession.

A suit under section 9 of the Specific Relief Act is a possessory suit in which no question of title is involved. Possession within the prescribed period and dispossession without the [652] consent of the plaintiff and otherwise than is due course of law are the only issues for determination, and it has consequently been held that where a person seeks to recover possession of property of which he has been illegally dispossessed, on *proof of his title to the property* the suit is governed by the ordinary law of limitation.

The question before us is whether the present suit is one of that description. The suit is brought by a non-occupancy raiyat to recover possession of land "by establishment of title, and the issue before us is whether the plaintiff, a non-occupancy raiyat, has any title to the land beyond his right to be placed in possession on the ground that he has been illegally ejected.

Section 44 of the Bengal Tenancy Act declares that a non-occupancy raiyat shall be liable to ejectment only on certain stated grounds, and under section 45 the landlord can sue to eject him on expiration of his lease only after notice duly served. Section 59 declares that no tenant shall be ejected from his tenure of holding except in execution of a decree. The law thus declares the right of an occupancy raiyat to be maintained in possession. Does this constitute a title in the land?

(1) (1868) 9 W. R. 513.
(2) (1902) 6 C. W. N. 919.
(3) (1900) I. L. R. 28 Cal. 227.
(4) (1882) I. L. R. 9 Cal. 130.
(5) (1879) 5 C. L. R. 278.
(6) (1902) 7 C. W. N. 218.

1904 MARCH 29. FULL BENCH.

31 C. 647=8 C. W. N. 446.

Or is it not rather a right to be maintained in possession, until ejected in due course of law as therein described—Is not a suit to recover possession of land, from which non-occupancy raiyat has been illegally ejected founded simply on his right to be maintained in possession rather than on any title with him in the land. The right to hold possession as against an illegal dispossession is one which is a possessory suit under section 9 of the Specific Relief Act is with any person, who can prove an illegal dispossession. The law protects him against the illegal dispossession quite independently of any title on which he may claim to hold it. He has a right to remain there as against the dispossessor, even though such person may have a superior title. In a possessory suit under section 9 of the Specific Relief Act the question of title to the land in suit cannot be raised. Such a suit is determined simply on the ground of illegal dispossession within the prescribed period of six months. I therefore am of opinion that there is a clear distinction between a suit founded on a right to be restored to possession, because that possession has [653] been illegally disturbed and suit to recover possession illegally disturbed on the ground that there is a title in the plaintiff in the land irrespective of the right which every one, even one who is a trespasser and without any title, has to be maintained in possession against an illegal dispossession.

In my opinion, while a non-occupancy raiyat has a right to be maintained in possession against an illegal dispossession, he has *no title* in the land irrespective of such right and that right is not a title such as would bring his suit outside section 9 of the Specific Relief Act.

What is the title of a non-occupancy raiyat, in a suit brought against his landlord to recover possession by reason of his illegal dispossession? He has a right to be restored to possession because the disturbance may be contrary to the terms of sections 44 and 45 of the Bengal Tenancy Act, which contain the law on the subject. He could not in my opinion bring a suit to recover possession on the strength of his title. In a suit against his landlord the question of illegal ejectment such as could be raised on a suit under section 9 of the Specific Relief Act could alone be raised. He has no title in the land as against his landlord. He has no title to convey to another in his lifetime by his voluntary act or on his death to his heir. His heir may be entitled to the standing crop raised by the deceased, as has been just declared by this Full Bench, but he cannot claim possession of the holding. The title to the land, on which a suit can be brought to recover possession as against a trespasser, is with the landlord. The right to be maintained in possession or to be restored to possession against a trespasser, which may be pleaded in a suit brought by a non-occupancy raiyat depends on his right not to be disturbed—not on any title in him independent of that right. The right not to be disturbed in peaceful possession is even with one, who is a trespasser. In my opinion a non-occupancy raiyat has no higher right and has no title on which he can bring a suit to recover possession, except one based on that right, and such a suit can only be one within section 9 of the Specific Relief Act. These are the considerations which were present to me as one of the Judges in *Bhagabutty Charan Roy* v. *Luton Mondal* (1).

[654] I am confirmed in this opinion by reference to the law of limitation in regard to a suit to recover possession of land brought by an

(1) (1902) 7 C. W. N. 218.

1904 MARCH 29. FULL BENCH. 31 C. 647=8 C. W. N. 446.

occupancy raiyat. Such a suit can be brought only within two years from the date of dispossession, Bengal Tenancy Act, Schedule III (3). Still if such a suit on title by a non-occupancy raiyat is outside section 9 of the Specific Relief Act it can be brought within a much longer period under the ordinary law of limitation. It would therefore be that, while a suit by a raiyat having the statutory right of occupancy can be brought only within two years, a much longer period is allowed for a suit by a non-occupancy raiyat of an inferior class. It has been suggested that this is due to an oversight on the part of the Legislature, and that in specially providing for the case of an occupancy raiyat the Legislature has neglected to deal with suits by a raiyat of an inferior class, and has thus allowed him the benefit of a longer time under the ordinary law of limitation within which he can bring his suit. I cannot accept this view when in my opinion a different and reasonable explanation is forthcoming. It seems to me rather that the Legislature proceeded on the ground stated by me.

In my opinion the case of *Bhagabutty Charan Roy* v. *Luton Mondal* (1) was rightly decided, and the term of limitation applicable to the present suit is six months, the suit being one under section 9 of the Specific Relief Act.

GHOSE, J. The true question involved in this reference is whether the remedy indicated in section 9 of the Specific Relief Act is the only remedy which the Legislature has provided for a non-occupancy raiyat, who has been dispossessed otherwise than in due course of law; for, if not, it is obvious that the limitation of six months provided by that section does not apply, and that the suit is governed by some one or other of the articles in the Indian Limitation Act. The chief argument in support of the proposition that it is the only remedy seems to be that a non-occupancy raiyat has no *right to the land*, but has *only a right to be maintained in possession*, until he is ejected in accordance with the **[655]** provisions of sections 44 to 46 of the Bengal Tenancy Act. I regret I am unable to accept this proposition as correct.

Chapter VI of the Bengal Tenancy Act gives to a non-occupancy raiyat certain rights. After such a raiyat has been admitted to the occupation of the land, his rent cannot be enhanced except by a registered agreement, or an agreement under section 46. He cannot be ejected unless it be on one or other of the grounds mentioned in section 44, and when the ejectment is sought on the ground of expiry of the term of the lease a notice to quit must be served on him at least six months before expiration of the term. The rent of a non-occupancy raiyat cannot arbitrarily be enhanced, and when he refuses to execute an agreement to pay enhanced rent, the Court is bound to determine what may be the fair and equitable rent. And when the Court determines such rent and the raiyat agrees to pay it, he is entitled to remain on the land for a term of five years. These provisions indicate that a non-occupancy raiyat has something more than a bare right to be maintained in possession of the land, until he is ejected in due course of law. He is, I think, entitled to the land as a tenant until he forfeits his rights as such, and he is ejected in accordance with the provisions of sections 44 to 46. Take the case of a non-occupancy raiyat, whose rent has been determined under section 46.

(1) (1902) 7 C. W. N. 218.

1904 MARCH 29.

FULL BENCH.

31 C. 647=8 C. W. N. 446.

He is entitled, upon the rent being so determined, to remain on the land for a term of five years as a tenant at the rent determined. This is certainly something more than a bare right to be maintained in possession. He is entitled to the land as a tenant for five years, and if, on the expiry of the term, he is allowed by the landlord to hold over, he continues to hold as a tenant, until he is ejected by the landlord in accordance with the provisions of the Act.

There is a clear distinction between a possessory action, such as section 9 of the Specific Relief Act contemplates, and an action upon title. And when the tenancy of a non-occupancy raiyat is not put an end to, as the law requires, he remains upon the land as a tenant, and necessarily, if he is illegally ejected, he is entitled to claim possession as a tenant, his title being that of a tenant of the land. His possession is very different from that of a person, who enters into the land as a trespasser, but who, if evicted [656] illegally, is entitled to be put back in possession according to the provisions of section 9 of the Specific Act, though he has no title to the land.

That section lays down only a summary remedy applicable alike to a person, whether he be a trespasser, a tenant or an owner of the land, when he is ejected without due course of law. But is this the only remedy which the legislature has provided for a person, who claims to be a tenant of the land; and who on proof of a subsisting tenancy is entitled to recover possession of the lands? I think not.

I may here refer to the provisions of section 27 of the old Rent Act [Bengal Act VIII of 1869], where the limitation of one year was provided for an action by a tenant, when illegally ejected. And it was held in a series of cases that that section referred to a possessory action against the landlord, and not to a suit where title is set up and possession is asked for in pursuance thereof, and that in such a suit the period of limitation was that provided in the Indian Limitation Act [see *Joyunti Dasi* v. *Mahomed Ally Khan* (1) and *Basurat Ali* v. *Altaf Hosain* (2)].

The summary remedy that was provided for a tenant in section 27 of Bengal Act VIII of 1869 is what is to be found in section 9 of the Specific Relief Act for all classes of persons. In the present case the plaintiff sought to recover on the strength of his title as an occupancy raiyat, and an issue was raised as to that title. The title, however, has been found on investigation not to be that of a non-occupancy raiyat only. But the result of the trial as to the exact character of his right hardly affects the question of limitation.

I have hitherto addressed myself to the question as if the person, who evicted the plaintiff, is the landlord; but here the eviction was by a person, who had no title to the land—a trespasser, as he has been found to be. Conceding that as between a non-occupancy raiyat and the landlord, the former has only a bare possessory right, if illegally ejected, can the same argument apply, if the eviction is caused by a trespasser, the right as between the plaintiff and the trespasser being clearly in the former?

[657] Take the case of a non-occupancy raiyat from year to year. Let us assume that in the month of *Joisth*, when he is holding as a tenant, he is evicted by a trespasser, and he does not bring his suit for recovery of possession until after six months, but before the expiry of the year. Take again the case of a tenant who under a lease is entitled

(1) (1882) I. L. R. 9 Cal. 423. (2) (1887) I. L. R. 14 Cal. 624.

1904 MARCH 29. FULL BENCH. 31 C. 647=8 C. W. N. 446.

to hold the land for five years, and the tenant being dispossessed in the middle of the first year by a trespasser does not bring his suit until after six months. According to the argument of the other side, he cannot recover, though there is still a subsisting tenancy right in him. Would the dismissal of his suit exonerate him from the liability to pay rent to his landlord? I doubt whether he would be so exonerated.

No doubt the fact that the Legislature has not provided in the Bengal Tenancy Act any period of limitation for the case of a non-occupancy raiyat is rather remarkable, and it is anomalous, as pointed out by me in *Ramdhan Bhadra* v. *Ram Kumar Dey* (1) that a longer period of limitation should be applicable to such a case than in the case of an occupancy raiyat. But we cannot guide ourselves by such considerations. We have to administer the law as it is.

For these reasons I agree with my Lord in holding that the first question should be answered in the negative, and, so far as the second question is concerned, the limitation I should say is either six or twelve years as provided in the Indian Limitation Act. In either view this suit is within time.

HARINGTON, J. I have read the judgment, which has been delivered by Mr. Justice Ghose, and I agree in that judgment.

BRETT, J. I also agree in the judgment of Mr. Justice Ghose, and agree that the question referred should be answered in the manner stated by the learned Chief Justice.

MACLEAN, C. J. The result is that the appeal must be allowed and the case must go back to the Subordinate Judge to be tried on the merits.

The appellant is entitled to his costs in this Court, including the costs of this reference.

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31 C. 658.

[658] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Harington.

KRISHNA KAMINI DEBI *v.* DINO MONY CHOWDHURANI.*

[29th March, 1904.]

Transfer of property Act (Act IV of 1882) s. 52—Lispendens—Contentious suit—Suit for partition—Admission of share in plaint—Transfer after filing of plaint—Objection to share in written statement.

A instituted a suit against *B* and other co-sharers, for partition, admitting that *B* had a share in the property. Afterwards *C* purchased the share, which *B* claimed to have held. Some of the defendants, who were co-sharers of the property under partition, then put in written statements in which they denied that *B* had any share.

A preliminary decree was passed by the Court specifying the shares of the several proprietors and declaring that *B* had no share at all. *B* did not enter appearance in these proceedings. After the decree declaring the shares of the proprietors had been passed, *C* applied to be made a party to that suit, but her application was rejected. *B* appealed against the preliminary decree, but his appeal was dismissed.

Upon a suit by *C* for possession of the share purchased by her from *B*, the defence mainly was that the suit was barred by reason of s. 52 of the Transfer of Property Act.

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* Appeal from Appellate Decree Nos. 1654 and 1655 of 1901, against the decree of Dwarkanath Mitter, Additional Judge of Mymensingh, dated the 11th of May 1901 affirming the decree of Rajendra Kumar Bose, Subordinate Judge of that District, dated the 10th September 1900.

(1) (1890) I. L. R. 17 Cal. 926.