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were paid within 15 days after the decree, and the consequence was that the decree for ejectment was not executed, and the defendant continued in possession. The plaintiff instituted this suit on the 4th Paush 1276 (18th December 1869) to recover the rents from 1272—75 (1865—68) inclusive. It was held by the Courts below that the plaintiff's claim for the year 1272 (1865-66), was barred by the law of limitation under s. 32, Act X of 1859; also that the plaintiff was not entitled to ask possession to be given to him by his plaint, unless he put a stamp of adequate value upon it, valuing the suit as one for ejectment. The lower Courts only gave the plaintiff a decree for the arrears of 1273, 1274, and 1275 (1866-67-68).

The plaintiff appealed.

Mr. *Ghose*, for the appellant, contended that the proper construction of s. 32, Act X of 1859, was that the rent for 1272 (1865-66) became due, not at the end of that year, as it would have done if there had not been litigation, but it became due when the tenant satisfied the subsequent decree by payment and prevented ejectment, The tenant virtually renewed his tenancy A suit for 1272 (1865-66) could not be brought while litigation was pending, and while the decree of ejectment was alive, according to the principle laid down in *Rani Swarnamayi* v. *Shashi Mukhi Barmani* (1) and *Ishan Chandra Roy* v. *Khaja Assanulla* (2).

(1) 2 B. L. R., P. C., 10.

(2) *Before Mr. Justice Jackson and Mr. Justice Mookerjee.*

The 16th June 1871.

ISHAN CHANDRA ROY (DEFENDANT) *v.* KHAJA ASSANULLH (PLAINTIFF.)*

Baboos *Kali Mohan Das* and *Rames Chandra Mitter* for the appellant.

The *Advocate-General* (with him Mr. *R. E. Twidale* and Baboo *Chandra Madhab Ghose*) for the respondent.

THE facts are fully stated in the judgment of the Court, which was delivered by

JACKSON, J.—We think that this appeal must be dismissed on all points. It was a suit for arrears of rent for the years 1272 to 1276 (1865—70). The lower Court has decreed the whole of that rent with costs and interest.

The first point which has been taken in appeal is that the rent for the year 1272 (1865-1866) is barred by the law of limitation.

* Regular Appeal, No. 236 of 1870, from a decree of the Subordinate Judge of Tipperah dated the 3rd September 1870.

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The Courts below were wrong as to the additional stamp. It is not required by law; see Rules of the Board of Revenue Chapter XVI, s. 1, and note.

Baboo *Girish Chandra Mookerjee*, for the respondent, contended that the case of *Rani Swarnamayi* v. *Shashi Mukhi Barmani* (1) was not analogous. There a zemindar had sold a patni in his zemindari for arrears of rent:—the sale was afterwards set aside: but, until it was set aside, he could not sue for the rents for which he had already sold the patni. It was held, his cause of action arose when the defendant's restoration to possession took place. To hold the contrary would have been to leave the plaintiff in that case without any remedy at all. But the principle there involved is inapplicable to the present

We think that the Subordinate Judge has given very good reasons for holding that it is not barred, the principle laid down by the Privy Council in the case of *Rani Swarnamayi* v. *Shashi Mukhi Barmani* (*a*) applies very clearly to this case. It was impossible, under the circumstances of the litigation pending between the plaintiff and the defendant, that the plaintiff should have brought this suit against the defendant, as his tenant for rent whilst he was still suing to eject him as a trespasser.

The next point upon which this appeal is preferred to us is as regards the costs in the lower Court. The determination of that question rests upon the tender, which it is stated the defendant made just about the time when this suit was instituted. His allegation is that he tendered the full amount of the money which he considered to be due, before the plaint was written out. The evidence upon the point is very doubtful, even upon the fact which the defendant wishes to prove. But there is against him also the fact that the tender was not made at the proper place, or to any person authorized either under the law or by the plaintiff to receive the money. Such a tender is not sufficient, and the plaintiff is therefore entitled to his costs. It is also to be recollected that this tender was made at the very last moment of three years' arrears of rent.

A cross-appeal is taken on the part of the plaintiff as regards the interest which has been awarded, and also as to the rate of interest. But we think we ought not to interfere on either point. We think the Subordinate Judge was quite right to give no interest previous to the decree as previous to that time the question was still open as to whether any rent should be paid or not.

As regards the rate of interest, this rate is not founded upon the rent law but founded, under Act VIII of 1859, on the total amount due at the date of the decree.

There only remains the question of 831 rupees which was claimed as a set-off, and which I think, as it is admitted, may be deducted from the amount of the decree.

We affirm the decree of the lower Court with this modification that the sum of Rs. 831 be deducted from it.

Each party will bear his own costs of this appeal.

(1) 2 B. L. R., P. C., 10.

(*a*) 2 B. L. R., P. C., 10.

case. The Privy Council in that case did not disturb the Full Bench Ruling in *Jan Ali Chowdhry* v. *Nittyanand Bose* (1) that Act X of 1859 has its own limitations. In this case there was nothing to prevent the plaintiff from suing for rents as they became due year after year. True, he tried to put an end to the defendant's tenancy; but that matter was in litigation for four years, and in the mean time the defendant, being in possession, could not refuse to pay rent; and, if he could not, what excuse had the plaintiff for not suing him?

The judgment of the Court was delivered by

COUCH, C.J.—I think that the decision of the Privy Council in the case which has been quoted, *Rani Swarnamayi* v. *Shashi Mukki Barmani* (2), is clearly applicable to the present case.

The facts of this case are that, at the end of the year 1272 (1865-66) the plaintiff instituted proceedings under cl. 5, s. 23, and s. 78 of Act X of 1859, for the arrears of rent due, and claimed to eject the defendant on account of the non-payment of those arrears. The litigation lasted until the year 1276 (1869-70), and the final result was that the defendant had the power of paying the arrears of rent claimed within 15 days of the final decree; and, if they were paid, then by virtue of s. 78, he would not be ejected. Up to that time, the plaintiff could not tell whether the tenancy would continue or not. If the defendant did not think fit to pay the arrears, he would be ejected as upon a forfeiture of the tenancy. The suit was brought in the year 1272 (1865-66) and, from 1272 to 1276 (1865—70), he would not then be in the position of having been tenant of the property at all. He would be liable for the profits which he might have received during those years, but there would be no tenancy, because, by his own election, he would have treated it as determined in 1271 (1864-65). But he did not do that: he paid the rent, and thereby secured the right of coutinuing as a tenant. By doing that, to use the language of the Lords of the Privy Council, he elected, in fact, to continue

(1) Case No. 1534 of 1867; 19th March 1868. (2) 2 B. L. R., P. C., 10.

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to hold the property as a tenant, and to have his possession treated as a continuance of the possession as a tenant.

The facts of the case before the Judicial Committee differ from the facts of the present case, but the principle equally applies. Instead of there being what their Lordships call a restoration of the property, there was here a continuance of the tenancy, and then it must be considered that the right to the arrears of rent has come within the principle of s. 32, and at the time the obligation to pay the rent must be considered to have arisen. Until that period it was in suspense, but when he determined to continue as tenant, the obligation to pay the rent arose.

The principle of the decision of the Judicial Committee, I think, clearly applies to this case, and it has been applied to a case somewhat similar by two of the Judges of this Court in the case of *Ishan Chandra Roy* v. *Khaja Assanulla* (1).

The decision of both the lower Courts upon this point is wrong, and ought to be reversed. There seems to be also no ground for the way in which the lower Courts decided with regard to the stamp. A decree will issue declaring the plaintiff entitled to eject the defendants if the rent is not paid within 15 days from the date of the decree with costs.

Decree reversed.

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Jany. 10.

Before Mr. Justice Bayley, and Mr. Justice Markby.

AMIRUNNISSA BEGUM (DEFENDANTS) *v.* UMAR KHAN (PLAINTIFF.)*

Title by Length of Possession—Possession for Twelve Years—Unexecuted Decree—Limitation.

I. L. R.
1 Bomb. 288.
1 Bomb. 592.

In 1859, A obtained a decree for possession of land against B, but no proceedings in execution were taken, and B. continued in possession. In 1869, C having purchased the right and interests of A in the decree, forcibly dispossessed B who

* Special Appeal, No. 835 of 1871, from a decree of the Additional Subordinate Judge of Mymensingh, dated the 28th April 1871, reversing a decree of the Moonsiff of that district, dated the 23rd August 1870.

(1) See *ante*, p. 537.