

Before Mr. Justice Jackson and Mr. Justice Mitter.

GUNGA GOBIND SEN (DEFENDANT) v. GOBIND CHUNDER DOSS
AND ANOTHER (PLAINTIFFS).*

Beng. Act VIII of 1869, s. 29—Limitation—Suit for Arrears of Rent—Pro
Formâ Defendants.

1873
March 18.

This was a suit instituted, under the provisions of Beng. Act VIII of 1869, on an *ijara kabuliat* dated 21st Jaishtha 1265 (2nd April 1858), executed by the principal defendant, Gunga Gobind Sen, to recover the sum of Rs. 489-3-10, being the sum due to the plaintiffs in respect of their fourth share of the Zemindari Ramkanic, of which they were co-shares with the defendants, for the year 1271 to 1276 (1864 to 1869). It appeared that the co-sharers jointly borrowed Rs. 5,000 from the appellant on the *ijara* or usufructuary mortgage of their shares for fourteen years at a yearly rental of Rs. 2,292, on condition that the appellant should keep to himself annually Rs. 725 on account of interest of the loan, pay the Government revenue Rs. 1,343-9-7, and give the mortgagors, Rs. 223-6-5 for their subsistence. It was in respect of the last claim that the present suit was brought. The plaintiffs had previously brought their suit in the Revenue Court making their co-sharers who did not join him in the suit *pro formâ* defendants. They instituted the present suit in the Civil Court on 27th February 1871. In the Courts below the defence was raised that a portion of the plaintiffs' claim was barred by the law of limitation, and that they were only entitled to recover for the three years previous to the institution of the suit. The Munsif referred to the case of *Prosonno Coommar Paul Chowdhry v. Mudden Mohun Paul Chowdhry* (1), and gave a decree for the whole amount claimed. On appeal

(1) Before Mr. Justice L. S. Jackson and
Mr. Justice Glover.

The 25th April 1870.

PROSONNO COOMAR PAUL CHOW-
DHRY AND ANOTHER (DEFENDANTS) v.
MUDDEN MOHUN PAUL CHOW-
DHRY AND OTHERS (PLAINTIFFS).†

Baboo Annoda Pershad Banerjee for the
appellants.

Baboos Onoocool Chunder Mookerjee and
Mohiny Mohun Roy for the respondents.

The judgment of the Court was deli-
vered by

JACKSON, J.—It appears to me that it is not necessary to trouble the pleaders who appear for the respondents, because the appellants have made out no good or sufficient cause for impugning the judgment of the Court below.

There were three questions of law raised in this appeal; the first being that the Civil Court had no jurisdiction to entertain this suit, the real object of that suit being to recover from the defendants an arrear of rent, such a suit being, it was contended, cogni-

*Special Appeals, Nos. 423 and 475 of 1872, from the decrees of Subordinate Judge of Tipperah, dated the 7th December 1871, affirming the decrees of the Munsif of that district, dated the 10th April 1871.

† Regular Appeal, No. 256 of 1870, from a decision of the second Subordinate Judge of the 24-Pergunnas, dated the 23rd September 1869.

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by the defendant Gunga Gobind Sen, the Judge held that the provisions of s. 16, cl. 1, Act XIV of 1859, applied to the case, and dismissed the appeal.

The defendant, Gunga Gobind Sen, appealed to the High Court.

Baboo *Doorga Mohan Doss* for the appellant.

Baboo *Bungsheedhur Sen* for the respondents.

Baboo *Doorga Mohan Doss* for the appellant contended that this was a suit for the recovery of money on a breach of a written contract, *viz.*, the *ijera kabuliat*, which could have been registered under the provisions of Act XIX of 1843, and therefore the period of limitation was that provided by cl. 10, s. I, Act XIV of 1859, *viz.*, three years from the time when the breach of contract in respect of which the suit is brought just took place, and that the lower Appellate Court was wrong in holding that there was no provision in Act XIV of 1859 for a suit like this, and in holding that, therefore, cl. 16, s. 1, was applicable. Even if cl. 10, s. 1, does not apply, the plaintiffs' claim is barred for the first three years sued for, as the period of limitation provided by s. 29, Beng. Act VIII of 1869, applies to the case.

Baboo *Bungsheedhur Sen* for the respondents contended that there being no special law of limitation by Act XIV of 1859 applicable to the case, it fell under cl. 16, s. 1 of that Act, and consequently the whole claim should be decreed, Act VIII of 1869 does not apply—*Prosonno Coomar Paul Chowdhry v. Mudden Mohan Paul Chowdhry* (1).

zable in the Revenue Court, and that Court alone. It appears that a suit for that sole object was commenced in the Revenue Court, and by the final judgment of the Full Bench (a) of this Court, it was decided that it was not cognizable by the Court of the Collector upon the ground that there was no actual contract between the plaintiffs and defendants, and that the liability of the defendants would arise out of equitable considerations which the Collector's Court was not competent to determine. The present suit, therefore, is not merely a suit to recover arrears of rent, but to determine the liability of the defendants arising out of matters not within the cognizance of the Revenue Court, so that the arrear of rent may be recovered upon such liability being made out. I think it clear, therefore, that the Civil Court (as indeed, a distinct expression of opinion to that effect was thrown out in the judgment of the Full Bench) had jurisdiction,
Secondly.—It was stated that this claim

was barred by limitation, inasmuch as the suit being for arrears of rent for 1270 and 1271 (1863 and 1864), and being commenced on the 7th of Magh 1275 (19th January 1869), was brought more than three years after the rent became due, and therefore, under s. 32, Act X of 1859, was after time. It appears to me that the period of limitation specified in Act X of 1859 has reference exclusively to suits brought and determined under that Act. This is not a suit tried under Act X of 1859, but under the general jurisdiction of the Civil Court.

But even if the plaintiffs were limited by the period of three years, it appears to me that they are amply within that period, because they are entitled, under s. 14, Act XIV of 1859, to a deduction of the period during which they were *bona fide* prosecuting their claim in the Revenue Court. This is the third point of law which was raised, and I think it must be decided in favor of the respondents.

(1) *Ante*, p. 31.

(a) *Prosonno Coomar Paul Chowdhry v. Koylash Chunder Paul Chowdhry*, Case 239 of 1866; 23rd September 1867.

The judgment of the Court was delivered by

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JACKSON, J.—The plaintiffs in this case sued the defendants, who are *ijaradars* of the property in which they were joint owners or co-sharers, for arrears of rent extending over the period of six years. They first brought their suit in the Revenue Court, and inasmuch, as the co-sharers had not joined them in that suit, they made them co-defendants. It does not appear that the plaintiffs sought any relief against these co-defendants, but by reason of their being parties to the suit, it was held by a Division Bench of this Court that the suit so constituted could not proceed in the Revenue Court. The plaintiffs therefore, have now instituted the suit in the Civil Court. It was brought in February 1871, therefore some time after the Beng. Act. VIII of 1869 came into operation.

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The defendants objected that, under the law of limitation applicable to the case, no more than three years' rent could be recovered, but the Subordinate Judge has held, affirming the decision of the *Munsif*, that cl. 16, s. 1, Act XIV of 1859, applied to the case.

It appears to me that although the co-sharers were made *pro forma* defendants in the case, that does not alter the real character of the suit which is to recover arrears of rent, and that therefore the provisions of s. 29, Beng. Act VIII of 1869, apply to the case. That being so, even allowing plaintiffs the space of nine months and ten days during which their previous suit was pending, it seems that all claim for rent beyond three years is out of time. This case is clearly distinguishable from the case of *Prosonno Coomar Paul Chowdhry v. Mudden Mohan Paul Chowdhry* (1). There it was held that the subject of the plaintiffs' claim was not rent, it being sought to enforce certain liabilities arising out of equities as against parties who were not the ostensible tenants. I think the judgment of the lower Court must be modified on this question. The plaintiffs will get a decree for only three years' rent. Each party will pay his own costs.

Before Mr. Justice Pentifex.

IN THE MATTER OF THE PETITION OF NOLITMOHAN DOSS, AN INSOLVENT.

11 & 12 Vict., c. 21 (*The Indian Insolvent Act*), s. 36.—Practice—
Examination—Counsel.

1873
August 12.

A person from whom property is sought to be taken under s. 36 of 11 & 12 Vict., c. 21 is entitled to be represented by Counsel.

ONE Hurruck Chand Golicha, a creditor of Nolitmohan Doss, an insolvent, on the 5th August 1873, applied for an order directing that an early day might

(1) *Ante*, p. 31.

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be fixed for the attendance and examination of the insolvent, and of Chundermoney Raur, and Shamlall Doss, under s. 36 of the Insolvent Act.

The applicant in his petition stated (*inter alia*) that the insolvent had other moveable property than that which had been set out in his estate-paper, and had not given up possession thereof to the Official Assignee for the benefit of his creditors, but had concealed a portion of the same in his own house, a portion in the house of Chundermoney Raur, of Goopeemohun Bose's lane, and another portion in the house of Shamlall Doss, of Suambhoonauth Doss's lane; that the insolvent had given up a portion of his *khatta* books and books of account, but had not as yet given possession of all of them, although he had been called upon for them by the Official Assignee. An order was made as prayed, and the matter now came on for hearing.

Mr. Allen, on behalf of Hurruck Chand Golicha, objected to Mr. Phillips' appearing for Chundermoney Raur and Shamlall Doss, and in support of his contention referred to *In re Mohendrolall Doss*, 30th July 1870, mentioned in the notes to s. 36 of the Insolvent Act; see Millet & Clarke's *Insolvency in India*, p. 51.

Mr. Phillips submitted that in the case of *In re Mohendrolall Doss*, it did not appear that the person who was to be examined had any interest at stake, whereas in the present case it was alleged that property was in the possession of his clients, and that endeavours were about to be made to take such property from them.

PONTIFEX, J.—The proceedings under s. 36 are peculiar. If in any case other than under the Insolvency Act Mr. Allen's client wanted to recover the property which he alleges is in the possession of the persons whom he has cited as witnesses, he would have to sue them for it as defendants.

I consider that, as a matter of fairness, a person from whom property is sought to be taken under s. 36, is entitled to be represented by Counsel.

Attorney for Hurruck Chand Golicha: Baboo *W. C. Bonnerjee*.

Attorneys for Chundermoney Raur and Shamlal Doss: Messrs. *Trotman & Co.*

Before Mr. Justice Pontifex.

1873
August 5.

IN THE MATTER OF HAMILTON ANSTRUTHER AND ANOTHER,
INSOLVENTS.

Schedule, Verification of, by Affidavit—Absence of Insolvent—11 & 12 Vict., c. 21 (Indian Insolvent Act).

HAMILTON ANSTRUTHER and William Mactavish, the insolvents in this matter, applied to the Court for their personal discharge. A similar application had been made on the 5th April 1873, and on that occasion the trustee, under the

English bankruptcy of one James Hamilton Robinson, appeared, and it was ordered that the further hearing of the matter should stand adjourned until the 5th of August with *ad interim* protection; that the insolvents be at liberty to amend their schedule, and that the substance of the order be published twice in the *London Gazette*, and once in the *Calcutta Gazette*. At this hearing Mr. Anstruther had been examined. It now appeared that, subsequent to this order Mr. Anstruther was obliged to leave India on account of ill health, and was on his way to the south of Italy, consequently he was not in Court to verify the schedule. No opposition had been entered and Mr. Mactavish was present in Court.

Mr. *Woodroffe* and Mr. *W. Jackson* for the insolvents.

Mr. *Woodroffe* contended that there was nothing in the Act which declares that the insolvent must personally attest the truth of the schedule; that in this case one partner was in Court, and that his attestation would be sufficient; but that, if necessary, a commission could issue, and Mr. Anstruther be examined.

Mr. *Remfry*, for the trustee, under the English bankruptcy of J. H. Robinson, asked for his costs.

PONTIFEX, J.—Under the circumstances of this case, there being no opposition, and no one desiring to question Mr. Anstruther, who has already been examined once, and has lately been sent away from India dangerously ill I consider that it will be sufficient that the truth of the schedule should be attested by the other insolvent, Mr. Mactavish, who was the partner of Mr. Anstruther; but perhaps it would be as well to have on the record of the case an affidavit from Mr. Anstruther sworn before a notary public, or a British consul, verifying the schedule. Personal discharge is given upon the understanding that such affidavit, will be filed.

Attorney for the insolvents: Mr. *J. O. Moscs*.

Attorneys for the trustee under the English bankruptcy of Mr. Robinson Messrs. *Rogers* and *Demfry*.

1873
Aug. 18 & 27.

Before Mr. Justice Macpherson.

KISTOKAMINY DOSSEE v. MIRTOONJOY DUTT.

Costs—Hindu Widow—Partition Suit.

In a suit by a childless Hindu widow for partition of her late husband's estate from which she alleged that she had been ejected by the defendant, the reversionary heir, the widow consented to a decree for partition, whereby a moiety of the property was allotted to her for the estate of a Hindu widow, and the parties were ordered to pay their own costs respectively. There was nothing in the decree to show that the defendant had been guilty of any misconduct, or that there was an neces-