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It appears, therefore, to their Lordships, that, in this case, the time must be taken to have begun to run, at all events, from the date of the decree, on the 19th November 1842, and that there is nothing whatever to bring this case within any of the exceptions to the Statute of Limitations; and, consequently, that the decisions of the Zilla Court were right, and that the High Court ought to have dismissed the appeal from that decision, with costs.

It is admitted, that the second appeal, now before their Lordships, raises precisely the same questions as the first. The order, therefore, which their Lordships will humbly recommend Her Majesty to make, will be to reverse the decision of the High Court, and to declare that that Court ought to have dismissed the appeals before them with costs. We think that the costs of both these appeals should follow the result.

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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Deed of Compromise—Service of Idol—Execution of Decree.

Two brothers executed and filed a deed of compromise, dividing between them the family property, and a decree was passed in terms thereof. Under this decree, the elder was to hold possession of certain lands, the rents of which were to go to perform the worship of the family idol. The younger, however, kept the elder out of possession of the lands, who therefore performed the worship at his own charges, and then took out execution for possession and mesne profits, in order to recoup his own expenditure on the family idols. The younger also took out execution, and objected that his brother had not performed his trust as family shevait, so that he had been compelled to perform ceremonies at his own expense. His objection was overruled. The elder brother having died without executing his decree, his widow applied to execute it for the amount of the mesne profits due under it.

Held, on the appeal of the younger in his own case, that the non-performance of ceremonies by his brother gave him no ground of complaint, unless he could show that such failure was not caused by any default on his part. *Held*, in the other case, that the widow was entitled to execute the decree for mesne profits of the idol lands, without showing that the ceremonies had been performed by her husband out of his own private funds.

* *Present*:—SIR JAMES W. COLVILE, LORD JUSTICE SELWYN, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.

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RADHAJIBAN MUSTAFI sued, in 1853, his elder brother, Sarbeswar Mustafi, and other members of his family, for a share in his ancestral estates and accounts, &c., for the period of his minority. A deed of compromise was ultimately filed, by which the family property was distributed, and a decree passed in terms of that deed binding both parties. By the fourth article of the deed, Sarbeswar, as the elder brother, remained in charge of the family idols, and was to hold possession of certain lands for the purpose of defraying expenses of worship, his co-sharers being responsible that the expenses were met therefrom. Of these lands, Sarbeswar was, however, deprived by Radhajiban, and he defrayed the expenses of the idol worship from his own funds, afterwards taking out execution of the decree against Radhajiban to recover the money so expended, which, under the deed of compromise, Radhajiban was bound to make good. Radhajiban also took out execution of the decree on his part, alleging that Sarbeswar had not made over to him what he was entitled to, and objecting to Sarbeswar's proceedings in execution, on the ground, that he had not performed the joint ceremonies, but that he, Radhajiban, had performed them separately at his own expense. Radhajiban's application was rejected in all the Courts.

On the 30th August 1862, the High Court (STEER and MORGAN JJ.,) held, that Sarbeswar was entitled to execute the decree in the manner proposed; that the question of whether he had broken his trust in not carrying out the terms under which he was to keep possession of the idol lands did not form any ground for enquiry in a proceeding of this kind; and that he was entitled to mesne profits of the lands of which he had been deprived. In 1863, Sarbeswar died, and his widow Taramani Dasi proceeded to realise in execution the amount of mesne profits awarded under the above order. Radhajiban objected, that, as Sarbeswar had been a mere trustee for the family in regard to the idol lands, his widow not being his representative in regard to the matter of the said trust, could not claim mesne profits of the lands.

The High Court, on 27th July 1865 (LOCH and GLOVER, JJ.,) held, that the order of 1862 had only determined the husband's

personal right to possession of the endowment and its usufruct, and that for the widow to recover, she must show that Sarbeswar's private funds had been expended on the idol worship, which had not been proved. On review, however, the Court held that there was evidence to show that Sarbeswar had expended his own funds, and it gave the widow a decree for the mesne profits of the idol lands. Radhajiban then appealed to the Privy Council against the order rejecting his application for execution, and against that decreeing mesne profits to the widow of Sarbeswar.

Their Lordships' judgment was as follows:—

Their Lordships are of opinion that no ground has been laid for prolonging this unfortunate litigation by the allowance of these appeals. It is unnecessary to state the earlier proceedings inthe first cause. It seems sufficient to begin with the order of the 30th August 1862, which has been admitted to be final. By that order it was held, that Sarbeswar had established his right to take out execution for the mesne profits claimed by him, as well as for the possession of the land included in the fourth article of the compromise; and that it was no bar to his execution that it had been alleged that he had broken trust, inasmuch as he had not carried out the terms in accordance with which it was agreed that he should hold possession.

This order was neither the subject of appeal, nor in their Lordships' opinion could have been successfully made so. There is no ground, as it appears to them, for saying that the proof of the performance of the religious ceremonies was a condition precedent to the enforcement of the claim for the rents which the fourth article of the compromise gave to Sarbeswar. And without enquiring whether many of the points, which are now taken, might not have been raised in the litigation which led to the order in question, or are concluded by it, it is sufficient to state that its effect was, that, as between the two brothers, Sarbeswar was entitled to take out the execution which he claimed to take out, and that the respondent, if he had any claim by reason of the non-performance of the religious ceremonies, or any other breach of the agreement, was bound to prefer that claim in a regular suit.

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In anticipation of that order, the younger brother (the appellant) had commenced the suit out of which the other appeal has arisen. It will be convenient to consider the nature of that suit, and the right of the party to have the decree that has been made in it reversed or altered, before we proceed to the subsequent proceedings in the original suit.

The suit which was so instituted was not exactly such a suit as that suggested by the judgment of the 30th August 1862. What the Judges of the High Court said was, that if the appellant, on the ground of any breach of agreement, claimed a right to dispossess the respondent, he might prefer that claim in a regular suit. But the suit really instituted was of the following nature. It was a suit in which the party alleged that, by reason of the non-performance by Sarbeswar of the duty which he had undertaken under the fourth article of the compromise, he, the plaintiff, had been compelled to perform certain religious ceremonies at his own cost, and that he had a right of action over against Sarbeswar for the moneys expended in the performance of those ceremonies. It was, therefore, essential, in such a suit, that he should show that he really had that right of action; that there not only had been the breach of duty alleged, but that by reason of it he was entitled to recover the damages which he had sustained from his brother. And he had of course to prove the amount of those damages.

Now as to the proof of the damages, that failed altogether. He produced only one witness, who proved nothing; he called the defendant, who denied generally that the claim was well founded. Upon that, the Judge of first instance, made a decree against him, and dismissed the suit.

The case was carried, by appeal, before the High Court, and they affirmed the decision. They remarked on the miscarriage of the Judge in refusing to allow the plaintiff to cross-examine the defendant, when called, and their Lordships fully concur in the propriety of that censure. Nevertheless, if the defendant had been cross-examined, all he could have proved would have been so much of the plaintiff's case as rested on the performance of the religious ceremonies, and by possibility, though that was not very probable, the cost to which the plain-

tiff had been put in the performance of them; but that, in their Lordships' opinion, would not have made out that he had any right of action. For the existence of that right of action you must go back to the original compromise, and in their Lordships' opinion, the plaintiff had wholly failed to prove that he had such a right of action, because, upon the compromise and the acts of the parties, the case stood thus:—The compromise gave certain lands and the rents of those lands to the elder brother, coupled, we may admit, with the performance of a trust, but a trust of that nature which is constantly vested in the managing or elder brother of a Hindu family, a trust which implies some considerable beneficial interest. If the non-performance of that trust, or the non-performance of those ceremonies, could, by any possibility, give such right of action to the appellant as that asserted in his suit, it surely was necessary for him to show that it was not by reason of any default on his part that the non-performance of the trust took place.

Now, the undisputed facts of the case are, that the younger brother did not perform his part of the agreement; that he retained his share of the rents of the land; and that the elder brother was put to take out execution under the decree founded on the compromise, in order to get the funds which that compromise gave to him.

Therefore, it seems to their Lordships that this suit, brought by the appellant, substantially failed upon the ground which is suggested by the Judges in the three last lines of their judgment of the 2nd of February 1864, *viz.*, that there was no cause of action at all; and in these circumstances it would be unreasonable to send down that case for a new trial, because the Judge did not allow the cross-examination of a witness, whom, moreover, by reason of his subsequent death, it is now impossible to examine.

These observations, therefore, dispose of the second appeal, and it is necessary to revert to the proceedings in the original suit. Sarbeswar died pending the second suit, and without having taken out execution under the decree of the 30th of August 1862. His widow then applied to take out execution, and as she merely sought to take out execution for that which had been adjudged

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to belong to her husband, and was, therefore, part of his estate, there seems no ground whatever for disputing her right, or imposing upon her the obligation of proving something which Sarbeswar had not been called upon to prove.

The Principal Sudder Ameen seems, therefore, in their Lordships' opinion, to have taken a right view of the question. He overruled the objections to the execution, which had been repeated by the appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which has just been alluded to as being, in their Lordships' opinion, erroneous, saying that she could stand in her husband's shoes; that it lay upon her to prove that Sarbeswar had actually expended his own moneys in performance of the ceremonies, and they, therefore, in the first instance, overruled the order and judgment of the Principal Sudder Ameen. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to that decree in the other suit, they came to the conclusion that the widow must be taken to have established, chiefly, if not wholly, by that decree, that of which they have required proof from her, *viz.*, that Sarbeswar had expended his own moneys in the performance of the ceremonies; that, therefore, their former order was wrong, and that the final order to be made was, that she should be entitled to issue execution, in fact, to affirm the Principal Sudder Ameen's order. A subsequent order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons which have been given, that the original order, reversing the Principal Sudder Ameen's order, was wrong; but if that order had been properly made, they would have been unable to adopt the reasoning of the learned Judges, as to the effect of the decree in the suit of the appellant, which certainly does not prove that Sarbeswar expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to

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prove is, that the appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit in respect of these ceremonies.

The effect, however, of the final orders of the High Court is to give to the widow that to which their Lordships consider she is entitled; and, therefore, the order which they will humbly recommend Her Majesty to make is, that both these appeals be dismissed, and that the orders of the Courts below, which are the subjects of them, be affirmed.

DEVAJI GAYAJI AND OTHERS *v.* GODABHAI GODBHAI AND ANOTHER.

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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Evidence—Undisturbed Possession.

Held, on the evidence in the case, that defendants' long possession was confirmatory of their title based on a mortrgage bond of old date, and that plaintiffs' suit for possession was rightly dismissed.

THEIR Lordships' judgment was as follows:

Their Lordships having had very full opportunity of considering the facts in this case, and the arguments which have been addressed to them, are now prepared to dispose of it.

The matter has been conveniently divided into three stages. The first litigation is that which commenced in the year 1836 with a suit by the present appellants, before the Assistant-Collector. That appears to have been a suit instituted by them for the recovery of the villages in question. On that occasion, it appears that the defendants did not enter into any evidence, and, accordingly, upon the evidence which then existed, which was entirely on one side, in August 1838, a judgment was given by the Assistant-Collector in favour of the present appellants.

That judgment was appealed against to the District Judge, who remanded the case for re-trial before the Principal Sudder Ameen.

* *Present*:—SIR JAMES W. COLVILE, LORD JUSTICE SELWYN, AND LORD JUSTICE GIFFARD.