Other defendants pleaded that they had no concern with the property, the mesne-profits of which were the subject of suit, and prayed to be exempted from costs.

The lower Court, looking upon the Full Bench judgment in the case of Anund Gobind Chowdhry, dated 2nd April 1864, as ruling that the date of dispossession is the date when the cause of action in suits for mesne-profits arises, found that the plaintiff had not sued in time for the mesne-profits claimed from 1256 F. to 1264 F.; but that he was in time as to those of 1265 Fuslee. The Principal Sudder Ameen gave a decree accordingly.

It is necessary to give the decretal order which was in these terms:—

"The decree, in modification of the claim "in favour of the plaintiff, is that rupees 844-14, "principal of mesne profits for 1265 Fuslee "and costs of the suit in proportion to the "amount allowed, with interest on the "whole, from the date of the decision to that "of realization, shall be paid by defendants "No. 1, Kalee Pershad, and Gujraj Suhay "to the plaintiff; that the remaining de-"fendant be exempted from the liability of "the claim; that the costs of the defend-"ant No. 1, in proportion to the amount "disallowed, shall be deducted from the "amount payable to the plaintiff; and that "the costs incurred by the *other defendants* "with interest from the date of decision to "that of realization, in proportion to the "amount of the claim proved, shall be borne "by *defendant* No. 1, and in proportion to "what is disallowed by the plaintiff."

Plaintiff appealed, and his pleader cited a case of the 22nd February 1864, Loch and Steer, JJ., as opposed to the Principal Sudder Ameen's judgment. But we think that the Full Bench judgment cited by the Principal Sudder Ameen, and that of this Bench of 7th September 1864, and of Trevor and Campbell, JJ., 31st August 1864 (Weekly Reporter, page 65), and Morgan and Shumbhoonath Pundit, JJ., 2nd April 1864, are *all opposed* to the single case of the one Division Bench cited by the appellant's pleader. That precedent, we may remark, does not appear to have been cited to us when we heard the case of the 17th September 1864 (*vide* Weekly Reporter, page 83). On the rulings, then, of the Full Bench, and of the majority of the Judges, we are of opinion that the decision of the Principal Sudder Ameen is correct.

It is then urged, on appeal, that costs have been charged against the plaintiff, as for the amount of his claim which has been disallowed, in separate sums of 479 rupees for each defendant, whereas, as all defendants might have come in by one pleader and one pleading, 479 rupees should have been only charged as *total* costs of all defendants.

We are not shown that the defendants had not separate interests, or could have come in on one pleading and by one pleader; but, even if it were so, the proper course for plaintiff would have been to have raised the objection before the lower Court, and have sought for amendment at once by that Court, which is to be presumed to have exercised a proper judicial discretion until the contrary be shown. Looking at the answers of the several parties, whom plaintiff chose to make defendants below and respondents here, and who all plead to be utterly unconnected with the property, we do not think that any one but plaintiff should pay the costs.

In this view, we decree the cross-appeal of defendant No. 1, who appeals against the order of the lower Court which made him responsible for the costs of the other defendants. As regards the amount allowed to plaintiff, no reason is given for this order as to costs; and if there was any reason, it should have been stated, which is the rule when the ordinary practice of the Court as to costs is varied, as it is here, by the order appealed against by defendant No. 1.

We accordingly dismiss the plaintiff's appeal, and decree the cross-appeal of defendant No. 1 on the above point of costs of the other defendant's charged to defendant No. 1.

The 31st May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Lakheraj—Onus probandi—Limitation—Auction purchasers.

Case No. 617 of 1864.

Application for review of judgment passed by Justices Trevor and Campbell, on the 9th of August 1864, in Special Appeal No. 1932 of 1863.

Mr. A. J. Forbes (Respondent), *Petitioner,*

versus

Sheikh Meah Jan and another (Appellant), *Opposite Party.*

Mr. T. T. Forbes for Petitioner.

No one for Opposite Party.

The mode in which the onus of proving a lakheraj holding from the period of the Permanent Settlement is to be thrown on an auction-purchaser at a sale for arrears of revenue coming under clause 14, section 1, Act XIV. of 1859, and suing within 12 years of his purchase.

THE Full Bench having decided that the Civil Court has concurrent jurisdiction in regard to suits to recover or assess lands wrongly held without payment of revenue from a date subsequent to 1790, the ground of want of jurisdiction previously allowed is gone, and we must try this appeal on other grounds.

We find that the case is one instituted on 23rd July 1862, after Act XIV. of 1859 came into operation; and that plaintiff is an auction-purchaser at a sale for arrears of revenue, coming just within twelve years of his purchase, which occurred on 24th July 1850. The ruling of the Full Bench in regard to limitation and *onus* of proof, therefore, does not apply to this case, which is governed by Act XIV. of 1859, section 1, clause 14. With *reference*, then, to the provisions of that section, plaintiff cannot be barred unless "it is shown that the land has been held lakheraj, or rent-free, from the period of the Permanent Settlement." The real question is, does defendant prove possession from 1790? And so far the *onus* is upon him. But that *onus* must not be imposed in a harsh way, such that after so long a lapse of time an honest holder cannot bear it, and *bonâ fide* holdings may be unjustly imperilled. It is not necessary that the defendant should give direct proof of holding to the exact date of the Permanent Settlement; but that he should give such evidence of long possession of the character and repute of his holding, and otherwise, that (after weighing also any evidence on the other side) the Court may be led to believe that the holding is really one of ancient date as old as the Permanent Settlement, and not a modern appropriation. We cannot consider the decision of the Lower Appellate Court so summary and brief to be a proper decision of the case treated in this way. The case must be remanded for a full and careful decision after going into the evidence in the manner above indicated; and as it may be doubted whether the parties have understood the mode in which the *onus* is to be thrown on them, we direct that the case should go back to the first Court, and that an opportunity should again be given to the parties of filing any evidence which they may possess.

The 7th June 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sales under Regulation VII. of 1825—Irregularities—Sections 257 and 387, Act VIII. of 1859—Limitation.

Case No. 3083 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 23rd July 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th December 1862.

Must. Bhoobun and others (Plaintiffs), *Appellants,*

versus

Sheikh Oozutool Huq and others (Defendants), *Respondents.*

Messrs. R T. Allan and *C. Gregory* for Appellants.

Baboo Onoocool Chunder Mookerjee for Respondents.

Neither section 257 nor 387, Act VIII. of 1859, applies to a suit to set aside a sale made under Regulation VII. of 1825 before Acts VIII. and XIV. of 1859 came into operation, and consequently the plaintiff had 12 years within which to sue.

Irregularities occurring in a sale under Regulation VII. of 1825 are not sufficient to vitiate the sale, unless they cause injury to the party suing.

PLAINTIFF instituted the present suit on the 12th February 1861 to set aside a sale, made on the 3rd July 1854, irregularly, and not under the forms prescribed by Regulation VII. of 1825.

The first Court dismissed the suit, and on appeal, the Judge, citing sections 257 and 387 of Act VIII. of 1859 as his authority, dismissed the suit as not maintainable.

Plaintiff now appeals specially, urging that neither section cited by the Judge is applicable to the present case; that section 257 of Act VIII. of 1859 only regards sales made under that Act, and section 387 only applies to cases pending at the time of the passing of Act VIII.; that he had by law twelve years to institute his present suit; and as he brought it within time, it should be remitted and investigated on the merits.

There can be no doubt, as contended by the plaintiff, that sections 257 and 387 of Act VIII. of 1859 cannot be applied to the present case. It was, moreover, instituted in 1861, before Act XIV. of 1859 came into