

provisions as may have been prescribed for representation of parties who have died leaving assets in this country.

I find as a fact that the deceased was a British born subject; that he has assets in Moulmein and England, but no assets within the Calcutta or Bengal jurisdiction of the High Court; and that the will being dated before the 1st January 1866, Act X of 1865 does not apply, but the law relating to wills executed before the 1st January 1866 is the law applicable to the case; and that this Court has not the power of granting probate or letters of administration.

Under the old law probates or letters of administration were granted by the Supreme Court in Bengal in regard to the estates of all British born subjects dying and leaving assets within the countries and provinces attached to the Bengal Presidency. Allowing that Moulmein belongs to the Presidency of Bengal, I have come to the conclusion that plaintiff can obtain probate from the High Court at Calcutta, and cannot sue in this Court without such probate or letters of administration from the High Court at Calcutta.

Having some doubt on this point I submit the following question to the High Court:—

Whether in the case of a British born subject dying and leaving assets in Moulmein, British Burmah, but no assets in Calcutta or Bengal Proper, and a will dated the 5th August 1865, the executrix of such testator can obtain probate or letters of administration with will annexed from the High Court in Bengal.

*The judgment of the High Court was delivered as follows by—*

*Peacock, C. J.*—We are of opinion that in the case of Mr. Saunders, a British born subject, who died on the 6th of March 1866, leaving assets in Moulmein in British Burmah, but leaving no assets in Calcutta or Bengal Proper, and a will dated the 5th August 1865, before Act X of 1865 came into effect, the executrix cannot obtain probate or letters of administration with will annexed from the High Court in Bengal.

The Provinces of Arracan and Tenasserim are part of British Burmah and not part of the Presidency of Bengal, see Act XII of 1862; and Moulmein is part of the Tenasserim Provinces.

The 3rd June 1867.

*Present :*

The Hon'ble J. P. Norman and  
W. S. Seton-Karr, *Judges.*

**Limitation—Suit for balance of accounts  
(limited dealings).**

Case No. 428 of 1867.

*Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 11th January 1866, reversing a decision passed by the Sudder Ameen of that district, dated the 30th June 1866.*

Gopal Chunder Shaha and others (Plaintiffs),  
*Appellants,*

*versus*

Mr. K. Sinaes and another (Defendants),  
*Respondents.*

*Baboo Roop Nath Banerjee* for Appellants.

*Baboos Otool Chunder Mookerjee and Gopeenath Mookerjee* for Respondents.

A suit for balance of account in respect of dealings of a limited nature is governed by the limitation of six years.

*Seton-Karr, J.*—THIS was a case in which the plaintiff sued the defendant to recover rupees 783 as the balance of account. The defendant pleaded limitation, the suit not having been brought within three years from the date of the last payment or the last account.

The Sudder Ameen held that limitation did not apply, as the two parties had carried on business together; and, as the sum of rupees 99 had been paid in 1270, and after the accounts had been closed in the year 1269, the Sudder Ameen held that Section 8 of Act XIV of 1859 applied, but decided the case on the merits in plaintiff's favor.

The Principal Sudder Ameen overruled this decision. Both parties, it seems, appealed, the defendant urging that limitation barred the suit, and the plaintiff contending that he was entitled, not to 3, but to 6 years. The Principal Sudder Ameen ruled that the plaint did not disclose a trading business between the parties; that their dealings were of a limited nature; and that the period of three, and not of six, years applied to the suit.

We have looked at the plaint and at the chief documents filed, and we think that the Principal Sudder Ameen was not legally correct in ruling that the parties were not traders. Wine and other

articles appear to have been taken by the defendant at various times, and not in the way of ordinary and private consumption, but evidently for the objects of a limited trade on his own account.

The cases quoted seem all on one side, and favor the contention of the plaintiff that he is entitled to six years. See Weekly Reporter, Vol. III, page 24, Small Cause Court Rulings; and the ruling of Mr. Justice Macpherson, quoted at page 57 of Mr. N. Thompson's Work on Limitation, and the Appendix of the same work, page 242, at the bottom of the page. No cases on the other side have been brought to our notice, for the case reported at page 68 of Vol. VII, Weekly Reporter, is not in point.

Under these circumstances, we think it right to follow the rulings above quoted, and we remand the case to the Principal Sudder Ameen for a decision on the merits, holding that the plaintiff is entitled to the limitation of six years.

*Norman, J.*—I entirely concur.

I think we ought to follow the cases which have been decided on this point, which are cited above, as I believe that the construction there put down on the 8th and 9th Sections, has been generally adopted and acted upon. Items beyond six years are of course barred.

The 4th June 1867.

*Present :*

The Hon'ble H. V. Bayley and J. B. Phear,  
*Judges.*

**Special Appeal—Issues.**

Case No. 2743 of 1866.

*Special Appeal from a decision passed by Mr. James Reilly, Principal Sudder Ameen of East Burdwan, dated the 7th July 1866, reversing a decision passed by the Moonsiff of that district, dated the 13th May 1865.*

Shaikh Ahmed Mundul (Defendant),  
*Appellant,*

*versus*

Shaikh Sonaollah (Plaintiff), and others  
(Defendants), *Respondents.*

*Moulvie Syud Murhumut Hossein for  
Appellant.*

*Baboo Mohesh Chunder Chowdhry for  
Respondents.*

A party was not allowed on special appeal to go behind the issues by which he was content to abide in the Lower Courts.

*Phear, J.*—THIS was a suit to recover possession of a piece of land. The Court of first instance dismissed the plaintiff's claim, but the Lower Appellate Court upheld it. In both Courts the only issues tried were whether the plaintiff had purchased the land, and whether he had been dispossessed by the defendant. The issue in the first Court did not mention the name of any vendor, but in the Lower Appellate Court the question was specially "whether the plaintiff bought the land of Tufuzal Hossein."

The defendant now appeals specially on the ground that the Lower Appellate Court ought to have enquired into the title of the plaintiff's vendor, because it was denied in his, the defendant's, written statement. We are of opinion that this ground cannot now be taken. The defendant had ample opportunity in the Lower Courts of raising all the issues upon which his case depended. And if either of the Lower Courts had refused to entertain any material issue suggested by him, it would have afforded him good ground of complaint against their proceedings. But nothing of this kind is alleged here, no doubt because it could not be alleged with truth; and we cannot now allow him to go behind the issues by which he was content to abide in the Court below, and which were actually tried there with apparent propriety.

The 4th June 1867.

*Present :*

The Hon'ble H. V. Bayley and J. B. Phear,  
*Judges.*

**Presumption under Section 4, Act X of 1859.**

Case No. 3030 of 1866 under Act X of  
1859.

*Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensingh, dated the 31st July 1866, affirming a decision passed by Mr. F. F. W. Smith, Deputy Collector of that district, dated the 16th March 1863.*