Judge of the 24-Pergunnahs returned an application for probate made to him on a stamp of the value of 8 annas, on the ground that the stamp was insufficient, and that such applications should be engrossed on a stamp of the value provided for plaints, and prayed for the Court's interference for its admission.

The Judge was called upon to explain the grounds upon which he based his order in respect of the stamp, and those also upon which he considered the stamp to be insufficient, and was referred to Act VII. of 1870 as repealing the Schedule of Act X. of 1865.

In his letter No. 651, dated the 16th December 1870, the Judge explained as follows: "In reply to your letter No. 3757 of the 13th instant, I have the honor to observe that, since the repeal of the Schedule of Act X., 1865, there is apparently no specific rule fixing the stamp requisite for applications for probate of wills. Cases instituted under Act X., 1865, and therefore cases under Act XXI., 1870, are declared to be in the nature of suits; and therefore I held that the stamp requisite for the application must be proportionate to the value of the property covered by the will. If the application be considered as coming under the rule of Clause 6, Article 1 of the 2nd Schedule of the Court Fees Act, the stamp for a common petition would suffice; but it seems to me that cases of applications for probate or letters of administration, and also certificate-cases under Act XXVII., 1860, and any other case which is to be tried as a regular suit, ought, according to strict interpretation of the law, to be covered by the stamps required for plaints. This appears to me to involve considerable hardship, and I shall be glad if the High Court can put a different interpretation on the law."

Note by the Deputy Registrar.—Act VII. of 1870 (Schedule 1, Article 11) fixes *ad-valorem* fees for a probate of a will or letters of administration, and (Article 12) for a certificate granted under Act XXVII. of 1860.

It does not expressly provide for *an application* for probate, &c., which is evidently intended to be treated as an ordinary application for which provision is made in Schedule 2, Article 1, Note c.

Judgment of the High Court.

Mookerjee, J.—We are of opinion that the view of the law taken by the Judge is incorrect. Section 329 of Act X. of 1865, and the Schedule appended to that enactment, having been repealed by the Court Fees Act (VII. of 1870), and no separate or special provision having been made by Act XXI. of 1870, or any other subsequent enactment, for stamps for applications for probate, &c., those applications appear to us to come under the provision made by law for common applications and petitions in Schedule 2, Article 1 of Act VII. of 1870.

The case will go back to the Judge who will admit the application as made on a proper stamp.

The 19th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Breach of contract—Damages.

Case No. 123 of 1870.

Regular Appeal from a decision passed by the Additional Judge of Backergunge, dated the 24th March 1870.

Raj Coomar Roy Chowdhry and another (Defendants), *Appellants*,

versus

Rajah Debendro Narain Roy (Plaintiff), *Respondent.*

Baboos Kallee Mohun Doss, Romesh Chunder Mitter, and *Doorga Mohun Doss* for Appellants.

Babóo Amerendro Nauth Chatterjee for Respondent.

D contracted to sell to P a piece of land for Rs. 4,500, of which he received 700 as earnest-money. A contract was drawn up by which D agreed to execute and register a bill of sale, and deposit a part (Rs. 1,800) of the price, and P was to execute a bond for Rs. 2,000 to bear interest conditioned for the payment of that sum by a fixed date, the transaction to be completed within a specified period. D was ready and willing to perform his part of the contract by the time named; but finding that P would not complete the purchase, but demanded back the earnest-money, he sold the property to a third party for Rs. 3,800. P then sued to recover the earnest-money and damages.

HELD that P was bound to show that the circumstances were such as to give him an equitable right to have back the earnest-money, and that, had it not been deposited, D could have justly sued for damages to the extent of the loss incurred by the second sale, and therefore P was not entitled to recover the 700 rupees.

Norman, C. J.—THIS is a suit brought by Debendro Narain Roy to recover a sum of Rupees 700 paid, as a deposit on a contract for the purchase of three lots of land, and Rupees 25 and 8 annas for stamp-paper, and also damages which the plaintiff alleges he has sustained in consequence of the defendant's not having carried out a contract to sell the land to the plaintiff.

The facts, so far as they are material, are shortly these :—

The defendant contracted to sell to the plaintiff the land in question for Rupees 4,500, and received as earnest-money Rupees 300 on the 2nd, and Rupees 400 on the 16th of Assin 1276, making up the Rupees 700 for the recovery of which the present action is brought.

A contract was drawn up by which the defendant agreed to execute and duly register a bill of sale of the property for Rupees 4,500, of which a part, *viz.*, Rupees 1,800, was to be deposited, and the said sum was, in fact, deposited with one Kala Chand Poddar, a resident of Burrisaul, and the plaintiff was to execute to the defendants a bond for Rupees 2,000 to bear interest at 3 per cent. per month conditioned for the payment of Rupees 2,000 by the 30th Maugh 1276. The transaction was to be completed within 10 days from the time of the opening of the Registry Office after the Dusserah vacation, which would bring the time for the completion of the sale to the 22nd Kartick 1276.

The defendants have proved that they were ready to execute the kobala by the time named, and that, on the 19th or 20th of Kartick, Jogendro Narain Roy, the younger of the two defendants, the son of Raj Coomar, the elder, came to Burrisaul for the purpose of having the kobala registered, and that he sent a message to the plaintiff to inform him of his arrival for that purpose. The plaintiff received that notice, and said he was coming, but did not come. He did not offer to execute the bond for Rupees 2,000 until after the 29th Aughran; and in fact on that day when he put his seal to that which was afterwards filled in as a bond for Rupees 2,000, it was in the condition of a piece of blank paper.

It is proved by the evidence on the record that the defendants were ready and willing to perform their part of the contract; so much so that they were willing to take the sum of Rupees 4,100 instead of Rupees 4,500 seven or eight days after the 22nd of Kartick. This appears from the statement of the plaintiff himself, who was examined on oath on the 22nd March 1870, and also from the evidence of Jogendro Narain, who was examined on the 23rd March of that year.

It is clear, therefore, that the defendants, not only down to the 22nd of Kartick at which time the kobala was to have been executed, but even subsequently to that date, were quite willing and ready to carry out the contract.

It is further proved by the witness Taruck-nath Ghose, that he was sent to ask the plaintiff if he would complete the purchase; that the plaintiff told him he would not, and demanded back the money paid by way of earnest. It is also proved by the evidence of Gopal Shaha, to whom the property has now been sold, that the plaintiff came to him and wanted him to come into an arrangement by which they should get the property from the defendants at a less price than the plaintiff had contracted to pay, the plaintiff offering to give him (Gopal) a share in the property if he would assist him.

On the 26th of Aughran, the defendants, finding that the plaintiff would not complete the purchase, sold the property to Gopal Kisto for Rupees 3,800, that is to say, for a sum less by 700 than the defendants would have got if the plaintiff had carried out his contract.

I do not think it necessary in this case to rely on the special condition for forfeiture of the deposit contained in the 8th paragraph of the contract. If, independently of the actual loss sustained by reason of the plaintiff's failure to carry out his contract, the defendants were insisting on retaining the 700 rupees by way of penalty, we might have been obliged to rest our judgment on the condition contained in the 8th paragraph. But in the present case, the plaintiff is bound to show that, the contract having been broken by him, the circumstances are such as to give him an equitable right to have back the 700 rupees deposited by him. Now, it is clear that, if he gets back any portion of that money, the defendants would be in a worse position than if the plaintiff had carried out his contract like an honest man.

It is clear that, if there had been no deposit, and the defendants had sued the plaintiff for damages for breach of contract in having failed to complete the purchase and to pay the sum originally stipulated to be paid, they would have been entitled in that suit to damages to the extent of the whole sum of Rupees 700.

For these reasons, I am of opinion that the judgment of the Lower Court, which awarded the plaintiff Rupees 700 on some notion that the contract had not been broken by the plaintiff, is erroneous, and must be reversed, and the plaintiff's suit must be dismissed with costs.

Loch, J.—I concur.

The 19th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Limitation—Statutory bar—Onus probandi.

Case No. 1455 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 2nd May 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th September 1869.

Syud Ameer Ali (Defendant), *Appellant,*

versus

Maharanee Indurjeet Kooer (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan for Respondent.

In a suit to recover land of which defendant had admittedly held adverse possession for upwards of 11 years, where plaintiff's cause of action was alleged to have arisen at the close of a contest between him and the Government which had claimed to resume the land, when the Collector recorded a proceeding that the plaintiff should recover possession of his land, defendant's case was that he knew nothing of that contest, and had held possession for 27 years.

HELD that it lay upon the plaintiff to remove the statutory bar which defendant had set up, by showing that he, or some one under whom he claimed, had been in possession within 12 years next before the commencement of the suit.

Jackson, J.—I THINK it clear that the decision of the Court below cannot be supported. This was a case in which the plaintiff sued to recover from the defendants possession of some 146 beegahs of land, which the defendant had admittedly held adversely to the plaintiff for upwards of 11 years. It appears that between the plaintiff and the Government the question had previously been raised, the Government claiming to resume a considerably larger tract of land, namely, 1,200 beegahs, but eventually giving up all claim except to a much smaller area.

Upon the claim being given up, the Collector seems to have recorded a proceeding in which he declared the plaintiff should recover possession of his land; and it is contended by the plaintiff, special respondent, that the plaintiff's cause of action arose at that period; and this is the view which has been taken by the Lower Appellate Court as well as by the Court of first instance.

The defendant's case was that he knew nothing whatever of the contest between the plaintiff and Government, but that he had acquired the land in dispute by purchase from certain lakherajdars some 27 years before suit, and that, consequently, the plaintiff, if he had any title whatever, was barred by limitation in consequence of lapse of time.

This, it appears to me, is a case in which the ruling of the Privy Council reported in VIII. Moore's Indian Appeals* precisely applies. The plaintiff by her own admission came into Court 11½ years after the cause of action arose; the defendant had set up a statutory bar to the suit; and it, therefore, clearly lay upon the plaintiff to remove that bar, to use the words of the Judicial Committee of the Privy Council, by showing that she or some one under whom she claimed had been in possession of the land in dispute within 12 years next before the suit was commenced.

Now, it seems to me that the words of the plaintiff's allegation do very strongly support this plea. The plaintiff does not allege that she was put out of possession of this land at the period mentioned, but at that period she obtained an order from the Collector entitling her to possession, and that, on going to take possession of those lands, she was obstructed by the defendant. That clearly seems to show that at that time the defendant was in possession of that land.

That being so, it was manifestly, I think, the business of the plaintiff to show at what period that adverse possession commenced.

* 1 W. R., P. C., p. 51.