Judge may have been influenced in this opinion by his erroneous finding upon the question of the fact of the *kubooleut* having been decided to be genuine in the former suit by the Collector, we are unable to say; but we do not base our decision upon this alone. We find that in the suit brought, as already observed, in the civil Court previous to the present suit for rent, the ryot defendant, special appellant, sued not only to establish his *mokurruree* pottah but also to have it declared that the *kubooleut* which was filed by the *talookdar* in the distraint proceedings was a spurious *kubooleut*. It is admitted that that case is still pending on remand from this Court, and that the question of the genuineness of this *kubooleut* has not yet been determined by a competent Court. Now it appears to us clear that, if the defendant succeeds in that case, all that the plaintiff will be entitled to will be to retain the decree which has been passed by the first Court giving him the rent admitted by the defendant. If it should so happen that the ryot's case fails, even then we do not think that the plaintiff's remedy is in any way barred, for in the event of the ryot's suit failing, the position of the ryot defendant as holding under the *kubooleut* will be restored and the plaintiff will be entitled to claim the rent under that *kubooleut*, and any plea as to the suit being barred will be met, and we think successfully met, by the fact that the question as to whether the *kubooleut* was genuine or not was a question which was pending in the Civil Courts.

We, therefore, think that the plaintiff is not entitled to the decree which he has obtained from the Judge and that the decision of the first Court must be restored. The decision of the Judge is reversed with costs payable by the special respondent.

The 1st May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law of Succession—Joint family—Sons of Surviving brothers—Per Capita—Presumption—Partition Deed—Bill of Sale.

Case No. 1268 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 1st July 1871, affirming a decision of the Moonsiff of Munickgunge, dated the 14th January 1871.

Ruttun Kristo Bosoo (one of the Defendants), *Appellant,*

versus

Bhugoban Chunder Bosoo (Plaintiff), *Respondent.*

Baboo Nulit Chunder Sen for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

By the rules of Hindoo succession, on the death of brothers of a joint family without issue, the sons of surviving brothers take *per capita* and not *per stirpes*.

Because in a partition deed of 1260, in the column showing the shares of the different members of the family, the name of N's son is inserted instead of N's own, it does not follow that N was dead in 1260 or that a sale alleged to have taken place in 1262 by N must necessarily be false.

Kemp, J.—The plaintiff in this case sues to recover possession of a one anna share in six talooks, claiming that one-anna share as his ancestral right; also of a 10-gundah share of the same talooks as the heir of Ashanund and Krishnanund, and of a further share of 6 gundahs 2 cowries 2 krants by purchase from Nityanund Bose, under a deed of sale dated the 20th of Srabun 1262. Total claim, 1 anna 16 gundahs 2 cowries 2 krants. The plaintiff alleges that he applied to the Collector under the Butwarah Law for a division of the estate, but that his co-sharers objecting, the Collector refused to make a partition and referred the plaintiff to a Civil Court to establish his right. Hence the present suit.

The defence is that neither the plaintiff nor his father Ramessur had any title as heir-at-law to any portion of the estate of Krishnanund and Ashanund, inasmuch as Ramessur, the father of the plaintiff, was not adopted by Surbessur during the lifetime of Ashanund and Krishnanund.

With reference to the purchase from Nityanund, the allegation of the defendant was that a plea of purchase was a false plea and that the defendants were in possession under a Meeras right. With reference to the 1st share claimed by the plaintiff as ancestral right, no objection was made by the defendants.

Both Courts have given the plaintiff a decree.

Before entering into the questions raised in special appeal, we think it right to mention that from the genealogical tree filed in the case and which is not disputed, it appears that Gunga Pershad, the head of the family had six sons, Kebul Kristo Bosoo, Raj Kri

Bosoo, Ramanund Bosoo, Ashanund Bosoo, Krishnanund Bosoo, and Surbessur Bosoo. Kebul Kristo Bosoo had two sons, Joy Kristo Bosoo, and Kristo Mungul Bosoo; and Kristo Mungul left a son Ruttun Kristo Bosoo, the defendant, special appellant.

Raj Kristo Bosoo had two sons, and Ramanund had also two sons, one of whom was Nityanund Bosoo, the plaintiff's alleged vendor of a 6 gundahs 2 cowries 2 krants share. Krishnanund and Ashanund died without issue. Surbessur, the sixth son, it is alleged, adopted Ramessur Bosoo, who again adopted Bhugoban Chunder Bosoo, the plaintiff.

The first ground taken in special appeal is, that the Lower Court was wrong in law in not trying the real question in the case, namely, whether Krishnanund and Ashanund predeceased Surbessur and whether the adoption of plaintiff's father took place during their lifetime.

It has been urged for the respondent that this is a new point not raised in the Court of first instance or in the Appellate Court. It appears that it was raised in the written statement of the defendant, and there is a clear finding by the first Court, that the adoption of Ramessur, the father of the plaintiff, took place in the lifetime of Krishnanund and Ashanund. That this point was not seriously contended before the Judge appears very clear from the second ground of appeal to him by the defendant, for in that ground it is admitted that the four brothers, that is to say, Kebul Kristo, Raj Kristo, Ramanund and Surbessur Bosoo left seven sons. The first Court having found on the evidence that the adoption of Ramessur, the plaintiff's father, took place before the death of Krishnanund and Ashanund, and the decision of the first Court having been confirmed by the Appellate Court, and the matter not having been pressed before the Judge, we overrule the first ground of special appeal.

The next ground is, that the shares of Krishnanund and Ashanund having been divided among his brother's sons into six shares, each succeeding *per capita* and not *per stirpes*, the plaintiff's claim to the half-anna share from Ashanund and Krishnanund cannot therefore stand.

We think there is some weight in this objection. It is very clear that Krishnanund and Ashanund would inherit each one-anna out of the six annas of their father Gunga Pershad, or in the aggregate two annas of the property. Therefore, on their death without issue, the sons of the surviving brothers would take *per capita* and not *per stirpes*, and the two annas which belonged to them would be divided amongst the seven sons of the surviving four brothers who left issue. In that case, the plaintiff would not be entitled to 10 gundahs of the property or one-fourth of the estate left by Krishnanund and Ashanund, but that estate would be divided into seven shares of which the plaintiff would be entitled to one share, that is to say, to one-seventh, and not to one-fourth of the two annas as found by the Court below. But it is contended that in 1863, in a suit between Ramessur, the father of the plaintiff, and the present defendant, special appellant, it was decided that Ramessur had been in possession of this share for more than twelve years in 1863. In special appeal it is contended that the Lower Court was wrong in treating that decree as evidence against the defendant in the present case, and we think that that contention is correct. That decree does not refer to the six talooks now in dispute. At the most it only refers to a very small quantity of land in some mouzahs in these six talooks. There was no dispute as to the share of Ramessur, and no decision upon that point. Therefore, by the rules of Hindoo succession, the plaintiff is clearly entitled to a share of one-seventh only in the estate of Ashanund and Krishnanund, and so much of the decision of the Lower Court, therefore, must be reversed.

We now come to the last point taken in special appeal, namely, the ground which opens out the question of the purchase from Nityanund Bosoo of a 6 gundahs 2 cowries 2 krants share. Nityanund, as already observed, was the son of Ramanund. The plaintiff has put in the *kobalah*, dated the 20th Srabun 1262, which has been found by both Courts to be proved on the evidence. In special appeal it is contended that because in the partition deed, dated the 12th Kurtick 1260, filed by the plaintiff in this case, in the column showing the shares of the different members of the family, the name of Manick Chunder Bosoo, the son of Nityanund, is inserted in lieu of that of his father, it is therefore clear that Nityanund was dead in 1260, and the sale which is alleged to have taken place in 1262 must necessarily be false. We do not think that this follows as a natural consequence of the name of Manick Chunder being inserted in that deed instead of the name of his father Nityanund Bosoo. The *kobalah* has been put in and

duly proved, and on the finding of fact as to the genuineness of the *kobalah*, we think we should be wrong in special appeal, simply because the name of Manick Chunder in a joint family like this appears instead of that of his father Nityanund, to set aside the concurrent finding of the two Courts below on a question of fact. We, therefore, dismiss the special appeal of the defendant with reference to the findings as to the adoption of Ramessur, and as to the purchase from Nityanund, and decree his appeal with reference to the share which the plaintiff takes as heir of Krishnanund and Ashanund, and modify the decision of the Court below to this extent by declaring that the plaintiff is only entitled to one-seventh of the estate of Krishnanund and Ashanund and not to one-fourth.

The costs of this appeal will be paid by the special appellant as he has failed in the main point in the case.

The 1st May 1872.

Present

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Interest—Costs.

Case No. 85 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Additional Subordinate Judge of Dacca, dated the 23rd December 1871.

Bharut Chunder Sircar and others (Judgment-debtors), *Appellants,*

versus

Gouree Pershad Roy (Decree-holder), *Respondent.*

Baboo Kashee Kant Sen for Appellants.

Baboo Nulit Chunder Sen for Respondent.

Costs in the suit carry interest unless the contrary is distinctly stated in the decree.

Kemp, J.—THE question raised in this appeal is whether the costs in the suit are to bear interest or not. We may observe that this point was not raised below and has been raised for the first time in this Court. The decree is silent as to awarding interest on costs, but it has been the practice of this Court to award interest on costs on the ground that costs generally carry interest without any distinct order to that effect being required. There are two decisions to that effect to be found in Volume I. Weekly Reporter, Miscellaneous Rulings, page 1, and in Volume II., Miscellaneous Rulings, page 21. There is no ruling that we can find, nor has any such ruling been brought to our notice which rules otherwise, and the ruling of the Full Bench which has been quoted by the pleader for the appellant is, we think, inapplicable to the facts of this case. The question there decided was whether interest could be awarded on the principal sum decreed or on the subject-matter of the suit when the decree is silent on that point, and the Full Bench decided that it could not, but there was no ruling as to interest on costs. Moreover, interest on costs is not of the same character as interest on the subject-matter of the suit. Costs, as observed by Mr. Justice Glover in the course of the argument, are advanced by parties from time to time during the progress of the suit; and when a party succeeds in a case, he is, we think, entitled to interest upon any sums duly and fairly spent by him in litigation. We hold therefore, that, as a general rule, unless it is distinctly stated in the decree that no interest is to be given on the costs, we ought to award them. The appeal is dismissed with costs.

The 2nd May 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Plea of Limitation—Defendant's Possession (in his own right and as farmer of Plaintiff, —Decree (for lands unascertained).

Cases Nos. 1287 and 1288 of 1871.

Special Appeals from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 21st August 1871, affirming a decision of the Sudder Moonsiff of the district, dated the 29th July 1870.

Nuthoo Singh and others (Defendants), *Appellants,*

versus

Ram Buksh Singh (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sen and *Chunder Madhub Ghose* for Appellants.

Mr. C. Gregory and Baboo *Bookh Sen Singh* for Respondent.