

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

MAHOMED ELAHEE BUKSH AND OTHERS (DEFENDANTS) v. BROJOKISHORE SEN AND OTHERS (PLAINTIFFS).*

1878
July 9.

Limitation—Beng. Act VIII of 1869, s. 29—Computation of Time according to English Calendar.

Held, in accordance with former decisions of the High Court, that, for the purpose of computing the period of limitation prescribed by s. 29 of Beng. Act VIII of 1869, the calculation is to be made according to the English calendar.

THE judgment in this case simply follows the decision in the cases of *Jay Mangal Sing v. Lal Rang Pal Sing* (1), *Khasro Mandar v. Premlal* (2), and *LuchmEEPut Singh Bahadoor v. Raj Coomaree Dabee* (3).

Appeal decreed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

BIDDOMOYE DABEE DABEE v. SITARAM

AND

BIDDOMOYE DABEE DABEE v. SOOBUL DAS MULLICK.

1878
July 24.

Custody of Servant—Possession—Pledge of Goods—Contract Act (Act IX of 1872), s. 178.

A servant entrusted by his mistress with the custody of goods, pawned them during her absence. The mistress sued in *trover* for the goods. *Held*, that the custody of the servant was not "possession" within the meaning of s. 178 of the Contract Act, and that if he was to be regarded as having taken

* Special Appeal, No. 1636 of 1877, against the decree of F. C. Fowle, Esq., Judge of Zilla Tipperah, dated the 2nd of February 1877, modifying the decree of Baboo Hara Chunder Dass, Munsif of Amirgunge, dated the 11th of December 1875.

(1) 4 B. L. R., App., 53.

(2) 9 B. L. R., App., 41.

(3) 23 W. R., 275.

1878 the goods into his possession for the purpose of pawning them, the case came within the second proviso to that section, and that accordingly the action would lie.

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MULLICK.

Greenwood v. Holquette (1) considered.

THESE were cases stated for the opinion of the High Court under s. 7 of Act XXVI of 1864, and s. 55 of Act IX of 1850, by H. Millett, Esq., First Judge of the Calcutta Court of Small Causes.

The plaintiff was a lady of property, having a country-house in Mymensing and a house in Calcutta. In the month of June 1877, she left her house in Calcutta in charge of her jemadar, one Sheoruttun Tewary, and among other articles Sheoruttun Tewary had charge of a box containing articles of jewellery. During the plaintiff's absence Sheoruttun Tewary broke open the box, and pawned some of the jewellery with the defendants. For this offence, he was convicted of criminal breach of trust as a servant, and sentenced to six months' rigorous imprisonment. The plaintiff now sued in *trover*, and the learned Judge of the Small Cause Court gave judgment for the defendants in both suits, contingent on the opinion of the High Court on the following question:—

“Whether, on the facts as above stated, having regard to s. 178 of the Contract Act IX of 1872, the plaintiff or the defendants are entitled to judgment?”

Mr. *Allen* for the plaintiff.

No one appeared for the defendants.

Mr. *Allen*.—Under the Penal Code, the custody of a servant does not take goods out of the possession of the master: therefore, as soon as the servant lifted the box with the intention of appropriating its contents, he committed larceny—see Penal Code s. 378, illustration (*d*)—*Reg. v. Wright* (2). The offence was theft, not criminal breach of trust as a servant. If property is out of the owner's possession in trust for some one, and is converted, the case is one of criminal breach of trust. But

(1) 12 B. L. R., 42.

(2) 1 Dearsley and Bell, 431.

here the goods were not in the possession of the servant—Dicey on Parties, 358:—section 178 of the Contract Act, upon which this case was decided, does not apply. [GARTH, C. J.—That section was intended to embody the Factors Act, 5 and 6, Vict. cap. 39. It was never intended to alter the existing law, but to meet the case of an agent entrusted with goods.] The distinction between possession and custody is referred to in this section. Even if the section applied, the pawn-broker gets no title. The general law continues that no man can give a better title than he has.—*Johnson v. Credit Lyonnais Co.* (1). (The learned Counsel was stopped by the Court.)

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MARKBY, J.—Referred to *Greenwood v. Holquette* (2).

The High Court delivered the following opinion:—

GARTH, C. J. (MARKBY, J., concurring):—We are of opinion, that, under the circumstances stated, the plaintiff is entitled to judgment in both cases.

During the plaintiff's absence from home the jemadar Sheoruttun was left in charge of her house and property as her servant. He was never possessed of the articles in question in any other character. He had only the bare custody of them, and had no authority to deal with them in any way whatever. We do not consider that such custody is "possession" within the meaning of the Contract Act, s. 178.

But even if the jemadar could be considered as having taken the articles into his own possession, we think the case is clearly within the scope of the second proviso to that section. The moment that they were removed by him from the box in which they were placed, for the purpose of being pawned to the defendants, there is no doubt that they were fraudulently obtained from their lawful owner.

In the case of *Greenwood v. Holquette* (2) where a piano had been hired from the plaintiff with an option of purchase, and the hirer sold the piano to the defendant before he had exercised that option, it was held by Sir R. Couch, C.J., and

(1) L. R., 3 C. P. Div., 43.

(2) 10 B. L. R., 42.

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Phear, J., that the defendant was liable in *trover* to the plaintiff, although it was found that he acted in perfect good faith. The Court thought that the possession, which was acquired by the hirer of the piano, was not such a possession as was contemplated by s. 108 of the Contract Act.

That case will be found a much stronger one than the present, because there the hirer of the piano was undoubtedly entitled to the possession of it for the time in his own right; whereas here, the possession of Sheoruttun was in fact the possession of the plaintiff. The plaintiff in the first suit will be entitled to judgment for Rs. 490, and in the second suit for Rs. 150.

Attorney for the plaintiff: Baboo Norendronath Sen.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Tottenham.

1878
 Aug. 7
 &
 Dec. 20.

HEERA LALL MOOKHOPADHYA AND ANOTHER (DEFENDANTS) v,
 DHUNPUT SINGH (PLAINTIFF).*

Kistibandi, Suit on—Acknowledgment of barred Decree—Limitation Act (XIV of 1859), s. 4—Contract Act (IX of 1872), s. 25, cl. 3—Consideration.

A obtained a decree in 1858 against B, but did not apply for execution till 1864, when B, although objecting that the decree was barred, presented to the Court, under arrangement with A, a petition acknowledging a certain sum to be due, and executed a kistibandi, agreeing to pay the debt by monthly instalments. B paid several instalments, but did not do so on one occasion until execution was taken out against her. On her death shortly afterwards, execution was taken out against her representatives. The representatives objected that the decree was barred, and that the kistibandi could not be substituted for the decree. The objection was, on appeal to the High Court, allowed. A then brought a suit on the kistibandi. *Held*, that at the time the kistibandi was entered into, the decree was under the limitation law then

* Special Appeal, No. 1909 of 1877, against the decree of A. J. R. Bainbridge, Esq., Judge of Zilla Moorshedabad, dated the 28th of July 1877, reversing the decree of Baboo Omrito Lall Chatterjee, Subordinate Judge of that District, dated the 29th of March 1877.