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possession. The Statute, therefore, commenced to run, and in twelve years Kali Prosonno lost, and the plaintiff gained, a title.

Considering the discreditable circumstances under which the plaintiff came into possession, I feel considerable reluctance in giving him the benefit of the Statute of Limitations; but the Legislature in this country has not thought fit in laying down its rules of prescription and limitation to make any distinction between cases where the possession begins by wrong, and cases where the possession commences, in a "just cause," although it may be under a defective title. And though I consider that distinction to be a sound one, and though it is recognized by the Hindu law (Mitakshara, Chap. III, Sec. iii, "On the effect of possession"), I do not think it is within the province of Courts of Justice to qualify the express and deliberate enactments of the Legislature.

I think, therefore, that we are bound to reverse the decisions of the Court below, and to give the plaintiff a decree for possession. The conduct of Kali Prosonno in dispossessing the plaintiff was clearly wrongful. But I do not think that we are called upon to award any costs up to decree.

PRINSEP, J.—I agree in setting aside the order of the Lower Court and decreeing the suit in favor of the plaintiff on the ground that Kali Prosonno on his return was not entitled to eject the plaintiff.

Appeal allowed.

PRIVY COUNCIL.

RAMANUND KOONDOO AND ANOTHER (PLAINTIFFS) *v.* CHOWDHRY SOONDER NARAIN SARUNGY AND OTHERS (DEFENDANTS).

P. C.*
1878
Nov. 15.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Principal and Surety—Execution against Surety—Interest—Giving Time.

R sued *M*, *B*, *C*, and *P* for money due for goods supplied. Separate solehnamas were filed by each of the four defendants, in which they admitted the debt, and each undertook to pay one-fourth thereof, with interest, by instal-

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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ments, and each further agreed that if the other three should make default and the amount due by them should not be realized by the sale of their property, then he should be liable to make good the deficiency. A decree was passed by the Court in accordance with the terms of the solehnamas. *C* and *P* each paid up their fourth shares, but *M* and *B* having failed to pay, *R* applied for execution against *C* and *P* in respect of the liability of *M* and *B*, *Held*, that in the absence of proof that the whole property of *B* had been exhausted, *R's* application could not be allowed.

Where a decree for payment of a certain sum with interest was passed against certain defendants as principal debtors and against other defendants as sureties, and it appeared that the decree-holder had allowed time to the principal debtors for the purpose of increasing the amount of interest,—*held*, that the decree-holder was not entitled to interest after the time when he might and ought to have put up the property of the principal debtors for sale, when possibly it might have realized the whole of the debt then due.

THE questions raised in this case sufficiently appear in their Lordships' judgment.

Mr. *C. W. Arathoon* for the appellants.

Mr. *Doyne* for the respondents.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This is an appeal from a decision of the High Court of Calcutta, affirming an order made by the Judge of the Zilla of Midnapore with respect to the execution of a decree made on the 5th July 1866 in a suit instituted by Ramanund Koondoo and Ramnidhi Koondoo against Srimatya Manika, a widow, Beer Narain, and two persons who may be designated by the name of Sarungy. The decree recites that the defendants, together with the late husband of the widow Manika, had become indebted, in respect of goods supplied, to the plaintiffs in a sum of about Rs. 53,000, and that the debtors filed a solehnama. Each of them filed a separate solehnama in precisely the same terms, with the necessary alterations in respect to names; that of Manika (the first recited) stated that "the sum of Rs. 56,500 was the debt claimed by the plaintiffs, "including costs; that the defendant was liable for Rs. 14,125,

"being one-fourth of that amount; and that being unable to "pay that money in cash, she, according to the kistbandi given "below, had recorded the following conditions of payment, "*viz.*, that interest should run on the entire amount due at the "rate of 12 annas per cent. per month from this date; that the "defendant should pay to the plaintiffs the principal amount "according to the kistbandi" (appended to this solehnama), "together with interest on the entire amount at the above rate, "and cause the payments to be endorsed on the decree passed "according to the present kistbandi solehnama; that no plea of "payment should be admitted other than the endorsements of "the payments on the decree; that if in breach of these condi-"tions there should be default in the payment of the entire "amount or any part of the amount of any one instalment, "the plaintiffs should at once realize from the defendant the "amount of all the instalments, together with interest at the "rate of Rs. 2 per cent. per month from this date, by executing "the decree passed on the basis of the kistbandi in this soleh-"nama; that if the other three co-sharers of the defendant who "have made separate kistbandis should neglect to pay the "monies respectively due by them, and the entire amount "should not be realized by the sale of their property, then the "defendant and her three co-sharers should all be liable for "the amount remaining due; that the talooks in the possession "of the defendant, and described in the second schedule, should "remain hypothecated until the entire amount due to the plain-"tiffs was realized in the manner above-mentioned; that as "long as the amount due to the plaintiffs remained unpaid, she "should not be able to make an alienation of this property by "gift, sale, &c., to anybody, or encumber the same by mort-"gage or ijara, &c.; that in case of non-payment of the money, "it should be realized by the sale of that property and other "moveable and immoveable properties of the defendant's hus-"band, whether held in his own name or benami; and that "when the entire amount of this kistbandi was paid, the kist-"bandi should be returned." Then there follows a list of the days on which the instalments are payable, and their amount. The second schedule gives the names, together with the Govern-

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ment revenue of six mouzas, in each of which each of the defendants held a share of three annas and four gandas.

The combined effect of the four documents is, that each of the debtors is liable, as a principal, to one-fourth of the whole debt, *viz.*, Rs. 14,125; that upon default being made by any one of the debtors, and all the property of that debtor having been taken and sold for the purpose of making good that default, then the other debtors shall be liable for the whole amount remaining due.

In 1873 an application was made by the plaintiffs against the two Sarungys, who had admittedly paid up the whole of their share of the debt, with proper interest, to make them liable, by an execution against them, in respect of the default of the other two debtors, Beer Narain and Manika; the whole sum remaining due is alleged to have amounted, with interest, to Rs. 65,000. The default was not denied, and the plaintiffs endeavoured to prove that the whole property of Beer Narain had been sold. No evidence seems to have been given that the whole of the property of Manika was sold, and there is no finding upon that subject.

The question dealt with by both Courts was, whether it was proved that the whole of the property of Beer Narain had been exhausted. This question reduces itself to a comparatively small point,— in their Lordships' view, not attended with much difficulty. It may be assumed to have been proved that the whole of the property of Beer Narain had been sold excepting his share of mouza Tudrooi, mentioned in the second schedule of the solehnama, and thereby hypothecated to the plaintiffs.

It appeared that one Bykunt Nath in 1868 bought the right, title, and interest of Beer Narain in this mouza at an execution sale under a decree recovered by one Soonder Mull in respect of a simple money claim which had accrued a considerable time after the date of the solehnama. He also paid off a mortgage debt due to one Golap Dé, to whom the mouza had been mortgaged before the solehnama, and who had obtained a decree under which it had been advertised for sale. Therefore Bykunt Nath obtained the interest of the judgment-debtor, which was

subject to both mortgages; he also obtained the interest of the first mortgagee, but he did not obtain the interest of the plaintiffs, who were the second mortgagees, and that interest, which must be assumed to be of some value, in the absence of evidence that it is worthless, has not been sold. That is the finding of both Courts, in which their Lordships concur. It therefore appears to them that the plaintiffs were not, at the time they applied for it, in a condition to issue execution against the two defendants as sureties for the debt of Beer Narain.

Only one further question remains in the case. The Subordinate Judge has intimated that if the plaintiffs sell what remains of Beer Narain's property, they may be in a position to issue execution against the defendants (a subject upon which, as there is no cross-appeal, their Lordships are not in a condition to give any opinion), but that they can only obtain interest up to the 11th of April 1867, when the estate was first ordered to be put up for sale. It has been contended that they are entitled to claim interest beyond that time. The learned Judge's finding is, that the decree-holders have allowed additional time to the defaulting debtors for the purpose of increasing their own amount of interest, the effect of postponing the payment being that, instead of interest at 9 per cent., they obtain what may be termed penal interest at the rate of 24 per cent. Undoubtedly it appears to their Lordships that there has been a great deal of delay, and apparently unnecessary delay, in putting up the property for sale under the execution. Applications have been from time to time made by the defaulting debtors for time to postpone the sale. That time has been granted and agreed to by the plaintiffs; and it would appear that in some cases the plaintiffs have themselves desired the postponement. The result has been that the sale has been put off for a number of years. Private sales have indeed been made, but no compulsory sale of any portion of the property seems to have taken place till many years after the first order for sale in April 1867.

Under these circumstances, and considering the finding of the learned Judge that the plaintiffs have consented to and indeed desired this postponement for the purpose of increasing the interest to which they are entitled, and thereby laying an additional

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burden upon the sureties, their Lordships are of opinion that the Subordinate Judge is justified in ordering that the plaintiffs shall not be entitled to interest after the time when they might and ought to have put up the property for sale, and when possibly it might have realized the whole of the debt then due.

For these reasons their Lordships think that the decision of the High Court affirming that of the lower Court is right, and they will humbly advise Her Majesty that that decision be affirmed, and that this appeal be dismissed with costs.

Appeal dismissed.

Agents for the appellants: Messrs. *Lambert, Petch,* and *Shakespear.*

Agents for the respondents: Messrs. *Dean, Chubbs,* and *Co.*

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1878
Dec. 9.

KIRTEE CHUNDER MITTER *v.* STRUTHERS AND ANOTHER.

Release to one of several Partners—Contract Act (IX of 1872), s. 44.

In a suit for damages against a partnership firm, the plaintiffs compromised the suit with one of the partners upon the terms contained in the following receipt:—"Received from *A* the sum of Rs. 9,500 in full discharge of all claims upon him as an individual and as a partner in the late firm of *B. S. & Co.*, and we hereby undertake to immediately withdraw the suit against him and others."

Held, that although, according to English law, the receipt operated as a discharge to all the remaining defendants, yet that the 44th section of the Contract Act applies to liabilities arising out of the breach of a contract, as well as to the performance of contracts, and that *A* alone was released.

THIS was a suit to recover damages in respect of certain contracts for the sale of jute entered into in the months of May and July 1877 between the plaintiff and the firm of Borrodaile, Schiller, and Co., which consisted at the date of the contracts of