Before Mr. Justice Norris, Mr. Justice Ghose and Mr. Justice Rampini.

SURAT LALL MONDAL AND OTHERS (PLAINTIFFS) *v.* UMAR HAJI AND OTHERS (DEFENDANTS.)*

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May 16.

Limitation—Suit for damages for misappropriation of crops—Act XV of 1877, Schedule II; Articles 36, 39, 48, 49, and 109.

In a suit for damages for misappropriation of paddy grown on plaintiffs' land, on the allegation that the defendants had wrongfully and forcibly reaped and misappropriated the crops, defendants pleaded limitation of two years under Article 36 of Schedule II of the Limitation Act (XV of 1877),

Held by NORRIS and GHOSE, JJ. (RAMPINI, J., dissenting) that the suit was not barred by limitation under Article 36.

Held by NORRIS, J. (without expressing any opinion on the applicability or otherwise of Articles 39, 49 and 109) that all the conditions existed in this case to bring it within Article 48 of Schedule II of the Limitation Act.

Essoo Bhayaji v. *The Steamship "Savitri"* (1) referred to.

Held by GHOSE, J.—Regarding the suit as one for compensation for the wrongful act on the part of the defendants in cutting the crops on the plaintiffs' ground, Article 39 would save a portion of the plaintiffs' claim from being barred by limitation. If, however, it is regarded simply as a suit for damages for carrying away and misappropriating the crops the case would fall under Article 49.

Pandah Gazi v. *Jennuddi* (2) dissented from; *Puddolochan Pardan* v. *Baidyanath Maity* (3) followed.

Held by RAMPINI, J.—None of the Articles 39, 49 and 109 applied to this case, and the suit was barred by the provision of Article 36.

THE plaint in this suit described it as a "suit for damages for misappropriation of paddy," and alleged that the defendants had wrongfully and forcibly reaped and misappropriated paddy grown on plaintiffs' land from the 17th Aughran 1295 (1st December 1888) to the month of Magh of the same year (13th January to 10th February 1889). The relief prayed for was "damages for misappropriation of paddy together with costs."

* Appeal from Appellate Decree No. 2265 of 1893, against the decree of J. Whitmore, Esq., District Judge of Beerbhoom, dated the 24th of August 1893, reversing the decree of Baboo Jado Nath Gossain, Additional Munsif of Ramporehaut, dated the 31st of December 1892.

(1) I. L. R., 11 Bom., 133. (2) I. L. R., 4 Calc., 665.
(3) Rule 381 of 1894, decided 22nd August 1894.

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The suit was instituted on the 30th November 1891, more than two years but less than three from the date of the cause of action as given in the plaint. The defendants, among other grounds of defence, pleaded limitation. The pleadings and decision in the Courts below sufficiently appear from the judgment of Mr. Justice Norris.

The lower Appellate Court dismissed the suit on the ground of limitation, and the plaintiffs preferred a second appeal to the High Court.

The case was first heard by GHOSE and RAMPINI, JJ., who differed in opinion, and it was thereupon referred to NORRIS, J., under section 575 of the Civil Procedure Code.

Babu *Karuna Sindhu Mukerjee* for the appellants.

Babu *Sarada Charan Mitra* and Babu *Chandra Sekhar Mukerjee* for the respondents.

Babu *Karuna Sindhu Mukerjee*.—The limitation prescribed for a case like this is three years. Either Article 39 or Article 49 or Article 109 would apply. Article 36 therefore is inapplicable. The plaint alleged that the paddy was "reaped and misappropriated;" and the issue whether it was "forcibly cut" as well as the expression "cut and carried" in the Judge's judgment point to the application of Article 39. [NORRIS, J.—But the plaint does not allege any damage in trespass.] The case of *Pandah Gazi* v. *Jennuddi* (1) is an authority on a different point. [NORRIS, J.—That case does not seem to throw much light on the present question, and the case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (2), takes a different view]. The unreported decision in *Puddolochan Pardan* v. *Baidyanath Maity* (3) is in point. The case of *Narasimma* v. *Ragupathy* (4) is also an authority for the application of Article 39. So also the case of *Shurnomoyee* v. *Pattarri Sirkar* (5). [NORRIS, J.—But that is not your case in the plaint]. In the view that the suit is for compensation for wrongfully taking specific moveable property Article 49 would apply. In a

(1) I. L. R., 4 Calc., 665. (2) I. L. R., 11 Bom., 133.
(3) Rule No. 381 of 1894 decided, 22nd August 1894.
(4) I. L. R., 6 Mad., 176. (5) I. L. R., 4 Calc., 625.

similar case *Passanha* v. *Madras Deposit and Benefit Society* (1) it was held that Article 49, and not Article 36, would apply. In another view of the case Article 109 may apply. The case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (2) was an action of tort and distinguishable from the present case.

Babu *Sarada Charan Mitra* for the respondents.—The relief prayed for in the plaint was on the ground of misappropriation and not on the ground of trespass. The case of *Narasimma* v. *Ragupathy* (3), which relates to trespass on immoveable property, cannot apply. As to the application of Art. 49, the case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (2) is a complete answer. That article applies to the case of moveable property and not property which was immoveable in its inception, but became moveable by an act of the defendants. Two years' limitation is the general rule, and there are certain exceptions specially provided for. The case of *Pandah Gazi* v. *Jennuddi* (4) is direct authority for the application of Article 36. The case cited from the 11th Volume of the Madras series is not against me.

Babu *Karuna Sindhu Mukerjee* was heard in reply.

The following judgments were delivered by the High Court (NORRIS, GHOSE and RAMPINI, JJ.) :—

NORRIS, J.—This appeal from appellate decree was heard by Ghose and Rampini, JJ., and those learned Judges having differed in opinion on a point of law the appeal has, under the provisions of section 575 of the Code of Civil Procedure, read with section 587, been referred to me by order of the Chief Justice.

The suit was for damages "for misappropriation of paddy," and the material portion of the plaint, which was filed on 30th November, 1891, was as follows :—

"1. The plaintiff owns several *lakhiraj* and *mal* lands in villages Bhagobutipur and Bhowanipur, within the jurisdiction of this Court. He holds possession thereof by cultivating the same and enjoying the crops thereof.

(1) I. L. R., 11 Mad., 333.
(2) I. L. R., 11 Bom., 133.
(3) I. L. R., 6 Mad., 176.
(4) I. L. R., 4 Calc., 665.

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"2. The defendants wrongfully and forcibly reaped and misappropriated the paddy grown in the year 1295 on 64 bighas 2 cottas of land, as per schedule, out of the said lands from the 17th Anghran up to the month of Magh that year. The plaintiff, therefore, brings this suit, and prays that a decree may be passed in his favour against the defendants for damages, as per account given below, for misappropriation of paddy together with costs.

"The cause of action in this suit has gradually accrued from the 17th Aughran 1295."

The 17th Aughran 1295 corresponds to the 1st December 1888.

The account referred to stated the damages the plaintiff had sustained at Rs 979.

The defendants pleaded limitation, denied that the plaintiff had raised any crops as alleged, and denied that they have cut or misappropriated any paddy grown on his land.

Upon these pleadings the Munsif framed the following issues, *viz* :—

"Whether the claim is barred by limitation? Whether the plaintiff raised these crops? Whether the defendants forcibly cut and took away the crops? Whether the plaintiff is entitled to damages? If so, what is the measure of damages"?

The Munsif makes no reference to the arguments, if any were urged, on the question of limitation; all that he says on this point is, "I do not see how the claim is barred by limitation"; he found it "satisfactorily proved that the land belongs to the plaintiff and he raised the disputed crops."

Upon the third issue the Munsif's judgment is as follows:

"I believe from the evidence adduced on behalf of the plaintiff that the defendants Nos. 2 to 8 cut and took away *dhan* with labourers.

"There is good and reliable evidence on behalf of the plaintiff to show that the defendants Nos. 2 to 8 cut and took away the *dhan*, *i.e.*, they did not cut it with their own hands, but helped in it and are liable. There is good and reliable evidence to shew that the contending defendants were the actual wrong-doers. Some of the contending defendants also took some *dhan*; they had one common object; they made regular *loot*."

The Munsif assessed the damages at Rs. 712, and gave the

plaintiff a decree for that amount against the defendants Nos. 2 to 8.

The defendants appealed, and the District Judge has reversed the Munsif's decision on the question of limitation, and, without going into the merits, has dismissed the plaintiff's suit with costs.

The District Judge's judgment is as follows :—

"The first ground which is argued is that of limitation, and, in my opinion, the case must be decided upon that ground.

"The suit is for the value of crops cut and carried.

"The case of *Pandah Gazi* v. *Jennuddi* (1) lays down that under Act IX of 1871, the Article applicable to this class of cases was not Article 26 (corresponding with Article 49 of the present law), but Article 40 (corresponding with Article 36 of the present law). If this is so, then the present suit, which was filed on the 30th November 1891, is clearly barred, for the acts complained of are said to have taken place from the 17th Aughran to the months of Pous and Magh 1295, and the last day of Magh 1295 corresponds with 10th February 1889. The period limited by Article 36 is two years, and the latest date for the cause of action is about nine and a half months in excess of two years prior to the suit being filed.

"It is suggested however that Article 39 will apply. If so, the period limited is three years. But the only authority for this view is an unreported remark of Field, J., quoted in the note on Article 36 in Mitra's Law of Limitation, to the effect that carrying away of crops may be treated as matter in aggravation of a trespass on immoveable property.

"But I think that an unreported remark by a single Judge in a case, the facts of which are unknown, cannot outweigh the ruling above quoted. Moreover, the remark presupposes a suit for damages for trespass. The present suit, however, is not so framed. All that the plaint says is that plaintiff's crop has been cut and carried, that its value was so and so, and that plaintiff asks that he may have a decree for that amount with costs and any other relief.

"Accordingly, I hold that this suit was barred by limitation, Article 36 limiting the period to two years. The appeal is decreed, and the suit is dismissed with costs."

The plaintiff appealed to this Court on the ground that the lower Appellate Court was in error in holding that the suit was barred by limitation.

For the appellant it was argued that either Article 39 or Article 49 or Article 109 of Schedule II of the Limitation Act (XV of 1877) applied. For the respondent it was contended that Article 36 applied.

(1) I. L. R., 4 Calc., 665.

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It was admitted that if Article 36 applied, the suit was barred, and that if either of Articles 39, 49 or 109 applied, it was not barred.

Article 36 runs as follows: "For compensation for any malfeasance, misfeasance, or nonfeasance independent of contract and not herein specially provided for, two years from the time when the malfeasance, misfeasance or nonfeasance takes place."

The plaintiff's suit is clearly one "for compensation for a malfeasance or misfeasance independent of contract;" if therefore there is any other article in Schedule II of the Limitation Act specifically applicable to the suit as framed, Article 36 will not apply; if there is not, the article will apply and the plaintiff's suit will be barred.

Any article that gives a period of limitation of three years will avail the plaintiff.

In the view I take of the case it is not necessary to express any opinion as to the applicability or otherwise of Articles 39, 49, and 109.

I am of opinion that the suit falls under Article 48, which is as follows: "For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, three years from the time when the person having the right to the possession of the property first learns in whose possession it is."

The meaning of the words "specific moveable property as used in Article 49 (and they must bear the same meaning in Article 48) was considered by Farran, J., in *Essoo Bhayaji* v. *The Steamship "Savitri"* (1). The learned Judge says: "The word 'specific' applied to property in one's own possession is meaningless. In addition to its medical, natural history and botanical meanings, Webster's Dictionary defines it as 'tending to specify or make particular, definite, limited, precise.' All property in possession of an owner is in this sense specific, as well the corn in his barn as the horse in his stable. Lawyers use the words 'specific property' in a different sense, *viz.*, as equivalent to property of which you may demand the delivery in *specie*. Thus a specific legacy is a legacy

(1) I. L. R., 11 Bom., 133.

'which can only be satisfied by the delivery of the identical subject.' The phrase is only apt when the thing to which you are entitled is in the possession of some third party. It is in this sense I think that the word specific is used in Article 49."

Adopting this explanation Article 48 would then read thus: "For property lost or acquired by theft, dishonest misappropriation or conversion of which the owner is entitled to demand the return in *specie* from the person in whose possession it is, or for compensation for wrongfully taking or detaining such property, three years from the time when the person entitled to demand the return of such property first learns in whose possession it is."

Upon the facts found by the Munsif I am of opinion that the defendants acquired the *dhan* if not by theft or dishonest misappropriation, at least by conversion. Conversion is a wrongful interference with goods as by taking, using or destroying them inconsistent with the owner's right of possession. The defendants clearly "converted to their own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiffs' goods," that is to say certain *dhan*.

The plaintiff was entitled to demand the return of the *dhan* in *specie* from the defendants, who converted it to their own use, and is entitled to damages for such conversion.

The words "wrongful taking" embrace "a taking by theft, dishonest misappropriation or conversion." The plaintiff could not have learned in whose possession his crops were until they were cut and carried away; the earliest cutting and carrying away was on 1st December 1888, and the suit was instituted on 30th November 1891.

All the conditions, therefore, seem to me to exist to bring the case within Article 48.

I should add that, though crops standing on the land are immoveable property, when severed from the land they are moveable property.

The appeal must be allowed, the judgment of the District Judge set aside, and the case remanded for trial on the merits.

Costs of both hearings in this Court will abide the result.

GHOSE, J.—This was a suit to recover compensation for wrongfully reaping and misappropriating certain paddy grown

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upon the plaintiffs' land. The suit was brought within three years, but beyond two years, of the wrongful act on the part of defendants complained of. Two issues were raised between the parties, as set out in the judgment of the Munsif: *First*, "whether the claim was barred by limitation; *second*, whether the plaintiff raised these crops; whether the defendants forcibly cut and took away the crops; whether the plaintiff was entitled to damages, and, if so, what was the measure of damages."

The Munsif held, upon the evidence in the cause, that the land on which the crops were grown belonged to the plaintiff; that he raised the crops, that the defendants cut and took away the same, and that the claim was not barred by the law of limitation.

On appeal by the defendants, the District Judge was of opinion that the suit was barred by the limitation provided in Article 36 of the Second Schedule of the Limitation Act (XV of 1877); and, in support of his view, he referred to the case of *Pandah Gazi* v. *Jennuddi* (1).

On second appeal, it has been contended before us on behalf of the plaintiff that the case falls under Articles 39 and 49 of the Limitation Act.

Article 36 runs as follows: "For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for, two years when the malfeasance, misfeasance or nonfeasance takes place;" so that if there is any other article in the Limitation Act specially providing for a case like the one we have before us, the limitation applicable would be that which is prescribed by that Article and not Article 36.

Article 39 provides: "For compensation for trespass upon immoveable property three years, the date of the trespass."

Article 48 runs thus: "For specific moveable property, lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, three years, when the person having the right to the possession of the property first learns in whose possession it is."

(1) I. L. R., 4 Calc., 665.

Article 49 is as follows: "For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same, three years when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

Standing crops have repeatedly been held to be immoveable property and not moveable property, and, therefore, there can be no doubt that, so long as the crops which the defendants cut were on the ground, they should be regarded as immoveable property. But it seems to me that so soon as they were cut, they became moveable property; and the question is whether, when the defendants carried them away, they were such "specific moveable property" within the meaning of Article 49 of the Limitation Act, in respect to which the plaintiff is entitled to come into Court within three years from the time when the said property was wrongfully *cut and taken away*.

If the crops, after they were cut, were left on the ground and not taken away, I should think that the plaintiff would be entitled *to claim compensation* as for trespass upon immoveable *property* within the meaning of Article 39, and the period of limitation would be three years from the date of the trespass. In the present case, however, what the defendants did was something in aggravation of the trespass, that is to say, they carried away the crops and appropriated them to their own use.

It has been said that Article 49 of the Limitation Act refers to property which in its inception is moveable property, but does not assume that character by any act on the part of the defendant. I am unable to accept this view as correct. It seems to me that when the crops after they were cut took the character of moveable property, there is no reason why the plaintiff should not be entitled to regard the said crops as moveable property within the meaning of the said Article.

The act of carrying away the crops is an act distinct and separate from the cutting thereof; and in this view, the wrongful act on the part of the defendants in misappropriating the crops would, I think, bring the case within Article 49.

The plaintiff, in this case, does not claim in specific words

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any compensation for trespass within the meaning of Article 39; but it seems to me that the issues that were framed by the Munsif sufficiently raise this point. If, therefore, the plaintiff is entitled to regard this suit as a suit for compensation for the wrongful act on the part of the defendant in cutting the crops on his ground, Article 39 would save a portion of his claim (whatever that portion may be) from being barred by limitation. If, however, this be not regarded as a suit for trespass, but simply a suit for damages on account of the wrongful carrying away and misappropriating the crops in question, the case in my opinion would fall under Article 49.

A law of limitation, which curtails the right of the subject, should be construed liberally and not strictly; and putting a liberal construction upon Articles 39 and 49 I should think that the case is not barred by limitation.

As to the precedent referred to in the judgment of the learned District Judge, it would appear that the cause of action to the plaintiff in that case arose when the old Limitation Act (IX of 1871) was in force; but the suit itself was instituted after the new Limitation Act (XV of 1877) had come into operation. The main question that was raised in the case was whether the suit fell under Article 26 or Article 40 of Act IX of 1871. The Small Cause Court, however, referred two questions for the consideration of the High Court—*first*, "whether standing crops are not moveable property under Acts X and XV of 1877; and, *secondly*, whether Article 49 of the present law of limitation (XV of 1877) revives and saves the plaintiffs' right of action from the operation of limitation." It was held by a Divisional Bench of this Court that Article 40 (Act IX of 1871) which provided two years' limitation was applicable and not Article 26, which prescribed one year's limitation; and it was further held that standing crops were not moveable but immoveable property. With reference to the second question that was referred by the Small Cause Court Judge, this Court held that that question did not arise. The learned Judges, however, went on to say that the Court below ought to have decided the question of limitation with reference to Act XV of 1877, and that under Article 36 of that Act the suit was not barred.

It will be found upon an examination of the old and the new Limitation Acts, that there was no such Article in the old Act corresponding to Article 49 of the new Limitation Act, and that Article 40 of the old Limitation Act was more comprehensive in its operation than the corresponding Article 36 of the new Limitation Act; for, in this latter Act, we do not find the general words "any wrong" which are to be found in the old Act.

If we confine ourselves to the questions that were submitted by the Small Cause Court in the case of *Pandah Gazi* (1) and the answers that were given by this Court, I do not think that that case should be regarded as any binding authority so far as the question raised in this case is concerned, and I would prefer to follow the unreported decision of this Court in *Puddolochan Pardan* v. *Baidyanath Maity* (2) decided on the 22nd August 1894.

For these reasons I would reverse the decision of the Court below and remand the case for retrial.

I have however the misfortune to differ in this case from my learned colleague, and the case will, therefore, be referred to a third Judge.

RAMPINI, J.—The plaintiff brings this suit to recover damages for paddy wrongfully and forcibly reaped and misappropriated by the defendant.

The District Judge has held that the suit is barred under Article 36, Schedule II of the Limitation Act. The plaintiff now appeals and contends that the suit is not barred, inasmuch as the Article of the Limitation Act applicable is not Article 36, but either Article 39 or Article 49, according to both of which Articles the period of limitation is not two, but three years. I am of opinion that neither of these Articles will apply.

Article 39 cannot apply, because the plaintiff does not sue for compensation for trespass on immoveable property. He does not even allege that any such trespass took place.

Article 49 cannot apply, because this is not a suit for wrongfully taking or injuring moveable property. Standing crops, which are what the defendant is said to have reaped and mis-

(1) I. L. R., 4 Calc., 665. (2) Rule No. 381 of 1894, unreported.

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appropriated, are not moveable but immoveable property. See the General Clauses Act, I of 1868 and *Gopal Chandra Biswas* v. *Ramjan Sirdar* (1), *Tofail Ahmud* v. *Banee Madhub Mookerjee* (2), *Pandah Gazi* v. *Jennuddi* (3), *Maddaya* v. *Yenkata* (4), *Cheda Lal* v. *Mul Chand* (5).

The learned pleader for the appellant in this case relies on the case of *Shurnomoyee* v. *Pattarri Sirkar* (6), and on the unreported case of *Puddolochan Pardan* v. *Baidyanath Maiti* (7), decided by this Court on the 22nd August last. The facts of the former of these cases are quite different from those of the present case. In that case the defendant had been put in possession of certain land in execution of a decree, and while so in possession he had reaped and appropriated the crop of the land. Afterwards, the decree in execution of which he had been put in possession was set aside, and he was sued for the value of the crop he had appropriated. Hence the suit was held to be one for the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant, and so it was held that the article applicable was Article 109 of Act IX of 1871. But the defendant in the present case was never put in possession of the land on which the paddy he reaped and misappropriated grew ; so Article 109 of the present Limitation Act cannot possibly apply.

In the unreported case above referred to (Rule 381 of 1894) it was held that a suit like this comes either under Article 39 or Article 49 of the Limitation Act, inasmuch as the tort complained of by the plaintiff was an act of trespass, and cutting of the crops might be regarded as an aggravation of it, in which case Article 39 would apply, and because crops when cut may be regarded as moveable property, in which case Article 49 would apply. But in the first place, the plaintiff, as already pointed out, has not shaped his case as the plaintiff in Rule 381 of 1894 did.

The present plaintiff has complained of no act of trespass, nor

(1) 5 B. L. R. 194 ; 13 W. R., 275.
(2) 24 W. R., 394.
(3) I. L. R., 4 Calc., 665.
(4) I. L. R., 11 Mad., 193.
(5) I. L. R., 14 All., 30.
(6) I. L. R., 4 Calc., 625.
(7) Rule No. 381 of 1894, decided 22nd August 1894.

has he alleged that any trespass took place. He complains merely of the wrongful conversion of his paddy. In the second place, the plaintiff did not shape his case as one for damages for the misappropriation of moveable property. Both in paras. 2 and 3 of his plaint he complains of the defendant having *reaped* the paddy. Moreover, I am of opinion that Article 49 must be meant to apply to cases of damages to property which is from the beginning of a moveable nature, and not to immoveable property which by the wrongful act of the defendant becomes moveable. I think the case of *Pandah Gazi* v. *Jennuddi* (1) is directly in point, and following that case, I would affirm the decision of the learned District Judge and dismiss the appeal. I would add that the case of *Krishna Prosad Nag* v. *Maizuddin Biswas* (2) has also been cited before us. But it does not appear to me in point. The question decided in that case was one of jurisdiction of the Small Cause Court and not one of limitation.

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Appeal allowed and case remanded.

S. C. G.

ORIGINAL CIVIL.

Before Mr. Justice Hill.

ROMANATH BURAL *v.* GUGGODONANDAN SEN AND OTHERS.*

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Practice—Issue of summons—Summons transmitted to local Court for service—Transmitting Court to consider sufficiency or non-sufficiency of service of summons—Civil Procedure Code (Act XIV of 1882), section 85.

When a summons is issued by one Court to persons resident outside its jurisdiction, and is sent to another Court for service to be effected, it is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not.

Nusur Mahomed v. *Kazbai* (3) distinguished.

THE plaintiffs entered into various transactions with the defendants' firm, and on an adjustment of accounts the sum of Rs. 3,339 was found to be due from the defendants to the

* Suit No. 179 of 1895.

(1) I. L. R., 4 Calc., 665.
(2) I. L. R., 17 Calc., 707.
(3) I. L. R., 10 Bom., 202.