

*Before Mr. Justice Norris and Mr. Justice Banerjee.*

KALU AND ANOTHER (DEFENDANTS) v. LATU (PLAINTIFF).\*

1893

August 14.

*Decree—Amendment of decree—Limitation Act, 1877, art. 178—Suit for mesne profits while plaintiff is out of possession.*

There is no limitation for an application under s. 206 of the Civil Procedure Code, to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment.

A instituted a suit for declaration of title and for possession. The decree, which was finally confirmed by the High Court, gave her the declaration sought for, but it contained no direction as to the possession, although the judgment stated that she was entitled to possession. A's son (having been substituted in her place) applied to have the decree amended. The Lower Appellate Court held that the application was barred by limitation. The High Court on appeal upheld the Lower Court's order, not on the ground of limitation, but on the ground that the application to amend the decree had been made in the wrong Court. A's son then instituted a fresh suit against the same parties for declaration of title, perpetual injunction, and for mesne profits. *Held*, that the plaintiff was entitled to have the decree amended under s. 206, Civil Procedure Code, and that though the plaintiff's claim to possession was barred, yet his right was not extinguished, and he having therefore a subsisting title, was entitled, though out of possession, to maintain the suit so far as it sought to recover mesne profits.

The facts of this case are sufficiently stated in the judgment of the Court.

Moulvie *Seraf Islam* for the appellants.

The respondent did not appear.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, respondent, for declaration of his title to, and for recovery of mesne profits for certain years in respect of, a two-annas share of some land, and for a perpetual injunction restraining the defendants from holding possession thereof, on the allegation that

\* Appeal from Appellate Order No. 295 of 1892, against the order of Babu Hure Krishna Chatterjee, Subordinate Judge of Chittagong, dated the 17th of June 1892, reversing the order of Babu Atool Chunder Battabyal, Munsif of Satkania, dated the 14th of December 1891.

1893

KALU  
v.  
LATU.

the plaintiff's mother had obtained a decree for the said share, and that the plaintiff was entitled to the same as the sole heir of his mother.

The defendants, amongst other things, urged that the suit was barred by limitation and also by section 13 of the Code of Civil Procedure, and that the plaintiff, who was out of possession, could not sue for any of the reliefs claimed.

The first Court dismissed the suit, holding that the plaintiff's right to obtain possession was barred, his predecessor in title having sued for possession and having failed to obtain a decree for it, and that being disentitled to possession of the disputed land, the plaintiff could not restrain others from holding possession of the same.

On appeal, the Lower Appellate Court has reversed the first Court's decree, and remanded the case under section 562 of the Code of Civil Procedure, for trial on the merits, holding that though the prayer for declaration of title may be barred, the claim as to the other reliefs was maintainable.

In second appeal, it is contended for the defendants that the Lower Appellate Court was wrong in law in remanding the case for trial on the merits when the suit was not maintainable, the plaintiff's right to recover possession being barred by section 13 of the Code of Civil Procedure, and the allegation in the plaint not being sufficient to entitle the plaintiff to obtain a perpetual injunction.

The admitted facts upon which the argument that the plaintiff has lost his right to recover possession is based, are shortly these:— The plaintiff's mother brought a suit for declaration of her title to, and for recovery of possession of, the property in dispute. The suit was dismissed by the first Court. The Lower Appellate Court, whilst finding in its judgment that the plaintiff in that suit was entitled to possession, gave her a decree which did not contain any direction for delivery of possession to her; and that decree was confirmed by this Court on second appeal. The present plaintiff was subsequently substituted in that decree in the place of his mother as her legal representative, and, in his attempt to recover possession in execution of that decree, he was defeated on the ground that the decree contained no direction for delivery of possession. He then applied to the Lower Appellate Court, under

section 206 of the Civil Procedure Code, for amendment of the decree, but his application was refused as being barred by limitation, and this Court, upon an application under section 622 of the Code of Civil Procedure, declined to interfere with the order of the Lower Appellate Court, on the ground that that Court had rightly refused to amend the decree, as it had no jurisdiction to do so after the decree had been confirmed by this Court.

1893

---

 KALU  
 n.  
 LATU

From the foregoing statement of facts it is clear, no doubt, that the plaintiff's right to recover possession of the property in dispute by a fresh suit is barred by section 13 of the Civil Procedure Code, Explanation III of that section distinctly providing that any relief claimed which is not expressly granted should be deemed to have been refused. But it is equally clear from the judgment of the Subordinate Judge in the former case that the plaintiff's mother was entitled to recover possession, and that it was only by oversight that that relief was not granted by the decree. The plaintiff was therefore clearly entitled to have that decree amended, under section 206 of the Code, by being brought into conformity with the judgment, and we think he is still entitled to have the decree so amended upon a proper application made to the proper Court. Such an application is not, as the Subordinate Judge erroneously held, barred by limitation. It has been held, by the Bombay High Court in *Shivapa v. Shivpanch Lingapa* (1) and by the Madras High Court in *Jivaji v. Praggi* (2), that there is no limitation for an application under section 206, it being the duty of the Court to amend a decree under that section whenever it is found to be not in conformity with its judgment, and in that view we fully agree. Nor does the refusal of this Court to interfere with the order of the Subordinate Judge declining to amend the decree, stand in the way of a proper application for such amendment being granted by this Court, as this Court refused to interfere, not on the ground of the application being barred by limitation, but on the ground of its having been made to a wrong Court. We are, therefore, of opinion that the plaintiff's right to recover possession is not extinguished, though he is not entitled to do so by a fresh suit. Then, as for his claim for a declaration of title, it is, properly speaking, not barred, but is wholly

(1) I. L. R., 11 Bom., 284.

(2) I. L. R., 10 Mad., 51.

1893

KALU  
v.  
LATU.

unnecessary, his predecessor in title having already by the decree in the former suit obtained such declaration, and he having been substituted in her place in that decree. That being so, the plaintiff clearly has made out his title to the land in dispute; and that title was a subsisting title at the date of the institution of this suit, as the Lower Appellate Court has found in this case that the dis-possession of the plaintiff's predecessor in title took place within 12 years before that date.

The plaintiff, therefore, having a subsisting title is, in our opinion, entitled, though out of possession, to maintain the present suit so far as it seeks to recover mesne profits. The cases of *Dyamoyee Dayee v. Modhoo Soodun Mytee* (1) and *Dwarkaram Misser v. Jogessur Lall* (2) may be cited as authority in favour of this view.

The remand order made by the Lower Appellate Court should therefore be affirmed, so far as it directs the trial of the suit on the merits, in respect of the claim for mesne profits. The prayer for a perpetual injunction must be disallowed, as no case is made out in the plaint for such relief.

The result is that, subject to the modification indicated above, the order of the Lower Appellate Court is affirmed, and this appeal dismissed, but without costs, as the respondent did not appear.

c. s.

*Appeal dismissed.*

### CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Amir Ali.*

1894  
Jan. 4.

C. W. GRIFFITHS (PETITIONER) v. TEZIA DOSADH (OPPOSITE PARTY).  
*Criminal breach of contract—Breach of contract of service—Act XIII of 1859, s. 2,—Statute & Geo. IV., Cap. 34, s. 3—Autrefois convict.*

A conviction for breach of contract of service under s. 2, Act XIII of 1859, is a bar to any subsequent conviction on the same contract for a further breach for not returning to service.

One Tezia Dosadh, a tea garden coolie, entered into a contract, under Act XIII of 1859 on the 16th May 1893, whereby she

\* Criminal Revision No. 8 of 1894, against the order passed by Babu Jagat Chandra Das, Extra Assistant Commissioner of Cachar, dated the 3rd October 1893.

(1) 3 W. R., 147.

(2) 21 W. R., 276.