1877

KALI KISHORE ROY v. DHUNUNJOY ROY.

and as this error has pervaded the whole of the proceedings from the first, the proper course will be, to send the case back for re-trial to the Court of first instance.

The attention of the Munsif must be drawn to the fact, that if the plaintiff is entitled upon the merits to any share in this joint property, and has at any time been excluded from it (which appears to have been the Munsif's finding on the trial) the plaintiff would have twelve years to bring his suit, not from the time of his exclusion, but from the time when he claimed and was refused his share, and if he has never claimed or been refused his share, then he might bring his suit at any time. The Munsif will frame a fresh issue or issues on the point of limitation, having regard to the judgment of this Court; and will re-try the case upon such issue or issues, both parties being at liberty to adduce further evidence upon the points so raised. In case of an appeal from the Munsif, the District Judge will, of course, be at liberty to re-hear the whole case upon the merits. The costs will abide the event.

Case remanded.

Before Mr. Justice Markby and Mr. Justice Prinsep.

MONOHUR DOSS (PLAINTIFF) *v.* McNAGHTEN (ONE OF THE DEFENDANTS).*

1877
Aug. 20.

Indigo Factories—Mortgage—Liability of Creditor of Factory—Lien by Custom.

A sold to *B*, the proprietor of an indigo concern, of which *C* was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale and after the seed had been planted, *C*, under a decree on his mortgage, obtained possession of *B's* factory. In a suit by *A* against *B* and *C* for the price of the indigo seed, *Held* that, in the absence of any agreement by *C* to pay the debts of *B*, *C* could not be held liable.

There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debt of the factory.

* Special Appeal, No. 1853 of 1876, against the decree of E. S. Mosley, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th of June 1876, affirming the decree of Baboo Mothura Nath Gupta, First Subordinate Judge of that district, dated the 25th of November 1875.

1877

MONOHUR DOSS v. MCNAGHTEN.

THIS was a suit for the recovery of Rs. 2,563-12, the value of certain bags of indigo seed. The plaint also asked for the realization of the money due by the sale of the prepared indigo cakes, the product of the seeds, or for a declaration of the plaintiff's right to a charge on the cakes in accordance, as it alleged, with the practice of indigo business. The seed was sold by the plaintiff to the defendant Fitzpatrick, the proprietor of the Paigampore Factory. The evidence of such sale was a "sata," or written agreement, which, however, contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. While the crop was still on the ground, the defendant McNaghten took possession of the factory under a mortgage decree obtained against the defendant Fitzpatrick. The Court of first instance dismissed the plaintiff's claim as against the defendant McNaghten, on the ground that there was no agreement, express or implied, that he should be liable for the debts of his mortgagor. The lower Appellate Court upheld this decision, and the plaintiff preferred a special appeal to the High Court.

Mr. *J. D. Bell* (with him Baboo *Jodu Nath Roy*) for the appellant.—The assignee of the indigo concern can be made liable for the price of the indigo seed. A mortgagee in possession is like an assignee in bankruptcy. Here the mortgagee has realized the advantage from the crop, the out-turn of seeds sold to his mortgagor, and is, therefore, liable for the price: *Kearnes* v. *Bhawani Charan Mitter* (1). The indigo crop being clearly for the benefit of both mortgagee and mortgagor, the cost of production is a charge on the factory, not a personal debt. The mortgagee takes subject to encumbrances: Macpherson on Mortgages, 109; see also an unreported case, No. 51 of 1874, Kemp and Birch, JJ., and *Jowadunessa Sabudai Khandan* v. *Jhaman Lall Misser* (2).

Mr. *Fergusson* for the respondents.—Unless the assignee has notice of the debt, he is not bound. The assignee must be found with some knowledge.

Mr. *Bell* in reply.

(1) B. L. R., Sup. Vol., Part I, 54. (2) 23 W. R., 158.

1877

MONOHUR DOSS v. MCNAGHTEN.

The judgment of the Court was delivered by—

MARKBY, J.—In this case the plaintiff is a person who supplied seed to an indigo factory. While that seed was in the ground, the mortgagee of the owner of the factory took possession of it, and I assume that he also took the crop which was produced by the seed. The person who sold the seed is plaintiff in this suit, and he sues the mortgagee, Mr. McNaghten, and also the mortgagor, Mr. Fitzpatrick, to recover the value of the seed. Both the Courts below have held that the mortgagor is liable, but that the mortgagee is not. The plaintiff appeals.

Now it is not necessary to advert to the exact terms of the plaint, as Mr. Bell, in arguing for the plaintiff, says, that he is not bound by the precise terms of the plaint, and has argued the general question whether, under these circumstances, the mortgagee in possession can be made liable for the price of the seed. I think he has failed to show that he can be made so liable.

Before considering the Full Bench decision that has been referred to, I will clear the case of one preliminary point,—namely, that there is not in this case any pledge of the crop of indigo which was grown out of this seed by the owner of the factory to the plaintiff. Mr. Bell read the "*sata*" to us, and it does not seem to us to constitute any such pledge. Therefore, that distinguishes the case from two manuscript judgments which were read to us in regular appeal, No. 51 of 1874, and the case of *Jowadunessa Satudai Khandan* v. *Jhaman Lall Misser* (1).

But then it is said that, quite independently of any arrangement of that kind between the seller of the seed and the owner of the factory, there is in the case of an indigo factory a right to recover the price of the seed from the mortgagee in possession.

Now I think the Full Bench ruling which has been quoted lays down two things. I think we must now take it to be the law of this country that there is no lien by custom or otherwise upon the factory or upon the produce in respect of any debt of the factory. And I think that that decision further lays down that the purchaser of an indigo factory is liable only for those debts which, as between himself and the vendor, he has agreed to pay. At page 59, Bengal Law Reports, Full Bench Rulings, Part I,

(2) 23 W. R., 158.

1877

MONOHUR DOSS v. MCNAGHTEN.

it is said:—"Looking to general principle, as well as to the authorities in the late Sudder Court, and particularly *E. D. De Sarun* v. *Wooma Churn Seth* (1), there seems no ground whatever for saying that the back rents of a firm, the lease of which had expired before the sale of the factory, can be considerd as a lien on the factory and other property belonging thereto in the hands of a purchaser." No doubt, that particular subject of remark is back rent, but I think the same principle applies to any other debts of the factory. And further on it is said: "We have already seen that if, as in the present case, the purchaser, by the contract of sale, takes over the assets of the factory, and agrees to pay the debts, the creditors may adopt and avail themselves of the contract in their favor. It is hardly suggested that there is any local or special custom which carries the liability of the purchaser further than this. Indeed, any such custom would be certainly at variance with the general law applying to the case of in-coming and out-going partners. The rule applying to such cases is stated in Lindley on Partnership, Vol. I, page 314, ed. 1860. A person, who is admitted as a partner into an existing firm, does not, by his entry, become liable to the creditors of the firm for anything done before he became a partner."

Now there is, undoubtedly, one decision of the Sudder Court which goes so far as to say that there is a lien on the factory. And one of the learned Judges who gave his opinion in the Full Bench case seemed still to think that there was a lien on the factory. But I think that only brings out the decision of the majority of the Court all the more strongly. It appears to me clear that the majority lay down that, according to law of this country, there is no such lien. Then how does the case stand? It is simply a question—did the mortgagee, by any contract between himself and the mortgagor, make himself liable for this debt? There is no evidence, as far as I can see, nor has any been suggested, that the mortgagee ever undertook to pay this debt. It would be exceedingly unlikely that the mortgagee should agree to pay the debts of the factory. His position is quite different from that of a purchaser. He does not mean to retain the factory in his own

(1) S. D. A., 1858, p. 1814.

1877

MONOHUR DOSS v. MCNAGHTEN.

hands as the purchaser does; what he intends to do is merely to work out the debt due to himself. Mr. Bell argued that the position of a mortgagee is stronger than that of a purchaser. I do not see any principle under which a mortgagee can be made liable for such a claim as this unless upon the principle laid down by the Full Bench that he has undertaken to do so.

Therefore, on these grounds, I think the decision of the Court below was right, and this special appeal ought to be dismissed with costs.

PRINSEP J.—I am of the same opinion.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

CHUNDER COOMAR ROY AND OTHERS (DECREE-HOLDERS) *v.* BHOGOBUTTY PROSONNO ROY AND ANOTHER (JUDGMENT-DEBTOR).*

1877
Sept. 11.

Limitation Act (IX of 1871*), Sched. II, art.* 167—"*Applying to enforce the Decree*"—*Application* "*to keep the Decree in force*"—*Act VIII of* 1859, *s.* 212.

The words "applying to enforce the decree," in Act IX of 1871, Sched. II, art. 167, mean the application (under s. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last named application, obtain execution of his decree.

THE facts of this case and the authorities cited appear in the judgment of Ainslie, J., referring the case to a Full Bench.

AINSLIE, J.—On the 22nd February 1875, the decree-holder applied, under s. 212, Act VIII of 1859, to put his decree

* Miscellaneous Regular Appeal, No. 386 of 1876, against the order of H. T. Prinsep, Esq., Judge of Zilla Hooghly, dated the 28th of August 1876.