

comparing the decree with the judgment, and of correcting the former, if necessary, where it appears to be at variance with the latter. The failure, however, on their part to avail themselves of this, and to amend the decree so as to open the door to an appeal, cannot render a finding of no effect or less binding upon the parties.

In this view, so long as the opinion of the Court has been given on a question which has been raised by the pleadings and argued, that opinion must be considered as *res judicata*, even though it may not have been embodied in the decree. I would answer the reference which has been made to this Bench accordingly.

PRINSEP, J.—I concur in the judgment delivered by Mr. Justice Morris.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

KASHIKANT BHUTTACHARJI (DEFENDANT) v. ROHINIKANT
BHUTTACHARJI AND OTHERS (PLAINTIFFS).*

1880
Sept. 6.

Limitation—Suit for Arrears of Rent—Beng. Act VIII of 1869.

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry (1) overruled.

THIS case was referred to a Full Bench by MORRIS and PRINSEP, JJ., with the following remarks:—

"We are called upon to decide, in this Special Appeal, whether a suit for arrears of rent of 1280, or of any portion of it, brought on the 30th Assar 1284 (corresponding with July 13, 1877) is

* Full Bench Reference in Special Appeal, No. 361 of 1879, against the decree of Baboo Nobin Chunder Ghose, First Subordinate Judge of Mymensing, dated 24th September 1878, modifying the decree of Baboo Anuntoram Ghose, Munsif of Attia, dated 31st May 1878.

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not barred by limitation under the terms of s. 29 of the Beng. Rent Law (Beng. Act VIII of 1869)?

“The plaintiffs’ (respondents’) pleader, relying on the judgment of a Division Bench of this Court in the case of *Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry* (1), at first contended, that the present suit, so far as it relates to rent of 1280. could be brought at any time within 1284. But on its being pointed out that, in this case, the defendant was under a contract to pay the rent by instalments in the months of Assar, Assin, Pous, and Cheyt, he admitted that this judgment did not support him so far as this suit related to the rent payable in the three first-named months; but he argues, that it is strictly applicable in respect of the rent payable in Cheyt.

“On reference to the judgment in question, it appears to us to be undoubtedly an authority for the proposition that a suit for the rent of Cheyt 1280 can be brought at any time before the close of 1284. But with all deference to the learned Judges who delivered that judgment, we cannot concur in the construction which they put upon the terms of s. 29 of the Rent Law.

“It appears to us that, following the construction placed both by the Courts in England and by the Imperial Legislature on terms similar to those used in s. 29, Act VIII of 1869 of the Bengal Code, a suit for arrears of rent of the entire year 1280, or of the last instalment of that year, cannot be brought after three years calculated from the last day of 1280.

“We do not agree with the learned Judges who decided the case of *Woomesh Chunder Bose v. Surjee Kant Roy Chowdhry* (1) that the rent of 1280, supposing it to be payable in one payment, would not be due until the 1st Bysak 1281. It would, in our opinions, be due or payable on the last day of 1280,—*i. e.*, on the last day of Cheyt of that year. The correct rule for interpreting the terms used in s. 29 seems to us to be that which is contained in the Limitation Acts of 1871 and 1877 and in cls. 2 and 3, s. 3 of the General Clauses Act (I of 1868), *viz.*, that, in calculating limitation, or determining a particular period, the first day of that period should be excluded and the last day

(1) I. L. R., 5 Calc., 713.

included. Moreover, it has been held by the Courts in England (see Maxwell on Statutes, page 310), where the particular period was one month, that 'the day corresponding with that from which the computation began is excluded, so that two days of the same number are not comprised in it,'

"It is true that the Acts of the Imperial Legislature to which we have referred, do not apply to the Bengal Rent Act, but there is nothing in that Rent Act which is opposed to such a construction; and in our opinion, the general principles which regulate the interpretation of expressions similar to those contained in s. 29, should be applied also to that special law. There is nothing in the Rent Law which makes it exceptional in this respect.

"In the present case, therefore, we are of opinion that limitation commenced to run from the last day of Cheyt 1280, when the instalment payable on that date became due; but that, in calculating the term of three years, that day must be excluded. A suit for that instalment could not be brought until the 1st Bysak 1281, and might be brought not later than the last day of the period of three years from the last day of Cheyt 1280, calculated according to the Gregorian era.

"This question, as affecting the period within which suits for arrears of rent may be instituted, is of great importance, and calls for immediate decision. We desire, therefore, the authoritative ruling of a Full Bench on the following point:—

"What is the last day on which a suit for the recovery of ordinary arrears of rent,—that is, rent payable yearly at the close of the year to which it relates, can be instituted under s. 29, Beng. Act VIII of 1869?"

Baboo Golap Chunder Sircar for the appellant.

Baboo Issur Chunder Chuckerbutty, *Baboo Mohiny Mohun Roy*, and *Baboo Kishory Mohun Roy* for the respondents.

The judgment of the Full Bench was delivered by

GARTH, C. J.—We think it clear that the last day on which a suit for the recovery of arrears of rent can be instituted under the section referred to, is the last day of the third year from the

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close of the year in which the rent became payable; and as in this case the rent was payable in the month of Cheyt 1280, and the defendant was bound to pay it before the close of the last day of that month, the plaintiff must have brought his suit within three years from that day.

We do not quite understand the reasons upon which the case of *Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry* (1) proceeded. It seems to have been considered by the learned Judges in that case, that an arrear of rent does not become due until the day after that on which by the terms of the holding the rent is payable. But this, we think, is a fallacy. The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within that time, it becomes an arrear; and continues an arrear until it is paid.

The word "arrear" in s. 29 of the Rent Act means "rent in arrear;" and that rent in arrear would, undoubtedly, become due on the last day of the year in which it is payable.

The judgment, therefore, of the lower Appellate Court will be modified by limiting the sum which the plaintiffs are entitled to recover, to the rent which became due in the years 1281 and 1282.

We think that the appellant should only have his proportionate costs of the hearing before Mr. Justice Morris and Mr. Justice Prinsep, but that he is entitled to the full costs of this hearing.

ORIGINAL CIVIL.

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

1880
 Aug. 11.

G. M. CUTTS AND ANOTHER (DEFENDANTS) v. T. F. BROWN AND OTHERS (PLAINTIFFS).

Specific Performance—Evidence—Admissibility of Parol Evidence—Evidence Act (I of 1872) s. 92, provisoes 1 and 6—Practice—Joinder of Causes of Action—Civil Procedure Code (Act X of 1877), s. 44, rule (a)—Specific Relief Act, ss. 17, 22, 26.

The plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that the defendants had agreed to sell, &c., under "certain conditions as agreed upon." The defendants alleged, that the written agree-

(1) I. L. R., 5 Calc., 713.