

1880

GUJJU LALL
v.
FATTEH
LALL.

I am, therefore, of opinion that the former judgment was not admissible in the present suit; and as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

The appellant will be entitled to his costs in this Court; and those of the Court below will follow the result of the suit.

MORRIS, J.—I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

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June 9.

MULLICK AHMED ZUMMA, *alias* TETUR (DECREE-HOLDER) v.
MAHOMED SYED (ONE OF THE JUDGMENT-DEBTORS) *

Limitation Act (XV of 1877), sched. ii, art. 179—Execution of Joint Decree against two or more Defendants.

In a suit for possession of land brought by *A* against *B*, *C*, and *D*, a decree was passed on the 14th of April 1874 for possession and costs against *B*, *C*, and *D* jointly. This decree was afterwards reversed on an appeal by *B*, who alone claimed the property. *A* then preferred a special appeal to the High Court, and on the 29th June 1877 the decision of the Judge was reversed, and the decree of the Court of first instance restored.

On the 30th December 1878, *A* applied to the Court of first instance for execution to issue against *C* and *D* for the costs specified in the decree passed on the 14th April 1874. *C* and *D* successfully objected in the Court of first instance and the lower Appellate Court, that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by art. 179 of sched. ii of Act XV of 1877. *Held*, on appeal to the High Court, that, inasmuch as *B*'s appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived *A* of his right to any costs at all, *A*, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court.

* Appeal from Appellate Order, No. 31 of 1880, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated the 14th October 1879, affirming that of the Subordinate Judge of that district, dated the 12th May 1877.

THE appellant brought a suit against Mahomed Syed, the present respondent, and two other persons, for possession of certain land; and a decree was, on the 14th April 1874, made therein against the three defendants jointly, with costs. One of them alone appealed to the Judge of Gya from that decision, claiming possession of the whole of the property. The Judge of Gya reversed the decree of the first Court; but on special appeal to the High Court preferred by the present appellant, the decision of the Judge was set aside, and the decree of the Court of first instance, of 14th April 1874, was restored.

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On the 30th December 1878, the decree-holder applied for execution of the decree of 14th April 1874, against Mahomed Syed, one of the defendants who had not appealed from that decree.

The Subordinate Judge of Gya held, that the decree of 14th April 1874 not having been appealed against by Mahomed Syed was final as between him and his decree-holder, and as the application for execution was made more than three years from the date of the decree, it was barred by lapse of time.

On appeal, the Judge of Gya upheld this decision, on the ground that "the fact that an appeal was preferred by one of the defendants will not prevent limitation running in favor of the others against the execution of the decree," in support of which he referred to the case of *Hur Proshad Roy v. Enayet Hossein* (1). From this decision the decree-holder appealed to the High Court.

Mr. *Sandel* for the appellant.

No one for the respondent.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—In this case there seems to have been a decree for possession with costs against three defendants. Inasmuch as possession was claimed by only one of the defendants, that defendant alone appealed and was successful before the Judge. But the plaintiff appealed to this Court, and obtained a decree restoring the decision of the first Court. The Judge in the

(1) 2 C. L. R., 471.

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Court below has relied on the case of *Hur Proshad Roy v. Enayet Hossein* (1), in which it was held that an appeal by one defendant did not prevent time from running for the purpose of executing the decree against the non-appealing defendants.

The reason why in that case it was held that limitation would apply, was because the appeal there was on the part only of a ten-pie shareholder of the property, leaving the decree capable of execution against the remainder of the property, which could not be affected by the result of that appeal. But in the present case the appeal of the one defendant related to the whole case of the plaintiff, and he was successful in getting the suit dismissed by the lower Appellate Court, which would have deprived the plaintiff of his right to any costs at all. In special appeal the plaintiff succeeded in getting the Judge's decree reversed; and therefore the original decree for costs was restored.

We overrule the orders of the Court below, and declare the plaintiff entitled to proceed with the execution of his decree for costs against the respondent.

The appeal is allowed with costs.

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
June 28.

KONARAM GAONBURAH (PLAINTIFF) v. DHATOARAM THAKOOR
AND ANOTHER (DEFENDANTS).*

Right of Occupancy in Assam—Act X of 1859, s. 6—Government Ryot.

A Government ryot can acquire a right of occupancy in respect of lands cultivated by him under the rent law in force in Assam.

THIS was a suit for the recovery of possession of one biga and one cotta of land situate in Assam.

The plaint alleged, *inter alia*, that a portion of the land in dispute had been held by the plaintiff's father in 1860; that

* Appeal from Appellate Decree, No. 1378 of 1879, against the decree of Colonel A. K. Comber, Deputy Commissioner and Subordinate Judge of Durrang, dated the 21st of April 1879, reversing the decree of K. N. Burroon, Esq., Munsif and Extra Assistant Commissioner of Tejpore, dated the 13th December 1878.