Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Juswunt Koonwur v. Mussumat Parabutty Koonwur and others, from the High Court of Judicature at Fort William, in Bengal; delivered 2nd March, 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THEIR Lordships have come to the conclusion that in this case they ought not to advise Her Majesty to disturb the judgment of the High Court.

The suit was brought by the present Appellant against the widows and heirs of Bhugwan Lall who was the purchaser at a judicial sale of, confessedly, the moiety only of the mehal in dispute, and he purchased at a sale which was ordered under a judgment which had been obtained against Mussumat Neemoo Bohoo. The suit in which that judgment was obtained was originally brought not only against Neemoo Bohoo, who was the widow of Mookhtar Bahadoor, one of the sons of Himmut Bahadoor, but also against Aupoornan Bohoo, who was the widow of Oomrao Bahadoor another son of Himmut Bahadoor, and Luchmee Bohoo, the widow of Himmut Bahadoor. These three persons were the Defendants in that suit as representatives and co-sharers of the estate, of which the mehal in dispute was part, which had descended from Himmut Bahadoor. Before the Decree was obtained Luchmee Bohoo had died, and Aupoornan, the widow of Oomrao Bahadoor, had also died, leaving as the survivor in the suit the surviving defendant Neemoo Bohoo only. Under the Decree obtained in that suit it appears

that there was a sale of the share and interest of Neemoo Bohoo in the mehal.

Now, it may be assumed, for the purpose of the decision of the question which arises for determination here, that under that judicial sale only one moiety of the mehal in question was sold; but it appears that although one half only was sold, the purchaser, Bhugwan Lall, obtained possession of the whole of the mehal, and that that possession was obtained in the year 1845.

The present Appellant, Juswunt Koonwur, who claims, as heir of Luchmee Bohoo the widow of Himmut Bahadoor, a right to the other and unsold moiety of the mehal, brings this action to recover possession of it. One of the defences set up (it is immaterial now to consider the others) is the limitation of twelve years which is established by the Regulation of 1793, and it is admitted that that defence must prevail, unless the Appellant can take this case out of the operation of the Regulation, by showing either that the possession was obtained by violence or by fraud within the terms of the Regulation of 1805, or that something has occurred which is a good and sufficient excuse to her for not bringing her action in the twelve years, within the terms of Regulation III. of 1793.

The first question which arises is under Regulation II. of 1805, which qualifies the former Regulation of 1793, and by the third clause provides that the limitation of twelve years, fixed by the Regulation of 1793, "shall not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property, if the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent court of judicature, shall have acquired possession thereof by violence, fraud, or by any other unjust, dishonest, means whatever." This, then, is an enactment that in case the possession shall have been acquired by violence or by fraud, the limitation of twelve years shall not be applicable; but the Regulation also provides that the

Plaintiff who relies on this answer to the limitation, shall set it forth distinctly, either in his petition of plaint, or in his replication.

No doubt the Plaintiff in his plaint does allege generally that possession was obtained by violence, that is, that there was a forcible entry, and their Lordships are not disposed to decide this case against the Appellant, on the objection that that is not a sufficient allegation; but they agree with the observation of the High Court, that it is a very vague allegation, and that when this qualification made by the Regulation of 1805 is relied upon, the pleading ought to state with more distinctness and particularity what is the nature of the violence by which the possession was obtained. However, in this case there is a general allegation that possession was obtained by force.

But their Lordships upon looking at the evidence find that it is wholly insufficient to sustain that allegation. Some of the witnesses say in general terms that the possession was obtained by violence, but the evidence discloses no specific act of force or violence. The only statement which the witnesses make to support the general allegation that there was violence in the mode of taking possession is, that two of them say that the amlahs of the Appellant were removed by the amlahs of the purchaser; but when it is considered that there was a lessee, it seems hardly credible that that statement can be true; and standing by itself and unsupported by the other witnesses, it is not trustworthy evidence upon which their Lordships can come to the conclusion that possession was obtained in this case by violent means.

It is also to be observed, that in the petition of Gunga Gobind, in his proceedings, he does not allege that there was any violence in the mode of obtaining possession, but he suggests that there was collusion between the purchaser and the tenant who had the lease of the mehal. But the Plaintiff cannot rely, in this suit, upon the ground that possession was obtained by collusion,

for he has not alleged that the possession was so obtained in his plaint or in his replication, and there is no evidence to support the suggestion. Their Lorships, therefore, think that the Appellant has not brought her case within the third section of Regulation II. of 1805.

Then there remains the question which has been mainly argued by Mr. Leith, viz., that the suit brought by Gunga Gobind, which suit was brought subsequent to the taking possession by the ancestor of the present Respondent, is sufficient to bring him within the exception to be found in Regulation III. of 1793, section 14. He contended that the pendency of that suit was a good and sufficient cause for delay, and was enough to bring him within this exception.

Their Lordships have considered the arguments which have been addressed to them by Mr. Leith, and the authorities to which he has referred, and they have come to the conclusion that the pendency of that suit did not prevent the running of the twelve years, and that it affords no good and sufficient cause for taking this case out of the operation of the limitation. The words of the 14th section are these. The first part of the section prohibits the Court from hearing, trying, or determining the merits of any suit whatever, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it. Then comes the qualification: "Unless the Complainant can show by clear and "positive proof that he demanded the money, or "that he directly preferred his claim within that "period, for the matters in dispute, to a Court of "competent jurisdiction to try the demand, and "shall assign satisfactory reasons to the Court why "he did not proceed with the suit." It is clear that this case is not brought within that branch of the exception. Then come the words on which reliance is placed, "or shall prove that, "either from minority or other good and sufficient cause, he has been precluded from obtaining redress."

In any view which may be taken of the suit brought by Gunga Gobind, their Lordships consider that it would be extremely difficult to affirm that the Appellant on account of its pendency was prevented by "good and sufficient cause" from bringing a suit to obtain possession of the moiety, to which she says she has always been entitled from the time that possession was taken in 1845. That suit was brought by Gunga Gobind, who appears to be her son-in-law, under these circumstances:—After the names of the two widows had been inserted in the Registry of the Collector, they desired on the ground that they were, as they described themselves, helpless women, that the name of Gunga Gobind should be placed on the Register instead of their own. This is the reason which they themselves have asserted; whether it is the true reason, perhaps, may be somewhat doubtful. The name of Gunga Gobind having been placed on the Register before the judicial sale to Bhugwan Lall, he brought an action against Bhugwan Lall, claiming the whole mehal as his own property derived from the two widows. He brought his suit against Bhugwan Lall, against the former tenant, and against the present tenants, to whom Bhugwan Lall, having accepted the surrender of the lease, had re-granted it, and also against the present Appellant, and the other widow, and in that suit he claims to be proprietor. He, no doubt, affirms that the judicial sale was improperly conducted, and, therefore, that it ought to be set aside; but he claims the whole mehal as his property under a prior title, having derived it, as he says, through the widows. The suit was decided against Gunga Gobind on the ground that he was not owner, as alleged, and that he had no right to contest the judicial sale.

Now, there seems to be nothing in the nature of that suit, in which Gunga Gobind makes a claim to the entire mehal against the widows and against Bhugwan Lall, to prevent the present Appellant from bringing an action against the

purchaser Bhugwan Lall for the moiety which belonged to her, and which was not sold to him at the judicial sale. If the suit was a hostile one by Gunga Gobind, she must have known that he was committing a fraud upon her, but that fraud did not preclude her from bringing a suit against Bhugwan Lall to recover her moiety. The determination of Gunga Gobind's action could not decide the right to that moiety as between her and Bhugwan Lall, and therefore, even if that had been a hostile suit, their Lordships consider that there would have been great difficulty in affirming that the pendency of it formed a good and sufficient cause which should have precluded the Appellant from bringing a suit against Bhugwan Lall to recover the moiety.

But their Lordships are disposed to come to the conclusion in point of fact to which the High Court came, viz., that this suit was not a hostile one as between Gunga Gobind and the widows, but that, at all events as regards the present Appellant, was a friendly suit between Gunga Gobind and the Appellant, the object apparently being to defeat the claim of Bhugwan Lall, the purchaser under the judicial sale, by setting up a prior title in Gunga Gobind which should have precedence of that sale. Their Lordships are confirmed in that view by the petition which was filed by the Appellant, Juswunt Koonwur, in that suit, which was a petition, as it is set forth at page 56 of the record "in proof of "the fact that Neemoo Bohoo and Juswunt Koonwur of their own accord having filed a petition "in the Khas Mehal by Wookhtear, caused a perpetual settlement to be entered into in the name "of the Plaintiff, and themselves relinquished it." That was evidently a petition filed in favour of Gunga Gobind in that suit, a petition which aided him, or was intended to aid him in it, and therefore is strong evidence that, as between the present Appellant and Gunga Gobind, it was not a hostile, but a collusive suit intended to defeat the judicial sale altogether. In this view, it is clear that the

pendency of it cannot be set up as a good and sufficient answer to the limitation relied on in the present suit.

Their Lordships have been referred to the case of Rayah Enayet Hossein *v.* Ahmet Reza Sayud in which the judgment was given by Lord Kingsdown, (7 Moore's Indian Appeals, 238), but their Lordships think that that case is entirely distinguishable from the present. The substance of that case is, that Enayet Hossein's suit was, in a sense, supplemental to the previous suits, and that until the proper line of succession was settled in the previously pending litigation which had been raised between other contending parties, and the proper law had been applied, it was not reasonable to expect that Enayet Hossein, who was the Plaintiff in that case, should commence any suit to assert his title. The whole succession was in dispute; the law applicable to the succession was uncertain; and their Lordships came to the conclusion in point of fact in that case, that until those questions were settled, the existence of the pending litigation was a good and sufficient cause for Enayet Hossein not setting up the title, because it was utterly uncertain, until that litigation was ended, whether he would have any title which he could affirm in a court of law or not. His suit was really treated as a supplement to that litigation. Here, as was pointed out a short time ago, Gunga Gobind's suit, even if hostile, would not affect, as between these parties, the right to the moiety now in dispute. If the sale had been set aside, it would only have been the sale of a moiety, leaving entirely untouched the question which arises in this suit, viz., whether the present Appellant was entitled to the other moiety, which had been, as she says, improperly taken possession of by Bhugwan Lall.

But assuming, as their Lordships are disposed in fact to hold, that Gunga Gobind's suit was, as between him and the Appellant, a friendly suit, it is obvious that neither the above decision, nor

the other case referred to by Mr. Leith, can have any bearing on the present Appeal.

Their Lordships, therefore, think that this case is entirely distinguishable from those cited, and, for the reasons they have already given, must humbly advise Her Majesty to affirm the Decree of the High Court and to dismiss this Appeal.