Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Luckhinarain Mitter and another v. *Khettro Pal Sing Roy and another from the High Court of Judicature at Calcutta; delivered 17th July,* 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS is an Appeal from a Judgment of the High Court, pronounced upon special Appeal in a suit in which the Respondents were Plaintiffs and the Appellants were Defendants. The suit was brought to recover a sum of money lodged by the Plaintiffs in the Court of the Collector of East Burdwan, in order to stay the sale of a putnee talook called Mouzah Astara, for an arrear of rent due to the Zemindar from the Defendants, who were the putnee talookdars, and thereby to save a durputnee talook of the second degree, which had been created by the Defendants out of their said putnee talook.

The durputnee was granted by the Defendants to Sitanath Ghose, at an annual rent of 5,496 rupees, in consideration of a bonus of 100 rupees, and it was stipulated that Sitanath was to have full powers of sale or gift, but was not to underlet in saputnee without the consent of the putneedars. Sitanath sold and assigned the durputnee to the Plaintiffs for the sum of 2,925 rupees, and it was stipulated that the Plaintiffs were, in the usual manner, to cause

mutation of names in the putneedars' books, by causing Sitanath's name to be removed and the Plaintiffs' names inserted instead, and that the Plaintiffs should duly pay the durputnee rent; and further, that if there should be any delay in causing mutation of names, and Sitanath's name should remain on the putneedars' books, it should not entitle him to profit or subject him to loss. The Plaintiffs did not register the transfer in the sherishta of the Defendants, and the Defendants never recognized the Plaintiffs as their tenants. The money deposited by the Plaintiffs was applied in discharge of the rent due from the Defendants as putneedars, and the sale of the putnee was stopped. It was contended that the money deposited by the Plaintiffs was a voluntary payment, and, consequently, that they were not entitled to recover the amount from the Defendants. The Court of First Instance held that the Plaintiffs were entitled to recover, and gave them a Decree for the amount, with interest, from the time of the commencement of the suit. The Zillah Judge, upon regular Appeal, reversed that Decree; but upon special Appeal, the High Court reversed the decision of the Zillah Judge, and upheld the Decree of the Court of First Instance. From that Decree the Defendants have appealed to Her Majesty in Council.

Their Lordships are of opinion that the decision of the High Court is correct. The Plaintiffs were assignees of the durputnee talook, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the Zemindar in order to protect their own interest. They made the deposit and the defendants had the benefit of it. The Plaintiffs are consequently entitled to recover the amount from the Defendants. The law upon the merits of the case is very clearly and accurately laid down in the Judgment of the High Court, and it is scarcely necessary for their Lordships to enlarge upon it.

Several cases were cited by the learned Counsel for the Appellants, and amongst others the case of Amindchunder Bannerjee *v.* Soobulchunder Dey, Sudder Decisions, 1857, page 1195. In that case it was held that a mortgagee of a durputnee tenure out of possession could not recover from the putneedars an amount deposited by him to prevent

the sale of a putnee talook for arrears of rent due from the putneedars: that he was not the holder of a talook in the 2nd degree, and had no authority under section 13, Reg. 8 of 1819 to make the deposit. It does not appear what the nature of the mortgage was, and it would seem that the durputneedar had not paid his rent to the putneedar, for it was said "the mortgagee might have sued the durputneedar for the money which he had been compelled to pay." Without knowing more of the facts of that case it is impossible to say whether the decision was correct or not. It is, however, unnecesaary to do so, as that case is very different from the present.

It may be remarked, however, with reference to that case, as well as to the case cited from 6 Weekly Reporter, Act X, Cases, p. 8, in which it was held that the amount deposited by the Plaintiffs in the present case could not be set off in a suit brought by the present Defendants against Sitanath for subsequent instalments of the durputnee rent, that neither of them is of any greater weight than the decision of the High Court now under appeal, and that their Lordships could not, upon the mere authority of those two cases, hold that the decision of the High Court in the present case was wrong.

With the exception of those two cases, none of the numerous authorities cited by the learned counsel for the Appellants are in point. In some of the cases it is impossible to ascertain from the reports what were the precise facts; many of them had no relation to putnee or durputnee tenures; and none of them appear to carry the case further than this, that the grantor of a durputnee talook is not bound to recognize the assignee of the tenure, until the transfer has been registered in his sherishta, and that, until such registry has been effected, he may sue the original durputnee for the rent, and sell the tenure in execution of a decree obtained in such suit without notice to the assignee. This is the only effect of the cases cited from 2 Hay's Reports, 14; 2 Weekly Reporter, 282, Civil Rulings; 10 Weekly Reporter, Civil Rulings, 466.

Those decisions are quite consistent with the ruling of the High Court. Until the assignment has been registered, or the assignee has been accepted by the putneedar as his tenant, the assignor

is not discharged from liability, and such liability may be enforced by the sale of the durputnee talook, in execution of a decree against him for the rent.

It was contended that the decision reported in 6 Weekly Reporter, Act 10, Rulings, page 8, in which it was held that the money deposited by the Plaintiffs could not be set off in an action against Sitanath for arrears of the durputnee rent, was a bar to the present suit, as an adjudication by a competent Court in a former suit upon the same cause of action. Their Lordships are, however, of opinion that that determination was not one within the meaning of section 2, Act 8, of 1859. It was merely determined in a suit under Act 10 of 1859, that Sitanath was not entitled to credit for the payment made by the Plaintiffs. As to the point of limitation, their Lordships are of opinion that the High Court was correct in holding that the present suit was not barred. It is unnecessary to determine whether the period of limitation was three years under clause 9, section 1, Act 14 of 1859, or six years under clause 16 of that section. The deposit sought to be recovered by the Plaintiffs in the present suit, was made on the 17th November, 1864, and the present suit was commenced on the 8th June, 1869. On the 30th October, 1867, a suit was instituted by the Plaintiffs against the Defendants in the Zillah Court of Hooghly, to recover the amount claimed in the present suit. The Defendants pleaded to the jurisdiction of that Court, and, on the 14th April, 1868, the Principal Sudder Ameen rejected their plea, and gave Judgment for the Plaintiffs. The Defendants appealed to the Judge, who, on 31st July, 1868, reversed the decision of the Principal Sudder Ameen, and, on special appeal to the High Court, the decision of the Judge was affirmed on the 26th of May, 1869.

Deducting the whole period occupied in the suit commenced in Zillah Hooghly from the time of the commencement of that suit to the time when the High Court gave final judgment therein on special appeal, the present suit was commenced within three years from the time when the cause of action arose. It has been found as a fact that that suit was prosecuted *bonâ fide*, and there is no reason for contending that that finding was in consequence of any error in law, or that the suit was not prosecuted with due

diligence. Their Lordships are of opinion that, according to the true construction of Section 14, Act 14 of 1859, the whole time occupied in that suit, including the time during which the special appeal to the High Court was pending must be deducted. It was contended on the part of the Appellants that, as the decision of the Principal Sudder Ameen was annulled by the Judge in consequence of a defect of jurisdiction, the time in which the Plaintiffs were engaged in the special appeal to the High Court, who affirmed the decision of the Judge, cannot be deducted under the provisions of Section 14 of the Act. The words of that Section are not very clear, but their Lordships are of opinion that, giving them a reasonable construction, the whole time in which a Plaintiff has been fruitlessly engaged in prosecuting a suit *bonâ fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted.

The learned counsel for the Appellants complained of the protracted litigation in reference to the Plaintiffs' claim, and he stated, in terms of indignation, that the case had been before eleven different Tribunals. But surely the Appellants are not the persons to complain, when they have been the cause of the whole of this protracted litigation, first, by neglecting to pay their rent to the Zemindar, and thus rendering it necessary for the Plaintiffs, for their own protection, to deposit the money with the Collector; then by refusing to allow credit for the amount in the suit against Sitanath; afterwards, by objecting to the jurisdiction of the principal Sudder Ameen of Hooghly; then by objecting to the amount of stamp on the plaint when it was transferred to the Court in Burdwan; and, finally, by appealing against the decision of the Principal Sudder Ameen in this suit, which was ultimately upheld by the High Court.

In short, the Appellants have resisted by every means in their power the endeavours of the Plaintiffs to recover the amount which they were obliged to deposit, of which the Appellants have had the benefit, and which they, according to every prin-

ciple of justice and good conscience, ought to have repaid.

It is idle to say that they were afraid of repaying the money, lest by so doing they should be held to have recognized the Plaintiffs as their tenants before the registration of the assignment, or to contend that the Appellants are not bound to re-pay the amount deposited because they would have benefited by the sale of the putnee free from incumbrances.

Their Lordships will humbly recommend Her Majesty in Council to affirm the decision of the High Court with the costs of this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—7/18/73.