Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Radha Persad Sing v. *Ram Purmeswar Singh and others, from the High Court of Judicature, at Fort William, in Bengal; delivered December 1st,* 1882.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the Appellant and Respondents as if there was no change. So speaking of them, the Appellant has been ordered to pay to the Respondents the costs of a litigation with them. He now seeks to set off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the Appellant was the Plaintiff, and the Respondents were the Defendants. The suit was for the recovery of certain lands; and the Respondents set up a defence of the Law of Limitation. That issue was decided in their favour by the Subordinate Judge on the 31st July 1868, and in consequence the Appellant's suit was dismissed. An appeal was presented to the

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High Court, who delivered judgment thereon on the 26th of April 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the Respondents should pay to the Appellant the sum of Rs. 2,499. 13 annas 5 pie being the amount of costs incurred by him in the High Court with interest; and further ordered that the Respondents should pay to the Appellant the costs incurred by him in the Lower Court with interest. With that order the suit was remanded. The litigation was then fought with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the Respondents. That decree was pronounced upon the 10th June 1874, when the Appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it is not in any way altered by that affirmation.

The Respondents applied to the Subordinate Court for execution for their costs, and the Appellant then claimed to set off against the costs claimed by the Respondents the costs which were due under the decree of the 26th April 1869. It may be well to mention that an application had been made by the Appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the Appellant were, first, the sum found by the High Court itself on the 26th April 1869 to be due for expenses in that Court; and secondly, an amount of Rs. 5,806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the

Subordinate Judge on the 31st July 1868. Mr. Brett, the judge of Shahabad, allowed those amounts to be set off by the Appellant against the claim of the Respondents, and he made an order to that effect on the 3rd August 1878. The Respondents presented an appeal to the High Court, and on the 24th February 1879 the High Court reversed the order of the Subordinate Judge and disallowed the claim of the Appellant to set off the costs awarded to him in the decree of the 26th April 1869; and they gave to the Respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th June 1874, giving the whole costs of the suit, overrode the decree of the 26th April 1869, which gives the costs of a portion of the suit in which the Respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of April 1869 was not before the Court in 1874; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any mistake in the prior order it ought to have been the subject of some review or rehearing, in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th June 1874 to interfere with the costs awarded by the order of the 26th April 1869.

It has been mentioned that there were two amounts claimed by the Appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships consider that

the Appellant is entitled to set those off against costs now claimable by the Respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs. 3,245, which is the Court fee. The Court fee applies not only to the hearing in 1869, but to the whole of the ligitation; and inasmuch as the general costs of the suit are awarded to the Respondents, it would be improper that they should have to pay the Court fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs. 2,490 for pleader's fee; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be: To discharge the order of the 24th February 1879; to declare that the Appellant is entitled to the costs properly recoverable under the decree of April 1869; to declare that those costs consist of the sum of Rs. 2,499. 13 annas 5 pie mentioned in the decree of April 1869, and also such costs in the Court below as were occasioned by the defence of the Law of Limitation, and the costs of the trial and hearing thereon, and of the decree of the 31st July 1868; that it be referred to the Court of the Subordinate Judge of Shahabad to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs. 2,499. 13 annas 5 pie, are to be set off against the costs found due to the Respondents. Interest should be charged as ordered by the decree of the 26th April 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the Appellant does not wholly succeed; but having regard to the fact that the whole of the Appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They therefore think it right that the Appellant should have the costs of this Appeal, and also the costs in the High Court.