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HORI DASI DABI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

We are unable to understand why precisely equal costs are allowed to the widow and Moni Lall (guardian of the minor), on whom the brunt of the suit fell, and to Rakhal Dass and Seetanath, who were added as parties, but had no interest in the matter, and who took care to tell the Court so. But there is no appeal before us on this point.

Decree varied.

Before Mr. Justice Jackson and Mr. Justice McDonell.

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May 16.

BRINDABUN CHUNDER SIRKAR (DEFENDANT) *v.* DHUNUNJOY NUSHKUR (PLAINTIFF).*

Limitation—Right of Occupancy—Res Judicata—Ejectment—Beng. Act VIII of 1869, *s.* 27—*Act VIII of* 1859, *s.* 2—*Act X of* 1877, *s.* 13—*Possessory Suit.*

The plaintiff sued for a declaration of *mourasi mokurari* rights to certain land and for mesne profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendants. A previous suit on the same cause of action was heard and dismissed on the ground of limitation.

Held, that the present suit was not barred (as *res judicata*) under s. 2 of Act VIII of 1859 (corresponding with Act X of 1877, s. 13), inasmuch as the first suit having been brought after the period allowed by law, the Court in which it was instituted was not competent to hear and determine it.

Held also, that the lower Courts were wrong in giving the plaintiff a decree for possession on the ground of occupancy right, he not having claimed such relief in his plaint.

Bijoya Debia v. *Bydonath Deb* (1) followed.

Where a ryot, having a mere right of occupancy in certain land, has been wrongfully dispossessed by the zemindar, his suit to recover possession must be brought under s. 27 of Beng. Act VIII of 1869, within one year from the date of dispossession.

IN this suit the plaintiff claimed to recover possession of four holdings, with mesne profits. He based his title on pottas which he alleged had been granted to him in 1262 (1855) by the naib of the then proprietors of the zemindari, Srish Chunder Sircar and

* Appeal from Appellate Decree, No. 1977 of 1878, against the decree of H. Beverley, Esq., Additional Judge of Zilla 24-Parganas, dated the 7th of August 1878, affirming the decree of Baboo Brojendro Coomar Seal, Subordinate Judge of that District, dated the 11th of December 1877.

(1) 24 W. R., 444.

Brindabun Chunder Sircar; and he stated that these proprietors had dispossessed him of the lands in the year 1278 (1871). On the 9th of September 1874, Shama Churn Laha purchased the share of Srish Chunder in the zemindari. In the month of December 1875 the present plaintiff brought a suit against the zemindars under s. 27 of Beng. Act VIII of 1869, but this was dismissed on the ground of limitation. The present suit was instituted on the 11th of September 1876.

The Court of first instance found that the pottas under which the plaintiff claimed were genuine, but that the naib who granted them had no authority to do so; that the plaintiff nevertheless had acquired under them a right of occupancy, and was entitled to recover possession as an occupancy ryot. The defendant appealed, when the Judge affirmed the decision of the lower Court, saying:—"It seems to me that the title by right of occupancy is not inconsistent with that claimed under the pottas. It may be that the plaintiff has no good title under the pottas; but having been in possession under them he has thereby acquired a subordinate right by virtue of that possession, and though he claimed a higher right, I do not think the Court was wrong to grant the lesser right to which plaintiff seemed entitled, and which was not inconsistent with his plaint." The defendant then brought this special appeal.

Baboo *Rash Behary Ghose* and Baboo *Saroda Churn Mitter* for the appellant.—The previous suit was based on the same cause of action as the present, to which it is, therefore, a bar under s. 2 of Act VIII of 1859; at least it is so far a bar as to prevent the plaintiff from recovering on an occupancy title, in the present suit, especially as he does not claim a right of occupancy.—*Huro Soonduree Debia* v. *Unnopoorna Debia* (1), *Shiu Dayal Puri* v. *Thakur Mahibir Prasad* (2), *Bijoya Debia* v. *Bydonath Deb* (3).

Baboo *Byddonath Dutt* for the respondent.—The former occupancy suit does not interfere with the bringing of the

(1) 11 W. R., 550. (2) 2 B. L. R., Ap., 8.
(3) 24 W. R., 444.

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present one—*Brojo Kishore Rukhit* v. *Bashi Mundul* (1), *Gunga Gobind Roy* v. *Kala Chand Surma* (2), *Gooroo Doss Roy* v. *Bishtoo Churn Bhuttacharjee* (3), *Chunder Coomar Mundul* v. *Namni Khanum* (4); and it is not governed by the same period of limitation—*Khajah Ashanoollah* v. *Ramdhone Bhuttacharjee* (5), *Surjoo Pershad* v. *Kashee Rawut* (6), *Nistarinee* v. *Kalee Pershad Doss Chowdhry* (7). The lower Court was right in giving a decree on the ground of occupancy, even though the title set up in the plaint was not made out—*Pandey Bishonath Roy* v. *Bhyrub Singh* (8).

The judgment of the Court was delivered by

JACKSON, J. (MCDONELL, J., concurring).—In our opinion the plaintiff's suit ought to have been dismissed. He claimed to recover possession of jamai land by adjudication of jamai right thereto, together with mesne profits; and the ground of the suit was, that he had obtained a mourasi potta under the signature of the naib of the zemindar. The suit was brought in *formâ pauperis*, and the plaintiff prayed for a decree for the recovery of possession by adjudication of tenancy right and for mesne profits.

It appears that, according to the plaint, the plaintiff had been dispossessed not by the present zemindar, but by his predecessors, in the year 1278 (1871). In the year 1281 (1874) the zemindari right of one of the co-sharers was acquired by another co-sharer, and it is now said the defendants Nos. 1 and 3 are wrongfully keeping the plaintiff out of possession of his jamai rights. The suit, therefore, is as against the defendants Nos. 1 and 3, who are zemindars, and against the defendant No. 2, who assisted the zemindars, for possession of the lands as aforesaid.

It seems that a first suit was brought on this cause of action on the 9th December 1875, which was dismissed after hearing on the 8th May 1876, on the ground that, under s. 27 of Beng.

(1) 21 W. R., 251.
(2) 20 W. R., 455.
(3) 7 W. R., 186.
(4) 19 W. R., 322.
(5) I. L. R., 1 Calc., 325.
(6) 21 W. R., 121.
(7) *Ibid*, 53.
(8) 7 W. R., 145.

Act VIII of 1869, the suit ought to have been brought within one year from the time of dispossession, and not having been so brought, it was barred by limitation. This, therefore, was a second suit upon the same cause of action.

The defendants set up limitation, *res judicata*, and also, as I gather, a denial of the plaintiff's mokurari, for, although the written statement says nothing of the kind, being rather in the form of a petition against the plaintiff being allowed to sue in *formâ pauperis*, we are told that another written statement was afterwards put in, which is not before us now, and in that written statement apparently the plaintiff's alleged mokurari tenure was denied by the defendants. The present suit included a much larger claim for mesne profits, and was, therefore, instituted in the Court of the Subordinate Judge.

It was held by that Court, that although the plaintiff did not acquire a valid mourasi and mokurari interest by virtue of his pottas, he was entitled to recover possession, as he had acquired a right of occupancy, and that right was not legally determined. Accordingly the plaintiff got a decree for possession with wasilat for three years next preceding the suit.

On appeal to the District Judge this judgment was in substance affirmed, and one of the defendants appeals to this Court and complains in the first place that the plaintiff's suit ought to have been thrown out under s. 2 of the Code of Civil Procedure (Act VIII of 1859).

On this point we do not think that the appellant is right. It seems to us that, inasmuch as the Munsif considered that the first suit had been brought after the period limited by law, and that consequently it was not open to him to enter into the merits of it, in truth the cause of action had not been heard and determined by a competent Court. Whether the decision of the Munsif took the form of a dismissal of the suit or otherwise does not appear to make any difference. The plaintiff, if his suit was now in time, was entitled to have his cause of action heard and determined, which had not been heard in the previous suit.

The question remains whether the plaintiff had a cause of action, and whether he had brought it in the proper time. It

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appears that, in the judgment of both Courts, he failed to make out any valid mourasi mokurari title, but then the Courts concur in thinking that he was entitled to recover under the right of occupancy. It was a point taken not in the memorandum of appeal, but at the hearing before the lower Appellate Court, that the plaintiff having failed to establish the jamai title which he had set up ought not to succeed on the strength of a right of occupancy. This objection was overruled by the lower Appellate Court, but we find that, in a very similar case before the present Chief Justice and Mr. Justice McDonell, in *Bijoya Debia* v. *Bydonath Deb* (1), such a ground of appeal was held to be valid. The learned Chief Justice says:—"The claim of the plaintiffs is simply to obtain a declaration of their title to the land under a mokurari lease, which they set up. The issues in the case were framed with a view to ascertain the existence and genuineness of this particular lease and title, and it seems to us that the judgment of the lower Appellate Court negativing the leasehold interest claimed by the plaintiffs, but investing them with an interest of a different character which they never claimed, is erroneous, and that if we were to confirm this judgment, we should be conferring upon the plaintiffs a totally different thing from that for which they brought their suit."

It appears to me that a plaintiff suing to recover possession of land as held under a mourasi mokurari title, and claiming wasilat in respect thereof not only from the present zemindars, but also from persons who dispossessed him, must bring a suit of an entirely different character from that of a ryot, suing his landlord for the recovery of possession of land in which he has a right of occupancy, and if the plaintiff in the first mentioned kind of suit fails to make out his allegations, he will clearly not be entitled to fall back upon a cause of action of an entirely different kind. Now the cause of action which the plaintiff did make out in the present case was simply a right to be in occupancy of the land from which he was ejected, and that it seems to me was an injury, the remedy for which is referred to in s. 27 of Beng. Act VIII of 1869, and must be claimed within one year from the date of ouster.

(1) 24 W. R., 444.

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The pleader for the respondent in this case appears to consider that there is an analogy between the rights of a tenant who by holding land and paying rent for it for twelve years acquires a right of occupancy, and the title of a person who by twelve years' adverse possession extinguishes the rights of the previous owner and himself acquires a title by prescription.

It appears to me that there is no analogy between the two cases. The right, if any, which the plaintiff had in the present case, is created entirely by his continued occupancy of the land. It does not rest upon any grant, it is not in general transferable, and it appears to me that if the tenant desires to maintain that right and have himself to be replaced in the possession which he occupied before ouster, he is bound to bring a suit under s. 27 of Beng. Act VIII of 1869 within one year from the date of dispossession. I think, therefore, that the plaintiff's suit in this case ought to fail, and that the judgments of the Courts below ought to be reversed, and the plaintiff's suit dismissed with costs.

Appeal allowed.

Before Mr. Justice Milter and Mr. Justice Tottenham.

NARAIN MAL (OBJECTOR) *v.* KOOER NARAIN MYTEE (PETITIONER).*

1879
April 25.

Act XXVII of 1860—*Right to Certificate of a Son adopted after the death of his adoptive Father.*

A son adopted in pursuance of an *unoomoti putro* (power to adopt), some time after the death of his adoptive father, does not require, and is not entitled to obtain, a certificate under Act XXVII of 1860, to enable him to collect debts in respect of the properties left by his adoptive father, which accrued due while they were under the management of his adoptive mother.

The estate of the adoptive father, if the adoption is a good one, vests immediately on the adoption on the adopted son, and debts to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right and not as representative of his adoptive father.

IN this case one Juggunauth Mal died in Falgoon 1270 (March 1864), having, as the petitioner alleged, previously, on

* Appeal from Original Order, No. 46 of 1879, against the order of W. Cornell, Esq., Officiating Judge of Midnapore, dated the 8th January 1879.