

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

1879
April 8.

RAJENDRO LALL GOSSAMI (PLAINTIFF) v. SHAMA CHURN LAHORI AND OTHERS (DEFENDANTS).*

Over-valuation of a Suit, Effect of—Joint Owners, Rights of—Exclusive Possession by one of several joint Owners—Code of Criminal Procedure (Act X of 1872), s. 530—Suit for joint Possession by a joint Proprietor.

The mere fact that a suit has been over-valued, does not deprive the Court in which it is brought, of jurisdiction, if the over-valuation was *bonâ fide* and had not the effect of altering the appellate jurisdiction, that is to say, did not cause the appeal from the judgment of the Court of first instance to lie to a different Court to that to which it would have lain, had the suit been instituted in a Court having a more limited jurisdiction.

One of several co-proprietors has no right to take exclusive possession of any portion of the land of which he is one of the co-proprietors without the sanction of all of his co-proprietors; and when after he has taken such exclusive possession an order has been made by a Magistrate acting under s. 530 of the Code of Criminal Procedure confirming the possession taken by him, such order is no answer to a suit brought by one of his co-proprietors to recover joint possession of the portion of land so wrongfully taken by him into his exclusive possession.

One of several co-proprietors has no right to erect a *nowbuthkana*, or a scaffolding supporting a platform, for the accommodation of musical performers upon land of which he is only one of several co-proprietors, without the sanction of all his co-proprietors.

Baboo *Omesh Chunder Bose* and Baboo *Troyluho Nath Mitter* for the appellant.

Mr. *Branson* and Baboo *Janokey Nath Muttilal* for the respondents.

THE facts of this case appear sufficiently from the judgment of the Court, which was delivered by

JACKSON, J. (MCDONELL, J., concurring).—The present suit was brought by Nundo Lall Gossami to recover joint

* Appeal from Appellate Decree, No. 1223 of 1878, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 11th June 1878, reversing the decree of Baboo Bhoopotty Roy, Subordinate Judge of that District, dated the 19th March 1877.

occupy it by placing thereon a structure fit for occupation of a band of musicians. It appears to me that such occupation by one of the joint owners is so interfering with the comfort of his co-owners that the Court ought to interfere to restrain it. There is no suggestion here that the defendants have been put to heavy expense, or that the inconvenience or loss to them in removing the structure would be great. We are informed that the bamboos or sticks which supported the second *nowbutkhana* are still there, and if the parties are disposed to be litigious, no doubt these sticks may furnish ground for further disputes. We think it right, therefore, to say that the defendants, in our judgment, are not entitled to retain these bamboos as part of the *nowbutkhana* on the land in dispute.

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But whether that be so or not, it would seem that the plaintiff had a further substantial cause of action. Even if the erection of the *nowbutkhana* there had been consistent with law and the rights of the plaintiff, undoubtedly the order for separate possession of these cottas could not be supported, and the plaintiff was entitled to get a decree. The Judge, therefore, was quite wrong in ordering the dismissal of this suit, and I must say that I see with great regret in the judgment of Mr. Grant an observation that "had he," meaning the plaintiff, in his turn exercised similar forbearance when, in October last, the defendants, as they had every right to do, proceeded to set up another temporary *nowbutkhana*, the unhappy litigation consequent thereon would have been avoided." It is quite clear that however defective in point of expression the decree of the lower Court may have been, that Court had undoubtedly found (and its judgment was then in full effect and vigor) that "the excavation of the land and the erection of the *nowbutkhana* by the defendants were acts of exclusive possession which the Joint Magistrate confirmed. I am bound to say that the defendants were not justified in taking exclusive possession of a specific share of an undivided plot of land, every particle of which belonged to all its owners." In that way the Subordinate Judge clearly expressed his opinion that the erection of the *nowbutkhana* was an act of exclusive possession which the defendants were not justified in committing.

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The judgment under appeal contains several other inaccuracies, one of which is this. The learned Judge says:—"The suit of the plaintiff is dismissed, both as having been brought in a Court which had no jurisdiction to try it, and as having been unnecessarily brought at all, seeing that the matter in dispute was already before a Court of competent jurisdiction in a proper form." The Judge was not justified in alleging this as a reason for throwing out the plaintiff's suit without satisfying himself how the facts really stood. In point of fact, this plaint bearing date the 20th November was filed on the 4th December, and the suit brought by the defendants for a partition was not filed until the 31st of January, nearly two months after. Therefore the stigma of the suit having been unnecessarily brought was entirely without foundation. We think the judgment of the lower Appellate Court in this case was entirely erroneous, and must be set aside with costs.

I may observe that in the decision of this case the Court below seems to have been in some slight degree influenced by the assertion made there that the *nowbuthhana* was a structure of a temporary character. It is clear from what has now transpired that it was not of a temporary character. It is still on the land, and seems intended to be a thing either permanent, or else of constant recurrence.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

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 April 17.

IN THE MATTER OF THE MAHARAJA OF BURDWAN (PETITIONER) v. THE CHAIRMAN OF THE DARJEELING MUNICIPALITY (OPPOSITE PARTY).*

Right of Way—Criminal Procedure Code (Act X of 1872), s. 532.

Gates having been placed at one end of a private road by a person claiming to be its sole proprietor, with the intention of preventing the use of such private road by the public between the hours of sunset and sunrise, and the Deputy Commissioner of Darjeeling, acting for the public, having obtained from the Magistrate an order under s. 532 of the Criminal Procedure Code

* Criminal Motion, No. 73 of 1879, against the order of L. C. Abbott, Esq. Magistrate of Darjeeling, dated the 20th January 1879.