

1881  
 RADHA  
 PROSHAD  
 WASTI  
 v.  
 ESUF.

the co-sharers wish to eject him; and the legal means by which such a partial ejection is effected, is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen v. Gooroodoss Roy* (1), per Jackson, J.

The judgment of the lower Appellate Court must, therefore, be set aside; and the case must go back to that Court for retrial in accordance with the view of the law which we have above explained.

The appellants will have their costs in this Court; and the costs in the lower Court will abide the result.

Appeals Nos. 2148 and 2149 will be governed by this decision.

*Case remanded.*

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.*

1881  
 May 30.

LOKESSUR KOER (PLAINTIFF) v. PURGUN ROY AND OTHERS  
 (DEFENDANTS).\*

*Suit for Possession—Formal Possession—Transfer of Possession—Civil Procedure Code (Act VIII of 1859), ss. 223, 224.*

In a suit for possession, it appeared that, in 1863, the plaintiff had sued some of the present defendants for khas possession of the same land. In that suit the defendants pleaded that they were tenants of the plaintiff and entitled to hold under a patta, which they failed to prove, and the plaintiff obtained a decree. Three years afterwards the plaintiff was put in formal possession by the Court under s. 224 of Act VIII of 1859, instead of under s. 223.

*Held*, that as the plaintiff was put in possession under his decree by the officer of the Court, the form in which execution was given was immaterial.

The formal possession given by a Civil Court under an execution operates in point of law and fact, as between the parties, as a complete transfer of possession from the one party to the other.

THE plaintiff in this case sued to recover from the defendants possession of seventeen bighas of land. The plaintiff

\* Appeal from Appellate Decrees, Nos. 1766 and 1767 of 1879, against the decree of Baboo Kally Prosonno Mookerjee, Additional Subordinate Judge of Sarun, dated the 25th April 1879, reversing the decree of Baboo Sarut Chunder Mookerjee, Munsif of Chumparun, dated the 17th November 1877.

obtained a decree in the first Court; but the lower Appellate Court dismissed the suit, upon the ground that the plaintiff had not been in possession for twelve years.

It appeared that, in the year 1863, the plaintiff brought a suit against the defendants Nos. 2 and 3, and the father of the defendant No. 1, to recover khas possession of the land, the subject of the present suit. The defendants at that time set up that they were tenants of the plaintiff, and entitled to hold the land as such under a certain patta. They failed, however, to prove their patta; and, consequently, the plaintiff obtained a decree against them for khas possession. Three years afterwards execution was taken out by the plaintiff under that decree, and he was put in possession by order of the Court. This happened within twelve years before the present suit. The Subordinate Judge, however, decided that, under the execution, the plaintiff did not obtain actual possession, but that he only obtained possession as malik; and from the return of the proceedings made by the officer on that occasion, it appeared that the plaintiff was professedly put into possession by proclamation and beat of drum under s. 224 of Act VIII of 1859, instead of under s. 223.

The plaintiff appealed to the High Court.

Mr. *Twidale* for the appellant.

Baboo *Nil Madhub Bose* for the respondents.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

GARTH, C. J. (who, after stating the facts as above, continued):—We are of opinion that as the plaintiff was put in possession under that decree by the officer of the Court, the form in which execution was given was quite immaterial. All that was necessary was for the officer of the Court to go upon a portion of the land, and give the plaintiff possession of that portion in respect of the whole; and any formal mistake which may have been made by the officer in the mode of giving possession could not prejudice the plaintiff. It does not appear

1881  
 LOKESHWAR  
 KOER  
 v.  
 PURGUN  
 ROY.

1881  
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 LOKESSUR  
 KOER  
 v.  
 PURGUN  
 ROY.

that the defendants resisted the officer when he gave possession, or that it become necessary to turn them out by main force.

The Subordinate Judge has, unfortunately, fallen into the common error which prevailed in the Mofussil Courts a few years ago, that the formal possession which the Civil Court gives under an execution is not actual possession; whereas, as between the parties, it operates, in point of law and in fact, as a complete transfer of actual possession from the one party to the other. It would not be so as against third parties of course; but, as between the parties to the suit, the formal delivery passes the actual possession as it can be passed. This has been decided by a Full Bench of this Court: *Juggobundhu Mookherjee v. Ram Chunder Bysach* (1).

The Subordinate Judge is quite in error in supposing that possession was given to the plaintiff as malik only, and that the defendants continued to hold the actual possession, because this would have been entirely inconsistent with the decree pronounced by the Court. The defendants had set up that they were the plaintiff's tenants, and by the decree that defence was directly negatived.

The case will, therefore, go back to the Court below for re-trial; and it must be taken for granted, that the plaintiff did obtain khas possession against the defendants within twelve years of the commencement of this suit. So that, unless the defendants can show that something has happened since that time to create a new tenancy between them and the plaintiff, or to justify them in some way in retaining possession as against the plaintiff, the latter must succeed in this suit.

The appellant must have his costs of this appeal, and the costs of the lower Court will abide the result of the new trial.

The appeal No. 1767 is admittedly governed by this decision, and will be remanded accordingly, the same order being made in that case as regards costs.

*Case remanded.*

(1) I. L. R., 5 Calc., 584.