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as we can see, to matter very little whether the widow or the adopted son was the proper representative. But it is quite right that the adopted son should be made a party to the proceedings, in order that, if there was any good reason against the sale, he might be able to show it.

After the observations that we have made, the plaintiff will see that his proper course will be to make an application to the Court below, to have the adopted son made a party to the proceedings.

What we are asked to do now, is to set aside the order made by the Deputy Commissioner, releasing the property from attachment or to make the adopted son a party to the proceedings. We have no power to do either one or the other. We have no materials before us, which would justify us in setting aside the order; nor have we any power in this Court to order that the adopted son be made a party to the proceedings. That, of course must be the subject of an application to the Court below.

If the adopted son is made a party to the proceedings, and another attachment is then issued, the order which has been made will be no bar to the execution.

We therefore think that the rule should be discharged, but, under the circumstances, we make no order as to costs.

Rule discharged.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884
October 9.

IN THE MATTER OF HARI MOHUN THAKUR AND ANOTHER (PETITIONERS) *v.* KISSEN SUNDARI AND ANOTHER (OPPOSITE PARTIES.)*

Burden of proof—Easement—Act X of 1882, *s.* 147.

The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would, therefore, lie upon the party alleging such rights.

THIS was a proceeding under s. 147 of the Criminal Procedure Code. The parties were zemindars of Chunderpore and Amkhuria respectively in the district of Bhagulpore. The dispute arose owing to the Amkhuria zemindars having used the water of a certain reservoir by cutting the spur of an old *bund*. It was

* Criminal Revision No. 352 of 1884, against the order of Baboo Ram Narain Banerji, Deputy Magistrate of Bhagulpore, dated the 15th September 1884.

admitted that the *hathu* or spur in question lay wholly within the village of Amkhuria. The Court of first instance (the Deputy Magistrate) held that as there was no reliable evidence to show that the Amkhuria party had, on any previous season during several years prior to the dispute, used the water of the reservoir by cutting through the spur, they should refrain from doing so now. The Amkhuria party applied to the High Court to have that order set aside. It was contended on behalf of the petitioners that inasmuch as the ditch in dispute lay admittedly within their zemindari, the Deputy Magistrate ought to have called upon the opposite party to abstain from interfering with the cutting of the *bund*, and that the provisions of s. 147 were wholly inapplicable to the case.

Mr. *Jackson* and Baboo *Gonesh Chunder Chunder* for the petitioners.

Mr. *M. M. Ghose*, Mr. *O. C. Mullick* and Baboo *Charu Charun Mitter* for the opposite party.

The judgment of the Court (WILSON and MACPHERSON, JJ.) was delivered by

WILSON, J.—It appears to us that the order of the Deputy Magistrate in this case cannot be sustained. The controversy was between the proprietors of two neighbouring properties. In the proceedings before the Deputy Magistrate the parties of the first part were the proprietors or persons connected with the proprietors of village Chunderpore. The parties on the other side were the proprietors or people connected with the proprietors of village Amkhuria. Now, it appears that there is a reservoir of some considerable size, which stands mainly within the limits of Chunderpore, but partly within the limits of Amkhuria, and partly within the precincts of another property, belonging to persons different both from the first and second party. The reservoir is secured by a *bund* running along its north side with a spur at the western end, and a spur at the eastern end, both running southerly; the western spur and the adjacent portion of the reservoir being within the limits of Amkhuria. It appears that in the present year the Amkhuria people set about cutting a passage or ditch through the western

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spur, in order to draw the water of the reservoir to their village Amkhuria, and this was objected to by the Chunderpore people, and there being information that a breach of the peace was imminent, proceedings were taken under s. 147. Now, it is necessary, in order to appreciate these proceedings, to see exactly the position in which the parties stand. The Amkhuria people stand simply upon their ordinary proprietary right as owners of the lands of Amkhuria. They claim a right which *primâ facie* all proprietors are entitled to exercise, *viz.*, to cut a *bund* on their own land, and use the water standing on their own land. On the other hand, the Chunderpore people claim a right, which they may very well have, but which it lay upon them to establish, *viz.*, to restrain the Amkhuria people from exercising ordinary proprietary rights over their own land. That is a right of the nature of an easement different from ordinary rights of owners of land. And in order to entitle them to ask for an order under s. 147, the Chunderpore people had to satisfy the Magistrate that the alleged right existed; that is to say, that the Chunderpore people had the right of restraining the Amkhuria people from doing as they would on their own land. The Deputy Magistrate, before whom the matter came, appears to us to have misunderstood the question which he had to deal with. He assumes that the question before him was not as to the easement alleged by the Chunderpore people, but the right of the Amkhuria people to cut their own *bund* and draw water standing on their own land. The finding which he arrives at is this: "The Court finds that the second party did not exercise any right in drawing water from the *Banhara bund* by cutting its western path for several years, and that they took no water from it by opening *kunwas* during the season next preceding such institution, and therefore the Court directs that they must not do so now, and that the western bottom be not cut till they obtain the decision of a competent Civil Court adjudging them to be entitled to do such thing." The Deputy Magistrate appears to us to have wholly misunderstood the question before him. He threw the burden on the wrong side, and his findings are insufficient to support the order that he has made. It is not necessary for us to say anything about the view taken by

the Deputy Magistrate of the proviso to s. 147. Whether that proviso really has any application to a case of this kind is a question of considerable difficulty, and one as to which we are not disposed to express any opinion at present. It is sufficient to say that in our judgment the order made by the Deputy Magistrate is not supported by any finding which he has arrived at, and that this order must therefore be set aside. Any costs that may have been paid under the orders of the Court will be refunded.

Order set aside.

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

BECHARAM DUTTA (JUDGMENT-DEBTOR) APPELLANT *v.* ABDUL WAHED AND OTHERS (DECREE-HOLDERS) RESPONDENTS.*

1884 *September* 12

Execution of Decree—Limitation—Application for Execution by what limitation governed—Act XV of 1877—Act XIV of 1859, s. 20—Proceeding to enforce judgment.

Act XV of 1877 operates from the date on which it came into force as regards all applications made under it.

Behary Lall v. *Goberdhun Lall* (1) dissented from.

An application for execution was made on the 2nd of March 1872. In the execution proceedings certain properties were attached and a sale proclamation was issued. A claim to a portion of the properties was then preferred by third parties, and allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th of June 1875.

Held, that the subsequent application was not barred by the provisions of s. 20, Act XIV of 1859.

Bonâ fide proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.

IN this case Abdul Wahed and others were the holders of a decree obtained, on the 10th January 1872, on a bond against one Becharam Dutta. The first application for execution of this decree was made on the 2nd March 1872, the second on the 14th June

* Appeal from Appellate Order No. 40 of 1884, against the order of J. F. Bradbury, Esq., Judge of Backergunge, dated 22nd of December 1883, affirming the order of Baboo Chandra Nath Ghose, Third Sudder Munsiff of Barrisal, dated the 17th of September 1883.

(1) I. L. R., 9 Calc., 446.