

Under these circumstances their Lordships will humbly recommend to Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed, but there will be no costs, as there is no appearance on the part of the respondent.

*Appeal dismissed.*

Solicitors for the appellants : Messrs, *T. L. Wilson & Co.*

HAR LAL (DEFENDANT) v. SARDAR (PLAINTIFF).

[On appeal from the High Court, North-Western Provinces.]

*Assent to and validity of mutation of names in the collectorate record-of-rights—Act XIX of 1873 (N.-W. P. Land Revenue Act) ss. 94, 97.*

The question was, according to the judgment of the High Court, whether a change of names in the collectorate record-of-rights represented a *bona fide* transfer, by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this “*dakhil kharij*” and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court.

APPEAL from a decree (15th January, 1886,) of the High Court, reversing a decree (25th September, 1885,) of the Subordinate Judge of Banda.

The suit out of which this appeal arose was for a declaration of title to a mauza named Nakra in the Banda district, and sought the cancellation of an order of 27th June, 1881, for change of names in the record-of-rights, on the ground that the plaintiff's assent to such change had been obtained by intimidating her (1). The mauza Nakra was formerly owned in equal shares by Thakur

Present: LORD HOBHOUSE, LORD MACNAGHTEN and SIR B. COUCH.

(1) Act XIX of 1873, the N.-W. P. Land Revenue Act, in section 94, requires the Collector to keep and maintain the record-of-rights, registering “all changes that may take place;” and, in section 97, enacts that all successions to and transfers of proprietary rights shall be notified, and

if on inquiry they appear to have taken place, they shall be recorded in the register. Should a dispute arise, the entry is to be made subject to any order that may subsequently be passed by the civil court: section 101.

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Das and Musammat Sardar Dullia, widow of one Bojraj, deceased, and was recorded in their names. They were indebted to Bijai Ram, adoptive father of Har Lal, who was now appellant. Bijai Ram had on the 4th August, 1865, obtained a money decree against them, and he proceeded to execute this decree by sale of their lands including Nakra. It was, however, disputed as to whether the latter mauza had not been excluded by the effect of an arbitration award from liability to be sold for their debts to Bijai.

According to the plaint, it was by purchases at successive judicial sales, first of Thakur Das's share and then of the Musammat's share, that Ganesh Pershad, the recently deceased husband of the plaintiff, became entitled to the whole of Nakra, the sales being in execution of decrees in favour of Bijai Ram, who afterwards disputed, but without success, the right of Ganesh Pershad, as purchaser, on the ground of collusion with the debtors. However, after the death of Ganesh Pershad in April, 1861 (he having been murdered on account of a quarrel not connected with the present dispute), his widow, the present plaintiff, assented to the name of Musammat Sardar Dullia being entered in the collectorate record of proprietors as owner of the eight-annas share of Nakra which the latter had possessed before the sale in execution of Bijai Ram's decree.

The plaint asked that "the mutation proceeding of 1881 be declared null and void, and that the plaintiff's right of proprietary possession as widow of Ganesh Pershad be declared." It alleged a gift of her assumed share in Nakra by Musammat Sardar Dullia to the defendant, Har Lal, in July, 1872, and the latter, at first, was sued alone. But Har Lal in his defence maintained that the suit could not proceed against him alone, without Musammat Sardar Dullia being impleaded.

The Subordinate Judge, Manmohan Lal, Rai Bahadur, made the order on 17th December, 1884, that she should be made a defendant under s. 32 of the Code of Civil Procedure. She referred to herself in the following written statement filed by her as defendant No. 2 :—

"During the lifetime of the plaintiff's husband there was unity of interest between him and defendant No. 2, with their mutual

consent. On the death of the plaintiff's husband an application was filed by defendant No. 2 for entry of her name in respect of the entire mauza Nakra, on the declaration of her being the actual proprietor thereof; then the plaintiff, of her own accord and free will, and without any compulsion or coercion, filed an application before a competent authority for the entry of defendant's name in respect of an 8-anna share in mauza Nakra, and the defendant No. 2 waived her right to the other 8-anna share. Therefore, the plaintiff cannot now deviate from her former declaration, according to s. 115 of the Evidence Act."

The Subordinate Judge found it clearly proved that all the proceedings relating to the mutation of names were taken by the plaintiff willingly, and that the entry of names was duly made. He found that the plaintiff's late husband, Ganesh Pershad, was in his lifetime in the employment of Musammat Sardar Dullia as a mukhtiar, and that not until she had executed a deed-of-gift in favour of Har Lal, for the entire mauza of Nakra (including the 8-anna share claimed by the plaintiff), had been entered in the name of Har Lal, did the plaintiff raise any objection. Not till then did she file her objection to the entry of Har Lal's name, which she ultimately did, and carried the question through the offices up to the Commissioner and to the Board of Revenue. The Subordinate Judge also found that the plaintiff had been lambardar, while Musammat Sardar Dullia had only been pattidar of her share, so that collections of rent by the former proved nothing in her favour as between the two. He declined to pronounce whether the possession of Ganesh Pershad had been proprietary on his own account or only *benami* for his employer, Musammat Sardar Dullia, because "when she" (the latter) "had become owner of the share in Nakra by the admission of the plaintiff she had power to make the gift in favour of Har Lal, and that the plaintiff had no concern therewith."

He, therefore, dismissed the plaintiff's claim.

On an appeal to the High Court by the plaintiff, a Division Bench (PETHERAM, C. J., and TYRELL, J.,) reversed the above

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decision, and decreed the plaintiff's claim. Their judgment was as follows:—

“It is unquestionable that up to May, 1881, the legal estate in the whole village vested in the representative of the deceased Ganesh Pershad, and whatever other statements may have been imported into the case, it is clear—and this was accepted by the Court below—that the defendant's title is based exclusively on the transaction between her and the plaintiff in the Revenue Court and the dakhil-kharij proceedings. So that the real question is, whether this was a *bonâ fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction relating to the ownership of the 8-anna share, and she did not act freely but under coercion. We have heard all the evidence in the case, and we entertain no doubt, not only that, under the circumstances which have been proved, the plaintiff's allegations were extremely probable, but that the direct evidence produced by her was sufficient to establish her allegations. On the other hand, it appears to us to be almost impossible that the defendant's story should be true, and the alleged reason why the defendant should, according to her story, leave any part of her estate in the plaintiff's hands, is incredible to us. We cannot believe that the defendant would give half her property to the plaintiff from motives of commiseration for the murder of the latter's husband; and it seems probable that the plaintiff's apparent acquiescence in the defendant's wishes regarding half the village is rightly explained by the intimidation which she has alleged. It therefore appears that the lower Court should have decided in favour of the appellant, and the decree must therefore be reversed, and the appeal allowed with costs of both Courts.”

On this appeal,

Mr. *R. V. Doyme*, for the appellant, argued that the earlier relations of the parties, not sufficiently adverted to by the High Court, explained the conduct of the respondent in assenting to the proceedings at which the change of names had been effected, a change which she had since sought to have disallowed. The contention, and actual state of the facts, was that Musammat Sardar

Dullia had been the real purchaser, although she had used the name of her agent Ganesh Pershad *benami* for her. To show this, he referred to an application of 12th May, 1881, to the Deputy Collector, in which she alleged that by reason of her being *parda-nashin*, she had the name of Ganesh Pershad, her "karinda," fictitiously entered against mauza Nakra in the column of proprietors: also that Ganesh Pershad having lost his life, her own name should be entered. Reference was also made to a petition of the 18th of the same month presented by Musammat Sardar, the respondent, stating the death of her husband "shareholder and lambardár of Nakra," and requesting that her own name and that of Musammat Sardar Dullia should be entered in respect of equal shares. Also to a statement of the respondent that her claim was only to the half of Nakra purchased by her husband at the auction sale, (*i. e.*, Thakur Das's moiety), and that Musammat Dullia was entitled to the other half, *i. e.*, that which had been the subject of sale apparently to Ganesh Pershad. Moreover, as held by the first Court, the burden of proof was on the respondent to prove intimidation and coercion exercised upon her, and in this she had failed.

The respondent did not appear. Their Lordships' judgment was delivered by LORD HOBHOUSE.

LORD HOBHOUSE.—The only question in this case is as to the validity of certain transactions which took place in the months of May and June, 1881, affecting the title to a moiety of a village called Nakra. The parties to the transaction were, first, the plaintiff, who is the widow of one Ganesh Pershad, and, secondly, the defendant, Sardar Dullia, under whom the other defendant, Har Lal, claims by virtue of a deed-of-gift.

The nature of the transactions is this: The village Nakra stood in the name of Ganesh Pershad, husband of the plaintiff, who had been the servant and agent of Dullia's husband, and afterwards of herself, and who had when in their service acquired the ownership of the village. He was recorded in the Collector's books as the owner. In May and June, 1881, the plaintiff came before the patwari, acknowledged Dullia's title to one moiety of the village,

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claiming the other moiety for herself, and a mutation of names was effected from that of Ganesh Pershad into those of the plaintiff herself and of Dullia, one moiety each. The mutation of names was followed by possession on the part of Dullia by receipt of rents and profits, and she was found to be in possession in a proceeding before the Revenue Court in November, 1883, when she executed the gift to Har Lal, and he applied for possession. The plaintiff now says that in effecting this mutation of names she was acting under intimidation and fear; that Dullia had incited a caste or sect in the village called Lodhis, hostile to Ganesh Pershad, who threatened the plaintiff with death unless she would transfer half the estate to Dullia. If the plaintiff fails to prove that case, her suit must fail altogether.

Now, Ganesh Pershad was murdered on the 13th of April, 1881, and his murder was imputed to this caste of Lodhis, five of whom were committed for trial. But it turned out that though the real culprit was a Lodhi, he was a person who had a private grievance against Ganesh Pershad, who, he said, had deprived him of his estate. He killed him out of private revenge. He was convicted and sentenced to death, and the other four who were tried with him were acquitted. The suggestion made in the suit now is still that the real murderers were the caste of Lodhis, and that they effected the murder because they were at enmity with Ganesh Pershad and favoured Dullia, and that the same motives operated to make them threaten the plaintiff unless she would transfer a moiety of the estate to Dullia. To prove that case several witnesses were called. The Subordinate Judge disbelieved the witnesses. He considered that their character was such as to make them not very trustworthy; that there were discrepancies in their evidence; and, above all, that the improbability of their story was so great that it should be rejected. On those grounds he dismissed the suit.

The plaintiff appealed to the High Court, and the High Court say as to the evidence:—"We have heard all the evidence in the case, and we entertain no doubt, not only that under the circumstances which have been proved the plaintiff's allegations were extremely

probable, but that the direct evidence produced by her was sufficient to establish her allegations." That is the whole of their comment on the evidence. They do not mention any point on which they think the Subordinate Judge has gone wrong in disbelieving the witnesses, but they differed with him in the result, and they reversed his decree, and gave the plaintiff a decree for the moiety of the estate that she claimed.

Such being the difference between the Courts below, the duty is thrown upon their Lordships of looking into the whole of the evidence, and of examining which of them is right.

The substantial story told by the witnesses is this : that one day after the murder of Ganesh Pershad—nobody says exactly how long, but one of them says a month after—the plaintiff and Dullia were sitting at the doors of their respective houses, which closely adjoined one another ; that on that occasion Dullia spoke to a number of Lodhis who were present, and incited them to threaten the plaintiff with death or injury if she did not give Dullia half the estate ; that the plaintiff at first refused ; that she refused several times, but the mob of Lodhis went on repeating the threats, until at last the plaintiff yielded and promised to give the moiety of the estate. Therefore what the Court is asked to believe is that, while five of these Lodhis were accused of a capital crime and were on their trial, another group of Lodhis assembled to commit another heinous offence by intimidating the widow of their former victim into parting with some of her property, from the very same motive that instigated the murder of Ganesh Pershad, and that the person who was to profit by that crime sat by and openly incited it. That is a story which would require proof by clear consistent testimony from persons who are above suspicion. Six witnesses are called to prove it. Three of them are tenants of the plaintiff, one of them is a servant of the plaintiff, and one of them is the plaintiff's brother, and the sixth is apparently an independent man.

What has been the conduct of the parties ? The plaintiff herself does not go to any Magistrate, and does not seek any assistance. Shortly afterwards—we cannot tell exactly how long, but probably

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a fortnight or three weeks afterwards—she appears openly before the patwari, is examined by him in the presence of her own general mukhtiar, one Debi Pershad, and gives evidence that Dullia is the proper owner of one moiety of the estate, and that the two have agreed to share that which stood in the name of Ganesh Pershad. The witnesses—these tenants, servants, brother, and neighbour—all appear to have been perfectly supine. Having seen this heinous crime committed, knowing that their mistress or their friend was under threats against her life, they do not appear to have gone to anybody to seek any assistance at all.

Their Lordships cannot agree with the High Court that that is a probable story. On the contrary, it seems to them to be a story of the highest improbability and one not to be believed without the clearest and most cogent evidence.

Then as to the amount of contradiction. The only independent witness is also the only one who speaks in any detail to the transactions, and he contradicts himself in a very material point. In the course of his examination he is asked whether he knew Dullia, whom he says he saw inciting the mob to threaten the plaintiff. He answered thus: "I did not hear"—by which he means I never heard—"the voice of Musammat Sardar Dullia, except on that day. I have seen Sardar Dullia on several occasions and recognise her also. On the day she asked the Lodhis to threaten the plaintiff her face was visible by the side of the door. I recognised her." But then in a subsequent part of his examination he says: "When the said Musammat"—that is Dullia—"was seated in her dehliz and asked to have the plaintiff threatened, I took her for the said Musammat because the people said it was her." "I did not see her face, nor could I recognise her." So that on the important point of the identity of Dullia this witness tells first one story and then the exact contradictory of it. Moreover, the witnesses mention several persons as having been present on the occasion. Three of those persons are called. Two of them deny that there was any enmity between the Lodhis and Ganesh Pershad, and all three deny that there was any intimidation whatever. There



seems to have been a conference of some kind, and according to these three witnesses Dullia required the plaintiff, whether on legal or moral grounds does not appear, to give her some advantage out of the estate, and the agreement ultimately was that she should have half.

So much for the evidence that was given. But then there was evidence which might have been given, and was not given, of a very important kind. The plaintiff herself, who would be a very important witness, is not one of those Indian ladies who could not be expected to come forward in a Court of justice. She is in the habit of appearing in public with her face uncovered, and she did appear before the patwári and was examined in the mutation case. Therefore there is no reason why she should not have appeared in this case, and yet she is not called. Moreover, the witnesses said that her general mukhtar, Debi Pershad, was present on the occasion of the threats. He appeared also on the question about possession after the conveyance to Har Lal, and he deposed to the appearance of the plaintiff before the patwári and to the story that was told there, and he said nothing then about any threat used to the plaintiff. He did say that after the mutation into Dullia's name he received the rents and that he paid over a moiety to Dullia because he was afraid of the villagers; but it appeared that he very soon abstained from paying the moiety, and, when asked whether he was not still afraid of the villagers he said he was, but he had not an opportunity to pay the rents. So that he gave somewhat ambiguous evidence on that occasion. But it is obvious that he would be the most important witness to prove the plaintiff's story if it were true, and yet he is not called, although he is still living.

Having regard then to the strange nature of the plaintiff's story; to the position of her witnesses; to her conduct and theirs at the time of the alleged threat; to the contradictions, internal and external, of the evidence adduced; and to the omission of evidence that ought to have been adduced, their Lordships think that her story is entirely incredible; that the Subordinate Judge was quite right in rejecting it; that the High Court ought to have dismissed

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the appeal to them with costs; that a decree to that effect should now be made; and that the respondent should pay the costs of this appeal. Their Lordships will humbly advise Her Majesty to that effect.

*Appeal allowed.*

Solicitors for the appellant: Messrs. *Pyke and Parrott.*

## APPELLATE CIVIL.

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*April 2.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.*

CHAJMAL DAS AND OTHERS (DEFENDANTS) v. JAGDAMBA PRASAD (PLAINTIFF).\*

*Appeal—Abatement—Death of plaintiff—respondent—Application by defendants—appellants for substitution—Application presented after the 1st July, 1888—Limitation—Civil Procedure Code, ss. 368, 582—Civil Procedure Code Amendment Act (VII of 1888), ss. 53, 66—Act XV of 1877 (Limitation Act), sch. ii, No. 175 C.*

The plaintiff-respondent in an appeal pending before the High Court died on the 17th September, 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased; on the 15th April, 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February, 1887, such suit was dismissed. On the 6th February, 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das v. Jagdamba Prasad* (1). On 24th July, 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent.

*Held* that the application having been made subsequent to the 1st July, 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and Art. 175C of the Limitation Act (XV of 1877).

*Held* also that the petitioners had not shown "sufficient cause" within the meaning of s. 338 of the Code for not making the application within the prescribed period. *Ram Jivan Mal v. Chand Mal* (2) referred to.

\* Application in First Appeal, No. 59 of 1884, from a decree of Manvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) I. L. R., 10 All., 260.

(2) I. L. R., 10 All., 587.