

the appellant's Counsel. We think that the father is entitled, as found by the Judge, to the custody of both the children, the girl having attained the age of seven. If she had been under seven her mother would have been entitled to her custody until she was seven.

The appeal is dismissed. We shall make no order as to costs.

H. T. H.

*Appeal dismissed.*

*Before Sir W Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.*

IN THE MATTER OF THE PETITION OF HAMID BAKHUT MOZUMDAR.

HAMID BAKHUT MOZUMDAR (CLAIMANT) *v.* BUKTEAR CHAND MAHTO (DECREE-HOLDER) AND ANOTHER (JUDGMENT-DEBTOR).<sup>a</sup>

1887  
June 8.

*Civil Procedure Code (Act XIV of 1882), s. 280—Attachment—Wakf.—Trust property—Jurisdiction of Court under s. 280, Code of Civil Procedure.*

The question to be determined under s. 280 of the Civil Procedure Code is the question of possession; the words "possession of the judgment-debtor or of some person in trust for him" refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances.

IN this case Buktear Chand Mahto and others, in execution of a decree obtained against one Hajee Majid Bakhut Mozumdar, attached certain shares in two properties alleged by them to have been inherited by Hajee Majid Mozumdar from his father Syed Bakhut. A claim was put in to the attached properties by one Hamid Bakhut, who stated that Hajee Majid had no interest in the said properties, and had never been in possession; but that he, the claimant, had been holding possession for the last 20 years as *mutwali* under two deeds, dated 13th Bhadro 1274, and 25th Chaitro 1275 respectively. The evidence taken in the claim case showed that since the execution of the *wakfnama* of the 25th Chaitro 1275 the property mentioned therein had been in the possession of Hamid Bakhut as *mutwali*, and that he had ad-

\* Civil Rule No. 532 of 1887, against the order passed by J. Kelleher, Esq., District Judge of Sylhet, dated the 28th of February, 1887.

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to take under it, and that the share of the deceased person devolved according to the devolution prescribed by Mahomedan law; and therefore he holds that the possession of the claimant is not a possession under that deed at all; but he does find in an earlier part of his judgment that this claimant is in possession of the entire property, and that the judgment-debtor is not; so that, for the purposes of s. 280 of the Code of Civil Procedure, he finds the first fact, which is necessary to let in the claimant in a case of this kind, namely, that the property is in possession of the claimant, and not in that of the judgment-debtor.

Having found so much the question then arises, whether he had jurisdiction to go further and ascertain whether the document of the 25th Chaitra 1275 was an invalid document, with a view to determine whether the possession of the claimant was that of a trustee for the judgment-debtor within the meaning of s. 280.

It seems to me that in doing that he has exceeded his jurisdiction, because what he had to do was to find, first of all, whether the claimant was in possession, and, if he was, whether it was his own possession or that of the judgment-debtor. The Judge has assumed that, in every case in which he finds a claimant in possession, he has jurisdiction to go on further, and enquire into the nature of his title and the title of the judgment-debtor. I do not think he had jurisdiction to do that. It seems to me that the meaning of s. 280 was, that the question which was to be determined was to be a question of possession, and where the Legislature uses the words, "the possession of a trustee for the judgment-debtor," they mean cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not cases in which very intricate questions of law may arise as to whether valid trusts may result in particular instances.

For these reasons, I am of opinion that the Judge had no jurisdiction in this case to go on, after he had disposed of the question of possession, and deal with the question of title, and, therefore, I think this rule must be made absolute.

There is only one thing I would wish to add, and that is, that upon the judgment of the Judge himself he nowhere finds

distinctly that the claimant here is a trustee for the judgment-debtor; he merely finds a state of facts from which we are asked to infer that he intended so to find. I do not think that we ought to draw that inference from those facts, and, therefore, we think that he was wrong in the conclusion to which he came, and that this rule must be made absolute with costs.

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*Rule absolute.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

MOHESHWAR PERSHAD NARAIN SINGH (PLAINTIFF) v. SHEOBARAN MAHTO (DEFENDANT)

1887  
May 25.

AND

MOHESHWAR PERSHAD NARAIN SINGH (PLAINTIFF) v. DURSUN RAUT AND OTHERS (DEFENDANTS).<sup>a</sup>

*Right of occupancy—Agreement restricting right of occupancy—The Bengal Tenancy Act (Act VIII of 1885), s. 178, Applicability of, to suits pending when Act came into force.*

Section 178 of the Bengal Tenancy Act (Act VIII of 1885) has no application to suits instituted before the date on which that Act came into force.

So where a landlord sued to eject a tenant who had executed a *solenamah* agreeing to hold the land in suit for a specified period at a specified rent, and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on the 6th October, 1885, and where it was found that at the date of the *solenamah* the tenant had acquired a right of occupancy with respect to some of the lands in suit: *Held*, that the tenant was not entitled to the benefits conferred by s. 178, cl. 1, sub-clause (b) of the Bengal Tenancy Act, but was liable to be ejected.

THE suits which gave rise to these three appeals were instituted on the 6th October, 1885, and their object was to eject the defendants from certain lands in their possession.

It was alleged by the plaintiff that the defendants held their lands under the terms of a *solenamah*, dated the 21st September, 1878, from the year 1286 to the year 1290. The *solenamah* contained a stipulation that after the expiry of the term the landlord (the plaintiff in these suits) would be at liberty to enter upon

<sup>a</sup> Appeals from Appellate Decrees Nos. 2138, 2139 and 2140 of 1886, against the decrees of Baboo Anirto Lall Chatterjee, Subordinate Judge of Sarun, dated the 29th of July, 1886, affirming the decrees of Baboo Haribur Churn, Munsiff of Chupra, dated the 15th of March, 1886.