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Munshis *Hanuman Prasad* and *Ram Prasad*, for the opposite party.

IN THE MAT-  
TER OF THE  
PETITION OF  
GAYA PRASAD  
v.  
SIKRI PRASAD.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.), so far as it is material for the purposes of this report, was as follows:—

STRAIGHT, J.—We are of opinion that the Subordinate Judge rightly held the petition for amendment of decree in accordance with the provisions of s. 206 of the Code to be an application of the kind mentioned in art. 178, sch. ii of Act XV of 1877, and as such subject to the limitation of three years.

### FULL BENCH.

Before Sir Robert Stuart, *Kt.*, Chief Justice, Mr. Justice Straight, Mr. Justice Tyrell, and Mr. Justice Duthoit.

UNKAR DAS (PLAINTIFF) v. NARAIN AND ANOTHER (DEFENDANTS).\*

*Pre-emption—Share of undivided mahál—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 10.—Physical possession.*

A share in an undivided zamindari mahál is not susceptible of "physical possession" in the sense of No. 10, sch. ii of Act XV of 1877. Limitation, therefore, in a suit to enforce a right of pre-emption in respect of such a share runs from the date of the registration of the instrument of sale.

ON the 9th August, 1880, the plaintiff, a co-sharer in an undivided village called Bara Khera (a village in which the custom of pre-emption prevailed), instituted the present suit in the Court of the District Judge of Banda against another co-sharer in that village, and a stranger to whom such co-sharer had sold his share, to enforce a right of pre-emption in respect of such share. The claim was founded upon the custom prevailing in Bara Khera. The instrument of sale was executed on the 2nd July, 1879, and was registered of that same day. The plaintiff averred that he had obtained possession of the property in suit in January, 1880. The vendee set up as a defence to the suit that it was barred by limitation. The District Judge allowed this defence, holding that a share of an undivided mahál was not capable of "physical possession" within the meaning of No. 10 of sch. ii of Act XV of 1877,

\* First Appeal, No. 151 of 1880, from a decree of G. E. Knox, Esq., Judge of Banda, dated the 23rd September, 1880.

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and limitation in this case consequently began to run from the date of the registration of the instrument. The plaintiff appealed to the High Court, contending, amongst other things, (i) that the lower Court had erred in computing the period of limitation from the date of the registration of the instrument of sale, and (ii) that the vendee had obtained physical possession of the property in January, 1880. The Division Bench (STRAIGHT, J., and TYRRELL, J.,) before which the appeal came for hearing referred the following questions to the Full Bench:—"Is a share of an undivided mahál susceptible of physical possession in the sense of art. 10, sch. ii of Act XV of 1877, and if so, what constitutes such possession."

Mr. *Siraj-ud-din*, Pandit *Ajudhia Nath*, and Munshi *Sukh Ram*, for the appellants.

Mr. *Simeon* and Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

STRAIGHT, J. (TYRRELL, J., and DUTHOIT, J., concurring).—We are asked whether a share in an undivided mahál is susceptible of "physical possession" in the sense of art 10, sch. ii, Act XV of 1877, and if so, what constitutes such possession? Assuming that by an undivided mahál is meant a pure zamindari tenure, we remark that a zamindari tenure has been defined as one "in which the whole land is held and managed in communion. The rents paid by the cultivators, whether the cultivators be the proprietors themselves or not, are thrown into a common stock, with all other profits from the estate, and after deduction of expenses, the balance is divided amongst the proprietors according to a fixed law." We believe that in most zamindari estates the division of profits takes place once a year only, and it is obvious that in times of severe agricultural distress the interval between one division of profits and another may well be even longer, and even a period of three or four years may elapse without any distribution taking place. While, therefore, a share in a zamindari estate no doubt represents an interest in land, it is plain that all that the transferee of such a right acquires is the title to demand profits in proportion to its extent at such time as division is made, or to compel a partition of that estate. In short, to employ a simple

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illustration, it represents the amount of a partner's interest in a partnership, in respect of which he is entitled to receive profits out of the common earnings. It seems to us that it would be straining matters to hold that the receipt of profits under such conditions from the *lambardar* would satisfy the expression "physical possession;" and indeed we find it impossible to conceive any possession of which a share in an undivided *mahál* is capable that could be said to be "physical" in the well understood acceptation of the term. Where a distinct parcel of land is sold by one person and bought by another, the vendee does obtain "physical possession" when he enters upon the land purchased, and there are like cases in which no difficulty need arise. But the position is altogether different as regards a share in an undivided *mahál*. In that case the right to receive profits vests in the purchaser from the time of sale, but such right can be materially enjoyed only at such time as the next division of profits may take place, and even such material enjoyment cannot be said to be physical possession of the "whole of the property sold," for the beneficial enjoyment acquired recurs at each subsequent division of profits. It is said that the alternative date sanctioned in column 3, art. 10 of sch. ii of Act XV of 1877, namely, "the registration of the instrument of sale," would enable cunning persons frequently to defeat the rights of pre-emptors by keeping a sale quiet until the twelve months from the date of registration had expired. We very much doubt whether it would be so, but this is certain that while, on the one hand, the object of the Legislature has been to shorten the periods of limitation, its purpose, on the other, has been to encourage registration, and it was probably under the influence of both these considerations that the word "physical" and the alternative provision in art. 10 above referred to were introduced. It was also contended that, if a share in an undivided *mahál* be held unsusceptible of physical possession, and the limitation as to it be declared to run from the date of the registration of the instrument of sale, where an interest of that kind of less value than Rs. 100 is transferred, no registration being necessary, or where the transaction is oral, the law would be found to prescribe no period of limitation at all as against a pre-emptor. There can be no doubt that this contention raises a question of much difficulty, but its discussion

does not fall within the limits of the question referred to us, and we therefore do not consider it necessary to determine it. We think that a share in an undivided mahál is not susceptible of "physical possession" in the sense of art. 10, sch. ii, Act XV of 1877.

STUART, C. J.—Without absolutely adopting all the reasons and arguments advanced in the judgment proposed by Mr. Justice Straight, I yet unhesitatingly concur in his conclusion that a share in an undivided mahál is not susceptible of "physical possession" within the true intent and meaning of art. 10, sch. ii of the present Limitation Act (XV of 1877). The point appears to me to be a very simple one, whether as regards the obvious nature of the right in question or the plain meaning of the limitation law applicable to it.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Straight and Mr. Justice Duthoit.*

EMPRESS OF INDIA v. HARAKH NATH SINGH.

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*Escape from custody under process of Revenue Court—Exemption from arrest—Act X of 1877 (Civil Procedure Code), ss. 642, 651.*

A Revenue Court is a "Court of Civil Judicature" within the meaning of s. 651 of the Code of Civil Procedure. A person, therefore, who escapes from custody under the process of a Revenue Court is punishable under that section.

S. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code."

*Held*, therefore, where a person, who had been convicted by a Magistrate and had been fined, was arrested in execution of the process of a Revenue Court while waiting in court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that, having escaped from custody under such arrest, such person had properly been convicted under s. 651 for escaping from "lawful custody."

On the 30th July, 1880, Harakh Nath Singh was under trial before the Magistrate of Ballia on certain charges under the Penal Code. He was convicted on that date, and was fined Rs. 100. While waiting in Court for his friends to bring the amount of such fine, he was arrested in execution of a decree for arrears of rent made by a Revenue Court, and was committed to jail. On the