

LETTERS PATENT APPEAL.

Before Shadi Lal C. J. and Broadway J.

KIRPA RAM AND OTHERS (PLAINTIFFS) Appellants

versus

MUHAMMAD ZAHUR DIN AND ANOTHER

(DEFENDANTS) Respondents.

Letters Patent Appeal No. 26 of 1927.

Adverse possession—against decree-holders—under conditional decree for possession—not executed.

This suit for possession of certain property was instituted on the basis of a decree given in 1866 declaring plaintiffs' ancestors owners and entitled to possession conditionally on their paying defendants' predecessors a certain sum of money, failing which the latter (who had throughout denied plaintiffs' title) were to remain in possession as before. The decree not having been executed, defendants pleaded adverse possession.

Held, that the conditional decree, neither creating a judicial hypothec nor establishing the relationship of landlord and tenant, and not having been executed, the possession of the defendants became adverse to the plaintiffs, and that the adverse possession matured into ownership after the expiry of twelve years.

Fazal v. Mihan Khan (1), followed.

Appeal under clause 10 of the Letters Patent from the judgment of Zafar Ali J., dated the 8th January 1927.

JAGAN NATH AGGARWAL and ASA RAM AGGARWAL,
for Appellants.

*ACHHRU RAM, for Respondents.

SHADI LAL C. J.—On the 13th October, 1866, SHADI LAL C. J. Pindi Mal and Nihal Chand, the ancestors of the plaintiffs, were declared owners of the site in dispute

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and given a decree for the possession of the house built upon it by the defendant Sarfraz Khan, conditional upon their paying a sum of Rs. 108-4-0 to the latter. It is common ground that this decree was never executed, and that Sarfraz Khan subsequently sold the house to one Baje Khan and, after several alienations, the property was mortgaged by one Rahim Bakhsh to Ghulam Gaus who, in execution of his decree on the mortgage, became the purchaser of the property at a Court sale.

The descendants of Pindi Mal and Nihal Chand have brought the present action to eject the purchaser from the site, but their claim has been negatived both by the District Judge and Zafar Ali J. on the ground that the defendant has acquired title by adverse possession.

The decree of 1866 did not create a judicial hypothec, nor did it establish the relationship of landlord and tenant between the parties. Indeed, the defendant in that suit had denied the title of the plaintiffs; and the decree expressly provided that, in the event of the plaintiffs not paying the money to the defendant, the latter would remain in possession of the property as before. In these circumstances it has been held in *Fazal v. Mihan Khan* (1), that, when a conditional decree has not been executed, the possession of the defendant becomes adverse to the plaintiff, and that the adverse possession matures into ownership after the expiry of twelve years:

There can be little doubt that, in the present case, the persons in possession have been using and alienating the property as owners, to the knowledge of the

plaintiffs; and that the latter took no action to assert their title.

The learned District Judge has upheld the plea of adverse possession, and his finding has been endorsed by a learned Judge of this Court. After hearing arguments on both sides I am not prepared to dissent from his conclusion; and would, therefore, dismiss the appeal with costs.

BROADWAY J.—I concur.

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Appeal dismissed.

REVISIONAL CRIMINAL.

Before Addison J.

MUSSAMMAT HAKIM DEVI, Petitioner

versus

SHAM SINGH, Respondent.

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May. 1.

Criminal Revision No. 49 of 1931.

Criminal Procedure Code, Act V of 1898, section 488.

Maintenance—Order on a compromise—fixing rate of maintenance—whether illegal—and whether liable to be set aside after long lapse of time.

In 1908, the petitioner applied for maintenance under section 488 of the Criminal Procedure Code, against her husband, but during the proceedings entered into a compromise on the 29th May 1908, to the effect that the amount of maintenance would be Rs. 5 per mensem. Accordingly the Magistrate passed an order fixing the maintenance at that rate. This maintenance was collected by the petitioner, by means of the Court, up to January 1929, when she applied for enhancement of the rate of maintenance, with the result that not only was her request for enhancement disallowed but the order for maintenance made in 1908 was held to be illegal in that it was based on a compromise.

Held, that the Magistrate was wrong in setting aside the order for maintenance passed in 1908. The order was not illegal merely because the parties agreed as to what was the proper rate of maintenance. Such an agreement does not