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than Rs. 280, and, if the landlord showed that he had given them credit for Rs. 280, and was not going to sue for that amount, they would not be entitled to the return of the Rs. 280 at all. What they are entitled to under s. 140 is compensation for damage done to them, and in such a suit as this, they must show how they have been endamaged. Now the amount, which they may be entitled to as damages, would seem to consist of two sums: (*i*) Any excess amount realized from them: and (*ii*) any amount to which they might be entitled owing to the way in which their crops have been sold off.

Learned counsel for the respondent has argued that in this case it is impossible for the plaintiffs to recover any compensation at all, inasmuch as, owing to their having failed to show that their rents were payable in money, they can never establish, that there was any excess amount exacted from them and they cannot show that the amount Rs. 994, for which the landlord distrained their crops, was not really due from them. That may be quite true, but there remains the second kind of damages, to which they may be entitled in the suit, namely, damages for the **[370]** crops having been sold in such a way as not to realize their full value. Probably the plaintiffs have not thought of their being entitled to damages on this ground, and they have probably adduced no evidence on this point. If we were entitled to go into evidence in this case, we could perhaps decide it without a remand. But in second appeal, we cannot deal with questions of fact. We must therefore remand this case to the Lower Appellate Court for a fresh decision, having regard to these observations. We feel bound to do this, seeing that the Judge has not apparently had in view the principles upon which compensation in such cases as the present is to be computed.

The case is accordingly remanded to the Lower Appellate Court for a fresh decision upon the evidence on the record, having regard to the above observations.

The costs will abide the result.

This decision will also govern second appeal No. 319 of 1899.

Case remanded.

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Before Mr. Justice Ghose and Mr. Justice Harington.

GOVINDA KUAR (*Defendant* No. 1) *v.* LALA KISHUN PROSAD (*Plaintiff.*)* [24th, 25th, 26th 27th July & 4th September, 1900.]

***Benami** Conveyance—Fraudulent transfer—Colourable conveyance to defraud creditors—Fraud, wholly or partially carried into effect—Suit by real owner against benamidar—Locus penitentiæ—Right of real owner to repudiate benami transfer—Effect of long continued possession by the transferor—Adverse possession.*

Where a colourable transfer is made for the purpose of enabling the transferor to defraud his creditors, and, where the intended fraud has been wholly or partially carried into effect, the Court will not lend its aid to enable the transferor, who has thus defrauded his creditors, to get his property back from the transferee.

Goberdhan Singh v. *Ritu Roy* (1), *Kali Charan Pal* v. *Rasik Lal Pal* (2), *Banka Behary Dass* v. *Raj Kumar Das* (3), *Taylor* v. *Bowers* (4) referred to

[371] But where the ostensible transferee never had any exclusive possession

* Appeal from Original Decree No. 403 of 1896, against the decree of Babu Tara Prasanna Banerjee, Subordinate Judge of Shahabad, dated the 21st of September 1896.

(1) (1896) I. L. R. 23 Cal. 962.
(2) (1894) I. L. R. 23 Cal. 962. (note).
(3) (1899) I. L. R. 27 Cal. 231.
(4) (1876) L. R. 1 Q. B. D. 291.

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of the property in question, which was for a great many years treated as a part of the joint-family property, and which was enjoyed by the joint-family (of which the plaintiff was now the sole surviving member) for more than twelve years before suit:

Held, that the plaintiff was entitled to have a declaration of his right to the property and to confirmation of his possession there of: *Bihans Kunwar* v. *Bihari Lal* (1), and *Buhuns Kower* v. *Lalla Buhoree Lall* (2) referred to and approved.

THIS was an appeal by the defendant No. 1, Govinda Kuar, against a decision of the Subordinate Judge of Arrah declaring the plaintiff's right as proprietor of the entire 16 annas share of mouzah Tendua, and confirming his possession therefore. The mouzah was registered in the name of Govinda Kuar (defendant No. 1) the widow of one Janki Prosad; the plaintiff is Janki Prosad's brother. These two brothers were the great grandsons of one Dewan Dyal Singh, the original proprietor of the mouzah in question.

In the year 1828 Dewan Sheo Dyal Singh executed two usufructuary mortgages, each of an 8 annas share in the property in question. Of these, one 8 annas share became the property of the mortgagees by foreclosure, the other 8 annas share was also in possession of the mortgagees in their character as usufructuary mortgagees. One Gonesho Bibi, the wife of Ram Narain, the grandson of Sheo Dyal Singh, became the ostensible proprietor of the last mentioned 8 annas share by virtue of a purchase from Pratap Narain Singh (son of Sheo Dyal) and his two sisters, representing themselves as the heirs of Sheo Dyal Singh in November 1844; a decree for redemption was obtained against the representatives of the mortgagees, and also an *ikrarnamah* executed by the said representatives in December 1848. Six annas out of the other 8 annas share, which had been purchased, were conveyed to Gonesho Bibi in December 1848 by the representatives of the mortgagees and in December 1852 they also conveyed to the same lady the remaining 2 annas by a deed, in which she is referred to as the proprietress of 14 annas of the mouzah in question. Thus it came about that by the beginning of the year 1853 **[372]** Gonesho Bibi was the ostensible proprietor of the entire 16 annas of the Mouzah Tendua. Ostensible, because it was alleged that these transactions were really by her husband Ram Narain in her *furzi* name, and that she was his benamidar.

The next step of importance in the devolution of his property was taken in December 1853, when Mussammat Gonesho Bibi sold the entire 16 annas to Mussammat Govinda Kuar and Mussammat Ramdulari Koer, the respective wives of her sons Janki Prosad and Kishun Prosad, and, the vendor's name being affixed to the conveyance by the pen of Ram Narain, whose benamidar she was alleged to have been. This transfer was alleged to have been made benami for the purpose of saving the property from being attached by one Bhagwat Ram, who had obtained a decree against Gonesho. If this was so, the plan was successful, for these ladies successfully resisted Bagwat Ram's attempt to attach and sell the property in 1853. (*Vide* proceedings dated the 25th July 1855).*

* *Robakari of the Civil Court at Shahabad in suit No.* 10 *of* 1855, *dated* 25*th July* 1855.
Copy of Proceeding of the Shahabad Civil Court.
Dated 25th July 1855.
Present:
Robert (illegible).
Offg. Judge.

(1) (1868) 3 B. L. R. F. B. 15. (2) (1872) 14 Moo. I. A. 496 (527).

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[373] This proceeding was followed by a suit for rent instituted by Govinda Kuar against some tenants of Mouzah Tendua in 1855 and by two ticca leases of that property granted by that lady in the years 1859 and 1862.

Mussammat Ramdulari appears to have died shortly before the institution of the rent suit; in that suit, and in the leases, which were granted, Govinda purported to act for herself as an heir to Mussammat Ramdulari. The property seems to have remained ostensibly in the possession of Govinda, the alleged benamidar, and in 1875 it became the subject of legal proceedings, for one Bichcha Ram who had obtained a judgment against Kishun Prosad endeavoured to seize and sell it in execution of his decree as part of the ancestral property of Kishun Prosad.

A suit was brought by Govinda against Bichcha Ram, to which Kishun Prosad was a party, and that resulted in a finding that the mouzah was the property of the lady, and that Kishun Prosad had no connection with it (*vide* judgment dated the 30th July 1875).† [374] In the same year Govinda executed a *zurpeshgi patta* in favour of one Fanjava Roy of 4 annas out of the 16 annas of the estate, and it is remarkable fact that this patta was witnessed by Kishun Prosad; two years later, namely in 1877, she procured the registration of her name as proprietress of the entire 16 annas of Mouzah Tendua, subject to a mortgage of 4 annas to Fanjava Roy, alleging that she had acquired the right by purchase. Kishun Prosad appears to have married a second wife Janki Bibi, and in 1888 she and Govinda Kuar executed a general

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Suit No. 10 of 1855.

Mussammat Govinda Kuar and Dulari Kuar ...*Objectors.*

In the case of

Bhagwant Rai ... ... *Decree-holder.*

versus

Ganesho Bibi ... ... *Judgment-debtor.*

Judgment:—

Be it known that the right and interest of Ganesho Bibi in Mouza Tendua, Pargana Sasseram, were attached in accordance with the inventory field in the execution case of Bhagwant Ram and the petition of the objectors praying that the attached property might not be sold by auction is based upon the fact that the Judgment-debtor transfered the aforesaid property under a deed of sale, dated the 24th December 1853, to them. Accordingly the aforesaid persons also filed that deed in this suit, and the witnesses cited by them testify to the above-mentioned property being in their possession from the date of execution of the said deed. Therefore the proof in support of their possession is strong and overwhelming. And notwithstanding that under an order of the 7th May of the last year the decree-holder was asked to produce rebutting evidence, he failed to do so. It is, therefore,

ORDERED:

That the objection be allowed, that the property attached be released, and that costs be charged against the decree-holder.

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† *Present.*

SYED AHMAD ULLA.

Munsiff of the town of Sasseram, Zilla Shahabad.

Dated the 30th July 1875.

Case No. 168 of 1875.

Mussammat Govinda Kuar ... ... *Plaintiff.*

versus

Bichcha Ram and others ... ... *Defendants.*

The following points are to be determined in this case.

Issue in bar.

Whether the plaintiff's prayer for postponement of the auction sale is fit to be entertained.

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power of attorney in favour of their respective husbands. Govinda's husband died in the year 1890. After his death a quarrel broke [375] out and Govinda cancelled the authority she had given to Kishun Prosad under the power of attorney executed in 1888 Govinda appears to have distrained on some of the tenants of Mouzah Tendua for rent. They denied her title and sued for compensation, alleging that they had in fact paid the rent to Kishun Prosad. They succeeded in the Court of first instance, but the judgment in their favour was reversed in the Lower [376] Appellate Court. They appealed to the High Court and their appeal was dismissed on the short ground that Govinda was the registered proprietress of the lands in question, and that under the Bengal Tenancy Act the tenants could only discharge their liability by paying the registered proprietor; their payment therefore to Kishun Prosad, even if in fact made, was no discharge of their liability for rent.

This proceeding was followed by the present suit which was instituted in 1895, for a declaration of the plaintiff's right to the property Tendua, upon the ground as already indicated, that both Gonesho and

Issue of facts.

Whether the defendants Nos. 1 and 2 caused the disputed Mouza Tendua which is owned and possessed by the plaintiff to be advertized for sale, declaring it to be the property of the defendant No. 3, their judgment-debtor; or whether the disputed Mouza is the property possessed by Kishun Prosad, the judgment-debtor of the defendants; and the deed of sale set up by the plaintiff is collusive. In the former case, whether the plaintiff is entitled to get the aforesaid miscellaneous orders set aside?

Judgment.

Finding upon issue-in-bar No. 1:—

The objection raised by the defendants is trivial and not fit to be considered, because from the evidence adduced by the plaintiff, it appears that Kishun Prosad, the judgment-debtor of the defendants, has no connection whatever with the disputed Mouza Tendua, which is owned and possessed by the plaintiff; such being the case, —the auction-sale with the words—right and interest of the judgement-debtor in the disputed Mouza—undoubtedly affects prejudicially the right of the plaintiff; and when her objections were disallowed, and a regular suit has been instituted for setting aside that order, it will be highly injurious to the plaintiff, if her prayer for postponement of the auction sale is not considered fit to be entertained. Besides, the defendants have not even produced any law and precedent in support of their allegation. Therefore their mere unsupported allegation cannot have any weight at all.

Finding upon issue of facts 2:—

In this suit (*sic*) witnesses have been examined on behalf of each of the parties and, besides these witnesses, 67 documents from No. 8 to No. 25, No. 26, No. 28, No. 30, No. 32, No. 34, and from No. 36 to No. 79 have been filed, on behalf of the plaintiff and kept with the record. From these papers, and also from the witnesses of the plaintiff as well as from the statements made by certain witnesses on behalf of the defendants themselves, it is clear that the disputed Mouza Tendua has been owned and possessed by the plaintiff for more than 12 years and that Kishun Prosad, the judgment-debtor of the defendants, has had no connection whatever with it. In the face of such a mass of documentary evidence, the mere statement of the witnesses, who are under the control of the defendants with regard to the transaction being Farzi, and collusive, cannot at all be relied upon. The statement of the pleader for the defendants that the mother-in-law, the daughter-in-law the wife, and the husband were among themselves the present and former buyers and sellers, is likewise not worthy of consideration, because according to law there is no prohibition to the purchase and sale among the mother-in-law, the daughter-in-law, the wife and the husband. Of course apparently it seems to be suspicious that such alienations were effected only to injure the right of some other person, but such a thing cannot be said to have taken place in this case (illegible) because all those proceedings were taken long before the debt and decree of the defendants. However, for the reasons given above, the plaintiff's claim appears in my opinion to be very just and proper and the

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Govinda Kuar were but *benamidars*, that the family was always a joint undivided one, and that, upon the death of Janki Prosad, husband of Govinda Kuar, the plaintiff became entitled to the whole property by right of survivorship. The Subordinate Judge decreed the suit, finding the case as set up by the plaintiff to be true.

Mussammat Govinda Kuar, the defendant No. 1, appealed to the High Court.

1900, JULY 24, 25, 26, 27. Mr. *C. Gregory*, Babu *Saligram Singh* and Babu *Makhan Lal* for the appellant.

Moulvie Mahomed Yusoof for the respondent.

Cur. adv. vult.

1900, SEPTEMBER 4. The judgment of the Court (GHOSE and HARINGTON, JJ.) was as follows :—

(After stating the facts as above, their Lordships continued) :—Since the appeal to this Court was preferred Govinda Kuar has died. Luchmon Prosad and Ramjani have been substituted as appellants, and by another order of this Court Mohesh Prosad has also been joined as a co-appellant.

The substantial contention on behalf of the appellants are (*i*) that the family property was partitioned before 1865 ; (*ii*) that Gonesho, and Govinda Kuar, respectively, were the real proprietors of the Mouza Tendua ; and (*iii*) that, even if they were *benamidars*, the *benami* transactions have been set up by the plaintiff for the purpose of defrauding creditors, and that, in fact, Bhagwat Ram [377] and Bichcha Ram, the two creditors, were defrauded by this *benami* transfer, and that the Court, therefore, cannot relieve the plaintiff from the consequence of his fraud.

The respondent contends that Kishun Prosad and Janki Prosad were members of an undivided Hindu family ; that the Mouzah Tendua has been all along joint family property, though standing *benami* in the names of various female members of the family, and that, as joint property, it devolved at Janki Prosad's death on the plaintiff by the right of survivorship ; and that the fact that the property was protected from seizure by Bhagwat and by Bichcha Ram does not disentitle the Court to grant the plaintiff the relief claimed.

On the first point in issue between the parties, *i.e.*, whether the family was or was not joint, the defendant relies on two deeds, one a conveyance of 8 annas share in Mehal Okri and Sonasu Niati made by Janki Prosad in favour of Govinda Kuar, and the other a similar conveyance of a similar share of the same property made by Kishun Prosad

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aforesaid miscellaneous orders are liable to be set aside; and the allegation about the transactions being Farzi and collusive is merely got up.

IT IS THEREFORE ORDERED:—

That this suit be decreed in favor of the plaintiff, that the miscellaneous orders dated the 7th December 1874 and 31st March 1875 be set aside ; that the plaintiff do get the costs of the Court with interest at Rs. 3 per cent. per annum from the contending defendants and that the costs of the defendants with interest be borne by themselves.

(Sd.) SYED AHMED ULLA,
Munsiff.

Suit No. 91 of 1895.

Kishun Prosad ... ... *Plaintiff.*

versus

Mussammat Govinda Kuar ... ... *Defendant.*

Ext. X filed by the defendant.

T. P. BANERJI,
O. S. J.
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in favour of Radhika Kuar. Each document is dated November 1865, and each alleges that the property conveyed has fallen to the share of the vendor in partition, and it is a singular and significant circumstance that each brother is a witness to the execution of the others deed. The defendant's oral evidence as to separation is meagre and unsatisfactory. Govinda indeed says that the brothers separated 30 or 35 years before the suit was brought, and other witnesses say they lived separate, but one of them, Sawadagar, admits that the brothers occupied "same kita," and so far as Govinda Kuar herself is concerned, she admits that during Gonesho's lifetime, Janki Prosad, Kishun Prosad and Ram Narain lived together jointly with Gonesho. The plaintiff gives oral evidence to show that he and his brother were living jointly, and he produces a pottah granted by himself and his brother jointly in 1886, and some letters which passed between them. These letters are couched in the terms of the greatest affection, and refer to money matters and to the cultivation of their land, treating it on the footing of their having a common interest. Those letters were written about the years 1888, 1889 and are consistent, and only consistent with the fact that the brothers were then joint. The defendant's [378] evidence at the highest only points to the partition of one estate about 1865. The plaintiff, on the other hand, indicates that the brothers were joint in 1888. On the balance of the evidence, we agree with the learned Subordinate Judge in thinking that the defendant has failed to establish any partition between the two brothers.

The next finding of fact, which has been questioned before us on appeal, is that Gonesho and the defendant No. 1 were *benamidars*, and that the property in truth is the property of the joint family, and it becomes necessary to see, whether the evidence supports the finding of the learned Subordinate Judge on this point.

It is not necessary to discuss the earlier facts and dealings with this property by Ram Narain: these transactions took place upwards of half a century ago; it is sufficient to see what took place on the transfer of the ostensible title to the property Tendua by Gonesho in 1853, and to see what evidence there is as to subsequent dealings with the proceeds of the estate.

Now, if Kishun Prosad's oral evidence is to be believed, this property belonged to his father Ram Narain, though it stood in the farzi name of his mother, and the conveyance to Govinda and Ram Dulari was made to protect the property from Bhagwat's decree and was only a benami transaction, and that the proceeds of the property were appropriated by the family.

This is met by the allegation by Govinda, that she purchased for valuable consideration, *i.e.*, for Rs. 3,000, of which some 1,000 was obtained by the sale of ornaments, and 2,000 advanced by her father. But it is to be observed that the whole of the purchase-money was Rs. 3,000, and the conveyance was to Govinda and Dulari jointly. Yet the whole purchase-money was found by Govinda or her father. Govinda meets this difficulty by asserting that Dulari was her cousin, and that she was never Ram Kishun's wife, but even this assertion does not clear the ground, or show Dulari's share became vested in Govinda. Then it is asserted that Govinda's father was a poor man, why should he have given her Rs. 2,000 for the purchase of an estate, when she was already provided for by her marriage? [379] Then, too, the oral evidence as to any separate appropriations of this mouza is very meagre. Accord-

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ing to Govinda's own account, the collections were made by her husband Janki, who was the *Kurta* of the family, and according to Kishun, they were dealt with as part of the joint family property. As has already been pointed out, the evidence shows that the family was joint, the proceeds then, of the estate are shewn to have come into the hands of the *Kurta*, and the story told as to the purchase-money and the acquisition by Govinda of Dulari's title does not appear to be true. But there are other matters on which the defendant relies; one is, that the leases, suits, and revenue challans relating to the Mouzah Tendua are in the defendant's name, and are produced by her, and, secondly, the judgment of the Munsif in the proceedings taken by Bichcha Ram in 1875. As to the first of these matters the fact that these documents are in her name is only consistent with the fact that she is the registered proprietor and throws no light on the question of *benami*, and the circumstance that they are produced by her is explained by the fact that they were, until quite recently, in the possession of Janki Prosad, the lady's husband and the *Kurta* of the family. The judgment in the case of 1875 is no doubt a strong piece of evidence in favour of the defendant.

Notwithstanding this judgment, which is not binding as "*res judicata*" as pointed out by the Subordinate Judge, we think that the evidence indicates that the learned Judge in the Court below was right in the conclusion to which he has come, and that Govinda's real title to the mouzah was merely a benami one. The real difficulty, to which it gives rise, is whether the plaintiff, having set up the defendant's title, as real and not merely *benami* for the purpose of defeating the rights of Bhagwat and Bichcha Ram, the Court ought not to refuse to assist the plaintiff to escape from the consequences of that fraud.

Authorities were, however, cited, which support the proposition that, where a colourable conveyance is executed for the purpose of enabling the transferor to defraud his creditors, the transferor is entitled to recover back his property before the fraud is actually carried out, and that there is a "*locus penitentiæ*," until a creditor has been actually defrauded.

[380] This proposition is supported by the English case of *Taylor* v. *Bowers* (1) and the Indian case of *Sham Lal Mitra* v. *Amarendro Nath Bose* (2).

But when the intended fraud has been wholly or partially carried into effect a different state of things arises, and the Court will not lend its aid to assist a transferor, who has defrauded a creditor by making a colourable transfer of his property, to get it back from his transferee. The proposition is laid down in the cases of *Goberdhan Singh* v. *Ritu Roy* (3) and *Kali Charan Pal* v. *Rasik Lal Pal* (4) and the principle has been recently affirmed in the case of *Banka Behary Dass* v. *Raj Kumar Dass* (5) in which the English case of *Taylor* v. *Bowers* (1) is distinguished.

The principle of law which lies at the root of these cases is that the Courts will assist no man to obtain advantage from his own fraud. In these cases, the fraud is committed when the true owner of the property has successfully used another's name to shield his property from his

1. (1876) L. R. 1 Q. B. D. 291.
2. (1895) I. L. R. 23 Cal. 460.
3. (1896) I. L. R. 23 Cal. 962.
4. (1891) I. L. R. 23 Cal. 962 (*note*)
5. (1899) I. L. R. 27 Cal. 231.

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creditors, and as defeated a creditor by presenting as real a transfer which he intends to be nominal. He enables another to deal with the property as owner to the defrauding of his own creditors: he desires to have the advantage of enjoying the property as real, though not as ostensible, owner. Unless he can so enjoy it, he ails to carry his fraud to a successful conclusion. But in this case, different considerations arise. If Govinda had been enjoying this property in her own exclusive right, the Court would have been bound to give effect to the principles laid down in the cases to which we have referred, and to have refused to assist the plaintiff, but it has not been shown that Govinda ever was really in possession of the property. On the contrary it appears that, notwithstanding the judgments of the 25th July 1855 and the 30th July 1875, to which we have referred, for great many years before the suit was brought the property in question was enjoyed as part of the family [381] property—the grains were brought to the family gola—the profits were expended on the joint purposes of the family and no effort was made by Govinda to set up a right to the enjoyment of Mouzah Tondua, until she distrained upon the tenants about the year 1891. Such conduct on her part really amounts to a disclaimer. The plaintiff, therefore, has succeeded in proving that the property has been enjoyed by the joint family, consisting of himself and his brother for a great many years, and for a period of more than 12 years since the last judgment in 1875 before action brought. He proves that his brother died in 1890. In our opinion that is sufficient to entitle him to succeed in a suit for declaration of right and confirmation of possession.

The effect of a long continued possession by the true owner as against the *benamidars* is incidentally referred to by Sir Barnes Peacock in the case of *Bihans Kunwar* v. *Bihari Lal* (1). In that case the question was, whether, when a certified purchaser sued a person in possession of the purchased property in ejectment, the defendant was debarred by s. 260 of Act VIII of 1859 from pleading, that the certified purchaser purchased *benami* for him. The Chief Justice (Sir Barnes Peacock) in giving judgment to the effect that the defendant is so debarred, unless he is in possession under circumstances which amount to a transfer to him of the title which the plaintiff derived under the purchase, after pointing out that the Statute of Limitations in the case of immoveable property not only debarred the remedy, but conferred a title, goes on to say "If a *benamidar* should acknowledge the purchase to have been made *benami* and waive the right conferred on him by ss. 259 and 260 and give up possession to the real purchaser as the rightful owner, such act would probably amount to the transfer of the title, as well as of the possession, to the real purchaser." This reasoning, which the Privy Council in appeal against the judgment of this Court in that case (as we understand it) approved [see *Buhuns Kowur* v. *Lalla Lall Buhoree* (2), appears to us to be applicable to the present case; and, granting that the Court would not have lent its aid to disturb Govinda, if she had been in possession of [382] the mouzah in question, it does not follow that the Court is not entitled to confirm the possession of Kishun Prosad in the property, which he and his brother enjoyed for so many years.

For these reasons we think that the judgment of the Lower Court must be affirmed and the appeal dismissed with costs.

Appeal dismissed.

(1) (1868) 3 B. L. R. F. B. 15.

(2) (1872) 14 Moo. I. A. 496 (527).