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In the case before us, the Appellate Court set aside the decree and made a new decree, in lieu of the decree passed by the Munsif. The sale had taken place in execution of the decree, which was set aside by the Appellate Court; and we can see no distinction in principle between the present case and the case of *Set Umedmal* v. *Srinath Ray* (1). We think the same principle applies and the District Judge has erred in the view he has taken in reversing the decision of the Munsif.

We therefore restore the decision of the Munsif with costs.

*Appeal allowed.*

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## [503] PRIVY COUNCIL.

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BHOLA NATH NUNDI v. MIDNAPORE ZEMINDARY CO.*

[13th November, 1903 and 26th February, 1904.]

### APPEALS CONSOLIDATED.

[*On appeal from the High Court at Fort William in Bengal.*]

*Pasturage—Cultivators—Indigo concern—Zemindars—Waste lands—Decree, form of.*

The plaintiffs, resident cultivators of villages belonging to the defendants, the proprietors of an indigo concern, claimed a right of free pasturage over the waste lands of the villages, and the Subordinate Judge made a decree in accordance with the finding of the two lower Courts, that the plaintiffs had enjoyed the right without interruption from time immemorial.

The High Court, in second appeal, differing as to the nature of the right and the character in which it was claimed, set aside the decree and made an order of remand for the case to be decided in accordance with their remarks.

On appeal the Judicial Committee discharged the order of remand as unnecessary and restored the decree of the Subordinate Judge with the addition of a clause that the decree should not prevent the defendants or their successors in title from cultivating or executing improvements upon their waste lands, so long as sufficient pasturage was left for the plaintiffs.

*Held* (agreeing with the judgment of the High Court) that the right claimed was not a right in gross.

[**Ref.** 6 C. L. J. 218; 18 C. W. N. 735=19 I. C. 890; 39 I. C. 868=2 Pat. L. J. 323; 53 I. C. 213=37 M. L. J. 284=26 M. L. T. 223=1919 M.W.N. 640; 20 I. C. 467. **Rel. on.** 2 Lah. L. J. 44.]

CONSOLIDATED appeals from seven decrees (22nd March 1898) of the High Court at Calcutta, which set aside seven decrees (12th November 1895) of the Subordinate Judge of Midnapore, by which decrees (14th May 1895) of the Munsif of Garbetta in seven suits were affirmed with slight modifications.

The plaintiffs appealed to His Majesty in Council.

The suits were brought on 14th May 1894 by seven different sets of plaintiffs, who were resident cultivators of certain villages situate in *turuf* Paschim, the whole of which was held in [504] *patni* right by the respondent Company, who carried on an indigo concern.

The plaintiffs claimed the right of free pasturage over certain portions of the land held by the respondent Company. The Company had been unable to induce the cultivators of the villages to grow indigo for them, in consequence of which they suffered loss. They therefore

* *Present*:—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, and Sir Arthur Wilson.

(1) (1900) I. L. R. 27 Cal. 810.

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resolved to limit the area over which the plaintiffs exercised the right of free pasturage, and with this object applied on 30th October 1892 to the Magistrate of Midnapore to depute an officer to fix the boundaries. The Magistrate declined to give the appearance of official sanction to proceedings of the merits of which he knew nothing, and the Company proceeded themselves to mark out certain lands as those over which alone the plaintiffs should be entitled to graze their cattle, and the Magistrate on 4th May 1893 published a list of such lands and issued a notice calling on the tenants to make any objections they might have to such pasture lands. Objections were made, but, on 13th May 1893, rejected, and in October 1893 the servants of the Company prevented the plaintiffs from grazing their cattle on lands over which they had always exercised the right of free pasturage. Thereupon the plaintiffs instituted the seven suits, out of which the present appeals arose. In each suit the plaintiffs sued on behalf of themselves and the other persons entitled to the right claimed, in accordance with s. 30 of the Code of Civil Procedure (Act XIV of 1882), and in each case was annexed to the plaint a schedule of the lands described by their boundaries, over which the right was claimed. The plaints varied as to the lands, but were otherwise similar. They stated that the plaintiffs had from time immemorial and for a period far in excess of twenty years openly and without interruption or disturbance exercised the right of free pasturage over the lands described in the schedule attached to each plaint. They referred to the dispute with the defendant Company and the order of 13th May 1893 rejecting their objections, and claimed a declaration of their right to graze their cattle on the lands mentioned in the schedule to each plaint, and also a perpetual injunction restraining the defendant Company from interfering with the exercise of their rights.

The defendant Company filed written statements, in which they denied the plaintiffs' right of free pasturage over the lands [505] claimed, and pleaded that all grazing rights exercised had been by license of the Company and on payment of rent by the plaintiffs; that the right claimed could not be acquired in law; and that the exercise of it would materially injure the Company.

The only issues now material were as follows :—

5. Whether the plaintiffs have acquired any prescriptive right of pasture over the lands scheduled in the plaints by grazing cattle thereon for over 20 years or not?

6. Whether the grazing of cattle is detrimental to the defendant Company's interest; and if so, can the plaintiffs acquire under law the right of common pasture claimed by them or not?

7. Whether ghaskur (pasturage fee) used to be levied for grazing cattle on the disputed lands, and whether of late the rate imposed was abolished by reason of the plaintiffs and other tenants materially helping the defendants in the cultivation of indigo; and, if so, have the plaintiffs acquired the right claimed?

On the 5th issue the Munsif was of opinion that the plaintiffs had proved that they and their ancestors had practically from time immemorial, and certainly for more than 20 years exercised the rights claimed to graze cattle over the lands mentioned in the schedules annexed to the plaints; that their enjoyment had been open and notorious to the knowledge of the defendant Company's servants; and that the enjoyment was of right and without interruption. He therefore held that

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the plaintiffs had established the right claimed by them, if in no other way, by virtue of the provisions of s. 26 of the Limitation Act (XV of 1877).

On the 6th issue, the Munsif found that the exercise of the right over the lands sown with indigo would materially injure the defendant Company and therefore the right could not be claimed in law in reference to the indigo lands.

On the 7th issue, he held that the allegations of the defendant Company as to the payment of a pasturage fee and its subsequent remission were not proved.

The decree of the Munsif declared the right of the plaintiffs to exercise the right of free pasturage over the lands in respect of which it was claimed, except the indigo land, and granted an injunction restraining the defendants from obstructing the plaintiffs in the exercise of such right.

**[506]** Both parties appealed from the Munsif's decrees to the Subordinate Judge, who dismissed the defendant Company's appeals, but on the plaintiffs' appeals modified the decree of the Munsif by extending the plaintiffs' right to graze their cattle on the indigo lands after the removal of the crop.

The defendant Company appealed to the High Court, and a Division Bench of that Court (O'KINEALY and RAMPINI, JJ.), reversed the decree of the Subordinate Judge and remanded the case. The material portion of their judgment was as follows :—

"It appears to us, that the facts found by the Subordinate Judge do not support the conclusion at which he has arrived. In the first place, the plaintiffs sue as tenants holding under the defendants. The right they claim is not an incorporeal right irrespective of the tenancy ; but they set up their tenancy and the circumstances attending their cultivation as the foundation of this right. We think, therefore, that the Subordinate Judge was not right in giving them any incorporeal right irrespective of the tenancy they claim, nor a right to graze an unlimited number of cattle. Whatever rights they have, must be rights which were given to them as tenants and cultivators of the villages.

"There is also another point on which we are unable to acquiesce in the conclusion of the Subordinate Judge. When, as in this case, no actual grant is put forward, but the Court from long user presumes a lost grant, that lost grant cannot give them the user. Here, what has been shown is that the plaintiffs were in the habit of grazing their cattle on waste land for many years, and that the defendants also have been in the habit of sowing indigo. It must be borne in mind that in Lower Bengal, which is permanently settled, all waste lands in a permanently settled estate vest in the zemindar of the estate. So that the fact that the plaintiffs' cattle were allowed to graze on such portions of land as were not cultivated with indigo, would not justify the conclusion that the defendants could not extend the cultivation of indigo on their own land or raise crops thereon other than indigo, if they consider it advisable.

"We, therefore, set aside the decree of the Subordinate Judge and remand the case to him, in order that he may decide it in accordance with the foregoing observations, as we have not the power to go into facts."

*DeGruyther* for the appellants contended that they were entitled to a prescriptive right of free pasturage over the lands of the respondent Company. Both the Munsif and the Subordinate Judge had found on the facts that this right had been enjoyed by the appellants and their predecessors from time immemorial : and that finding was final. Such a right was one to which s. 26 of the Limitation Act (XV of 1877) applied : it came within the definition of "easement" in s. 3 of that Act; and twenty years **[507]** uninterrupted enjoyment as of right would be sufficient to give them a title by prescription. But the Limitation Act

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did not interfere with the acquisition of a right otherwise than under the Act, which was remedial and not exhaustive. *Rajrup Koer* v. *Abul Hossain* (1) ; and *Johnson* v. *Barnes* (2) were referred to. The respondent Company practically admitted the appellants' right by assigning lands to them for grazing their cattle. One of the grounds of defence was that a tenant could not acquire such a right against his landlord and in the Courts below the case of *Udit Singh* v. *Kashi Ram* (3), the decision on which was based on *Gayford* v. *Moffatt* (4), was cited ; but in the present case the right of free pasturage was not claimed as being appurtenant to the holding or tenancy. The High Court in dealing with the case on second appeal and setting aside the decrees of the Courts below had not acted in accordance with s. 584 of the Civil Procedure Code (Act XIV of 1882). Reference was made to *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (5). Under the circumstances the order of remand was illegal and unnecessary.

*Jardine*, *K. C.* and *H. Cowell* for the respondents contended that the appellants claimed as tenants and could not acquire a prescriptive right as against the respondent Company, their landlords. *Gayford* v. *Moffatt* (4) was cited, and the plaint was referred to to show the character in which the appellants sued. The right claimed was a personal right and could not be acquired by an indefinite number of persons like the plaintiffs. Reference was made to *Secretary of State for India* v. *Mathurabhai* (6) ; *Lutchmeeput Singh* v. *Sadarulla Nushyo* (7) ; and *Lord Rivers* v. *Adams* (8) cited in the last named case. The fact of rights being given to tenants to graze cattle in waste lands did not prevent the landlord from reclaiming the waste land and growing crops on it. *Ram Saran Singh* v. *Birju Singh* (9). **[508]** A right which would have that effect would be unreasonable. The High Court were right in pointing out that the existence of the right of pasturage claimed should not prevent the respondents from extending their indigo cultivation and so improving their estate. The decree of the Subordinate Judge was indefinite ; there was no area defined over which the right of pasturage might be exercised ; and there was nothing to show whether " indigo lands " meant lands on which indigo had been actually grown, or lands on which it might be grown, that is, lands suitable for growing indigo.

*De Gruyther* in reply. The appellants did not claim to prevent the respondent Company from extending the cultivation of indigo provided sufficient land was left, on which they could exercise the right to graze their cattle. Their evidence was that the pasturage land was insufficient.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. These are appeals from a judgment of the High Court of Bengal setting aside appellate decrees of the Subordinate Judge of Midnapore, who concurred with the Munsif of Gurbetta, the Judge of First Instance, in his findings on the facts, and affirmed, with a slight variation, the decrees of the Lower Court.

After the appeals were presented, Robert Watson and Company, Limited, who were respondents to England, and had been defendants in

(1) (1880) L. R. 7 I. A. 240 ; I. L. R. 6 Cal. 394.
(2) (1873) L. R. 8 C. P. 527.
(3) (1892) I. L. R. 14 All. 185.
(4) (1868) L. R. 4 Ch. App. 133.
(5) (1890) L. R. 17 I. A. 122, 124, 127 ; I. L. R. 18 Cal. 23.
(6) (1889) I. L. R. 14 Bom. 213.
(7) (1882) I. L. R. 9 Cal. 698, 703.
(8) (1878) L. R. 3 Exch. D. 361.
(9) (1896) I. L. R. 19 All. 172.

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the Court of First Instance, went into liquidation. Their estates, which were formerly the property of Messrs. Robert Watson and Company, the well-known indigo-planters, were transferred to the Midnapore Zemindary Company, Limited, and that Company has now been substituted on the record as respondents in the place of Robert Watson and Company, Limited.

There were originally seven suits. The plaintiffs were different. The lands, which were the subject of controversy, were different. But the question involved was the same in all. The suits were consolidated for the purpose of the hearing, and disposed of by separate decrees.

The plaintiffs were cultivators by occupation belonging to nine villages appertaining to *turuf* Paschim, *pergunnah* Bagri, [509] formerly held by Messrs. Robert Watson and Company, and afterwards by the defendant Company in *patni* right. They averred that from time immemorial they and their predecessors had enjoyed the right of pasturage over the waste lands of the villages, to which they belonged, and, in some cases, over waste lands of adjoining villages. Their complaint was, that in consequence, as they alleged, of some dispute about planting indigo, the *patnidars* had denied their title and interfered with the enjoyment of their ancient and undoubted rights.

The case, as presented by the plaintiffs, on the face of it and in substance, seems simple enough. It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured by copious references to English authorities, and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions. The result is that, although the decrees appear to be justified by the main facts, which both the Lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory.

In the High Court the learned Judges set aside the decrees of the Subordinate Judge, and remanded the case to him in order that he might decide it in accordance with their observations. The learned Judges did not take upon themselves to dismiss the suits, though the drift of their remarks seems to lead to that result. At the same time they pointed out, properly enough, that they had "not the power to go into facts." It is by no means easy to see what conclusion other than that embodied in the decrees could be arrived at on remand so long as it remains an incontrovertible fact that the right of pasturage claimed has been enjoyed by the plaintiffs and their predecessors from time immemorial—from the time of the Hindu Rajahs—long before the Watsons had anything to do with the property. The learned Judges, in their Lordships' opinion, were justified in rejecting the notion, which seems to have been advanced in argument and was adopted [510] by both the Lower Courts that the right claimed was a right in gross, but they appear to have been under some misapprehension both as to the character in which the plaintiffs sued and as to the effect of the decrees pronounced by the Subordinate Judge. It was certainly not the intention of the Subordinate Judge or the Munsif, that the decrees should prevent the defendants improving their property. And, indeed, the Munsif expressly states that the plaintiffs admitted the right of the

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defendants to improve their property, provided sufficient pasturage were left. Their Lordships think it will be advisable to insert a provision to that effect in the decrees of the Subordinate Judge. It will tend to prevent disputes in future. With this variation the decrees seem to be unobjectionable. Mr. Jardine, for the respondents, said everything that could be said on their behalf. But it was obviously impossible to support the order of the High Court or to argue that the result would be different, if the case went back to the Subordinate Judge on remand.

While their Lordships are unable to concur in the view of the learned Judges of the High Court, they wish to guard themselves against being supposed to adopt all the reasoning on which the decrees of the Subordinate Judge appear to be based.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged with costs, and that the decrees of the Subordinate Judge ought to be restored, with an amendment in terms providing in each case that the decree is not to prevent the defendants or their successors in title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage is left for the plaintiffs and the other persons entitled to the right of pasturage claimed, with liberty to the parties from time to time, in case of difference, to apply to the Subordinate Judge, as they may be advised.

The alteration in the decrees will make no difference in the costs, as the right, which it is now proposed to protect by express words, has never apparently been disputed. The respondents must pay the costs of the appeals.

*Appeals allowed.*

Solicitors for the appellants : *Miller, M. Smith & Bell.*

Solicitor for the respondent : *Freshfields.*

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31 C. 511.

## [511] APPELLATE CIVIL.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

## FULKUMARI *v.* GHANSHYAM MISRA.*

[4th and 10th December, 1903.]

*Court-fee—Suit—Title—Possession— Injunction— Consequential relief*—Ad valorem *fee—Court Fees Act (VIII of* 1870), *Sch. II, art.* 17—*Civil Procedure Code (Act XIV of* 1882), *s.* 283.

A suit of the nature referred to in section 283 of the Code of Civil Procedure, instituted for the declaration of the plaintiff's right to and possession of a property attached, and for a perpetual injunction to restrain its sale in execution of a decree, is one, in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

*Ahmed Mirza Saheb* v. *Thomas* (1), *Modhusudun Koer* v. *Rakhal Chunder Roy* (2) and *Mufti Jalaluddeen Mahomed* v. *Shohorullah* (3) followed ; *Ram Prasad* v. *Sukh Dai* (4).

[Ref. 11 C. W. N. 705=6 C. L. J. 427; 32 I. C. 267. Cons. 2 N. L. R. 87.]

APPEAL by the plaintiff, Bibi Fulkumari.

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* Appeal from Original Decree, No. 381 of 1900, against the decree of Shoshi Bhushan Chatterjee, Subordinate Judge of Purnea, dated the 1st of September, 1900.

(1) (1886) I. L. R. 13 Cal. 162.
(2) (1887) I. L. R. 15 Cal. 104.
(3) (1874) 15 B. L. R. Ap. 1 ; 22 W. R. 422.
(4) (1880) I. L. R. 2 All. 720.