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he may license another to do, so that, if all the co-tenants are exercising acts of possession, their rights *inter se* would be to an account of the profits realised and a distribution of them according to their proportions of the ownership.

The result therefore is that the appeal must be dismissed and the cross objection decreed; the suit will stand dismissed with costs in this Court and the Court below. As the right of the defendant to the 175 rupees claimed by way of set off has not been disputed before us, he is entitled to a decree for that sum, with interest at 6 per cent. per annum from the date of the written statement to the date of realization.

Appeal dismissed.
Cross objection allowed.

32 C. 856.

[856] APPELLATE CIVIL.

Before Mr. Justice Henderson and Mr. Justice Geidt.

BENI PRASAD KOERI *v.* SHAHZADA OJHA.*
[2nd May 1905.]

Landlord and tenant*—*Possession*—*Possession of property under attachment by Magistrate*—*Criminal Procedure Code* (*Act X of* 1882) s. 146—*Abandonment.

Where on account of a dispute between rival tenants under the same landlord regarding possession of certain lands, the Magistrate, acting under section 146 of the Criminal Procedure Code, attached the lands and settled them with outsiders on yearly settlements, and neither of the rival tenants brought any suit to establish their title to the lands or paid any rent for them to the landlord since the date of the attachment.

***Held* that the possession of the Magistrate was possession on behalf of such of the rival tenants as might establish a right to possession on their own account and the money realized by the Magistrate from the persons settled by him on the lands was held on behalf of such tenants and not on behalf of the landlord.**

***Held* also that the above facts did not constitute abandonment of the lands by the rightful tenants.**

APPEAL by the plaintiff Maharani Beni Prasad Koeri.

The plaintiff was the proprietress of the Dumraon Raj estate. She alleged that the lands in dispute were situated on the boundary of two adjoining villages, Ojhoulia and Sonbarsa, both of which appertained to her estate; that on account of disputes between the defendants Nos. 1 and 2 and the ancestors of the defendants Nos. 3 to 8 on the one side, who claimed that the land was situated in Sonbarsa, of which they were in possession as tenants, and the defendants Nos 9 to 11 and the ancestors of the defendants Nos. 12 to 15 on the other side, who claimed that the lands were in Ojhoulia, of which they were in possession, the Magistrate instituted proceedings under section 145 of the Criminal Procedure Code and attached the lands under section 146 of the Code on [857] the 24th March 1884; that from that date up to the date of the present suit the Government continued to be in possession by making yearly settlements with various tenants; that the defendants had not paid any rent for the lands since the date of the attachment nor had they taken any steps to have the question of title to the property settled between themselves; that consequently she had been precluded from taking any action for

* Appeal from Original Decree, No. 378 of 1903, against the decree of H. R. H. Coxe, District Judge of Shahabad, dated the 28th of July 1903.

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the recovery of rent and that a sum of Rs. 13,868 was due as arrears of rent and interest in respect of the lands.

She brought the present suit against the aforesaid defendants Nos. 1 to 15 and the Secretary of State for India in Council for the recovery of Rs. 6,596-12-6, being the amount of rents realized from the lands in dispute by the Government and lying in deposit in the Collectorate Treasury of the district, claiming to be entitled to receive the same in part payment of the arrears of rent due to her. She also prayed for recovery of direct possession of the lands on a declaration of her own title and the absence of title of the defendants who, she pleaded, had by their conduct abandoned the said lands.

The defendants Nos. 1 to 8 Gonesh Misser and others, tenants of Sonbarsa, pleaded that the lands were in Sonbarsa and that the rent thereof was being paid along with that of other lands of the village, that their right in the lands had not lapsed, that the plaintiff was not entitled to get direct possession, that she was not entitled to the money in deposit in the Collectorate, that the suit was not maintainable in its present form and that it was barred by limitation.

The defendants Nos. 9 to 15, Shahzada Ojha and others, pleaded that the lands appertained to mouza Ojhoulia and belonged to the tenures of themselves and other persons. They took substantially the same objections to the suit as the other defendants and further pleaded that the suit was bad on the ground of misjoinder of parties.

Two preliminary issues were raised namely:

(*i*) Will the plaintiff's suit lie as framed? and

(*ii*) Have the defendants any subsisting interest in the property covered by the plaint?

The District Judge, who tried the suit, decided both the issues against the plaintiff and dismissed the suit.

[858] The plaintiff appealed to the High Court.

Babu *Raghunandan Prasad* and Babu *Jogendra Chunder Ghose* for the appellant. The Magistrate, having attached the lands in 1884 in a proceeding between the rival tenants and neither party having taken any step to get back possession and neither party having paid rent, the land must be taken to have been abandoned: the plaintiff is therefore entitled to the land and also to the money, which is an accession to the land; or the suit may be amended into one for rent and the money in deposit directed to be paid to the plaintiff in part payment of the arrears.

Babu *Sarat Chandra Basak* for the respondents. The Magistrate's possession is possession on behalf of the true tenant; there is no abandonment; even if there be, the procedure laid down in the Bengal Tenancy Act not having been adopted, the plaintiff is not entitled to re-enter; the tenants are still residing in their respective villages. As regards the money, the plaintiff is not entitled to it as it is held on behalf of the true tenant. The landlord is the person, who knows best who is the true tenant; she cannot ask the Court to determine, who the tenant is and then claim a decree against him.

Babu *Raghunandan Prasad* in reply.

HENDERSON AND GEIDT, JJ. The appellant in this case is the proprietor of two adjoining villages named Sonbarsa and Ojhoulia. In 1884 a dispute arose between the tenants of the two villages as to who were entitled to cultivate certain lands as being within their holdings on the boundary between the two villages. In consequence of this dispute,

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proceedings were taken by the Magistrate under section 145 of the Code of Criminal Procedure, and in the result the Magistrate, being unable to find whether the tenants of the one village or of the other were in possession, attached the land. From that time up to the present the attachment has remained, and the Magistrate has been letting out the holdings to outsiders under yearly settlements; and there is now in deposit in the Court of the Magistrate the sum of Rs. 6,596-12-6. No suit has been brought by the tenants of either village to establish their title to the lands, the subject of the dispute.

[859] The present suit was filed on the 24th of April 1903. In the meantime the disputing tenants paid no rent and the plaintiff had taken no steps to compel payment of rent by anybody in respect of the lands in dispute. She alleged that there was due on account of rents, for the years 1292 to 1309 inclusive, the sum of Rs. 6,843-10-6, together with interest amounting to Rs. 7,025-2-7, or a total of Rs. 13,868-13-1; and she claimed that she was entitled to receive the amount in deposit in the Court of the Magistrate in part payment of that total sum. The persons, whom she sued, were eight of the tenants of the one village and nine of the tenants of the other village,—these apparently being the parties, or there representatives, to the proceedings under section 145 of the Code of Criminal Procedure—and she also joined the Secretary of State as a defendant.

It was contended in the Court below and also in this Court that the tenants or such of them as were really entitled to hold the lands, which were the subject of the proceedings under the Criminal Procedure Code, had, in consequence of the non-payment of rent and of having forborne to bring a suit to establish their rights, abandoned their holdings; and, upon that ground the plaintiff sought to obtain direct possession of the lands. The District Judge was of opinion that the plaintiff was not entitled either to the money in deposit in the Court or to obtain direct possession of the lands; and he dismissed the suit.

In the first place it is necessary in dealing with this appeal to consider what was the position of the Magistrate. The dispute was with regard to the right of two sets of rival tenants to cultivate the lands in suit. The subject of the dispute, therefore, was the right of the contending tenants to possess and cultivate the lands as portion of their respective holdings. The effect of the attachment by the Magistrate was that he took possession on behalf of such of the tenants as might eventually establish their right to possession. Instead of cultivating the land himself, the Magistrate settled the land yearly with other persons and the amount now held in deposit represents the money received by him from these other persons. The possession, therefore, of the Magistrate must be taken to have been a possession on behalf of such of the rival tenants as might establish a right to possession **[860]** on their own account; and that being so, it would seem to follow, that the amount held in deposit was held on behalf of such tenants and not on behalf of the landlord. It was money collected by the Magistrate from persons to whom, he, on behalf of those for whom he held possession, had sublet the land and it was therefore not payable to the landlord as rent. With regard to the alleged abandonment it is not suggested that any of the tenants have abandoned their residences in either of the villages, nor is it alleged that they have actually given up or done any act with the intention of relinquishing any rights, which they or any of them may have had in the lands. It is true that they have not paid any rent since 1884, but

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it is apparently also true that they have never been asked to pay. In our opinion it cannot be said that they have been out of possession, for the possession of the Magistrate purported to be and really was, as already stated, a possession on behalf of such of them as might eventually prove themselves entitled to such possession. Under these circumstances, it seems to us that there has in fact been no abandonment by any of the defendants of their holdings in the disputed area.

The appellant, therefore, is not entitled to obtain direct possession of the lands in suit nor is she, having regard to what we have already stated as to the conditions under which the deposit is held, entitled to claim to be paid in part payment of the rent alleged to be due to her for the years 1292 to 1309, the amount in deposit in the Magistrate's Court.

We have been asked to allow the plaint at this stage to be amended and to remand the suit to the lower Court in order to enable the plaintiff to recover any rent, which may not be barred by limitation. We are not disposed to allow any amendment at this stage. But apart from this, it seems to us that as this suit is framed against a large number of tenants, some belonging to one village and some to another and there is no allegation as to which of them are in possession of or tenants of any particular plot, there would be great difficulty in turning the suit into a suit for rent.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

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32 C. 861 (=1 C. L. J. 270.)

[861] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

AMULYA CHARAN SEAL *v.* KALI DAS SEN.*

[28th March, 1905.]

Hindu Law—Will—Construction of will—Gift over—Defeasance—Vesting of corpus in abeyance—Executors and trustees, position of—Hindu Law—Adoption—Adoption of sons in succession.

Where under the terms of a will the corpus of the estate was not to vest until the happening of a certain event, it would in the meantime vest in the heir, and on the death of the heir (intestate) it would devolve on his heir.

Executors and trustees of Hindu wills executed before the 1st September, 1870 are merely managers and no estate vested in them.

Sarat Chandra Banerjee v. *Bhupendra Nath Basu* (1) followed.

A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person.

The implication of a gift over to a second adopted son who may never be adopted cannot prevent the widow of the first inheriting the share taken by the latter.

Where a Hindu gave authority to his widow to adopt sons to him in succession; her power to adopt a second son would terminate on the first adopted son dying leaving a widow in whom the estate became vested.

Bhoobunmoyee Debia v. *Ramkishore Acharj Chowdhry* (2); *Padma Kumari Debi Chowdhrani* v. *Court of Wards* (3); *Keshav Ram Krishna* v. *Govind Ganesh* (4); *Thayammal* v. *Venkatarama* (5) and *Tara Churn Chatterji* v. *Suresh Chunder Mukerji* (6) followed.

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* Appeal from Original Decree No. 89 of 1903, against the decree of Kali Kumar Bose, Subordinate Judge of 24-Pergannahs, dated the 5th January 1905.

(1) (1897) I. L. R. 25 Cal. 103.
(2) (1865) 10 M. I. A. 279; 3 W. R. (P. C.) 15.
(3) (1881) I. L. R. 8 Cal. 302.
(4) (1884) I. L. R. 9 Bom. 94.
(5) (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.
(6) (1889) I. L. R. 17 Cal. 122.