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a separate estate, merely beacue a part of it is conterminous with that of the *Shafi*."

So far as we know, it has never been decided in any case that any custom prevails amongst Hindus giving a right of pre-emption to the owner of an estate adjacent to that sold on the mere ground of vicinage. In fact, the Courts have repeatedly refused to recognize such a custom; as, for instance, the Sudder Court of the N. W. Provinces in two cases referred to in *Fakir Rawot* v. *Sheikh Emambaksh* (1). The same point was decided in the cases of *Ejnash Kooer* v. *Shaikh Amjudally* (2) and *Nirput Mahtoon* v. *Mussamut Deep Koonwar* (3).

No evidence was given of the existence in Purneah of any custom amongst Hindus giving a right of pre-emption on the ground of such vicinage, and no such custom is even alleged by the plaintiff, and, therefore, we think it unnecessary to remand the case for the trial of an issue on the point.

We reverse the Judge's decree, and dismiss the suit with costs in both Courts.

Before Mr. Justice Norman and Mr. Justice Jackson.

1869. *March* 18.

SARADAMAYI CHOWDHRAIN (PLAINTIFF) *v.* NABIN CHANDRA ROY CHOWDHRY (DEFENDANT.)*

Act VIII. of 1859, *s.* 230--*Dispossession--Adverse Claims.*

Four persons made separate applications to the Court, under section 230, Act VIII. of 1859, alleging that the defendant having obtained a decree against Government for possession of fisheries in a suit to which they were no parties, had in execution dispossessed them of fisheries, of which they were severally in possession. On enquiry it appeared that each and several of the four applicants claimed possession of the same portions of the fisheries. The lower Court, holding that it was impossible for each of several parties setting up adverse claims to the same property to show that it had been *bona fide* his possession, and that he had been dispossessed from it, referred all parties to a regular suit.

* Regular Appeals, Nos. 182, 184, 198, and 213 of 1868, from the decrees of the Judge of Rungpore, dated the 10th July 1868.

(1) Case No. 1116 of 1861; 28th Sept., 1863. (2) 2 W. R., 261. (3) 8 W. R., 3.

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Held, that the Judge should have tried each case by itself as between the applicant and the decree-holder.

Baboos *Girija Sankar Mazumdar* and *Iswar Chandra Chuckerbutty* for appellant.

Baboos *Mohini Mohan Roy* and *Ashutosh Chatterjee* for respondent.

The facts are sufficiently set out in the following judgment of

NORMAN, J.—THESE are suits or proceedings under section 230 of Act VIII. of 1859. The plaintiffs in the several cases above mentiond, allege that Nabin Chandra Chowdhry, having obtained a decree against the Government for possession of certain jalkars, proceeded, in execution of that decree, to take possession of fisheries, of which they severally were in possession, describing them by boundaries. They allege that these fisheries had always belonged to them; that they were not parties to the decree obtained by Nabin Chandra, and, therefore, pray to be restored to possession. One judgment was delivered in all the cases. The Judge says, a good deal of evidence has been taken, the result of which has been to shew that there are diversities of claims amongst the plaintiffs themselves, each and several claiming possession of the same portions of the fisheries, and all the claims are pretty equally supported by both oral and documentary evidence. It behoved each party complaining of dispossession under the decree to shew, to the satisfaction of the Court, that the property of which he had been dispossessed was *bona fide* in his possession, and this could never have been done by several parties complaining of dispossession of the same property to which they laid adverse claims. He adds, I belive that when the several applicants petitioned under section 230, they had no personal knowledge whatever of the state of the said fisheries, or that their interests in them were conflicting or adverse to any one but the decree-holder. He dismisses all the suits, leaving the several plaintiffs to their remedy by suit.

We are of opinion that this decree cannot stand. The effect of the decision is to put all the several claimants out of posses-

sion, without any determination of the question, whether they were in possession or not at the date of the execution,—to leave the decree-holder in possession, and give him the immense advantage of being able to throw upon his adversaries the burden of proof, not of previous possession, but of title.

The nature of the point to be decided between each claimant and the decree-holder is not in any way affected, because there are many claimants, as will be evident from a practical illustration. Suppose a person in possession of a house is dispossessed in execution of a decree against a third person to which he is no party. It is clear that his right to be restored to possession under section 230, cannot in any way be affected, because in a similar proceeding, another person falsely alleges that he was in possession of the whole house, or truly alleges that he was in possession of a part of it. Would the Judge say that, because such a claim is made by another, a man in rightful possession may be turned into the street and left homeless, till, perhaps in twelve months' time, a suit to recover possession can be heard, and finally decided on appeal.

The Legislature may properly make the party alleging dispossession a plaintiff in the proceeding, thereby throwing on him the onus of proving his possession. If he fails to prove, to the satisfaction of the Court, that he was in possession, his claim must be dismissed, and he will be left to his remedy to establish, not his possession, but his title by an ordinary suit in the Civil Court. The 230th section does not appear to us to contemplate the adjudication of any question between adverse claimants. It is easy to put cases where two several parties have been in possession of the same property, of which they cannot be deprived in execution of a decree against a fourth person. In such cases each might be entitled to a decree, declaring what his possession was, and that he is entitled to be maintained in it, notwithstanding the proceedings in execution.

The question in each case is perfectly simple, and each case should have been tried by itself. If the claimant was in possession, though without a good title, he cannot be dispossessed in execution of a decree against a third person to which he was no party. On the other hand, if the party against whom the

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decree was obtained was in possession, though without a good title, it is clear that, in execution of a decree, the person, who is declared to have acquired the rights of the party actually in possession, is entitled to be placed in the same position as the party whose rights he has acquired; and no person, not in actual possession or receipt of rents, can come in under section 230 to resist the execution of the decree. He must, like any other person out of possession, be left to enforce such right as he has in a regular suit. With all respect for an opinion which seems to have been expressed by Mr. Justice Mitter in *Ajoo Khân* v. *Kristo Pershad Lahoory* (1), it appears to us that the question under section 230 is not properly a question of title, though in a case of the claim of an incorporeal right, such as that of fishery, evidence of possession might be to some extent evidence of *title*.

The Judge very rightly says that section 230 provides only for disputes between the decree-holder and the party dispossessed under the decree. In cases, like the present, the sole questions under section 230 are: Was the claimant really and *bona fide* in possession of the fisheries claimed at the time of the execution of the decree? Was he dispossessed by the decree-holder in execution of the decree? It is suggested by the vakeels on both sides that the whole of the evidence has not been taken, and we, therefore, remand the cases to the Judge for the trial of the above-mentioned two issues. The Judge will try the issues and return to this Court his finding thereon, together with the evidence.

(1) 8 W. R., 477.