

Jadunath Roy in the Court of the Subordinate Judge of Nuddea, within the jurisdiction of which Court Jadunath Roy resided. Jadunath Roy had obtained a decree in the Beerbhoom Court against Banwari Gobind, which was attached by the Nuddea Court, under the decree of the plaintiff, and sold to the plaintiff himself under the execution. It appears to us, that the Nuddea Court had jurisdiction to sell Jadunath's right, title, and interest in that decree, and having done so, the plaintiff, who had purchased under that execution, became the assignee of the decree, and as such assignee has a right to apply to the Beerbhoom Court to have execution of it.

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Under these circumstances, we think that the order of the Subordinate Judge must be reversed with costs.

This decision will govern Miscellaneous Appeals, Nos. 315, 316, and 317 of 1868 in which the orders of the Subordinate Judge are reversed without costs.

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson,  
and Mr. Justice Mitter.

RADHA CHARAN GHATAK AND OTHERS (PLAINTIFFS) v. ZAMIRUN-  
NISA KHANUM (DEFENDANT).\*

Mesne Profits—Possessor, Decree—Act XIV. of 1859, s. 15.

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A decree for possession in a suit under section 15 of Act XIV. of 1859, is *prima facie* evidence that the plaintiff in that suit is entitled to recover from the defendant therein, mesne profits for the period of dispossession.

THIS was a suit for mesne profits of a certain share in Kismats Ramhari and others, for the year 1272 (1866), valued at Rs. 74-11, which the plaintiffs, who had recovered possession from the defendant, under section 15 of Act XIV. of 1859, sought to obtain from the defendant, for the time during which they alleged that she had been in wrongful possession.

The defendant contended, *inter alia*, that the plaintiffs were not entitled to recover mesne profits, without proving their title to the disputed property.

\* Special Appeals, Nos. 10 to 20 of 1868, under section 15 of the Letters Patent of 1865, for the High Court at Calcutta, from a judgment of Mr. Justice Macpherson and Mr. Justice E. Jackson, dated the 20th May 1865, in Special Appeals, Nos. 2097, 2296, 2298 to 2301, 3284, 3285, and 3286, from decrees of the Judge of Rajshahye.

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The Moonsiff gave a decree for the plaintiffs for the amount sued for.

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On appeal, the Judge affirmed the decision of the Moonsiff.

The following were the judgments of the Division Bench :

E. JACKSON, J.—I would dismiss these appeals. They are for the mesne profits of certain lands from which the defendant had forcibly dispossessed the plaintiffs, and to possession of which the plaintiffs were restored by a suit under section 15, Act XIV. of 1859. The plaintiffs now sue to recover the amount collected by the defendant during the period she held possession. The Judge has decreed the claim upon the strength of the possessory decree, without going into the title of the parties. It is contended, for the defendant, on special appeal, that the plaintiffs must prove their title before they can recover the mesne profits. I admit that, as a general rule, mesne profits cannot be recovered until title is established. But the decree in the suit for possession is, in my opinion, sufficient title to recover from the defendant what she has obtained by force, and illegally. The title of the plaintiffs to possession carries with it the title to recover the mesne profits during the time they were dispossessed. It may be that the defendant holds a superior title to the plaintiffs, but it does not follow that she is entitled to retain these mesne profits, as it may also be that she labors under some disability in asserting her title. For instance, it may be that the defendant, having been out of possession for more than 12 years, is barred from a hearing on the question of title. In such a case it would not be right that the question, as to whether the plaintiffs should receive the mesne profits during the time they were forcibly and illegally kept out of possession, should depend on the decision on an issue as to whether the plaintiffs or the defendant has the superior title to the lands. The plaintiffs, though holding no superior title, would be entitled to the mesne profits.

MACPHERSON, J.—I do not concur in the judgment of Mr. Justice E. Jackson.

I think that the appellant's first ground of appeal is good, and that the respondents are not entitled to a decree for mesne profits without proving their title.

The mere decree in the suit for possession in no degree shews that the respondents have any right to the collections made by the appellant; and, for all that that decree proves to the contrary, the appellant may be the person lawfully entitled to them.

In each of these cases the decree of the lower Courts is reversed, and the plaintiff's suits are dismissed with costs both here and in the Courts below.

The plaintiffs appealed under section 15 of the Letters Patent of the High Court.

Bahoo Chandra Madhab Ghose (with him Baboo Srinath Banerjee) for plaintiffs, appellants.—The objection of the defendant cannot avail, inasmuch as she might or might not bring a suit for the declaration of her title within 12 years, whereas the plaintiffs would be altogether barred of their right to recover *wasilat*, if they failed to bring an action within 6 years from the date of the possessory decree. No issue was raised as to the respective titles of the parties either in the Court of first instance or in the Appellate Court. The possessory decree obtained by the plaintiffs, under section 15 of Act XIV. of 1859, is at least *prima facie* evidence of plaintiffs' title, so as to shift the burden of proving a better title upon the defendant.

Mr. Paul (with him Baboo Nalit Chandra Sen) for defendant, respondent.—Section 15 of Act XIV. of 1859 was enacted in lieu of section 4 of Act IV. of 1840, which contained a similar provision. The object of the Legislature in making this enactment was simply to restore a party to possession, when his possession was disturbed, in order to prevent affray and preserve peace. A summary decree, under section 15 of Act XIV. of 1859, wholly leaves the question of title undetermined and open between the parties. That section does not contain any provision for mesne profits. A possessory

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decree under the aforesaid section, ordering a party to be restored to possession, does not necessarily entitle him to recover wasilat. For, if this were so, the claim for mesne profits could be very properly included in the summary suit for possession, instead of leaving the successful party to institute a fresh suit for recovery of mesne profits, after having obtained a decree for possession. But section 15 does not warrant the joinder of a claim of wasilat in a suit for possession. But it is otherwise in an ordinary regular suit instituted under Act VIII. of 1859, where the two things, *viz.*, possession and mesne profits, can be recovered in one and the same action. From this it clearly appears, that a mere decree in a summary suit for possession in no degree shows that the decree-holder has any right to the collections made by his opponent. The right to obtain summary possession is entirely distinct from that of recovering mesne profits. The two rights are based on a wholly different state of things. Mesne profits cannot be recovered until title is established. In the present case, the question of title has not been adjudicated upon. It is a question affecting the jurisdiction of the case. The Courts below could, of their own motion, have raised the point, and decided accordingly. Hence there has been a failure of justice and defect of investigation. Although the defendant did not distinctly raise the question of title, yet it was patent on the face of the proceedings. The determination of title was so essential to the trial of this suit, that the ends of justice require that the point should be enquired into and finally adjudicated upon, consequently the case ought to be remanded to the lower Court to allow the parties an opportunity of establishing their respective title, otherwise there can be no satisfactory decision on the question, whether or not the plaintiffs are entitled to claim wasilat.

The judgment of the Court was delivered by

PEACOCK, C. J.—We are of opinion that the plaintiffs are entitled to the decree which they obtained, and that the special appeal to the High Court ought to have been dismissed.

The suit was brought for the mesne profits of a 7-anna odd share of certain kismats, of which share the plaintiff recovered

possession against the defendant in a suit brought under section 15, Act XIV. of 1859. That decree, as between the plaintiffs and the defendant, was evidence for the plaintiffs that they had been dispossessed by the defendant of that share, and that the Court had ordered them to be restored to the possession. In that suit it was not competent to the Court to determine the question of title. The plaintiffs having been restored to possession of the share, commenced a suit against the defendant to recover the mesne profits thereof, which the defendant had collected whilst she was in possession of it; and the issue raised by the Moonsiff was, whether the kismats in question were included in the decree; that is to say, whether the 7-anna odd share, of which the plaintiffs had recovered possession, was a share of those kismats. That issue was found in favor of the plaintiffs, and they recovered Rs. 74-11, the mesne profits of the share. The defendant, in the suit for mesne profits, had a right to have the question of title tried; but the prior possession of the plaintiffs, to what they had been restored under the Act XIV. decree, was sufficient *prima facie* evidence of their title to warrant a decree in their favor against the defendant for the mesne profits, unless she could prove a better title. No issue was raised as to the defendant's title to the share, and no appeal was preferred by the defendant to the Judge, upon the ground that no issue had been raised by the Moonsiff as to her title. This case involves a mere pecuniary demand of Rs. 74-11, and does not affect any question of title between the parties. It has now arrived at a fourth stage, and it is too late for the defendant to ask to have the case remanded to the Moonsiff to try a question of title which, if the Moonsiff was wrong in not trying it originally, ought to have been made a ground of objection in the second stage, viz., in the regular appeal to the Judge.

The main ground of appeal is, whether a suit for wasilat founded on a decree obtained under section 15, Act XIV. of 1859, can be maintained. It was contended before the Judge that no such suit for wasilat could be maintained until the defendant, who had been ordered to restore possession, should have brought a suit to declare her right, and had had that suit dismissed. If such contention could be supported, the plaintiffs

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might be altogether deprived of the mesne profits which had been collected by the defendant after she had turned them out of possession, and during the time that she retained it; for it does not necessarily follow that the defendant ever would bring a suit, to have her title declared; and even if she should bring a suit, she may, as pointed out by the Judge, bring it at any time within 12 years, whereas the plaintiffs' suit for mesne profits must be brought within six years.

Mr. Paul, in his argument, admitted that a suit for mesne profits is in the nature of an action of trespass for damages. Such a suit, according to English law, may be maintained as soon as a plaintiff has recovered possession in an action of ejectment. It has been held that prior possession is a sufficient title to maintain ejectment. So, it appears to me that the plaintiffs' prior possession and the dispossession by the defendant was sufficient *prima facie* evidence, after the plaintiffs had been restored to possession under section 15, Act XIV. of 1859, to entitle them to maintain a suit for mesne profits. Although the defendant, in the suit under Act XIV. of 1859, could not set up title as an answer to the restoration of possession, she was not precluded in this suit for mesne profits from proving, if she could, that at the time when she dispossessed the plaintiffs, and at the time when she collected those profits, she was entitled to the property, and the plaintiffs, although in possession, had no title to it. In the absence, however, of such proof on the part of the defendant, there was no error in law in awarding mesne profits to the plaintiff.

For these reasons I am of opinion that the decree of the Division Bench ought to be reversed, and that the decision of the lower Appellate Court ought to be affirmed with costs; and the appellant ought to pay the costs of the special appeal to the High Court, as well as of the appeal from the Division Bench.

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