it is said, actually exceed the entire one-third to which she is entitled. The effect of this contention, of course, would be that the plaintiff would take nothing by her decree at all, but, apparently, would be in a worse position than she was before her suit. It seems to me that we have nothing to do with the results which may flow from the terms of the decree in respect of the lands previously in the plaintiff's hands, but that she must be entitled to execute her decree in respect of the lands in the hands of the defendant, taking, of course, any consequence that may seem to flow from the terms of her decree. It appears to me, therefore, that the decision of the Court below in regard to the execution must so far be affirmed, namely, that the plaintiff is entitled to go on with her execution. The special appeal must be dismissed with costs

Markby, J.—I concur.

The 5th June 1870.

Present :

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Appeal—Issues.

Case No. 133 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 23rd March 1869.

Tekait Doorga Pershad Singh and others (Defendants), *Appellants,*

versus

Mussamut Doorga Koonwaree (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

In a suit by a Hindoo widow for possession and declaration of title : HELD, that defendant could not be allowed to come in and urge for the first time in appeal that by a familly custom or *koolachar* females were excluded from inheriting.

Norman, J.—THIS was a suit by the plaintiff, Mussamut Doorga Koonwaree, for possession of two-thirds and a declaration of title to the other one-third of a zemindary mehal called Chakaye in Zillah Monghyr. Her title is a very plain one.

Tekait Futteh Narain Singh died on the 14th of Chyet 1270, leaving three widows, Lulleet Koonwaree, Narain Koonwaree, and Doorga Koonwaree Doorga Koonwaree, the plaintiff, was pregnant at the time of her husband's death, and in the month of Sowun 1270 gave birth to a son Goorda Narain, who lived till Chyet 1272. On the death of Goorda Narain, who, of course, on his birth succeeded to the property in the entire mehal Chakaye as heir of his father, the plaintiff, as his mother and heiress, became entitled to the entirety of the mehal. She has been kept or been put out of possession of two-thirds by the other two widows of her husband, with one of whom at least, Lulleet Koonwaree, the appellant Doorga Pershad Singh, who is the third defendant in this case, appears to have colluded.

Doorga Pershad Singh stands to the late proprietor, Goorda Narain, in the relation of great-grand-father's brother's great-grand-son, and it may be that after the death of the plaintiff he will be entitled as next heir to the property ; to which, according to ordinary Hindoo Law, the plaintiff in entitled as mother and heiress of Goorda Narain during her life-time.

By his written statement, the appellant Goorda Pershad Singh first of all set up that the plaintiff was not in possession even of the one-third share which she does not claim. He goes on to say that the plaintiff was not entitled to the estate which had belonged to her son, because the widows and minor son lived in commensality and as a joint family with him ; that the entire property was ancestral ; and that under the Mitakshara, after the death of the plaintiff's husband and of her son, he, Doorga Pershad, was entitled to the ancestral estate. Next he sets up a title that he, Doorga Pershad, with the consent of the three wives of Futteh Narain, being rightfully entitled, was installed as rightful heir by being marked with the *teeka* in 1274. Further, he says that the plaintiff had gone away from her husband's house with one Ahlad Panday, and was livig an unchaste life.

We proceed to consider the four defences which he sets up. He does not attempt to show that the plaintiff was not in possession of one-third of the property.

As to the second, the Subordinate Judge finds that the parties were not in possession of the estate as a joint family estate. In fact, it is clearly proved that this ghatwalee estate descended from the father to the eldest son, and was not held jointly, the

younger sons having allowances made to them. Therefore, the second ground utterly fails.

As to the third ground, Doorga Pershad Singh attempted to give evidence that there is a family custom, or *koolachar*, by which in this family females were excluded from inheritance. He did not make any averment to that effect in his written statement, and therefore did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or *koolachar*, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved.

We think that it would be a great injustice to the plaintiff to raise that issue now, and to allow the defendant to come in upon an allegation as to the truth of which he has never pledged himself and which the plaintiff has had no opportunity of meeting. We therefore decline to go into the question whether upon the evidence as it stands, there is any proof of the existence of any such custom as that now alleged by the vakeel of the defendant Doorga Pershad.

It is said that the plaintiff's witnesses admit the existence of a custom to exclude females. The only statement to which the learned vakeel for the defendant can point as in any degree substantiating that contention is the statement of one Ahun Chand, one of the plaintiff's witnesses, who says, "I know of no case in which women have succeeded to any *guddee* in Chakaye." Very likely, but ignorance is not proof.

The charge that the plaintiff has been living an unchaste life has been abandoned. And, as has been shewn by the Subordinate Judge, has been contradicted by the widow Narain Koonwaree, whose evidence shows that there is no foundation for such a charge.

We think that the suit has been very properly decreed. We think it is evident that the defence set up is a mere fraudulent contrivance and a reckless attempt on the part of Doorga Pershad Singh, a possible future heir, to defeat the rights of the plaintiff whose title as heiress of her son is clear.

We dismiss the appeal with costs.

The 5th January 1870.

Present :

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Execution—Mesne profits—Section 11, Act XXIII of 1861—Involving process—Extending Court's award.

Case No. 446 of 1869.

Miscellaneous Special Appeal from an order passed by the Officiating Judge f Hooghly, dated the 16th July 1869, affirming an order of the First Subordinate Judge of that district, dated the 3rd April 1869.

Eckowree Singh and others (Judgment-debtors), *Appellants,*

versus

Bijoynath Chatterjee (Decree-holder), *Respondent.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

A suit for possession of land, in which the plaint contained also a demand for mesne profits, was decreed as to a part of the land, the decree being silent as to mesne profits. The plaintiff appealed in respect to the undecreed portion of land, and the Appellate Court reversing, in this particular, the judgment of the Court below "decreed" the appeal.

HELD, that as mesne profits were not expressly given in the decree, and as they did not in this case come within the terms of Section 11, Act XXIII of 1861, they could not be obtained in execution.

HELD, that the words "appeal decreed" in the Lower Appellate Court's decree could not be interpreted as giving the appellant every thing he asked for, and that there was no decree which could be executed at all.

HELD, that process in execution must always be granted by the direct act of the Court itself. And as parties cannot invoke process *de novo* either by agreement or by their conduct, so neither can they extend the relief which the Court has chosen to award.

Jackson, J.—THE plaintiff, who is now before us as decree-holder and special respondent, brought a suit against the special appellant, for a certain quantity of land. In that suit, he got a decree from the Court of first instance for the land which he claimed, except 22 beegahs. The plaint also contained a demand for mesne profits in respect of the land, but the decree was wholly silent as to such mesne profits.

The plaintiff, being dissatisfied with the judgment of the Court of first instance,