

three-fourths by virtue of his execution sale, and one-fourth by virtue of the decree in that other suit, or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.

The 30th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

Right of Way.

Case No. 758 of 1871.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 13th April 1871, reversing a decision of the Moonsiff of Hathazaree, dated the 21st July 1870.

Futteh Ali (one of the Defendants)
Appellant,

versus

Asgur Ali and another (Plaintiffs)
Respondents.

Baboo Grish Chunder Ghose for Appellant.
Mr. G. A. Twidale for Respondents.

To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

Glover, J.—THIS was a suit for a declaration of plaintiff's right of way over a waste piece of land belonging to defendant, and for an order to pull down a house which defendant had erected across the pathway. The defence was that the path was not a public road, and that there was no right of way to the plaintiffs.

The first Court found that there was no right of way over this land, but that plaintiff along with other villagers used to pass over the land to the public road by consent of the defendants. The Judge, however, although he found that so much of the plaintiff's statement that the road was used for marriage and burial processions was false, still considered that the plaintiff's suit should not be altogether dismissed, because the plaintiffs had actually been in the habit of using the path as a means of proceeding directly to the high road. At the same time, the Judge appears to admit the existence of

another way by which processions and cattle, &c., were wont to pass.

It appears to us that the Judge's decision is not maintainable. It is admitted that the waste land, through which the path in dispute runs, is the defendant's land; and there is nothing whatever to disprove the allegation of the defendant, that plaintiff used the land for some years by his sufferance and permission. To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

In this case, it is clear from the finding of the Lower Appellate Court that the plaintiff has another way to the public road when going with cattle, procession, &c., but that he has been in the habit of making use of this pathway by the sufferance of the defendant. This creates no right of way.

The Judge's decision is therefore reversed with costs.

The 8th December 1871.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Separate Estate—Possession—Adverse Possession—Limitation—Fraud of Life-tenant—Suit by Reversioners.

Case No. 752 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 13th April 1871, reversing a decision of the Subordinate Judge of that District, dated the 30th June 1870.

Gunesh Dutt and another (two of the defendants) *Appellants,*

versus

Mussamut Lall Muttee Kooer (Plaintiff) and another (Defendant) *Respondents.*

Baboo Mohesh Chunder Chowdhry and Gopal Lall Mitter for Appellants.

Baboo Chunder Madhyb Ghose for Respondents.

Suit by a Hindoo daughter, for herself and as guardian for her minor son, to recover possession of her deceased father's separate estate. The legal representatives of the estate were, first, the deceased's widow, and after her the plaintiff and her son. The widow not only failed to occupy and manage the estate, but, in collusion with the other defendants claiming under a hostile title,

abandoned her rights, alleging that her husband was not separate but a member of a joint family, and left the hostile holders undisturbed. To preserve the separate estate from becoming extinguished by the operation of the law of limitation, it was necessary to remove the adverse occupants and to place the estate in the possession of some person to be appointed to represent it; and as the widow (the legal representative) never was in possession, and did not ask for it, but repudiated all claim to it, it was held that no one had a better right to the possession than the plaintiff, and possession was accordingly decreed to her as manager during the widow's life-time.

Ainslie, J.—Shitab Roy left two sons, Mohadeb Narain and Huruck Narain. The former had a son Chedee Lall, who died leaving a childless widow Mussamat Dowlut Koor, one of the defendants, and a daughter Lall Muttee Koor who sues for herself and as guardian of her minor son, Mohabeer Pershad. The other defendants are the sons of Huruck Narain.

After the death of Chedee Lall, separate applications were made to the Judge under Act XXVII of 1960 by the widow and the sons of Huruck Narain, the former claiming as widow a life-interest in the estate of the deceased, on the ground of separation of the family, and the latter claiming the property on the ground of union.

The widow abandoned her claim and admitted that the sons of Huruck Narain were entitled to and were holding the estate of Chedee Lall as part of the joint property of an undivided family, and that her own right was limited to a claim to maintenance for which she had made her arrangements with the adverse claimants of the estate.

In consequence of this, the plaintiff who is the next heir to the estate of Chedee Lall, if as she asserts the family was a divided one, has instituted this suit to recover possession of the estate from the hands of the sons of Huruck Narain making the widow a co-defendant on the ground that she had collusively admitted the claims of the principal defendants.

The points taken before the Judge were two,—firstly, was Chedee Lall a member of an undivided family, or not. Secondly, can the plaintiff succeed in this suit during the life-time of the widow.

The Judge found that Chedee Lall had separated from the family, and was holding his various properties to his own exclusive use and benefit; and he also found that the suit was not affected by the fact of the widow being alive, resting his judgment on a Full Bench Ruling reported in IX Weekly Reporter, page 505.

In special appeal, the latter ground has been pressed, sub-divided into two branches,—

namely, 1st, generally whether the plaintiff, whose right is only in reversion after the widow's death, can sue before her death; and 2nd, whether he can get the decree for possession which he seeks.

On the first point, I entertain no doubt whatever. It seems to me that the view taken by the Judge of the nature of the possession by the appellants is quite correct, and that it is not a permissive possession derived from the widow, but an adverse possession adverse to her and to every one claiming as the heir of Chedee Lall's separate estate. It has been said that the compromise entered into by the widow in the Act XXVII suits, places the appellants in the position of parties holding with her consent; but it is not admitted that they derive title from her and that their rights are limited by and co-extensive with hers. Looking to the proceedings under Act XXVII, it is quite clear that the defendants have never admitted in the slightest degree that they hold under the widow. They alleged, and still allege, a title entirely hostile to her and possession based on that title, and the fact that she, for reasons which we need not consider, chooses to abandon her own claim, which, under the finding of the Judge in this suit, was a good one, and to admit a claim which has no foundation in right, does not alter the nature of their possession from an adverse to a derived possession. The compromise may be perfectly binding on her, but there is nothing in the terms of it to show that the appellants admitted and acquired her rights. On the contrary, this is studiously avoided, and the appellants carefully maintained their position as heirs to the undivided share of the joint estate,—a position adverse to every one interested in the separate estate. They bought the widow's silence, but did not attempt to acquire her rights as heiress. In fact, the appellant's case rests upon ignoring the distinction between the nature and extent of the rights in a joint and in a separate estate, and looking only to the subject-matter to which those rights apply; but this cannot be permitted. In considering whether the possession is adverse, we must see whether it is based on a title derived from the widow as representative of the separate estate, or on one which leaves no separate estate to be represented, and as it clearly appears that the appellant's claim rests and has always rested solely on the non-existence of the separate estate, it is impossible to hold otherwise than that it is a claim by virtue of a hostile title. This being so, it follows from

the Full Bench Ruling relied on by the Judge that limitation would run against all persons interested in the separate estate of Chedee Lall from the date on which possession was taken of it by the appellants as part of the joint family property. In the judgment referred to, the late Chief Justice, Sir Barnes Peacock said: "It has been contended that, as the widow cannot absolutely convey away her husband's estate without sufficient cause so as to be binding upon the reversionary heirs, they ought not to be barred by limitation against the widow; otherwise she will be able, if she lived a sufficient time, to do indirectly, by allowing adverse possession to be held against her, that which she could not do directly, by a sale without sufficient cause. But reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste: and I have no doubt that if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor, by suit against the widow and the adverse holder to have the estate reduced into possession, so as to prevent their rights from becoming barred by limitation."

It seems to me quite clear that the fact that the widow being still alive is no bar to this suit being brought.

The appellants rely on the Full Bench decision in XII Weekly Reporter, page 14, F. B.; but that case is clearly distinguishable, inasmuch as the possession which it was sought to extinguish was derived from the act of the widow herself, and, as remarked by Mr. Justice Macpherson, "*it being admitted that the property was originally inherited by the widow, until it is ascertained whether she in giving possession to her alleged adopted son acted in a manner warranted by Hindoo law, it cannot be ascertained whether that possession was adverse to the reversioner.*" Here we have no such admission, but the very contrary.

The other cases cited by the pleader for the appellants all refer to possession acquired from the life-tenant and pre-suppose an undoubted right and possession in her.

I am further of opinion that the Judge was right in making the decree for possession. In the passage above quoted from the judgment of Sir Barnes Peacock, that learned Judge distinctly indicates that cases may arise in which by a suit brought by a reversioner against the widow and adverse holder the estate may be reduced into possession. This seems to

me to be such a case. Here is the separate estate of Chedee Lal wanting a representative—the legal representatives are first the widow for life, and after her the plaintiff and her son. The widow has not only failed to occupy and manage the estate, but has allowed some one else claiming under a different title to come in and take possession, and has, after a feeble show of opposition, abandoned her rights and left the hostile holders undisturbed. Indeed, she has done more, for, so far as lay in her power, she has worked to support their hostile title and to defeat the reversioner's rights. To preserve this separate estate of Chedee Lal from becoming extinguished by the operation of the Law of Limitation, it is necessary that it should be placed in the possession of some person who may be appointed to represent that estate, and that the adverse occupants should be removed. It is a case of waste of the widest kind. It is not mere deterioration of the property that is threatened, but a total destruction of all benefit derivable from the right of succession. There has been an attempt so to deal with the property that the rightful heir may possibly never be able to lay hands on it. The widow, who at present is the legal representative of Chedee Lal, never has been in possession, and does not ask for possession, but on the contrary repudiates all claim, and there is no one with a better right to the possession than the present plaintiff. I would, therefore, confirm the decree of the Court below and dismiss this special appeal. It is admitted by Baboo Chunder Madhub Ghose for the respondent that the respondent is not entitled to enter as absolute owner, but merely as manager during the life of the widow, and therefore I would add to the decree of the Judge a declaration to this effect, and an order that the plaintiff, after entering into possession as manager, shall annually, on or before a given date (the end of Bhadoon or other more convenient day) to be determined by the Judge, file his accounts in the Court of the Judge of Sarun and deposit all the profits of the estate during the preceding year for the joint use and benefit of the defendants in this suit, so long as the widow Mussamat Dowlat Kooer shall remain alive, or until further orders of the Court.

Loch, J.—I have no doubt as to the necessity and propriety of this suit, for it is clear from the facts put before us that Dowlat Kooer, widow of Chedee Lal, has, in collusion with the other defendants, to the manifest injury of the plaintiff and her son

given up her rights to her husband's property, alleging that her husband was not separate but a member of a joint family. The only doubt that existed in my mind was as to the form and extent of relief which we should give the plaintiff, whether it would be sufficient to declare that the property of Chedee Lall was held by him separately, and that on the death of the widow notwithstanding her acquiescence in the possession of the other defendants, the legal heirs might take it from their hands, or whether the plaintiff is entitled to get possession as prayed for. It is clear that the other defendants cannot be permitted to hold possession because they have no legal right to do so. The widow cannot have possession, for she does not ask for it, and has colluded with the other defendant to the injury of the heirs of her husband. Under these circumstances, I think the plaintiff should, as proposed by my colleague, be allowed to hold possession in the capacity of manager during the life of the widow, and a decree will be made accordingly. The special appeal is dismissed with costs.

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The 8th December 1871.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Execution (Suit to recover money received in)—Collectors' Courts—Section 11 Act XXIII of 1861.

Case No. 796 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 26th April 1871, reversing a decision of the Moonsiff of Cox's Bazaar, dated the 23rd September 1870.

Kristo Chunder Goopto and others
(Plaintiffs) *Appellants*,

versus

Ramsoonder Sein (Defendant) *Respondent*.

Baboo Chunder Madhub Ghose for Appellants.

Baboo Nuleet Chunder Sein for Respondent.

Before bringing suit to recover money which defendant had received in execution of decree, and which he was no longer entitled to retain, plaintiff is not bound to make application to him for the money. There is no express provision of law with regard to the Collectors' Courts as there is in Section 11 Act XXIII of 1861 with regard to the Civil Courts.

Couch, C. J.—I am not at all prepared, nor is it necessary for me, to decide whether the Collector had or had not jurisdiction to order the return of this money. But whether he had or had not jurisdiction, it was not incumbent upon the plaintiff to make any application to him before bringing this suit, which he was entitled to bring, in order to recover back the money which the defendant had received in execution of the decree, and which he was no longer entitled to retain.

There is no express provision of law with regard to the Collectors' Courts as there is in Section 11 Act XXIII of 1861 with regard to the Civil Courts.

I think the decree of the Lower Appellate Court must be set aside, and that of the first Court restored with costs.

Glover, J.—I concur.

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The 8th December 1861.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

Rent Suit—Question as to Agency.

Case No. 729 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 22nd March 1871, affirming a decision of the Deputy Collector of that district, dated the 30th October 1869.

Rangutty Mundul and others (Defendants)
Appellants,

versus

Gourish Chunder Pauray and others
(Plaintiffs) *Respondents*.