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EMPRESS v. IRAD ALLY.

(3) That the Sub-Deputy Magistrate did not hear all the witnesses produced by Irad Ally as he should have done before pronouncing his complaint to be a false one.

The Magistrate, objecting to the proceeding of the Deputy Magistrate, referred the case to the High Court.

No one appeared to argue the points.

The opinion of the High Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—We think the Deputy Magistrate was wrong to question the sanction given by the Magistrate. It was an order made by a superior Court, purporting to be made under a particular provision of law. Whether it was rightly or wrongly made was not for the subordinate Court to enquire into. The Deputy Magistrate was not sitting as a Court of appeal or revision to examine the mode in which the Magistrate of the district had dealt with the case in which he had sanctioned a prosecution under s. 211 of the Penal Code. He was bound to accept the sanction as valid, and leave the accused to question it before a competent Court, if so advised.

We cancel the order of the Deputy Magistrate, and direct him to try the accused on the charges before him.

Order cancelled.

APPELLATE CIVIL.

Before Mr. Justice Birch and Mr. Justice Mitter.

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March 10.

UMBICKA CHURN GOOPTA (PLAINTIFF) *v.* MADHUB GHOSAL AND OTHERS (DEFENDANTS).*

Limitation—Formal Possession given to a Decree-holder—Effect of.

Formal possession given to a decree-holder by an officer of the Court in execution of his decree is sufficient to give him a fresh cause of action, and notwithstanding that he may never have obtained actual possession, he or

* Appeal from Appellate Decree, No. 1282 of 1878, against the decree of T. M. Kirkwood, Esq., Officiating Judge of Zilla West Burdwan, dated the 16th of April 1878, reversing the decree of Baboo Nilmony Dass, Munsif of Bankoora, dated the 12th of November 1877.

his assigns may sue to recover possession at any time within twelve years from the time when such formal possession was given.

Pearee Mohun Poddar v. *Jugobundhoo Sen and others* (1) dissented from as being opposed to the decision of the Privy Council in *Gunga Gobind Mundul* v. *Bhoopal Chunder Biswas* (2).

In this case it appeared that one Rungomoni Dabee, having sued the defendants for arrears of rent due in respect of 11 bigas and 15 cottas of mal lands held by them under her, obtained a decree, in execution of which the tenure of the defendants was sold and purchased in 1864 by Rungomoni Dabee herself. In 1865, Rungomoni Dabee, not having been able to get khas possession of the tenure, instituted a suit to eject the defendants. On the 31st January 1866, a decree was passed in her favor; and in August 1866, *formal* possession was given to her in execution of this decree by an officer of the Court, but the actual possession of the defendants was not disturbed. In November 1866, Rungomoni Dabee granted a pottah of the lands in question to the plaintiff. The present suit was brought in June 1877 to eject the defendants from a portion of the lands in question, the plaintiff alleging that the defendants held under him as tenants-at-will, and that by a verbal agreement made between him and them in 1868, they were bound to give up possession within fifteen days after receiving notice to quit, which they had received, but refused to give up possession. The defendants denied having received notice to quit as alleged, and also denied having ever held as tenants under the plaintiff, or having ever agreed to give up possession to him as alleged, and pleaded further, that this suit was barred by limitation, as they had been in actual adverse possession for more than twelve years before the institution of this suit. It was admitted on the part of the plaintiff that neither he nor his lessor Rungomoni Dabee had ever had any actual possession of the lands in suit, or any possession at all other than the formal possession given to Rungomoni Dabee. The Court of first instance held that as this suit was brought within twelve years from the time when formal possession was given in August 1866 to Rungomoni

(1) 24 W. R., 418. (2) 19 W. R., 101.

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Dabee in execution of her decree of the 31st January 1865, it was not barred by limitation, and accordingly made a decree in favor of the plaintiff. The lower Court of appeal reversed this decree, relying on the decisions of the High Court in the following cases: — *Imdad Ali* v. *Shaikh Booniad Ali* (1), decided by Phear and Morris, JJ.; *Shaikh Mukbool Ali* v. *Shaikh Wajed Hossein* (2), decided by Garth, C. J., and Birch, J., in which it was held that "whatever the *decree* might have been, the defendant's possession could not be considered as having ceased in consequence of that decree unless he was actually dispossessed" (3); *Pearee Mohun Poddar* v. *Jugobundhoo Sen* (4), decided by Markby, J.; *Moonshi Jowher Ali* v. *Ramchand* (5), decided by Macpherson and E. Jackson, JJ.; and *Mahomed Wali* v. *Noor Buhsh* (6), decided by Macpherson and Morris, JJ., and accordingly dismissed the plaintiff's suit with costs.

From this decree the plaintiff appealed to the High Court.

Baboo *Nilmadhub Sen* for the appellant. — Of the cases relied upon by the Court below, the first two have no application to the present case; they decide only that a decree is not by itself any proof of a change of possession, and that when it is necessary for a plaintiff to prove his own possession, or the possession of some one through whom he claims within the period of limitation, it is not sufficient for him to prove a decree which may never have been executed; the other three cases are no doubt adverse to my client's claim, but they should not be followed, as they are not consistent with the decision of the Privy Council in the case of *Gunga Gobind Mundul* v. *Bhoopal Chunder Biswas* (7).

Baboo *Rash Behary Ghose* for the respondents.—The case is settled by authority. The judgments of this Court,

(1) 20 W. R. 271.

(2) 25 W. R., 249.

(3) In the case referred to, the decreeholder does not appear to have been put into even formal possession, and the question whether such formal possession amounted to a dispossession of the defendant was not raised

(4) 24 W. R., 418.

(5) 2 B. L. R., App., 29.

(6) 25 W. R., 127.

(7) 19 W. R., 101.

in deference to which the Court below dismissed this suit, have not been reversed on appeal, and if this Court should be of opinion that they are erroneous, it can only give effect to its opinion by reference to a Full Bench.

The judgment of the Court was delivered by

MITTER, J.—This is a suit to recover possession of 7½ bigas of land upon the allegation that the defendants, who held it as the plaintiff's tenants, were served with a notice by which their tenancy was determined. The Munsif decreed the claim, but the lower Appellate Court has reversed that decree upon the ground that the tenancy of the defendants alleged by the plaintiff was not proved, and that, on the other hand, the defendants had established adverse possession of the disputed land for more than twelve years.

The plaintiff has preferred this special appeal, and contends that, notwithstanding his failure to prove that the defendants held the disputed land as his tenants, he is entitled to a decree upon the other facts found by the Courts below.

These facts are as follows:—The land in dispute was part and parcel of a tenure of 11 bigas 15 cottas held by the defendants under one Rungomoni Dabee, the putnidar of Lot Senapoti Mehal. Some time before 1864, the rent payable by the defendants fell into arrears, and a suit was brought against them by Rungomoni. A decree having been obtained in execution of it, the tenure was sold and purchased by the decree-holder herself on the 22nd Sravan 1271 (1864). On the 11th September 1865, Rungomoni, not having been able to take khas possession of the tenure, brought a suit to eject the defendants. This suit was decreed in her favor on the 31st January 1866; and in August 1866, formal possession in execution of this decree was given to the decree-holder by an officer of Court. The plaintiff acquired the rights of Rungomoni in November 1866 by a pottah of the whole 11 bigas and 15 cottas of land executed in his favor by her. Upon these facts the plaintiff contends that he is entitled to a decree, because in a suit between his landlord and the defendants, the title of the former has

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already been established, and that the present suit has been brought within twelve years from August 1866, when in execution of the decree passed in that suit formal possession was delivered to his landlord by a Court officer.

The title of the plaintiff to the land in dispute is quite clear, but the lower Appellate Court has dismissed the suit as barred by limitation. The District Judge is of opinion that, as the defendants were never dispossessed, notwithstanding the execution of the process of delivery of possession taken out by Rungomoni, the claim is barred by limitation. In support of this view, he cites two decisions of this Court—*Pearee Mohun Poddar* v. *Jugobundhoo Sen* (1) and *Mahomed Wali* v. *Noor Buksh* (2). The first-mentioned case really supports him; but the facts of the other case are not set forth in the Weekly Reporter, and without them we cannot say whether it is in accordance with the view taken by the District Judge in this case. So far as the facts are given in the judgment, it appears to us, that all that it decides is, that unless possession is obtained in execution of a decree for possession of land, the decree-holder cannot maintain a second suit for possession against the same defendants alleging a fresh disturbance of his possession. But in the present case no such question has arisen. In this case the finding is, that Rungomoni obtained formal possession through the intervention of the Court in execution of her decree against the defendants. The question is, she not having taken any steps afterwards to put the defendants actually out of possession, whether a suit to recover possession brought by her lessee within twelve years from the date of the execution proceedings would be barred by limitation.

As already observed, the ruling to be found in *Pearee Mohun Poddar* v. *Jugobundhoo Sen* (1) fully supports the view of the District Judge. But it appears to us that the view taken in that case is opposed to the decision of the Judicial Committee in *Gunga Gobind Mundle* v. *Bhoopal Chunder Biswas* (3). This latter case is noticed by the learned Judge whose judgment is reported in the above-mentioned case of *Pearee Mohun*

(1) 24 W. R., 418. (2) 25 W. R., 127. (3) 19 W. R., 101.

Poddar v. *Jugobundhoo Sen* (1), but he draws a distinction which it seems to us does not really exist.

From the printed record the facts of the Privy Council case appear to be these. One Hurnarain Mundle possessed of large properties died, and left surviving him two sons, Digumber and Rajkristo, and three daughters, the eldest of whom was married to Sumboo Halder, the second to Nobin Tikaree, and the third to Bhoopal, the plaintiff in that suit. Digumber died first, and his widow was Romonee Dassee, then died Rajkristo before he was married. Of his sisters, only Sumboo's wife at that time had a son named Protap. Shortly after Rajkristo's death Protap also died. It was alleged by the plaintiff in that case, that Rajkristo's share first devolved upon Protap, and upon Protap's death, upon his father Sumboo. Of the properties left by Hurnarain some were in the possession of his agnatic relations, Peary Lall Mundle and others, and the rest in the possession of Romonee Dassee. A deed of gift was executed by Sumboo, by which out of 8 annas of the properties of Hurnarain, which constituted the share of his youngest son Rajkristo, he gave 2 annas to Bhoopal and 1 anna to one Nobin Tikaree. Sumboo brought a suit against Romonee Dassee and the Mundles to recover the properties of Rajkristo. While this suit was pending, Sumboo sold his rights to one Joykristo, who got himself substituted for his vendor as plaintiff in the action. A decree was passed in favor of Joykristo for 8 annas of the properties left by Hurnarain. Against this decree Romonee alone appealed, and it was modified, so far as the properties in her possession were concerned, to a 5-anna share. In execution of this decree Joykristo obtained possession of the 5-anna share decreed in the way in which possession is delivered in execution of decrees. Joykristo afterwards sold all his rights to the Mundles. Bhopal then, under the deed of gift referred to above, brought the suit in question against the Mundles to recover possession of 2 annas of Hurnarain's properties, which at the time of Hurnarain's death were in their possession. The suit was instituted within twelve years from the time when

(1) 24 W. R., 418.

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Joykristo obtained possession in execution, but more than twelve years from any of the following dates, *viz.*, (i) when wrongful possession was first taken by the Mundles; (ii) when Hurnarain died; and (iii) when the deed of gift was executed by Sumboo in favor of Bhoopal.

The main defence raised in the suit was limitation. With reference to this question, their Lordships of the Judicial Committee observe:—"Joykristo executed the decree under which a 5-anna share was delivered to him in the manner in which delivery is made under executions of decrees for land in the possession of ryots, *viz.*, by beat of drum and the affixing of bamboos; and he filed a receipt for the same in the Court of the Principal Sudder Ameen. The decree and execution put an end altogether to limitation. It is immaterial whether Joykristo obtained actual possession or not." It is quite clear from this passage that the Judicial Committee have held, that when a decree for possession is executed, and possession delivered in the usual way, whether actual possession is thereby obtained or not, the defendant cannot thereafter successfully rely upon the plea of limitation based upon his wrongful possession previous to the execution. In the decision in the case of *Pearee Mohun Poddar* v. *Jugobundhoo Sen* (1), Mr. Justice Markby, referring to the Privy Council case, thinks that "it does not lay down this proposition, and the only ground he assigns for this opinion is, that the Privy Council record shows that the Mundles never questioned the fact that Joykristo obtained possession of 5-anna share of the properties decreed in his favor. This is true, but the Judicial Committee decided the question of limitation quite irrespective of the admission of the Mundles upon this point. And the Privy Council record shows the reason why this admission was not made the basis of their decision. The record shows, that although the Mundles admitted the fact of Joykristo's possession, the plaintiff Bhoopal on the other hand alleged that Joykristo was a mere benamidar for the Mundles, and their Lordships of the Judicial Committee were of opinion in the passage extracted above that the suit was

(1) 24 W. R., 418.

not barred by limitation, even if Joykristo being a mere benamidar did not obtain actual possession.

The result, therefore, is, that the decision of the lower Appellate Court in this case on the question of limitation is contrary to the ruling in the Privy Council above referred to. It has been already shown that there cannot be any question as to the plaintiff's title.

The decision of the lower Appellate Court must therefore be reversed, and the plaintiff's suit decreed with costs in all the Courts.

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

HURRONATH BHUNJO (DECREE-HOLDER) *v*, CHUNNI LALL GHOSE (JUDGMENT-DEBTOR)

1878
June 24

Execution of Decree—Partial Satisfaction under Arrangement made by Court—Limitation — Subsequent Application for Execution.

Striking off an execution order from the file is an act which may admit of different interpretations according to the circumstances of the case, and is not conclusive proof that such execution proceedings were intended to be abandoned.

A, a judgment-debtor, being arrested in execution of a decree, applied in the year 1873, under s. 273 of Act VIII of 1859, for his discharge. The Court refused to entertain the application except on condition that *A* should pay into Court a certain fixed sum of money per month on behalf of the judgment-creditor. *A*, accepting these terms, was thereupon discharged, and the execution proceedings struck off the file. *A*, in compliance with the directions of the Court, made regular payments into Court until October 1876, when he discontinued payment.

Held, on an application made in June 1877 by the judgment-creditor for a warrant of further arrest against *A*, that, inasmuch as the decree-holder was not seeking to enforce by means of execution the arrangement made by the Court in 1873, but was rather attempting to execute the original decree, such application was barred, more than three years having elapsed since the date of the last application for execution of such decree.

* Miscellaneous Regular Appeal, No. 25 of 1878, from an order of J. O'Kinealy, Esq., Additional Civil and Sessions Judge of the 24-Parganas, dated the 1st October 1877, reversing that of Baboo Brojendra Coomar Seal, Subordinate Judge of that District, dated the 16th July 1877.