

continue the proceedings already commenced by the application of July 1871. In this view it is clear that the application does not come within the provisions of s. 167 of the Limitation Act. The application to execute the decree in this case is that of the 10th July 1871. It is not disputed that that application was within time. We think, therefore, that the decree-holder's right to execute the decree is not barred by limitation. We remand the case to the Munsif to proceed with the execution of the decree. The decree-holder is entitled to the costs of this appeal.

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 DASSEE
 v.
 ABDUOL
 KHALAK.

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF MOHESH CHUNDER KHAN.*

1878
 Aug. 7.

Ouster without authority of Civil Court—Peaceful Possession—Criminal Procedure Code (Act X of 1872), s. 530.

Ouster by one person of another lawfully in possession of property, confers no rights on the former which can be recognized in proceedings taken under s. 530 of the Code of Criminal Procedure. The Court should refer back to a time previous to the quarrel when such possession was peacefully enjoyed by one or other of the disputants.

Mr. A. Bose (with him Baboo *Grija Sunker Mozoomdar* and Baboo *Doorga Mohun Dass*) for the petitioner.

Baboo *Rashbehary Ghose* and Baboo *Kishori Mohun Roy* for the opposite party.

The facts of the case appear sufficiently in the judgment, which was delivered by

AINSLIE, J. (MACLEAN, J., concurring).—One Promotho-nath Sandyal, a minor, died on the 12th of Pous last, corresponding with the 1st of January of the current year. During his lifetime, Bholanath Khan was one of his guardians,

* Criminal Motion, No. 112 of 1878, against the order of Baboo Mohindra Nath Bose, Deputy Magistrate of Rajshahye, dated 21st May 1878.

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and, to use the language of the Deputy Magistrate, "it is admitted that Bholanath Khan was the sole surviving trustee of the late Promothonath Sandyal at the time of his death, and that the property was vested in him." Khethernath Chuckerbutty, on behalf of his son Shibnath Chuckerbutty, claimed the estate of the late Promothonath Sandyal. He obtained an order for a certificate under Act XXVII of 1860 on the 28th of February last, and subsequently took out the certificate. He then proceeded to the villages, and on the strength of this certificate he induced a number of ryots to give him kabuliats. The Deputy Magistrate was informed by the Police that there was likely to be a breach of the peace, and he instituted proceedings under s. 530 of the Criminal Procedure Code, calling upon Khethernath Chuckerbutty on one side, and Mohesh Chunder Khan and Bholanath Khan on the other, to establish, if they could, their possession of the property. The Deputy Magistrate says, that "it was alleged on both sides that they held possession of the estates by receiving rent from the ryots in occupation since the death of the deceased, which happened on the 12th of Pous last, which may fairly be assumed as the date when the dispute first commenced. It is, however, clear from the evidence that Khethernath Chuckerbutty, in proceeding to assert his possession under the authority of the certificate which he obtained from the Judge's Court, could not obtain access to the dwelling-house and the zemindary cutcherry at Aulanga. He remained in the bazar, where ryots came to him, and to whom he explained the authority which the certificate conveyed, and the position of his son in respect to the estate which the deceased Promothonath Sandyal left, and he caused bamboos to be posted in all directions as a symbol of the acquisition of the estates; and the ryots came and acknowledging their tenancy gave the rents due, which established the relation of landlord and tenant."

The Deputy Magistrate has, therefore, come to the conclusion that Khethernath Chuckerbutty has got into possession, which, in whatever way it may have been acquired, must be taken to have become a peaceful possession of the property;

and he has accordingly made an order confirming him in possession of the villages, and the other side in possession of the zemindary catcherry at Aulanga.

In dealing with the allegations of the other side, the Deputy Magistrate seems entirely to have overlooked the position of Bholanath. Bholanath has stated that he is the trustee to the estate of the late Promothonath Sandyal, minor, his mother acting with him, but that she died in Bhadar, and that in Pous last his ward having died, Mohesh Chunder Khan, the brother of the maternal grandfather of the deceased minor, entered into possession as his sole legal heir. It is evident from what the Deputy Magistrate has said as to the position of Bholanath, and from what he recites as the statement made by Bholanath himself, that the question of disposing of the property at the time of the death of Promothonath rested entirely with Bholanath, who was responsible for the manner in which he disposed of it : and until there has been a yielding up of possession by Bholanath or the person to whom he chose to make over the property, anybody coming forward to take it without the sanction of the Civil Court is, as far as the Magistrate is concerned with him, in the position of a trespasser.

It is perfectly clear that there has never been any yielding up of possession in this case. The whole of the evidence which the Deputy Magistrate has commented upon goes to show that since Promothonath's death there has been a struggle by Khethernath to assert his son's rights as against Mohesh Chunder, who was supported by Bholanath, the party in legal possession during Promothonath's lifetime.

It is very possible that a breach of the peace was imminent, but in order to prevent that breach of the peace, the proper course was to bind Khethernath in heavy recognizances to maintain the peace, and not to oust the person whose possession was undoubted.

The Deputy Magistrate seems to think that if two parties come forward—one being lawfully in possession and the other struggling for possession—and the latter succeeds in ousting the former, he is to recognize the stronger and successful party

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as the one to be maintained in possession under s. 530, although such possession has never been acquiesced in, and the struggle for it is in fact that which caused him to interfere. This is an error. The Magistrate must look to possession which may be termed peaceful. He must go back to the time when the present dispute originated, and not to the result of the dispute itself.

The Magistrate's course in this case was a very simple one, but unfortunately he has misapplied the power given by the law, and given support to a deliberate attempt by Khethernath to enforce his own claims by the high hand.

The order of the Deputy Magistrate must be set aside.

Order set aside.

ORIGINAL CIVIL.

Before Mr. Justice White.

1878
Nov. 20.

IN THE MATTER OF THE WILL OF C. M. HUNTER (DECEASED)

AND

IN THE MATTER OF ACT XXVIII OF 1866.

Will—Vested Interest—Divesting—Executory Trust.

H., by his will bequeathed to his daughter A. M. H. "on her attaining her 18th year, the sum of company's rupees 10,000, with any interest that may have accrued thereon, if she marries, to be settled upon herself and children solely; should she die unmarried, her money to be equally divided between her brothers; and if either of them die, the whole of deceased's money to go to the survivor."

Held, that A. M. H. (who had attained her 18th year) had a vested interest in the legacy subject to be divested upon her dying at any time unmarried, and further, subject to an executory trust in favour of her children in the event of her marrying at any time, and therefore that she was not entitled to have the capital of the legacy paid to her.

THIS was an application by the Administrator-General of Bengal, under Act XXVIII of 1866, s. 43, for the opinion of the Court.