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GANGA
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him, and the arrested person escape, he is guilty of an offence under s. 224.

The judgment of the Court (PRINSEP and AMBER ALI, JJ.) was as follows:—

In this case the petitioner escaped from custody, after arrest by a police constable under the belief that he was a man who had been charged with an offence and could not be arrested on warrants issued. He was subsequently brought to trial, and was acquitted on the ground that he was not the person who was charged with that offence, but was another person bearing the same name as the person accused. The question raised before us is whether, under such circumstances, it could be properly said that he was lawfully detained for any offence so as to make him liable to punishment for his escape. In our opinion he is not liable to punishment under section 224, Penal Code, because he was not lawfully detained for any offence. Whether the police were or were not justified in arresting this man is a matter which does not concern the point raised before us. We accordingly set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

C. S.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

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June 6.

ROHNI SINGH AND OTHERS (PLAINTIFFS) v. J. HODDING,
ADMINISTRATOR OF THE ESTATE OF THE LATE L. COSSERAT,
AND ANOTHER (DEFENDANTS).*

Execution of decree—Execution pending appeal of decree set aside on appeal—Restitution of rights by motion, where the Appellate decree does not mention restitution—Civil Procedure Code (Act XIV of 1882), s. 523.

Where a decree made by a Court of the first instance is executed pending an appeal, and on appeal such decree is set aside, the appellant is entitled by motion to obtain restitution, even though the decree of the Court of Appeal is silent as to such restitution.

* Appeal from Order No. 334 of 1892, against the orders of Babu Ananta Ram Ghose, Subordinate Judge of Saran, dated 25th June, 13th July, and 13th and 27th of August 1892.

A, the owner of a 15 odd pie share of certain indigo land, brought a suit for partition against his cosharer *B*, the owner of the rest of the land, and obtained a decree, from which *B* appealed. *A* without waiting for the disposal of the appeal executed his decree and obtained possession of his share, settling it with tenants. The decree was subsequently set aside on *B*'s appeal, but no order as to restitution was made in it. *Held*, on motion by *B*, that he was entitled to be put into the same position as before the partition was made (i.e., joint possession with *A*) and to remove any tenants who refused to vacate.

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THE facts in this case were as follows:—

The plaintiffs, Rohni Singh and others, now appellants, brought a suit in the Sub-Judge's Court at Chupra for partition and for recovery of *khas* possession of 94 out of 97 bighas of indigo *serat* lands. The plaintiffs were owners of 15 annas odd pie and the defendants owned five pies odd. The plaintiffs obtained a decree on the 20th of September 1890, and the defendants appealed against that decree. The plaintiffs, without waiting for the disposal of the appeal, took out execution of the decree and caused the said lands to be partitioned by a Commissioner deputed by the Court. After confirmation of the said partition, the plaintiffs obtained *khas* possession of their partitioned share. Subsequently to the execution of the process of delivery of possession, the decree of the Subordinate Court was set aside by the High Court on the 1st September 1891. The defendants then filed a petition to be put into the same position as they were in before the partition decree was made: the plaintiffs made objections to the petition, stating that they had settled all the lands with tenants, and that the defendants could realize the rent of their share from the tenants. The plaintiffs' objections were disallowed, and they were ordered to put the defendants into exactly the same position as they were in before the partition proceedings were instituted.

From this order the plaintiffs appealed to the High Court.

The *Advocate-General* (Sir Charles Paul) and Babu *Joyesh Chunder Roy* for the appellants.

Sir *Griffith Evans*, Mr. *McNair*, Mr. *Geddes*, and Babu *Dwarkanath Chuckerbutty* for the respondents.

The *Advocate-General*:—Restitution cannot be granted unless there is an order for restitution in the decree. There is no decree

1893 that can be executed and there is no judgment-debtor. The decree must say exactly what you are to get. Section 583 of the Civil Procedure Code says the benefit must be mentioned in the decree. The order for removal of the tenants is bad. Possession can be taken in two ways—by a regular suit for ejection, by proclamation in execution of a decree. Here proclamation should be made that the defendants are the owners of a five-pie share in the 97 bighas of land. Tenants have been placed on the lands, and the defendants can get their five-pie share from the tenants. The plaintiffs had a right to put tenants on the land. What is the position of these tenants? Can they be turned out? If they are turned out they can come in again next day. The Court ought not to stultify itself in that way. Execution may be given by proclamation, and the respondent ought not to have more.

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Sir *Griffith Evans* for the respondents :—As regards the first point, namely, that restitution cannot be granted unless there is an order for restitution in the decree, the whole of the authorities on the subject are collected under section 583, in the annotated editions of the Civil Procedure Code. Under the authorities restitution can be granted on motion. The order for removal of the tenants is not bad. We are entitled to be in as good a position as we were in before the partition decree was made—*Rogers v. Comptoir d'Escompte de Paris* (1). At present we are in a much worse position. The plaintiffs now are virtually the holders of the whole 16 annas, and they say our assignees will pay you part of the rent if you will let us hold the whole 16 annas. A man cannot place himself in a better position than he would have been in had the decree not been passed. The question is, are the respondents entitled to be put into the actual possession they had before the suit was brought or not? It is admitted that the respondents are five-pie sharers and they should obtain possession of that share.

The judgment of the Court (O'KINEALY and AMBER ALL, JJ.) was as follows :—

This is an appeal from an order of the Subordinate Judge of Chupra, dated the 25th of June 1892, whereby he directed that certain parties should get restitution and be entitled to be put

(1) L. R., 3 P. C., 465.

exactly in the same position they were in before the suit was brought. It appears that there are two classes of owners in this village—one of them, Mr. Hodding, has a five-pies odd share, and Bohni Singh and others are the owners of the 15 annas odd pie share. The owners of the 15 annas share brought a suit for partition of certain land against Hodding. That suit was decreed in the First Court, but on appeal, the suit was dismissed on the ground that no such suit would lie. After the dismissal of the suit Hodding applied in the Lower Court to be put in the same position as he was in before the suit was brought. In the meantime the owners of the 15 annas odd had taken out execution of the decree for partition and settled tenants upon it. Therefore, when the question of restitution arose, it became necessary to decide what was the position of Hodding in regard to these tenants. The learned Advocate-General has argued that under section 583 of the Code of Civil Procedure, restitution cannot be granted, by motion, unless there is an order for restitution in the decree. So far as we are aware, that is a proposition contrary to the settled practice of this Court and of the Bombay High Court, as well as of their Lordships of the Privy Council. Hodding has no doubt a right to be put exactly in the same position in which he was before, and neither more nor less; and therefore he is entitled to joint possession with the other owners; and no title taken *pendente lite* can prevent him from removing a tenant if he was not found on the land before the partition; or, in the words of section 263, he is entitled to have possession delivered over to him, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree, who refuses to vacate the property.

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Now, we notice that in the Court below Hodding seems to have been under the impression that he has a right to cut the crops. We think no Court could accede to that.

Then, it is argued by the learned Advocate-General that it would be useless to pass the order asked for, because, although even if we remove any person who may have taken title to their land since the restitution of the suit, their 15 annas zamindar will be entitled immediately afterwards to bring them in. It is argued on the other side that that cannot be so. The rights of owners of lands

1893 held jointly has been practically settled by the Privy Council in
 ROHNI the case of *Watson & Co. v. Ram Chand Dutt* (1), and the subse-
 SINGH quent case of *Lachmeswar Singh v. Manowar Hossein* (2), and
 v. whatever rights they possess according to law, of course they can
 HODDING. claim. All we wish to say at present is that Hodding is entitled
 to get into joint possession with the 15 annas zamindar, and to
 remove such tenants as may refuse to vacate. We make no order
 as to costs.

c. s.

*Appeal dismissed.**Before Mr. Justice O'Keenaly and Mr. Justice Anceer Ali.*

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 July 5. MOHUN PERSHAD NARAIN SINGH AND ANOTHER, THROUGH HIS
 FATHER AND GUARDIAN, LUCHMI PERSHAD NARAIN SINGH (PETI-
 TIONERS), v. KISHEN KISHORE NARAIN SINGH (OBJECTOR).*

*Hindu Law—Stridhan—Mithila Law—Succession—Letters of
 administration.*

The husband's sister's sons are preferential heirs to the husband's
 paternal great-grandfather's great-grandsons in the succession to *stridhan*
 property.

In an application for letters of administration, *held*, on the evidence,
 that the deceased left property to which administration could be granted
 without finally determining the title to such property.

THE petitioners applied to the District Judge of Mozufferpore
 for a grant to them of letters of administration to the estate of a
 lady named Punit Koer, who died at Mozufferpore on the 3rd of
 December 1890. They filed their application on the 19th of Sep-
 tember 1891. In their petition they stated that Punit Koer died,
 leaving the petitioners, her husband's sister's sons, her heirs to her
stridhan under the Mithila school of Hindu law. The petition
 further set out that the deceased left her surviving one Malikrani
 Koer, her husband's stepmother, and Awadh Behari Narain Singh,
 Janki Pershad Narain Singh, and Kishen Kishore Narain Singh,
 her husband's paternal great-grandfather's great-grandsons, and
 Kishen Buldeo Narain Sing, her brother's son; but the petitioners
 submitted that they were preferential heirs to the *stridhan* property,

* Appeal from Original Decree No. 97 of 1892, against the decree of
 W. H. Page, Esq., District Judge of Tirhut, dated the 6th of April 1892.

(1) I. L. R., 18 Calc. 10; L. R., 17 I. A., 110.

(2) I. L. R., 19 Calc., 263; L. R., 19 I. A., 48.