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forming any opinion of their own as to what is a reasonable amount. They prefer to maintain the decree of the District Judge because he seems to have addressed his mind most directly to that which the Oudh Act requires, and his reason seems to have been overlooked by the Judicial Commissioner.

The result is that they will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, to dismiss the plaintiff's appeal to the Judicial Commissioner with costs, and to restore the decree of the District Judge. The plaintiff must pay the costs of these appeals.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellant and cross respondent: Messrs. *Young*, *Jackson*, and *Beard*.

Solicitors for the respondent and cross appellant: Messrs. *Walker* and *Row*.

C. B.

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*P.C.** 1893. *June 27 and 28, and July 15.*

DAKHINA MOHAN ROY (PLAINTIFF) *v.* SARODA MOHAN ROY AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Voluntary payment—Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.

Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed through any fault of his own to obtain, enough out of the rents and profits during his possession to cover this expenditure.

The plaintiff had paid revenue and cesses in such a case: *Held*, that on his accounting for mesne profits, and all that he had received, or might have received from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's, payments and receipts.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

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APPEAL, by special leave, from a decree (9th February 1891) of the High Court, reversing a decree (16th September 1889) of the Subordinate Judge of Rangpur.

This suit was brought by the appellant, the adopted son of Kali Mohan Roy who died in 1856, to recover from the defendants now respondents, Rs. 5,767 the amount of revenue and other public demands recoverable in like manner, paid by the plaintiff to prevent a sale by the Collector, in respect of an estate comprising four mehals in Rangpur, on different dates from September 1885 to September 1886, amounting with interest to Rs. 7,489. The plaintiff when he made this payment was in possession of one of the mehals under a decree of the High Court, dated 25th March 1882, afterwards reversed by order of Her Majesty in Council dated 9th April 1886. The question on this appeal was whether he was entitled to recover the above sum from the defendants, in whose favour the decree ultimately stood, or as the High Court had held, was not so entitled.

The facts, which were not in dispute, were these :—

Kali Mohan Roy had two brothers, Tarini Mohan and Hari Mohan, who before February 1836 were originally in joint and undivided possession with him of the four mehals, of which one bore the *tauzi* number 146. In 1836 a private partition between the brothers took place, and they took among themselves separate possession of equal portions consisting of villages belonging to all the four mehals, on which the total Government revenue amounted to Rs. 31,155, which the brothers agreed to pay in equal third parts. But there was no collectorate partition of the land or the revenue assessed upon it, either under Regulation IX of 1811 or any other revenue law relating to partition, so that the entirety of each mehal remained liable for the revenue upon each. On the deaths of Kali Mohan and Tarini Mohan, their respective sons had their names entered as proprietors of the shares of their fathers. The present question relates to half the share of Hari Mohan, who died in 1846 leaving two widows, to each of whom he gave power to adopt a son to him. Then the several adoptions of Saroda Mohan, one of the present defendants, which took place in 1853, and of Durga Mohan, father of the other defendant Jotendra Mohan, which took place in 1856, became the subject of litigation from

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1873 till 1886: see *Jagadamba Chaodhrani* v. *Dakhina Mohan* (1). Decrees were made in the High Court on the 25th March 1882 in favour of Dakhina the present plaintiff, and in favour of Tara Mohan Roy, son of Tarini, each for a two annas eight pie share in the estate, which had been Hari Mohan's. But the defendants in those suits (who were also afterwards the present defendants, respondents) appealed to Her Majesty in Council. They did not, however, obtain an order from the High Court to stay proceedings in execution meanwhile; and Dakhina, as he was entitled to do, obtained an order under which he was put into possession of almost all of mehal No. 146, between the 30th July and the 16th August in 1885. In the end the High Court's decree of 25th March 1882 was reversed by an order in Council, dated 9th April 1886, and possession was restored to his opponents. The next step concerned Dakhina alone. In 1887, after the order in Council of April 1886 had been enforced, a suit for the mesne profits of mehal No. 146 was brought by Saroda Mohan against Dakhina. It was then found as a fact by the Courts that in consequence of difficulties placed in his way by his opponents, Dakhina had only received a sum of Rs. 403 from the tenants, and that when the costs of collection had been deducted the profits were only Rs. 363: and that during that time he had to pay on account of the Government revenue, kists or instalments due from September 1885 to September 1886, Rs. 4,821, and Rs. 946 for cesses and *dâk* tax.

The plaint (20th September 1888) set forth the above, and the defence was, in effect, that the defendants were only liable in respect of revenue paid for that portion of mehal No. 146, of which they had remained in possession; and that payments, over and above Rs. 136, which covered what was due in respect of what they had retained, had been made by the plaintiff for his own interests, and voluntarily, in respect of revenue-paying estate not then in the possession of the defendants.

Issues were fixed that met all these points.

The Subordinate Judge decreed in favour of the plaintiff. He considered that the payments made by him, in respect of mehal No. 146, were not voluntary, but a necessity under the revenue

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

law to prevent sale for arrears, and that the payments were, in the end, for the benefit of the defendants, who, obtaining the estate, were bound to repay the sums, with interest from the dates of payment.

The judgment of the First Court was reversed by a Division Bench (TOTTENHAM and TREVELYAN, JJ.) of the High Court. The Judges were of opinion that the plaintiff, during his period of possession, was a wrong-doer, and was not entitled to charge the defendants with payments made in his own interest at the time. Their judgment, as to the claim of the appellant, was as follows:—

"The suit was brought to recover Government revenue, cesses, and *dâk* fund paid by the plaintiff when in possession of this property.

"The Subordinate Judge has given the plaintiff a decree for what he claims. The defendants admit that they are liable for a portion of this sum which was paid on account of lands of which they retained possession; but they dispute any liability as to the rest.

"We think it quite clear that the plaintiff is not entitled to recover any outgoings in respect of lands wrongfully taken possession of by him. For a portion of the time he had not even the excuse of having a decree in his favour. As far as the time which elapsed between the plaintiff's getting possession and the Privy Council decree, we think it must also be taken that he was a wrong-doer. A person who is in possession under a decree which is subsequently set aside, is liable for mesne profits and cannot be said to be in rightful possession, and therefore is in wrongful possession. A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from *Tiluck Chand* v. *Soudamini Dasi* (1) and the other cases cited to us. The judgment of the Subordinate Judge is, therefore, we think, wrong, and should be altered, except so far as the property which remained in the possession of the defendants is concerned. The decree will be for the sums admitted in the 4th paragraph of the written statement, *viz.*, Rs. 200, with a proportionate amount of road cess and *dâk* fund cess, also interest at 12 per cent. from date of payment to the date of decree of the Subordinate Judge (these amounts must be inserted in the decree), with interest on decree at 6 per cent. and proportionate costs. The defendants must also pay to the plaintiff proportionate costs of the suit and of this appeal in respect of the amount decreed. The plaintiff must pay to the defendants proportionate costs of suit and appeal in respect of amount disallowed."

(1) I. L. R., 4 Calc., 566.

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On this appeal

Mr. *R. V. Doyne*, for the appellant, argued that the judgment of the High Court was erroneous in holding that the possession of the plaintiff, which had been under the decree of the High Court of 25th March 1882, was wrongfully taken by him. He had remained in lawful possession until the decision of the High Court was reversed by the order of Her Majesty in Council of 9th April 1886. There could be no more lawful title while it lasted than the decree of the competent Court, the execution of which decree the defendants had not applied to have stayed. It was not disputed that the payment of revenue was necessary to preserve the estate from sale for default. The rights of the owners of the four mehals, antecedently to the litigation which ensued upon the adoptions, shows that revenue paid upon mehal No. 146 secured the shares of others; and though the payment by the plaintiff was made at the time in his own interests, it operated to save the estate for the defendants.

It had been shown that the plaintiff, while in possession, had been unable, in consequence of the defendants' opposition, to get in the rents due, with the exception of a small amount. He referred to *Tiluck Chand* v. *Soudamini Dasi* (1); *Gopal Chunder Chuckerbutty* v. *Oodoy Lall Dey* (2); *Binda Kuar* v. *Bhonda Das* (3); and the Indian Contract Act, IX of 1872, section 69.

Mr. *J. D. Mayne*, for the respondent, Saroda Mohan Roy, argued that it was not necessary, in order to support the judgment of the High Court in its result, to insist upon the wrongfulness of the plaintiff's possession. At the time when the payments were made the plaintiff believed himself to be making them on his own account. The revenue was a charge upon the mehal in the plaintiff's hands, and it was the estate that had to pay it. The plaintiff's ultimate disconnection with any title to the estate did not involve the consequence that his payments of revenue were anything different from discharges of obligations imposed upon the land, for which he in consequence of his temporary possession of it, was liable at the time. He was bound so to hold

(1) I. L. R., 4 Calc., 566. (2) 10 W. R., 115.
(3) I. L. R., 7 All., 660.

the estate that, if he should not ultimately succeed in the litigation as to the adoptions, he would be in a position to restore it. The claim of the plaintiff could not rest upon any implied contract. He referred to the cases above cited.

Mr. *R. V. Doyne* was not called on to reply.

Afterwards, on the 15th July 1893, their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The question in this case is a very short one, and it is purely a question of law.

In March 1882 the appellant obtained a decree from the High Court establishing his title as against the respondents to a revenue-paying estate. In 1885 the appellant obtained possession of the estate in execution of the decree.

The decree of the High Court was reversed by the judgment of the Privy Council in April 1886, and in the latter part of the same year the respondents were replaced in possession of the estate in dispute.

In the interval, while the appellant was in possession, the respondents actively interfered with the tenants upon the estate, and in consequence of their obstruction the appellant received only a trifling sum on account of rents and profits. During the same period the appellant was called upon to pay, and did in fact pay, large sums for Government revenue and other charges assessed upon the estate, and recoverable in the same manner as Government revenue.

The Subordinate Judge held that, as the estate was preserved for the benefit of the respondents by the payments which the appellant had made, he was entitled to recover from the respondents the difference between the amount so paid and the net amount of the rents and profits which he actually received, and for which alone, owing to the conduct of the respondents, he was held accountable. That decision was reversed on appeal. The learned Judges of the High Court held that the appellant, though in possession under the decree of the Court, was in "wrongful possession," and they laid it down as a proposition of law of universal application that "a person who is in wrongful possession is not entitled to recover sums paid on account of

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outgoings, although he may be able to use them for the purpose of reducing the mesne profits."

Even if the rule stated by the learned Judges admitted of no exception—a proposition which it would be difficult to maintain, having regard to the recent case of *The Peruvian Guano Company* v. *Dreyfus Brothers* (1) in the House of Lords—it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in India. Not only was he in rightful possession and acting in good faith, but the respondents were acting wrongfully in trying to deprive him of the fruits of his decree otherwise than by due process of law.

The Government revenue represents that portion of the produce of the land which from time immemorial has been considered in eastern countries to belong as of right to the sovereign power in the State. In India payment in kind has long since been commuted for a money payment, which in some cases is fixed permanently, and in others is liable to revision by periodical settlements. Sometimes the Government revenue is spoken of as a quit-rent, sometimes as a land tax. But however it may be described, and however it may have been assessed, it is the first and paramount charge upon the land, and if default is made in payment, the estate is sold in a summary way. The Government gives a clear title to the purchaser, and the land is lost for ever to the defaulting proprietor.

Now, it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course he is bound to account for mesne profits, for all rents and profits which he has received, or which without wilful default he might have received. But if owing to circumstances beyond his control, and still more if in consequence of some wrongful conduct on the part of his

(1) L. R., App Cas. 1892, 166.

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opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity, and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognizes an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the decree of the High Court reversed and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent, Saroda Mohan Roy: Messrs. *Barrow & Rogers.*

C. B.

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* UMRAO JAN AND ANOTHER (PLAINTIFFS).

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* JAGGU AND ANOTHER (PLAINTIFFS).

*P.C.** 1893 *June 27, July 22.*

[On appeal from the Chief Court of the Punjab.]

Mahomedan Law—Custom—Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.

Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law.

Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was *held* that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.