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JANOKINATH MUKHOPADHYA v. MOTHURANATH MUKHOPADHYA.

There remains to notice the case cited before us of *Kathaperumal* v. *Venkabai* (1); but with deference to the learned Judges who decided it, it seems to us that their decision was based upon a misapprehension of the Privy Council cases referred to above. The learned Judges were of opinion that according to those decisions there could not be *any* kind of partition between two widows jointly inheriting their husband's property. We have already shown that the judgments of the Privy Council do not go to that length.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous. We accordingly reverse them, and remand the case to the Munsiff to decide the remaining issues. We think it right to observe here that if a partition be ultimately decreed, it should be effected in such a way as would not be detrimental to the future interests of the reversioners.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

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PARBUTTY DASSI (PLAINTIFF) *v.* PURNO CHUNDER SINGH AND OTHERS (DEFENDANTS).*

Evidence Act (I of 1872,) s. 35.—Admission—Statement in Decree—Practice of Mofussil Courts.

In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case.

Held, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872.)

Lekraj Kuar v. *Mahpal Singh*, (2), referred to.

* Appeal from Appellate Decree No. 105 of 1882, against the decree of Baboo Promotho Nath Mookerjee, Additional Subordinate Judge of East Burdwan, dated the 29th October 1881, reversing the decree of Baboo Janoki Nath Mookerji, Munsiff of Cutwa, dated the 30th June 1880.

(1) I. L. R., 2 Mad., 194.
(2) I. L. R., 5 Calc., 744.

IN this case the plaintiff stated that her late husband purchased a patni mehal, lot Mowgram, at an auction sale for arrears of rent held under the provisions of Act VIII of 1819, on the 14th of May 1874; that as the heir and representative of her husband she was entitled to a four annas share of a julkur included in the said patni mehal; and that from this julkur she had been dispossessed by the defendants. She prayed for a declaration of her right to possession, and that possession be awarded to her. The main issue was whether the julkur was in point of fact included within the patni mehal; and in support of her case the plaintiff tendered in evidence a "decree in suit No. 617 of 1818, instituted in the Civil Court of Birbhum by No. 2 defendant's predecessor, Boidya Nath Ghose, against the plaintiff's predecessors, patnidars, Enatulla and Ajmatulla Chowdhry, and No. 1 defendant's predecessor, Rashmoni Dasi." This document was drawn up in the manner formerly used in the mofussil, *i.e.*, it contained an abstract of the plaint and written statements of the parties, together with the judgment and the decree proper, and in the abstract given of Rashmoni's defence appeared an admission that the julkur claimed in the present suit belonged to plaintiff's mehal. In reference to this document the Court of first instance said: "This decree is conclusive evidence between the parties; and even if it was not so, it is a very good piece of evidence as declaring the right of the parties at such a distant date." He then decreed the plaintiff's claim and the defendants appealed. On appeal, the Subordinate Judge said:—

The lower Court has given a decree to the plaintiff, solely relying on a decree No. 617 of 1818, but it does not appear to me to be legally admissible as evidence against the present defendants. In that case one Boidya Nath Ghose, former patnidar of lot Sitahati, was plaintiff, and Enatulla Chowdhry, predecessor in title of the present plaintiff, and Rashmoni Dasi, were defendants. It is said that Rashmoni Dasi then held the property which the defendants now own; hence Rashmoni must be considered to be predecessor in title of the defendants; but, assuming this to be true, it does not appear that the plaintiff's predecessor Enatulla and Rashmoni had any question decided between them in that suit. On the other hand, it appears that they were both in the same category of defendants, and made a common defence. Under such circumstances, the decree cannot be conclusive against the defendants, and under the late Full Bench ruling (2) it

(2) *Gujju Lall* v. *Fatteh Lall*, I. L. R., 6 Calc., 171.

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is no evidence at all against them. It has been argued that the substance of Rashmoni's defence embodied in the decree should at least be accepted as an admission and should be binding on the defendants; but if the plaintiff wanted to use the defence as an admission, she ought to have produced the same in original, and any substance of it given in the decree cannot be accepted as legal evidence.

The Subordinate Judge then reversed the decision of the Court of first instance. The plaintiff appealed to the High Court on the grounds that the decree of 1818 was binding on the parties, and that, even if not binding, the statement of Rashmoni's defence contained therein was evidence against the defendants in the present case.

Baboo *Hem Chunder Banerjee* and Baboo *Umbica Churn Banerjee* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Taruck Nath Palit* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—In this case the plaintiff, as representative of her late husband, claims to hold a three annas, eighteen and three-fourth gundahs share in a certain julkur called Noa Bawarkati as appertaining to a patni mehal purchased by her husband at a sale held under Regulation VIII of 1819.

The defendants deny that the disputed julkur appertains to the plaintiff's taluk, and assert that it appertains to Jote Gossain appertaining to Mouzah Narainpore.

The Moonshee decreed the suit. He based his judgment partly on a Civil Court Decree, No. 617 of 1818, and, interpreting it with the light of an Ameen's report in a former case, decided that the plaintiff was entitled to the property, and accordingly gave her a decree.

On appeal the Subordinate Judge decided that that decree could not be admitted in evidence between the parties to the present suit. He then went on to say that even if one of the parties to that suit, namely Rashmoni, could be considered as the predecessor in title of the present defendants, her admission

entered in the decree was not admissible in evidence and could only be proved by production of the original. Further, he decided that the Ameen's report in the former case could not be treated as evidence in the present suit.

Against that decision the plaintiff has appealed to this Court, and it has been contended that the Subordinate Judge has committed an error in law in rejecting the decree and admission, and in not taking cognizance of certain other decrees on the record.

The present plaintiff is a purchaser of the taluk for arrears of rent. She therefore holds it free from all encumbrances created by previous talukdars and cannot be bound by any act of theirs. The decrees to which she refers could not be used as evidence against herself; and it seems to us clear that if they could not be used as evidence against her, she cannot use them as evidence against the defendants; but in regard to the point whether the plaintiff was bound to prove the admission by production of the original, we differ from the view taken by the Subordinate Judge. There can be no doubt that the production of the original was impossible. If there was any original it was destroyed years and years ago. By s. 35 of the Evidence Act an entry in a public record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duty, is admissible in evidence. In this case the admission in the decrees is no doubt a relevant fact; and the only question for decision is whether it falls within the other portion of s. 35. At the time that these decrees were recorded it was the universal practice in Lower Bengal to write all proceedings on one side of a long roll of paper. This practice is referred to in Circular No. 131, dated 3rd May 1851. Previous to the issue of that Circular the Sudder Dewany of the Lower and Western Provinces issued a Circular on the 12th February 1847, from which it appears that it was the duty of the Court, and indeed had been the practice, to enter in the decree an abstract of all the pleadings. So far there seems no reason to doubt that these entries were made by the officers of the Court in discharge of their official duties. The question as to the effect of s. 35 of the Evidence

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Act was lately before the Judicial Committee of the Privy Council in the case of *Lekraj Kuar* v. *Mahpal Singh*. (1) In that case the question arose whether a statement made in a settlement rubokari, recorded in the province of Oudh, in which place officers were directed to be guided by the spirit of the Settlement Regulations, but were not bound by them, was admissible in evidence under this section. It was there argued that the precise information in the rubokari was not directed by any particular regulation, and that the settlement records were prepared and attested by subordinate officers and could not be accepted as in any way invalidating the records themselves. But their Lordships of the Privy Council in overruling these objections said as follows: "It is necessary to look at the precise terms of this section, and for the present purpose it may be read: 'an entry in any official record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duties, is itself a relevant fact.' There can be no doubt that the entries in question supposing them to bear the construction already given to them, state a relevant fact, if not the very fact, in issue, *viz.*, the usage of the Bahrulia Chur. If so, then the entry having stated that relevant fact, the entry itself becomes by *force of the section a relevant fact*, that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant." In the present case it is not contended, and indeed could not be contended, that the admission in these decrees is not relevant. Following the words of their Lordships of the Judicial Committee we think that the admission made in these decrees could be proved by the production of the decrees; and that it is not necessary that the plaintiff should be placed in the position of doing what everybody knows is impossible for him to do, namely, to produce the original decrees.

In this view of the case we think that the Subordinate Judge was wrong in saying that so much of the decree was not admissible as legal evidence. Whether the defendants are bound by the statements of Rashmoni depends on the question whether Rashmoni was their predecessor in title; and this point has not

(1) I. L. R., 5 Calc., 744.

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been decided by the Subordinate Judge. If he holds that the defendants do not represent Rashmoni, neither the decrees nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni then, in our opinion, so much of the decrees as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be decided by the Court below.

The costs of this appeal to follow the result of the case.

Case remanded.

Before Mr. Justice Mitter, Offg. Chief Justice and Mr. Justice Maclean.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. RASBEHARY MOOKERJEE AND OTHERS (PLAINTIFFS).*

1882 *September* 12.

Sale for arrears of Revenue—Revenue-paying Estate—Sale of share of an estate—Recorded Proprietors—Omission of names of Proprietors—Irregularity—Act XI of 1859, *ss.* 6, 33.

When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859.

THIS was a suit instituted by the plaintiffs to set aside a sale of a share of an estate of which they were part owners, which was held by the Collector of Burdwan for arrears of Government revenue due on the share. The Secretary of State for India in Council, the purchaser at the auction sale and the remaining co-sharers of the plaintiff were made defendants. The material facts of the case are as follows:—

(1) That Aima Mungulpore, which bore a sudder jumma of Rs. 58-14-5, was recorded in the towzi as estate No. 1312.
(2) That defendants Nos. 8 and 9 had a separate account opened for their share, the revenue payable by them being Rs. 20-12.

* Appeal from Appellate Decree No. 791 of 1881 against the decree of Baboo Brojendro Coomar Seal, Additional Judge of East Burdwan, dated the 19th February 1881, reversing the decree of Baboo Bhoopoty Roy, Subordinate Judge of that district, dated the 20th November 1880.