

PRIVY COUNCIL.

*P. C.**
1892.
February
12 and
March 5.

SARODA PROSUNNO PAL AND ANOTHER (PLAINTIFFS) *v.* SHAM
LAL PAL AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Evidence of title—Commission of partition.

Under a Commission of partition issued by the Supreme Court, land in Calcutta was apportioned among the members of a family, and the allotments were confirmed by a final decree in 1825.

In this suit, brought in 1884, the plaintiff claimed, through one of the family, a parcel of land, by reference to one of the allotments so made. The defence, which was made by setting up a title through the widow of him who received the allotment, was not proved; but the correctness of the area allotted was also in dispute, and the appellate Court excluded part from the decree, made by the first Court for the whole.

It appeared to the Judicial Committee that there was no ground for assuming that the members of the family, who were parties to the partition suit, were under any mistake as to the family property, or that there was any error, or want of due care, on the part of the Commissioners of partition, whose proceedings had been regular: nor had there been any adverse claim to any part of the allotted land. The first Court's decree was restored.

APPEAL from a decree (16th August 1888), of the High Court, in part reversing a decree (26th March 1888) of the Court in its original jurisdiction.

In this suit, brought in 1884, the late plaintiff, Raichurn Pal, whose executors were the present appellants, sued for possession of 4 bighas 13 cottahs of land in Calcutta, to which he was entitled through his nephew Khetter Chunder Pal, deceased in 1837. Piarimoni, widow of the latter, had been entitled to the land for her widow's estate during the years intervening from the death of her husband till she died in 1884. Through her the defendants claimed, alleging a mortgage made by her in 1867, followed by a decree, and a judicial sale to them, whereby afterwards, according to them, the land became vested in the second

* *Present*: LORDS HOBHOUSE, MACNAGHTEN, and HANNEN, and SIR R. COCHRAN.

defendant, as benamidar for his father, the first defendant, and they also alleged a purchase by her of part out of her own money.

The plot had been apportioned to Khetter Chunder, who was grandson of Roghoo Nath Pal, deceased in 1819, the estate of the latter having been allotted in shares to his descendants by a commission of partition in the Supreme Court, confirmed by a final decree in 1825, the parties taking undisturbed possession, each of his allotment. The defence was not established. The area of the plot that was, or should have been, allotted to Khetter Chunder on the partition was, however, disputed, with the result that, in the original jurisdiction, TREVELYAN, J., decreed the whole plot claimed; but the appellate Court's judgment, delivered by WILSON, J. (PETHERAM, C.J., and TOTTENHAM, J., concurring) reduced the area decreed by 1 bigha 4 cottahs.

On this appeal Mr. *J. D. Mayne* appeared for the appellants.

The respondents did not appear. Their Lordships' judgment was delivered by:—

SIR R. COUCH.—On the 25th September 1822 a suit was brought in the Supreme Court at Calcutta on the Equity side by Issar Chunder Pal, one of the sons of Roghoo Nath Pal, deceased, and Khetter Chunder Pal, son and heir of Tarachand Pal, deceased, another son of Roghoo Nath, against the other members of their family, which was an undivided Hindu family, to have the will of Roghoo Nath established and the provisions thereof carried into effect, and to have a partition of the immovable estate of Roghoo Nath, subject to the provisions of his will. On the 22nd April 1823, by an order of the Supreme Court, Commissioners were appointed to make the partition, with power to examine the parties and their witnesses on oath, and to compel the production of documents. On the 28th June 1825 the Commissioners made their report, and thereby certified that they had allotted to Khetter Chunder Pal, with other property, a portion of tenanted ground in Deehee Entally, called Sontose's garden, containing by admeasurement about four bighas and thirteen cottahs, and included within the boundary line coloured green in the map of the garden annexed to the report. The map is in existence. There is no doubt that Khetter Chunder's allotment,

1892

SARODA
PROSUNNO
PAL
v.
SHAM LAL
PAL.

1892

SARODA
PROSUNNO
PAL
v.
SHAM LAL
PAL.

as delineated on the map, does contain four bighas and thirteen cottahs. And there is no question as to the exact position and boundary line of that allotment.

Khetter Chunder died intestate, and without issue, in 1837, leaving Piarimoni Dossee his sole widow and heiress. Piarimoni died in 1884, and thereupon Raichurn Pal became the heir of Khetter Chunder, and entitled to his estate. In August 1885, Raichurn Pal brought a suit in the High Court, in its ordinary original civil jurisdiction, against the respondents for possession of four bighas thirteen cottahs of Sontose's garden, as having been allotted to Khetter Chunder by the decree in the partition suit. The plaint alleged that, from the time of the decree down to the time of his death, Khetter Chunder was in possession of the piece of land so allotted to him, and that after his death Piarimoni had possession for many years, and that the defendants were then in possession. Besides relying on a Hindu widow's power of alienation in case of necessity, the written statement of Sham Lal, the real defendant, denied that Roghoo Nath died possessed of the four bighas thirteen cottahs, and alleged that within the land the subject-matter of the suit about one bigha of land, described inaccurately in the conveyance and in a subsequent pottah thereof as sixteen cottahs, had been purchased by Piarimoni with her own moneys from one Sheik Budooroodin under a bill of sale dated the 25th December 1834, and never was part of the estate of Roghoo Nath. The main defence failed. But both Courts have dealt with the minor point suggested by Sham Lal. The learned Judges of the Court of Appeal, differing from the Judge of First Instance, have found or placed within Khetter Chunder's allotment Budooroodin's sixteen cottahs, now developed into one bigha four cottahs. In order to arrive at this result they assume a blunder on the part of the Partition Commissioners, and an adverse title to part of the allotment extinguished in 1834 by Piarimoni's purchase.

The defendant Sham Lal derived his title to the premises under a mortgage granted by Piarimoni to one Lokenath on the 7th August 1867. The mortgage deed is in English form. It contains two important recitals. In the first place it recites that Khetter Chunder "was in his lifetime and at the time of his

death seized and possessed" among other property of the four bighas and 13 cottahs, formerly called Sontose's garden. That is the piece of land allotted to Khetter Chunder on the partition. Then it recites Budooroodin's conveyance of the 16 cottahs. They are described as "adjoining to the said piece or parcel of land measuring four bighas and 13 cottahs hereinbefore mentioned, and forming together one entire piece or parcel of land measuring five bighas and nine cottahs." The deed proceeds to convey to Lokenath by way of mortgage among other property "all that piece or parcel of land . . . measuring five bighas and nine chittaks or thereabouts," describing it by its abuttals. Now the first observation which arises in reference to this deed is this:— It is directly at variance with the allegations of the principal defendant in his written statement. The defendant alleges that the 16 cottahs conveyed to Piarimoni by Budooroodin were within the ambit of the four bighas and 13 cottahs allotted to Khetter Chunder. The mortgage deed shows that they were two distinct properties, adjoining but not intermixed. In the next place it is to be observed that in 1868, when Raichurn Pal brought a suit against Piarimoni and Lokenath to impeach Piarimoni's dealings with her husband's estate, Lokenath put in a defence on oath, in which he stated that from the title-deeds in his possession he believed that the four bighas and thirteen cottahs, with certain house property, did belong to Khetter Chunder in his lifetime, but he alleged that the rest of the property in the mortgage was held under a different title. He said he was not bound to disclose his title to it, and therefore he objected to produce the mortgage deed. He added that on the occasion of the mortgage the title to the property was investigated by his attorney. Nothing could show more plainly that the theory on which the judgment under appeal proceeds had not been invented in the year 1868.

Lokenath, suing on his mortgage, obtained a decree for sale in default of payment of the amount due. The land in mortgage was sold under the decree on the 19th February 1870. It was bought by one Modoosoodun Dutt. On the 1st December 1877 Modoosoodun Dutt became insolvent. His property was put up for sale in lots by the Official Assignee. At the auction the defendant Sham Lal in the name of his son, the co-defendant,

1892

 SARODA
 PROSUNNO
 PAL
 " "
 SHAM LAL
 PAL.

1892
 SARODA
 PROSUNNO
 PAL
 v.
 SHAM LAL
 PAL.

bought Lot 2. Lot 2 was conveyed to him by deed dated the 4th August 1880. On examining this deed it seems clear that Lot 2 is the piece of land allotted to Khetter Chunder Pal on the partition, diminished slightly in extent by some encroachments which are noted by Mr. Cantwell, who surveyed the property on behalf of the plaintiff in 1888. Lot 2 is described as "containing by estimation four bighas and three chittacks, and 13 square feet, more or less." The record is silent as to the other lots, among which Budooroodin's 16 cottahs if they exist might not improbably be found. But it would, in their Lordships' opinion, be an unprofitable task to enquire what has become of these 16 cottahs, and what is their precise situation. The plaintiff does not claim them. The defendant Sham Lal has not connected himself with them by any document of title or anything that can be described as evidence.

Under these circumstances, Mr. Justice Trevelyan, who heard the case in the first instance, was "satisfied that the land in dispute belonged—the whole of it—to Khetter Chunder Pal," and he made a decree to the effect that possession of the premises should be delivered to the plaintiff.

The defendant Sham Lal appealed to the High Court in its appellate jurisdiction. The learned Judges who heard the appeal have modified the decree of the Lower Court by excluding from it one bigha and four cottahs, as representing Budooroodin's 16 cottahs, measured off in a position determined apparently by mere guesswork.

Their Lordships are of opinion that that there is no ground for assuming that the members of Roghoo Nath's family, who were parties to the suit for partition, were under any mistake as to the property which belonged to their father, or that there was any error or want of due care on the part of the Commissioners (whose proceedings appear to their Lordships to have been perfectly regular), or that there was ever any adverse claim to any part of the land allotted to Khetter Chunder Pal.

Their Lordships think the title of the plaintiff to the land claimed in the plaint was proved, and they will humbly advise Her Majesty to affirm the decree of Mr. Justice Trevelyan, to

reverse the decree of the Appellate Court, and to order the appeal to it to be dismissed with costs. The respondent, Sham Lal Pal, will pay the costs of this appeal.

1892

SARODA
PROSUNNO
PAL
v.
SHAM LAL
PAL.

Appeal allowed.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Trevelyan, Mr. Justice Ghose, and Mr. Justice Ameer Ali.

MAKHAN LAL PAL (PLAINTIFF) v. BUNKU BEHARI GHOSE
AND ANOTHER (DEFENDANTS).*

1892.
August 1.

Transfer of Property Act (IV of 1882) s. 54, para. 3—Transfer of Property Act Amendment Act (VII of 1885), s. 3.—Immoveable property of value less than one hundred rupees, transfer of—Suit by purchaser for possession when vendor is out of possession.

The transfer by sale of tangible immoveable property of a value less than one hundred rupees can be effected only by one of the two modes mentioned in section 54, paragraph 3 of the Transfer of Property Act, viz., by a registered instrument or by delivery of possession.

Khatu Bibi v. Madhuram Barsick (1) overruled.

THIS case was referred to a Full Bench by PRINSEP and BANERJEE, JJ. The facts sufficiently appear from the following order of reference:—

“The plaintiff sues to recover certain land in the possession of defendant No. 1. It has been found that defendant No. 1 conveyed to defendant No. 2 by an unregistered instrument; that defendant No. 2 conveyed to the plaintiff by a registered instrument, and that defendant No. 1 has, notwithstanding this transaction, remained in possession.

* Appeal from Appellate Decree No. 842 of 1891, against the decree of F. W. Badcock, Esq., District Judge of Burdwan, dated the 17th March 1891, affirming the decree of Babu Monmoth Nath Chatterji, First Munsiff of Katwa, dated the 6th February 1890.

(1) I. L. R., 16 Calc., 622.