1899.

GURUSHANTAPPA v. CHANMALLAPPA.

promisor, the only person entitled to payment, and that the contention, that payment to any member of the family was by itself necessarily binding on the promisee, could not be supported, and that, therefore, it lay on the promisor to show that his payment to a third party was binding on the promisee. These are propositions that seem to us to be sound in principle, and we apply them to the present case.

The plaintiff and one Kallyanappa were members of a joint family and lived together and managed their joint property for the common benefit. Each used to recover debts due on bonds taken in the other's name. The defendant in 1890 passed a bond to the plaintiff. In 1892 he passed a mortgage bond to Kallyanappa wherein the debt under that bond was included and discharged.

In the ordinary course of dealings the plaintiff would have admitted the discharge, and the only reason he gives for disputing it is, that he says that he and Kallyanappa quarrelled some eight or nine years ago, (that is, in 1889 or 1890), and that Kallyanappa started a branch business at Byadgi. He admits, however, that no partition took place and no notice of any kind was given to the defendant. We find, moreover, that in 1894 the plaintiff received a debt due under a mortgage bond passed to Kallyanappa in 1888. We think, therefore, that the payment by the defendant to Kallyanappa must be held to be good as against the plaintiff, and accordingly we dismiss the appeal.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
August 23.

IN RE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* HARI DWARKOJI.

HARI DWARKOJI, APPLICANT.*

Bombay City Municipal Act (Bom. Act III of 1888), *Sec.* 381—*Low ground—Low-lying ground—Notice by Municipal Commissioner requiring owner of low-lying ground to fill it with sweet earth up to a certain level.*

Under section 381 of the Bombay Municipal Act (Bom. Act III of 1888) the Municipal Commissioner for the City of Bombay issued a notice to the appellant

* Criminal Revision, No. 151 of 1899.

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as owner of certain low-lying ground. The notice stated that in the opinion of the Commissioner the ground accumulated water in the monsoon and caused nuisance to the tenants of two chawls situated on the premises. The owner was, therefore, required by the notice "to fill in the low-lying ground with sweet earth to the level of the road and slope it towards the new drain on the road side."

As the owner refused to comply with the notice, he was convicted and sentenced to pay a fine of Rs. 15 by the Presidency Magistrate under section 471 of the Municipal Act (Bombay Act III of 1888).

Held, reversing the conviction and sentence, that the notice was illegal. The words used in section 381 are "low ground," which is not the same as low-lying ground. And though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite extent of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled up with sweet earth, or that it shall be sloped in a particular direction.

APPLICATION under section 435 of the Code of Criminal Procedure (Act V of 1898).

The applicant was owner of a large area of low-lying ground at Dádar Road in Bombay.

On 8th February, 1899, the Municipal Commissioner of Bombay issued to the applicant a notice under section 381[1] of the City of Bombay Municipal Act (Bom. Act III of 1888).

The notice was in the following terms:—

"Whereas in my opinion the ground accumulates water in the monsoon and causes nuisance to the two chawls situated in your premises, now pursuant to the provisions of section 381 of the City of Bombay Municipal Act, 1888, I do hereby with the approval of the Standing Committee require you within one month from the service hereof *to fill in with sweet earth the low-lying ground to the level of the road and slope it towards the new drain on the road side.* And if you fail to comply with this requisition, you will be liable to the penalty prescribed by section 471 of the said Act."

The applicant was prosecuted for not complying with this notice. He pleaded that he was fazendár of the land, and had leased it to one Manekji Edulji for a term of 999 years at an annual

(1) Section 381 of Bombay Act III of 1888 provides as follows:—If, in the opinion of the Commissioner, any pool, ditch, tank, pond, well, quarry-hole, *low ground* or stagnant water is or is likely to become a nuisance, the Commissioner may, with the approval of the Standing Committee by notice in writing, require the owner thereof to cleanse, fill up, drain off or remove the same or take such other order therewith as the Commissioner shall deem necessary.

rent of Rs. 275, and that the lessee ought to have been called upon to fill in the ground.

This contention was overruled, and the applicant was convicted and sentenced to pay a fine of Rs. 15 under section 471 of the Municipal Act (Bombay Act III of 1888) by W. R. Hamilton, Second Presidency Magistrate.

The accused moved the High Court under its Revisional Jurisdiction to set aside the conviction and sentence.

H. C. Coyaji, for applicant.

L. Crawford, for the Municipality.

PARSONS, J :—We have no materials before us upon which we can decide whether the applicant is or is not the owner of the ground in question. It is said that he has leased it to a third party for a term of 999 years renewable at the option of the latter for a further term of 999 years. There is, however, no proof of this lease, as no evidence was taken on this point by the Magistrate. If the lease is proved, no doubt a question arises whether he is the "owner" within the meaning of section 381 of the City of Bombay Municipal Act, 1888; but it cannot arise until that point is proved. In the present case it is unnecessary for us to order further enquiry, because we are of opinion that the notice is not a legal one under the section. It is addressed to Hari Dwarkoji, "owner of the low-lying ground at Dádar Road,' and after reciting that the ground accumulates water in the monsoon and causes nuisance to the tenants of the two chawls situated in his above mentioned premises, requires him within one month "to fill in with sweet earth the said low-lying ground to the level of the road and slope it towards the new drain on the road side."

The words used in section 381 are "low ground," which is not the same as low-lying ground, and though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite quantity of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled with sweet earth, or that it shall be sloped in a particular direction.

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For this reason we reverse the conviction and sentence and acquit the applicant, and direct the fine if paid to be refunded. This will leave the Commissioner free to take such further steps, if any, as he may be advised in the matter and as may be legal.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *August* 15.

SHIVMURTEPPA (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* VIRAPPA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Suit by a purchaser of a co-sharer's interest for partition of a specific part of joint property—Right of defendant co-sharers to require a general partition—Rules as to partition, general and partial.

Where a co-parcener or a purchaser of the rights of a co-parcener sues for partition, the partition must be general: a suit for a partial partition of a single property will not lie.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

Suit for partition. Plaintiffs sued for partition of a certain warehouse in which they claimed a half share. They alleged that it was the joint ancestral property of the first and second defendants; that the right, title and interest therein of the first defendant had been sold in execution of a decree and purchased by their (the plaintiffs') ancestor in 1880, and that they (the plaintiffs) were now in joint possession with defendant No. 2.

Defendant No. 2, who alone defended the suit, pleaded (*inter alia*) that, besides the warehouse, there was other family property belonging jointly to himself and defendant No. 1 which ought to be included in the present partition suit; that a general partition ought to be made of the whole of the joint property; and he prayed that his share thereof should be ascertained and allotted to him.

The Subordinate Judge awarded the plaintiff a half share of the warehouse, without ordering a general partition of the joint property as prayed by the second defendant.

* Second Appeal, No. 164 of 1898.