

tions, one of which was that the payment of the full amount of purchase-money should be a condition precedent to the extinction of the vendor's title. The other ground is that the Lower Appellate Court has altogether misconceived and mis-stated the evidence as to payment of part of the consideration-money.

It appears to me that both these objections are to some extent well-founded. The parties had entered into a written contract; the Court was, therefore, bound to see whether it was, or was not, the intention of the parties that a complete and binding sale should take place, although the purchase-money was not paid. There are words in the contract which justify doubt on the subject, and that question is one which ought to be considered.

Secondly, I think there is no doubt that the evidence would point to quite a different conclusion from that to which the Subordinate Judge has come as to the payment of consideration-money. So far as we can see, that payment undoubtedly was a payment on account of the expenses of preparation and registration, and those expenses are usually borne by the purchaser. But independently of that, it seems to me that the Subordinate Judge was not justified in saying that the evidence of the witnesses set up that which he states they set up. It appears that only one of the witnesses spoke to some declaration on the part of the vendor, whereas another of the witnesses, possessing much better means of knowledge, spoke distinctly to the contrary effect. And besides that, there was the letter of the purchaser himself which appears to be almost conclusive upon the point, which clearly shows that he looked upon the payment which he had made as a payment made on account of registration. It would also seem that at that time he had no precise conception in his mind of what he was entitled to, because he insisted that the vendor should pay either the whole or half of that amount, whereas, if he had really paid any part of the purchase-money, he would have been clearly entitled to take credit for the whole of such payment.

It is quite clear, therefore, that the evidence was not properly considered and the effect of it mis-stated, and that, upon this point, at any rate, it should be re-considered. The case will, therefore, be remanded for a new trial, regard being had to the observations which I have made.

I must also observe that it was quite improper on the part of the Subordinate Judge to allow the plaintiff a period of three months after decree to pay the money of the decree. The plaintiff, it seems to me, was bound in bringing such a suit as the present, if he had not previously tendered it to the defendant, at all events to have paid the money into Court when he brought the suit.

*Ainslie, J.*—I concur.

The 19th January 1871.

*Present:*

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

**Possession—Title.**

Case No. 1228 of 1870.

*Special Appeal from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 30th March 1870, reversing a decision of the Moonsiff of that District, dated the 28th August 1869.*

Golam Reza Chowdhry and another (Defendants), *Appellants,*

*versus*

Chandoo Meah Lushkur (Plaintiff),  
*Respondent.*

*Baboo Romesh Chunder Mitter* for  
Appellants.

*Baboo Tarucknath Sein* for Respondent.

In a suit to recover possession of land which both plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which both claimed to have obtained pottahs from Government, the mere fact that the land was included in plaintiff's pottah was held to be insufficient to entitle him to a decree.

*Jackson, J.*—It seems to me that the decision of the Officiating Deputy Commissioner of Cachar cannot stand.

The plaintiff in this case brought the suit to recover possession of a certain plot of land from the defendant. He alleged that the land in question had been 15 or 16 years ago in the possession of himself and a co-sharer; that subsequently in 1857 he had obtained a pottah of it from Government, the land having fallen to his share under a

private partition with his co-sharer; that he, plaintiff, held possession of the land until within the last two or three years, when the defendant, without any right or title, forcibly dispossessed him from it. The defendant, on the other hand, stated that he had reclaimed the land from jungle 16 or 17 years ago; that it was contained in his pottah; and that he had all along been in possession and had never dispossessed the plaintiff, whose story was an utter fabrication.

The first Court went minutely into the evidence, and disbelieving that of the plaintiff, and considering that the defendant had always been in possession, dismissed the plaintiff's suit as barred by limitation.

The Deputy Commissioner, on appeal, has held that, as plaintiff obtained a pottah of the land from Government in 1857, the suit is not barred by limitation, and for the same reason that plaintiff is entitled to possession, whether the defendant has or has not been in possession for the last 16 years.

On special appeal it is urged before us that this is no real trial of the case, and we think that, it is not. It will be observed that both parties lay claim to the land as having been in their possession for some 15 years, and, in fact, as having been reclaimed from jungle by them, and both parties claim it as being included in their pottahs from Government.

In a former case, it was held that the date of the pottah which the plaintiff obtained from Government was the date on which the plaintiff's cause of action arose. This may be the case where the plaintiff obtains a pottah of jungle land. But in this case neither party allege that their rights commenced under their respective pottahs. Both state that they have been in possession some 15 years; both state that they reclaimed the land from jungle; and both state that they subsequently obtained a confirmation of their rights by a pottah from Government. In such a case, the pottah of the plaintiff conferred no new rights to the land, and the mere fact that the land is contained in that pottah is not sufficient ground for deciding in favor of the plaintiff. If it was, the Government might give a pottah to the defendant one year, to the plaintiff the next year, and again to the defendant the third year, and no person's rights or interests would be safe. The whole of the facts of

the case must first be tried, and the dispute as to which of the two parties has all along been in possession decided. If the plaintiff has held the land for the last 15 years until he was dispossessed by the defendant, he will be entitled to a decree. If, on the other hand, the defendant has held possession during all that time, the plaintiff would not, on the false allegations made by him, be entitled to dispossess him, whether he had obtained a pottah of the land or not. In the case to which the Deputy Commissioner alludes, there was a remand by this Court to try the question of the effect of such settlements as that claimed by the plaintiff; and it was then found by the then Deputy Commissioner, in a long and careful judgment, that where land has been reclaimed from jungle by one person that person is entitled to the settlement-pottah, and that it must be offered to him before it is granted to any one else. The effect of the present Deputy Commissioner's judgment is completely to set aside that of his predecessor.

We reverse the decision of the Deputy Commissioner, and remand the case for trial. The costs will await the final judgment.

*Mookerjee, J.*—I concur.

The 19th January 1871.

*Present:*

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

**Right of way—Marriage-processions.**

Case No. 1561 of 1870.

*Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 3rd May 1870, modifying a decision of the Moonsiff of Bohur, dated the 21st December 1869.*

Raj Manick Singh (Plaintiff), *Appellant,*  
*versus*

Ruttun Manick Bose and others (Defendants), *Respondents.*

*Baboo Luckhee Churn Bose for Appellant.*

*Baboos Kalee Mohun Doss and Huree Mohun Chuckerbutty for Respondents.*

A general right of thoroughfare includes a right of way for marriage or other processions of the like