

Bujrungee Lall having obtained an order from the Collector under Section 10, Act XI of 1859, to open a separate account with reference to a 3 annas 4 gundahs share of the property without objection on the part of the plaintiffs, therefore the plaintiffs' suit is not cognizable by the Civil Courts, they not having objected to the proceedings under the aforesaid Section. The third point taken is that the decision of 1849 referred to by the Judge does not decide that Nurkoo Roy's share was 11 gundahs and not 3 annas 4 gundahs; and the last point is that even supposing that that decision does decide the point, the special appellant being an auction purchaser at a sale for arrears of Government revenue is not bound by that decision.

The first point, we think, is clearly untenable. The suit is not to set aside a sale, but to set aside an order of the Collector passed under the Butwarrah law, Regulation XIV of 1819, and to establish the share of the plaintiffs in the estate. Therefore the first point is overruled.

On the second point, namely, with reference to Section 10, Act XI of 1859, the decision of a Bench of this Court* published in Sevestre's Reports, Part 6, Volume XI, p. 311, has been quoted. That decision does not refer to Section 10, Act XI of 1859. Moreover what that decision lays down is that if a Collector's proceedings are without jurisdiction, then a suit in the Civil Court will lie. Act XI of 1859, according to the preamble of the Act, was passed amongst other reasons for the reason that it was expedient to afford sharers in estates who duly pay their shares of the sudder jumma easy means of protecting their shares from sale by reason of the default of their co-sharers. Now, Bujrungee Lall, who represented the rights and interests of Nurkoo Roy, made an application stating that the share of Nurkoo Roy was 3 annas 4 gundahs. The Collector under Section 10 directed that a separate account be opened with the applicant, that is, with Bujrungee Lall. There is nothing in the Section which enacts that if the share of the applicant shall not be such as he states it to be, the co-sharers shall not be able to bring a suit in the Civil Court to establish the extent of their shares, in the event of the Collector, under the Butwarrah law, rejecting their application for a division of their specific shares.

With reference to the 3rd point taken, a decision has been read to us, and in that case the contention between the parties was on the one side that Tirbhoowun had acquired the property in dispute from his self-acquired funds, and on the other side that Tirbhoowun and his brothers were joint, and therefore that the nephew of Tirbhoowun who was the plaintiff in that suit was entitled to a moiety of the property, and it was found that the whole of the property then in dispute had been acquired by Tirbhoowun from his own funds, and that he during his lifetime had made a disposition of the property whereby it was divided amongst his sons and nephews in equal shares, and the decree was that they were entitled to $\frac{1}{3}$ th of the property in dispute, that is to say, to 11 gundahs each.

On the last point, we think it very clear that what the defendant acquired by purchase at the revenue sale was the share of Nurkoo Roy, and that share having been found to be 11 gundahs and not 3 annas 4 gundahs, we confirm the decisions of the lower Courts and dismiss this appeal with costs.

The 2nd June 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Ijmalee lands—Co-parcener's rights and remedies.

Case No. 189 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 10th November 1870, reversing a decision of the Moonsiff of that District, dated the 23rd January 1869.

Dwarkanath Bhooeah and others (Plaintiffs)
Appellants,

versus

Gopeenath Bhooeah (Defendant) *Respondent.*

Baboo Doorga Mohun Dass and Bungshee Dhur Sein for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

A co-parcener in respect of ijmalee land is entitled to the use of every part thereof; and if by erecting a building he takes possession of more land than he would be entitled to on a partition, the proper remedy is to sue for a division of the land, and not for a demolition of the building.

Mitter, J.—We are of opinion that the Subordinate Judge has committed several errors in law in the investigation of the case so far as plot No. 2 is concerned. In the first place, he is quite wrong in assuming that the deed of partition of 1254 was executed between the ancestors of the parties to this litigation. It appears that that deed was executed between the father of the plaintiff on the one side and his uncles on the other, and after a careful perusal of it we find that it has no bearing whatever upon the land which is now in dispute. In the second place, the Subordinate Judge has rejected certain entries made in the resumption chittahs of 1839 as interpolations. The first Court sent for the originals of those chittahs from the Collectorate, and after comparing those originals with the copies filed on the record, came to the conclusion that there were no interpolations whatever. The Lower Appellate Court ought to have, under such circumstances, examined the originals of those documents before it came to the conclusion that the entries objected to by the respondent were interpolations. In the third place, the Subordinate Judge appears to have laid considerable stress upon a resumption proceeding No. 55 bearing date the 12th December 1839. There is nothing whatever in this proceeding or in any other document on the record to show that the land now in dispute was included in the claim for resumption which was brought by Government on that occasion. It is admitted on both sides that that land is covered by the sunnud No. 13123, and we find it distinctly recorded in the resumption proceeding above referred to that out of the lands covered by that sunnud only two plots, one called *Tatooleah Pooshkurnee* and the other *Jalkinarah* or banks of that *Pooshkurnee*, were in dispute before the resumption authorities. It is also admitted on both sides that the land now under litigation has nothing whatever to do either with the *Tatooleah Pooshkurnee* or its banks. It is clear, therefore, that the Subordinate Judge is wrong in relying upon this resumption proceeding as showing conclusively, as he observes, that the ancestors of the plaintiff had lost their possession over the disputed land 35 years previous to the institution of the present suit. It is true that the Subor-

dinate Judge has, towards the end of his judgment, observed that the possession of the defendant has been satisfactorily proved by the testimony of his witnesses. But we cannot help thinking that this conclusion has been arrived at on the strength of the observations made by him in the earlier part of his judgment, which observations, as we have already shown, are altogether founded upon mistake.

We, therefore, reverse the decision of the Subordinate Judge so far as plot No. 2 is concerned, and remand the case to him with directions to re-try it with reference to the evidence on the record.

We wish to observe, however, that the plaintiffs' claim for the demolition of the building erected by the defendant on the land covered by plot No. 2 cannot be maintained. Even if the land be found to be ijmalee the defendant was clearly entitled as a co-parcener to use every inch of that land; and if by erecting the building in question he has taken possession of more land than he would be entitled to on a partition, the proper course for the plaintiff to adopt would be to sue for a division of the lands, and not to ask the Court for the demolition of the building. The decision of the Subordinate Judge with regard to plot No. 1, in respect of which no question has been raised before us, will stand.

The costs of this appeal will abide the ultimate result.

The 3rd June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Attaching creditors — Section 270, Code of Civil Procedure—Right of suit—Jurisdiction.

Case No. 96 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 16th February 1870.

Wooma Moyee Burmonya (Plaintiff)
Appellant,

versus

Ram Buksh Chetlangee and others (Defendants) *Respondents.*