In the first place it is clear that this pretended purchase of the 23rd of Aghran is absolutely null and void, inasmuch as it was made at a time when the properties covered by it were under attachment in execution of Manick Chunder's decree. This was distinctly found by the Moonsiff, and the defendants Bhugwan Chunder and Shumboo Chunder could not in their memorandum of appeal to the Judge venture to deny the *factum* of the attachment, though they attempted to get rid of it upon a ground to which we shall presently refer. The Judge also admits it in one part of his decision, though in another part he says that it was not necessary for him to enquire into the validity of the defendant's purchase, with reference to that point. It has been urged however that a certain petition of Manick Chunder Doss shows that the attachment had come to an end in consequence of the execution case having been struck off the record. We are of opinion that this plea is of no weight whatever. It has been repeatedly held by this Court, as well as by the Privy Council, that the mere fact of an execution case being struck off the record does not put an end to the attachment. But without entering into any further discussion on this point, it is sufficient for us to say that the very order by which Manick Chunder's execution case was struck off contains a distinct provision to the effect that the attachment should continue in force. Manick Chunder might have misunderstood this order and asked for a renewal of the attachment, but that circumstance cannot destroy its legal effect in any manner whatever.

In the next place, the Judge has clearly found that the defendants Shumbhoo Chunder and Bhugwan Chunder are mere *benamee* holders for the Indu defendants. It has been said that this finding is not supported by any legal evidence. We have looked into the record, and we find that this plea is altogether unfounded. There is ample evidence to support the finding of the Judge, and we feel no hesitation in saying, after looking into that evidence and the surrounding circumstances of the case, that it is the only reasonable finding which could have been arrived at. This being so, it is clear that Manick Chunder's purchase must prevail over the pretended purchase set up by the defendants Shumbhoo Chunder and Bhugwan Chunder, notwithstanding the alleged priority of the latter in point of date.

But if Manick Chunder is admitted to be the rightful owner of the superior *talooks* B. and C., the question whether the *ousut talook* claimed by the plaintiff was real or fictitious becomes of no importance whatever. The plaintiff is a purchaser from Manick Chunder for a valuable consideration, and if the latter chose to carve out a new *ousut talook* from the two superior *talooks* which undoubtedly belong to him, or to deal with a fictitious *ousut talook* previously set up by his predecessors in title as a real *ousut talook*, and then to sell it to the plaintiff for a proper consideration, the plaintiff's claim for the recovery of that *ousut talook* cannot be possibly resisted upon any ground of law or of justice, either by the Indu defendants who have no rights whatever in the property, or by the pretended purchasers from them, namely, the defendants Shumbhoo Chunder and Bhugwan Chunder.

For the above reasons, we set aside the decision of the Judge and restore that of the Moonsiff. The whole costs of this litigation must be paid by the Indu defendants and the defendants Shumbhoo Chunder and Bhugwan Chunder who are jointly and severally responsible for the same.

The 15th December 1871.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Case No. 823 of 1871.

Rent—Sharers—Misdescription—Assignment.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 20th April 1871, *reversing a decision of the Moonsiff of Belmarhia, dated the 17th September* 1871.

Bhoobun Moye Dossee (Plaintiff) *Appellant,*

versus

Ruffick Mundul and others (Defendants) *Respondents.*

Baboo Kaleekishen Sein for Appellant.

Baboos Bhugobutty Churn Ghose and *Shushee Bhoosun Sein* for Respondents.

Plaintiff sued for rent describing herself as ho *dur mourosee jote*, and the Lower Appellate Court treated that description of her *jote* as a misdescription, because

the *jumma-wasil-bakee* papers called her a *mourosee-ijáradar*, and other papers showed her to be a *dur-mourosee-talookdar*. HELD in special appeal that the misdescription, if there was any, was an utterly insufficient ground for throwing out plaintiff's claim.

Where the rents of a share with certain specified boundaries have been assigned by one shareholder absolutely, by no arrangement (*e. g.*, partition) between that shareholder and his co-sharers, without the assent of the assignee, can the right of the assignee to collect rents under his assignment be in way affected?

Bayley, J.—WE think this case must be remanded to the Lower Appellate Court for trial of the single question as to whether the jumma in this case should be Rs. 11-12 annas 12 gundahs, or Rs. 17-11 annas 2 gundahs. This point was decided in favor of the plaintiff by the first Court, and although a distinct objection was taken on the finding by the defendant in his grounds of appeal before the Lower Appellate Court, that Court has come to no proper decision on this point.

The facts of the case are these: The plaintiff sued for the rents of 1274, 1275, and 1276. She described herself as holding a *dur-mourosee jote*, and as entitled to collect rents of 6 annas share in *kismut* Moyna from the defendant's ryots. That 6 annas share, plaintiff alleged, paid rent at Rs. 11-12 annas 12 gundahs before resumption, and was assessed at Rs. 17-11 annas 2 gundahs after resumption.

The zemindar was also made a defendant in this suit.

The ryots' (defendants') answer was that they paid rent at the rate of Rs. 11-12 annas 12 gundahs for 1274; that they never agreed to pay higher rent after resumption; that there had been a partition under which 5 annas went to one Rohinee Kant, 5 annas to one Boydonath, and the remaining 6 annas became the property of Radha Soonderee; that, by the partition thus made, the land was so distributed that only 1½ cottahs remained to plaintiff for her share, and that those 1½ cottahs have been relinquished by the defendants.

The first Court raised these general issues: 1*stly*.—Whether the plaintiff was entitled to get Rs. 5-12 annas 10 gundahs as excessive rent on the land assessed after resumption, and what was the amount of rent paid in 1274 to plaintiff by the ryot defendant.

2*ndly*.—Whether the *mehal* was partitioned among the zemindars, and whether plaintiff was bound thereby, and,

3*rdly*.—Whether it was true that under the said partition the ryot defendants had only 1½ cottahs in the plaintiff's share, and whether they since relinquished the same.

On all these issues, the first Court found against the defendants.

In regard to the question of partition, the first Court held that the plaintiff could not be bound thereby, as she was no party to it, and there was no proof that she admitted the said partition; that the ryot defendants could not rely on it as they were not parties to it, and further because they admitted the relation of landlord and tenant.

On the question of the alleged relinquishment of the 1½ cottahs, the first Court held that the ryot defendants gave no proof of relinquishment.

On appeal from this decision by the defendants, no objection was raised as to the finding by the first Court on the question of relinquishment. The question of the partition and its validity, and the liability of the ryot defendants to the plaintiff for the amount of the share that was alleged to fall to her, were the points raised in appeal. It was further disputed whether the plaintiff was a *dur-mourosee jotedar* as stated in the plaint, or only a *mourosee ijaradar* as stated in the written statements of the defendants.

The Lower Appellate Court decided the case really upon two points, mainly upon the point of the want of the title alleged by the plaintiff and the consequent non-liability of the defendants to pay rent to her, and also on the point of partition leaving the plaintiff no share in the land on account of its having been assigned to the other proprietors.

The plaintiff appeals specially, and urges, firstly, that the partition relied upon cannot affect her rights, because in the first place she was no party to it; in the second place, the ryot defendants cannot take advantage of it, as they were also no parties thereto; and, thirdly, because they had already admitted the relation of landlord and tenant.

The second point urged before us is as to the misdescription upon which the Lower Appellate Court has so much relied,—*viz.*, that the plaint described the plaintiff as a *dur-mourosee jotedar*, the *jumma-wassil-bakee* papers called her *mourosee ijaradar*, and

other papers showed her to be a *dur-mourosee talookdar;* and it is contended that there is nothing in these descriptions to vitiate her title to collect rents from the defendants.

The tenure was distinctly described in the plaint as a *dur-mourosee jote,* and that the description in the *jumma-wassil-bakee* papers was in terms equivalent to her being a tenant-in-form,—*i. e., dur-mourosee jotedar.* Ordinarily either of these positions may be described by either of these terms. It was therefore an unsubstantial ground on which the Lower Appellate Court threw out the plaintiff's claim.

In regard to the question of partition, the Lower Appellate Court has entirely disregarded the strong point relied on by the first Court,—*viz.*, that the plaintiff was no party thereto, and was therefore not bound by it; and that the ryot defendants also under that partition could not repudiate the relation of landlord and tenant as they too were no parties. On both these points, therefore, we think that the judgment of the Lower Appellate Court must be reversed, and that of the first Court restored.

There still remains another point on which no decision has been pronounced by the Lower Appellate Court,—*viz.*, whether the *jumma* in this case will be Rs. 17-11 annas 2 gundahs, or Rs. 11-12 annas 12 gundahs, and on this point we think the case should be remanded to the Lower Appellate Court for trial.

The plaintiff will be entitled to her costs both of this Court and of the Lower Appellate Court.

Markby, J.—I am of the same opinion. I entirely agree with Mr. Justice Bayley in his view as to the misdescription of the plaintiff's *jote* in this case; and I think that even if there is any misdescription, it is an utterly insufficient ground to dismiss the plaintiff's suit.

The point mainly argued as to the partition seems to me quite clear. Where the rents of a share with certain specified boundaries have been assigned by one shareholder absolutely, by no arrangement between that shareholder and his co-sharers, without the assent of the assignee, can the right of the assignee to collect rents under his assignment be in any way affected.

The respondents must pay the costs of the Court below and of this appeal.

The 19th December 1871.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Execution—Construction—Joint Decree—Aliquot Part—Interest—Jurisdiction—Amendment.

Cases Nos. 296, 303, and 304 of 1871.

Miscellaneous Appeals from an order passed by the Additional Subordinate Judge of Mymensingh, dated the 14th July 1871, reversing an order of the Moonsiff of that district, dated the 28th December 1869.

Nubo Kishore Mojoomdar and others (Judgment-debtors) *Appellants,*

versus

Anund Mohun Mojoomdar and others (Decree-holders) *Respondents.*

Baboo Nuleet Chunder Sein for appellants.

Baboos Doorga Mohun Doss and *Gopal Lall Mitter* for respondents.

In execution, a decree must be construed by its own terms, and not by the plaint. Where a decree is a joint decree, execution cannot proceed upon an application made with a view to execute an aliquot part of the decree.

Where no interest is given in a decree, none can be recovered in execution of that decree.

When an application for execution is contrary to the terms of the decree, the High Court cannot in appeal allow the application to be amended, but the decree-holder must apply to the Lower Court to be allowed to execute it according to its terms.

Kemp, J.—These are appeals on the part of the judgment-debtors from the decision of the Additional Subordinate Judge of Zillah Mymensing, reversing the decision of the Sudder Moonsiff of that district. The decree now sought to be executed was a joint decree.

The first Court very properly held that the application which was made with a view to execute an aliquot part of the decree was contrary to the terms of the decree itself, and therefore execution could not proceed upon such an application. The first Court quoted a decision of this Court to be found in Weekly Reporter, Volume XI, page 241, case of Poorno Chunder and others *vs.* Saroda Churn Roy, dated the 15th March 1869.

The Subordinate Judge observes that the ruling of the High Court referred to by the Moonsiff has no bearing on the present case, and looking to the plaint in the original case, he considered that the intention of the judgment-creditors in bringing the suit was to recover the money due in half shares. In other