

1 to 4, who were the sons of Mirtoonjoy, the principal member of this community, and its most influential shareholder, dismissed the plaintiff's case as against the defendant Nund Coomar. The point which we have had argued in special appeal is that such a decree is incapable of execution; that there being no exact definition of the shares of these shareholders, and no partition having taken place, the plaintiff's decree for possession of an unknown portion of this plot No. 1 cannot be carried into execution. It appears to us that, however hard it may be on the plaintiff, this objection must prevail. Nund Coomar, who has got a decree on his appeal before the Subordinate Judge, had a right to a certain share in every foot of land in this *howlah*, and he can, if he chooses, make this decree void and of no effect by laying claim to a portion of every piece of the ground on which the plaintiffs might attempt to build their house. It is all very well to say that Nund Coomar might perhaps not to do so, and that this objection comes with a very bad grace from the other defendants against whom the decree has been passed; but still the fact remains that the decree, as it at present stands, cannot be executed, inasmuch as under it the plaintiffs are to be allowed to have exclusive possession of a plot of land of which the defendants Nos. 1, 2, 3 and 4 are not the sole owners.

On this ground we think that the judgment of the Court below must be reversed, but under the circumstances we shall give no costs.

The 8th May 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Sale in execution—Right of Purchaser—Distribution of rent.

Case No. 7 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 5th October 1871.

Maharaneé Adheeraneé Narain Coomaree
(Plaintiff), *Appellant,*

versus

Rajah Murdraj Biddyadur Singh Nurendro
Bahadour (Defendant), *Respondent.*

Baboos Juggodanund Mookerjee and Chunder Madhub Ghose for Appellant.

Baboos Unnoda Pershad Banerjee and Mohendro Lall Mitter for Respondent.

Plaintiff having purchased at a sale in execution the rights and interests of the former proprietor after the whole of the Government Revenue had been paid by the Surburakar out of the collections made by him, was considered entitled to a share of those rents in proportion to the actual term of her proprietorship in the estate; and as defendant had not received more than he was entitled to upon the above principle of division, plaintiff's suit was held to have been properly dismissed.

Glover, J.—THE plaintiff (appellant) was the purchaser in execution of a Civil Court decree of the defendant's right, title, and interest in a killah paying a Government revenue of Rs. 7,503-9-3 yearly.

The revenue was payable in three instalments—

Rs. 2,535-11-11 in April.

„ 2,535-11-11 in June.

„ 2,432-1-9 in July.

The collections of the estate are stated to be (and the fact is not denied) Rs. 26,830-5-4 yearly.

The estate appears to have been for some years in charge of the Collector, and the Surburakar, had, before the date of the sale to plaintiff, which took place in May 8th, 1868, paid up the whole revenue for the Amlee year, from 1st Assin 1275 to 1st Assin 1276, that is.

Up to the date of sale, *Surburakar* had collected Rs. 15,507-2-5, and the plaintiff claims the two-thirds of this sum after deducting the June and July kists of Government revenue on the ground that, as those two kists fell due after the date of his purchase, he took the responsibility of payment, and was in the same way entitled to a proportionate share of the rents already collected.

The defendant denied the plaintiff's right to anything more than a share of the collections proportionate to the time he had been owner of the estate.

The Subordinate Judge took this view of the case. He held that the plaintiff could not claim a two-third share of the collections merely because two kists happened for the convenience of the old proprietor to have been fixed for June and July. He held plaintiff entitled to his share of the collections calculated on the number of days he had been in possession, and finding that he had already appropriated a larger sum, dismissed his suit with costs.

It is contended in appeal that this calculation is made on a wrong principle.

If the plaintiff had been at the time of her purchase liable for the two Government kists of June and July, there would have been perhaps some show of reason in her contention, but the fact is that she was not so liable. When the plaintiff bought the estate on the 18th of May, there was no revenue due. It had been already paid in advance for the entire year by the *Surburakar*, and the plaintiff entered into possession free of all demands for that year. But putting aside this for the moment, the plaintiff as auction-purchaser at a sale in execution of decree brought the rights and interests of the judgment-debtor, defendant, as they stood on the 18th of May 1868. What were those rights? It seems to me that they consisted of the right to hold the estate revenue free for the remainder of the year, and to collect from the ryots the balance of the Rs. 26,830-5-4 still outstanding. It is alleged, and not denied, that the plaintiff has since entering on possession collected these moneys, amounting to Rs. 11,323-2-11.

It appears to me, therefore, that the plaintiff has, by the decree of the Subordinate Judge, got more than she had any right to ask, and that, for this reason alone, her appeal should be dismissed with costs. I think it right to add that, if there were any necessity to go into the question of assets as the Subordinate Judge has done, I should have held that his decision apportioning the receipts and payments according to the number of days each party was in possession of the estate, was a very fine and proper one, and indeed the only one that could have been come to under the circumstances.

Kemp, J.—I also think that this appeal must be dismissed. I am of opinion that the principle upon which the Lower Court has distributed the rent collected by the *Surburakar* is proper and certainly fair to the parties. The whole of the Government revenue which is payable in three kists of nearly equal amounts was paid by the *Surburakar* out of the collections before the plaintiff purchased the rights and interests of the former proprietor. The plaintiff is, therefore, entitled not to two-thirds of the collections made by the *Surburakar*, but to a share of those rents in proportion to the actual term of her proprietorship in the estate; and as it is clear that the defendant has not received more than what he is entitled to upon the above principle of division, the plaintiff's suit has been properly dismissed.

The 27th March 1872.

Present:

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

Witness—Refusal of Defendant to give Evidence—Benamee.

Case No. 46 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 30th November 1870.

Kalee Chunder Chowdhry (one of the Defendants), *Appellant*,

versus

Ranee Surut Soonduree Debia (Plaintiff), *Respondent*.

Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter and Hem Chunder Banerjee for Appellant.

Baboos Sreenath Doss and Gopal Lall Mitter for Respondent.

In a suit to recover possession brought by the zemindar against one who claimed to be the *dur-putneedar*, the defendant, though allowed an opportunity to give his evidence and displace the finding of the Lower Court that his *dur-putnee* lease was not a real but a nominal transaction, refused to do so and notwithstanding that the *putneedar* and his alleged vendee who were called as witnesses for another purpose, had in some respects given evidence in support of the defendant's case, the Court nevertheless confirmed the finding of the Lower Court.

Markby, J.—In this case it appears that the plaintiff, Raneer Surut Soonduree, was the zemindar of 10 annas of Pergunnah Pookhoria, and that some time prior to the 30th November 1849, a putnee talook was granted to Anund Chunder Roy and others, which was nominally sold to one Brojonath Chuckerbutty on that date, *viz.*, the 30th November 1849.

On the 26th December 1855, a *dur-putnee* tenure of the same 10 annas share was said to have been created by the Roy *putneedars* in favor of one Nitaye Soondur. On the 16th September 1862, Nitaye Soondur executed a bond for Rs. 3,000 in favor of the defendant Kalee Chunder Chowdhry, who is also a zemindar of a 4-anna share of the zemindaree, by which bond the *dur-putnee* tenure was made security for the re-payment of the loan.

On the 22nd September 1863, Kalee Chunder obtained a decree on his bond, but it was a money decree only.