The Weekly Reporter,

CIVIL RULINGS.

The 21st March 1872.

Present:

Sir James W. Colvile, Lord Justice James, Sir Montague E. Smith and Sir Robert P. Collier.

Possession—Purchaser from Heir—Grantees from Widows—Mokurruree, Dur Mokurruree, Putnee and Dur-Putnee Rights.

*On Appeal from the High Court at Calcutta.**

Sheroocoomaree Debia,

versus

Keshub Chunder Bosoo and others.

In a former suit appellant sought as purchaser from the *heir* to a former proprietor, to establish her *mokurruree* right to certain lands as against the grantees from the widows of such proprietor, upon the death of the last surviving widow. She obtained a decree establishing such right, and on proceeding to take out execution, was opposed by the respondents who claimed the lands as being a *putnee* tenure which had been sold by auction for arrears of rent due by B. S. the former *putneedar*, and which had been purchased by K. B. & H. B. who had granted a *dur-putnee* of the same to the respondents in 1849. In 1841 there was a proceeding before the Magistrate as between the grantees of the *dur mookurruree* right under the widows and B. S. the *putneedar*, the result of which investigation was that the Magistrate quieted the former in possession as *dur mookurrureedars* under the widows, and ordered the *putneedar* to institute a suit in the Civil Court to enforce his claim, which suit was never brought.

The claim of the respondents was tried as a regular suit between the objectors (respondents) as plaintiffs, and the decree-holder (appellant) as defendant, and was decided in favor of the respondents in the Lower Courts. On appeal to the Privy Council, THEIR LORDSHIPS held that the proceeding in 1841 was conclusive of the present case, as showing that the actual possession then was in the grantees of the widows; that it was in the highest degree improbable that they, having established their possessory right against B. S., would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same B. S.'s right; that the possession of the grantees was obtained and continued under the widow's title and was referable solely to the title which was now vested in the appellant; and that the right of the appellant should in nowise be affected by the acquisition of the *putnee* title in 1849.

THIS is an appeal from the High Court of Judicature at Calcutta; and also, by special leave, from two judgments and decrees of the Zillah Judge of West Burdwan. As the suit was not heard on the merits by the High Court, and as the whole case is open on the decisions of the Zillah Judge, it is only necessary for their Lordships to deal with the latter.

The case is shortly this:—

The appellant instituted her original suit under these circumstances. She alleged that the property in question was hers by purchase from the person who became entitled to it as heir of a former proprietor, on the death of the last survivor of the four widows left by such proprietor. The widows, she alleged, had made a grant to Modhoosoodun Bosoo and Bhoyrub Chunder Bosoo, which grant would, of course, determine on the death of the last surviving widow. Upon such death she instituted her suit against the said Modhoosoodun and Bhoyrub Chunder and others in assertion of her right as purchaser from the heir, and obtained a decree establishing such right as against the defendants in that suit, and took possession in the usual form by planting bamboos in execution of the decree. The litigation in this suit was very hostile. The heirship of the appellant's vendor was disputed strenuously, and it was only after appeal to the High Court that her right was finally established. The lands in question were alleged by the appellant to have been held by *mokurruree* tenure under the Rajah of Burdwan, but were included in a part of the Rajah's zeemindary, which he had granted in putnee,

* From the judgment of Kemp and Markby, JJ., dated 21st February 1867.

and the result of that state of things would, of course, be that the *mokurrureedars* were entitled to the possession of the lands, paying the rents reserved by their grant to the putneedar, as middleman between them and the zemindar.

When the appellant came to take out execution of her decree, other members of the Bosoo family who had not previously intervened in the suit, objected to such execution, on the ground that they were the persons really in possession under a better title, which was thus alleged :—

Keshub Chunder Bosoo said "that lot Beesoonundunpore, &c., seven mouzahs in Purgunnah Bistoopore (being the putnee tenure above-mentioned), having been sold at auction for the arrears of rent due by Beer Singh Baboo, Khetternath Bosoo, and Hungseswur Bosoo purchased the same on the 15th May 1849. In the year 1256, Khetternath Bosoo granted the *dur-putnee* of his half share to me, and Hungseswur Bosoo granted the *dur-putnee* of his half share to Ram Chunder Bosoo, and since that time we have been in *khas* possession of the same."

On this claim being so made, it was put in course of trial as a regular suit between the objectors (the first three respondents) as plaintiffs, and the decree-holder as defendant, as provided by law in that behalf.

The alleged purchase in 1849 is not disputed, nor is the fact of the actual possession of the property by the Bosoo family, or some of them, denied; the appellant's case being that what was so purchased was the interest of the putneedar, and that the alleged possession was, in truth, a possession under the *mokurrureee* title derived from the widows, as above stated, and, therefore, a possession not adverse to, but supporting, her (the appellant's) title.

The Court of first instance was of that opinion, and gave judgment as follows:—

"I consider the *mokurrureee* rights of the decree-holder to be true. If the plaintiffs have a putnee right, they can obtain the rent from the female defendant."

The suit of the objectors was, therefore, dismissed with costs.

On appeal to the Zillah Judge, he at first thought that the suit had not been instituted with sufficient and proper allegations, and decided against the plaintiffs on that technical ground; but the High Court having remanded it to be tried on the merits, the Zillah Judge proceeded to try it, and gave judgment against the appellant, on the ground stated in page 96 of the "Record," the substance of which is "the long and undisputed possession of the plaintiffs gives rise to a strong presumtion of their title being good; the *onus* of proving a strict legal title lies on the party seeking to disturb such possession. The defendant cannot disturb the possession of plaintiff without proving possession within twelve years. Defendant has given no proof of possession within twelve years. On the contrary, her witnesses prove the plaintiff's possession. There is no proof, indeed, that defendant has ever collected the rents, or has ever paid rent to the putneedar. And she produces no title-deeds and no reliable proof that her vendor was ever in possession. It appears to me that the only ground on which the defendant stands is that the under-tenure subordinate to the putnee is called a *mokurrureee* in various old papers, one if not more of which is a copy of a copy. This is quite insufficient to prove a title." And for these reasons the judgment of the Lower Court was reversed and the appeal decreed.

On special appeal, the High Court held that the case had not been really tried on the true merits, that is to say, under what title the *khas* or actual possession had been held, and remanded it for re-trial, and directed that such re-trial should be in the presence of the putneedars and the zemindars, so as to make a final decision.

Such re-trial was had. The Zillah Judge adhered to his former decision. His judgment is contained in a few lines as follows :—

"There is no proof whatever that the possession of the dur-putneedars is the same as the alleged possession of the 'dur-putneedars' (the grantees of the widows). Defendant's witness acknowledges that a former suit for rent was instituted some seven or eight years ago, by Ram Chunder Bosoo, styling himself dur-putneedar. The putnee title is proved, and the putneedars acknowledge the dur putnee. But there is no proof whatever of the existence of the *mokurrureee*, and, for the reasons given in my judgment of the 9th August 1865, I believe that no *mokurrureee* has ever existed as separate from the putnee, though the latter tenure may have been occasionally styled a *mokurrureee*. Therefore, clearly, the dur-putneedar is entitled to his claim."

It appears to their Lordships that the Judge must have overlooked the most material evidence in the case. The title alleged by the dur-putneedars was a title acquired in

1849 to the putnee which had previously been Beer Singh's.

Now, in 1841, there was a proceeding before the Magistrate, in which the above-named Modhoosoodun and Bhoyrub Chunder Bosoo were plaintiffs, and the same Beer Singh and one Caristoprosaud, his Mookhtear, were defendants, in which the whole title and the respective rights of the parties, as they then stood, were gone into and investigated.

Modhoosoodun and Bhoyrub Chunder then expressly alleged their title as grantees of the "dur-mokurruree" right under the widows, and their possession under such title, and then insisted, as the appellant now insists, that the putneedar's right was only to the reserved rent.

As the result of that investigation the Magistrate found in favor of the then plaintiffs that they were and had been in possession as *dur-mokurrureedars* under the widows, and he accordingly, by his order, quieted them in such possession, and remitted the putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought.

It appears to their Lordships that this proceeding, unless its effect can be altered by some other cogent evidence, is conclusive of the present case.

In the year 1841 the actual possession was clearly in the grantees of the widows; and any subsequent possession by other members of their families must be presumed and taken to be a possession by their permission and with their consent, unless the contrary is very clearly shown. If a widow or person claiming under a widow could destroy the title of the heir by allowing a friend or relative to have twelve years' possession of the estate, no heir would be safe.

In this case there is nothing to show that the possession was other than permissive, and on the other hand there is very strong evidence confirmatory of the presumption that it was permissive.

There is, moreover, considerable parol evidence that the possession was a joint family possession, and important documentary evidence to the same effect. Amongst these documents are a bond and a suit upon that bond showing that the purchase of the putnee, although made in two names only, *viz.*, Kheterpath Bosoo and Hungseswur Bosoo, was really made on behalf of themselves and of Modhoosoodun, Ram Chunder, Bhoyrub Chunder, and Keshub Chunder (Modhoosoodun and Bhoyrub Chunder being the two *dur-mokurrureedars*). There are also on record a petition purporting to be a petition of Khetternath's and filed as far back as 1858, claiming to be a co-sharer in the *dur-mokurruree* taken from the widows in the name of his brother Modhoosoodun; and a similar petition, of the same date, of one Eshan Chunder Bosoo, claiming in like manner to be a co sharer in the *dur-mokurruree* taken in the name of his uncle, Bhoyrub Chunder.

All the probabilities of the case lead to the same conclusion. It is in the highest degree improbable that Modhoosoodun and Bhoyrub Chunder, having established their possessory right against Beer Singh, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same Beer Singh's right. And it is equally improbable that, if they were not in possession, but the possession was in their relatives (the putneedars), they would have litigated the original suit in the way in which it was litigated.

Their Lordships are clearly of opinion that the family or families of the Bosoos were in joint possession, that such possession was obtained and continued under the widow's title, and is to be referred solely to the title which is now vested in the appellant, and that the right of the appellant can in no wise be affected by the acquisition of the putnee title in 1849.

The Zillah Judge seems to have thought throughout that the mere production of the purchase of title acquired in 1849, and the possession by the purchaser subsequent to that year, were sufficient to establish his right. If he had rightly apprehended (as was clearly pointed out to him by the High Court) that such purchase and possession were perfectly consistent with the appellant's case, if that case were true—if he had considered the proceeding in 1841, and ascertained in whom the possession then was and under what title, and had enquired whether any change had been made in such possession between 1841 and 1849; or whether there had been any change in the possession consequent on the purchase in the latter year, and how that change, if any, had been effected—there would not have been what their Lordships cannot but consider a serious miscarriage of justice.

Their Lordships will humbly recommend to Her Majesty that, notwithstanding the decree of the High Court of Judicature at Fort William in Bengal of the 21st February 1867 on the special appeal, the

the cause, indeed set aside the Moonsiff's report, which he considered unsatisfactory, and decided substantially all the issues in favor of the plaintiff. The case then came on for appeal before the High (Sudder?) Court and it is against this judgment that the present appeal is lodged.

It has been contended that the High (Sudder?) Court mistook the law as applicable to this case, and that their decision is in contravention of two cases—one, Mussamut Imam Banda *v.* Hurgobind Ghose, reported in the 4th Moore's Indian Appeals, p. 403,* and another in the 12th Moore's Indian Appeals†—in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly that the High (Sudder?) Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision; but it appears to their Lordships impossible to suppose that the High (Sudder?) Court could not have been acquainted with the first of those cases, reported so long ago, as before observed, as the 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some color to the contention of the appellant, it does not appear to their Lordships that the High (Sudder?) Court have, in the reasons of their decision acted in contravention of either of the above decisions. It appears to their Lordships that the judgment must be taken to have proceeded mainly upon the ground that the plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the *chur*, which he alleged to have been diluviated. Whether the second clause of the forth section of Regulation XI. of 1825 applies, or whether the fifth paragraph of the same section applies, which is in general terms and to this effect, "That in all cases "not previously provided for, and in all "cases of claims and disputes respecting land "gained by alluvion or by dereliction of a "river or sea, which are not specifically "provided for by the rules of this Regula-"tion, the Courts of Justice, in deciding upon "such claims and disputes, shall be guided "by the best evidence they may be able to "obtain of established local usage, if there be "any applicable to such a case; if not, by "general principles of equity or justice;" in either case it is equally essential for the maintenance of the plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think that on the face of the judgment it appears that this consideration must have been present to the High (Sudder?) Court, and they read their finding, "that "there were not any marks by which the "lands can be identified as having at any time "formed part of the estate of the plaintiff;" not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks, but as a general finding on the part of the Court that the lands had not been identified; and, if so, undoubtedly there was an end of the plaintiff's main case. But, further, it would appear from the judgment that the plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for in the judgment of the Court it is said: "But he," the plaintiff, "urges that being in possession "of part of the *chur* as the Goag under a de-"cree of the competent Court which has be-"come final, the rest of the *chur* lands must "be considered an increment to that village." The Court disposed of that argument by stating their opinion that if the lands in question had formed to the south of the portion which was in possession of the plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the plaintiff.

Under these circumstances, their Lordships, whatever might have been their view if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High (Sudder?) Court, which was to the effect that the plaintiff has failed to prove his case, that he has not proved the lands which have reformed, if lands have reformed in the bed of the river, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds their Lordships will humbly advise Her Majesty that this appeal be dismissed.

* 7 W. R., P. C., 67 and Suth. P. C., Cases, 208.
† 11 W. R., P. C., 2.