

The 23rd January, 1850.

PRESENT : W. B. JACKSON, ESQ., *Judge.*

FETITION NO. 713 OF 1849.

[*Procedure—Judgment based on futwah—Judgment inconsistent with futwah—Remand.*]

Case remanded, as decision of lower appellate court was inconsistent with a *futwah* upon which it was professed to be based.

IN THE MATTER OF THE PETITION OF MUSST. KHORESA BANOO *alias* KHOSBANOO, filed in this court on the 7th December 1849, praying for the admission of a special appeal from the decision of the judge of zillah Chittagong, under date the 7th September 1849; reversing that of Moulvée Abdool Hosein, moonsiff of Hathazaree, under date 30th December 1848, in the case of Musst. Khorsa Banoo *alias* Khosbanoo, plaintiff, *versus* Abdool Hosein and Soja Bibi, defendants.

It is hereby certified that the said application is granted on the following grounds :

Plaintiff sues for the property left by Nubeeoollah. The judge dismisses the claim, on the ground of a deed of gift (*hibbehnamah*) executed by Nubeeoollah, during his last illness, but when in the possession of his senses. The *futwah*, under which the judgment is given, is wrongly stated in the judge's decision. From the copy [6] before the court, it would appear that, supposing the gift to be made during the last illness of Nubeeoollah, but when of sound mind, the gift would be good only for one-third part of the property. The judge says that the *futwah* declares the gift good for the whole, and decides accordingly.

I therefore admit the special appeal on the ground of the above error ; and, under Regulation IX, 1831, remand the case to the judge, with orders to decide it over again.

The 29th January, 1850.

PRESENT : SIR R. BARLOW, BART., AND J. R. COLVIN, ESQ., *Judges,*
J. DUNBAR, ESQ., *Temporary Judge.*

CASE NO. 153 OF 1849.

Regular Appeal from a decision passed by Mohummud Sadik, Principal Sudder Ameen of Zillah Sarun, March 14th, 1849.

GUNGA PURSHAD SAHEE, *Appellant (Plaintiff) v. MADHOPURSHAD SAHEE AND OTHERS, Respondents (Defendants).*

[*Transfer of property—Vendor and purchaser—Vendor reserving right of suing regarding property, in his own name—Reservation of, no effect against third parties.*]

A plaintiff in selling his rights in a property, cannot, as against third parties, reserve to himself the obligation and power of carrying on suits regarding that property in his own name.

Wukeel of Appellant—Govind Chunder Mookerjee.

Wukeel of Respondents—Ramapurshad Ræe.

THIS suit was instituted by the appellant in the zillah court to cancel a certain document, which was fictitiously executed in the name of Jootee Rawoot, one of the defendants (respondents). Suit laid at rupees 6,512.

The appellant, in this case, sued originally as plaintiff on his own right, on the 20th August 1846. After the filing of the reply, one Gunga Dut Raee presented a petition on 3d February 1847, with an *ikrarnamah*, dated 15th July 1846, stating that another *ikrarnamah* from the plaintiff, of 6th May 1846, had also been filed; and that by the first-mentioned *ikrar*, of 15th July, Gunga Purshad Sahee, the plaintiff, was to prosecute and defend suits and appeals, and would fulfil all the engagements he had contracted towards the petitioner, Gunga Dut Raee and Baboo Govind Singh. This petition, given by Gunga Dut Raee, on February 3d, 1847, further stated that the petitioner assented to Gunga Purshad Sahee carrying on the case in his own name, according to the conditions specified in the *ikrarnamah*. The defendant, in his rejoinder of 27th February 1847, [7] referred to a claim which had been made by the aforesaid Gunga Dut Raee and Baboo Govind Singh, on the ground that the rights of Gunga Purshad Sahee, (plaintiff and appellant), in the subject-matter of this suit, had been sold by him to them, by the *ikrar*, or deed of agreement and sale, before adverted to, of May 6th, 1846, which would bar his right of action as on his own part.

In the proceeding under section 10, Regulation XXVI, 1814, of 20th December 1847, the principal sudder ameen called on the *wukeel* of the defendant to produce a copy of the deed of agreement and sale, of 6th May 1846, to which he had referred in his rejoinder; and the plaintiff filed a petition acknowledging that deed, and stating that he had authority to sue according to the stipulations of the *ikrarnamah* of 15th July 1846. On the 2nd March 1848, the principal sudder ameen recorded, that looking to the contents of this *ikrarnamah*, and to the consent given by Gunga Dut Raee, one of the purchasers of the plaintiff's rights, he would allow the case to go on without then deciding on the nature and effect of the *ikrarnamah*, as the instrument on which the plaintiff claimed still to sue.

In his decision, now under appeal, the principal sudder ameen, who had succeeded to the office by whom the above order of 2nd March 1848 was passed, stated that on a summary appeal, which had been brought to the sudder court against the first principal sudder ameen's order of 2nd March 1848, it had been ruled by the sudder court, that if the plaintiff had actually sold his rights to another, such transfer would be a ground for dismissal of his claim, an order for which could only pass in the court in which the suit was pending; hence the principal sudder ameen argued, that the admission of the suit on the part of the plaintiff, was, in effect, negatived, and the order of the former principal sudder ameen overruled, there being no dispute between the parties as to the sale having been really made. The principal sudder ameen, in his decision, further set aside the *ikrarnamah* of 15th July 1846, on two grounds:—*first*, that it was written after he had sold all his rights; and, *second*, that the consent to the suit, now proffered, was not given by both the purchasers of the plaintiff's rights, but by one only. He accordingly dismissed the suit.

The appeal in this case rests wholly on a condition, which is professed to be included in the bill of agreement and sale of 6th May 1846, by which it is argued that the plaintiff, in selling his rights, reserved to himself the obligation and power of carrying on a suit on account of them in his own name.

JUDGMENT.

We are clearly of opinion that, even had the deed of sale included such a condition as is above stated, applicable to this suit, it could confer no title on the plaintiff to sue in his own name and for his own ostensible benefit. Such conditions, between a seller and a purchaser, [8] can have no effect in regard to third parties. A suit can only be brought by a person preferring and

proving a right as *bona fide* vested in himself, or by an agent regularly empowered by such person; but, in this case, the condition alluded to has no reference to the present suit, but, clearly, exclusively to an earlier suit, out of the steps taken in execution of which the present suit has arisen. The appeal is, therefore, not merely untenable in law, but is in truth frivolous and vexatious on the face of the document on which it is founded.

There is further the consideration, mentioned in the decree of the principal sudder ameen, that the consent recorded to this suit being carried on by the plaintiff in his own name is given by only one of the two purchasers of his rights.

The appeal is, therefore, dismissed with all costs.

The 30th January, 1850.

PRESENT: SIR R. BARLOW, BART., AND J. R. COLVIN, ESQ., *Judges*,
J. DUNBAR, ESQ., *Officiating Judge*.

CASE No. 79 OF 1849.

Special Appeal from a decision passed by Niamut Ali Khan, Principal Sudder Ameen of Zillah Tirhoot, September 15th, 1848; confirming a decree passed by the Sudder Moonsiff, January 20th, 1848.

HOOLAS TEWAREE, *Appellant (Defendant)* v. BUNDOO TEWAREE,
Respondent (Plaintiff).

[*Landlord and tenant—Regulation V of 1812, sections 9 and 10—General notice to ryuts not to cultivate without pottahs, not due notice.*]

A general notice issued by a Zamindar to his *ryuts*, prohibiting them to cultivate without taking *pottahs* from him, is not a due notice under sections 9 and 10, Regulation V, 1812.

The decision of Niamut Ali Khan, principal sudder ameen of Tirhoot, noticed as inconsistent and unsatisfactory.

Wukeels of Appellant—Rampran Raae and Bungee Buddun Mitr.

Wukeel of Respondent—Aftabooddeen.

THIS case was admitted to special appeal, on the 10th January 1849, under the following certificate recorded by Mr. Aber. Dick:

'This application is granted on the following grounds:—

'*First*.—Because it appears, that the notice required by sections 9 and 10, Regulation V, 1812, was not duly served upon the petitioner (appellant).

'*Secondly*.—Because, after issue of notice, no summary suit was instituted to prove that a legal demand of enhanced rent only had been made, and not paid, previous to virtually ousting petitioner by entering into engagements for his lands with another.'

[9] JUDGMENT.

We find that the principal sudder ameen, Moulvee Niamut Ali Khan, has declared in his decision the sufficiency of the notice, though he, in his detail of the process of proclamation, sets forth that the zamindar issued only a *general notice to the ryuts*, prohibiting them to cultivate without taking *pottahs* from him. Such general notice, (if, indeed, any notice is necessary in the case) is entirely opposed to the specific provisions of the law quoted in the certificate. The first ground raised by the certificate, obliges us to remand the case for complete investigation of all merits, on which we must observe that there is a great repugnancy in the different grounds stated on the face of the decree itself.