The 17th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge*.

CASE NO. 337 OF 1851.

Regular Appeal from the decision of Hurochunder Ghose, Principal Sudder Ameen of Zillah 24-Pergunnahs, dated 8th April 1851.

JUGGUNNAUTH PERSAUD MULLIK (*Plaintiff*), *Appellant v.* PREONATH MULLIK AND OTHERS (*Defendants*), *Respondents*.

[*Procedure—Rejection of plaint as deed of gift relied upon was not stamped—Other documentary evidence not considered—Remand.*]

Case remanded, as the lower appellate court had rejected a plaint as inadmissible for defect of stamp on a deed, without due consideration of all the grounds on which the plaint might be held to be laid.

Vakeels of Appellant—Baboo Ramapersaud Roy and Kishen Kishore Ghose.

Vakeel of Respondents—None.

SUIT laid at rupees 98,147-10-4-1, for the possession of a share of property assigned for the worship of certain idols.

This is a suit regarding the right to a share in the control and possession of certain properties, stated to have been assigned by Ram Shewuk Mullick by two deeds of gift, dated 31st Bhadoon **[28]** 1223 B.E., for the worship of different idols, together with a rotation in the exercise of the religious rites connected with the idols. It is also stated in the plaint that the obligations of the deeds of gift were acknowledged by the ancestors of the defendants on a deed of partition, dated 18th Cheyt 1224 B. E., or one year seven months after the execution of the earlier deeds.

Only one of the deeds of gift, and the deed of partition, have been filed in the cause.

The principal sudder ameen has ruled that the deed of gift which has been filed, having been executed in 1816, when a stamp was necessary on such an instrument according to the provisions of section 9, Regulation I of 1814, the suit resting on that deed must be dismissed under the precedents of this court, in the case Rajendar Chatterjee *versus* Taramonee Debea, decided September 17th, 1850, Reports, page 487, and other subsequent cases.

The appeal is on the ground that the deeds of gift were not regarded by the plaintiff as the necessary foundation of his suit, as is shown by the fact of copy of only one of them having been filed in the court below, and that the later deed of partition of 18th Cheyt 1224 B E., which is filed in original, contains all that is requisite for the support of the plaintiff's claim. The principal sudder ameen has, however, omitted all notice of this latter deed.

The admissibility of the deed of partition in reference to the terms of the plaint, as by itself a sufficient foundation of the suit, and the validity of that document with reference to the stamp which it bears, or other circumstances, ought certainly to have been considered by the principal sudder ameen on an issue of law struck between the parties, before he rejected the claim of the plaintiff in consequence merely of one of the deeds of gift being unstamped at the date of suit.

The decision of the principal sudder ameen is therefore annulled, and the suit remanded, in order that he may proceed as above intimated, and then after any proper and necessary investigation, pass a fresh decision, as may be called for with reference to his determination on the issue of law stated in the preceding paragraph.

The 19th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 432 OF 1851.

[*Procedure—Dismissal of suit as time barred—Reasons to be stated.*]

Remand, upon application of special appeal, the lower appellate court having omitted to show how, under the averments in the plaint, the claim to a particular part of the properties sued for was barred by the limitation which he held to apply to the remainder of the properties.

IN THE MATTER OF THE PETITION OF BHYRONATH ROY, filed in this court on the 16th August 1851, praying for the admission of a special appeal from the decision of J. H. Patton, judge of zillah [29] East Burdwan, under date the 13th May 1851, reversing that of Moulvee Fuzul Rubbi Khan, principal sudder ameen of that district, under date 21st August 1850, in the case of Bhyronath Roy, plaintiff *versus* Neelkunt and others, defendants.—

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

The particulars of this case are given at page 71 of the Decisions of the judge of zillah East Burdwan for May 1851.

The suit was for possession, on ancestral right, of certain landed property, a place of worship, &c. It was dismissed in the first instance by the lower courts under the law of limitation, and in special appeal to this court, the case was remanded for re-investigation with regard to some special property which, as the plaintiff alleged, he had been ejected from within a period of twelve years prior to the institution of the suit.

The principal sudder ameen adjudged a share in the Bijour estates, and the place of worship, to the plaintiff. The judge reversed the decision, holding that the objections raised in bar to the hearing of the case were, under the statute of limitation, conclusive.

The application for the admission of a special appeal is on two grounds:—

First.—That the admission of dispossession in 1241, was made by Surgonath Roy, and not by the petitioner, Bhyronath Roy.

Secondly.—That the judge has altogether omitted to notice that the dispossession of the house appropriated to worship, with its dalan, and the main entrance of the enclosure of the family dwelling-house, took place, as alleged in the plaint, in the month of Assin 1252, on the day of the Doorga-Poojah, and not in 1242, the date on which the general plea of limitation was founded.

With regard to the first point, we are of opinion that the judge, having recorded his adoption of the statement made by the defendants, appellants, in their objections of appeal, *viz.*, that Surgonath Roy's action was for dispossession in 1241, and the two brothers, *viz.*, Surgonath Roy and petitioner, having been by their own admissions in undivided possession of the patrimony, and their interests being identical, the alleged ousting was committed from that period, *viz.*, 1241, and the petitioner, (respondent in this appeal below,) having placed on record no denial that he made such an admission, though it was distinctly alleged against him in the reasons for appeal, it is not open to the court to question the accuracy of the judge's record to the effect that such admissions had been made before him. If there should have been any error as to the fact of this admission in the court below, it could only be brought forward on application to the judge for a review of his judgment.

[30] With regard to the second point, we find that the plaint sets forth the dispossession in 1252, from particular properties, as alleged in the present application, and the judge has omitted to show in his decision how limitation applies to this part of the claim, which is not affected by the dispossession referred to in the suit brought by Surgonath Roy. On this subject, the pleader for the petitioner has read a material passage from the rejoinder of the appellants in the present case, who were defendants in that action.

The case must be remanded on this one point, in order that the judge may distinctly state whether, and upon what grounds, in his opinion, the claim of the plaintiff to this particular part of the property is barred by the law of limitation. We therefore admit the special appeal and annulling the judge's decision, remand the case for re-investigation with regard to the above point only.

If the judge should hold that limitation does not apply to the place of worship, &c., its dalan, and the main entrance of the family dwelling enclosure, he will proceed to decide on the general merits of the case as respects that property,—the intimation of an opinion on the merits in the present decision having been irregular, after it had been held by the judge that limitation applied to the suit.

The 19th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge.*

PETITION NO. 483 OF 1851.

See following case. [8 S.D.A.R. 31, *infra*].

IN THE MATTER OF THE PETITION OF BEER CHUNDER SHAH, filed in this court on the 3rd September 1851, praying for the admission of a special appeal from the decision of the judge of 24 Pergunnahs, under date the 28th May 1851, affirming that of the principal sudder ameen of the said district, under date 11th March 1851, in the case of Moonshee Rajindernarain Bose and others, plaintiffs *versus* petitioner, defendant—

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

For the decision and the grounds of admission in this case, see case No. 482.

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[31] *The 19th January*, 1852.

PRESENT: J. R COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge.*

PETITION NO. 482 OF 1851.

[*Procedure—Suit based on hat-chitta for adjusted balance—Chitta in admissible in evidence—Suit to be dismissed—General examination of accounts not allowed.*]

Remand, as above, as, when a suit is laid expressly on a hat-chitta, *signed as for an adjusted balance*, and the claim is for the recovery of the sum so adjusted, and not for the examination and settlement of accounts generally, the suit will not lie unless the hat-chitta be duly stamped.

IN THE MATTER OF THE PETITION OF RUSICKANUND SHAH AND ANOTHER, filed in this court on the 3rd September 1851, praying for the admission of a special appeal from the decision of Mr. H. T. Raikes, judge of 24 Pergunnahs, under date the 28th May 1851, affirming that of Hurochunder Ghose,

principal sudder ameen of the said district, under date 11th March 1851, in the case of Moonshee Rajindernarain and others, plaintiffs, *versus* petitioners, defendants.

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

The particulars of this decision will be found at page 83 of the May Decisions for the zillah of the 24 Pergunnahs.

The plaintiffs alleged, that on an adjustment of account, the defendants signed a hat-chitta for the balance, on a separate page of his khata, with interest to be computed on it from that date at 6 per cent.

It is urged in special appeal that the hat-chitta, which is the express foundation of the suit, should, under head I, schedule A, Regulation X of 1829, which states that "any minute or memorandum of agreement, whether the same *be only evidence of a contract*, or obligatory on the party," be stamped like bonds of the same amount.—See Decision of this court, dated 18th August 1851, Mr. James Erskine *versus* Gunganurain Roy, page 505, of which the following is the marginal note :—

"Whether a suit is laid essentially on an account, and such account has not been duly stamped at the time of bringing the suit, the plaint must be dismissed,—the dismissal, however, being understood as carrying only the consequences of a nonsuit."

We find that the judge considered that the hat-chitta need not to be stamped because "it is merely a memorandum of the amount due after striking a balance, and the mere circumstances of that account being written on a separate sheet in the khata, and signed by the defendants, does not bring it within the stamp law."

We are of opinion, however, that the objections above stated by the petitioner, founded on the stamp laws, and on a precedent of the full bench of this court, which is exactly in point, are valid. The suit is plainly laid on the hat-chitta, and not only as evidence of contract, but also as in itself an acknowledgment obligatory on the party. The terms in the plaint are that the account was closed, and that the defendants signed the *moblughbundee*, [32] or the adjusted balance. The suit is for the recovery of the sum so adjusted, and not for the examination and settlement of accounts generally.

We therefore admit the special appeal, and annulling the judge's decision, remand the case in order that he may pass a fresh judgment with reference to the observations above recorded and the precedent of this court before quoted.

The 20th January, 1852.

PRESENT : J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 507 OF 1851.

[*Appeal by one of several defendants—Appellate court cannot modify decree so as to affect parties not appealing.*]

Remand as above, the lower appellate court having reversed a decision as regards a party who had not appealed from it.

IN THE MATTER OF THE PETITION OF RAMGUNGA KYBURT, filed in this court on the 10th September 1851, praying for the admission of a special appeal from the decision of Pundit Nurohuri Siromoni, principal sudder ameen of zillah Mymensing, under date the 20th June 1851, reversing that of Syud

Mahomed Hossein, moonsiff of Bazutpore, under date 6th December 1850, in the case of Ramguhga Kyburt, plaintiff, *versus* Manik Dass Kyburt and others, defendants.

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

The plaintiff sued the defendants, five in number, for the recovery of rupees 31-10-1, due on a bond.

The moonsiff decreed the claim against two of the defendants, *viz.*, Manik and Siromoni, who borrowed the money and executed the bond. On an appeal from Manik Dass only, the principal sudder ameen reversed the entire decision.

The principal sudder ameen should, on the principle recently settled by the decision of this court at large, have confined his decree to the party who appealed before him, as he could not touch that part of it which affected the party who did not appeal. We therefore admit the special appeal, and reversing the decision of the principal sudder ameen, remand the case, in order that he may pass a fresh decision so as to allow the decree of the court of first instance to stand against the party not appealing.

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[33] *The 20th January*, 1852.

PRESENT : J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge.*

PETITION NO. 510 OF 1851.

[*Suit for rent No question of joinder of parties—Appeal—Appellate judgment to be confined so as to affect only party appealing.*]

Remand as above, the lower appellate court having non-suited a case for defect of parties on grounds which were not applicable to the suit as one for the rent only. The lower court also had erroneously given the benefit of the order of nonsuit to all the defendants, though the case was before it on the appeal of only one defendant.

IN THE MATTER OF THE PETITION OF RAM KUNHYE ROY, filed in this court on the 10th September 1851, praying for the admission of a special appeal from the decision of Syud Abbas Alee Khan, principal sudder ameen of zilla Dacca, under date the 26th July 1851, reversing that of Moulvee Imdad Alee, moonsiff of Lohagacha, under date 28th June, 1850, in the case of Ram Kunhye Roy, plaintiff, *versus* Musst. Gunga and others, defendants.

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

The plaintiff sued the defendants, three in number, for arrears of rent, amounting to rupees 86-11-9. The moonsiff decreed the claim, holding the defendants jointly answerable for the amount.

The principal sudder ameen reversed the entire decision on the appeal of one of the defendants, *viz.*, Musst. Gunga, and nonsuited the case.

The pleas of the defendant, Musst. Gunga, who alone appeared in the moonsiff's court, were, *firstly*, that the defendants held only a certain part of the property, rent of which was sued for by the plaintiff ; *secondly*, that rent up to 1245 B.E., had been paid to the former farmer, Bhoobun Chunder Banerjea, and after that had been tendered to the plaintiff, who would not receive it ; *thirdly*, that the suit was bad for defect of parties, the former farmer above alluded to, and the parties who sold their tenure to the defendants, not having been made defendants.

The principal sudder ameen nonsuited the case, on the grounds that the zemindar from whom the plaintiff got his title, the former farmer, and the proprietor of an intermediate howala, whom the plaintiff represented to have

been set aside for non-payment of his howala jumma, ought all to have been been made defendants.

The application is on the grounds that the case is one for rent simply, which ought to be decided on its own merits between the only proper parties to such suit, that is, the plaintiff and the defendants, his alleged ryots. The defendant who appeared raised no plea that she held her tenure from any other talookdar, so as to raise an issue *of conflicting proprietary right* as to the superior talook. It is contended that it is for the plaintiff, petitioner, to establish his right by proof against defendant. If he succeeds, he is entitled to his decree: if he fails, he must submit to the rejection of his claim; but there is no necessity for other parties being **[34]** brought into the suit. For instance, if the plaintiff should fail to prove that Bhoobun Mohun Banerjea, the former farmer, had resigned his lease, he would have no claim against the defendants during the period of that lease. The question was entirely between him and the defendants, and there was no claim brought against the farmer. Indeed, the plaintiff has had the farmer examined as a witness in the suit.

We consider the reasons above stated to be valid and applicable, and the order of the principal sudder ameen for a nonsuit to be clearly erroneous. We therefore admit the special appeal, and annulling the decision of the principal sudder ameen, remand the case for inquiry into its merits. The principal sudder ameen, however, can affect by his decision only the one party, *viz.*, Musst. Gunga, who has appealed, it having been recently settled by the precedents of this court that a decree cannot be touched as regards parties not appealing from it.

The 20th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 518 OF 1851.

[*Landlord and tenant—Suit for rent—Rights and liabilities of plaintiff and defendant alone to be considered—Stranger third party's right not to be decided therein.*]

Remand as above, as in a suit against a tenant merely for balances of rent, it is improper to decide as to the right of a third party intervening in the suit, and claiming the lands, on which rent was sued for, as his property.

IN THE MATTER OF THE PETITION OF NUDDEARCHAND BISWAS, filed in this court on the 12th September 1851, praying for the admission of a special appeal from the decision of Mr. C. Garsting, judge of West Burdwan, under date the 10th June 1851, affirming that of Syud Moorcol Hossein, moonsiff of Bishunpore, under date 10th September 1850, in the case of Prankishen Mitter, plaintiff, *versus* Sheikh Saduk, defendant.

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

For particulars of this case, see page 461 of the June Decisions for zillah West Burdwan.

The plaintiff sued the defendants for balance of rent; the petitioner intervened, claiming the lands, on which rent was sued for, as his property.

The moonsiff decreed the claim against the defendant, but went beyond the merits of the case for rent, and rejected, on investigation, the claim, *of right* put forward by the petitioner. The judge, on appeal from the petitioner, followed the same course, and upheld the orders passed by the moonsiff, rejecting the claim of right on the part of the petitioner.

[35] We are of opinion that the judge ought to have amended the decree of the moonsiff by directing it to stand as a decree for rent only against the ryots sued, but cancelling that part of it which affected the petitioner's right as extra the suit. We admit the special appeal, and reversing the decision of the judge, remand the case to him that he may pass a fresh decision in conformity with the above remarks.

The 20th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge*, AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 519 OF 1851.

See preceding case. [8 S.D.A.R. 34, *supra*.]

IN THE MATTER OF THE PETITION OF NUBOKISHORE BISWAS, filed in this court on the 13th September 1851, praying for the admission of a special appeal from the decision of Mr. C. Garstin, judge of West Burdwan, under date the 10th June 1851, affirming that of Syud Moorool Hossein, moonsiff of Bishunpore, under date the 10th September 1850, in the case of Prankishen Mitter, plaintiff *versus* Bunnee Bebee, widow of Koochil Mundul, and others, defendants.

The order recorded on the preceding petition No. 518 is also applicable to this case.

The 20th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge* AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 521 OF 1851.

[*Procedure—Judgment on misapprehension of plaint allegations—Remand.*]

Remand as above, the lower appellate court having misapprehended the object of the plaint, and, in consequence, not having given a judgment against a defendant who had confessed his liability to the claim therein preferred for arrears of rent.

IN THE MATTER OF THE PETITION OF NUBKISHEN BANERJEA, filed in this court on the 13th September 1851, praying for the admission of a special appeal from the decision of Mr. H. T. Raikes, judge of 24 Pergunnahs, under date the 12th June 1851, reversing that of Jugunnathpursaud Banerjea, moonsiff of Bishunpore, under date 24th January 1850, in the case of petitioner, plaintiff, *versus* Bholanath Mundul, defendant.

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

For the particulars of this case, see the Zillah Decisions, 24 Pergunnahs, of June 12th, 1851, pages 93 to 95, and the order of this court of January 13th, 1851, pages 23, 24.

[36] The judge has held that the action is not for arrears of rent only, but, to recover the *value of certain identical crops* and to contest, under section 3, Act X of 1846, the decision of the revenue court regarding the ownership of those crops.

On reference, however, to the plaint, we find that the prayer is distinctly to obtain a decree *for arrears of rent* against Bholanath (who confessed the

justice of the claim), the revenue court's decision being set aside, or, as the words would have been more properly used, that decision *notwithstanding*.—See observations by a judge of this court at page 478, Sudder Dewanny Adawlut Decisions for 1850. The judge in the zillah, indeed, in his original decree on the case, (see page 100, Zillah Decisions of July 5th 1850), states that the plaintiff now sues to set aside that decision, (of the revenue court), and to procure a *decree for the arrears of rent*, and such a *decree could* only be against Bholanath, the plaintiff's alleged tenant.

The special appeal application is on the ground that the claim, being clearly for arrears of rent, and not for value of particular crops, as supposed by the judge, is good against Bholanath, who admits that he was the plaintiff's tenant under a pottah from him, and that the rent was due to him.

This ground is distinctly established by the record, and a judgment should pass against Bholanath on his own confession. If, in filing such a confession, he has colluded with the plaintiffs, in order to injure other parties, he will justly bear the penalty of his own act. The decree for the arrears of rent against him will in no way touch the rights of other parties.

We therefore admit the special appeal, and reversing the decision of the judge, remand the case for a fresh decision as respects the defendant Bholanath with reference to the above remarks.

The 20th January, 1852.

PRESENT: J.R. COLVIN, ESQ., *Judge* AND A.J.M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 522 OF 1851.

See preceding case. [8 S. D. A. R. 35, *supra*.]

IN THE MATTER OF THE PETITION OF NUBKISHEN BANERJEA, filed in this court, on the 13th September 1851, praying for the admission of a special appeal from the decision of the judge of 24 Pergunnahs, under date the 12th June 1851, reversing that of the moonsiff of Bishunpore, under date 24th January 1850, in the case of petitioner, plaintiff, *versus* Taramony Bewah and others, defendants.

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

[37] For the decision and grounds of admission in this case, see case No. 521.

The 20th January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge* AND A. J. M. MILLS, ESQ., *Officiating Judge*.

PETITION NO. 525 OF 1851.

[*Procedure—Material pleas in suit not considered—Judgment defective—Remand.*]

Remand as above, the lower appellate court having omitted to notice and dispose of two material pleas in the suit.

IN THE MATTER OF THE PETITION OF SHEO SINGH, SHIJJEEWA LALL, filed in this court on the 15th September 1851, praying for the admission of a special appeal from the decision of Mr. R. J. Loughnan, judge of city Patna, under date the 12th June 1851, affirming that of Roy Shunker Lall, principal

sudder ameen of that district, under date 25th January 1851, in the case of Sheikh Tulluttup Hossein, plaintiff, *versus* the petitioners, defendants.

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

This suit was brought for the recovery of malikana allowance, on a 2 annas, 8 dams share of Mouza Kodawa, from 1246 to 1254 Fuslee.

The claim was decreed by the principal sudder ameen, and the judgment was upheld by the judge, upon the grounds detailed at length at pages 52 to 56 of the zillah Patna Decisions for the month of June 1851.

Two grounds stated in the application for special appeal seem to us valid :—

First.—The judge records (see page 54) that the appellants represented themselves to have frequently offered to pay to the plaintiff malikana calculated on the Government jumma, which he would not receive, (the appellants, indeed, having petitioned the collector, as appears from the answer to the suit, to receive that amount of malikana on account of the plaintiff's refusal to take it) ; and that the appellants pleaded in appeal that they were not, therefore, liable to the payment of interest, —a plea, which, supposing the tender by them to be proved, appears to be good in so far as regards interest on the malikana calculated on the Government jumma.

Second.—That the judge records that the appellants raised a question of nonsuit in consequence of the plaintiff not having specified the share of the malikana alleged to be due to other parties, which involves the point of the co-sharers of the plaintiff not having been made in any manner parties to the suit,—so that the defendants, appellants, might be protected from other actions by its being duly **[38]** and completely settled, *in this case*, what is the share of the common malikana to which the plaintiff is separately entitled.

It is contended for the petitioners that the judge's investigation is defective, as it takes no notice of these two material pleas. We find the objection to be valid, and therefore admit the special appeal, and annulling the decision of the principal sudder ameen, remand the case that he may pass a fresh decision, disposing of the above two points with reference to the foregoing observations.

The 21st January, 1852.

PRESENT: J. R. COLVIN, ESQ., *Judge* AND A.J.M. MILLS, ESQ., AND R.H. MYTTON, ESQ., *Officiating Judges*.

CASE NO. 256 OF 1849.

Regular Appeal from a decision passed by Mr. C. Mackay, Principal Sudder Ameen of Zillah Jessore, dated 29th May, 1849.

BABOO RAM RUTTUN ROY AND OTHERS (*Plaintiffs*), *Appellants v.* PERTAB CHUNDER SINGH AND OTHERS (*Defendants*), *Respondents*.

[*Suit for possession of land—Claim not proved—Suit dismissed.*]

Appeal of an appellant, plaintiff, for some bheel land, lying contiguous to, and claimed as having been cultivated and enjoyed as an appurtenance of his putnee talook, dismissed, as he could show no satisfactory proof that he had so cultivated and used the particular land claimed.

Vakeels of Appellants—Baboo Ramapersaud Roy and Mr. J. G. Waller.

Vakeels of Respondents—Pertab Chunder and Ishwur Chunder—Taruk Chunder Roy.

Vakeels of Respondents—Banikanth Roy and others—Kishen Kishore Ghose, Bunsee Buddun Mitter and Mr. E. Colebrooke.