

The 11th January, 1858.

PRESENT: C. B. TREVOR, G. LOCH AND H. V. BAYLEY, ESQRS.,  
*Officiating Judges.*

CASE NO. 20 OF 1857.

Special Appeal from the decision of Mr. J. S. Torrens, Judge of 24-Pergunnahs, dated 21st March 1855, reversing a decree of Baboo Lokenath Bose, Principal Sudder Ameen of that district, dated 20th May 1854.

KESHUBHUNDER GHOSE (*Plaintiff*), *Appellant* v. RANEEEMONEE DASSEE  
 AND OTHERS (*Defendants*), *Respondents*.

[*Specific performance—Agreement to deliver possession of certain property—Decree for specific performance by supreme court—Subsequent suit for possession by assignee of rights of decree-holder—Non-execution of conveyance no bar to suit for possession—Dispute as to extent of property—Remand to determine extent of property.*]

A sued B in the supreme court for performance of a contract by which B had agreed to give up possession of the family residence (ghur-bati) to A, and obtained an injunction commanding B to comply with the terms of the contract and to execute a conveyance to A. Plaintiff purchased the property in dispute from A, but being unable to obtain possession, brought an action against B, in the civil court of the 24-Pergunnahs neither party being then resident within the jurisdiction of the supreme court. B contended that the decree of the supreme court was not final. It merely upheld the contract made between A and B and provided that the question of the manner of its fulfilment was in the event of a dispute, to be referred to the Master which reference had never been made. The principal sudder ameen considered the decree of the supreme court to be final. On appeal the judge held the decree of itself insufficient to establish plaintiff's right to the property claimed. It provided that B should at his own expense execute a conveyance which had not been done. On special appeal it was held, that a separate conveyance was not necessary, for there appeared no question as to the right conveyed which was distinctly set forth in the pleadings in this suit and decision of the supreme court. The extent of the right conveyed alone was in dispute, plaintiff affirming that the ghur-bati agreed to be given up by the defendant comprised 74 beegas, while defendant contended that it comprised only 2½ beegas.

The case remanded to determine the extent of the right conveyed.

*Vakeels of Appellant*—Baboo Sumbhoonath Pundit and Mr. R. T. Allan.

*Vakeels of Respondent, Bhowanichurn Mitter*—Baboos Kisbenkishore Ghose and Unnodapersaud Banerjea.

THIS case was admitted to special appeal on the 6th January 1857, under the following certificate recorded by Messrs. C. B. Trevor and D. I. Money:—  
 [30] "Plaintiff, special appellant, represents, that on the 27th Assin 1246 B. S., one Mudoosoodun Nundee, executed to Bhowanichurn Mitter, who was zemindar of a *la.*, 9 *g.*, 2 *k.* share of Kistopore, a kubooleut under which he took a putnde lease of the above share in the village with the exception of the *ghur-bati*, the family residence, and 2 beegas, 10 cottas of land; that Mudoosoodun Nundee afterwards refused to deliver up possession of the excluded property and the parties being both then residents within the jurisdiction of the supreme court, an action for the enforcement of the agreement had been brought there, and decreed on the 6th July 1847; that on the 8th August 1847, he, plaintiff, purchased from Bhowanichurn Mitter 74 beegas, comprising the latter's family residence, *ghur-bati*, with 8 beegas, 10 cottas occupied by the cutcheree in Kistopore, the whole of which had been decreed to Bhowanichurn in the suit brought by him against Mudoosoodun Nundee in the supreme court and that being unable to obtain possession of his purchase, he sues the defendant to obtain the same.

"The defendants in the suit, for themselves and as guardians of the minor sons of the late Muddoosoodun Nundee, plead that the decree of the supreme court is not final between Bhowanichurn, the vendor of the land to plaintiff and Muddoosoodun Nundee: that it merely supported the kubooleut executed by Muddoosoodun Nundee in 1246, but that the question of, how that kubooleut was to be interpreted or enforced in respect to the delivery of the lands was, the decree determined, to be referred, in the event of a dispute arising, to the decision of the Master, a reference, which had never been made, the decree therefore was insufficient to support the present suit for possession.

"The principal sudder ameen considered the decree of the supreme court to be final; that the kubooleut of 1246 on which it was based, covenanted for the delivery by Muddoosoodun Nundee of the ghur-bati and that the evidence of the witnesses shewed that it covered 74 beegas; that plaintiff had specified this area with boundaries in the plaint, and that whilst defendant pleaded that the kubooleut and decree covered only 2 beegas, 10 cottas, he had not, in his pleadings questioned the claim as advanced to the 74 beegas on the boundaries stated, he therefore decreed possession to plaintiff as sued for.

"On appeal the judge remarked that he did not agree in the interpretation which the principal sudder ameen put upon the decision of the supreme court, or on his reasoning on it, and the kubooleut of 1246 B. S., viz., that the whole 74 beegas which he has awarded to plaintiff were formerly assigned to Bhowanichurn Mitter, the kubooleut and likewise the decree are extremely vague in their wording, but the former expressly stipulates that the defendant, that is, Muddoosoodun Nundee, do execute to the complainant [31] a conveyance of the premises mentioned in the kubooleut, such conveyance to be executed at the expense of defendant and in the event of a difference between the parties as to the terms of the conveyance, such difference to be settled by the master of the supreme court, this conveyance not having been executed, I am of opinion that the decree of the supreme court cannot *per se* be taken either to establish that the ghur-bati specified in the kubooleut, comprises the whole 74 beegas decreed by the principal sudder ameen, or that plaintiff's right can be decided under the decree alone with which object his suit is brought. A consideration of the circumstances under which the defendant and plaintiff vendor, sold the village of Kistopore as shewn from the evidence and pleadings, at once shows that it would be most hazardous to take the decree of the supreme court alone as conclusive of plaintiff's title until the whole conveyance which it contemplated had been drawn out. To leave those points, which it was evidently intended, should be determined, under the conveyance ordered in the decree, undetermined, and to give plaintiff a decree or title merely on that decision of the supreme court, would be unjust. The judge therefore reversed the decree of the lower court, but this decision is not to prevent plaintiff from suing on any ground of absolute title, which he may be able to support.

"From this decision, plaintiff in the court of first instance appeals specially on the following grounds:—

*First*—"That the decision of the supreme court for specific performance against defendant, Muddoosoodun Nundee, of the engagement entered into by him with Bhowanichurn Mitter is conclusive, that the order for the execution of the conveyance by defendant, is a mere formal act for the benefit of the plaintiff, but in no way adds to the effect of the decree which is complete without it,

*Secondly*.—"If this be the case, even if plaintiff has waived his right to have the conveyance executed, it is quite competent for him as his representative by purchase, on the strength of the kubooleut for the specific

performance of which a decree has passed to sue in the mofussil civil courts for possession of the land covered by such deeds, and it is incumbent on the court in determining such a case to interpret the terms of the kubooleut and to decide upon all the circumstances under which the defendant and plaintiff vendor sold the village of Kistopore, as shewn from the evidence and the pleadings, to pass a clear order either for the decreeing or dismissal of the plaintiff's claim.

"We admit the special appeal to try whether on both the grounds urged by special appellant, the decision of the judge is or is not incorrect and defective, and if it be, whether the case should not be remanded to him for further investigation."

[32] JUDGMENT.

From the pleadings before us there appears no question as to the rights conveyed to Bhowanichurn by the kubooleut executed by Muddoooodun and the subsequent decision of the supreme court, dated 6th July 1847, in favour of Bhowanichurn. The dispute between the parties now before the court, regards the extent of that right, the plaintiff who derives his title from Bhowanichurn, asserting that the gbur-bati, &c., mentioned in the kubooleut, comprised 74 beegas while the defendant alleges that the gbur-bati and outcheree, &c., were contained in 2½ beegas. We think that the issue to be determined by the lower court was the extent of the right conveyed by the kubooleut, viz, whether the gbur-bati, &c., made over by that instrument to Bhowanichurn comprised 74 beegas or only 2½ beegas, and that a conveyance under the decree of the supreme court was unnecessary. We remand the case to the judge for re-trial with reference to these remarks.

The 13th January, 1858.

PRESENT: C. B. TREVOR, G. LOCH AND H. V. BAYLEY, ESQRS.,  
*Officiating Judges.*

CASE NO. 190 OF 1855.

Regular Appeal from the decision of Mr. J. Grant, Judge of zillah  
Dinagapore, dated 18th January 1855.

JOYGOPAL MOONSHEE (*Plaintiff*), *Appellant* v. GOHERKAUNTH  
MOONSHEE (*Defendant*), *Respondent*.

[*Suit for contribution—Debt borrowed by one brother and discharged by him—Suit for contribution against other—Plea that amount was not borrowed for benefit of joint estate—Allegations of plaintiff inconsistent with his statements in previous litigation—Suit dismissed.*]

Appeal dismissed as the plaintiff's allegations in the present suit were at variance to those made by him in a former suit relative to the same subject.

*Vakeel of Appellant*—Baboo Bungsheebuddun Mitter.

*Vakeels of Respondent*—Baboo Ramapersaud Roy, Kishenkishore Ghose, Sumbhoonath Pundit and Kaleprosunno Dutt.

SUIT laid at Company's rupees 1,997-0-3.

The plaintiff and defendant are brothers and hold joint possession of mouza Gopalpore, &c., zillah Dinagapore, bearing a sadder jumma of rupees 6,380-7-8 g. 3 c.

One or other of the parties remains in the mofussil and superintends the collections. In Cheyt 1255 B. S., a kist of the Government revenue amounting