

We are very much disposed to think that if the defendants held by a service tenure they could not acquire a right of occupancy. However, it is not necessary to decide that point on this occasion.

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DEY.

The Subordinate Judge has not done his duty in deciding the issues. The case must, therefore, go back to him for retrial. If he finds it necessary, for the proper determination of the question, to take further evidence, he will be at liberty to do so, the parties also being at liberty to adduce such further evidence as they may think fit. The costs must follow the result.

Case remanded.

Before Mr. Justice L. S. Jackson and Mr. Justice Tottenham.

KANGAL CHANDRA RUJ (DEFENDANT) v. KANYE LALL RUJ AND ANOTHER (PLAINTIFFS).*

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May 10.

Decree—Boundaries—Specific Statement of Relief granted by Decree.

A claimed certain lands, claiming one portion of such lands under one title, and the remainder under another and separate title. In the schedule to his plaint he gave the boundaries of the entire lands claimed by him, but did not give any boundary between the lands claimed by him under one title and the lands claimed by him under the other title. The lower Court decreed the whole of the plaintiff's claim. The lower Appellate Court confirmed so much of the decree of the Court of first instance as declared the plaintiff's right to the first portion of the land, and dismissed his suit as to the remainder; and there being no evidence to show what lands in particular out of the whole claim were comprised in the first portion for which it gave him a decree, directed them to be ascertained in execution. *Held*, that the decree was bad, as it should have specified the particular lands decreed.

THE plaintiff in this case sued to recover 5 bighas 16 cottas 6 chittacks and 3 dhurs of land, which, he said, had been wrongfully attached, sold in execution, and purchased by the first defendant.

* Appeal from Appellate Decree, No. 2547 of 1877, against the decree of S. H. C. Taylor, Esq., Judge of Zilla Beerbhoom, dated the 27th June 1877, modifying the decree of Baboo Poorno Chunder Shome, Sudder Munsif of that district, dated the 31st October 1876

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His case was, that one Ramcanto Dass had been the proprietor of 17 bighas and 17 cottas of land, 11 bighas and 17 cottas of which were in Mouza Singur, and 6 bighas in Mouza Jibdhurpore; that Ramcanto left as his heirs and successors two sons, Gunganarain Dass and Dabee Churn Dass, who became entitled to the said 17 bighas and 17 cottas in equal moieties; that, on the 16th Śrabun 1244, the heirs of Gunganarain Dass sold and conveyed his moiety, which amounted to 8 bighas 13 cottas and 10 chittacks, to one Mohut Churn Ruj; that the purchase by Mohut Churn Ruj was on behalf of himself and of his two uterine brothers; and that the plaintiff as grandson and representative of one of such uterine brothers was entitled, under the bill of sale to Mohut Churn Ruj, to 2 bighas 17 cottas 16 chittacks and 3 dhurs. The plaintiff further alleged that of the other 8 bighas 13 cottas and 10 chittacks, which fell to the share of Dabee Churn Dass, his representatives, namely, the daughter and the daughter's son of Dabee Churn Dass, had granted to his father, Kashipersad Ruj, an usufructuary lease of 2 bighas 18 cottas and 10 chittacks of land, of which $\frac{1}{2}$ bigha 18 cottas and 10 chittacks were out of their share of the land in Singur, and the remaining 1 bigha out of their share of land in Jibdhurpore. He further stated that his (the plaintiff's) father had, in his lifetime, been in possession of the whole 5 bighas 16 cottas 6 chittacks and 3 dhurs (made up of the 2 bighas 17 cottas 16 chittacks and 3 dhurs held under the bill of sale, and the 2 bighas 18 cottas and 10 chittacks held under the usufructuary mortgage), and that this possession by his father was under partition by demarcation, with the boundaries specified in the plaint. It did not appear that any boundary was specified as dividing or distinguishing the lands to which he claimed title under the bill of sale and the lands to the possession of which he asserted his right under the usufructuary mortgage.

The cause of action was that, under a decree obtained by the first defendant against the sixth and seventh defendants, the first defendant had seized, sold, and himself purchased, and in execution obtained possession of the whole of the plaintiff's 5 bighas 16 cottas 6 chittacks and 3 dhurs.

The first defendant pleaded limitation, and other pleas generally disputing the whole of the plaintiff's claim. The Court of first instance found that the plaintiff had sufficiently proved both the bill of sale to Mohut Churn Ruj and the usufructuary mortgage to his father Kashipersad Ruj, and accordingly gave him a decree for his entire claim.

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The lower Appellate Court confirmed the finding of the Court of first instance as to the bill of sale, but reversed so much of it as found in favour of the usufructuary lease, and finding that there was no evidence on the record to show what lands were covered by the bill of sale and what lands were comprised in the usufructuary lease, directed that the lands decreed should be ascertained in execution. From this order the defendant appealed on the ground that the decree should have itself indicated and specified the boundaries of the lands decreed, and not left them to be subsequently ascertained in execution. The appellant also complained that the plea of limitation had not been properly considered by the lower Appellate Court.

Baboo *Hurry Mohun Chuckerbutty* for the appellant.

Baboo *Umbica Churn Bose* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—The plaintiffs sued in this case to recover possession of land which they claimed under two distinct titles—one being a title by sale and the other under a lease or usufructuary mortgage. The Court of first instance (Munsif) gave judgment for the plaintiffs for the whole of the lands claimed.

On appeal the Judge held that the title under the deed of sale was satisfactorily made out, but that the evidence of the usufructuary mortgage altogether failed. So he cut down the decree and allowed the plaintiffs only to recover the land which fell under the deed of sale. When the officer of the Court came to draw out the decree, he found no means of ascertaining what the lands were that were covered by the decree, and consequently he was unable to specify the boundaries of the

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land of which the plaintiffs were to recover possession, and the decree accordingly provided that this should be ascertained in execution. Now decrees of Appellate Courts as well as decrees of original Courts ought to contain specifically the relief allowed by those Courts, and it was certainly necessary to determine by the decree what land, if any, the plaintiffs were to recover possession of. It would be necessary, therefore, to set aside the decree in order that this might be ascertained before judgment. But here arises a further question upon the defendant's plea of limitation, because inasmuch as the Judge has held that the plaintiffs are entitled to one portion of the land and not to the other, and especially as it appears that the evidence of possession was not of uniform equal force in regard to all the land, the Judge, in determining what land passed under the kubala, would have to find whether the plaintiffs had been in possession of that particular land within twelve years before suit. The case will have to be remanded accordingly to the lower Appellate Court. The costs of this appeal will follow the result.

Case remanded.

Before Mr. Justice L. S. Jackson and Mr. Justice Tottenham.

1878
 May 31.

HIRDY NARAIN AND ANOTHER (DEFENDANTS) v. SYED ALLAOOLLAH
 AND OTHERS (PLAINTIFFS).*

Mortgage—Equity of Redemption—Proportionate Share of Mortgage Debt.

A, the holder of a decree upon a mortgage-bond, attached in execution a one-third share of a certain mouza, one of seventeen monzas included in the mortgage, and the equity of redemption in which one-third share had been purchased by B. *Held*, that although, as laid down in *Nawab Azimut Ali Khan v. Jowahir Sing* (1), B would have been at liberty to insist that his one-third share should be burthened with no more than a proportionate amount of the original mortgage-debt, and might claim to redeem such share upon pay-

* Appeal from Appellate Decree, No. 133 of 1878, against the decree of Hafiz Abdul Karim, Khan Bahadur, Officiating First Subordinate Judge of Zilla Bhagulpore, dated 14th December 1877, affirming the decree of Rai Burma Dut, Bahadur, Sudder Munsif of Monghyr, dated the 26th May 1877.

(1) 18 Moore's L. A., 404.