1878

PROSUNNO COOMAR SIRCAR v. RAM COOMAR PAROOEY.

thing stronger than the mere fact of his having collected some rent from the persons who were fishing in the river, to show that, under the word "*jalhars*," the Crown intended to grant him the exclusive right of fishery in a tidal navigable river.

I do not think it necessary to send this case back, because I find upon the documents, *viz.*, the quinquennial papers and the evidence of user, which are the only evidence in this case, that the District Judge could not legally find, and ought not to find, that the plaintiff has the right which he claims. I think, therefore, although for reasons somewhat different from those given by the District Judge, that the suit is rightly dismissed. The special appeal must be dismissed, but without costs, as no one appears for the respondent.

PRINSEP, J.—I agree in dismissing this case, because in my opinion it has been rightly held that the plaintiff has failed to establish the right that he claims.

Appeal dismissed.

Mr. Justice Markby and Mr. Justice Prinsep.

1878
March 22.

RAM COOMAR PAUL (DEFENDANT) *v.* JOGENDER NATH PAUL (PLAINTIFF).*

Joint Hindu Family — Partition — Dewutter — Trust in favour of Idol— Evidence.

In a suit for possession by partition, the plaint stated that the common ancestor of the plaintiff and the defendant and his five sons acquired certain properties; that, on the death of the ancestor, his five sons separated among themselves, and each took a certain share of land for his own expenses, and the remaining portion of the lands they held in *ijmalee* among themselves; that one of them became the manager of this portion of the lands, made the collections of the rents, and from the profits thereof paid the expenses of the *Rash*, *Dole*, etc., festivals and the worship of the *Debta*,—all of which were alleged to be patrimonial, and divided the balance. The defence substan-

* Special Appeal, No. 600 of 1877, against the decree of Baboo Doorga Prosad Ghose, Subordinate Judge of Zilla Hooghly, dated the 12th January 1877, affirming the decree of Baboo Gobind Chunder Ghose, Second Munsif of Amtah, dated the 31st of March 1876.

tially was, that the whole of the ijmalee land was the property of the idol. It was found in the lower Court that a certain portion of the land was dewutter and not partible, and a decree was made for partition of the remainder.

Held on appeal, that as it was not shown that this latter portion of the property had been transferred from the family and dedicated to the idol, a partition of it should be made, but subject to a trust in favour of the idol.

Baboo *Hem Chunder Banerjee* and Baboo *Boihunt Nath Paul* for the appellant.

Baboo *Ashootosh Dhur*, Baboo *Rashbehary Ghose*, and Baboo *Troylokyo Nath Mitter* for the respondent.

The facts of this case appear sufficiently from the judgment of the Court, which was delivered by

MARKBY, J.—In this case the suit was brought for a partition. The plaintiff alleged that the common ancestor of the parties and his five sons acquired certain properties; that after his death his five sons separated among themselves, taking certain land, amounting to 16 bigas each, for their own private expenses; that the remaining lands they held in *ijmalee* among themselves; that one of them became the manager, who made the collections of the rents, and from the profits thereof paid the expenses of the *Rash, Dole, etc.*, festivals and the worship of the idols,—all of which are patrimonial; and that the balance of the money they divided among themselves.

The substance of the defence, so far as we need advert to it now, is, that the whole of the land under claim was the property of the idol.

The Munsif, who went very fully into the matter, came to the conclusion that 94 bigas and 6 cottas of the land were dewutter property and were not partible; and as there is no complaint now in respect of that part of the decision, we must assume that the Munsif came to the conclusion that the defendant had, in respect of that quantity of land, made out his allegation that this was the property of the idol. As to the rest of the property, with the exception of some land which has already been divided, the Munsif found that it was the joint family property,

1878

RAM COOMAR PAUL v. JOGENDER NATH PAUL.

and gave a decree for partition. The Subordinate Judge has affirmed that decision.

Objection has been taken to that decision in special appeal, with regard to that part of the property which was found by the Munsif to be still *ijmalee* property, that by the plaintiff's own admission contained in the plaint it is shown that this property could not be made the subject of partition; and the paragraph in the plaint upon which the special appellant relies is that to which I have already referred, *viz.*, where the plaintiff states how the properties were disposed of when the family separated. It is contended that when that admission is once made we must assume that the property was to this extent transferred to the idol.

It seems to me that this is carrying the statement in the plaint considerably beyond what would be the reasonable construction of the plaintiff's statement. He nowhere states expressly that the property was given to the idol, whilst he expressly says that each member of the family had an interest in the surplus profits.

The case is somewhat like the case of *Sonatun Bysack* (1). There the will begins with this statement that the property was given to the idol; but, nevertheless, relying mainly upon a subsequent clause in the will, by which it was declared that the members of the family of the testator should have an interest in the surplus, the Privy Council came to the conclusion that the property remained in the family and was not transferred to the idol, and that it was only subject to a trust in favor of the idol. It is argued here, and we think correctly, that all these cases must depend upon the intention of the parties. Nevertheless, this judgment of the Privy Council is a guide to us as to what our decision ought to be in this case; and it seems to me clearly to indicate that we should be going considerably beyond what the plaintiff states in the plaint, if we were to say that it contains an admission that this land is the property of the idol. I also think it clear upon the decisions that, unless the property is transferred from the family and dedicated to the idol, the par-

(1) 8 Moore's I. A., 66.

tition ought to take place. There may be some inconvenience in carrying on the worship of the idol, should the property be partitioned; but nevertheless partition is an incident of property in this country, and if the property is the property of the several members of the family and has not been actually dedicated to the idol, I think that the authorities show that the several members have a right to partition. A strong case in favour of the right to partition is that of *Radha Mohun Mundul* v. *Jadoomonee Dossee* (1), where the claimant of a share admitted that the property was in a sense dewutter property. She claimed, nevertheless, that as shebait she had a right to a separate share of the dewutter property. Here the property could scarcely be called dewutter property at all. It is, as in the case of *Sonatun Bysack* (2) the private property of the family, subject only to a trust in favor of the idol. Therefore, upon the facts as found by the Court below, I think that the decree for a partition was right.

But a difficulty has occurred as to one passage in the judgment of the Subordinate Judge. It appears that some thirty years ago the Government took proceedings for resumption of this property. As I understand, this property would not have been resumed if it could have been shown to have been the property of the idol. It was therefore the interest of all the members of the family to make out that it was so, and all the members of the family then joined together in making representations to the persons who were making the enquiry on behalf of the Government that the property belonged to the idol. Undoubtedly those statements, whatever their value may be (and we cannot enter into that in special appeal), were evidence as between the different members of the family, now that one party alleges that the land is the property of the idol, and the other party alleges that it is not so. Unfortunately the Subordinate Judge seems to have taken upon himself, for some reason or other, to say that those statements were not evidence in this case. We are informed, and we have no reason to doubt, that no question was raised before him as to

(1) 23 W. R., 369. (2) 8 Moore's I. A., 66.

1878

RAM COOMAR PAUL v. JOGENDER NATH PAUL.

those statements being evidence. Nevertheless he does say so, and the only possible doubt in the matter is whether he really means what he says, or whether he means to say that they are not conclusive evidence. If he means to say that they are not conclusive evidence, he is right; but we cannot put that construction upon what he says. He says that those statements cannot be used as evidence, and we think we should be taking too great a liberty with his language if we were now to say that this is not what he means. If the Subordinate Judge had been any longer in the judicial service, we should have made some enquiry about it. Unfortunately he has ceased to be so, and therefore we can make no further enquiry in the matter.

All that we can do is to remand the case. We have now explained what the law applicable to this case is. The appeal will be reheard, and the Subordinate Judge will determine whether or no he agrees with the view taken by the Munsif that the lands other than the 94 bigas and 6 cottas and the bhatee land 80 bigas, were not dedicated to the idol. If they were dedicated to the idol and ceased to be the property of the family, except otherwise than as representing the idol, then these lands are not partible. On the other hand, if he finds that they remained as the property of the several members of the family subject to a trust in favor of the idol, and that only the profits of these lands were dedicated to the worship of the idol and the surplus proceeds were distributed among the members themselves, then the decree will stand.

There is also another matter which can be set right on remand. It is complained before us that the decree as it now stands is not correctly drawn up. That decree being set aside, it is desirable that the Subordinate Judge should pay attention to this matter, and on the case being heard on remand, he will draw up a decree which will carry out fully and clearly the directions of the Court.

Costs will abide the result.

Case remanded.