

1881
 IN THE MAT-
 TER OF THE
 PETITION OF
 JUBDUR
 KAZI AND
 GOLAB
 KHAN.

the several offences, or for the combined offence. Illustration (f), which is referred to by the Judge, shows that offences under ss. 147, 324, 152 may be separately dealt with.

In this case the conviction is for offences under ss. 147 and 324, and this Court has held that separate convictions under those sections are not legal: *vide* the case of *Queen v. Durzoola* (1). There is, however, a contrary ruling in the case of *Queen v. Callachand* (2), followed apparently in *Empress v. Ram Adhin* (3); but whether there can be separate convictions or not, it is certain that, under s. 454, Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence: *Reg. v. Tukaya Bin Tamana* (4).

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jubdur Kazi.

Sentence modified.

PRIVY COUNCIL.

P. C.*
 1880
 Nov. 12.

BHUBANESWARI DEBI (ONE OF THE DEFENDANTS) *v.* HARISARAN SURMA MOITRA (PLAINTIFF).

[On Appeal from the High Court at Fort William in Bengal.]

Evidence—Secondary Evidence of Contents of Document.

By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original.

APPEAL from a decree of the High Court of Bengal (22nd December 1874), modifying a decree of the Subordinate Judge of the District of Rungpore (13th December 1872).

* *Present*:—SIR J. W. COLVILLE, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 9 W. R., Cr., 33.

(3) I. L. R., 2 All., 139.

(2) 7 W. R., Cr., 60.

(4) I. L. R., 1 Bomb., 214.

The suit, out of which this appeal arose, was brought by the daughter and heiress of one of the five sons of Romanath Lahiri, deceased, to obtain a declaration of her right to that son's full share in the paternal joint estate. For the defence was set up the fact of an unequal distribution among the sons having been made many years before; and, in order to prove it, reference was made to two written instruments. Of these one was an "anumati patro," purporting to have been executed by the plaintiff's grandfather, Romanath Lahiri, in Kartick 1233, or by the English style, October 1826. The other was an instrument of sale alleged to have been executed by the plaintiff's mother when in possession of her husband's (the plaintiff's father's) share, as his widow and heiress, of a portion of that share. The "anumati patro" of 1826 was not produced.

The first Court held that there was sufficient evidence of this document, but not of the instrument of sale, having been executed. The High Court held, that neither document was proved to have been made as alleged.

The principal question in this appeal was, whether secondary evidence of the contents of the "anumati patro" was admissible, that evidence having been held inadmissible in the High Court.

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondent was not called upon.

The facts of the case are stated in their Lordships' judgment, which was delivered by

SIR R. P. COLLIER.—The facts necessary to the understanding of this case are as follows:—Romanath Lahiri, who died in October 1831, had five sons, and left a widow, who died in the year 1849. One of his sons, Roghoomoni, died in 1842, leaving his widow and heiress Chundramoni, who died in October 1858, leaving Uma Soonderi heiress to her father; she was the plaintiff in this suit. Her son has been since substituted, but it will be convenient to treat her as the plaintiff. She sued as defendants, three members of the family, *viz.*, the widow of

1881

BHUBANES-
WARI DEBI
v.
HARISARAN
SURMA
MOITRA.

1881
 BHUBANES-
 WARI DEBI
 v.
 HARISARAN
 SURMA
 MOITRA.

Sibnath, the youngest son of Lahiri, who died about May 1861, having been the manager of the property from his father's death to that time; Nilcomul, who was a son of the third son of Romanath Lahiri; and Konuk Tara, the widow of the eldest son of Romanath Lahiri. Neither Nilcomul nor Konuk Tara appears in this appeal, the only appellant being Bhubaneswari, widow of Sibnath. The claim of the plaintiff was in right of her father to a fifth share of the property of her grandfather, and of the accretions to that property which had subsequently accrued during the management of Sibnath. With reference to the property left by the grandfather, she admitted that she had been in possession for some time of a two-anna share. Therefore she only claimed the difference between that 2 annas share and the fifth,—that is to say, an one-anna and four-ganda share. With respect to the rest, the subsequent accretions, she claimed the fifth, being 3 annas and 4 gandas. It has been found by both Courts that these accretions consisted of acquisitions made by Sibnath out of the family property, and not, as he contended, out of his separate funds, and therefore they became part of the family property, the family remaining joint, as has been found by both Courts, until the death of Sibnath.

The main defence to the claim of the plaintiff consisted of two deeds set up by the defendants. The first is called a deed of "anumati patro," alleged to have been executed by Romanath Lahiri in 1826, wherein he made a distribution of his property somewhat different from that which would have been made by the law. According to that deed, as alleged by the defendants, he retained a 3-anna share of the property for himself, he gave a 3-anna share of it to his eldest son, and a $2\frac{1}{2}$ -anna share to each of his four younger sons; and therefore, under that deed, it was contended by the defendants that the share of the plaintiff, instead of being to a fifth, was to only to a $2\frac{1}{2}$ -anna share. It was further contended that Chundramoni, the mother of the plaintiff, during her widowhood, *viz.*, in 1856, had executed another deed, whereby she had sold to Sibnath one-fifth of her $2\frac{1}{2}$ -anna share, that is, a $\frac{1}{2}$ -anna share, in consideration of money advanced by Sibnath, and of Sibnath having, as was alleged by the deed, paid a portion of his father's debts out of

his own property. With respect to this deed the findings of the Court are as follows:—The Judge of first instance doubted its execution by Chundramoni; he thought that, if executed, the execution was obtained from her by fraud and coercion, and he was further of opinion that no consideration for it had been proved. The High Court agreed with him, at all events on the latter point, and the result is, that, by the judgment of two Courts on what is a question of fact, that deed has no validity, and may be at once disposed of.

The two Courts differ with respect to the first deed; the Judge of first instance holding that the deed had been properly proved—that is to say, that secondary evidence of it was admissible and had been sufficiently given, the deed itself not being produced. The High Court were of opinion, in the first place, that the original deed had not been sufficiently accounted for to admit secondary evidence of its contents; and, secondly, that if secondary evidence were admissible, satisfactory secondary evidence had not been given. It is necessary, therefore, to inquire how the case stands with reference to this deed.

Their Lordships can entertain little or no doubt that a deed of the description which the defendants allege was executed by Romanath Lahiri. Such a deed is referred to in some judicial proceedings. It is referred to in a proceeding in the year 1832, whereby it appears to have been filed by one Kasinath Moitra, who then acted as a solicitor for some of the members of the family. It is also shown to have been filed in 1837 by the same person and returned to him. It further appears that what may be assumed to be the same deed was filed in the Court of Goalpara in 1857 by Ramottum Mullik, who acted on behalf of Konuk Tara, widow of the eldest son, and one of the defendants in this suit, though said to be only *pro formâ* a defendant. It appears that Ramottum Mullik, who was the muktear of this lady, obtained a copy of this deed; and further that he got back from the Court the original and signed a receipt for it on the 7th December 1857. There may possibly be a question whether Mullik was or was not authorised to act on behalf of this lady, but it appears to

1881

 BHUBANES-
 WARI DEBI
 v.
 HARISARAN
 SURMA
 MOITRA.

1881

BHUBANES-
WARI DEBI
v.
HARISARAN
SARMA
MOITRA.

their Lordships that, whether he was or not, the custody of the deed is tolerably well shown. If Mullik acted on behalf of the lady, the presumption would be, that he returned the deed to her. If he did not act on her behalf, it is shown to be in his custody, and has not been shown to have come out of it. Under these circumstances it appears to their Lordships that the very first duty of the defendants was to endeavour to obtain the deed from the custody either of Ramottum Mullik or of Konuk Tara, one of the defendants. But no attempt whatever appears to have been made to obtain it from either of them, or even to inquire whether or not it was in their custody, or in whose custody it was. In short, no search for it, or inquiry respecting it, of any kind, has been shown. Under these circumstances, by the law of this country, which has been in a great measure, with respect to deeds, made the law of India, it appears to their Lordships that the first condition of the defendants' ability to give secondary evidence—namely, the accounting for the nonproduction of the original—has not been complied with; and on that ground they are of opinion that the judgment of the High Court was right, and that secondary evidence was not admissible. That being so, it is not necessary to determine whether, if secondary evidence was admissible, the evidence given was sufficient. Their Lordships do not, however, desire to indicate any difference of opinion between themselves and the High Court upon this subject.

It has, indeed, been further argued by Mr. Doyne that the general conduct of the family shows that a family arrangement, such as is contained in this deed, was acted upon and recognised by the family. But whatever arrangement there was, according to his case, was under a deed, and at the most the evidence which he relies upon, the conduct of the family, could have no greater effect than to corroborate the secondary evidence of the contents of the deed, if secondary evidence were admissible.

The only other aspect in which the conduct of the family could be held to be material would be with respect to the application of the Statute of Limitations, that conduct tending to show that there had been a partition beyond the statutable

period. But here again there is a finding of two Courts that there was no division of the family until May 1861, within the period of limitation.

Under these circumstances, their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

1881

BHUBANES-
WARI DEBI
r.
HARISABAN
SURMA
MOITRA.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

Solicitor for the respondent: Mr. *T. L. Wilson*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and Mr. Justice Maclean.

KALLY CHURN SAHOO AND OTHERS (PLAINTIFFS) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

1881
Jan. 24.

Suit for Possession—Diluvion—Possession on Re-formation—Subsequent Diluvion—Possession—Limitation Act (IX of 1871), sched. ii, arts. 143, 145.

Per GARTH, C. J.—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case, the onus lies upon the dispossessor to show that he has acquired a title under the law of limitation which has put an end to the rights of the original possessor.

Koowar Singh v. Nund Loll Singh (1) and *Radha Gobind Roy v. Inglis* (2) distinguished.

Per WHITE, J.—The dispossession, or discontinuance of possession, mentioned in art. 143, sched. ii of Act IX of 1871 is that which occurs where the property is taken actual possession of by another, and does not apply to the

* Appeal from Appellate Decree, No. 717 of 1879, against the decree of J. M. Lewis, Esq., Judge of Bhagulpore, dated the 10th January 1879, affirming the decree of Hafizabdul Kurim, First Subordinate Judge of that district, dated the 13th May 1878.

(1) 8 Moore's I. A., 199.

(2) 7 C. L. R., 364.