Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheroocoomaree Debia v. *Keshub Chunder Bosoo and others, from the High Court of Judicature at Fort William, in Bengal; delivered 21st March*, 1872.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from the High Court of Judicature at Calcutta; and also, by special leave, from two judgments and decrees of the Zillah Judge of West Burdwan. As the suit was not heard on the merits by the High Court, and as the whole case is open on the decisions of the Zillah Judge, it is only necessary for their Lordships to deal with the latter.

The case is shortly this:—

The Appellant instituted her original suit under these circumstances. She alleged that the property in question was hers by purchase from the person who became entitled to it as heir of a former proprietor, on the death of the last survivor of the four widows left by such proprietor. The widows, she alleged, had made a grant to Mudhoosoodun Bosoo and Bhoyrub Chunder Bosoo, which grant would, of course, determine on the death of the last surviving widow. Upon such death she instituted her suit against the said Mudhoosoodun and Bhoyrub Chunder and others in assertion of her

right as purchaser from the heir and obtained a decree establishing such right as against the Defendants in that suit, and took possession in the usual form by planting bamboos in execution of the decree. The litigation in this suit was very hostile. The heirship of the Appellant's vendor was disputed strenuously, and it was only after appeal to the High Court that her right was finally established. The lands in question were alleged by the Appellant to have been held by Mokurreree tenure under the Rajah of Burdwan, but were included in a part of the Rajah's Zemindary, which he had granted in Putnee, and the result of that state of things would of course be that the Mokurrereedars were entitled to the possession of the lands, paying the rents reserved by their grant to the Putneedar, as middleman between them and the Zemindar.

When the Appellant came to take out execution of her decree, other members of the Bosoo family who had not previously intervened in the suit, objected to such execution, on the ground that they were the persons really in possession under a better title, which was thus alleged:—

Keshub Chunder Bosoo said "that lot Beesoonundunpore, &c., seven Mouzahs in Pergunnah Bistoopore (being the Putnee tenure above mentioned) having been sold at auction for the arrears of rent due by Beersing Baboo, Khetternaut Bosoo, and Hungseswur Bosoo purchased the same on the 15th May, 1849. In the year 1256, Khetternaut Bosoo granted the durputnee of his half share to me, and Hungseswur Bosoo granted the durputnee of his half share to Ram Chunder Bosoo, and since that time we have been in khas possession of the same."

On this claim being so made, it was put in course of trial as a regular suit between the objectors (the first three Respondents) as Plaintiffs, and the decree holder as Defendant, as provided by law in that behalf.

The alleged purchase in 1849 is not disputed, nor is the fact of the actual possession of the property by the Bosoo family, or some of them, denied; the Appellant's case being that what was so purchased was the interest of the Putneedar, and that the alleged possession was, in truth, a possession under the Mokurreree title derived from

the widows, as above stated, and, therefore, a possession not adverse to, but supporting her (the Appellant's) title.

The Court of First Instance was of that opinion, and gave judgment as follows :—

"I consider the Mokurreree right of the decree holder to be true. If the Plaintiffs have a putnee right, they can obtain the rent from the female Defendant."

The suit of the objectors was, therefore, dismissed with costs.

On appeal to the Zillah Judge, he at first thought that the suit had not been instituted with sufficient and proper allegations, and decided against the Plaintiffs, on that technical ground, but the High Court having remanded it to be tried on the merits, the Zillah Judge proceeded to try it, and gave judgment against the appellant, on the ground stated in page 96 of the "Record," the substance of which is "the long and undisputed possession of the Plaintiffs gives rise to a strong presumption of their title being good; the onus of proving a strict legal title lies on the party seeking to disturb such possession. The Defendant cannot disturb the possession of Plaintiff without proving possession within twelve years. Defendant has given no proof of possession within twelve years. On the contrary her witnesses prove the Plaintiff's possession. There is no proof, indeed, that Defendant has ever collected the rents, or has ever paid rent to the Putneedar. And she produces no title-deeds and no reliable proof that her vendor was ever in possession. It appears to me that the only ground on which the Defendant stands is that the undertenure subordinate to the Putnee is called a Mokurreree in various old papers, one if not more of which is a copy of a copy. This is quite insufficient to prove a title." And for these reasons the judgment of the Lower Court was reversed and the appeal decreed.

On special appeal, the High Court held that the case had not been really tried on the true merits, that is to say, under what title the khas or actual possession had been held, and remanded it for re-trial, and directed that such re-trial should be in the presence of the Putneedars and the Zemindar, so as to make a final decision.

Such re-trial was had. The Zillah Judge adhered to his former decision. His judgment is contained in a few lines (p. 139), as follows :—

"There is no proof whatever that the possession of the Durputneedars is the same as the alleged possession of the 'Durmokurrereedars' (the grantees of the widows). Defendant's witness acknowledges that a former suit for rent was instituted some seven or eight years ago, by Ram Chunder Bosoo, styling himself Durputneedar. The Putnee title is proved, and the Putneedars acknowledge the durputnee. But there is no proof whatever of the existence of the mokurreree, and, for the reasons given in my judgment of the 9th August, 1865, I believe that no mokurreree has ever existed as separate from the Putnee, though the latter tenure may have been occasionally styled a mokurreree. Therefore, clearly, the Durputneedar is entitled to his claim."

It appears to their Lordships that the Judge must have overlooked the most material evidence in the case. The title alleged by the Durputneedars was a title acquired in 1849 to the Putnee, which had previously been Beer Sing's.

Now, in 1841, there was a proceeding before the Magistrate, in which the above named Mudhoosoodun and Bhyrub Chunder Bosoo were Plaintiffs, and the same Beer Sing and one Christoprosaud, his Mookhtear, were Defendants, in which the whole title and the respective rights of the parties, as they then stood, were gone into and investigated.

Mudhoosudun and Bhyrub Chunder then expressly alleged their title as grantees of the "durmokurreree" right under the widows, and their possession under such title, and then insisted, as the Appellant now insists, that the Putneedar's right was only to the reserved rent.

As the result of that investigation the Magistrate found in favour of the then Plaintiffs that they were and had been in possession as Durmokurreereedars under the widows, and he accordingly, by his order, quieted them in such possession, and remitted the Putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought.

It appears to their Lordships that this proceeding, unless its effect can be altered by some other cogent evidence, is conclusive of the present case,

In the year 1841 the actual possession was clearly in the grantees of the widows; and any subsequent possession by other members of their families must be presumed and taken to be a possession by their permission and with their consent, unless the contrary is very clearly shown. If a widow or person claiming under a widow could destroy the title of the heir by allowing a friend or relative to have twelve years' possession of the estate, no heir would be safe.

In this case there is nothing to show that the possession was other than permissive, and on the other hand there is very strong evidence confirmatory of the presumption that it was permissive.

There is, moreover, considerable parol evidence that the possession was a joint family possession, and important documentary evidence to the same effect. Amongst these documents are a bond and a suit upon that bond showing that the purchase of the Putnee, although made in two names only, viz., Khetternauth Bosoo and Hungseswur Bosoo, was really made on behalf of themselves and of Mudhoosoodun, Ram Chunder, Bhyrub Chunder, and Keshub Chunder (Mudhoosoodun and Bhyrub Chunder being the two Durmokurrereedars). There are also of record a petition purporting to be a petition of Khetternauth's, and filed as far back as 1858, claiming to be a co-sharer in the durmokurreree taken from the widows in the name of his brother Mudhoosoodun; and a similar petition, of the same date, of one Esaunchunder Bosoo, claiming in like manner to be a co-sharer in the durmokurreree taken in the name of his uncle, Bhyrub Chunder.

All the probabilities of the case lead to the same conclusion. It is in the highest degree improbable that Mudhoosoodun and Bhyrub Chunder, having established their possessory right against Beer Sing, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same Beer Sing's right. And it is equally improbable that, if they were not in possession, but the possession was in their relatives, (the Putneedars) they would have litigated the original suit in the way in which it was litigated.

Their Lordships are clearly of opinion that

the family or families of the Bosoos were in joint possession—that such possession was obtained and continued under the widows' title, and is to be referred solely to the title which is now vested in the Appellant, and that the right of the Appellant can in no wise be affected by the acquisition of the Putnee title in 1849.

The Zillah Judge seems to have thought throughout that the mere production of the purchase of title acquired in 1849, and the possession by the purchaser subsequent to that year were sufficient to establish his right. If he had rightly apprehended (as was clearly pointed out to him by the High Court) that such purchase and possession were perfectly consistent with the Appellant's case, if that case were true—if he had considered the proceeding in 1841, and ascertained in whom the possession then was and under what title, and had inquired whether any change had been made in such possession between 1841 and 1849; or whether there had been any change in the possession consequent on the purchase in the latter year, and how that change, if any, had been effected, there would not have been what their Lordships cannot but consider a serious miscarriage of justice.

Their Lordships will humbly recommend to Her Majesty that, notwithstanding the Decree of the High Court of Judicature at Fort William in Bengal of the 21st February 1867 on the Special Appeal, the Judgments and Decrees of the Zillah Judge of West Burdwan dated respectively the 9th August 1865 and the 2nd August 1866 ought to be reversed, and that the Decree of the Principal Sudder Ameen of West Burdwan of the 21st July 1864, ought to be affirmed with a declaration that the Appellant is entitled to possession of the property claimed, and that the suit ought to be remanded to the High Court of Judicature, with directions to cause the Decree of the Principal Sudder Ameen, of the 21st July, 1864, to be executed in due course of law, and to take an account of the mesne rents and profits of the property claimed, to be repaid to the Appellant by the Respondents, Keshub Chunder Bosoo, Redaynatt Bosoo, and Ahladinee Dasee; and their Lordships will further report to your Majesty that the said Respondents ought to pay to the Appel-

lant her costs of the proceedings before the Principal Sudder Ameen and before the Judge of the Zillah Court of West Burdwan, and that the costs (if any) paid by the Appellant in the Zillah Court be repaid to her by the Respondents.

And the Respondents are also to pay to the Appellant the costs of this Appeal.

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