Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hurro Soondari Debia Chowdhrani v. *Kesub Chunder Acharjya Chowdhry, from the High Court of Judicature at Fort William in Bengal; delivered 7th May* 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is a suit brought by Hurro Soondari Debia, the widow of the late Anund Chunder Acharjya, against Ishan Chunder Acharjya and Kesub Chunder Acharjya, the sons of the late Ram Chunder, by which she seeks to recover certain portions of three villages called respectively Byara, Kismut Kandania, and Bhatipara.

Anund Chunder and Ram Chunder were brothers, and were entitled jointly to an estate consisting of a portion of Pergunnah Alapsing. Proceedings were taken under Regulation XIX. of 1814 of the Bengal Code for a partition of the estate. For this purpose it was divided into three dehas, or circles, called Koomria. Kandania, and Dhanikhola. An Ameen was deputed to make the partition, and according to the goshwara or abstract statement prepared by him which is set out in the Supplemental Record, each party was to receive certain villages in each of the three circles; but in order to make equality of partition the three villages which were the subject of the suit, viz., Byara, Kismut Kandania, and Bhatipara, were proposed to be divided in unequal portions between the two parties.

L 827. 125.—5/79. Wt. B 30. E. & S.

Village Byara was in circle Koomria, Kismut Kandania in circle Kandania, and village Bhatipara in circle Dhanikhola.

The goshwara, so far as it related to the villages in question, was divided into several columns; the first contained the name of the village, the second the extent of the share to be allotted, the tenth the assessed jumma of the share allotted, and the intermediate columns the description of the lands included in the share allotted, such as unculturable waste land, culturable waste land, assessed land in cultivation, &c.

It appears that the three circles were intended to be divided in such a manner that each party was to receive villages and portions of villages, of which the assessed jumma of those included in circle Koomria was stated to be Rs. 10.735 odd, of those included in circle Kandania Rs. 3.118 odd, and of those included in circle Dhanikhola Rs. 3.059 odd. (See Supplemental Record, pages 4 and 5, and 38 and 39.)

Those amounts were inclusive of the amounts which in the goshwara were stated to be the assessed jummas of the portions of the three villages intended to be allotted to the respective parties. For instance, the sum of Rs. 305 odd, stated to be the assessed jumma of the share of village Byara proposed to be allotted to the Plaintiff, was included in the Rs. 10,735, the assessed jumma of the whole of her share of circle Koomria, in which the village was situate, whilst the sum of Rs. 371 odd, stated to be the assessed jumma of the Defendant's share of the same village, was included in the sum of Rs. 10.735, the assessed jumma of his share of that circle.

It should be remarked that although the portion of the village proposed by the Ameen to be allotted to the Plaintiff was greater than that proposed to be allotted to the Defendant, the former being 2. 14. 2. 2. and the latter

2. 12. 0. 1., the assessed jumma of the proposed share of the Defendant was greater than that of the Plaintiff. This is accounted for by the fact that the share of the Plaintiff contained more unculturable waste land than the share of the Defendant, whilst the quantity of assessed land in cultivation in the Plaintiff's share bore the proportion to the assessed land in cultivation in the Defendant's share of 79 to 100.

In England if a man claims property under a title derived through a sale in execution of a judgment to which he is a party, it is not sufficient to prove the writ of execution, but he must prove the judgment in order that the Court may see that the writ of execution was warranted by the judgment. So here the Plaintiff ought to have proved the order of partition drawn out by the Collector in pursuance of section 13 of the Regulation. But no such order was produced or put in evidence, and there is nothing except the istahar of the Deputy Collector to show that the partition of the villages was ever completed. The Plaintiff in her plaint alleges that the butwara was approved by the Sudder Board of Revenue, but there was no evidence to that effect. It is evident from the goshwara that the shares of the three villages were intended to be divided by metes and bounds, otherwise the Ameen could not have stated the quantity of unculturable waste and of assessed land in cultivation, and of the other description of lands intended to be included in each of the shares. The Plaintiff states in her plaint that the shares of the villages were not definitely demarcated, but remained undivided and joint. She relies upon the istahar of the Deputy Collector of the 4th October 1861 (Record, p. 75), directed to the Nazir of the Collectorate, directing him to require the ryots to pay their rents to the Plain-

tiff and to the opposite party according to the shares stated in the schedule thereto, in which the shares were stated as in the second column of the Ameen's goshwara, instead of in the tenth column thereof, thus fixing the shares according to the quantity instead of the quality and value thereof, which were the basis of the partition. For instance, the Plaintiff's share of Byara was stated to be 2. 14. 2. 2., and the Defendant's 2. 12. 0. 1., which gave the Plaintiff a larger share in quantity without referring to the quality of the land or to the fact that in the goshwara the assessed rent of the Plaintiff's share was less than that of the Defendant's share. It is clear therefore that if the butwara was completed according to the Ameen's report the istahar was not warranted by it.

The Plaintiff's case was that in the year 1861 she was put into possession according to the share stated in the schedule to the istahar, and that she was dispossessed by the Defendants in 1865 of so much of the villages as was in excess of a one half share thereof.

It was remarked by Mr. Cutler, and it appears to their Lordships that the remark is entitled to considerable weight, that from 1865 the Plaintiff did nothing until 1873, when she presented a petition, which is to be found at page 121 of the Record, in which she stated: "There was "no division of the lands and rent thereof; and "as the lands and rent of the villages given "in the schedule have not been demarcated "and divided. there is great inconvenience "in cultivation, habitation, and collections." &c.: and therefore she prayed that a butwara might be made. dividing the villages according to metes and bounds. and to have a regular partition made of them. The Collector ordered. "That a purwannah be issued to the Ameen "to measure all the lands of the villages

" mentioned in the petition and according to " the quantity of the lands and the number " of dehas, first to separate the lands in the " petitioner's share, and then to prepare a " saham of the shares of the proprietors of " the mehals, the subject of partition;" in fact he ordered that there should be a regular partition of the villages. That order was made by the Collector on the 6th September 1873. Nothing appears to have been done upon it, but on the 20th September 1873 the Plaintiff commenced her suit, seeking to recover the proportions of the three villages according to the second column in the Ameen's goshwara, as ordered by the istahar. The Judge of the first Court acted upon the istahar, and held that the Plaintiff was entitled to recover the rents of the three villages according to the proportions given in the second column of the Ameen's goshwara; but the High Court considered that the Subordinate Judge had misunderstood the butwara and the Ameen's report, and they considered that it was intended to divide the villages, not according to the proportions mentioned in the second column, that is to say, according to the quantity of the land, but according to the value thereof as ascertained in the column defining the fixed jumma thereof. They say, "It is admitted on all hands that the " butwara effected no separate definition of lands " in those villages in which each shareholder had " a division of interests. In mouzah Byara, for " example, the saham paper records that the " total amount of rent paying lands apper- " taining to Defendant's share is 116 puras " odd, of which 4 puras odd are unculturable " or fallow, and the balance, 111 puras odd, " are paddy lands, and that the gross rental is " Rs. 371. 2. 9. On the other hand, the total " amount of rent paying lands appertaining to " Plaintiff's share in this village is 127 puras

"odd, of which 41 puras odd are unculturable "or fallow, and the balance, 86 puras odd, "paddy lands, while the gross rental is "Rs. 305. 6. 0. There is thus the anomaly "presented of the larger gross area of land "falling to the Plaintiff's share carrying with "it a smaller rental than the lesser area as- "signed to the Defendant's share. The same "divergencies between area and rental exist "in respect of the other two villages of Kan- "dama and Bhatipara. It is thus at once "apparent that the specification of shares which "appears in the second column of the saham "paper has reference not to the proportion of "the rent due to and realizable by each share- "holder, but to the total quantity of the land "held by him in each village; and the fact "that the rental is not in proportion to the "total area is evidently attributable to the "character of the lands apportioned."

It appears to their Lordships that the High Court were right in that view of the butwara, and that the Plaintiff is not entitled to recover according to the quantity of the land, but that if she was entitled to recover at all, it ought to be in proportion to the rents specified in the last column. It appears to their Lordships that the Plaintiff had to make out her title. No order of the Collector for the butwara was proved. The Ameen had no power to make it, and it never was completed as regards the three villages in question, which according to the Ameen's report must have been intended to be divided by metes and bounds. The Plaintiff derived no title from the butwara to recover the land in the proportions claimed, nor is it equitable that she should do so.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and the Appellant must pay the costs of this Appeal.