Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhoobuneswari Debi v. Hurri Sarun Surma Moitro, from the High Court of Judicature at Fort William in Bengal; delivered 12th November 1880.

Present:

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

THE facts necessary to the understanding of this case are as follows:—Romanath Lahira, 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 Sibnath, the youngest son of Lahira, 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 Lahira, and Konuk Tara, the widow of the eldest son of Romanath Lahira. Neither Nilcomul nor Konuk Tara appear in this Appeal, the only Appellant being Bhoobuneswari, 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

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admitted that she had been in possession for some time of a 2 annas share. Therefore she only claimed the difference between that 2 annas share and the fifth, that is to say a 1 anna and 4 gundas share. With respect to the rest, the subsequent accretions, she claimed the fifth, being 3 annas and 4 gundas. 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 Patra, alleged to have been executed by Romanath Lahira 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 annas share of the property for himself; he gave a 3 annas share of it to his eldest son, and a $2\frac{1}{2}$ annas 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 $2\frac{1}{2}$ annas 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 $2\frac{1}{2}$ annas 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 Lahira. 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 moktear 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 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 non-production 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.