Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheik Torab Ally v. *Sheik Mahomed Tukkee and others, from the High Court of Judicature at Fort William in Bengal; delivered 20th November* 1872.

Present:

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

SIR LAWRENCE PEEL.

THIS is a suit brought for confirmation of possession.

It appears that Sheik Mahomed Afzul had three wives. By his wife Mussumat Wujjeeha he had several children, namely, the Appellant and the Respondents in this suit. His wife Bibee Jan had no issue. Sheik Torab Ally, the Appellant in this suit, claims to be entitled to certain property which he says belonged to Bibee Jan, who he says conveyed it to him by a bill of sale, and afterwards remitted to him the whole of the purchase money, with the exception of a small portion which he paid off to a mortgagee. The Respondents, his brothers and sisters, say that the property did not belong to Bibee Jan in her own right, but that it was purchased by Mahomed Afzul, her husband, in her name benamee for him; and, consequently that upon his death it became vested in the Respondents and the Plaintiff, as his heirs.

The two main questions in the suit were—first, whether Bibee Jan bought the property for her

own benefit, or whether it was purchased by her husband in her name benamee for himself; and, secondly, whether assuming that the property belonged to Bibee Jan in her own right, and that she did not hold it benamee for her husband, she conveyed it by bill of sale to Sheik Torab Ally.

Now this is a suit not for relief, but for confirmation of possession. The Plaintiff says that he sues on a claim for relief from injury and for the confirmation of his possession. He then states that the Defendants commenced a proceeding against him under Act 4 of 1840 claiming that he was about to injure them, and that if the magistrate did not interfere, a riot would take place; that the magistrate did interfere and decided in favour of the Plaintiff. The magistrate had no right whatever to enter into any question of title. He was simply to decide as to who was the person in possession. The Plaintiff says, "He decided " that I was in possession and that I was to be " retained in possession;" but, subsequently, that decision of the magistrate was reversed by the sessions judge. Then he says: "From that date " the Defendants have been practising various " frauds and raising disputes against my possession. " The cause of action arose from the passing of the " said decision of the Court of Circuit. I pray that " by issuing summons to the Defendants, and " making investigations required by the Court, " my possession of the property claimed may be " ordered to be confirmed;" that is, he asked not merely that he should be retained in possession, but that the Court should declare affirmatively that his possession was accompanied by title. This involves the necessity of determining the two questions to which I have referred.

Now the evidence upon both those points was exceedingly unsatisfactory. If the Plaintiff meant that the Court should declare that the property belonged to Bibee Jan, it was necessary for him, in a suit of this nature, in which he asked for an affirmation of his title, to show

affirmatively how the property became vested in Bibee Jan, and out of whose money the property was purchased. But he has failed to do that, and their Lordships are of opinion that he has not proved affirmatively that the property did belong to Bibee Jan in her own right.

Then, with regard to the bill of sale, some of the witnesses prove that a bill of sale was executed by Bibee Jan on the 29th of Bysack 1258. Both the judge in the Court below, and the judges of the High Court have found as a fact that Bibee Jan died on that very day; and it certainly is very inconsistent with the whole of the evidence, that, if she died on the 29th of Bysack 1258, she should have executed a deed on that very day in the manner in which the witnesses depose that it was executed.

The deed is not forthcoming, and the excuse for not producing it is, that the Plaintiff intervened in a suit in the Moonsiff's Court between other parties; that he gave this deed, and another deed to which we shall presently advert, to his pleader; that that pleader gave him a receipt for the two deeds, and filed them in the Moonsiff's Court, and that during the mutiny, the records of the Moonsiff's Court having been destroyed by the mutineers, those two deeds are not forthcoming.

It is a very important fact that there being two deeds, namely, the deed of sale and the deed of remission, and the pleader having given his receipt for those two deeds, the only deed which in the record of the Moonsiff is stated to have been lodged in his Court is the deed of sale. There is nothing on the records of the Moonsiff's Court to show that the deed of remission was lodged. We have, therefore, only the evidence of the pleader that he lodged that deed as against the fact that in the record of the proceedings of the Moonsiff as to the documents which were lodged in his Court no notice whatever is taken of the deed of remission.

If that deed of remission existed and was not lodged in the Moonsiff's Court it would not have

been destroyed with the other records of the Moonsiff, and it ought to be forthcoming. If it existed and was not destroyed it would have been very important that it should be produced to the Court, because in all probability that deed would have recited the bill of sale. The remission is said to have been executed under these circumstances:—the Plaintiff was to pay to Bibee Jan 15,000 rupees as the purchase money of the property; he says that he paid out of the purchase money to the holder of a zuripeshghee lease, about Rs. 1,400, and that then Bibee Jan excused him by this deed from paying the remainder of the purchase money. It is most extraordinary that all this should have taken place on the day of the lady's death; that, in the first place she should have executed to him an absolute bill of sale treating Rs. 15,000 as the purchase money; that on that same day she should have executed to him a remission of the remainder of the purchase money, giving him credit only for that portion which he had paid off to the holder of the zuripeshghee. If he did pay off the zuripeshghee or mortgage, there is no reason given why the zurispeshghee holder has not been called as a witness. His evidence would have been most important. If the case is true he would have said, "I was the holder of a zuri-" peshghee lease. I was paid off the amount " of my mortgage by the Appellant, and I de-" livered up my zuripeshghee lease to him;" but neither the holder of the zuripeshghee lease, nor the lease itself which was paid off, is produced.

Under these circumstances the Court cannot say that they are so satisfied affirmatively of the Plaintiff's title that they can declare not only that he has possession, as he says he has, but that he has that possession in consequence of a valid and good title. The Court cannot make such an affirmative declaration of title, upon the evidence which has been given in the cause.

Their Lordships are therefore of opinion that the decision of the Court below is substantially

correct and that the suit ought to be dismissed. But they cannot help remarking that as regards the deed of sale, the learned judges of the High Court, in expressing their opinion regarding the bill of sale, do not appear to have had before their minds the whole of the evidence in the cause.

Looking, then, to the case as it stands, the nature of the suit, and the nature of the evidence that has been given, their Lordships think that the Appeal ought to be dismissed, and the judgment of the High Court affirmed, which dismisses the suit; but that the dismissal of the suit ought not to be treated as a binding adjudication of title between the parties.

Their Lordships, therefore, will humbly recommend to Her Majesty that this Appeal be dismissed and the judgment of the High Court affirmed, with costs, but with a declaration that the judgment and decree in this suit do stand without prejudice to any question of title between the parties in any future suit or proceeding.

There was one point I should have mentioned, that the suit proceeds for 10 annas odd as the Plaintiff's property, and 1 anna odd as his right of lease and sub-lease. Mr. Bell has admitted that he cannot maintain the decision as to that one anna odd, consequently as to that there will be a simple dismissal, without any declaration as to its being without prejudice.