

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Saroda Prosunno Paul and another (executors of Rye Churn Paul, deceased) v. Sham Lall Paul and another, from the High Court of Judicature at Fort William in Bengal; delivered 5th March 1892.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD HANNEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

On the 25th September 1822 a suit was brought in the Supreme Court at Calcutta on the Equity side by Issar Chunder Paul, one of the sons of Roghoo Nauth Paul, deceased, and Khetter Chunder Paul, son and heir of Tarra-chund Paul deceased another son of Roghoo Nauth, against the other members of their family, which was an undivided Hindoo family, to have the will of Roghoo Nauth established and the provisions thereof carried into effect, and to have a partition of the immoveable estate of Roghoo Nauth, subject to the provisions of his will. On the 22nd April 1823, by an order of the Supreme Court, Commissioners were appointed to make the partition, with power to examine the parties and their witnesses on oath, and to compel the production of documents. On the 28th June 1825 the Commissioners made

their report, and thereby certified that they had allotted to Khetter Chunder Paul, with other property, a portion of tenanted ground in Deehee Entally, called Sontose's garden, containing by admeasurement about four bighas and thirteen cattahs, and included within the boundary line coloured green in the map of the garden annexed to the report. The map is in existence. There is no doubt that Khetter Chunder's allotment, as delineated on the map, does contain four bighas and thirteen cattahs. And there is no question as to the exact position and boundary line of that allotment.

Khetter Chunder died intestate, and without issue, in 1837, leaving Pearymoney Dossee his sole widow and heiress. Pearymoney died in 1884, and thereupon Rye Churn Paul became the heir of Khetter Chunder, and entitled to his estate. In August 1885, Rye Churn Paul brought a suit in the Supreme Court, in its ordinary original civil jurisdiction, against the Respondents for possession of four bighas thirteen cattahs of Sontose's garden, as having been allotted to Khetter Chunder by the decree in the partition suit. The plaint alleged that, from the time of the decree down to the time of his death, Khetter Chunder was in possession of the piece of land so allotted to him, and that after his death Pearymoney had possession for many years, and that the Defendants were then in possession. Besides relying on a Hindoo widow's power of alienation in case of necessity, the written statement of Sham Lall, the real Defendant, denied that Roghoo Nauth died possessed of the four bighas thirteen cattahs, and alleged that within the land the subject matter of the suit about one bigha of land, described inaccurately in the conveyance and in a subsequent pattah thereof as sixteen cattahs, had been purchased by Pearymoney with her own moneys from one Shaik

Budooroodin under a bill of sale dated the 25th December 1834, and never was part of the estate of Roghoo Nauth. The main defence failed. But both Courts have dealt with the minor point suggested by Sham Lall. The learned Judges of the Court of Appeal, differing from the Judge of First Instance, have found or placed within Khetter Chunder's allotment Budooroodin's sixteen cattahs, now developed into one bigha four cattahs. In order to arrive at this result they assume a blunder on the part of the partition Commissioners, and an adverse title to part of the allotment extinguished in 1834 by Pearymoney's purchase.

The Defendant Sham Lall derived his title to the premises under a mortgage granted by Pearymoney to one Lokenauth on the 7th August 1867. The mortgage deed is in English form. It contains two important recitals. In the first place it recites that Khetter Chunder "was in his lifetime and at the time of his death seized and possessed" among other property of the four bighas and 13 cattahs, formerly called Sontose's garden. That is the piece of land allotted to Khetter Chunder on the partition. Then it recites Budooroodin's conveyance of the 16 cattahs. They are described as "adjoining to the said piece or parcel of land measuring four bighas and 13 cattahs hereinbefore mentioned, and forming together one entire piece or parcel of land measuring five bighas and nine cattahs." The deed proceeds to convey to Lokenauth by way of mortgage among other property "all that piece or parcel of land . . . measuring five bighas and nine chittahs or thereabouts," describing it by its abuttals. Now the first observation which arises in reference to this deed is this:—It is directly at variance with the allegations of the principal Defendant in his written statement.

The Defendant alleges that the 16 cattahs conveyed to Pearymoney by Budooroodin were within the ambit of the four bighas and 13 cattahs allotted to Khetter Chunder. The mortgage deed shows that they were two distinct properties, adjoining but not intermixed. In the next place it is to be observed that in 1868, when Rye Churn Paul brought a suit against Pearymoney and Lokenauth to impeach Pearymoney's dealings with her husband's estate, Lokenauth put in a defence on oath, in which he stated that from the title deeds in his possession he believed that the four bighas and thirteen cattahs, with certain house property, did belong to Khetter Chunder in his lifetime, but he alleged that the rest of the property in the mortgage was held under a different title. He said he was not bound to disclose his title to it, and therefore he objected to produce the mortgage deed. He added that on the occasion of the mortgage the title to the property was investigated by his attorney. Nothing could show more plainly that the theory on which the judgment under appeal proceeds had not been invented in the year 1868.

Lokenauth, suing on his mortgage, obtained a decree for sale in default of payment of the amount due. The land in mortgage was sold under the decree on the 19th February 1870. It was bought by one Modoosoodun Dutt. On the 1st December 1877 Modoosoodun Dutt became insolvent. His property was put up for sale in lots by the Official Assignee. At the auction the Defendant Sham Lall in the name of his son, the Co-Defendant, bought Lot 2. Lot 2 was conveyed to him by deed dated the 4th August 1880. On examining this deed it seems clear that Lot 2 is the piece of land allotted to Khetter Chunder Paul on the partition, diminished slightly in extent by some

encroachments which are noted by Mr. Cantwell, who surveyed the property on behalf of the Plaintiff in 1888. Lot 2 is described as "containing by estimation four bighas and three chittahs, and 13 square feet, more or less." The record is silent as to the other lots, among which Budooroodin's 16 cattahs if they exist might not improbably be found. But it would, in their Lordship's opinion, be an unprofitable task to enquire what has become of these 16 cattahs, and what is their precise situation. The Plaintiff does not claim them. The Defendant Sham Lall has not connected himself with them by any document of title or anything that can be described as evidence.

Under these circumstances, Mr. Justice Trevelyan, who heard the case in the first instance was "satisfied that the land in dispute belonged—the whole of it—to Khetter Chunder Paul," and he made a decree to the effect that possession of the premises should be delivered to the Plaintiff.

The Defendant Sham Lall appealed to the High Court in its appellate jurisdiction. The learned Judges who heard the appeal have modified the decree of the Lower Court by excluding from it one bigha and four cattahs, as representing Budooroodin's 16 cattahs, measured off in a position determined apparently by mere guesswork.

Their Lordships are of opinion that there is no ground for assuming that the members of Roghoo Nauth's family, who were parties to the suit for partition, were under any mistake as to the property which belonged to their father, or that there was any error or want of due care on the part of the Commissioners (whose proceedings appear to their Lordships to have been perfectly regular), or that there was ever any adverse

claim to any part of the land allotted to Khetter Chunder Paul.

Their Lordships think the title of the Plaintiff to the land claimed in the plaint was proved, and they will humbly advise Her Majesty to affirm the decree of Mr. Justice Trevelyan, to reverse the decree of the Appellate Court, and to order the appeal to it to be dismissed with costs. The Respondent, Sham Lall Paul, will pay the costs of this appeal.

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