

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Chunder Dutt v. Pearee Lall Mundul and others, from the late Sudder Dewanny Adawlut at Calcutta; delivered 13th December, 1869.

Present:

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE GIFFARD.

SIR LAWRENCE PEELE.

THIS case was heard as one Consolidated Appeal, pursuant to Her Majesty's Order in Council of the 27th July, 1863. The Consolidation was of two Appeals which the Petitioner, the present Appellant, by a special application to Her Majesty in Council, asked leave to bring.

The application to Her Majesty was for leave to appeal, not only against two Decrees of the late Sudder Dewanny Adawlut at Calcutta, made on Special Appeals to that Court, but also against two Decrees of Mr. La Tour, the Judge of the Civil Court of the Zillah of the 24 Pergunnahs, each of the four Decrees being specified in the Petition by its date.

The order of the Judicial Committee really was to grant leave to Appeal as prayed, but inadvertently it was drawn up in words which, construed literally, would limit the Appeal to the Decrees of the Sudder Court only; but for reasons to be stated presently, it must be taken that there was leave to appeal against the four Decrees.

The original Suits, Nos. 68 and 69 of 1852, were brought in the Zillah Court of the 24 Pergunnahs before the then Principal Sudder Ameen Lokenauth Bose. They were of the nature of ordinary ejectment suits, for the recovery of the lands sued for in each, and of wasilat or mesne profits.

In No. 68 the Plaintiff sought to recover 6 cottahs 4 chittacks; in No. 69, 1 beegah 4 cottahs 6 chittacks and $13\frac{1}{2}$ teals of land: the total being 1 beegah 10 cottahs 10 chittacks and $13\frac{1}{2}$ teals, part of 1 beegah 14 cottahs, to which he made title as follows:—

His son had purchased the 1 beegah 14 cottahs at a sale in execution of a Decree in a civil suit for a money demand, and had subsequently conveyed it by deed of gift to the Plaintiff, his father.

The Decree holders were Gooroodoss Ghose and Bhuggobutty Dossee, widow and heiress of Ramtonoo Ghose, who had obtained their Decree in a suit brought by them against Hurramoney Dossee, widow and heiress of Tarrachund Ghose, brother of Gooroodoss and Ramtonoo.

The Plaintiff thus accounted for the entire quantity of 1 beegah 14 cottahs. He stated in his plaint that he had possession of 3 cottahs 5 chittacks $6\frac{1}{2}$ teals; that one Ramlochun Seal, the ancestor of the Seal Defendants, had concealed half a cottah; that the Plaintiff's son had originally obtained possession of 9 cottahs 9 chittacks $6\frac{1}{2}$ teals only, and that the residue of the whole quantity the Munduls had, by force and collusion with the tenants, kept in their possession. He gave this explanation as to the 3 cottahs 5 chittacks $6\frac{1}{2}$ teals: "That out of the eastern portion of the southern parcel of land within the bazaar my son had an absolute right to 10 cottahs of land, held by the following Ryots;" and after an enumeration of their names, with the quantities of their lands, and amounts of rents respectively, the plaint proceeds thus: "But in collusion with the said Munduls, the tenants gave cabooleuts, in the said month of Srabun, of a one-third on the said land, namely, 3 cottahs 5 chittacks $6\frac{1}{2}$ teals, at 83 rupees 15 annas 4 pice."

The Plaintiff divided the lands sued for in No. 69 into two portions, one described as the southern, containing 8 cottahs 2 chittacks, and the other as the

northern, containing 16 cottahs 4 chittacks. This division is not derived from anything contained either in the lot at the sale which described his son's purchase, or in the deed of sale conveying the property to the purchaser, but is apparently due to the fact that the two parcels of land are separated from each other by intervening land. The Plaintiff's title to all the land for which he sued in the two actions was the same, but he divided his claim into two suits, stating as the ground for doing so that the dispossessions of which he complained took place at different times, and that the actors in both were not wholly the same persons.

In No. 68 the Defendants were first, Peary Leal Mundul (who, dying during the litigation, is represented by his two sons (Respondents in this Appeal), and two other Munduls of the same family, the three being styled in the plaint as the "actual dispossessors;" secondly, certain persons representing Ramlochund Seal; and lastly, certain persons, the representatives of the Decree holders and of the judgment debtor, that is, of the Ghose family. In No. 69 these last parties are said to be joined *pro forma*; the rest are called the actual dispossessors, and are the same as the parties in No. 68, with the addition of four other Munduls and the widow of a fifth.

The pleadings, which are in the old form, are lengthy, extending to a Rejoinder, with much repetition and the customary imputations of fraud on both sides. Suit No. 68 was brought for a small portion of the land, on the west; Suit No. 69 included the rest of the lands sued for, divided into the southern and northern portions. The boundaries in the plaints are meant by the Plaintiff to describe and demarcate a holding called No. 85, in which all the land to which he was entitled was, by his admission, situate. This admission, however, applies only to the Collectorate Holding No. 85, alluded to in the issues.

To suit 68, the Munduls, Defendants, answered that these lands were not in No. 85, nor part of the Plaintiff's son's purchase; that they were their own old *dinpin* lands; and that neither the Plaintiff's son, nor the Plaintiff had ever been in possession of them. The Seals denied, first, any connection whatever with the lands in this part; and, secondly,

that they had dispossessed either the Plaintiff or his son of any portion of them.

In Suit 69, the Defendants, the Munduls, answered as to the lands in the southern part of the holding, as divided by the plaint, by admitting a title in the Plaintiff as a sharer of one-third. They pleaded that Tarrachund was not exclusive owner of any part of the lands sued for in this suit, but a co-sharer only with his brothers; that he had but one-third; that the two-thirds of the other members of the family had passed to them, the Munduls, by mortgage and foreclosure, and that they had obtained possession under a writ of possession issued by the late Supreme Court at Calcutta. They denied that the Plaintiff had any title to the lands in the more northern part lying beyond No. 78, 78-1, and 78-2. Of these they said they were the purchasers at the auction sale, their lot consisting of a share in about 1 beegah 8 cottahs, described as Lakiraj, and as the share of Tarrachund. These lands they alleged *not to be* in No. 85, and *to be* beyond the sale boundaries, to the north. They alleged the Plaintiff's northern boundary to be the southern boundary of the holding described as No. 78, 78-1, and 78-2, and that this holding severed wholly the two portions which the Plaintiff sought to include in his one lot, described in the sale proceedings on the attachment as "one parcel," and they insisted that the Plaintiff must be limited to one parcel.

The answer of the Seals was somewhat different; but as a decision which is not appealed from was made in their favour, it is unnecessary to state its substance.

The case will be made plainer by stating the description of the property, and of the boundaries, as given in an instrument called a zimmanamah, or deed of security, part of the usual proceedings in an attachment previous to sale under a decree; and also the description of the property in the deed of sale executed to the Plaintiff's son on the completion of his purchase. The property is thus described in the zimmanamah:—"One parcel within the bazaar of Kaleychn Mistree, about 1 beegah 14 cottahs of rent-paying land, the self purchased lands of the Defendant (meaning the said Tarrachund) bearing no shares." In a separate column in the same line, the land was

further described as "belonging to the Defendant exclusively." The boundaries of the land were described as follows:—"East of the Government road, north of the Tank of the said Tarufdar, west of the bazaar tenants and the lands of Rajah Sunkur Ghosal, and south of the lands." In the bill of sale the property is described as "mentioned in the annexed list." That list is written under the Bill of sale, and is as follows:—"List of the property, Lot 9, Pergunnah Mogoorah, in the village of Kidderpore, 1 beegah 14 cottahs rent-paying purchased land." The words of the zimmanamah, "one parcel" and "about," are not found in the bill of sale. The number of the lot, and the word "purchased," in connection with rent-paying land, evidently refer to the lot under which the Plaintiff's son purchased.

The deed of sale contains an additional statement, viz., that one Bhoyrubchunder had claimed the lands, and "therefore, 'that the purchaser has in this purchased property become like the former proprietor.' Since some stress was laid on this expression in the argument for the Respondents, it is proper to state further, that in the deed of gift from the Plaintiff's son to the Plaintiff, the property is further described as the *share* of Hurromoney, the widow of the late Tarrachund Ghose."

The property remained under attachment for eight years. None of the Defendants made any objection to the description of the property pending the attachment, or previous to the sale.

After the completion of his purchase, the Plaintiff's son tried to obtain possession of the land. He was opposed in that attempt, and, except as to a small part of the land, with success. The Plaintiff imputes this opposition to the collusion of the Munduls with his tenants. With the exception of one suit, that brought by the Plaintiff against one Anundchunder Sircar, in which Pearee Lall Mundul intervened, it will not be necessary to allude further to this earlier litigation.

The purchaser obtained caboolents from certain of the tenants, some of whom, viz., those referred to in connection with the 10 cottahs, the Plaintiff states to have subsequently attorned to the title of the Munduls. In this state of things, his title being

disputed as to a large part of his purchase, and as to the rest, cabooleuts having been given and accepted, apparently without protest, as for a share, viz., one-third only, the purchaser made a gift of the land to his father, the Plaintiff, by the description before referred to, of "a share."

After this gift the Plaintiff commenced his proceedings against Anundchunder Sircar.

He relied on an ekrar and a cabooleut, executed according to the Plaintiff's statement by that Defendant. Pearee Leal Mundul, intervened as an objector. Both ekrar and cabooleut were denied, and declared by the Defendants to be forgeries. The Judge doubted their genuineness, but hesitated to pronounce them forgeries. He said, that if not forgeries, they were probably extorted, alluding to a complaint of several of the tenants, including Anundchunder, publicly preferred to a magistrate, but not substantiated by proof that the Plaintiff was imprisoning them, and otherwise using force to obtain from them engagements with him as landlord. One of the issues was, whether the Plaintiff was thus irregularly seeking to obtain possession, without instituting a suit to try the proprietary right. The Judge decided the cause on the ground that the title was in dispute, and that a summary suit for rent could not be entertained. On Appeal, the Judge before whom the case next went nonsuited the Plaintiff, on a merely technical ground.

The Plaintiff having thus failed to obtain possession by effecting arrangements with the tenants, or by litigation with them, proceeded to take a step at last which, if well advised, he would have adopted in the first instance, viz., that of bringing a regular suit for the decision of the question of proprietary right. He preferred the Suits No. 68 and No. 69, in which, dividing his claim as before stated, he brought forward his whole demand. As a complaint of this division was renewed upon the hearing of this Appeal, it may be convenient to dismiss the subject at once by observing that their Lordships attach no weight whatever to it, and do not think that the division complained of was made for any other reason than that assigned for it by the Plaintiff in his Plaint.

The Suits No. 68 and No. 69 were first heard before Lokenauth Bose, the then Principal Sudder

Ameen of the 24 Pergunnahs, and were heard as one cause. Some issues not on the merits may be passed over. Those on the merits were in No. 68. "First, whether the land in dispute is included in the holding No. 85 of the Collectorate or not; Second, if so, then is it comprised within 1 beegah 14 cottahs, the entire rights of the late Tarrachund Ghose purchased by the Plaintiff's son?"

In Suit 69 they were, "First, whether the land mentioned within the sale boundaries was the exclusive share of the late Tarrachund Ghose included in Bill No. 85; second, if it be proved to be such, whether the land in dispute was within the boundaries aforesaid."

The Principal Sudder Ameen in No. 68 dismissed the case against the Seals, a decision acquiesced in by the Appellant; but gave the Plaintiff a Decree against the other Defendants for his whole demand. In No. 69 he also decreed partially in favour of the Plaintiff, excepting, however, on special grounds, a half cottah from the Decree. His opinion was also unfavourable to the Plaintiff's contention as to the northern part of the lands which the Judge thought not to be within the Plaintiff's sale boundaries.

In the course of the proceedings an inquiry by an Ameen was directed. He was ordered to prepare a map of the disputed premises. This map was so prepared, and it was signed by both parties. It is No. 102 at p. 65 of No. 69; the inquiry directed in this stage was strictly regular and conformable to the issues. It was whether the lands notified in the Proclamation, a step in the sale proceedings, were included in Bill 85, and whether the lands in dispute were part of them. The Ameen reported in favour of the Plaintiff that the lands were included in No. 85; and that those sued for were part of them. He founded his opinion mainly on oral testimony.

The Decrees of the Principal Sudder Ameen in the Plaintiff's favour were appealed from, and the Appeals were heard by Mr. Torrens, the Civil Judge of the Zillah Court. The Plaintiff had claimed and had succeeded in obtaining Decrees for the entirety and not for a share. One of the objections urged in the Petition of Appeal to Mr. Torrens was, that the quantities allotted by the Ameen would, on admeasurement, be found to exceed the quantity

of land purchased by the Plaintiff's son, viz., 1 beegah 14 cottahs. The Plaintiff had, in fact, in his pleading, contended that he had bought virtually the residue of the holding, putting a construction on his deed of purchase which its terms do not warrant. Mr. Torrens sent back both causes for further and more complete investigation.

Mr. Torrens also expressed some doubt whether the Collector should not have been joined as a party. This seems to have proceeded on the ground of the land being a Khas possession of the Government, and the Collector being, as it were, in the place of the Zemindar or landlord.

The causes as remanded came before Mr. Bell, the Additional Sudder Ameen; he nonsuited the Plaintiff for the non-joinder of the Collector as a Defendant, but on appeal to Mr. La Tour, who had, in the meantime, succeeded Mr. Torrens as Judge of the Civil Court, Mr. La Tour reversed the decision, and sent the causes back to Mr. Bell to be tried on the merits.

On the 10th of November, 1858, Mr. Bell decided Suit No. 68 in the Appellant's favour, decreeing to him possession of the land (6 cottahs 4 chittacks) claimed in that suit, with wassilat from the date of the plaint. On the preceding day he had postponed Suit No. 69 for further local investigation, and on the 5th of January, 1859, he directed the Second Ameen to make that investigation. The order of reference to the Second Ameen was accompanied by copies of the plaint and answer, copy of a chitta dated 8 Pous, 1214, a petition of the Plaintiff (the Appellant) dated the 17th December, and the original survey plan filed with the order.

The Ameen, under the directions in the order, made an elaborate Report, which has been much commented on by both sides on the argument of this Appeal. The Report was not acted on by the Judge, Mr. Bell.

The Appellant stated specific objections to the Report, and, by petition, requested Mr. Bell to view the premises, which he did. It appears by the Respondent's petition of Appeal to the Civil Judge that the Respondent's vakeels were present at the view, which may be treated, therefore, as strictly regular and judicial. The Report of the second

Ameen was on all points opposed to that of the former Ameen. It reported against the Appellant, that the holding No. 85 did not include the lands in 68, nor those in the more northern part; that the revenue survey was inaccurate in several particulars which it mentioned; and that the lands claimed in the northern part, and in the suit No. 68, were not within the Plaintiff's plaint boundaries. It also reported that, on the measurement made according to the principle insisted on by the Respondent, which the Ameen treated as the correct principle, the land contained in the southern portion of the lands claimed in Suit No. 69 amounted to 1 beegah and 16 cottahs. As new terms, "plaint divisions, descriptions, and boundaries," are introduced into this confused subject, as if to confuse it more, it may be as well to observe that the second Ameen is not answerable for the introduction of this additional element of uncertainty into his Report, since he strictly pursued in this respect the order of reference to him. The direction was the act of the Court itself, both parties, in fact, having requested that the investigation should proceed according to the Lotbundie, that is, the sale boundaries, in the same manner as the inquiry had been pursued on the former investigation. It is obvious that on such a purchase as the present where a purchaser is, as it were in quest of his lands to identify them, the plaint itself framed at the outset of the inquiry, on probably very imperfect information and knowledge, is not likely to be that certain proceeding by which an inquiry should be guided which is to identify the lands.

Mr. Bell, the additional Sudder Ameen, dissented from the opinion expressed by the second Ameen, declared his Report to be opposed to the survey and his own conclusions from his own view, and declined to act upon it. The Respondents, in their petition of Appeal to the Civil Judge, do not deny that the Report is opposed to the survey, but they attack the latter document on grounds of misconduct in the Deputy Collector, which, if they had any foundation, should have been made matter of appeal and complaint to his superior the Collector. Mr. Bell, on the 15th of April, 1859, also decided Suit 69 in favour of the Plaintiff.

In Suit 68 he had acted on the last-mentioned

survey, and on an award of the Deputy Collector unappealed from, which on a dispute between the Plaintiff and the Munduls, whether the lands in No. 68 should be mapped as within holding 85, had included them in it. This award, which is at page 26 of the Record in suit No. 68, states, "that it is necessary to lay down the boundaries;" "but the second Petitioner Peary Loll Mundul appears to be in possession of the lands, there being no necessity of any investigation into possession, or dispossession, or any alteration thereof from this office; should any party have any objection as to possession or dispossession he can sue for it according to law in Court. At present, there being no necessity for cancelling the order which has been passed in laying down the boundaries of the said land along with the holding No. 85, according to the plan of the Tussidor, it is ordered that the boundaries of the said disputed 6 cottahs 8 chittacks 16 teals of land be laid down according to the foregoing directions within the holding No. 85."

In Suit No. 69, the Principal Sudder Ameen found that the lands sued for were in the exclusive ownership of the execution debtor without sharers. He seems to have been influenced, in a great degree, in coming to that decision by the non-claim of the Munduls pending the attachment after the notification and before the sale. His decision implies, on this point, that the Munduls knew of the intended sale, and description of the lands. He concluded that they would have objected unless they had known, or supposed the description to be true.

The Munduls alone appealed from these Decrees. On appeal to Mr. La Tour, the Civil Judge, he reversed both Decrees; that in No. 68, wholly; that in No. 69, in part. The Decree in No. 68 he dismissed with costs; in No. 69 he decided the case on what he considered an admission by the Munduls of the Plaintiff's title to one-third of the lands, and limited the Decree to those lands in the southern part, which the Second Ameen had found to be within the Plaintiff's plaint boundaries, and to be 1 beegah 16 cottahs. Mr. La Tour declared the Plaintiff to be entitled to one-third of this quantity, 1 beegah 16 cottahs, including the 3 cottahs 5 chittacks $6\frac{1}{2}$ teals, of which he was in possession. The quantity 1 beegah 16 cottahs $6\frac{1}{2}$ teals is gained

by adopting the Second Ameen's Report. In substance, therefore, it was decreed that Tarrachund was a co-sharer, and entitled to a third only. The costs were charged on the Plaintiff on the ground that he had failed on the proof of all the issues.

Mr. La Tour on this last Appeal, referred as evidence to a decision of the Sudder Dewanny Adawlut (which appears to be a reported case), in which it had been decided, on a former litigation between the two brothers Gooroodoss and Ramlonoo on the one side, and Tarrachund on the other, that the family was joint in property. Some land, 9 beegahs and a fraction, out of which the holding 85 was subsequently constituted, was scheduled as part of the family property. This was reduced by purchase by the Government of part, viz., about 2 beegahs and a fraction, in the formation of the Kidderpore Road. Subsequently to that reduction, the residue is said to have been formed into the holding No. 85. The Judge termed this decision, which he introduced and relied on as evidence, a decision *ad rem*, declared that it threw on the Plaintiff the onus of proving a subsequent partition, and that the Plaintiff had not sufficiently discharged himself from that obligation. He added that, "a subsequent partition was probable enough, but that the Court must act on evidence and not on conjecture."

In suit 68, Mr. La Tour observed that certain of the Collectorate Chittas which the Respondents had produced in evidence, including that referred to by the Alipore Ameen, had been rejected by Mr. Bell on insufficient grounds. He did not dispute that the survey must be adopted as showing the state of Bill 85, as to boundary and contents, but thought the Award no decision on the question of title, and as evidence of no weight, especially on the northern part. He decided in both suits that the Plaintiff could recover only one parcel, and could not overleap the barrier which the holding No. 78, 78-1, and 78-2 presented, nor recover in suit 68, lands that formed a different parcel from that of which he recovered a portion on the southern part.

The decisions of the Sudder Court were made on Special Appeals from these two last Décrees.

That Court could not decide in such Appeals on

questions of fact. It merely examined the evidence to see whether the objections urged turned on questions of law, and finding them to be, as they appear to their Lordships to have been, objections to decisions on questions of fact, it declared that it could not entertain them on Special Appeal. Its judgments cannot be appealed to as a confirmation of Mr. La Tour's decisions on the facts, since it had no jurisdiction on such Appeals to decide on the facts.

Their Lordships will now consider the arguments addressed to them on the hearing of the Appeal. The first objection was in the nature of a preliminary one; that the Appeal allowed was from the two Decrees of the Sudder Dewanny Adawlut only. Their Lordships observed that if this was the correct construction of the words of the order—a view which, however, they did not entertain, it would no doubt be amended on their recommendation to Her Majesty to that effect; a recommendation which they should, in such a case, think it their duty to make. On this intimation of opinion the learned Counsel pressed the objection no further.

It was next urged that the Appellant had not argued before the Sudder Court the case of No. 68, the decision in which differed materially on several points from that of No. 69. This forbearance ought not, in the opinion of their Lordships, to prejudice the Appellant here; the more especially as the two Appeals involved the same material question, viz., whether the title was to a share or to the entirety of the lands.

Then there was an objection affecting the weight of evidence generally urged by the Appellant, and stated in his case, viz., that the Munduls must be considered as mere wrong-doers, since they have not attempted to prove the title pleaded by them that they are purchasers of two-thirds of the whole of the property of the Ghose family. The evidence shows, in the opinion of their Lordships, a contest as to the title of the purchaser to a large part of what he claimed, contemporaneous with his purchase, to which contest no other description than that of a *bond fide* dispute could or can be given. The title of the Munduls to two-thirds does not rest on mere pleading. *Prima facie* proof of their title is to be found in the receipts for revenue or

rent, in the time, as well of Hurramoney's possession as of the purchaser's, in a Petition also of the Plaintiff himself at pages 21 and 22 of the first record, wherein he calls Gooroodoss and Bhuggobutty the "acknowledged vendors of the Mundul," and also in the cabooleuts taken for the third of the rents. The zimmanamah which is put in by both parties favours the same conclusion, for the Decree holders, who would otherwise have had the title to the two-thirds, are connected with that instrument, and pointed out the property by their agent to the Nazir. Many of the lots describe the Munduls as owners of the two-thirds, which had been the property of the Ghose family.

The next matters for consideration are the evidence and findings in Suit 69, and the reasons given by Mr. La Tour for his decision. The Judgment, the reception of which in evidence has been objected to, was one to the reception of which, had it been tendered in evidence at the right stage of the proceedings, no legal objection could have been made. The objection as to the Judgment being used at all was one dependent only on the time and manner of its introduction; this more limited objection was not included in the grounds of special appeal, and as it does not affect the merits cannot be entertained now. It is true that the status of the family as a joint Hindu family was not continuing. The alienation of the shares of two members of that family to the Munduls determined that status, and substituted the status of co-sharers or joint owners, whose rights, as is shown by Lord Westbury in the case of *Appovier v. Ayan* (11 Moore's L. A., p. 411), are in many important respects distinguishable from those of a joint and undivided family. This joint-ownership status would, however, only be determined by an actual partition, or an agreement by mutual consent to divide; and such a severance of interest, it lay upon the Appellant to prove. Their Lordships have not been insensible to the presumptions in favour of an actual severance of Tarrachund's share which the learned Counsel for the Appellant has drawn from the terms of the Zimmanamah and the conduct of the Munduls with reference to that document. But looking at the whole of the evidence before Mr. La Tour, and in particular to the receipts for revenue, and to the

acceptance of at least one cabooleut for a share by the Appellant's son, who is not produced to explain his act, and is not shown to be dead or incapable of giving evidence; their Lordships, while they dissent from much of Mr. La Tour's reasoning, are nevertheless of opinion that he has come to a right conclusion in finding that the Appellant has failed to show that Tarrachund was entitled to more than a one-third undivided share in the property which was the subject of the lot purchased.

The next question to be considered, is whether the Appellant has proved that any part of the lands of which his son purchased Tarrachund's share, is situate in the northern portion of the lands claimed in Suit No. 69. The Appellant relies on the Revenue Survey and the award already referred to as conclusive upon this question, the award not having been questioned in a regular suit within three years of its date. This award, however, as has already been stated, did not purport to determine the right of possession it stated as a fact that Peary Lall Mundul was in possession of the lands; but in itself it was a mere order relative to the mapping of the holding and defining its boundaries. It would be unjust to give the Order indirectly an effect on possession, which directly it disclaims; nevertheless it must be held to fix the boundaries.

In this more northern part of the holding, the question that arose between the Plaintiff and the Munduls was one of proprietary right, not of mere boundary; the Respondents relied on their title as purchasers of a share belonging to Tarrachund. They said this land never was in No. 85, or if it be so adjudged, it is our purchase. In the former case, the Plaintiff, by his own admission, would have no title to it; in the latter case the question between them would be whether the Respondent's purchase was proved.

The survey in this case is not questioned by the issues; it must, therefore, be viewed as evidence of the boundaries and of what holding No. 85 includes, but it furnishes no evidence of proprietary right in the Plaintiff in his contest with the Munduls directly nor indirectly. The award for the reasons already given is evidence only to the same extent as the survey.

The Respondents claim under a purchase of a

share of Tarrachund in the more northern part. It is the case, therefore, of both parties that some property of his extended thus far. The Plaintiff's son did not purchase all Tarrachund's share in holding No. 85, but only a certain quantity in that holding, the situation of which was not clearly defined. The survey, therefore, does not much advance his case. The origin of his title is a sale under the Decree of the Court directing a sale in execution. The whole holding was sold: there was no unsold residue. The justice of the case requires that the Plaintiff, whose son paid for 1 beegah 14 cottahs should obtain that entire quantity, if so much exists in the holding unsold to others, and if so much does not exist, then all that is capable of being so applied. His claim, however, can extend no further than the sale boundaries.

This being so, their Lordships proceed to deal with the subject of the sale boundaries. These begin with the north bank of the Tank, and are therefore not those of the whole holding. The description of the boundaries north, is the lands of the Rajah Kalisunkur Ghosal. That description tallies with the Plaintiff, and favours the Plaintiff's construction. It means strictly sole, not Ijmallee lands. As an imperfect description, it may be applied to Ijmallee lands also, if the evidence shows that it was meant to describe them. The holding No. 85 is found to extend beyond the Ijmallee lands to the sole owned lands; and as the whole surplus is inadequate to supply the whole quantity, no ground exists for narrowing the construction, since, in a doubtful case, that interpretation should prevail which may best effect a satisfaction of a claim which cannot be otherwise fully satisfied.

Their Lordships are merely considering so far how the case would stand in a contest on the construction of the words as to boundaries, supposing a clear surplus to exist in the more northern part. The language therefore of the zimmanamah as to the boundaries presents, in the opinion of their Lordships, no bar to the Plaintiff's prosecuting his claims on the more northern part. It lies, however, on him to show that there are lands in that part of the holding capable of being applied to the satisfaction of his demand. Here, however, he is met by

the Respondents claiming as auction purchasers under a distinct lot; and alleging themselves to be in possession under that title.

Therefore the contest in this suit on this part must be considered to be narrowed to this, whether the Respondents' purchase *de facto* is in this northern part. The issue lies on them to prove their purchase, as the Plaintiff, by the survey has established a *prima facie* case to land in this northern parcel.

The Respondents prove their title-deed. It is a bill of sale of a moiety of 1 beegah 8 cottahs. The lot is No. 3. The land is described as *alleged* to be La Kiraj. The bill of sale contains no statement of boundaries. On referring in the zimmanamah, to the lot which is the one immediately beneath that of the Plaintiff's son's purchase, a further description of the land is found. The lands are described as rent free, within the house of Kully Churn Mutree, about 1 beegah and 8 cottahs, inclusive of the dilapidated buildings, after deducting two shares belonging to Oodoy Naram Mundul, the remaining one share being 9 cottahs. The boundaries are thus described: "North and west of the lands of Rajah Kalesunkur Ghosal" (a part is left out as worm-eaten) "and south of the lands of the said Ghosal." So far, therefore, as this description is decypherable, it describes lands surrounded by those of the Rajah Kalesunkur Ghosal. If it appeared that the Rajah had no lands in the neighbourhood, except those delineated or referred to, it would appear that the Holding No. 78, 78-1, and 78-2, was meant to be described, though erroneously, by a description of the lands of the Rajah exclusively; and the same inference might be drawn from the description of the place, if the meaning of the words "within Kaleechurn Mustree's house and dilapidated buildings" was clearly ascertained. Both descriptions, however, are the subjects of dispute. It would be wrong to conclude anything against the Respondents in a case where the Court is dealing with inaccurate documents, by reason of mere variances between the deed of sale and the zimmanamah.

The Judge, Mr. Bell, found the dilapidated buildings to be in No. 78, 78-1, and 78-2. The Plaintiff's second witness places the pukka house of Kaleechurn Mustree in that holding. The Plaintiff

also, in his pleadings, supposes the Respondent's purchase to be there in that holding, but he does not show how any concealment could be effected.

The Judge, Mr. Bell, finds as a fact that the Respondents had fraudulently attributed portions of the Holding 78, 78-1, and 78-2 to the lands claimed by the Plaintiff in the northern part, which he says were less than 1 beegah 8 cottahs, and had so increased their quantity fraudulently, and were aided by the Rajah in this scandalous attempt to defeat justice. Yet this is a matter to which a mere view would not afford discovery; and Mr. Bell assigns no reasons for his conclusion which implicates the Rajah in a fraud.

The Appellant has not attempted to show, by evidence, the real original extent of this holding 78, 78-1, and 78-2. He had to prove the fraud which he alleged. The Collectorate must reasonably be supposed capable of furnishing some evidence as to this holding, as to its former quantity and boundaries, if rent paying as to its rent. If a quantity had been abstracted, proof of its former state would detect the fraud. Without any evidence, and without the disclosure of any reason, to justify a suspicion of collusion in a fraud to defeat a purchaser under a judicial decree, the Rajah must, in support of this hypothesis, be supposed guilty of conniving at a concealment and deception on the Court. Their Lordships, therefore, cannot adopt Mr. Bell's conclusion, that the Respondent's possession is so augmented as he concludes it to have been, and without it, this land, which the Munduls certainly purchased somewhere, becomes, unless it be where the Respondents place it, an untraceable possession, scarcely a probable conclusion. Upon the whole, therefore, their Lordships are of opinion that the Appellant has failed to establish a title to any land or to any share in any land in the northern plot, which he claims in Suit No. 69, and that the Judgment of Mr. La Tour, which it is to be observed is consistent with the original Judgment of Lochanauth Bore on this point, must be established.

As to Suit 68, the Respondents urge that the Appellant can not have believed that his son's purchase included the land claimed in this particular suit, since he offered to take it from the Govern-

ment on a separate settlement of revenue, whereas had he believed it to be already included in holding No. 85, he would have stood upon that title and settlement. Whatever might have been the weight of this objection, had the offer been unqualified, it loses its effect, when the language of the Plaintiff's Petition is carefully weighed. In that document the Plaintiff still insists on his claim under his son's purchase, and on the existing settlement, and asks merely to be preferred on a fresh settlement, if on measurement the lands are found to be beyond the holding No. 85. This proposal, thus made and guarded, cannot be construed to amount to any admission that he could not rely on the settlement, or to imply any consciousness that the land was really beyond the limits of the holding No. 85.

The survey which includes the lands sued for in No. 68, within the holding No. 85, makes out a *prima facie* case, at least, in favour of the Plaintiff. Whatever older title, if any, the Munduls may have had they did not stand upon. They settled for the land with Government. It was a khas possession of the Government. The settlement with the Munduls proceeded on a measurement. The Plaintiff said the land was wrongly measured and wrongly settled, because already included in No. 85. He denied that there was any excess of land over the measured quantity properly belonging to No. 85, and appealed to the Sudder Board of Revenue, which set aside the measurement complained of by the Appellant, and directed a new one, on which the existing survey was made. The survey showed the disputed land to be included in the settled estate No. 85. The Respondents deny that this restoration proceeded on the Plaintiff's Appeal; but the reason which they give, viz., that the Government at that time resumed the whole of the durpin lands, is unsatisfactory, for it is opposed to the plain language of the Proclamation declaring the annulment of the settlement; and it supposes further, a power in the Board of Revenue which it is not shown ever to have exercised, and which is not authorized by the Regulations, viz., the power of resuming lands by a general notice, applying to several distinct holdings. Such a proceeding as that supposed would be virtually a resumption proceeding, and must be pursued according to the Regulations applying to resumption proceedings. The question, then, was reduced to

this, whether the old holding No. 85 settled with Tarrachund included these lands; that is, it became a question of the boundary and contents of an existing settlement, and was properly to be ascertained by a measurement by the revenue authorities. Mr. La Tour's reasoning proceeds entirely on a preference of the Report of the Second Ameen to the Revenue Survey, and on the assumption that the measurements which were made by that officer at the instigation of the Respondents' vakeels, are correct, the Report of this Ameen was deliberately discredited and rejected after a view of the lands by Mr. Bell, who necessarily had much better means of forming a correct judgment on the point in question, than their Lordships can have.

It is not at all probable that the survey with which the Ameen's Report is inconsistent should be inaccurate.

Their Lordships have, therefore, come to the conclusion that Mr. La Tour's Judgment in Suit No. 68 cannot be supported, and that the Appellant has established his title to a one-third share in the land claimed by him in that suit.

Under all the circumstances, therefore, their Lordships will humbly advise Her Majesty that the Appeal against the Decrees of the Sudder Dewanny Adawlut be dismissed, and that the Decrees of Mr. La Tour in Suits No. 68 and No. 69 be discharged, and that in lieu thereof one Decree be made in both suits on this consolidated Appeal in the following terms, viz. :—

Declare that the Plaintiff's son purchased, and that the Plaintiff, as donee of his son, is entitled to the right, title, and interest of Tarrachund in 1 beegah 14 cottahs of land within the holding No. 85, as the same holding was constituted, and as the same is delineated and shown by the survey in the pleadings mentioned, and referred to in the issues framed in the two Suits No. 68 and No. 69 respectively; and declare further that the Plaintiff has failed to show that Tarrachund had more than a one-third share in that holding; and that the same share must be taken as one-third only: and declare that the Plaintiff's quantity of land so described as 1 beegah 14 cottahs can be made up only out of the said share, and so far only as such share will extend to satisfy the same: and declare further that the Plaintiff has proved a right to

have, so far as the quantities permit, that quantity made up out of the said share of the land sued for in Suit No. 68, and out of the said share of the land sued for in No. 69, except as to the land in the more northern part, described and stated on his plaint to consist of $16\frac{1}{2}$ cottahs, as to which the said Plaintiff has not established his title: and further declare that as to the lands in that northern part so described in his plaint, and as to which his suit has been dismissed, that the same do stand and remains dismissed: and declare that the Plaintiff is entitled to wassilat in respect of the said one-third as from the date of his plaints respectively, but that in ascertaining the amount thereof, regard is to be had to the fact of his having been in exclusive possession of 9 cottahs and 9 chittacks and $6\frac{1}{2}$ teals in the southern portion: and declare that the costs awarded in the Suits No. 68 and No. 69 to the Respondents should be reduced by one-third; and that the rights and interests of the Appellant and Respondents, and the sums due from or to the Appellant and Respondents ought to be settled and adjusted in accordance with the foregoing declaration, and remit the causes to the High Court to the end that such settlement and adjustment may be made accordingly; and their Lordships think that each party should pay his own costs of this Appeal.