

HDI



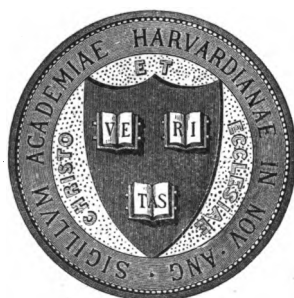
HL 2TPA I

www.libtool.com.cn



W. INDIA

www.libtool.com.cn



HARVARD LAW LIBRARY.

Received

May 10, 1905.

www.libtool.com.cn

www.libtool.com.cn

THE
LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:
BEING
CASES
IN
THE PRIVY COUNCIL
ON APPEAL FROM
THE EAST INDIES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTED BY HERBERT COWELL,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. XXXI.—1903-1904.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.

1904.

www.libtool.com.cn

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

Rec. May 10, 1905.

LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., c. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY
IN COUNCIL.

1904.

Earl of *Halsbury*, Lord Chancellor.
Marquis of *Londonderry*, Lord
President.
Duke of *Devonshire*,
The Marquis of
Ripon,
Earl of *Cranbrook*,
Earl *Spencer*,
Earl of *Rosebery*,
Lord *Ashbourne*.
Lord *Macnaghten*.
Lord *Field*.
Lord *Shand*.
Lord *Davey*.

Ex-Lord
Presidents.

Lord *James of Hereford*.
Lord *Brampton*.
Lord *Robertson*.
Lord *Lindley*.
Lord *Alverstone*.
Sir *Edward Fry*.
Sir *Samuel Way*, Bart.
Sir *Henry De Villiers*.
Sir *Henry Strong*.
Sir *Ford North*.
Sir *Samuel Griffith*.
Sir *Andrew Scoble*.
Sir *Arthur Wilson*.
Sir *John Bonser*.
Sir *Henri Elzear Taschereau*.

*And others ex-officio under the Appellate Jurisdiction Acts of 1876 (39 & 40 Vict. c. 50)
and 1887 (50 & 51 Vict. c. 70).*

www.libtool.com.cn

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

PAGE		PAGE
1	Abdul Aziz Khan Sahib <i>v.</i> Appa- yasami Naicker	195
24	Amar Chunder Kundu <i>v.</i> Soshi Bhusan Roy	57
75	Bholanath Nundi <i>v.</i> Midnapore Zemindary Company, Limited	94
169	Bombay Tramway Company <i>v.</i> Municipal Corporation of the City of Bombay	203
46	Chaudhri Thakur Das <i>v.</i> Chaudhri Jairaj Singh	52
10	Chowdhry Ganesh Dutt Thakoor <i>v.</i> Mussummat Jewach Tha- koorain	239
160	Debi Pershad Chowdhry <i>v.</i> Rani Radha Chowdhrair	188
235	Durga Bakhsh Singh <i>v.</i> Mirza Muhammad Ali Beg	30
122	Durga Prosad Sureka <i>v.</i> Bhajan Lall	212
	Fakir Chunder Dutt <i>v.</i> Ram Kumar Chatterji	
	Kedar Mal Marwari <i>v.</i> Dewan Bishen Pershad	
	Jotindra Mohun Lahiri <i>v.</i> Guru Prosunno Lahiri	
	Maharaja Jagadindra Nath Roy Bahadur <i>v.</i> Rani Hemanta Kumari Debi	
	Maharaj Kumar Bagheswari Per- shad Singh <i>v.</i> Khaja Mahomed Gowhar Ali Khan	
	Maharajah Madhava Singh <i>v.</i> Secretary of State for India in Council	
	Maung Shwe Oh <i>v.</i> Maung Tun Gyaw	
	Mohammad Abdussamad <i>v.</i> Kur- ban Husain	
	Munnu Lal <i>v.</i> Maulvi Saiyid Muhammad Ismail	

	PAGE		PAGE
Musammat Maqboolan <i>v.</i> Ahmad Husain	38	Seena Pena Reena Seena Mayandi Chettiyar <i>v.</i> Chokkalingam Pillay	83
Musammat Shafiq-un-nisa <i>v.</i> Khan Bahadur Raja Shaban Ali Khan	217	Sham Kumari <i>v.</i> Raja Rameswar Singh Bahadur	176
Nilratan Mandal <i>v.</i> Ismail Khan Mahomed	149	Shivabasava kom Amingavda <i>v.</i> Sangappa bin Amingavda	154
Raj Chunder Sen <i>v.</i> Gangadas Seal. Ramgati Dhur <i>v.</i> Raj Chunder Sen	71	Srish Chandra Roy <i>v.</i> Roy Banomali Rai	107
Raja Rangayya Appa Rao Bahadur <i>v.</i> Bobba Sriramulu	17	Thakur Ganesh Bakhsh <i>v.</i> Thakur Harihar Bakhsh	116
Raja Yarlagadda Mallikarjuna Prasada Nayadu <i>v.</i> Raja Yarlagadda Durga Prasada Nayadu	64	Thakurain Balraj Kunwar <i>v.</i> Rae Jagatpal Singh	132
Rani Srimati <i>v.</i> Khajendra Narayan Singh	127	Thakurain Jaipal Kunwar <i>v.</i> Bhaiya Indar Bahadur Singh	67
		Turner <i>v.</i> Haji Goolam Mahomed Azam	222
		Upendra Krishna Mandal <i>v.</i> Ismail Khan Mahomed	144

TABLE OF CASES CITED.

A.

		PAGE
Abdool Bari <i>v.</i> Ramdass Coondoo	Ind. L. R. 4 Calc. 607	180, 186
Abdool Razack <i>v.</i> Aga Mahomed Jaffer	} L. R. 21 Ind. Ap. 56 .	. 40
Bindaneem		
Achal Ram <i>v.</i> Udai Partab Addiya Dat Singh	} L. R. 11 Ind. Ap. 51 .	34, 37, 138
Ali Khan <i>v.</i> Appadu		
Anangamanjari Chowdhrani <i>v.</i> Tripura	} L. R. 14 Ind. Ap. 101	155, 159
Soondari Chowdhrani		
Anundlall Mookerjee <i>v.</i> Bhugwan Chunder Mookerjee	12 Beng. L. R. 489, n.	. 200
Ashutosh Dutt <i>v.</i> Doorga Churn Chatterjee	} L. R. 6 Ind. Ap. 182 .	. 209
Auhindro Bhoosun Chatterjee <i>v.</i> Chunnoololl Johurry		
	Ind. L. R. 5 Calc. 101	. 60

B.

Babaji <i>v.</i> Nanaji	Ind. L. R. 3 Bomb. 340	. 150
Baboo Hurday Narain Sahu <i>v.</i> Pundit Rooder Perkash Misser	} L. R. 11 Ind. Ap. 26	. 6
Bayabai <i>v.</i> Balauf Venkatesh Ramakant Beresford <i>v.</i> Ramasubba		
Bhaiya Ardawan Singh <i>v.</i> Udey Partab Singh	} L. R. 23 Ind. Ap. 64	. 146
Bhaiya Rabidat Singh <i>v.</i> Indar Kunwar		
Bhaiya Tribhawandatt Ram <i>v.</i> Bhaiya Sambhadat Ram	} Oudh Rulings, 1859-1893, p. 256	. 137
Blackett <i>v.</i> Bates		
Brij Indar Bahadur Singh <i>v.</i> Ranee Janki Koer	} L. R. 1 Ch. 126	. 108
	L. R. 5 Ind. Ap. 1	. 34

C.

Chitko Raghunath Rajadiksh <i>v.</i> Janaki	11 Bomb. H. C. 199 .	. 156
Chockalinga Pillai <i>v.</i> Vythealinga Pundara Sunnady	} 6 Madr. H. C. 164	. 86, 92
Collector of Madura <i>v.</i> Ramalinga Sathupathy		
Colls <i>v.</i> Home and Colonial Stores	[1894] A. C. 179	. 150
Colvin <i>v.</i> Newberry	1 Cl. & F. 283	. 222, 231
Cowie <i>v.</i> Remfry	3 Moore's Ind. Ap. Ca. 448	. 123

D.

www.libtool.com.cn

Deendyal Lal v. Jugdeep Narain Singh .	L. R. 4 Ind. Ap. 247 .	PAGE 6
Delaunier v. Wyllie .	17 R. 167 .	226
Dewan Ran Bijai Bahadur Singh v. Rae } Jagatpal Singh .	L. R. 17 Ind. Ap. 173 .	138
Dhunput Singh v. Gooman Singh .	11 Moore's Ind. Ap. Ca. 433 .	146
Doolar Chand Sahoo v. Lalla Chabeel- chand .	L. R. 6 Ind. Ap. 47 .	200
Duncombe v. Brighton Club and Norfolk Hotel Co. .	L. R. 10 Q. B. 371 .	121

E.

Easwara Doss v. Pungavanachari .	Ind. L. R. 13 Madr. 361 .	18
European Central Ry. Co., In re .	4 Ch. D. 33 .	60

F.

Fewings, Ex parte .	25 Ch. D. 338 .	60
Ford v. Stier .	[1896] P. 1 .	156
Fry v. Chartered Mercantile Bank of India .	L. R. 1 C. P. 689 .	232

G.

Ganga Pershad Sahu v. Land Mortgage Bank .	L. R. 21 Ind. Ap. 1 .	60
Ganshiam Singh v. Daulat Singh .	Ind. L. R. 18 Allah. 240 .	117
Gardner v. Trechmann .	15 Q. B. D. 154 .	232
Gayford v. Moffatt .	L. R. 4 Ch. 133 .	79
Girdharee Lall v. Kantoo Lall .	L. R. 1 Ind. Ap. 321 .	6
Giyana Samhandha v. Kandasami Tam- biran .	Ind. L. R. 10 Madr. 375 .	11, 16
Gledstanes v. Allen .	12 C. B. 202 .	227
Gnanasambhanda Pandara v. Velu Pan- daram .	L. R. 27 Ind. Ap. 69 .	206
Gopala Sawmy Mudelly v. Mukkee } Gopalier .	7 Madr. H. C. 312 .	18
Gossamee Sree Greedharreejee v. Ruman- lolljee Gossamee .	L. R. 16 Ind. Ap. 137 .	205, 208, 228
Greeman Singh v. Wahari Lall Singh .	Ind. L. R. 8 Calc. 12 .	68

H.

Hansen v. Harrold Brothers .	[1894] 1 Q. B. 612 .	226, 233
Haywood v. Brunswick Building Society .	8 Q. B. D. 403 .	228
Hurpurshad v. Sheo Dyal .	L. R. 3 Ind. Ap. 259 .	34

I.

Ismail Khan v. Aghore Nath Mukerjee .	7 C. W. N. 734 .	146
Ismail Khan Mahomed v. Broughton .	5 C. W. N. 846 .	150
Ismail Khan Mahomed v. Jaigun Bibi .	Ind. L. R. 27 Calc. 570 .	147
Itraj Kuar v. Bacho Mahadeo Kuar .	Oudh Cases, vol. v. p. 345 .	137

J.
www.libtool.com.cn

		PAGE
Jagatpal Singh v. Jageshur Baksh Singh	L. R. 30 Ind. Ap. 27.	138
Jatra Mohun Sen v. Aukhil Chandra Chowdhry	Ind. L. R. 24 Calc. 334	180
Johnson v. Barnes	L. R. 8 C. P. 527	79

K.

Kalidas Laldas v. Bhaiji Naran.	Ind. L. R. 16 Bomb. 647	150
Kasu Munnissa Bibee v. Nilratna Bose	Ind. L. R. 8 Calc. 79	60
Kathama Natchiar v. Dorasinga Tever	L. R. 2 Ind. Ap. 169	68
Kern v. Deslandes	10 C. B. (N.S.) 205	227
Khajah Hidayat Oollah v. Rai Jan Khanum	3 Moore's Ind. Ap. Ca. 295	40
Komul Kumari Chowdhrair v. Kuan Chandra Roy	2 C. W. N. 229	180
Krishnabai v. Khangowda	Ind. L. R. 18 Bomb. 197	11, 15
Krishnasami Pillai v. Varadaraja Ayyangar	Ind. L. R. 5 Madr. 345	86, 93

L.

Leduc v. Ward.	20 Q. B. D. 475	228
Lloyd v. Guibert	6 B. & S. 100	9
London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.	[1892] 1 Ch. 120	121
Lutchmeeput Singh v. Sadaulla Nushyo	Ind. L. R. 9 Calc. 698	79

M.

Magan Lal Purushottam v. Govind Lal Nagindas	Ind. L. R. 15 Bomb. 697	68
Mahableshvar Fondba v. Durgabai	Ind. L. R. 22 Bomb. 199	156
Maharanee Shibessouree Debia v. Mothooranath Acharjo	13 Moore's Ind. Ap. Ca. 272	88, 206
Maharani Rajroop Koer v. Syed Abdul Hossein	L. R. 7 Ind. Ap. 240	79
Mahomed Banker Houssain Khan v. Shurfounnissa Begum	8 Moore's Ind. Ap. Ca. 136	40
Mahomed Gazi Chowdhry v. Leicester	7 Beng. L. R. App. 52	180
Mahomed Reasat Ali v. Hasin Banu	L. R. 20 Ind. Ap. 155	11
Meenakshi Naidu v. Immudi Kanaka Ramaya	L. R. 16 Ind. Ap. 1	6
Merchant Shipping Co. v. Armitage	L. R. 9 Q. B. 99	121
Mew and Thorne, In re	31 L. J. (Bank.) 87	137
Mohammad Abdussamad v. Kurban Hussain	L. R. 31 Ind. Ap. 30	137
Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan	L. R. 26 Ind. Ap. 41	117, 119
Murray v. Watkins	62 L. T. (N.S.) 796 (Ch. D.)	208
Mussumat Anundee Koonwur v. Khedoo Lal	14 Moore's Ind. Ap. Ca. 412	10, 13
Mussummat Durga Choudhrai v. Jawahir Singh Choudhri	L. R. 17 Ind. Ap. 122	79, 155, 159

		PAGE
Mussamut Nanomi Babuasin v. Modun Mohun	L. R. 13 Ind. Ap. 1	6
Mussamut Ranee Surno Moyee	12 Moore's Ind. Ap. Ca. 244	18, 20
Shooshee Mokhee Burmonia		

N.

Nabu Mondul v. Cholim Mullik	Ind. L. R. 25 Calc. 896	150
Narayanbhat v. Davlata	Ind. L. R. 15 Bomb. 647	150
Narindar Bahadur Singh v. Achal Ram.	L. R. 20 Ind. Ap. 77	68, 138
Nawab Muhammad Azmat Ali Khan v. Lalli Begum	L. R. 9 Ind. Ap. 8	40
Nilakant Banerji v. Suresh Chunder Mullick	L. R. 12 Ind. Ap. 171	60

P.

Peek v. Larsen	L. R. 12 Eq. 378	226, 228
Pettachi Chettiar v. Sangili Veera Pandia	L. R. 14 Ind. Ap. 84	3, 5, 8
Popple v. Sylvester	22 Ch. D. 98	60
Prosunno Kumari Debya v. Golab Chand	L. R. 2 Ind. Ap. 145	206

R.

Rahimuddin v. Rewal	L. R. 30 Ind. Ap. 89	214
Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai	L. R. 17 Ind. Ap. 11	3, 6, 8
Rai Jagatpal Singh v. Raja Jageshwar Baksh Singh	L. R. 30 Ind. Ap. 27	128, 138
Raja Rao Venkata v. Court of Wards	L. R. 26 Ind. Ap. 83	4, 9
Ralli Brothers v. Paddington Steamship Co.	5 Com. Cas. 124	226
Ram Chunder Dutt v. Jughes Chunder Dutt	12 Beng. L. R. 229	146
Ramchandra Bhagavan v. Mulji Nana-bhai	Ind. L. R. 22 Bomb. 558	156
Rampal Singh v. Balbhaddar Singh	L. R. 29 Ind. Ap. 203	146
Ram Ranjan Chuckerbutty v. Ram Narain Singh	L. R. 22 Ind. Ap. 60	146
Ram Saran Singh v. Birju Singh	Ind. L. R. 19 Allah. 172	80
Rani Anund Koer v. Court of Wards	L. R. 8 Ind. Ap. 14	68
Rani Pirthi Pal Kunwar v. Rani Guman Kunwar	L. R. 17 Ind. Ap. 107	68
Rani Sartaj Kuari v. Rani Deoraj Kuari	L. R. 15 Ind. Ap. 51	4, 6, 9
Reynolds v. Jex	34 L. J. (Q.B.) 251	226, 227
Rivers (Lord) v. Adams	3 Ex. D. 361	80
Rodocanachi v. Milburn	18 Q. B. D. 67	228

S.

Sangram Singh v. Rajan Bai	L. R. 12 Ind. Ap. 183	128
Sayud Chanda Miah Sahib v. Lakshmana	Ind. L. R. 1 Madr. 45	18
Scott v. Sebright	12 P. D. 21	156
Secretary of State for India v. Mathurabhai	Ind. L. R. 14 Bomb. 213	79
Sewell v. Burdick	10 App. Cas. 74	228

		PAGE
Shankar Bakhsh v. Hardeo Bakhsh . . .	L. R. 16 Ind. Ap. 71 . . .	32, 34
Shillitto, <i>The</i> . . .	3 Com. Cas. 44 . . .	227
Shosinath Ghose v. Krishna Soondari } Dasi.	L. R. 7 Ind. Ap. 250 . . .	155
Simbhunath Panday v. Golab Singh . . .	L. R. 14 Ind. Ap. 77 . . .	3, 8
Siramulu v. Sobhanadri Appa Rau . . .	Ind. L. R. 19 Madr. 21 . . .	18
Small v. Moates . . .	9 Bing 574 . . .	226, 227, 231
Sobhanadri Appa Rau v. Chalamanna . . .	Ind. L. R. 17 Madr. 225 . . .	18
Sonatur Bysack v. Sreemutty Juggut- soondree Dossee . . .	8 Moore's Ind. Ap. Ca. 66 . . .	209
Sri Raghunadha Deo v. Sri Brozokishoro } Patta Deo	L. R. 3 Ind. Ap. 154 . . .	156
Sutto Surrun Ghosal v. Mohesh Chunder } Mitter	12 Moore's Ind. Ap. Ca. 263 . . .	146

T.

Thakooranee Dossee v. Bisheshur } Mookerjee	Beng. L. R. Supp. Vol. 202 . . .	146
Tharsis Copper Mining Co. v. Culliford . . .	22 W. R. 47 . . .	227
Thiagaraja v. Giyana Sambandha Pan- dara	Ind. L. R. 11 Madr. 78 . . .	86, 93
Titu Bibi v. Moheshchunder Bagchi . . .	Ind. L. R. 9 Calc. 683 . . .	180

V.

Vellanki Venkata Krishna Row v. Ven- kata Rama Lakshmi	L. R. 4 Ind. Ap. 1 . . .	156
---	--------------------------	-----

W.

Widow of Shanker Sahai v. Rajah Kashi } Pershad	L. R. Suppl. Vol. 220 . . .	34
Winterscale v. Surat Chandra Banerjee . . .	7 C. W. N. 155 . . .	146

www.libtool.com.cn

CASES
www.libtool.com.cn

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

ABDUL AZIZ KHAN SAHIB PLAINTIFF; J. C.*
AND 1903
APPAYASAMI NAICKER AND OTHERS . DEFENDANTS. April 29, 30;
Nov. 13.

FOUR CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Execution Sales—Sale of Right, Title, and Interest—Intention of the Parties—
Title sold depends upon Interpretation of Law at date of Sale.*

Where the right, title, and interest of a judgment debtor, holder of an impartible zemindari, was sold in 1873 and 1876 in execution of a decree for debts, for which the debtor's joint family was not liable, and the accepted interpretation of the law at the time was that an impartible estate was inalienable, except for the life of the holder or under special circumstances:—

Held, that the Court must be deemed to have intended to sell and the purchaser to buy the right, title, and interest as then understood—namely, as one which ceased at the debtor's death; and this notwithstanding that the interpretation of the law then prevailing has been subsequently overruled.

FOUR CONSOLIDATED APPEALS from two decrees of the High Court (July 18, 1898) affirming two decrees of the Subordinate Judge of Madura West (Sept. 29, 1894) which dismissed the suit of the appellant Abdul Aziz Khan and the other appellants associated with him as plaintiffs, and decreed the suit of the

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

VOL. XXXI.

B

J. C. respondent bank as against the zemindar of Kannivadi and
1903 his sons. libtool.com.cn

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.
—

The first suit was brought to enforce the title of Abdul Aziz Khan (his co-plaintiffs being purchasers from him), which was that of a purchaser of twelve villages of the zemindari sold in 1873 and 1876 in execution of decrees against Bangaru, the former zemindar. To that suit Appayasami Naicker, the present zemindar, and his sons pleaded that Bangaru was only entitled to the net usufruct of the estate during his life, with power to charge the same only for purposes beneficial to the estate or necessary for the family, without "power to alienate any portion of the estate for a term expiring beyond his lifetime," basing this contention both upon "the tenure upon which the estate is held" and upon "the custom of the family." They contended further that they were not bound by the debts alleged to have been incurred by the said Bangaru, nor by the Court sales made in execution of the decrees passed against him in respect of such debts; and that the right, title, and interest sold ceased with Bangaru's death, and that the estate then passed to the first defendant, Appayasami, by survivorship.

They contended further that only a life interest "was intended to be sold by the Court, and bargained for and purchased" by Abdul Aziz Khan for a "sum of Rs.6,980-4," who was at the time of sale, and subsequently, "fully aware that what he bargained for and purchased was only the right, title, and interest of this defendant's late undivided brother in the plaint villages as aforesaid," and that "he is estopped by his conduct from bringing the present suit."

The Commercial Bank and others were added as defendants claiming title under mortgages executed by Appayasami after his succession to the zemindari on the death of his brother Bangaru in 1881 without issue.

The second suit was brought by the Commercial Bank to enforce their rights under the mortgages executed by Appayasami. It raised the same issue as between the same parties as in the former suit, in reference to the title conferred upon Aziz Khan by the execution sales in 1873 and 1876.

Upon this issue the first Court held "that the uniform

course of decisions in this Presidency before the ruling in 10 Allahabad, 272, was that acts and alienations by the holder of an impartible zemindari made to enure beyond his lifetime will, if otherwise than bona fide, and if prejudicial to the family, be set aside; his acts and alienations are good for his life, but not beyond it, and that series of decisions in this Presidency established the practice above referred to. Until very lately it was the settled usage of those provinces of India which administer Mitakshara law that the holder of an ancestral impartible estate could not alien or incumber it beyond his own life so as to bind his co-parceners, except for purposes beneficial to the family and not merely to himself." It added: "In deciding this issue as to what was attached, bargained for, sold, and purchased by the first plaintiff, we must be guided only by the prevailing law at that time. Nobody could have expected then what the Privy Council decided thirteen years afterwards. The Courts and parties must have proclaimed for sale and sold only what right, title, and interest the judgment debtor had in the property according to the law then in force. In deciding upon the intention of the parties, I must . . . find that the life interest of the judgment debtor was alone sold and purchased by plaintiff. Nobody could have dreamt or thought of what was to happen thirteen years afterwards . . . The conduct of the plaintiffs and the low price paid for this large estate of immense value referred to in the arguments fully support my finding on the intentions of the parties."

The High Court referred to a judgment of the Judicial Committee of the Privy Council to the effect "that what the Courts have to do in such cases as this is to determine 'the question of fact whether the thing meant to be sold and bought was the entirety of the estate or only a share in it'": *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai* (1); *Simbhunath Panday v. Golab Singh* (2); and *Pettachi Chettiar v. Sangili Veera Pandia* (3); and they added: "That being so, we have no hesitation in concurring in the conclusion at which the Subordinate Judge has arrived—namely, that the estate

J. C.

1903

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.

(1) (1889) L. R. 17 Ind. Ap. 11, 14. (2) (1887) L. R. 14 Ind. Ap. 77.

(3) (1887) L. R. 14 Ind. Ap. 84.

J. C.

1903

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.

sold and bought by the appellants was only the life estate of the zemindar, and determined with his death. The law, as then understood, gave the zemindar no more than a life estate, and the ridiculously low price given for the property purchased indicates that it was only a limited estate that was sold. The first plaintiff would not venture into the witness-box to swear to the truth of his case that he understood he was buying the villages out and out."

Phillips, for the appellant in two appeals, namely, Abdul Aziz Khan (the appellants in two other appeals did not appear), contended that Bangaru was entitled to dispose absolutely of the zemindari: see *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1) and *Raja Rao Venkata v. Court of Wards*. (2) It is said that the view of the law prevailing in 1873 and 1876 was the reverse of that laid down in the two cases cited, and that an impartible zemindari was by that view only alienable for the life of the holder except under special circumstances not shewn to exist in this case. That view is not proved to have existed; and if it did, it was erroneous and did not govern the effect or operation of the sales in question: see Act VIII. of 1859, s. 249, which was the Civil Procedure Code in force at the date of sale. The right, title, and interest sold was the title actually, and according to the correct view of the law, vested in Bangaru. There is no sufficient evidence that the sales in question were intended by the Courts making them to pass any less interest than the full legal title of Bangaru, whatever that might be. Nor is there any evidence that the bidders were acquainted with that intention, if it existed. And the cases referred to in the judgment of the High Court were all cases in which the question in the appeal was whether the interest of the judgment debtor was alone sold in execution, or whether more than that share was sold, as it might have been under certain circumstances. There was no question in those cases, or in any other case, as to whether less than the judgment debtor's interest was sold, or as to the effect upon a sale of an erroneous view of the law prevailing at the

(1) (1888) L. R. 15 Ind. Ap. 51.

(2) (1899) L. R. 26 Ind. Ap. 83.

time. It is now settled that an impartible estate is alienable absolutely and not merely for life, and is consequently at the disposal of the Court in execution. The judgment creditor was entitled to have that entire estate sold, if necessary. The question is whether less than the whole of the interest which Bangaru really had passed by the sale. Even assuming the Court and the parties to have thought that he had a less interest, and that the decisions of the Madras Presidency warranted that view, still his actual right, title, and interest was sold, whatever it might turn out to be. The purchaser has to take the risk of its turning out to be of no value, no title being warranted.

It was further submitted that the question as to what passed by the execution sales was in this case a question of law. There was no ambiguity in the description of the property; there is no question now that the description in its terms covers the entire and absolute interest; there is no question as to its covering more than the property absolutely at the disposal of the judgment debtor.

Consequently the legal operation of the sale was to pass whatever interest the judgment debtor actually had in the property, unless such operation was precluded by the use of an appropriate description of the interest sold, specifically limiting it to something less than his full interest.

Mayne, and *De Gruyther*, for the Commercial Bank, contended that both Courts were right in holding that only Bangaru's life interest in the villages in question passed by the execution sales to Abdul Aziz Khan. It was not seriously disputed that at the dates of those sales it was the settled law as administered by the Courts in Madras that the holder of an impartible zemindari, who was himself a member of an undivided family, could not aliene or incumber it beyond his own life so as to bind his co-parcener except for purposes beneficial to the family. In fact, the case of *Pettachi Chettiar v. Sangili Veera Pandia* (1) shews that that was the opinion of the Privy Council as well as of all the Indian Courts down to the date of L. R. 15 Ind. Ap. 51. As a matter of law, therefore,

J. C.

1903

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.

(1) L. R. 14 Ind. Ap. 84.

J. C.
1903
ABDUL AZIZ
KHAN SAHIB
v.
APPAVASAMI
NAICKER.

Bangaru's estate was not alienable at the date of the sales except for his own life according to the prevailing interpretation of that law at the time; and the doctrine of *Sartaj Kuari's Case* (1) could not be applied retrospectively. Then there is the question of fact—What was intended by the Courts to be sold at the execution sales? Obviously it was that title which alone vested in Bangaru according to the established doctrines. They sold whatever right, title, and interest he possessed according to the law as then understood—not what might have been sold under an alteration in the law as subsequently declared. The purchaser also must be deemed to have so intended to buy and to have so understood the transaction, and he has not given evidence to the contrary. Reference was made to *Girdharee Lall v. Kantoo Lall* (2); *Deendyal Lal v. Jugdeep Narain Singh* (3); *Baboo Hurdey Narain Sahu v. Pundit Rooder Perakash Misser* (4); *Mussamut Nanomi Babuasin v. Modun Mohun* (5); *Meenakshi Naidu v. Immudi Kanaka Ramaya* (6); *Rai Babu Mahabir Pershad v. Markunda Nath Sahai*. (7) It is a question of fact in each case, and here the property was sold at a very low price, shewing the view taken by all parties as to the limited extent of Bangaru's alienable interest: *Beresford v. Ramasubba*. (8)

Phillips replied.

1903
Nov. 13.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. These appeals were heard together, as the decision in all depends upon the same point. The material facts may be very shortly stated.

Bangaru, who succeeded to the zemindari of Kannivadi, in the Madras Presidency, in the year 1852 was a member of a joint Hindu family governed by the Mitakshara law. The zemindari is an impartible estate, the succession to which is regulated by the custom of primogeniture, and upon the death of Bangaru, on February 9, 1881, without male issue, his brother Appayasami succeeded to the zemindari.

(1) L. R. 15 Ind. Ap. 51.

(2) (1874) L. R. 1 Ind. Ap. 321.

(3) (1877) L. R. 4 Ind. Ap. 247.

(4) (1883) L. R. 11 Ind. Ap. 26.

(5) (1885) L. R. 13 Ind. Ap. 1.

(6) (1888) L. R. 16 Ind. Ap. 1.

(7) L. R. 17 Ind. Ap. 11, 14, 16.

(8) (1889) Ind. L. R. 13 Madr. 197.

Bangaru had found the estate heavily incumbered ; and after endeavouring for some years, without much success, to manage it through agents, he executed on July 20, 1861, an instrument by which he transferred to one Adimulam for thirty years the possession and management of the whole zemindari, with the exception of three hill villages, in order to secure the regular payment of the Government demand, the gradual reduction of existing debts, and a modest income for himself. Having made this arrangement, Bangaru proceeded to incur fresh liabilities, and in 1870 and 1871 numerous suits were brought against him, and money decrees obtained by creditors. Two of these were transferred to the appellant Abdul Aziz Khan. The first, dated March 18, 1870, was for Rs.5264 15a. 9p., with interest and costs ; and the second, dated March 7, 1871, for Rs.20,904 9a., with interest and costs. In execution of these decrees twelve villages of the zemindari were attached and sold by order of the District Court of Madura, and were purchased by the appellant above named for a total sum of Rs.7010. The certificate of sale of seven villages is dated on March 7, 1873, and that of the remaining five villages on March 22, 1876. In both cases what was purchased was expressed on the face of the certificate to be "the right, title, and interest" possessed by the defendant Bangaru in the properties mentioned.

As has been already stated, Bangaru died without issue in 1881, and on April 23 in that year the respondent Appayasami (since deceased) filed a suit against Adimulam and others to set aside the instrument of July 20, 1861, as not binding upon him for reasons given in the plaint. The District Judge found that it was not binding as a lease, but was binding as a mortgage, and, after taking an account of what was due to Adimulam as mortgagee, passed a decree in his favour for Rs.1,87,835 with interest. Upon appeal to the High Court at Madras, this decree was affirmed with the exception that the sum payable to the mortgagee was reduced to Rs.1,20,000. To satisfy this decree and redeem the property, Appayasami borrowed money from various persons, whose claims are now represented by the respondent, the Commercial Bank of India.

J. C.

1903

ABDUL AZIZ
KHAN SAHIBv.
APPAYASAMI
NAICKER.

J. C.

1903

ABDUL AZIZ
KHAN SAHIB

v.

APPAYASAMI
NAICKER.

On July 20, 1891, the term of thirty years reserved in the conveyance to Adimulam expired, and the appellant Abdul Aziz Khan brought a suit to recover possession of the twelve villages which he had purchased at the Court sales before mentioned from Appayasami, whom he alleged to be in wrongful possession of them. Appayasami in his written statement asserted that all that was attached and sold in execution of the money decrees held by the appellant "was the right, title, and interest of the deceased Bangaru, and that such right, title, and interest ceased with his death." Of the numerous issues raised, the most important was the sixth, namely, "Whether what was attached, bargained for, sold, and purchased by the" (appellant) "was only the life interest of the deceased Bangaru?"

The Civil Procedure Code of 1859, which was in force at the time of the execution sales, "required that property sold in execution should be described as the right, title, and interest of the judgment debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment debtor might have sold": *Mahabir Pershad v. Markunda Nath Sahai*. (1) Each case, however, must depend upon its own circumstances, and "in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money decree": *Simbhunath Panday v. Golab Singh*. (2) As Lord Watson puts it in the course of the argument in the case of *Pettachi Chettiar v. Sangili Veera Pandia* (3), in the case of a sale in execution of a money decree, "the questions are, what did the Court intend to sell, and what did the purchaser understand that he bought?" These are questions of fact, or rather of mixed law and fact, and must be determined according to the evidence in the particular case.

In the present case it is not disputed that Bangaru and his

(1) L. R. 17 Ind. Ap. 11, at p. 16. (2) L. R. 14 Ind. Ap. 77, at p. 83.

(3) L. R. 14 Ind. Ap. 84, at p. 85.

brother constituted an undivided Hindu family, and that the debts in respect of which the decrees were made were not debts for which the joint estate was liable, if it passed by survivorship to the younger brother. What then was the extent of the interest held in the estate by Bangaru in his brother's lifetime, and which he was entitled to charge in favour of a personal creditor? As regards the law of the matter in 1873 and 1876, when the sales took place, it was the accepted law in Madras that the holder of an impartible zemindari, who was himself a member of an undivided family, could not alienate or incumber the corpus of the estate so as to bind his co-parceners, except for justifiable especial causes. Prior to 1889 there had been a series of decisions to this effect in the Madras Courts; but in that year, following the judgment of this Committee in the case of *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1), the High Court of Madras overruled those decisions (*Beresford v. Ramasubba* (2)); and it has recently been held by this Committee in the case of *Raja Rao Venkata v. Court of Wards* (3) that impartible zemindaris in the Presidency of Madras are not inalienable in the absence of proof of some special family custom or tenure attaching to the zemindari, and having that effect. This reversal of the previously accepted interpretation of the law does not, in their Lordships' opinion, displace its application to the construction of the contracts contained in the certificates of sale now under consideration. "The rights of the parties to a contract," as Willes J. observes in delivering the judgment of the Court of Exchequer Chamber in *Lloyd v. Guibert* (4), "are to be judged of by that law which they intended, or rather by which they may justly be presumed to have bound themselves." Their Lordships agree with the Courts below in holding that in 1873 and 1876, when the sales took place, the parties must be taken to be bound by the law as it was at that time understood, and that the estate purchased by the appellant was only the life interest of the then zemindar. Their Lordships will humbly advise His Majesty

J. C.

1903

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.

(1) L. R. 15 Ind. Ap. 51.

(2) Ind. L. R. 13 Madr. 197.

(3) L. R. 26 Ind. Ap. 83.

(4) (1865) 6 B. & S. 100, at p. 133.

J. C. that these appeals should be dismissed, and the decrees of the High Court at Madras confirmed.

1903

ABDUL AZIZ
KHAN SAHIB
v.
APPAYASAMI
NAICKER.

Munhar Das and his co-appellants have not appeared before their Lordships in support of their appeals. Their Lordships will accordingly order them to pay the costs of those appeals incurred by the Commercial Bank of India, the only respondent who has appeared. The bank's costs of the other two appeals must be paid by Abdul Aziz Khan, the appellant therein.

Solicitors for appellant, Abdul Aziz Khan : *T. L. Wilson & Co.*
Solicitors for Commercial Bank : *Burton, Yeates & Hart.*

J. C.*

1903

May 18, 19,
25;
Nov. 12.

CHOWDERY GANESH DUTT THA- } DEFENDANTS;
KOOR AND OTHERS }

AND

MUSSUMMAT JEWACH THAKOORAIN PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Partition—Right of Hindu Mother to a Share—Effect of Cesser of Commensality—Practice—Civil Procedure Code, s. 44, rule A.

Cesser of commensality is an element which may properly be considered in determining whether there has been a partition of Hindu joint family property, but it is not conclusive.

Mussumat Anundee Koonwur v. Khedoo Lal, (1872) 14 Moore's Ind. Ap. Ca. 412, followed:—

Held, in this case, notwithstanding the unsatisfactory character of the oral evidence had it stood alone, that the finding of the High Court in favour of partition, though overruling that of the lower Court, should be affirmed.

According to the Mitakshara as applied in Bengal, a mother is entitled, if a partition takes place between her sons, to a son's share in property which is ancestral or acquired by the employment of ancestral wealth, and is not bound by a partition effected in disregard of her right. Her rights

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

may be declared under the partition, which is not rendered invalid by the omission to reserve her share.

Notwithstanding s. 44, rule A, of the Civil Procedure Code, there is nothing irregular in seeking to recover in one suit immovable and movable property if the cause of action is the same in respect of both.

APPEAL from a decree of the High Court (Feb. 3, 1897) varying a decree of the Subordinate Judge of the District of Tirhoot (May 5, 1894).

The suit was brought by the respondent as the widow of Chowdhry Balmukund to recover the share of her husband in the family property. The family consisted of her husband and his three brothers, Raja Thakoor, who was the managing member, Ganesh, and Chhedi. The respondent alleged that her husband was separate from his brothers at the date of his death; the appellants alleged that he was joint with them in food, worship, and estate.

The Subordinate Judge decreed in her favour for part of the share claimed. The High Court decreed in her favour for the whole amount of the claim.

Bonnerjee and *Blair* contended that there was no reliable evidence of separation; that the suit as framed was not maintainable under s. 44, rule A, of the Civil Procedure Code: see *Giyana Sambandha v. Kandasami* (1); that as regards the movables, the suit was barred by limitation: *Mahomed Reasat Ali v. Hasin Banu* (2); that the partition was invalidated by the omission to reserve a share for the mother: see *Krishnabai v. Khangowda*. (3)

Mayne, for the respondent, relied upon concurrent findings of fact that a partition had taken place, and contended that it was the case of neither party that the partition was partial.

Bonnerjee replied.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. This suit was brought by the respondent, Jewach Thakoorain, the widow of one Balmukund Thakoor, to determine her rights under a partition of family

(1) (1887) Ind. L. R. 10 Madr. 375, 506. (2) (1893) L. R. 20 Ind. Ap. 155.

(3) (1893) Ind. L. R. 18 Bomb. 197.

J. C.

1903

CHOWDHRY
GANESH
DUTT
THAKOOR
v.
MUSUMMAT
JEWACH
THAKOORAIN.

1903

Nov. 12.

J. C.
1903
CHOWDHRY
GANESH
DUTT
THAKOOR
v.
MUSSUMMAT
JEWACH
THAKOORAIN.

property which she alleged had taken place in her husband's lifetime, and for such relief as she might be found entitled to under the circumstances of the case. The defendants were the three surviving brothers of her husband, Ganesh Dutt Thakoor, Raja Thakoor, and Chhedi Thakoor, Niterbati Thakoorain, the wife of Chhedi Thakoor, in whose name one of the properties alleged to belong to the family had been purchased, and Harakhbati Thakoorain, the mother of the four brothers, who would be entitled to a share on the partition, if proved. All the parties are Brahmins of Tirhoot, and the law which governs the case is the Mitakshara law, as modified in its application in Bengal.

Chowdhry Raja Thakoor died on October 7, 1902, and by an order of His Majesty in Council dated March 28, 1903, Chowdhry Manindra Marayan Thakoor was substituted in his place.

It is common ground that the four brothers, at any rate up to the Fasli year 1290, formed an undivided Hindu family. They were zemindars, owning considerable interests in land, and in addition carried on a mahajuni or money-lending business of a profitable character.

The plaintiff's case is that her husband, Balmukund, separated from his brothers in Fasli 1290; that a partition of household goods and zeraib lands took place in that year; that a further partition of the zemindari and mahajuni properties took place in Fasli 1295; and that Balmukund died while the actual division of these assets was in progress. She further alleges that, after her husband's death, the brothers invited her to the family house, and took advantage of her absence from her own house to demolish it, and possess themselves of the entire family property. Some months later, when she went to visit her father, she discovered what had taken place, and instituted legal proceedings. The allegations are, as may be supposed, denied by the defendants.

The evidence on both sides is very voluminous, very conflicting, and for the most part unsatisfactory. But both Courts in India concur in finding that Balmukund, in Fasli 1290, built a house for himself and went to live in it with his

family. He thus became separate from his brothers in food and residence. This fact lends probability to the evidence that at the same time a partition took place of household furniture and other movable property of a similar character.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive: *Mussumat Anundee Koonwur v. Khedoo Lal*. (1) It is, therefore, necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

It is alleged by the plaintiff's witnesses that, at the time Balmukund took up his abode in a separate house, a division of zerait lands was made; and in support of this allegation, Exhibit 16, which purports to be a list of the zerait lands so divided, was produced. This document was discredited by the Subordinate Judge, but accepted by the High Court. In their Lordships' opinion, it is of such doubtful authenticity that they think it safer not to rely on it, at any rate as a correct statement of zerait lands in the possession of the joint family in Fasli 1290.

Five years later, in Fasli 1295, the plaintiff alleges that the zemindari and mahajuni properties were divided. Here again the evidence is conflicting; but it may be observed that only one of the three surviving brothers was called to support the case put forward on their behalf; that both Courts in India discredited the evidence of Raja Thakoor, the brother who was called; and that two important witnesses, Jibi Jha and Rajib Nain, were not examined. Upon the evidence as it stood, the Subordinate Judge found that no partition in Fasli 1295 was proved; while the High Court found that "the separation which had begun in part in 1290 was effectually completed . . . in 1295, and that not in respect of some properties only, but in respect of all."

The entire evidence on the record was very minutely dissected by the learned counsel who appeared before their

(1) 14 Moore's Ind. Ap. Ca. 412.

J. C.

1903

CHOWDHRY
GANESH
DUTT
THAKOOR

v.
MUSSUMMAT
JEWAOH
THAKOORAIN.

J. C.
 1903
 CHOWDHRY
 GANESH
 DUTT
 THAKOOR
 v.
 MUSSUMMAT
 JEWACH
 THAKOORAIN.

Lordships in this appeal, and in the result they have come to the conclusion that it is not their duty to advise His Majesty that the carefully considered judgment of the High Court upon the main question at issue should be set aside. In coming to this conclusion they have been influenced by the circumstance that there is no dispute as to five facts which, in their opinion, tend to corroborate the story told by the plaintiff's witnesses.

1. It is admitted that of sixty-five revenue-paying estates belonging to the family, payment of revenue of nineteen was made separately after Fasli 1295, namely, one-fourth in the name of Balmukund, and three-fourths in the name of his three brothers.

2. It is admitted that of a sum of Rs.35,004 1a. recovered in 1295 under a decree obtained by the family firm against one Gholam Mahomed, three-fourths were credited to the three brothers, and one-fourth to Balmukund.

3. It is admitted that the rent payable by the Ather Indigo Factory to the family under a lease of certain villages was paid in 1295, as to three-fourths to the three brothers and as to one-fourth to Balmukund, and that after Balmukund's death one payment of one-fourth of the rent was made to his widow, and then stopped upon an indemnity being given to the factory by the brothers against any claim that might thereafter be advanced by the widow.

4. It is admitted that in 1295 an estate was purchased out of the family funds in the name of the four brothers, "in equal shares."

5. It is undisputed that in a suit brought to recover a debt due to the family, shortly after Balmukund's death, one of the brothers claimed to sue "as heir and adopted son" of Balmukund—a claim entirely inconsistent with the theory of survivorship in an undivided Hindu family.

These facts give material support to the case made on behalf of the plaintiff, however unconvincing the oral evidence might have been, had it stood alone. It was the case of neither party that there was a partial separation—that is, a separation in respect of certain properties only; and their

Lordships consequently agree with the finding of the High Court that the plaintiff, as heir to Balmukund, is entitled to succeed to his share in the family property as it existed at the time of his death, or has been subsequently increased by employment of the family funds.

The amount of this share is the next question to be determined. There is no doubt that, according to the law in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth. She may, of course, acquiesce in the division of the property between her sons without claiming any share for herself; but there is no evidence of any such acquiescence in this case. On the contrary, she claims her share in the written statement which she has filed in this suit, and denies all knowledge of any partition having taken place between her sons. Under these circumstances the learned Subordinate Judge held that Balmukund's share was one-fifth and not one-fourth. The judges of the High Court apparently considered that acquiescence on the part of the mother was established, and awarded one-fourth to the plaintiff. But their Lordships have not been referred to, nor have they been able to discover, any evidence of acquiescence except a vague statement by the plaintiff that no share was assigned to the mother "because she did not make any objection." Under these circumstances their Lordships agree with the Subordinate Judge that the mother's claim must be allowed, and the decree of the High Court varied accordingly.

It was contended by Mr. Bonnerjee that the omission to reserve a share for the mother rendered the partition invalid; and in support of this contention he relied on the case of *Krishnabai v. Khangowda* (1), in which it was decided that a partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor. So here, their Lordships recognise that the mother is not

(1) Ind. L. R. 18 Bomb. 197.

J. C.

1903

CHOWDHRY
GANESH
DUTT
THAKOOR

v.

MUSSUMMAT
JEWACH
THAKOORAIN.

J. C.
1903
CHOWDHRY
GANESH
DUTT
THAKOOR
v.
MUSUMMAT
JEWACH
THAKOORAIN.

bound by a partition to which it is not shewn she ever assented ; and the suit being one for a declaration of rights under the partition, in which all the parties interested are represented, and in which the mother claims her share, their Lordships have felt no difficulty in giving effect to her claim in the order which they will humbly advise His Majesty to make upon this appeal.

Mr. Bonnerjee also contended that the suit as framed was not maintainable under the provisions of s. 44, rule A, of the Code of Civil Procedure. The rule is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immovable and movable property, if the cause of action is the same in respect of both: *Giyana Sambandha Pandara v. Kandasami Tambiran*. (1) Here the cause of action arose in the refusal of the three male defendants to recognise the right of the widow to succeed to her deceased husband's share in the family property under a partition which had not been completed by actual division at the time of her husband's death; and it would be a denial of justice to hold that in a suit upon such a cause of action relief could not be given in respect to movable as well as immovable property. It follows that the claim as regards the movable property cannot be held to be barred by limitation.

In their Lordships' opinion the decree of the High Court must be varied so as to include a declaration that the defendant Musummat Harakbati Thakoorain is entitled to one-fifth share of the family property, and that the respondent Musummat Jewach Thakoorain is likewise entitled as heir to her husband to one-fifth share in the said property; and subject to this declaration, unless the parties shall come to an equitable arrangement approved by the Court, the suit should be remanded to the Subordinate Judge to inquire what was due to the estate of Chowdhry Balmukund Thakoor in respect of his share at the time of his death, and what have been the subsequent accretions thereto from the employment of the family funds, and for that purpose to take the usual accounts, including the accounts of the family business, and to order

(1) Ind. L. R. 10 Madr. 375, at p. 506.

that the costs of the inquiry and of taking the accounts and of the partition be paid out of the estate.

Their Lordships will humbly advise His Majesty to make an order remanding the suit to the effect and containing the directions above stated. The appellants Chowdhry Ganesh Dutt Thakoor, Chowdhry Manindra Narayan Thakoor, and Chowdhry Chhedhi Thakoor must pay the respondent's costs of this appeal.

J. C.

1903

CHOWDHRY
GANESH
DUTT
THAKOOR
v.
MUSUMMAT
JEWACH
THAKOORAIN.

Solicitor for appellants : *W. W. Boz.*

Solicitors for respondent : *T. L. Wilson & Co.*

RAJA RANGAYYA APPA RAO BAHADUR PLAINTIFF ;

AND

BOBBA SRIRAMULU AND OTHERS . . DEFENDANTS.

J. C.*

1903

Nov. 5;
Dec. 2.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Madras Rent Recovery Act (VIII. of 1865)—Act XV. of 1877, art. 110—
Construction—Limitation does not run till Rate of Rent ascertained.*

Although in most cases the point of time at which rent becomes due is the close of the period for which it is to be paid, yet under the procedure prescribed by the Madras Rent Recovery Act no rent becomes due while the rate of rent is in suspense and until it has been ascertained.

In suits to which the said Act applies, brought to recover balances of rent due for certain holdings for the Fasli years 1295, 1296, 1297, 1298, at rates determined by a decree of the High Court dated October 29, 1889 :—

Held, that under the true construction of art. 110 of the Limitation Act of 1877 prescribing three years, reckoned from the time when the arrears become due, limitation ran, not from the close of the respective Fasli years mentioned, but from October 29, 1889.

CONSOLIDATED APPEALS from decrees of the High Court (Dec. 8, 1896) affirming decrees of the District Court of Kistna (Dec. 22, 1894), affirming decrees of the Munsiff of Bezvada (Sept. 11, 1893), dismissing on the ground of limitation suits

* *Present* : LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

VOL. XXXI.

C

J. C. for rent as regards four years mentioned, and decreeing a balance due for 1299 Fasli.

1903

RAJA
RANGAYYA
APPA RAO
BAHADUR
v.
BOBBA
SIRAMULU.

The plaintiff is zemindar of Nusvid, and brought separate suits against each of the respondents which claimed, under the circumstances stated in their Lordships' judgment, balance of rent due for the years 1295-99 Fasli. The respondents pleaded limitation in respect of the years 1295-98 Fasli. The date of suit was October 28, 1892. The Munsiff decided that the period of limitation was three years from the time the rents became due. He found that the rents became due for each Fasli year on the expiry of that year, i.e., on July 1, 1886, July 1, 1887, July 1, 1888, and July 1, 1889.

The High Court in affirming this judgment relied on the case of *Siramulu v. Sobhanadri Appa Rau* (1), which was in conflict with *Sobhanadri Appa Rau v. Chalamanna*. (2)

De Gruyther, for the appellant, contended that no suit for rent would lie while the amount and rate thereof were unascertained. Art. 110 of Act XV. of 1877 says that the period runs from the time when the arrears claimed became due. According to the true construction of Madras Act VIII. of 1865 (see ss. 3, 4, 7, 9, 10, 11, and 14), while proceedings are pending thereunder to ascertain the rate and amount of rent, there is no rent due within the meaning of the Limitation Act. In this case, therefore, limitation did not begin to run till the decree of the High Court dated October 29, 1889. He relied upon the case cited above from Ind. L. R. 17 Madr. 225, and referred to *Gopala Sawmy Mudelly v. Mukkee Gopalier* (3); *Sayud Chanda Miah Sahib v. Lakshmana* (4); *Easwara Doss v. Pungavanachari* (5); *Ali Khan v. Appadu*. (6) In Bengal there is s. 32 of Act X. of 1859 to govern a like case: see *Mussamat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*. (7)

The respondents did not appear.

- | | |
|-------------------------------------|------------------------------------|
| (1) (1894) Ind. L. R. 19 Madr. 21. | (5) (1890) Ind. L. R. 13 Madr. |
| (2) (1893) Ind. L. R. 17 Madr. 225. | 361. |
| (3) (1873) 7 Madras H. C. 312, | (6) (1883) Ind. L. R. 7 Madr. 304. |
| 331. | (7) (1868) 12 Moore's Ind. Ap. Ca. |
| (4) (1876) Ind. L. R. 1 Madr. 45. | 244. |

1903. Dec. 2. The judgment of their Lordships was delivered by www.libtool.com.cn

SIR ARTHUR WILSON. This appeal raises a question of considerable importance in Madras, as to which there has been some difference of opinion amongst the learned judges of the High Court.

The plaintiff (appellant) is the zemindar of Nuzvid, and is a "landholder" within the meaning of the Rent Recovery Act (Madras Act VIII. of 1865). The several defendants hold lands under him in the village of Mustabada, which is included in his zemindari, and they are "tenants" within the meaning of the Act.

The defendants occupied the lands to which the present controversy relates for a long period, but the time which has to be considered in this appeal commences with the Fasli year 1295. In that year the plaintiff tendered puttahs which the defendants refused to accept (similar proceedings took place in the subsequent years). The plaintiff thereupon instituted summary suits before the Collector to enforce the acceptance of the puttahs and the execution of corresponding muchilkas. The head Assistant Collector, who heard the cases, made his order modifying the terms of the proposed puttahs, and directing the tender of puttahs embodying his modifications. The District Judge on appeal made additional changes in the puttahs. On further appeal the High Court again varied the terms of the puttahs to be tendered; and thus by the decree of the High Court dated October 29, 1889, the conditions of the tenancies, including the rates of rent, were finally determined.

The present suits were brought on October 28, 1892, in the Court of the Munsiff of Bezwada. In them the plaintiff claimed to recover from the defendants balances of rent for their respective holdings, at the determined rates, in respect of the Fasli years 1295, 1296, 1297, 1298, and subsequent years.

With the subsequent years this appeal has nothing to do; it is limited to the four years mentioned. The Courts in India have held that the claim for rent in respect of those four years is barred by limitation, and the correctness of that ruling is the one question raised in the present appeal.

J. C.

1903

RAJA
RANGAYYA
APPA RAO
BAHADUR
v.
BOBBA
SRIRAMULU.

J. C.
 1903
 RAJA
 RANGAYYA
 APPA RAO
 BAHADUR
 v.
 BOBBA
 SRIRAMULU.

The rule of limitation applicable to the case is art. 110 of Sched. II. of the Indian Limitation Act (Act XV.) of 1877, which prescribes for a suit for arrears of rent a period of limitation of three years reckoned from the time when the arrears become due. The Courts in India have held that the period of limitation in this case for the rent of each Fasli year runs from the close of that year, and if that view be correct the cases have been rightly decided. The contention before their Lordships was that the period should be counted from October 29, 1889, when the decree of the High Court determined the rent payable. And, if this contention be correct, these claims were in time.

The point of time from which, under the Limitation Act, the period of limitation is to run is that at which the arrear became due. In most cases no doubt the point of time at which rent becomes due is the close of the period in respect of which it is to be paid. But this is not necessarily always the case in India, and the Limitation Act is an Act for all India. Legislation, or custom, or express contract, or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid. The case of *Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia* (1), heard before this Board, is an example of a suit for rent, governed by a law of limitation substantially the same as that now before their Lordships, in which the date at which the rent became due was held to be an entirely different date from the close of the period in respect of which that rent was payable. The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all. In such an Act the falling due of rent naturally means the falling due of an ascertained rent, which the tenant is under an obligation to pay, and which the landlord can claim and, if necessary, sue for.

In order to see when rent becomes due in a case like the present it is necessary to turn to the Rent Recovery Act (Madras Act VIII. of 1865). That Act enacts (s. 3) that

(1) 12 Moore's Ind. Ap. Ca. 244.

certain landholders and others shall enter into written engagements with their tenants, to be embodied in puttahs and muchilkas, which (s. 4) must contain, amongst other things, the amount and nature of the rent. By s. 7 no suit or legal proceedings for rent can be sustained unless puttah and muchilka have been exchanged, or a puttah has been tendered such as the tenant was bound to accept, or both parties have agreed to dispense with such documents. If a puttah is tendered and the tenant refuses to accept it, the landholder (s. 9) may proceed by summary suit before the Collector to enforce acceptance of the puttah. And in such a suit it is for the Collector to settle the terms of the tenancy, including the rent, in accordance with the principles laid down in the Act. From the Collector's decision an appeal lies to the Civil Courts (s. 69).

Under this procedure it seems clear that as long as proceedings are pending before the Collector and, on appeal from him, before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that, therefore, no arrear of rent can be said to have become due within the meaning of the Limitation Act. That this is the meaning and effect of the Rent Recovery Act becomes much plainer on a further examination of the Act. The Act (s. 87) keeps alive the right to proceed in the Civil Courts in respect of rent, and the present appeal arises out of a civil suit so brought. But the Act deals very briefly with such suits. Its meaning and effect can be better learned from the provisions relating to those special and summary remedies which are dealt with in some detail and fill a large part of the Act. They are available for arrears of rent, and must be put in force within one year from the time when the rent became due (s. 2). Those special remedies are distress, sale of the holding, ejectment, and arrest. And in each of these cases the proceedings must commence with a document stating the amount of rent due (ss. 15, 16, 39, 41, 46).

Their Lordships are of opinion that in the present cases no rent was in arrear or due till the rates of rent were ascertained

J. C.

1908

RAJA

RANGAYYA

APPA RAO

BAHADUR

v.

BOBBA

SRIRAMULU.

J. C.

1903

RAJA

RANGAYYA

APPA RAO

BAHADUR

v.

BOBBA

SIRAMULU.

by the decree of the High Court of October 29, 1889, and that limitation runs from that date.

It may be well to notice two arguments against the view taken by their Lordships, which seem to have had weight with some of the learned judges in Madras.

Sect. 14 of the Rent Recovery Act says that "when rent shall remain unpaid at the time when, according to any written agreement or the custom of the country, it ought to have been paid," it is to be "deemed an arrear of rent." It has been said, and no doubt rightly, that by the custom of the country agricultural rents are payable at or before the close of the Fasli year. And it has been thought that this section defines the point of time at which agricultural rent becomes in arrear as the close of the Fasli year. And so it seems to do in the cases to which it applies. But, in their Lordships' opinion, this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined.

Another argument has been based upon s. 7 of the Act, already cited. It has been thought that, under that section, where a landholder has tendered a puttah which the tenant refuses, but which, as the result of the litigation rendered necessary by that refusal, has been found to have been a proper one, and then proceeds to sue for the rent so ascertained, he may be met by a plea of limitation, on the ground that he might have sued, and ought to have sued, for the rent without waiting to have the rate determined. If that view were correct, it would not affect the present case, for in this case the puttah tendered by the landholder was not approved by the Courts, but was altered by them. The High Court, however, in the judgment under appeal, has drawn no distinction between the case in which the puttah tendered has been ultimately approved by the Courts and the case in which it has been modified. And their Lordships think the Court was right in so doing. Sect. 7 is not an enabling section, but a restraining section. In order to see when there is an arrear which can be sued for it is necessary to examine the Act as a whole; and the reasons have already been stated which lead

their Lordships to think that its provisions as to rent due, rent in arrear, and the recovery of rent refer to ascertained rents.

For the foregoing reasons their Lordships are of opinion that the claims for rents in respect of the Fasli years 1295, 1296, 1297, and 1298 are not barred by limitation. They will humbly advise His Majesty that the decrees of the High Court and the District Court ought to be discharged with costs, and those of the Munsiff's Court discharged, and that the cases ought to be remitted to the High Court with a declaration to the above effect, in order that they may be disposed of in the Munsiff's Court in accordance with that declaration.

The appellant will recover his costs of this appeal from the respondents.

Solicitor for appellant: *R. T. Tasker.*

J. C.

1903

RAJA

RANGAYYA

APPA RAO

BAHADUR

v.

BOBBA

SRI RAMULU.

www.libtool.com.cn

J. C.*

1903

Nov. 11;
Dec. 10.

AMAR CHUNDER KUNDU APPELLANT;

AND

SOSHI BHUSAN ROY AND OTHERS . , RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Bengal Tenancy Act, 1885, ss. 93, 98, sub-s. 3—Power of Manager to mortgage
—Powers of Co-owners during Management—Construction.*

Held, that a manager appointed under s. 93 of the Bengal Tenancy Act of 1885 has power, with the sanction of the District Judge, to sell or mortgage the estate under his management.

While the estate is under management the co-owners jointly cannot exercise the powers which under s. 98, sub-s. 3, are entrusted to the manager. But any co-owner can aliene his share with the result that it vests for all purposes in the alienee subject to the management, and therefore to every charge created by the manager.

APPEAL from a decree of the High Court (July 16, 1900) affirming a decree of the District Court of Chittagong (March 4, 1898).

The suit was filed by Rai Golak Chunder Chowdhry, afterwards represented by some of the respondents (his heirs), against three co-owners of the estate in suit, named Assanulla, Rahimulla, and Basirulla, or their representatives. It was brought to enforce a mortgage thereof dated 21st Pous, 1298 (January 4, 1892), made by a manager appointed on September 20, 1890, under the Bengal Tenancy Act (VIII. of 1885), s. 95, which had been made, with the sanction of the District Judge, mainly for the purpose of paying off a previous mortgage (December 23, 1890) at higher interest to the appellant, made with the like sanction, for the purpose of paying Government revenue. The appellant was added as a party defendant on account of his having purchased "about the whole of the property in suit," the property purchased having been previously mortgaged to him (August 4, 1891) by Rahimulla, one of the three co-owners, to the extent of his share therein. He claimed

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

by his written statement priority of the plaintiff, since his purchase, which was at a sale in execution of a decree on his own mortgage, was effected prior to the plaintiff's mortgage.

Sect. 95 of the Bengal Tenancy Act (No. VIII. of 1885) provides that the District Judge, if a dispute exists among co-owners of an estate, may appoint a manager.

Sect. 98 says, in clause 3, that the manager "shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might, but for his appointment, have exercised"; and the section adds, "and the co-owners shall not exercise any such power."

Sect. 100 enacts, "The High Court may from time to time make rules defining the powers and duties of managers under the foregoing sections."

In pursuance of above power conferred by the Act, the High Court framed certain rules; one of them is as follows: "No manager shall have power to sell or mortgage any property, nor shall he grant or renew any lease for any period exceeding three years, without the express sanction of the District Judge."

The District Judge held that the words "for the purposes of management" in s. 98, sub-s. 3, included the power to mortgage; that the power to mortgage was conferred by the Act was shewn by the rules made by the High Court under s. 100; that under the proviso the power conferred on the manager was taken away from the co-owners. "I therefore hold that the mortgage created by Rahimulla is wholly invalid as against the present plaintiff's lien."

He further held that even if it were valid it would only be a second mortgage, and the plaintiff's claim would have precedence; that in law and equity the appellant was bound to treat the mortgage now in suit as prior to the mortgage upon which his title was based; that the suit brought by appellant on his mortgage was bad because he did not make plaintiff a party to it, although the evidence went to shew that he was aware of the circumstances.

The High Court held that the two mortgages given by the manager were valid; that Rahimulla had no power of creating a mortgage; that the words used in the section were clearly

J. C.

1903

AMAR
CHUNDER
KUNDUv.
SOSHI
BHUSAN
ROY.

J. O.
1903
AMAR
CHUNDER
KUNDU
v.
SOSHI
BHUSAN
ROY.

prohibitive—that is to say, that while the common management existed, the powers of the co-owners must be regarded as in abeyance. It followed that the mortgage created by Rahimulla on August 4, 1891, cannot in any way interfere with or derogate from the rights created under any transaction made by the common manager with respect to the joint properties. The Court also held that it was clear from the provisions of the mortgage bond executed by the manager in plaintiff's favour that plaintiff never intended to give up the benefit of the first mortgage to the appellant (which had been paid off with the proceeds of the mortgage to plaintiff). The words in the document were an indication that it was the intention of plaintiff to keep alive the security of appellant in his own favour, and the presumption, in the absence of evidence to the contrary, was that a person whose money goes to satisfy a prior mortgage intends to keep alive for his benefit that prior mortgage.

Haldane, K.C., and Phillips, for the appellant, referred to ss. 93, 94, 95, and 96 of Act VIII. of 1885, and contended that the mortgage of August 4, 1891, was valid, and that the appellant's decree and purchase thereunder passed to him Rahimulla's share before the plaintiff's mortgage was executed, and entitled him to priority over that mortgage. Besides, the latter mortgage was invalid, for on the true construction of the sections referred to, and of s. 98, sub-s. 3, the power of a common manager appointed thereunder is confined to the management of the property, and does not include any powers of alienation. The rule made by the High Court was *ultra vires* so far as it contemplated such a power in the manager.

Asquith, K.C., and C. W. Arathoon, for the respondents, were not heard.

1903
Dec. 10.

The judgment of their Lordships was delivered by
SIR ANDREW SCOBLE. The Bengal Tenancy Act of 1885 by s. 93 provides that “when any dispute exists between co-owners of an estate or tenure as to the management thereof, and in consequence there has ensued or is likely to ensue (a) inconvenience to the public, or (b) injury to private

rights, the District Judge may," upon proper application and under certain specified conditions, appoint a manager. The powers and duties of the manager are mainly to be found defined in s. 98, sub-s. 3 of which provides that "he shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might but for his appointment have exercised, and the co-owners shall not exercise any such power." By sub-s. 8 of the same section, "he shall be removable by the order of the District Judge and not otherwise." And by s. 100, "the High Court may from time to time make rules defining the powers and duties of managers under the foregoing sections." Under this section the High Court made a rule that "no manager shall have power to sell or mortgage any property, nor shall he grant or renew any lease for any period exceeding three years, without the express sanction of the District Judge."

Mr. Haldane took a preliminary objection that this rule was ultra vires, sale and mortgage not being included in the terms "for the purposes of management" contained in s. 98, sub-s. 3, of the Act. There is no definition in the Act of what is to be included in the word "management," and it must, therefore, be construed with reference to the subject-matter of the Act itself. Their Lordships agree with the learned judges of the High Court at Calcutta in the opinion that "to hold that the manager has no power to sell or mortgage would have the effect of frustrating the object for which, generally speaking, a common manager is appointed." In India, "the management of a property carries with it the obligation of paying the dues accruing upon it; and for the payment of the dues which may accrue from time to time, it may become necessary either to sell, mortgage, or grant a lease. To hold that a common manager may grant a lease, but may not sell or mortgage, would have, in our opinion, the effect of nullifying the provisions made by the Legislature for the purpose indicated in the Act."

Passing now to the facts of the case, it appears that on September 20, 1890, a manager was appointed under the

J. C.
1903
AMAR
CHUNDER
KUNDU
v.
SOSHI
BHUSAN
ROY.

J. O.
1903
~
AMAR
CHUNDER
KUNDU
v.
SOSHI
BHUSAN
ROY.
—

Act of an estate in Chittagong belonging to three co-owners named ~~Rahimulla, Assanulla~~, and Basirulla. There was a considerable amount of Government revenue due on the estate, and on December 23, 1890, the manager, with the sanction of the District Judge, borrowed from the present appellant, Amar Chunder, the sum of Rs.6200 at $1\frac{1}{4}$ per cent. per month interest, in order to pay off these arrears. To secure the advance he gave the appellant a mortgage on the property under his management. On November 24, 1891, finding he could borrow at a lower rate of interest than that charged by the appellant, he obtained the sanction of the District Judge to carry out this purpose; and on January 4, 1892, he executed a mortgage in favour of one Golak Chunder for the sum of Rs.6700, with interest at 1 per cent. per month. With the money thus obtained he paid off the appellant's mortgage.

In the meanwhile, on August 4, 1891, the appellant obtained from Rahimulla, one of the co-owners, a mortgage of his own share in the property; and subsequently brought a suit and obtained a decree against Rahimulla alone, in execution of which decree he purchased Rahimulla's share.

The estate having been released from management under the Act, the heirs of Golak Chunder, on April 2, 1897, brought the present suit in the Court of the District Judge of Chittagong to establish their claim under the mortgage of January 4, 1892. To this suit the appellant was made a party, and the sole question on this appeal is whether the mortgage of Rahimulla's share to him gives him any right as against the mortgage of the whole property by the manager to Golak Chunder.

It appears to their Lordships that all that the appellant obtained under the mortgage by Rahimulla or his subsequent purchase of Rahimulla's interest was that he should be substituted as a co-owner in the place of Rahimulla, and that whatever he took, whether under the mortgage or by reason of the purchase, was subject to any charge on the estate that might be properly incurred by the manager during the period of management. In this view, no question of priority or subrogation arises, and it is unnecessary to do more than

inquire whether the mortgage to Golak Chunder was a valid charge upon the estate. As already intimated, their Lordships think that it was.

The question raised in the Courts below "whether Rahimulla had the power of creating a mortgage while the properties were in the hands of the common manager" has, in their Lordships' opinion, been incorrectly decided by the High Court. Rahimulla, no doubt, had no power of creating a mortgage on the whole estate; but there is nothing in the Act to take away his power of dealing with his own share. The words of s. 98, sub-s. 3, give to the manager "the same powers as the co-owners jointly might but for his appointment have exercised," and the co-owners are prohibited from exercising "any such power"—that is, any power which they might jointly have exercised had no manager been appointed. The restraint upon them is co-extensive with the power conferred on the manager; it does not extend to the exercise of individual rights. In the view which their Lordships take, the acquisition of Rahimulla's share in the property by the appellant made the appellant a co-owner of the property under the manager, and as such co-owner he is entitled to the benefit of the decree for redemption which has been passed in the suit, with such alteration of the date for redemption as the High Court may find proper.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Watkins & Lempriere.*

Solicitors for respondents: *T. L. Wilson & Co.*

J. C.

1903

AMAR
CHUNDER
KUNDU
v.
SOSHI
BHUSAN
ROY.

www.libtool.com.cn

J. C.*
1903
Nov. 10, 11,
25.

MOHAMMAD ABDUSSAMAD AND OTHERS DEFENDANTS;
AND
KURBAN HUSAIN AND OTHERS . . . PLAINTIFFS.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH, LUCKNOW.

*Act I. of 1869, ss. 8, 10—Talukdar entered in Lists 1 and 3 after his Death—
Right of Heirs under ordinary Law.*

In a suit by the heirs under Mahomedan law of a deceased talukdar to recover a moiety of his estate from the appellants, who defended their possession as statutory heirs under Act I. of 1869, it appeared that the talukdar died in 1865, but that his name had been entered in lists 1 and 3 under s. 8:—

Held, that although s. 10 rendered such lists conclusive evidence that the deceased was a talukdar within the meaning of the Act, yet that the Act had no retrospective operation so as to divest rights of inheritance which had accrued before it was passed.

APPEAL from a decree of the above Court (May 10, 1899) affirming a decree of the Subordinate Judge of Hardoi (May 26, 1896).

The suit was brought to recover certain villages which were in the possession of Imtiaz Fatima when she died on December 19, 1894, on the allegation that she was in possession as absolute owner, and that on her death the estate, of which the appellants had taken unlawful possession, devolved by the Mahomedan law of inheritance upon the plaintiffs as her brother and sister.

The plaint alleged in effect that Imtiaz Fatima was at her death the absolute proprietor of the estate in suit as the surviving widow of Murtaza Bakhsh, who died in 1865, and that the plaintiffs were her heirs.

The written statements pleaded that on the preparation of the lists of talukdars under s. 8, Act I. of 1869, the name of Murtaza Bakhsh was entered in lists 1 and 3, list 1 being a list of all persons who were to be considered talukdars

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

within the meaning of the Act; and list 3 being "A list of the taluqdars not included in the second of such lists to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture." It was urged that s. 10, Act I. of 1869, provided that the Courts shall take judicial notice of the said lists, and shall regard them as conclusive evidence that the persons named therein are such taluqdars; while s. 22 provided a special rule of descent for taluqdars, whose names were entered in list 3, which under the circumstances of this case carried the estate to the widows for life, with reversion to the heirs of the husband as that term is interpreted by the Act. The appellants accordingly contended that on the death of Murtaza Bakhsh the estate vested in the widows for life, and that on the death of Mussammat Imtiaz Fatima, they, as next heirs of her husband, were entitled to succeed.

The plaintiffs in their replication pleaded that no sanad had ever been granted to Murtaza Bakhsh; that the entry of his name in the lists of taluqdars was ultra vires and made by inadvertence, in consequence of which, the provisions of s. 10, Act I. of 1869 notwithstanding, he was not a taluqdar within the meaning of the Act. They next urged that, Murtaza Bakhsh having died on January 18, 1865, prior to the passing of Act I. of 1869, the succession could not be governed by the provisions of that Act; that on his death the estate vested in his heirs as indicated by the Mahomedan law, and was not divested by the passing of the Act. They further contended that his mother and two widows had by adverse possession acquired a title as against the right heirs of Murtaza Bakhsh, and that on the death of the first widow in 1888, Imtiaz Fatima, as the surviving joint tenant, became sole absolute owner of the entire estate.

The judge of the First Court decreed in favour of the respondents for one-half of the property in dispute. He held that Murtaza's heirs, as ascertained by the ordinary Mahomedan

J. C.
1903
MOHAMMAD
ABDUSAMAD
v.
KURBAN
HUSAIN.
—

J. C.
1903
MOHAMMAD
ABDUSSAMAD
v.
KURBAN
HUSAIN.
—

law, were entitled at his death, and found that his mother held possession as absolute owner adversely to the appellants; that after her death his two widows held similar possession with equal shares. He held that on the death of the first widow her half-share devolved by inheritance under Mahomedan law on the appellants; and that on the death of the second widow, Imtiaz, her half-share, which had been in her possession for more than twelve years adversely to the appellants, devolved upon the respondents.

The judgment appealed from affirming this decision was concluded as follows:—

“As Murtaza Bakhsh’s estate had lawfully vested in persons who were his heirs under the ordinary Mahomedan law of inheritance, and who were not his heirs within the meaning of Act I. of 1869 before that Act came into force, the provisions of s. 22 cannot be applied to the succession, and it is unnecessary to consider the effect of the entry of Murtaza Bakhsh’s name in list 3 in connection with the provisions of s. 10. It appears to me, however, that the contention of the learned counsel for the defendants has much force, namely, that the entry of Murtaza Bakhsh’s name in list 3 is, by s. 10, conclusive evidence that he was not only a taluqdar, but also a taluqdar to whom a sanad had been given by the British Government, declaring that the succession to the estates comprised in the sanad should thereafter be regulated by the rule of primogeniture. But we are at once faced with this difficulty—that as no sanad was as a matter of fact given to him, it is impossible to ascertain the estates the succession to which is to be regulated by the rules of primogeniture. It appears to me that the rule of succession enacted in s. 22 is, in the case of a taluqdar whose name is entered in list 3, applicable only to the estates comprised in the sanad.

“In the case of *Shankar Bakhsh v. Hardeo Bakhsh* (1) their Lordships of the Privy Council held that an entry in list 3 had been improperly made, and, notwithstanding the provisions of s. 10, did not give effect to it. That was a case in which the first summary settlement of 1856 had been made with the

(1) L. R. 16 Ind. Ap. 71.

three sons of Daryao Singh, the then head : a sanad had been issued in 1859 in the terms of that settlement, and of Daryao Singh's reply to the circular of 1860 ; there was a family arrangement by which the estate was treated as one owned by the members of the family as co-sharers ; a second sanad was subsequently given to Daryao Singh on October 11, 1860, containing the rule of primogeniture, although Daryao Singh had stated that he was satisfied with the previous sanad, and that he did not wish to have a sanad according to the law of primogeniture ; and in 1869, when the lists were prepared, the name of Daryao Singh, then deceased, was entered in list 3, notwithstanding that his three sons had expressed a wish that their names should be so entered. Having regard to these facts, their Lordships found it impossible to attach importance to the proceeding by which the name of Daryao Singh was entered in list 3, and held that there was an improper entry in that list.

" Similarly, in the present case I think that importance cannot be attached to the entry of Murtaza Bakhsh's name in list 3, and that his name was improperly entered in that list.

" His application for a sanad had been rejected by the Chief Commissioner in 1862, on the ground that he was not a proper person to receive such a document. The learned counsel for the defendants admitted that his clients were unable to shew that any circular regarding the succession to the estates of taluqdars was issued to him. It is admitted that no sanad was given to him. He had died in 1865, and his estate had then vested in his heirs under the ordinary Mahomedan law. There is no evidence that any inquiries were made from the members of the family at the time of the preparation of the lists."

Ross, for the appellants, contended that the Courts below were wrong in holding that s. 22 of Act I. of 1869 did not apply to the estate of Murtaza Bakhsh. Although he had no sanad, the kabulyat executed at the time of settlement was equivalent thereto. Sect. 10 of Act I. of 1869 was conclusive on the subject of the entry of his name in the lists under s. 8.

J. C.

1903

MOHAMMAD
ABDUSSAMAD

v.

KURBAN
HUSAIN.

J. C.
1903
MOHAMMAD
ABDUSSAMAD
v.
KURBAN
HUSAIN.
—

According to the true construction and intention of the Act, the succession to his estate was governed in consequence by s. 22 and not by s. 23, and the line of succession directed by the statute must be followed in preference to that indicated by the ordinary Mahomedan law. He referred to ss. 2, 3, 8, 9, 10, and 22 of the Act, and to the Indian Evidence Act, 1872, ss. 4, 112, 113; also to *Brij Indar Bahadur Singh v. Ranee Janki Koer* (1); *Achal Ram v. Udai Partab Addiya Dat Singh* (2); *Hurpurshad v. Sheo Dyal* (3); *Shankar Bakhsh v. Hardeo Bakhsh*. (4)

De Gruyther, for the respondents, contended that the Lower Courts were right in holding that Murtaza Bakhsh was not in law during his life and at the time of his death a taluqdar within the meaning of Act I. of 1869. Accordingly, that Act did not govern the succession to his estate, which was regulated by the Mahomedan law. The heirs indicated by that law attained to vested interests in that estate at his death, and there was nothing in the Act which operated to divest those interests or which shewed any intention with that view. The Act only applied to those who had been settled with as taluqdars in their lifetime, not to those who had been settled with only as zemindars: see *Widow of Shanker Sahai v. Rajah Kashi Pershad* (5), and the letter of October 10, 1859, scheduled to the Act; Sykes' Taluqdari Law, pp. 51, 55, 286, 389, 391. Murtaza Bakhsh had never been settled with as taluqdar, but only as zemindar, and the Government had never decided in his favour that he should be regarded as a taluqdar. The entry of his name in the lists after his death was clearly a mistake, and the case in L. R. 16 Ind. Ap. 71 shews that no effect will be given to it.

Ross replied.

1903
Nov. 25.
—

The judgment of their Lordships was delivered by

LORD LINDLEY. The appellants in this case claim one-half of certain estates in Oudh as the statutory heirs of one

- | | |
|---------------------------------------|-----------------------------------|
| (1) (1877) L. B. 5 Ind. Ap. 1, 12. | (4) (1888) L. R. 16 Ind. Ap. 71. |
| (2) (1883) L. R. 11 Ind. Ap. 51. | (5) (1873) L. R. Suppl. vol. 220, |
| (3) (1876) L. R. 3 Ind. Ap. 259, 270. | 237. |

Murtaza Bakhsh, who was a Mahomedan taluqdar, and who died on January 18, 1865. The respondents claim the same half as his heirs by Mahomedan law, and it is conceded that they are entitled to it unless the succession was altered by the Oudh Estates Act of 1869 and what was done after his death.

J. C.

1903

MOHAMMAD
ABDUSSAMADv.
KURBAN
HUSAIN.

Murtaza Bakhsh in his lifetime was a taluqdar, and in May, 1858, a summary settlement of the estates in question was made with him.

The Oudh Estates Act, 1869, was founded on, and was passed to give effect to, certain orders of the Governor-General of India made in October, 1859, and set out in the 1st schedule to the Act. Under those orders lists were to be prepared of the taluqdars with whom summary settlements had been made, and sanads, i.e., grants, were to be issued to them. Forms of these sanads were prepared and many were granted.

In January, 1862, Murtaza Bakhsh applied for a sanad from the English authorities, and his application was refused. He never in fact obtained any sanad in his lifetime; and his name was never in his lifetime entered on any list of officially recognised taluqdars.

Under these circumstances it seems plain that when Murtaza Bakhsh died he had acquired a permanent hereditary and proprietary right recognised by the Indian Government in the estates in question; but the succession to them, not having been altered by any sanad, was governed by the ordinary Mahomedan law, which was the only law applicable to the case.

The appellants, however, rely on what happened after his death, and it is necessary to consider what this was. When he died he left his mother and some cousins and two widows; and in March, 1865, his mother's name was entered in the Collector's books in substitution for his own, and she was recorded as sole owner. This appears to have been done with the consent of his two widows and the cousins under whom the respondents claim. The Estates Act, 1869, came into operation in January of that year, and in July 1869, the name

J. C.

1903

MOHAMMAD
ABDUSSAMAD

v.

KURBAN
HUSAIN.

of the deceased appears in two of the lists directed to be made by the Act. How it got there is not known. But there it is. In November, 1870, the mother died. She appointed the two widows her successors, and in April, 1871, the names of the two widows who were in possession were substituted for hers in the Collector's books. Their right, however, to be so recorded was disputed by the cousins, and litigation ensued; but both widows died before it ended, and it is unnecessary to refer further to this matter.

The present suit was instituted in March, 1895. The plaintiffs (now represented by the respondents) were the heirs, namely, brother and sister of the last surviving widow, i.e., the second wife of Murtaza Bakhsh. They claimed under the ordinary Mahomedan law. The defendants (i.e. the appellants) claim under his first wife and under the Act of 1869. The Subordinate Judge held that the entry of Murtaza Bakhsh's name in the lists was *ultra vires* and of no effect; that the mother held the estate as absolute owner; that after her death the two widows held as absolute owners in equal shares; that on the death of the first wife one-half of the estate descended on the defendants in accordance with ordinary Mahomedan law, and that on the death of the second wife her half descended on the plaintiffs by the same law. The plaintiffs were content with this decision, but the defendants appealed from it. The decision was, however, affirmed by the Judicial Commissioner, and the defendants have appealed from his decision.

Their Lordships have no hesitation in affirming it. The whole case turns on the entry of Murtaza Bakhsh's name in two of the lists ordered to be made by the Act of 1869. Sect. 10 of the Act compels the Courts to regard such lists as conclusive evidence that the persons named therein are taluqdars or grantees within the meaning of the Act. When the lists referred to are looked at, it will be found that there are six lists: see s. 8. Murtaza Bakhsh's name is in the first and third. The entries, therefore, by ss. 8 and 10 are conclusive evidence (1.) that he is to be considered as having been a taluqdar within the meaning of the Act: see ss. 2, 8,

list 1; and (2.) that he was a taluqdar to whom a sanad had been made, ~~declaring that the~~ succession to the estates comprised in it should be regulated by the rule of primogeniture: see ss. 2, 8, list 3.

These enactments are clear and peremptory, and would be decisive if they applied to this case.

It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe ss. 8 and 10 so as to deprive the successors of the estates of a person who had died before those sections came into operation of rights which they acquired on his death. Entries of the names of deceased persons in the lists mentioned in s. 8 do not appear to have been contemplated by the Act, but such entries have no doubt been made and they are practically harmless if the names were already in former lists made under the Orders in Council, or if the entries do not alter the previously acquired rights of any one. This was the case in *Achal Ram v. Udai Partab Addiya Dat Singh*. (1) But no decision has been referred to which supports the contention that the entry of the name of a person who died before the Act came into force can divest rights previously acquired on his death. In this case the death occurred in 1865, and the successors then acquired their rights under the ordinary Mahomedan law. The Oudh Estates Act did not come into operation until 1869; and to construe its provisions as altering the succession would be not only unjust, but plainly contrary to well-settled legal principles.

The able counsel for the appellants endeavoured to surmount this difficulty by suggesting that there must have been some family arrangement to the effect that the entries in question should have been made, and that the succession should be changed. But there is no evidence from which any such conclusion can be drawn. The only evidence bearing on the subject is the consent of the heirs to the entry of the mother of Murtaza Bakhsh in the Collector's books shortly after his death. But when she died, the entry of the names of her two daughters-in-law was objected to, and litigation followed. The

J. C.

1903

MOHAMMAD
ABDUSSAMAD

v.

KURBAN
HUSAIN.

(1) L. R. 11 Ind. Ap. 51.

J. C. issues settled in the action do not raise the question whether
 1903 any such arrangement was in fact come to, and their
 MOHAMMAD Lordships cannot adopt the suggestion of the learned counsel
 ABDUSSAMAD as a basis for their decision.

v.
 KURBAN Their Lordships, therefore, will humbly advise his Majesty
 HUSAIN. to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondents : *Watkins & Lempriere.*

J. C.* MUSAMMAT MAQBOOLAN DEFENDANT ;
 1903
 AND
 June 11, 12; AHMAD HUSAIN AND OTHERS PLAINTIFFS.
 Nov. 10.
 ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
 OF OUDH.

*Evidence, Effect of—Heading of Deposition—Description of Witness—
 Admissibility.*

The description given of a witness in the heading of a deposition is no part of the evidence given by the witness on solemn affirmation. It may have been filled in by a subordinate official prior to the evidence and may never have been read over to the witness.

Where credible evidence supported the alleged divorce and remarriage of a Mahomedan woman, *held* that the description of her as wife to the former husband given in the heading of a deposition made subsequent to the remarriage, even if admissible in evidence, was entitled to no weight.

APPEAL from a decree of the Court of the Judicial Commissioner (May 31, 1899) reversing a decree of the Subordinate Judge of Barabanki (Dec. 16, 1896) and decreeing the respondents' suit as prayed.

The suit was brought to recover the estate of Ghulam Ali, a Mahomedan, who died on November 14, 1892. The respondents claimed as his legal heirs, alleging that the appellant, who was sued under the guardianship of her mother Ghafooran, had no title. The appellant claimed as daughter of Ghulam

* *Present* : LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

Ali by his wife Ghafooran, and the main question at issue was whether there had been a valid marriage between Ghulam and Ghafooran.

The Subordinate Judge found that the evidence on the record shews "that Ghafooran first entered into Ghulam Ali's service as a female servant when his wife was alive; upon the latter's death he began to have a fancy for her. Her husband suspected illegal connection and divorced her; then Ghulam Ali took her as a wife and contracted nikah; that some years after, defendant was born and brought up as his child. Ghafooran in her prime of life left her husband Eda and lived with Ghulam Ali, a widower, for sixteen years until his death, and they lived alone in the house having no other member of the family. Defendant is born and brought up in Ghulam Ali's house as his child. The Mahomedan law under such circumstances presumes a marriage between parties who live together as man and wife, and also legitimacy of the child born under such circumstances: see Tagore Law Lectures, 1873, p. 126. Here there is direct evidence besides of Ghafooran's nikah with Ghulam Ali and defendant's birth long after as his child."

The Judicial Commissioners found—(1.) that Ghafooran was not divorced by Eda, and was not married to Ghulam Ali as alleged; (2.) that Ghafooran lived in concubinage with Ghulam Ali, and that the defendant was his daughter, but not his legitimate daughter; (3.) that Ghulam Ali acknowledged her as his daughter; but "that as Ghafooran was the wife of Eda, and therefore could not lawfully be married to him, and consequently could not bear him legitimate issue, the defendant could not be legitimated by any acknowledgment by Ghulam Ali."

They discredited the evidence accepted by the Court below, mainly on two grounds—first, that Ghafooran was not called; second, that in a deposition before a magistrate in 1890, long after the alleged divorce and remarriage, she was described as being then the wife of Eda, the former husband, as follows:—

"Musammat Ghafooran, wife of Eda, caste Sheikh, age forty years, of Dewa." In her deposition she said: "I have lived with Ghasetay (i.e., Ghulam Ali) these twelve or fourteen years.

J. C.

1903

MUSAMMAT
MAQBOOLAN

v.

AHMAD
HUSAIN.

J. O. I lived with him before his wife died—two years before that event. www.libtool.com.cn

1903

MUSAMMAT
MAQBOOLAN

v.
AHMAD
HUSAIN.

Cowell, for the appellant, contended that an admission by a next friend was not binding, and in any event that this heading was inadmissible in evidence: see ss. 17, 19, and 80 of the Evidence Act, and *Taylor on Evidence*, s. 742. It was not part of the deposition required to be read over to the witness, and there was no evidence as to how it got there, or whether her attention had been drawn to it: see s. 356 of the Criminal Procedure Code as to the mode of taking depositions. As the criminal proceeding in which the deposition was taken related to the witness's daughter by Eda, the magistrate's clerk must have assumed that she was Eda's wife, and the mistake is further shewn by the name of one husband being given and the caste of the other. Further, Ghafooran was not a party to this suit, and the appellant was not affected by her statement not given in her sworn deposition. This statement is the main reason for rejecting the direct evidence, which, if believed, was conclusive of divorce and remarriage. The legal presumption was in favour of marriage and legitimacy: see *Mahomed Banker Houssain Khan v. Shurfoonnessa Begum* (1); *Khajah Hidayat Oollah v. Rai Jan Khanum* (2); *Nawab Muhammad Azmat Ali Khan v. Lalli Begum*. (3)

De Gruyther, for the respondents, contended that the negative of the appellant's contention was placed beyond reasonable doubt by this former deposition of Ghafooran, who had not been called as a witness to explain it, and had not been examined as a witness in support of her own divorce and remarriage. The deposition also contained the statement that she lived with the deceased, without saying that she was his wife, as she would have said had she been married to him. He referred to the Indian Evidence Act, ss. 3, 11, 80, and 114, and to *Abdool Razack v. Aga Mahomed Jaffer Bindaneem* (4), as to the law of acknowledgment of legitimacy and sonship,

- | | |
|---|--------------------------------------|
| (1) (1860) 8 Moore's Ind. Ap. Ca. 136. | (3) (1881) L. R. 9 Ind. Ap. 8. |
| (2) (1844) 3 Moore's Ind. Ap. Ca. 295, 316. | (4) (1894) L. R. 21 Ind. Ap. 56, 69. |

and as to the mode in which the presumption in favour of marriage may be rebutted.

Cowell replied.

1903. Nov. 10. The judgment of their Lordships was delivered by

J.C.

1903

MUSAMMAT
MAQBOOLAN

v.
AHMAD
HUSAIN.

LORD MACNAGHTEN. In this case the Subordinate Judge of Barabanki found that the appellant Musammat Maqboolan, sued as a minor under the guardianship of her mother Ghafooran, was the legitimate offspring of Ghulam Ali, who died intestate in 1892 without leaving any other issue, and that she was consequently entitled to succeed to the property of which Ghulam Ali died possessed. The Judicial Commissioners on appeal reversed this finding and adjudged the property to the respondents, who were plaintiffs in the suit, and whose title as heirs to Ghulam Ali in default of issue of his body is not now in dispute.

Both Courts have held that Maqboolan is the daughter of Ghafooran by Ghulam Ali. The question is whether she was born in lawful wedlock. That depends upon whether her mother Ghafooran was free to marry and did in fact marry Ghulam Ali.

It is common ground that Ghafooran, when first heard of in this case, was the wife of a person now living—one Eda, a Sepahi, a man of a class inferior to that of Ghulam Ali, who was a Sheikh. She had four children by Eda. Having been deserted by her husband at a time when there was famine in the land, she took service with Ghulam Ali. That was some sixteen years before his death. Ghulam Ali's first or only wife, Mashukan, was then living. Mashukan died in 1878, and Ghafooran continued to live on in Ghulam Ali's service. She lived with him till his death. She is described as an attractive person, and there was no other woman in the house.

The case on behalf of Maqboolan is that some time after Mashukan's death Eda returned home, and then there was a quarrel between Eda and his wife. Either he suspected her of too great intimacy with Ghulam Ali, or she charged him with familiarity with some prostitute, or, more probably, there

J. C.
1903
MUSAMMAT
MAQBOOLAN
v.
AHMAD
HUSAIN.

were mutual recriminations. At any rate she refused to leave Ghulam Ali's house for Eda. She was not going to starve with him. That was her answer (says one witness) to her husband's appeals. So he divorced her, and after the divorce Ghulam Ali married her by the rite or ceremony called Nika.

In support of these allegations there is oral evidence direct and positive. Eda himself and one other witness speak to the divorce. Seven witnesses, one of whom says that he performed the ceremony of reading the Nika, speak to the marriage. It is quite true that these witnesses cannot be regarded as independent witnesses. But they do not seem to have been shaken on cross-examination, and the Subordinate Judge, who heard what they said and saw their demeanour, accepted their statements. It would be out of the question to reject their evidence on mere suspicion. The story in itself is not improbable. It is difficult to see what further or better evidence could have been offered assuming the story to be true. According to the evidence no register of marriages or divorces was kept then. A marriage such as that set up on behalf of the appellant—a marriage with a woman of his own household and of inferior birth—would presumably not have been celebrated with any sort of pomp or ceremony. There was no music, said one witness, or feasting either. Besides, Ghulam Ali seems to have led a very retired life. He had little intercourse with his neighbours, and none at all with the respondents, who lived at a considerable distance and apparently never came near him. Whatever his relations towards Ghafooran before his alleged marriage may have been, he bore the reputation of a religious and respectable person. Then there is some evidence that he treated Ghafooran as his wife. As to Maqboolan, she was born in his house. In her case he performed the ceremonies usual in the case of a legitimate daughter. He had her well educated and taught to read Urdu and Persian.

The Judicial Commissioners, who reject the evidence of the witnesses at the trial, comment on the fact that various reasons are assigned for the alleged quarrel between Eda and his wife. Perhaps it is not surprising that Eda should have attempted

to clear himself at the expense of his wife, while Ghafooran's adherents put the blame on him. Then the Judicial Commissioners point out that the witnesses who deposed to Ghafooran's marriage with Ghulam Ali could not fix the year or even the season of the year when it took place. That does not seem very extraordinary. After the lapse of so many years, when there was nothing in the circumstances of the marriage to impress their memory, they may well have borne in mind that there was a marriage without being able to recall anything in particular about it. With more reason the Judicial Commissioners comment on the circumstance that the person who states that he read the Nika was not the regular qazi, but the naib or deputy of the qazi, and they justly observe that the reason alleged for the intervention of the deputy is not satisfactory. No doubt this circumstance is suspicious; but the man was examined before the Subordinate Judge, who saw no reason to disbelieve him.

Although the Judicial Commissioners, upon these grounds and on a general view of the position of the witnesses, thought themselves justified in describing the oral evidence as of little value, it does not appear that they would have differed from the Subordinate Judge if they had not come to the conclusion that the whole of the evidence adduced on behalf of the appellant was displaced by a document put in evidence by the respondents to which the Subordinate Judge—erroneously, as they thought—attached little or no importance.

The document in question is a certified copy of a statement by Ghafooran taken before Lieutenant-Colonel E. E. Grigg, Deputy Commissioner of Barabanki, on April 30, 1890, on the occasion of a criminal charge brought at the instance of Zainab, one of Ghafooran's daughters by Eda, against her husband, Ali Husain, for an assault. The heading of that statement is in these words: "Musammat Ghafooran, wife of Eda, caste Sheikh, age forty years, of Dewa, on solemn affirmation," and it contains the following passage: "I have lived with Ghasetay"—that is Ghulam Ali—"these twelve or fourteen years. I lived with him before his wife died—two years before that event." This document was included in the list of

J. C.
1903
MUSAMMAT
MAQBOOLAN
v.
AHMAD
HUSAIN.

J. C.
1903
MUSAMMAT
MAQBOOLAN
v.
AHMAD
HUSAIN.
—

documents filed with the plaint, but it does not seem to have been referred to in the course of the trial until the pleader for the plaintiffs was in the act of addressing the Court after the evidence was closed. The pleader for the defendant objected that it was inadmissible. On behalf of the plaintiffs it was contended that Ghafooran, defending as guardian of Maqboolan, was a party to the suit, and that under the Indian Evidence Act the statement was admissible as an admission by her. The Subordinate Judge ordered it "at present . . . to remain on the file for what it is worth." In the judgment which he afterwards delivered the learned Judge seems to have considered the document admissible, but his opinion was that the heading of the statement was not part of Ghafooran's deposition, and it does not seem to have occurred to him that the statement in the deposition, that the deponent was living with Ghulam Ali and had been living with him for fourteen years, was susceptible of the meaning that she was living with him in adultery. The Judicial Commissioners, however, held that "Ghafooran must have been questioned by the magistrate as to her name, husband's name, caste, age, and residence. Her answers," they go on to say, "were a part of the deposition as much as any other answer." Proceeding on this view, they held that Ghafooran's statement was "fatal to the case of the defendant that Ghafooran was divorced by Eda and subsequently married Ghulam Ali." Accordingly they found that "she was not divorced by Eda and was not married to Ghulam Ali," and that when she said she had "lived" with Ghulam Ali for twelve or fourteen years and had done so for two years before the death of his wife, she meant that "she had cohabited with him." It appears to their Lordships that the construction which the Judicial Commissioners have put upon her language is harsh and uncalled for. She seems for some reason or other to have been asked how long she had been living with Ghulam Ali, and to have answered correctly enough, "for twelve or fourteen years." It is difficult to suppose that the magistrate, if it was the magistrate by whom the question was asked, intended to convey any imputation on the witness, and equally difficult to suppose that the witness

intended by her answer to make a confession of immorality. As regards the description of the witness in the heading of the deposition, their Lordships agree with the Subordinate Judge that it is no part of the deposition proper—that is, no part of the evidence given by the witness on solemn affirmation. It may have been elicited by questions put by the magistrate. It is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the magistrate for him to take down the evidence of the witness. Again, it may have been read over to the witness by the magistrate when the evidence of the witness was completed, or the magistrate may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act.

In these circumstances, even assuming that there was no slip or accidental omission in the heading of the document and that there was no confusion between the two husbands in the mind of the person who took down the heading, and assuming that the document is admissible in this suit as evidence against Maqboolan's claim, their Lordships are of opinion that it is not entitled to any weight.

Differing from the Judicial Commissioners on the only ground upon which they appear to have relied in reversing the Court of first instance, their Lordships see no reason for not accepting the finding of the Subordinate Judge.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the Court of the Judicial Commissioners ought to be reversed with costs and the judgment of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Solicitors for appellant : *Barrow, Rogers & Nevill.*

Solicitors for respondents : *T. L. Wilson & Co.*

J. C.

1903

MUSAMMAT
MAQBOOLAN
v.
AHMAD
HUSAIN.

www.libtool.com.cn

J. C.* CHAUDHRI THAKUR DAS AND OTHERS . DEFENDANTS ;

1903

AND

Nov. 11, 12; CHAUDHRI JAIRAJ SINGH PLAINTIFF.
Dec. 2.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Indian Evidence Act, s. 111—Active Confidence—Evidence.

Where a Hindu widow claiming succession to her husband's estate had recourse to a money-lender, the respondent, who assisted her in her litigation, and after final decree in her favour transferred her estate to her two grandsons, who thereupon mortgaged the same to the respondent and others in satisfaction of prior charges created in their favour, and finally conveyed in conjunction with the widow the whole property to the appellants :—

Held, in a suit by the respondent to enforce his mortgages against the grandsons and the appellants, that whatever may have been the relations between the respondent and the widow pending litigation, there was no evidence during the later transactions of any relation of active confidence between him and the grandsons within the meaning of s. 111 of the Indian Evidence Act.

APPEAL from a decree of the High Court (Dec. 22, 1899) modifying a decree of the Subordinate Judge of Meerut (March 31, 1897).

The suit was brought on a mortgage dated October 18, 1894, executed by the appellants' vendors, Rewa and Sheo Singh, grandsons of one Bhup Kunwar, a Hindu widow, in favour of the respondent. It alleged a prior mortgage of 1893 by the same mortgagors in favour of the respondent and three other persons. The prayer was for sale of the mortgaged property free from the mortgage of 1893, which was to be satisfied out of the sale proceeds.

The appellants in their written statement insisted that the bond of October 18, 1894, sued upon was without consideration. They further urged that the respondent and the three defendants, who were his co-mortgagees under the mortgage of 1893, were in a position of confidence reposed in them by the mort-

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBBLE, and SIR ARTHUR WILSON.

gagors and their grandmother, and that they had by undue influence obtained "several documents without consideration in their favour and in favour of other defendants," i.e., the co-mortgagees under the deed of 1893, and "caused fictitious demands to be entered in the bonds, and took back after registration the amounts stated in the bonds to have been paid at the time of registration." Accordingly the bond of 1893 was also without consideration.

It appeared that one Debi Singh died in 1889, and litigation forthwith arose as to whether he was at his death joint with or separate from the appellants, who were the heirs of his brother Kallu Singh. In the former case the appellants succeeded to his estate by survivorship; in the latter Bhup Kunwar was entitled as his widow with reversion to Rewa and Sheo, as his daughter's sons. In that litigation the appellants, who were plaintiffs, were unsuccessful, but it was stated that the dispute led to confidential relations being established between the widow Bhup Kunwar and her grandsons on the one side, and the respondent with his three co-mortgagees under the bond of 1893 on the other side. The Subordinate Judge considered that "all these men formed a party and plotted together, and that having caught in their trap Bhup Kunwar, who being a woman, and Rewa and Sheo Singh, who, being very young, were ignorant, and stood in need of help on account of the disputes, made them write whatever they liked. These men spent something on their behalf, and gave them some money, but made them execute bonds according to their own choice."

The Subordinate Judge considered that under these circumstances the mutual relations between the widow and her grandchildren, and the men who were either mortgagees under one or other of the mortgages recited in the plaint or were holders of prior bonds in satisfaction of which those mortgages were alleged to have been given, were such that, under s. 111 of the Indian Evidence Act, the respondent "ought to have proved each and every item in the prior bonds by producing an account thereof. The burden of proving every single item, even in the prior bonds held by Nanak Chand and Kishen Lall, lies on

J. C.

1908

CHAUDHRI
THAKUR DAS
v.
CHAUDHRI
JATRAJ
SINGH.

J. O.
1903
CHAUDHRI
THAKUR DAS
v.
CHAUDHRI
JAIRAJ
SINGH.

Jairaj." His view of the respondent's case as presented before him was that "a detail of the expenses has not been given or proved from which the amount which was actually spent and the amount which was paid in cash to the executants of the bonds might be ascertained. It is very difficult to ascertain these amounts, but whatever will appear from the facts and probabilities of the case will be noted further on."

Both Courts found that the respondent helped Bhup Kunwar and her grandsons in the litigation against the appellants, and that Jairaj, the respondent, had falsely denied it. The Subordinate Judge found that only Rs.1250 was recoverable, as it was the only amount proved to have been paid. There was no doubt, he said, that the respondent had spent something in carrying on litigation, otherwise it would not have continued for years. But, he added, the respondent has entirely failed to prove the series of monetary transactions stated to have taken place under the previous bonds, and not produced a single receipt or scrap of documentary evidence shewing what had actually happened.

The High Court held that "from the mere fact that Jairaj helped these persons in the conduct of their cases it did not follow that there was any fiduciary relation between him and them." At the dates of the two bonds the litigation had successfully terminated, and there was nothing then in existence by reason of which the two grandsons were under the influence of the respondent. The High Court found that there was satisfactory evidence in favour of consideration having passed.

Cowell, for the appellants, contended that the relations of active confidence found by both Courts to have existed between the respondent on the one side and the widow and her grandsons on the other, one of whom was a minor and the other very young and inexperienced, were not shewn to have been determined in 1893 and 1894. He referred to evidence of other litigation which continued to a later date in which the same active assistance was afforded. He submitted that, both under s. 111 of the Indian Evidence Act as well as

on general principles of equity, it was for the respondent to prove the good faith of these transactions, and therefore the consideration for the two bonds in suit. Under the circumstances of the case, the onus lay on the respondent to prove what advances he had actually made. The lower Court had found that there was no evidence other than admissions made in the bonds. The High Court did not refer to any specific evidence to that effect, either books of account or receipts or other memoranda made at the time, or of the source or appropriation of the moneys alleged to have passed.

Ross, for the respondent, contended that the plea of undue influence and active confidence under s. 111 was not made out as regards the years 1893 and 1894, when the grandsons had entered upon their inheritance and the widow was no longer engaged in litigation. It was therefore for the appellants to prove non-receipt of consideration, and the High Court was right in finding that there was satisfactory evidence of payments made to mortgagors, who reposed no special confidence in the mortgagee.

[He was stopped by their Lordships.]

Cowell replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. One Debi Singh died in 1889, leaving surviving him a widow, Bhup Kunwar, two grandsons, daughter's sons, and three nephews, brother's sons, Thakur Das, and his brothers.

The widow claimed the succession to her husband's estate, but was opposed by the nephews.

While the litigation thus caused was in progress, the widow had recourse to *Jairaj*, a money-lender, the present respondent, who assisted her in her litigation, and advanced or procured funds for its maintenance. This involved a series of transactions mainly embodied in documents, the actual execution of which is not disputed, and the details of which it seems unnecessary to examine. The controversy was finally decided in favour of the widow by the decree of the High Court of May 12, 1893.

VOL. XXXI.

E

J. C.

1903

CHAUDHRI
THAKUR DAS
v.
CHAUDHRI
JAIRAJ
SINGH.

1903

Dec. 2.

J. C.
1903
CHAUDHRI
THAKUR DAS
v.
CHAUDHRI
JAIRAJ
SINGH.

On July 21, 1893, the widow transferred her estate to her two grandsons. On July 25, 1893, the two grandsons executed a mortgage bond for Rs.4000 in favour of Jairaj and others. The consideration was expressed to be the satisfaction of prior charges in favour of persons who may very likely have been connected with Jairaj, and a parol debt to Jairaj. On October 18, 1894, the two grandsons executed a further mortgage bond for Rs.5000 in favour of Jairaj alone. The consideration was expressed to be the satisfaction of certain existing obligations and a fresh cash advance of Rs.1250. On September 8, 1895, the two grandsons with their grandmother conveyed the whole property to the nephews Thakur Das and his brothers.

On October 26, 1895, Jairaj brought the present suit upon the mortgage of October 18, 1894. He made defendants, amongst others, his mortgagors, the two grandsons, their grandmother, and the three nephews as purchasers, and he asked that the sale proceeds of the property should be applied, first, in payment of a charge, which is not disputed, in favour of the nephews, defendants, secondly, in satisfaction of the mortgage bond of July 25, 1893, and, thirdly, in satisfaction of that of October 18, 1894. The questions in the case were as to the validity of the two mortgage bonds of July 25, 1893, and October 18, 1894.

The substantial defendants were the now appellants—that is to say, the nephews Thakur Das and his brothers, and they set up a case of want of consideration, undue influence, and fraud, and an issue was raised accordingly. The mortgagor defendants, the two grandsons, told a detailed story leading to the same result as that aimed at by their co-defendants; but that story has been disbelieved by both Courts in India, and need not be further noticed.

The Subordinate Judge who heard the case came to the conclusion that there was such a relation of active confidence between Jairaj and his mortgagors, within the meaning of s. 111 of the Indian Evidence Act, as to throw upon the former the burden of proof of the good faith of the transactions upon which he relied. He held further that Jairaj had failed to

prove the consideration for either of the mortgage bonds in question ~~except the cash advance~~ of Rs.1250 under the second instrument; and except to this extent he decided against the validity of the two mortgage bonds.

The High Court, on appeal, dissented from the opinion of the Subordinate Judge that any relation of active confidence existed between Jairaj and his mortgagors at the dates of the mortgage bonds. Their Lordships agree with the opinion of the High Court upon this point. Whatever may be thought of the relations between Jairaj and the widow while he was dealing with her during the course of her litigation, their Lordships can see no sufficient evidence that during the later transactions there was any relation of active confidence between Jairaj and the grandsons within the meaning of s. 111 of the Evidence Act.

The learned judges of the High Court arrived at another conclusion of much greater importance than anything affecting the burden of proof. They carefully examined the evidence, and were of opinion that the consideration for the two mortgage bonds in question was proved to the full extent. Their Lordships agree in this view. The contrary view taken by the Subordinate Judge appears to have resulted from two opinions which he had formed, first, that the conduct of Jairaj had been dishonest throughout the transactions in question, and, secondly, that practically all those concerned in those transactions were parties to a conspiracy to defraud; and for these opinions their Lordships, concurring with the High Court, can see no sufficient foundation.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

Solicitors for appellants: *Ranken Ford, Ford & Chester.*

Solicitors for respondent: *Barrow, Rogers & Nevill.*

J. O.
1903
CHAUDHRI
THAKUR DAS
v.
CHAUDHRI
JAIRAJ
SINGH.

www.libtool.com.cn

J. C.*
 1903
 Nov. 12.

MAHARAJ KUMAR BAGHESWARI	}	APPELLANTS;
PERSHAD SINGH AND OTHERS . . .		
AND		
KHAJA MAHOMED GOWHAR ALI	}	RESPONDENTS.
KHAN AND OTHERS		

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Sale for Arrears of Land Revenue—Act XI. of 1859, s. 5—Notice—Malikana included in Land Revenue.

Revenue and malikana are classified together, and a notice under Act XI. of 1859, s. 5, sub-s. 3, is not necessary in respect of malikana as being an "other demand." They need not be calculated separately in ascertaining the amount of a year's demand.

And where a notice specified the arrears at Rs.529 while the Collector sold on account of Rs.656, including arrears subsequent to the notice :—

Held, that the sale was not vitiated thereby, and that as the Collector acted under s. 31 his action could not under s. 33 be questioned, no objection having been taken thereto either in the Court below or before the Commissioner.

APPEAL from a decree of the High Court (July 11, 1899) reversing a decree of the Subordinate Judge of Monghyr (March 22, 1897).

The appellants, who are the three sons of the late Maharaj Kumar Babu Har Pershad Singh, sued to set aside the sale of certain shares in four mouzahs in which the plaintiffs and the pro formâ defendants had a proprietary interest, and which were purchased by the first defendant on September 24, 1894, at a sale for arrears of revenue.

The plaint alleged that four mouzahs named Sonahye Madwa, Dhad, and Padmawat, which formed part of the mehal of Bisthazari, were separated from it and assessed at an annual revenue of Rs.548 3a. Of this separated portion the plaintiffs' father purchased the whole of Padmawat and a portion of Madwa, the residue being the property of the pro formâ defendants. On September 12, 1894, the entire sepa-

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

rated portion was sold on account of Rs.656, being arrears of revenue up to June, 1894, and was purchased by the first defendant for Rs.13,250. Against this sale petitions were presented by the plaintiffs' father and some of the other defendants to the Commissioner of Bhagulpore, but they were rejected on the report of the Collector of Monghyr on May 14, and the auction sale was confirmed.

The grounds on which it was alleged that the sale should be set aside fell under the following heads :—

1. That notices which were necessary under ss. 5, 6, and 7 of Act XI. of 1859 were irregular in form and were not properly served.

2. That the property was at the time under Civil Court attachment, and that the Collector had issued an order on July 23, 1894, exempting it from sale on that account.

3. That the price was inadequate, the real value of the property sold being Rs.36,000, such inadequacy of price being caused by the irregularities complained of.

4. That although the division of Bisthazari actually sold was in arrears, there was a surplus in the possession of Government upon the whole mehal which covered the arrear, and therefore the sale was illegal.

The first defendant denied all the irregularities complained of, and that any inadequacy of price resulted therefrom.

The notices were said to have been irregular in form, in that they stated that in default of payment of an arrear of Rs.529 4a. 11p. on June 7 the share would be sold on September 24. They contained a statement (which was erroneous) that the property "is attached by the Civil Court for Rs.588 14a. 11p." The Collector's order of July 23, 1894, ordered generally that estates under attachment by a Civil Court should not be sold, but did not specifically relate to the sale for arrears of the division in question. A notice of even date and omitting any reference to attachment by a Civil Court was made under ss. 6 and 13, and stated that the sale would be on September 24, 1894, for an arrear of Rs.656 15a. 11p.

The Subordinate Judge decreed in favour of the plaintiffs. He found that there was no arrear legally due on account of

J. O.

1903

MAHARAJ
KUMAR
BAGHESWARI
PERSHAD
SINGH
v.
KHAJA
MAHOMED
GOWHAR
ALI KHAN.

J. C.
1903
MAHARAJ
KUMAR
BAGESHWARI
PERSHAD
SINGH
v.
KHAJA
MAHOMED
GOWHAR
ALI KHAN.

the plaintiffs' share, or on account of the estate sold. He held that a part of the claim was for malikana, and that as malikana is something different from revenue, notice under s. 5 was necessary. He thought there was no satisfactory proof that the notice was ever served, and in any case the notice was insufficient, as it did not include the full amount of Rs.656 for which the property was sold, and omitted particulars which should have been given. He found that the notice under s. 6 of the Act had been served, but that there was no evidence to shew when the attachment for Rs.588 14a. 11p. was received. He, however, considered that the sale was forbidden by the Collector's order of July 23, 1894; and that all these irregularities were sufficient to account for the inadequacy of the price realized at the sale.

The High Court on the appeal of the first defendant set aside this decree, and decided that there was no difference between Government revenue and malikana, as both were to be paid to Government at one and the same time and in the same kists; that malikana was classified as land revenue under s. 2, Act XI. of 1859, and s. 1, Act VII. of 1868 B.C.

They found that the properties were not under attachment at the time of the issue of the notification. The statements in the notification to that effect were mistakes. The judgment proceeded to find as follows: "The third point is that the arrears were due, not only for the current year immediately preceding, but for the previous years, namely, for the year 1892; and on this point the learned pleader for the respondent relied upon the evidence of Bajrangi Sahai. It certainly appears from the evidence of this witness that if the malikana be calculated alone, there were arrears for the year 1892 due on the date of the issue of this notice, but it is not necessary that malikana should be calculated separately from land revenue. The revenue authorities are entitled to calculate both together, and that being so, it is evident that on the date of the issue of the notice there could not have been more than one year's demand due. The Government demand for the share of the estate in question sold was for Rs.548 8a. 3p., as mentioned in the plaint and in the notice issued under

s. 5, and as the arrear that was then due was only Rs.529, it is evident that the amount due was less than one year's rent.

"For all these reasons we think that no notice under s. 5, Act XI. of 1859, was necessary, and that this contention of the plaintiff falls to the ground.

"It is therefore superfluous for us to enter into the other objections raised to the notice, but we may say that, in our opinion, there is no ground for supposing that the notice was invalid or imperfect.

"The notice mentioned the nature and amount of the arrear or demand due, and it specified the latest date on which payment would be received, and the date on which the property would be sold.

"We think that under the circumstances this was a good notice.

"The learned pleader for the respondent, however, contends that it was not a good notice, because the amount of arrears mentioned in the notice, Rs.529, was the arrear due at the end of March, and he says that this notice, which was issued on the 15th May, should have specified the arrears which became due subsequently, and for which the property was ultimately sold.

"We think there is no force in this contention.

"It was utterly impossible for the Collector when issuing the notice of May 15 to include in that notice arrears which had not then accrued, and there is no reason for saying that the notice was bad on this ground.

"We have felt some difficulty in this case as to whether the Collector was justified in selling the property on September 24 for subsequent arrears as well as for the arrears mentioned in the notice.

"It appears that he sold the property for Rs.656, whereas he specified in the notice that the arrears due were Rs.529.

"We think, however, that there is no ground for supposing that this vitiates the sale.

"In the first place, the Collector seems to have acted under s. 31, Act XI. of 1859; and in the second place, this point was not taken either in the Court below or before the

J. C.

1903

MAHARAJ
KUMAR
BAGHEWARI
PERSHAD
SINGH

v.
KHAJA
MAHOMED
GOWHAR
ALI KHAN,

J. C.
1903
MAHARAJ
KUMAR
BAGESHWARI
PERSHAD
SINGH
v.
KHAJA
MAHOMED
GOWHAR
ALI KHAN.

Commissioner, and, therefore, cannot be taken under s. 33 of the Act; and thirdly, there appears to be no authority for holding that a sale is bad because the sale was held for arrears that subsequently accrued due, as well as for arrears specified in the notice issued under s. 5. Then as to the service of notice, we do not agree with the learned Subordinate Judge in holding that the service has not been proved."

C. W. Arathoon, for the appellants, contended that the sale was bad and ought to be cancelled on account of its having been made for arrears accruing after the sale notification had been issued. The statement contained in the notification, "is attached by order of the Civil Court for Rs.588 14a. 11p.," was sufficient to bring it within the operation of the Collector's order of July 23, 1894. It was not admitted that such statement was erroneous. With regard to the notification issued on the date of that order, it stated that the sale would be for arrears of revenue "and other demands," without separately specifying the two items of revenue and malikana, and it contained no specification of the share to be sold so as to enable an intending purchaser to know definitely what he was bidding for. There was no good reason given for overruling the finding of the lower Court that the notice was not duly served. The High Court erred also in holding that the Collector acted rightly under s. 31 of Act XI. of 1859 in making a sale for old arrears as well as such as had accrued subsequently to the notice.

Cowell, appeared for the first respondent to ask for costs down to and including the filing of a printed case.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that there is no irregularity in the sale to which this appeal relates, or in the notifications issued in respect of it. All the objections, which Mr. Arathoon has placed before their Lordships very fully and very clearly, are so completely disposed of by the reasons given by the learned judges of the High Court that their Lordships are quite satisfied to adopt their judgment. It is not necessary to go through these reasons again.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the first respondent—the only respondent who appeared—down to the filing of his case, and the costs of his application for payment thereof.

Solicitors for appellants: *Dallimore & Son.*

Solicitors for respondent: *T. L. Wilson & Co.*

J. C.
1903
MAHARAJ
KUMAR
BAGHESWARI
PERSHAD
SINGH
v.
KHAJA
MAHOMED
GOWHAR
ALI KHAN.

KEDAR MAL MARWARI AND ANOTHER . PLAINTIFFS;
AND
DEWAN BISHEN PERSHAD (DECEASED) } DEFENDANTS.
AND OTHERS }

J. C.*
1903
Nov. 10;
Dec. 2.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—New Point in Appeal—Costs occasioned by Delay—Effect of Decree rendered Final by Consent.

In a suit by the appellant to enforce a mortgage of 1886, it appeared that the respondent was a purchaser under a sale decree (to which the appellant was not a party) upon a mortgage of 1884, and also claimed under a decree, to which both appellant and respondent were parties, upon a yet earlier mortgage in 1882, having paid off the amount found due thereunder, together with a further sum by way of compromising the mortgagee's appeal against the decreed reduction of the stipulated rate of interest:—

Held, that it was too late to contend for the first time on appeal that the appellant should have enforced as party defendant to the suit on the mortgage of 1882 the rights now claimed by him; and also, in reversal of the High Court, that the respondent was only entitled to be allowed the sums actually paid thereunder at the reduced rate of interest decreed thereby.

The appeal not having been set down for hearing till nearly three years after the transmission of the record, costs, if any, occasioned by the delay were disallowed to the appellants.

APPEAL from a decree of the High Court (May 23, 1898) reversing a decree of the Subordinate Judge of Bhagulpore (April 20, 1896).

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

J. C.
1903
KEDAR MAL
MARWARI
v.
DEWAN
BISHEN
PERSHAD.

The question decided in this appeal related to the rights of the deceased appellant Biseswar Lal and the respondent Dewan Bishen Pershad under certain mortgage bonds executed by the respondent Brij Pershad Singh, and to the terms on which redemption should take place or the mortgaged properties be made liable. Of these mortgages, so far as material, the first was on October 4, 1882, whereby Brij Pershad mortgaged the properties in suit to the respondent Bhagwan Das Marwari for Rs.4600, with compound interest at 2 per cent. The second was on January 27, 1884, by Brij Pershad to Bhagwan Singh. The third was on September 5, 1886, by the same mortgagor, to Bhagwan Das Marwari, who subsequently sold his interest therein to Biseswar Das, the predecessor of the above-named appellant.

Bhagwan Singh sued to enforce his mortgage of January 27, 1884. Therein he ignored the earlier mortgage of 1882 and the later of 1886. He obtained a decree for sale, and on December 6, 1890, the respondent Dewan Bishen Pershad became a purchaser.

Then came the suit (No. 47 of 1890) on the mortgage of October 4, 1882, in which the assignee of Bhagwan Das Marwari's mortgage sued to enforce the same against the Dewan, purchaser of December 6, 1890, making defendants all parties appearing to be interested, whether as mortgagors or mortgagees. He obtained a decree on June 29, 1891, for the principal, with simple interest only. The respondent Dewan paid the amount, and also an additional sum of Rs.8000 to compromise an appeal by the mortgagee in reference to the interest, which appeal was thereupon dismissed by consent.

Biseswar Das Marwari, who was party defendant to the suit 47 of 1890, then sued on his mortgage of September 5, 1886. He ignored the mortgage to Bhagwan Das Marwari of October 4, 1882, but he referred to the suit by Bhagwan Singh, and to the circumstance that his own predecessor in title was not a party to that suit, and to the respondent Dewan Bishen Pershad's purchase on December 6, 1890. He claimed that the said respondent was only entitled to his "entire purchase-money, with interest at 8 annas per cent. per month," and

that this amount had been received out of the rents, and that, consequently, nothing was due to him. He prayed for mortgage accounts with compound interest, and for sale.

The respondent Dewan Bishen Pershad in his written statement pleaded that the plaintiff had no cause of action under the circumstances. And he denied that the plaintiff had any right to redeem the property, and in any case that he could only redeem by payment of the entire amount of the mortgages of Bhagwan Das (of October 4, 1882) and Bhagwan Singh (of January 27, 1884), principal and interest "according to the terms of the said bonds."

The Subordinate Judge held that the appellant was entitled to be paid the amount claimed for principal with compound interest, and that he was entitled to redeem (unless the respondent Dewan Bishen Pershad elected to redeem him) by paying to Dewan Bishen Pershad the sum appearing due upon an account to be taken on the basis of allowing that defendant credit for the sums he had paid, as already mentioned. And on April 20, 1896, after accounts had been taken, the Subordinate Judge made his final decree for payment to the plaintiff, and for sale of the properties in case of default.

On appeal by the defendant Dewan Bishen Pershad the High Court decreed that the said defendant was "entitled to recover the amount of principal and interest according to the terms of that document" (the mortgage of October 4, 1882) "up to date. He will also receive the sum under Ex. R." (the sale certificate for his purchase of December 6, 1890), "namely, Rs.2505, to which no objection is taken in this Court"; and, on the other hand, he was "to account for rents and profits in the ordinary way up to date."

Sir W. Rattigan, K.C., and *C. W. Arathoon*, for the appellants, contended that the High Court was wrong in deciding that Bishen Pershad was entitled to recover the amount of principal and interest according to the terms of the bond of October 4, 1882. The amount due to him was only what he paid for his purchase, which had been allowed by consent, together with anything which he might have paid in respect

J. C.

1908

KEDAR MAL

MAEWARI

v.

DEWAN

BISHEN

PERSHAD.

J. C.
1903
KEDAR MAL
MARWARI
v.
DEWAN
BISHEN
PERSHAD.

of any prior mortgages. From this was to be deducted the amount he had received as net profits during possession. He was never a mortgagee or decree-holder, but an outside purchaser at a sale under a decree, and he was, therefore, only an incumbrancer to the extent of payments made. He did not by his purchase succeed to all the rights of the mortgagor under whose decree the sale took place. Reference was made to Transfer of Property Act, ss. 74, 75, 88, and 89; Fisher on Mortgages, 4th ed. p. 1009; 5th ed. p. 977; *Auhindro Bhoosun Chatterjee v. Chunnoololl Johurry* (1); *Ganga Pershad Sahu v. Land Mortgage Bank*. (2) In any view, the covenant to pay interest had become merged in the judgment: see *Ex parte Fewings* (3), *In re European Central Ry. Co.* (4), and a judgment by Fry J. in *Popple v. Sylvester*. (5)

Phillips and Bonnerjee, for the respondents, representatives of Dewan Bishen Pershad, contended that the High Court was right. Dewan Bishen Pershad by his purchase and subsequent payments became absolutely entitled to all the rights then possessed by the other parties in the suit No. 47 of 1890. All parties then entitled to redeem were before the Court as parties to that suit, and were excluded from redeeming except in that suit. The Dewan redeemed the other parties by his payments, and accordingly became entitled to the rights of all those parties, and thus became absolutely entitled to the property. In any event he is entitled to the full benefit of the mortgage of October 4, 1882, in place of the mortgagee thereof under whose decree he bought, and to the full amount which that mortgage purported to secure, including compound interest. As to what has to be paid under a mortgage, see *Nilakant Banerji v. Suresh Chunder Mullick*. (6) The Subordinate Judge erroneously held that the case was to be governed by the doctrine laid down in *Kasu Munnessa Bibee v. Nilratna Bose*. (7)

Counsel for the appellants were not heard in reply.

(1) (1879) Ind. L. R. 5 Calc. 101.

(6) (1885) L. R. 12 Ind. Ap. 171,

(2) (1893) L. R. 21 Ind. Ap. 1.

174.

(3) (1883) 25 Ch. D. 338.

(7) (1881) Ind. L. R. 8 Calc. 79,

(4) (1876) 4 Ch. D. 33.

88.

(5) (1882) 22 Ch. D. 98.

1903. Dec. 2. The judgment of their Lordships was delivered by www.libtool.com.cn

J. C.

1903

KEDAR MAL
MARWARI

v.

DEWAN
BISHEN
PERSHAD.

LORD MACNAGHTEN. This suit was brought by the late appellant Biseswar Lal Marwari to enforce a mortgage bond dated September 5, 1886, hypothecating, together with other property, 8 annas of a mouzah known as Burhanpore or Badhanpore.

It seems that this share of Burhanpore was included in an earlier mortgage bond dated January 27, 1884. The owner of that incumbrance brought a suit to enforce his security and obtained a decree. The property was put up for sale on December 6, 1890. It was then bought for Rs.2505 by the late respondent Dewan Bishen Pershad in the name of his relative Sumbhu Sahai. The incumbrancer from whom the appellants derive title was not a party to this suit or bound by the decree for sale.

Another suit (No. 47 of 1890), brought in respect of the same property on a bond dated October 4, 1882, resulted in a decree dated June 29, 1891. The principal question in that suit was as to the rate of interest on the money secured by the bond. The bond purported to reserve interest at the rate of 2 per cent. per month, with annual rests and compound interest. But the learned judge held that rate exorbitant and improper under the circumstances, and allowed only simple interest at the rate of 1 per cent. per month or 12 per cent. per annum. Sumbhu Sahai, who represented the Dewan, was added as a party, and the decree was pronounced in his presence and also in the presence of the person from whom the appellants derive title, who being already a party to the suit was ordered to be "made a defendant as a subsequent mortgagee." Under this order, which was dated September 8, 1890, amendments seem to have been made, though they are not to be found in the record. The order for sale of the property appears to have been made absolute. But on the day of the auction the Dewan deposited the amount found due to the plaintiff, the decree-holder. It was accepted by him. The sale did not take place, and the order for sale dropped. There was at the time an appeal pending on behalf of the plaintiff, who was dissatisfied with

J. O.
1903

KEDAR MAL
MARWARI
v.
DEWAN
BISHEN
PERSHAD.

the rate of interest allowed, and also a cross-appeal on behalf of the Dewan on some question of costs. Ultimately a compromise was made. The Dewan paid the plaintiff Rs.8000 in addition to the amount found due to him. By an order of the High Court dated June 21, 1892, the plaintiff's appeal was by consent dismissed without costs, and so the order reducing the rate of interest on the bond of October 4, 1882, as against the mortgaged property and the subsequent mortgagees became absolute.

In the present suit Biseswar Lal obtained a decree to enforce his mortgage security of September 5, 1886. The Dewan, who as purchaser at the sale of December 6, 1890, had succeeded to the rights of the mortgagor, and who also stood in the shoes of the decree-holder under the decree of June 29, 1891, declined to redeem, and accounts were directed to be taken in view of Biseswar Lal either redeeming the Dewan or in default of payment standing foreclosed.

The accounts as passed by the Subordinate Judge allowed the Dewan the sum found due to the plaintiff in the suit No. 47 of 1890, with interest on the sum secured by the bond of October 4, 1882, at the reduced rate allowed by the decree of June 29, 1891, and also the sum of Rs.8000 paid by the Dewan to the plaintiff in that suit on the occasion of the compromise which resulted in the order of the High Court dismissing the plaintiff's appeal.

From the final decree in this suit of April 20, 1896, the Dewan appealed to the High Court. The judgment of the High Court was pronounced on May 23, 1898. The Court held that the Dewan was entitled to recover the sum of Rs.2505 paid for the property at the sale of December 6, 1890, which was allowed by the Subordinate Judge, and to which no objection was taken in the High Court, and also the amount of principal and interest secured by the bond of October 4, 1882, "according to the terms of that document up to date," while on the other hand he had "to account for rents and profits in the ordinary way up to that date." A slip in the accounts of rents and profits as passed by the Subordinate Judge was corrected. No order was made as to costs in the High Court.

The effect of that order, as worked out with interest at 2 per cent. ~~per month and annual~~ rests, resulted in Biseswar Lal having to pay Rs.1,21,546 13a. 1p. in order to recover 8 annas of Burhanpore.

J. C.
1903
KEDAR MAL
MARWARI
v.
DEWAN
BISHEN
PRESHAD.

The appellants contend that the Dewan was not entitled to a higher rate of interest under the bond of October 4, 1882, than that allowed by the decree of June 29, 1891. Their Lordships think this contention is plainly right. The High Court gives no reason for disregarding the decree of June 29, 1891, and none was given at the bar. The predecessor in title of the appellants was a party to that decree as well as the Dewan, and the Dewan himself before the Subordinate Judge claimed to be allowed, and was allowed, as against Biseswar Lal and the mortgaged property, the sum of Rs.8000, which he voluntarily paid as the consideration for having the decree reducing the rate of interest made absolute.

It was contended on behalf of the Dewan's representatives (who alone defended this appeal) that Biseswar Lal ought to have enforced his right, if any, in the suit No. 47 of 1890, and that it was not competent for him to bring a fresh suit. Assuming that contention to be well founded, it seems to their Lordships much too late now to raise a point not insisted upon in either of the Courts below. It was also urged that the effect of the Dewan finding the money to pay off the plaintiff in the suit No. 47 of 1890 was to foreclose all subsequent mortgages, and make the Dewan absolute owner of the property. It is hardly necessary to say that their Lordships were unable to accept that view of the transaction.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged, and that the Dewan's representatives ought to pay the costs in that Court, and that the order of the Subordinate Judge ought to be restored subject to correction of the slip in that order pointed out by the High Court, the accounts brought up to date, and six months from the date of His Majesty's Order in Council fixed for redemption of the property.

The Dewan's representatives will pay the costs of the appeal.

Their Lordships observe that the record in this case was

J. C.
1903
KEDAR MAL
MARWARI
v.
DEWAN
BISHEN
PRESHAD.

received in December, 1900, but that the case was not set down for hearing till September, 1903. They have accordingly directed the registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitor for respondents : *G. C. Farr.*

J. C.*
1903
Dec. 2.

RAJA YARLAGADDA MALLIKARJUNA }	DEFENDANT ;
PRASADA NAYADU }	
AND	
RAJA YARLAGADDA DURGA PRASADA }	PLAINTIFF.
NAYADU }	

CONSOLIDATED APPEALS AND CROSS-APPEALS.

Ex parte RAJA YARLAGADDA DURGA AND ANOTHER.

ON APPEAL FROM THE HIGH COURT IN MADRAS.

Practice—Petition for Directions in regard to an Order in Council.

Case in which their Lordships, pending an appeal from an order of the High Court in execution of an Order in Council, expressed their opinion as to the intention of the said Order in Council in a sense contrary to that of the High Court.

THIS was a petition for directions and declarations in regard to an Order in Council dated August 7, 1900, or, if necessary, for its amendment under the following circumstances. The order (of which there was a duplicate) was based on a judgment delivered in the above-mentioned appeals and cross-appeals, and reported in L. R. 27 Ind. Ap. 151. It discharged a decree of the High Court in so far as it had directed that the sum of Rs.23,000 be substituted for Rs.56,000 awarded in the decree of the District Court, and it ordered the restoration

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR AETHUR WILSON, and SIR JOHN BONSER.

of the latter decree as to the payment of the said amount. The petition stated that the defendant had paid into court the balance due of the said Rs.56,000, and that on March 11, 1901, the petitioners, who were plaintiffs in two suits, applied to the District Court for execution of the Order in Council, so far as it remained unexecuted, giving credit for the said balance. The defendant thereupon claimed to set off a sum of Rs.19,500, which he had been ordered to refund in another suit, on the ground that the same had already been paid by him by way of set-off by consent against the decree for Rs.23,000. The District Court refused the claim because the decree for Rs.56,000 purported to be the balance due after deducting the Rs.19,500, whereas the High Court decree in arriving at the substituted sum of Rs.23,000 included therein the amount of Rs.19,500, and afterwards directed that that amount be set off against a similar amount directed to be refunded to the defendant in another suit. In appeal from the order of the District Judge, the High Court directed that the set-off be also allowed as against the Rs.56,000 mentioned in the Order of Council, the effect of which was that it was twice deducted from the amount of the final adjudication: first, in computing its amount; and, second, in its execution. The reason given was that they must give effect to the Order in Council as it stands, and not in effect vary it on equitable considerations. The order directed that Rs.56,000 be paid; if the circumstances had been brought to the attention of the Judicial Committee the order might have directed payment of Rs.75,500, but either way the sum of Rs.19,500 deducted by a consent order of set-off still subsisting to the final decree made must be allowed. To avoid limitation petitions of appeal from the order of the High Court had been filed.

J. C.
1903
RAJA
YARLAGADDA
DURGA.
Ex parte.

De Gruyther, for the defendant, as a preliminary objection to the hearing of the petition, contended that, as an appeal to the Crown had been filed, there was no jurisdiction to deal with the order made, which might have turned on other considerations, until the appeal was heard.

Sir W. Rattigan, K.C., and *Cowell*, in support of the

VOL. XXXI.

F

J. C. petition, contended that their Lordships might explain the
1903 intention of their judgment and of the order, leaving the Court
below in review to deal with the case, having regard to the
RAJA intention so expressed, and thus save the costs of an appeal.
YARLAGADDA It was obvious that there was no intention that the defendant
DUBGA, should deduct Rs.19,500 twice over.
Ex parte.

De Gruyther, contra.

LORD MACNAGHTEN expressed the following opinion of their Lordships :—Their Lordships are of opinion that the orders of His Majesty in Council of August 7, 1900, were intended to uphold the decrees of the First Court, and to decide that the sum due to the petitioners at the date of His Majesty's orders was the balance of Rs.56,000, after deducting the sum of Rs.19,500 in question between the parties.

Their Lordships will make no order as to the costs of this petition, and direct the petition to stand over generally.

Solicitors for petitioners : *Richardson & Sadler.*

Solicitor for respondent : *R. T. Tasker.*

www.libtool.com.cn

THAKURAIN JAIPAL KUNWAR AND } DEFENDANTS; J. C.*
ANOTHER } 1904

AND

BHAIYA INDAR BAHADUR SINGH. . PLAINTIFF.

Feb. 12, 25.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.

Specific Relief Act, s. 42—Discretion of the Lower Court.

The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under s. 42 of the Specific Relief Act.

Though the execution of a will by a limited owner such as a Hindu widow may not as a general rule justify the exercise of such discretion in favour of the reversionary heir, it will not be interfered with when the case made by the defendants denies any present or future rights of the plaintiff or any other heir. A decree so made leaves the actual right to succeed at the death of the widow unsettled.

APPEAL from a decree of the above Court (July 31, 1899) modifying a decree of the Subordinate Judge of Bahraich (Oct. 12, 1898).

Upon the question of discretion to entertain a declaratory suit under the circumstances stated in the judgment of their Lordships, the Subordinate Judge was of opinion that the execution of the will dated December 25, 1896, by the widow, appellant, gave a valid cause of action, and that in the exercise of a proper discretion he was justified in granting a declaration of its invalidity under s. 42, Act I. of 1877. The Judicial Commissioners declined to interfere with this discretion, for although it was not set up in appeal that the widow had power to devise the taluqa, it was easier for the respondent at the present time to prove his pedigree shewing himself to be the next reversioner contingent on his surviving the appellant, than if he waited till after her death before bringing his suit.

De Gruyther, for the appellants, contended that the decrees should be reversed and the suit dismissed with costs. The

* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

F 2

J. C.
1904
THAKURAIN
JAIPAL
KUNWAR.
v.
BHAIYA
INDAR
BAHADUR
SINGH.

mere execution of a will by the appellant devising property in which the testatrix had only a life estate does not justify a declaratory suit and decree. He referred to Act VIII. of 1859, s. 15; Specific Relief Act, s. 42; *Kathama Natchiar v. Dorasinga Tever* (1); *Greeman Singh v. Wahari Lall Singh*. (2)

The mere existence of this inoperative will did not give a cause of action, nor does a suit lie except under special circumstances to establish a presumptive title only: see *Magan Lal Purushottam v. Govind Lal Nagindas* (3); *Rani Pirthi Pal Kunwar v. Rani Guman Kunwar*. (4) It is a matter of discretion under any circumstances with the Court whether to entertain it or not, and in this case that discretion was wrongly exercised. The next reversionary heir alone can sue, and it was not shewn that the plaintiff was next in reversion: see *Rani Anund Koer v. Court of Wards* (5) and *Narindar Bahadur Singh v. Achal Ram*. (6)

The respondent did not appear.

1904
Feb. 25.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against a decree of the Court of the Judicial Commissioner of Oudh, which so far as is now material affirmed the decree of the Subordinate Judge of Bahraich. The point raised is a short one. Indarjit Singh died on June 4, 1877, possessed of the taluqa of Mustafabad, a taluqa governed by the Oudh Estates Act (I. of 1869). He left three widows, and under s. 22, sub-s. 7, of that Act the first appellant as the first married of the widows succeeded to the taluqa; the other widows have since died. On December 25, 1896, the first appellant executed a will by which she purported to declare the second appellant, who is her sister's son, as her heir and successor to the estate; and this will was registered on January 2, 1897.

The respondent filed the present suit against the appellants in the Court of the Subordinate Judge of Bahraich. He

- | | |
|-------------------------------------|-------------------------------------|
| (1) (1875) L. R. 2 Ind. Ap. 169. | (4) (1890) L. R. 17 Ind. Ap. 107. |
| (2) (1881) Ind. L. R. 8 Calc. 12. | (5) (1880) L. R. 8 Ind. Ap. 14, 22. |
| (3) (1891) Ind. L. R. 15 Bomb. 697. | (6) (1893) L. R. 20 Ind. Ap. 77. |

alleged himself to be the next reversionary heir to the estate, and he set out the pedigree upon which he based his claim to that character. He stated the will of the first appellant, and his contention that it was invalid for the purpose of transferring the estate, and he asked for a declaratory decree to that effect.

The appellants by their joint written statement denied that Indarjit died intestate, and denied that the first appellant was in possession as a Hindu widow. They submitted that the mere execution of a will did not give the respondent a cause of action to obtain a declaratory decree. They traversed in detail the respondent's pedigree. And they alleged that the first appellant was absolute owner of the estate under an oral will of her husband. On all the points thus raised issues were settled. At the trial the evidence was mainly directed to the proof of the respondent's character as next reversionary heir. The Subordinate Judge found the necessary issues in the respondent's favour, and granted a declaratory decree as prayed; and that decree was affirmed on appeal by the Court of the Judicial Commissioner.

In both the Courts in India it was realized that under s. 42 of the Specific Relief Act, 1877, a claim to a declaratory decree is not a matter of right, but that it rests with the judicial discretion of the Courts; both Courts, however, held that in the exercise of their discretion in the present case the decree ought to be made. The only point raised by the present appeal is that the Courts in India exercised their discretion improperly.

Their Lordships would guard against being thought to lay down that the execution of a will by a limited owner, such as a Hindu widow, as a general rule affords a sufficient reason for granting a declaratory decree. They are not prepared to concur in all the reasoning of the learned judges in the present case. And if they had been sitting as a Court of first instance they would have felt no little hesitation before making the decree that has been made.

But their Lordships are always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law. And in the present case there are

J. C.

1904

THAKURAIN
JAIPAL
KUNWAR
v.
BHAIYA
INDAR
BAHADUR
SINGH.

J. O.

1904

THAKURAIN

JAIPAL

KUNWAR

v.

BHAIYA

INDAR

BAHADUR

SINGH.

special reasons why they should hesitate before so interfering at the instance of the present appellants. The will of the first appellant, taken by itself, left it open to doubt on what ground she relied in what she was doing. But when the appellants came to file their written statement, and thereby to define their position and put their own interpretation upon what had gone before, there was no ambiguity left. It was made clear that they relied upon an alleged title in the first appellant inconsistent with any present or future rights of the respondent or any other reversionary heir. And, further, the appellants have no legitimate interest in this appeal except in respect of costs; and it is clear that the costs which have been incurred have been caused by the course taken by them throughout the case.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The respondent not having appeared, there will be no order as to costs.

In order to guard against any possible misapprehension hereafter their Lordships think it well to point out that, although in the present case issues have necessarily been raised and decided as to the position of the respondent as next reversionary heir to the taluqa, those issues have been raised and decided only between the parties to the suit, and that whenever the inheritance opens by the death of the widow the present decision will have settled nothing as to who should succeed.

Solicitors for appellants: *Young, Jackson, Beard & King.*

www.libtool.com.cn

RAJ CHUNDER SEN PLAINTIFF;
 AND
 GANGADAS SEAL AND OTHERS DEFENDANTS.
 RAMGATI DHUR AND ANOTHER APPELLANTS;
 AND
 RAJ CHUNDER SEN AND OTHERS RESPONDENTS.
 CONSOLIDATED APPEALS.

J. C.*

1904

Feb. 11;
 March 2.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Civil Procedure Code, ss. 368, 582—Abatement of Appeal.

By ss. 368 and 582 of the Civil Procedure Code an appeal abates if the appellant does not within the statutory period of six months from the date of the death of a deceased respondent apply to substitute his legal representative, unless he satisfies the Court that he had sufficient cause for not doing so.

CONSOLIDATED APPEALS from two decrees of the High Court (March 20, 1900) affirming a decree of the Subordinate Judge of Chittagong (July 6, 1896).

Rules nisi were obtained by the above-named plaintiff and the appellants in the second appeal to revive the appeals from the decree of July 6, 1896, against the executor of Abhoy Churn Chowdhry, a respondent who died on July 9, 1898. The rules were applied for in April and May, 1899, and on November 21, 1899, the High Court discharged them, holding that the applications for revival were barred under art. 175 (c) of the Limitation Act (see Act VII. of 1888), unless sufficient cause were shewn for the delay, and finding that no such cause existed. Thereafter the appeals came on for hearing, and on a preliminary objection that they had abated under s. 368 of the Civil Procedure Code and could not proceed in the absence of the executor of the deceased respondent, the High Court held that, the suit being in substance one for the winding-up of a partnership business and for the taking of the accounts

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. O. thereof, the decree settling the partnership account and giving
 1904 effect to the settlement could not be set aside so long as Abhoy
 ~~~~~  
 RAJ CHUNDER   Churn was unrepresented, the more so as the decree was in his  
 SEN  
 v.  
 GANGADAS    favour, and he had under it to receive a sum of money from  
 SEAL.        some of the other partners.

RAMGATI        *Cohen, K.C., and C. W. Arathoon, for the appellants, con-*  
 DHUR        tended that the High Court was wrong in thinking that the  
 v.  
 RAJ CHUNDER   case fell under s. 368 of the Civil Procedure Code ; or, at all  
 SEN.  
 ~~~~~  
 events, that the appellants in the second appeal, who were
 defendants, were not within the scope and meaning of that
 section. Reference was made to ss. 362, 368, and 582 of the
 Civil Procedure Code, ss. 32 and 33 of the Amendment Act of
 1888, and to Act XV. of 1877, s. 5, and art. 175 (c) ; and it was
 contended, first, that the applications were not barred, and,
 second, that the appeals had not abated.

Cowell, for the three Seal respondents, was not heard.

1904
 ~~~~~  
 March 2.

The judgment of their Lordships was delivered by

LORD DAVEY. The only question on these consolidated  
 appeals is whether the High Court at Calcutta was right in  
 holding that the suit had abated, and the appeals to that Court  
 could not proceed in the absence of a representative of one of  
 the respondents who had died pending the appeals.

The material facts are as follows : The suit was in substance  
 for taking the accounts and winding up the affairs of a part-  
 nership which had subsisted between the plaintiff and the  
 several defendants to the suit. There were complicated ques-  
 tions as to the respective relations of the parties inter se.  
 These preliminary questions were disposed of by the Sub-  
 ordinate Judge, and he thereupon directed the accounts to be  
 taken by a Commissioner. Objections were taken to the report  
 of the Commissioner, and in the result a final decree, dated  
 July 6, 1896, was made by the judge, by which it was ordered  
 (so far as material for the present purpose) that a sum of  
 Rs.9288 odd should be contributed in certain proportions by  
 the plaintiff (appellant in the first appeal), the defendants  
 Ramgati Dhur and Bissumbhur Poddar (appellants in the

second appeal), and certain other parties, and that out of that sum a sum of Rs.1740 odd should be paid to Abhoy Churn Chowdhry, one of the defendants, and other payments be made to other parties. The defendants Ramgati Dhur and Bisumbhur Poddar and the plaintiff respectively appealed to the High Court. The defendant Abhoy Churn Chowdhry died on July 9, 1898, leaving a will, probate of which was granted to his son Nagendra Lal Chowdhry on November 18, 1898. On April 27, 1899, application was made by the appellants in the second appeal for an order for substitution of the name of Nagendra Lal Chowdhry for the deceased defendant on the record. A similar application was made by the first appellant. On November 21, 1899, these applications were rejected on the ground that they were out of time and no sufficient cause had been shewn for the delay. The substantive appeals came on for hearing on March 20, 1900, when the Court held that the appeals had abated, and could not, therefore, proceed. The present appeals are from the decrees then made.

By s. 368 of the Civil Procedure Code, if any defendant dies before decree and the right to sue does not survive against the surviving defendant or defendants alone, the plaintiff may apply to have a specified person whom he alleges to be the legal representative of the deceased substituted for him, and the Court is thereupon to enter the name of such person on the record; but it is provided that when the plaintiff fails to make such application within the period prescribed, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period.

By s. 582 the words "plaintiff," "defendant," and "suit" include an appellant, respondent, and an appeal respectively.

By s. 66 of the Civil Procedure Code Amendment Act (Act VII. of 1888) the period of six months from the date of the death of the deceased defendant is the period prescribed for making an application under s. 368 of the Civil Procedure Code.

It is not disputed that the right to sue did not survive against the other defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a

J. C.

1904

RAJ CHUNDER  
SENGANGADAS  
SEAL.RAMGATI  
DHURRAJ CHUNDER  
SEN.

J. C. representative of Abhoy Churn Chowdhry. But applications  
1904 to substitute his legal representative for the deceased respon-  
RAJ CHUNDER dent were not made until after the expiration of the period of  
SEN six months from that respondent's death. The legal represen-  
v. tative of Abhoy Churn Chowdhry was constituted nearly two  
GANGADAS months before the expiration of the period, and there was no  
SEAL. apparent difficulty in making the application in proper time.  
RAMGATI The only question, therefore, could be whether the Court was  
DHUR satisfied that the appellants had sufficient cause for not doing  
v. so. No serious attempt was made for this purpose. In the  
RAJ CHUNDER circumstances, therefore, the Court had no option, and the  
SEN. present appeals are perfectly idle. Their Lordships will  
humbly advise His Majesty that they should be dismissed.  
The appellants will respectively pay the costs of them.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for Seal respondents : *Barrow, Rogers & Nevill.*

www.libtool.com.cn

BHOLANATH NUNDI AND OTHERS . . PLAINTIFFS ;  
 AND  
 MIDNAPORE ZEMINDARY COMPANY, }  
 LIMITED, AND SIX OTHERS . . . . } DEFENDANTS.

J. C.\*  
 1903  
 Nov. 13.  
 1904  
 Feb. 26.

APPEALS CONSOLIDATED.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Easement—Ryot's Rights of Pasturage—User—Putnidar's Rights of Cultivation and Improvement.*

Where it was found that the plaintiffs, as cultivators by occupation, had a right of pasturage from time immemorial over the waste lands of the villages to which they belonged, and in some cases over waste lands of adjoining villages, a legal origin for that right will be readily presumed. Such a right is not in gross, and their Lordships, in restoring the decrees of the lower Courts, directed an amendment to the effect that they are not to prevent the putnidars from cultivating or executing improvements upon the waste lands so long as sufficient pasturage is left, with liberty to the parties to apply from time to time in case of difference.

CONSOLIDATED seven appeals from seven decrees of the High Court (March 22, 1898), which set aside decrees of the Subordinate Judge of Midnapore, dated November 12, 1895, and remanded the seven cases in which they were severally passed to him that he might decide them in accordance with the directions laid down in their judgment. The decrees of the Subordinate Judge had affirmed with some variation decrees of the Moonsiff's Court, dated May 14, 1895, which were in favour of the appellants.

Seven suits had been brought on May 14, 1894, by seven different sets of plaintiffs, in conjunction with a large number of people mentioned in the schedules to the complaints, who were all of them tenants of nine villages appertaining to turuf Paschim of pergunnah Bagri, a large estate of which the respondents were the putnidars.

The prayer of the complaints was for a declaration of the

\* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

J. C.  
1904

BHOLANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

plaintiffs' right to graze their cattle on the lands specified in schedules to the said plaints, and situate within the ambit of the pergunnah, and for an injunction restraining the respondents from obstructing the exercise of the said right.

The plaintiffs described themselves as tenants on the Bagri estate, and as living by cultivation, keeping and rearing cattle, a large number of which were necessary to bring the lands under cultivation by means of manure and ploughing. They alleged that the only way to maintain and keep the cattle alive was by letting them graze in the jungles and on the waste lands described in the schedules. They claimed the right sought to be enforced as of necessity appurtenant to their tenancy, basing their claim upon immemorial user, and on an enjoyment for the statutory period of twenty years according to s. 26 of the Limitation Act (XV. of 1877).

The respondents in their written statement denied that the plaintiffs had ever exercised any prescriptive right of pasturage on the scheduled lands according to their own will within the said twenty years. They alleged that most of the scheduled lands were valuable indigo lands and pal land situate on the borders of rivers and khals belonging to them; and that if indigo lands be used as pasture ground for cattle no indigo can be grown thereon. They denied that any prescriptive right had accrued to the plaintiffs. Pasture lands for their cattle had formerly been fixed by the Commissioner and afterwards by other Government officers, and the plaintiffs had up to this time been grazing their cattle on land so fixed. "They can have no land in addition thereto for pasture ground, nor can they obtain a decree for using any additional land."

The Moonsiff found that the plaintiffs had prescribed for a common in gross; that their claim "was neither too large and indefinite in its nature, nor is it incapable of definite enjoyment"; that their pasture right had been exercised throughout without any let or hindrance on the part of the defendants. He considered that the growing of indigo amounted to a breach of the continuity of the enjoyment as of right, and that the cessation of user prevented the statutory right being acquired as regards the indigo lands. Also that the grazing

of the cattle in the forest did not harm the defendants, but that grazing them on the indigo lands caused substantial damage to the indigo crops, and should be disallowed as unreasonable.

The Subordinate Judge on appeal found, "upon careful consideration of all the facts and circumstances disclosed in evidence, that the right of each and every one of the plaintiffs to graze his cattle on the lands severally claimed has been sufficiently established. It has been proved by a large number of witnesses examined on the side of the plaintiffs that for a period of more than forty years the plaintiffs and their ancestors were wont to graze their cows, bullocks, and buffaloes on the lands in suit, and that this user, which was in existence even before the period of defendants' accession to the putni of Bagri in 1245 (1838-9), was enjoyed openly as an easement and as of right without licence or leave of the defendants, and also without let or hindrance on their part. It is only since Kartick 1301 (1895) that the plaintiffs have been prevented from driving their cattle to these lands for pasturage; that these lands were formerly used for pasturage may be gathered even from the evidence of some of defendants' witnesses."

He held that the plaintiffs' claim was not unreasonable or indefinite; and that "as for the argument that a fluctuating body of persons, like the tenants of certain villages, cannot derive any benefit from the rule of prescription, it is to be observed that it has no force so far as these cases are concerned, since here the claim is laid, not by variable bodies on the ground of custom, but on the ground that the same determinate persons (meaning the tenants) have enjoyed the right claimed from time immemorial."

Further, "it has been clearly proved in the case on behalf of the plaintiffs that the cattle are taken for pasture to the jungle lands after the cutting is over, from Assar when the new grass begins to grow, and into the indigo lands after the crop is gathered."

While admitting that there can be no easement so large as to preclude the ordinary uses of property by the owner of the

J. C.

1904

BHOLANATH  
NUNDIv.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

J. C.  
1904  
BHOANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

lands affected, the Subordinate Judge held that the exercise of the plaintiffs' rights of the easement claimed had not the effect of destroying the ordinary uses of those lands by the defendants. He held, further, that the rule that a tenant cannot as against his landlord acquire a right of easement is not of universal application, that the exceptions were in favour of an easement of necessity, and in favour of a right of common as claimed in these cases.

He accordingly dismissed the appeals of the defendants, and on the plaintiffs' appeals he added to the Moonsiff's decrees a direction that the plaintiffs were entitled to graze their cattle on the indigo lands after the crop is taken away.

The High Court on the respondents' appeals set aside the decrees which the Subordinate Judge had passed in accordance with his judgment, and remanded the cases to be dealt with by him in accordance with the observations contained in their own judgment. Those observations were to the effect that the facts found by the Subordinate Judge did not support the conclusion at which he had arrived. The plaintiffs sue as tenants holding under the defendants, they set up their tenancy and the circumstances attending their cultivation as the foundation of their right, and they did not claim an incorporeal right irrespective of their tenancy. The Subordinate Judge was wrong in giving them a right which they did not claim, and in giving them a right to graze an unlimited number of cattle. "Whatever rights they have must be rights which were given to them as tenants and cultivators of the villages." And, further, "What has been shown is that the plaintiffs were in the habit of grazing their cattle on waste land for many years, and that the defendants have also been in the habit of sowing indigo. It must be borne in mind that in Lower Bengal, which is permanently settled, all waste lands in a permanently settled estate vest in the zemindar of the estate; so that the fact that the plaintiffs' cattle were allowed to graze on such portions of land as were not cultivated with indigo would not justify the conclusion that the defendants could not extend the cultivation of indigo in their own lands or raise crops thereon other than indigo, if they consider it advisable."

The decree founded on this judgment was that "the decree of the lower Appellate Court be set aside and the case remanded to that Court to be dealt with as indicated in the judgment of this Court, a copy whereof is hereunto annexed."

J. C.  
1904  
BHOJANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

*De Gruyther*, for the appellants, contended that the High Court erred in law in holding that the plaintiffs claimed the rights of pasturage as appurtenant to their tenancy, but, whether this were so or not, nevertheless, on the findings of the Subordinate Judge, which were final and unappealable (see on this point *Mussummat Durga Choudhrain v. Jawahir Singh Choudhiri* (1)), they were entitled to the decree made by him. The presumptive right claimed was an individual right on the part of each plaintiff, as a khudkhast right, to graze on specific lands. The persons were definite and the land was definite. The user was as of right anterior to the grant of the putni under which the respondents hold. Accordingly a title by prescription was established: see Act XV. of 1877, ss. 3, 26. The order of remand in this case was illegal and unnecessary, and it was difficult to say what the lower Court could do under it, and what sort of decree it could frame with regard to the directions given. He referred to *Maharani Rajroop Koer v. Syed Abul Hossein* (2) and *Johnson v. Barnes* (3) to shew that even if the right claimed was acquired otherwise than under the Act, it was not interfered with thereby, for the Act was remedial and not exhaustive.

*Jardine, K.C.*, and *Cowell*, for the respondents, contended that the decree of the High Court was right and ought to be affirmed. The user in this case was inseparably connected with the tenancy and with the cultivation of the lands by the appellants. As matter of law a tenant cannot as against his landlord acquire by prescription an easement in respect of his holding over land belonging to his landlord: see *Secretary of State for India v. Mathurabhai* (4); *Gayford v. Moffatt* (5); *Lutchmeeput Singh v. Sadaulla Nushyo* (6); *Lord Rivers v.*

(1) (1890) L. R. 17 Ind. Ap. 122,  
127.

(2) (1880) L. R. 7 Ind. Ap. 240.

(3) (1873) L. R. 8 C. P. 527.

(4) (1889) Ind. L. R. 14 Bomb. 213.

(5) (1868) L. R. 4 Ch. 133.

(6) (1882) Ind. L. R. 9 Calc. 698.

J. C.  
1904  
BHOANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

*Adams* (1); *Ram Saran Singh v. Birju Singh*. (2) The right as claimed was a personal right, and could not be acquired by an indefinite number of persons over an undefined area. The user as found is referable, and was by the appellants in their several complaints referred to the relationship of landlord and tenant, and therefore to be accounted for without any claim of adverse right. It was inconsistent with that relationship that the tenant should by virtue of an occupation which is constructively that of his landlord acquire rights paramount to his. The user was referable to a mutual consent. Even if the tenants had acquired adverse rights they were not paramount to those of the landlord. The evidence shewed that, concurrently with the user found, the putnidars sowed indigo as they pleased; that grazing was suspended while indigo was on the land or the jungles were being cut; that the rights of cultivation, improvement, and building were paramount to those of pasturage. It was contended that at least the decree should recognise and reserve the rights of the landlord, so that rights of pasturage should not be claimed in such a way as to be destructive of proprietary right.

*De Gruyther* replied.

1904  
Feb. 26.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. These are appeals from a judgment of the High Court of Bengal setting aside appellate decrees of the Subordinate Judge of Midnapore, who concurred with the Moonsiff of Gurbetta, the judge of first instance, in his findings on the facts, and affirmed, with a slight variation, the decrees of the Lower Court.

After the appeals were presented, Robert Watson & Co., Limited, who were respondents to England and had been defendants in the Court of first instance, went into liquidation. Their estates, which were formerly the property of Messrs. Robert Watson & Co., the well-known indigo planters, were transferred to the Midnapore Zemindary Company, Limited, and that company has now been substituted on the record as respondents in the place of Robert Watson & Co., Limited.

(1) (1878) 3 Ex. D. 361.

(2) (1896) Ind. L. R. 19 Allah. 172.

There were originally seven suits. The plaintiffs were different. The lands which were the subject of controversy were different. But the question involved was the same in all. The suits were consolidated for the purpose of the hearing, and disposed of by separate decrees.

The plaintiffs were cultivators by occupation belonging to nine villages appertaining to turuf Paschim, pergunnah Bagri, formerly held by Messrs. Robert Watson & Co., and afterwards by the defendant company in putni right. They averred that from time immemorial they and their predecessors had enjoyed the right of pasturage over the waste lands of the villages to which they belonged, and, in some cases, over waste lands of adjoining villages. Their complaint was that, in consequence, as they alleged, of some dispute about planting indigo, the putnidars had denied their title and interfered with the enjoyment of their ancient and undoubted rights.

The case, as presented by the plaintiffs, on the face of it and in substance, seems simple enough. It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Moonsiff's Court and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the application of principles or doctrines, more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions. The result is that, although the decrees appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory.

In the High Court the learned judges set aside the decrees of the Subordinate Judge, and remanded the case to him in order that he might decide it in accordance with their observations. The learned judges did not take upon themselves to dismiss the suits, though the drift of their remarks seems to lead to that result. At the same time they pointed out, properly enough, that they had "not the power to go into

J. C.

1904

BHOLANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

J. C.  
1904  
BHOLANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

facts." It is by no means easy to see what conclusion other than that embodied in the decrees could be arrived at on remand so long as it remains an incontrovertible fact that the right of pasturage claimed has been enjoyed by the plaintiffs and their predecessors from time immemorial—from the time of the Hindu Rajahs—long before the Watsons had anything to do with the property. The learned judges, in their Lordships' opinion, were justified in rejecting the notion, which seems to have been advanced in argument and was adopted by both the lower Courts, that the right claimed was a right in gross; but they appear to have been under some misapprehension both as to the character in which the plaintiffs sued and as to the effect of the decrees pronounced by the Subordinate Judge. It was certainly not the intention of the Subordinate Judge or the Moonsiff that the decrees should prevent the defendants improving their property. And, indeed, the Moonsiff expressly states that the plaintiffs admitted the right of the defendants to improve their property provided sufficient pasturage were left. Their Lordships think it will be advisable to insert a provision to that effect in the decrees of the Subordinate Judge. It will tend to prevent disputes in future. With this variation the decrees seem to be unobjectionable. Mr. Jardine, for the respondents, said everything that could be said on their behalf. But it was obviously impossible to support the order of the High Court, or to argue that the result would be different if the case went back to the Subordinate Judge on remand.

While their Lordships are unable to concur in the view of the learned judges of the High Court, they wish to guard themselves against being supposed to adopt all the reasoning on which the decrees of the Subordinate Judge appear to be based.

Their Lordships will humbly advise His Majesty that the decrees of the High Court ought to be discharged with costs, and that the decrees of the Subordinate Judge ought to be restored, with an amendment in terms providing in each case that the decree is not to prevent the defendants or their successors in title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage is left for the plaintiffs and the other persons entitled to the right of pasturage claimed, with liberty to the parties, from

time to time, in case of difference, to apply to the Subordinate Judge as they may be advised.

The alteration in the decrees will make no difference in the costs, as the right which it is now proposed to protect by express words has never apparently been disputed. The respondents must pay the costs of the appeals.

Solicitors for appellants: *Miller, Smith & Bell.*

Solicitors for respondents: *Freshfields.*

J. C.

1904

BHOLANATH  
NUNDI  
v.  
MIDNAPORE  
ZEMINDARY  
COMPANY,  
LIMITED.

SEENA PENA REENA SEENA MA- } PLAINTIFF ;  
YANDI CHETTIYAR . . . . }

AND

CHOKKALINGAM PILLAY AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

J. C.\*

1903

Nov. 5.

1904

Feb. 26.

*Madras Regulation VII. of 1817—Powers of Collector as Manager of a Temple  
—Construction of Lease granted by the Collector—Purakudis.*

The effect of Madras Regulation VII. of 1817 is to supersede the powers of managers to alienate charitable property, to sanction the revision of existing appropriations if unduly made, and to render the creation of a fixed rent for all time in the absence of justifying circumstances a breach of duty in the manager.

In 1820, V., being the assignee of permanent leases of temple lands granted by the manager in 1813, obtained a permanent lease of the same land to himself purporting to confer a permanent and heritable title.

In 1832-3, V. and S., not claiming under these grants, but describing themselves as purakudis, that is tenants of a temple from year to year, obtained from the Collector, as representing the Board of Revenue under the regulation, a muchilika from year to year of the lands in suit, which had been comprised in the grants of 1813 and 1820.

In an action by the temple manager to eject the respondents, who were in possession thereunder:—

*Held*, that they had no permanent rights of occupancy. The muchilika must be treated as creating a new tenure, and not as confirmation of the antecedent grants, which were liable to objection under the regulation and had not been insisted upon before the Collector.

APPEAL from a decree of the High Court (Aug. 13, 1896) as amended by order on review (Oct. 1, 1897), which reversed

\* *Present*: LORD MACNAGHTEN, LORD LINDLAY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

J. C.  
1904  
SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR  
v.  
CHOKKA-  
LINGAM  
PILLAY.

on second appeal the decrees of the Subordinate Judge of Negapatam (Nov. 13, 1893) and of the District Court of Tanjore (Aug. 29, 1894).

The suit was brought by the appellant, as representing the landlord's interest in the village of Vadagudi, to eject the respondents, who were tenants holding under a lease. The question decided was whether upon the true construction of a series of documents the tenants held from year to year or on a permanent tenure.

The appellant sued as manager of the temple of Kayarohanaswami. His predecessor in 1813 had granted half of the said village to one Chokkanada Pillay, and the grant declared that he was "to possess and enjoy permanently as ulavadaikani (cultivation-right land from son to grandson and descendants)." The grantee assigned his interest to his son Virdhachala, who also obtained an assignment from the grantee of the other half; and in 1820 the manager, by a document which recited the grant of 1813, granted the whole of the said village to the son, "and you alone shall possess and enjoy the lands for ever as ulavadaikani from generation to generation." The management of the temple subsequently passed to the Collector of Tanjore as representing the Madras Government. On December 4, 1831, Virdhachala and one Subbaian applied to the Collector by petition, which is set out in their Lordships' judgment. They described themselves as purakudis—that is, as tenants who provide themselves with seeds and ploughing cattle and cultivate by personal or hired labour, and receive a share of produce in return. They applied for a lease for the year 1241 (1831). Next year (1832) they executed a taramuchilika for carrying on the village cultivation from 1241. In this they described themselves as ulavadai miras (owners of the cultivation right). The Collector's order, dated February 14, 1833, set out in the said judgment, evidenced the transaction on the Government side. The accounts shewed that in 1870–73 an increased rent of 205 kalams a year was paid, and in 1874–82 the rent was further increased. In 1889 notice of further enhancement of rent was issued by the manager of the temple.

Hence the suit. The defendants, the representatives of

Virdhachala and Subbaïen and other persons in possession, or so many of them as appeared, set up that the land in dispute belonged to their ancestors, and that 200 years ago they gave away to the temple the miras right which they possessed in it and retained the permanent right of cultivation. They also contended that under the muchilika of 1832 there was no right to eject. No reference was made to any title under the leases of 1813 and 1820 as being still in force.

J. C.

1904

SEENA PENA  
 REENA SEENA  
 MAYANDI  
 CHETTIYAR  
 v.  
 CHOKKA-  
 LINGAM  
 PILLAY.

The issues were exclusively directed to the rights created by the muchilika of 1832.

The Subordinate Judge decreed the suit as prayed. He said that the issue as to permanent occupancy or tenancy from year to year depended upon the construction of the muchilika. He pointed out that the Collector as trustee had no power to grant a perpetual lease, and no words indicating perpetuity were to be found in any of the documents of that date. The District Court took the same view.

The High Court reversed these decrees, holding that Virdhachala had never lost his rights under the grants of 1813 and 1820, and that after such a lapse of time it must be assumed that circumstances of necessity existed which rendered them valid. They also held that the muchilika of 1832 was not a new grant, but a confirmation of the old grants of 1813 and 1820, which were valid and still in force, and that the lands in suit were still held under those grants as modified by the muchilika.

*De Gruyther*, for the appellant, contended that this ruling was based upon a ground which was never put forward in the pleadings or the issues, and which was not discussed in the original Court. The original and first Appellate Courts were, he contended, right in holding that in 1832 Virdhachala must be assumed to have lost or abandoned all rights under the grants of 1813 and 1820, and to have claimed no higher right than was possessed by Subbaïen. With regard to the transaction of 1832, its terms and effect must be ascertained solely from the documents of that date which were settled with the Collector, and in which no heritable or permanent right was

J. C.

1904

SEENA PENA  
SEENA SEENA  
MAYANDI  
CHETTIYAR  
v.  
CHOKKA-  
LINGAM  
PILLAY.

asked for or purported to be granted. There is no ground for supporting the High Court's view that the muchilaka of 1832 must be treated as a confirmation of the older grants, of which the Collector had no knowledge or notice, and which were not referred to so far as appears in the registration at that date. That view was not put forward by the defendants, and it was ultra vires of the Collector to grant a heritable or permanent lease except in special circumstances, which were neither alleged nor proved. An intention to make such a grant cannot be imputed to him, nor can the circumstances which could render it valid be presumed. He referred to the Madras Regulation of 1817, *Thiagaraja v. Giyana Sambandha Pandara* (1), *Chockalinga Pillai v. Vythealinga Pundara Sunnady* (2), *Krishnasami Pillai v. Varadaraja Ayyangar* (3), and to a District Manual of Tanjore by Venkasami Row, pp. 396, 606.

The respondents did not appear.

1904

Feb. 26.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The suit out of which this appeal arises was brought by the appellant as trustee or manager of the temple of Kayarohanaswami, of Negapatam, in the district of Tanjore in the Madras Presidency, to recover possession of certain lands in the village of Vadagudi, of which the temple is Mirasdar, from a number of defendants, who are admittedly tenants under the temple, but who claim a permanent tenure as cultivators, dependent only on the payment of ayan and swamibhogam—that is to say, of the revenue due to Government and a money-rent to the proprietor. So long as these payments are made, they deny the right of the temple to eject them; and their title is said to be derived, either directly or indirectly, from two persons named Virdhachala and Subbaian, with whom a settlement of the lands was made by the Collector of Tanjore in the year 1833. The Subordinate Judge of Negapatam and the District Judge of Tanjore decided the suit in favour of the appellant; but the High Court of Madras,

(1) (1887) Ind. L. R. 11 Madr. 78.

(2) (1871) 6 Madr. H. C. 164.

(3) (1882) Ind. L. R. 5 Madr. 345, 353.

upon appeal, reversed their decision. The question which their Lordships have to determine is the nature of the interest which Virdhachala and Subbaien had in the lands in question; for it is not disputed that whatever interest they had has passed to the respondents. It is much to be regretted that the respondents did not appear upon this appeal, and that the case has to be decided *ex parte*.

In the written statement of the principal respondent it is alleged that "the whole of the lands mentioned in the plaint belonged to our ancestors. Two hundred years ago they gave away the miras right which they had in them to the temple of Kayarohanaswami and retained the permanent ulavadaikani (or right of cultivation). In accordance with the said ulavadaikani right, our ancestors and ourselves have, for the last 200 years, been enjoying the lands, cultivating them and paying the ayan and swamibhogam amounts to the temple." There was no reliable evidence as to the origin of the relation between the tenants and the temple; but in support of their allegation of the character of their tenancy three documents were produced by the respondents, to which great weight is attached in the judgment of the High Court. These documents were more than thirty years old, came from proper custody, and may be presumed to be authentic. By the first, which is dated March 11, 1813, the then manager of the temple gave a permanent lease of one-half of the lands in dispute to Chokkanada Pillay, the father of Virdhachala, and the other half appears to have been granted on a similar tenure to one Nalla Pillai. Nalla Pillai appears to have transferred his interest, after Chokkanada's death, to Virdhachala, and by the second document, which is dated January 26, 1820, Virdhachala obtained the entire land on permanent lease from the manager of the temple. The third document, which is dated July 6, 1822, is a sub-lease of a half-share of the property by Virdhachala to two persons named Visvanatha Mudaliar and Namasivaya Mudaliar. The first and second documents are described as *vara adai olai chits*, which is translated as "deeds letting land for cultivation and providing for share of produce," and the character of the tenure granted is described

J. C.

1904

SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR  
v.  
CHOKKANADA  
LINGAM  
PILLAY.

J. C.  
1904  
SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR  
v.  
CHOKKA-  
LINGAM  
PILLAY.

as ulavadaikani or "cultivation-right land"—that is to say, land which the grantee and his heirs were to have a hereditary right to cultivate. In the third the tenure is described as ulavadai miras, a phrase which is not employed in the transactions between the temple and the grantees. There is some uncertainty as to the precise meaning of this last phrase; but the Courts below concur in holding that the two grants by the temple manager, if still valid and subsisting, confer a permanent and heritable title.

It must be observed, however, that the second and more important of these grants bears a date subsequent to the passing of Madras Regulation VII. of 1817, which vested the general superintendence of all charitable endowments "in land or money" in the Board of Revenue, and made it the duty of the local agents of the Board (of whom the Collector was one *ex officio*) to report to the Board "any instance in which they may have reason to believe that lands or buildings, or the rent or revenues derived from lands, are unduly appropriated," care being taken not to infringe private rights. These grants were thus liable to objection, not only on the ground that "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty" in the trustee, unless there were special circumstances of necessity to justify it: *Maharani Shibessouree Debia v. Mothooranath Acharjo* (1); but also because the effect of the regulation was to supersede the powers of managers to alienate charitable property, and to sanction the revision of existing appropriations, if unduly made.

There is nothing on the record to shew at what date the Collector took in hand the direction of the affairs of this particular temple, but on December 4, 1831, a petition in the following terms was presented to him:—

"To

"N. W. Kindersley, Esquire,

"Principal Collector of the Tanjore Province.

"Durkhast (tender or application for land presented to the

(1) (1869) 13 Moore's Ind. Ap. Ca. 270, at p. 275.

Revenue Department) written and given by the two persons Vadagudi Virdhachalla Pillai and Subbaian who are purakudi (purakudis) of the assessed lands owned in the village of Vadagudi by Kayarohanaswami of Negapatam, Andanapettai Maganam, Kivalur Taluq.

J. C.

1904

SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR

v.  
CHOKKA-  
LINGAM  
PILLAY.

"As we shall not only continue to pay for one year the current fusli 41, swamibhogam paddy 51 kalamas 4 marcalas to the temple paying also the Circar assessment taking on durkhast for the current fusli 41, the wet land 20 velis, 5 mahs, 40½ gulis and dry land, &c., 6 mahs, 81 gulis of the said village and cultivating and enjoying the land, but shall also furnish adequate cash security therefor (or cash security adequate thereto), we request that orders may be passed to settle (or make certain) and give for ekasal (a Revenue expression meaning one year) durkhast ijara (contract or lease granted upon application to the Revenue Department) in our names accordingly.

"(Signed) Virdhachallam.

"( " ) Subbaian.

"(Signed) Venkata Row,

"4th December, 1831.

Tahsildar."

In this petition, which, it will be observed, is in the names of two persons, Virdhachala and Subbaian, no reference is made to the antecedent grants held by Virdhachala. The petitioners are described as purakudis, that is to say, "tenants who provide themselves with seeds and ploughing cattle, and cultivate the land by personal or hired labour, receiving a share of the produce in return." The application is for a lease for one year, and no distinction in status is made between the two applicants. There is also some difference between the quantity of the land mentioned in Virdhachala's grants and that applied for in the petition. When it is borne in mind that one of those grants was made only four years before, and the other three years after, the passing of the Regulation of 1817, it does not seem improbable that the existence of these grants was not brought to the notice of the Collector, by whom their validity might have been questioned, and that the

J. C.

1904

SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR

CHOKKA-  
LINGAM  
PILLAY.

petitioners preferred to base their application on grounds less open to controversy. Be this as it may, neither in the muchilika of January 10, 1832, nor in the security bond of January 11, 1832, which followed the petition and completed the tender of the applicants for a lease of the lands, is there anything to indicate a claim to occupancy tenure, except that the applicants are described as ulavadai miras instead of as purakudis. On the other hand, the muchilika clearly contemplates a tenancy for more than one year, for it provides that "if, in any year," garden crops are raised by means of irrigation, a higher money-rent is to be paid. In like manner it is stipulated that if "in any fusli damage is caused by flood or drought," allowance is to be "made for the damage, according to custom and discretion." And the applicants further agree that "as kayam taram thirwa (permanent classification money-assessment) has been fixed from the current fusli 1241 . . . . we shall pay the Circar the thirwa (money-assessment) of each numberwari land." In explanation of the phraseology used, it is stated that classification settlement is a settlement of assessment made with reference to the quality of each field (or number) as opposed to the settlement of a village in gross, and that such a settlement was at that time in progress in the Tanjore district.

No puttah appears to have been granted in exchange for the muchilika, but the order passed by the Collector is shewn in the following extract from an official diary containing copies of orders sent to the Tahsildar of Kivalur, the district in which the property is situated :—

"Received your arzi, dated 18th January last, stating that, as the two persons *Virdhachala Pillay* and Subbaïen who had given durkhast (presented a petition or tender) for the previous one sal (one year, termed also ekasal) as per order for the assessed wet, dry, &c., land owned by Kayarohana Swami of Negapatam, said taluq, in the village of Vadagudi, had agreed to taram faisal (classification settlement) permanently at the rate of 51 kalams of paddy per annum (on account of) swami-bhogam to the temple paying the Circar kist due for the said

land, you had obtained muchilika, &c., from him (them) and forwarded the same and soliciting orders for putting him (them) in possession of the land.

"Referring to that matter, you shall put the ijaradar (tenderer) in possession of the said land, and collect duly as per instalments what is *due to the Circar* as well as the swamibhogam.

"(Initialled) M. K.

"Camp Vallam,

"14th February, 1833."

This being the state of the title of the defendants, as shewn by the documentary evidence in the case, the following issue was raised in the Court of the Subordinate Judge:—

"Whether under the terms of the muchilika of the 10th January, 1832, Virdhachella Pillai and Subbaian were tenants from year to year or acquired a right of occupancy?" And the Subordinate Judge found that, "looking at the muchilika by itself, it does not evidence more than a contract of letting from fusli to fusli at the yearly rent specified"; and he further held that from the petition it was plain that Virdhachala, "owing to his inability to cultivate the land, or from some other reason, must have given up his right of perpetual lease granted to him under" the grant of January 26, 1820. The District Judge of Tanjore came to the same conclusion. He says: "In some way or other it is perfectly clear, as the Subordinate Judge points out, that on the 4th December, 1831" (the date of the petition to the Collector), Virdhachala "had either given up or had lost all his right to the perpetual lease granted to him" by the temple authorities; and he held that "all he and his successors in title have to depend upon is the fresh contract that was made" (with the Collector) "in 1832," under which no permanent right of occupancy was conferred.

The learned judges of the High Court took a different view. They held that the tenancy began, not under the muchilika, but under the grant from the temple authorities in 1813; that there was no sufficient evidence to prove that the tenancy under the grants of 1813 and 1820 was ever determined, and

J. C.

1904

SEENA PENA  
REENA SEENA  
MAYANDI  
CHETTIYAR  
v.  
CHOKKA-  
LINGAM  
PILLAY.

J. C.

1904

SEENA PENA  
KEENA SEENA  
MAYANDI  
CHETTIYAR

v.

CHOKKA-  
LINGAM  
PILLAY.

that the transaction evidenced by the muchilika was not a new lease, but a confirmation of the previous grant, with a modification as to the mode of paying the rent. In support of these conclusions, they attach much importance to the description of the applicants, in the muchilika and security bond, as ulavadai mirasidars; and they hold that this description differentiates the present case from cases in which the High Court had, under similar circumstances, decided otherwise. They accordingly reversed the decrees of the Courts below, and dismissed the plaintiff's suit with costs throughout.

Upon a careful consideration of the whole of the evidence in the case, their Lordships are unable to adopt the conclusions arrived at by the learned judges of the High Court. It seems to them incredible that if the previous grants had been brought to the knowledge of the Collector in 1831-33 there should not have been some reference to those grants in the proceedings taken before him. Not only is there no such reference, but the applicants come before him in the same character as purakudis, and their description as ulavadai mirasidars does not occur in any document emanating from the Collector's office, but only in documents put forward by the applicants themselves. The words, moreover, do not appear to have a well-established meaning. The judges of the High Court translate them as "persons with an hereditary right to cultivate"; but the Subordinate Judge says that, although the meaning of the words taken separately is clear enough, "the meaning of both the words put together is not explained," nor does the combination find a place in Wilson's Glossary. It would be extremely unsatisfactory to rest the decision in a case of this importance on a vernacular expression of doubtful signification.

On the other hand, their Lordships find that the term purakudis, which is employed by the applicants in their petition to the Collector, has a well-understood and definite meaning, and the character of the tenure created by the proceedings before the Collector in analogous cases has been determined by judicial decisions. In the case of *Chockalinga Pillai v. Vythelalinga Pundara Sunnady* (1), in which the circumstances were very

(1) 6 Madr. H. C. 164.

similar to those of the present appeal, and there was a muchilika in similar terms, it was held that no permanent tenancy was created. "The language of the agreement," says Scotland C.J. (1), "had, I think, no greater effect than the ordinary form of muchalka given by a ryot in exchange for a puttah, except so far as it indicated the intention that its term should apply to every successive fasli for which the holding might be continued by neither party exercising the right to terminate it at the end of a fasli." This decision was followed by the Madras High Court in the case of *Thigaraja v. Giyana Sambandha Pandara* (2), in which the circumstances were almost identical; and their Lordships see no reason to differ from the conclusions at which those learned judges arrived, upon a state of facts which cannot be distinguished, in any material degree, from those in the present suit. In a third case, *Krishnasami Pillai v. Varadaraja Ayyangar* (3), in which there was no muchilika and the decision turned on length of occupation, it was held that the term purakudi ulavadai, by which the tenant's predecessor in title was described in his petition to the Collector, did not necessarily imply a right of occupancy; but, in other respects, the decision does not affect the question now before their Lordships, which, in their opinion, must be decided upon the contract sanctioned by the Collector in 1833.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the decree of the High Court reversed with costs, and the decrees of the District Court of Tanjore restored. The respondents will pay the costs of the appeal.

Solicitor for appellant: *R. T. Tasker.*

(1) 6 Madr. H. C. at p. 168.

(2) Ind. L. R. 11 Madr. 77.

(3) Ind. L. R. 5 Madr. 345.

J. C.

1904

SEENA PENA  
REENA SEENA  
MAYANDI  
QHETTIYAR  
v.  
CHOKKA-  
LINGAM  
PILLAY.

www.libtool.com.cn

J. C.\* JOTINDRA MOHUN LAHIRI . . . . PLAINTIFF;  
 1904  
 Feb. 23  
 March 23  
 AND  
 GURU PROSUNNO LAHIRI AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Decree of Mesne Profits—Suit for Contribution—Shares of Liability—Principle on which Interest should be charged in the Accounts.*

A decree was obtained in 1882 for mesne profits for the years 1826–1854 in respect of their wrongful enjoyment of property as part of their family estate against the shareholders therein, and was fully satisfied in 1889 by payments made by the co-sharers in execution proceedings, which were in effect directed against the family estate.

In an action for contribution amongst the co-sharers:—

*Held*, that the proper basis of assessment was according to the shares held by them respectively at the date of the decree, and not according to the shares enjoyed during 1826–1854.

In taking the account interest should be computed on the total judgment debt to the date of its final extinguishment without regard to the sums from time to time paid on account, and interest at the same rate should be credited on each contributory payment in favour of the contributor from the date of payment to the date of final satisfaction.

APPEAL from two decrees of the High Court (July 17, 1900) dismissing the appellant's suit, thereby allowing the appeals of two of the defendants, Nilkamal Lahiri and Hari Saran Moitra, from a decree of the Subordinate Judge at Rungpore (May 25, 1898).

That suit was brought on September 10, 1894, alleging that the appellant and the said two defendants were the heirs and legal representatives of Ramanath Lahiri, and that, in that capacity, a decree had been obtained against them and another defendant since deceased for mesne profits of a 4-annas share of a certain property called Karaibari. It appears from the proceedings that Ramanath dispossessed the decree-holders' predecessor, and that Ramanath, and after his death in 1831 his representatives, held possession of the said 4-annas share from September 22, 1826, to July 25, 1854.

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

The final decree of the High Court which was made in 1882 was for Rs.85,795, with costs and interest at 6 per cent. per annum. The appellant further alleged that in satisfaction of this decree he had been compelled, in order to save his own property, to pay "an amount largely in excess of the amount which upon calculation was payable by the plaintiff." An account was given in the schedule to his plaint as to how, and when, and what amounts were paid by the appellant and the respondents in full satisfaction of the decree. According to that account the plaintiff claimed from defendant No. 1, i.e., Nilkamal Lahiri, Rs.3229 as principal, and from defendant No. 2, i.e., Hari Saran Moitra, Rs.6215 as principal. He prayed to recover against the defendant No. 1 Rs.4670, and against defendant No. 2 Rs.9000, in each case including interest to the filing of the plaint, and for interest during the pendency of the suit at the rate of 12 annas per cent. per mensem.

The shares of liability to satisfy the judgment debt under the said decree of the High Court were stated in the plaint to be as follows: The plaintiff, 5 annas 3 gundahs; defendant No. 1, Nilkamal, 7 annas 13 gundahs; defendant No. 2, Hari Saran Moitra, 3 annas 4 gundahs; being the shares to which they were entitled at the date of the decree for mesne profits modified by the subsequent death of one of the judgment debtors.

The accounts scheduled to the plaint were treated by both Courts as correct, and the Subordinate Judge gave a decree for both the principal sums claimed, disallowing interest, but adopting the shares as stated in the plaint which were undisputed in the pleadings and by the issues, and only questioned for the first time in oral argument before the High Court.

The ground of the High Court's decision dismissing the suit was that "for the years 1826-1854 the plaintiff's share must be taken as 5 annas, the share of defendant No. 2 as 2 annas 10 gundahs, and the share of defendant No. 1 as 6 annas odd gundahs. This excludes the share of Kanaktara, as to which there is no dispute." Kanaktara was the judgment debtor who died. Her share was 2 annas 10 gundahs, divisible between

J. C.

1904

JOTINDRA  
MOHUN  
LAHIRIv.  
GURU  
PROBUNNO  
LAHIRI.

J. C.  
1904  
JOTINDRA  
MOHUN  
LAHIRI  
c.  
GURU  
PROSUNNO  
LAHIRI.

the plaintiff and defendant No. 1. The share of liability assigned to the plaintiff being larger than that alleged in the plaint, and the share assigned to the two defendants being smaller, the High Court readjusted the accounts on this basis, and found that the amounts paid by the two defendants covered their respective liabilities, and that the plaintiff's claim against them for contribution must fail.

*Asquith, K.C.*, and *Cowell*, for the appellant, contended that the Subordinate Judge was right in adjusting the accounts between the contributory parties according to their shares in Ramanath's estate existing at the date of the decree, modified only by what had subsequently occurred, namely, the death of Kanaktara, one of the judgment debtors, pending proceedings in execution. The liability enforced by the decree for mesne profits devolved upon the parties in their representative capacity, and were rightly apportioned by him according to their existing shares in the inheritance. The High Court was in error in distributing the liability according to the shares as they stood during enjoyment of the mesne profits, namely, from 1826-1854, and it appeared on the face of the judgment that, assuming that to be the correct principle, the shares imputed to the parties at that date had been erroneously calculated. The shares in which the parties were interested had been admitted all through the litigation, and the High Court ought not to have altered them in the absence of issues, pleadings, and evidence directed to that point. Reference was made to former portions of the litigation between these parties in Ind. L. R. 6 Calc. 720 and L. R. 15 Ind. Ap. 195.

*C. W. Arathoon*, for the respondents, contended that, assuming the Subordinate Judge to be right as to the shares in the liability to be attributed to the parties, yet that the appellant was not entitled to say that he had paid in excess of his share. It appeared from various proceedings in the record that it was owing to frivolous objections taken by his adoptive mother and natural father, for which he must be held responsible, that the decretal amount had not been liquidated at an early date. He was thus responsible for that amount having

been enhanced by interest to a considerable extent. Besides, it did not appear from the accounts that the respondents, who had made early payments in satisfaction of their liability under the decree, had had the advantage to which they were entitled of being credited with interest thereon. It was not shewn in the accounts scheduled to the plaint that they had had the benefit of those early payments which had reduced the total interest accruing on the judgment debt, whilst the appellant's payments had not been made till the close of the execution proceedings.

*Cowell* replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against two decrees of the High Court of Bengal dated July 17, 1900, overruling a decree of the Subordinate Judge of Rungpore of May 25, 1898. The suit was for contribution in respect of a decree under which all parties to the present suit and all parties to the present appeal (or those whose interests they represent) were liable as judgment debtors; the plaintiff's case being that he had paid a larger amount towards the satisfaction of that decree than properly fell to his share as between him and his co-debtors.

The proceedings now before their Lordships are a stage, and it is to be feared not the final stage, in a tedious and complicated course of litigation between the various persons from time to time interested in the estate of Karaibari, and between the several branches of a family which owes its origin to one Ramanath Lahiri, who was at one time the principal sharer in that estate. The present suit is so far connected with the earlier transactions that, although the decree in respect of which contribution is claimed was in its final form only settled in 1882, it is necessary, in order to understand the points raised upon this appeal, to go back to a much older story. But for the present purpose the merest outline of that story will be sufficient.

In 1826 Ramanath Lahiri was the owner and in possession of a 12-annas share of the estate of Karaibari, the remaining 4-annas share being the property of one Kali Chunder Lahiri.

VOL. XXXI,

H

J. C.

1904

JOTINDRA  
MOHUN  
LAHIRI  
v.  
GURU  
PROSUNNO  
LAHIRI.

1904

March 23.

J. C.  
 1904  
 JOTINDRA  
 MOHUN  
 LAHIRI  
 v.  
 GURU  
 PROSUNNO  
 LAHIRI.

Ramanath had five sons and a wife (their mother), and he then executed a document of the nature of a family settlement, by which he reserved to himself and his wife a 3-annas share of his estate, and gave 3 annas to the eldest son, and 2 annas 10 gundahs to each of the four other sons. Ramanath died in 1831, and after his death, instead of his five sons succeeding to the estate in equal shares under the ordinary law of inheritance, the widow remained in the enjoyment of 3 annas, while the sons continued to hold the unequal shares assigned to them by the settlement of 1826; and so things continued till the death of the widow in 1849. At that time the four elder sons were dead, of whom the first, second, and third were represented by female heirs, and the fourth by his son Nilkamal; the fifth son, Shibnath, was living. The 3-annas share hitherto enjoyed by the widow was then divided equally between Nilkamal and Shibnath. This, of course, effected a change in the proportionate interests of the several members of the family; and so far as the matter can be traced with certainty, it cannot be said that there was any further alteration of the shares then fixed until after the year 1854—a year which forms an important date in this case.

In the same year, 1826, in which the family settlement was executed, Ramanath, whose real title was, as has already been said, to 12 annas of Karaibari, came into possession of the remaining 4 annas, which property belonged to Kali Chunder. How this happened does not appear, but Ramanath's possession of the 4 annas, which was continued after his death by his successors in interest, was subsequently proved to have been wrongful. This was established by a suit in which the representatives of Kali Chunder obtained a decree against the representatives of Ramanath for possession of the 4-annas share. Possession in accordance with this decree was actually obtained in 1854.

The representatives of Kali Chunder followed up their success by instituting another suit, on January 27, 1862, in the Court of the Deputy Commissioner of Goalpara to recover mesne profits in respect of the period of wrongful exclusion from possession, extending from 1826 to 1854; and they joined as

defendants all those who then were or might be entitled to share in the estate that had been Ramanath's, including the representatives of the lines of all the five sons of Ramanath, and described them as "co-sharers, zemindars of a 12-annas share of pergunnah Karaibari."

The decree of the Deputy Commissioner in that suit, dated September 6, 1875, awarded to the plaintiff a sum of over two lacs of rupees, including costs, and that decree was against the persons who were co-partners at its date, one of the original defendants, Chandmoni, having died while the suit was pending, and the line of her husband, the third son of Ramanath, having, with her, become extinct.

From that decree there was an appeal to the High Court, which reduced the amount awarded by the Deputy Commissioner to Rs.85,795. Other proceedings followed, as the result of which the terms of the decree were finally settled on April 3, 1882. That decree is not before their Lordships, but its effect is stated in documents which are in evidence and are on the record, its terms must be perfectly well known to all the parties, and throughout the proceedings in the Courts below and on this appeal it has always been assumed and frequently stated, and the statements have been accepted, that the final decree was one merely reducing the amount awarded by the First Court. Their Lordships accept it as a decree doing this and nothing more.

In order to appreciate the meaning and operation of these decrees, it must be noticed that between 1854, when the dispossession of Kali Chunder's family came to an end, and 1882, when the final decree for mesne profits in respect of that dispossession was passed, a number of changes had taken place in the distribution of interests between the branches of Ramanath's family. Voluntary transfers had been made from one branch to another. Long and complicated litigation had resulted in the compulsory acquisition of certain shares by one from others of them. And, as has been already stated, one branch, that of the second son, had become extinct by the death of his widow during the pendency of the suit, and thereby her share had devolved upon Nilkamal, the son of the fourth son. It is not

J. C.

1904

JOTINDRA

MOHUN

LAHIRI

v.

GURU

PROSUNNO

LAHIRI.

J. C.

1904

JOTINDRA

MOHUN

LAHIRI

v.

GURU

PROSUNNO

LAHIRI.

necessary to examine these transactions in detail. It is enough here to say that, in the result, at the date of the decree, Kanaktara, the widow of Ramanath's first son, held a share, and the representatives of the second, fourth, and fifth sons other shares, while the line of the third son was extinct. Subsequently to the final decree for mesne profits, and before the institution of the present suit, Kanaktara died, and so the line of the first son of Ramanath became extinct, and the share which she had enjoyed passed to those who represented the fourth and fifth sons in equal shares. The stems of descent from Ramanath were thus reduced to three, and amongst these the plaintiff in this suit (appellant before their Lordships) represents the line of the fifth son; Nilkamal, the first defendant (for whom the first group of respondents, his heirs, are now substituted), that of the fourth son; and Hari Saran Moitra, the second defendant (for whom the second group of respondents, his heirs, are now substituted), that of the second son.

After the final decree for mesne profits, the decree-holders issued execution in 1882 and again in 1888 to recover the amount due to them by attachment and sale of the estate.

Under each of these executions, and to prevent the sacrifice of the properties against which they were issued, payments were made from time to time by and on behalf of the several persons liable under the decree. These payments began at least as early as April, 1883, and the decree was finally satisfied and the matter concluded on September 17, 1889, during which period interest was running on so much of the amount of the decree as for the time being remained unsatisfied.

The plaintiff filed the present suit on September 10, 1894. In his plaint he stated the decree for mesne profits, and proceeded to say that:—

“The property left by the late Rama Nath Lahiri was liable for the amount due on account of mesne profits, and the property left by him, a 7 annas 13 gundahs share consisting of the entire share of Chandmoni Debi and a moiety of Kanaktara Debi's share, is owned and held by the defendant No. 1, a

3 annas 4 gundahs share by the defendant No. 2, and with Kanaktara's moiety share, 5 annas 3 gundahs share is owned and held by the plaintiff, and the plaintiff and the defendants are liable to pay the amount of the said decree in proportion to those shares. The plaintiff and the defendant No. 1, having after Kanaktara Debi's death got the property left by her in equal shares, were bound to pay equally the amount of that decree payable on account of her share, and as the defendant No. 1 after Chandmoni Debi's death got the share belonging to Ram Mohun Lahiri, the defendant No. 1 is bound to pay her share of the amount due."

The plaintiff then set out an account intended to shew that, taking the foregoing specification of shares as the basis of liability, he had, as against each of the defendants, paid more than his proper share under the decree, and he asked for a decree accordingly against each of them.

The defendants in their written statements raised certain defences, which it is not now necessary to notice. They further alleged that the satisfaction of the decree had been delayed by wilful default and obstruction on the part of the plaintiff's adoptive mother, and that but for this the sums paid by the defendants respectively would have been sufficient to cover their shares of liability; and issues were raised with reference to this defence. The Subordinate Judge who tried the case, in deciding these issues, held that in fact the defendants had not been prevented from paying their shares by what had occurred; and from this finding the learned judges of the High Court have not expressed any dissent. The point has been again raised in argument on this appeal; but after hearing all that was to be said their Lordships see no reason to differ from the finding of the Subordinate Judge. The matter therefore need not be mentioned further. It is not improbable, however, that any injustice which might seem to be done to the defendants by this conclusion may be remedied by the directions which their Lordships propose to give in another connection.

The written statements did not traverse the allegations of the plaint as to the shares in the family estate enjoyed by the

J. C.

1904

JOTINDRA  
MOHUN  
LAHIRI  
v.  
GURU  
PROSUNNO  
LAHIRI.

J. C.  
1904  
JOTINDRA  
MOHUN  
LAHIRI  
v.  
GURU  
PROSUNNO  
LAHIRI.

parties to the suit, nor was any issue ever raised, or ever asked for, upon that matter; though the issues raised were probably sufficiently wide to cover the point ultimately raised in the High Court as to the proper basis of liability. The Subordinate Judge therefore adopted the specification of shares put forward in the plaint as correct. And there can be no doubt—indeed it has never been seriously questioned—that the shares at the date of this suit were those stated. Nor is there any doubt that the shares then existing, as between the branches of the family, were the same as they had been at the date of the decree for mesne profits, except for the death of Kanaktara and the devolution of her share; and as her share of course devolved, subject, as between the co-partners, to its burdens, that change gives rise to no complication.

The Subordinate Judge further accepted the specification of shares so ascertained as the basis for determining the respective liabilities of the parties to the suit. This is the first point on which difference of opinion has arisen.

The second defendant, by his written statement, raised another point, relating to certain moneys formerly lying in the Garo Hills Government Treasury. The facts as they appeared at the trial were these, and they are not disputed. A portion of the Karaibari estate seems to have lain in the Garo Hills district, and for some reason or other moneys derived from that portion were held in the Treasury to the credit of the various co-partners. In 1883 the aggregate of those moneys was paid to the decree-holders towards satisfaction of the decree for mesne profits. At that date these moneys were not held on joint account to the credit of the estate or of the co-partners collectively, but on separate accounts to the credit of the individual co-partners, and the sum so credited to the second defendant was equivalent to a 2-annas share of the whole; he had, however, before that time by legal proceedings established his right to a 3 annas 4 gundahs share of the whole estate. The plaintiff, in the account filed by him in this suit, credited the second defendant, as a payment by him, with the amount which had stood to his credit in the Treasury; the latter contended that he should be credited with a larger sum cor-

responding with the share of the whole estate to which he had established his title. The Subordinate Judge held that effect could not be given in this suit to the contention of the second defendant, and pointed out that his remedy (if any) lay in another direction.

The Subordinate Judge took an account in accordance with his findings; and as it shewed each of the defendants to be indebted to the plaintiff, he gave a decree in which he made each liable for the amount shewn against him.

Against this decree each of the defendants or their representatives appealed to the High Court. The learned judges in that Court differed from the Subordinate Judge as to the principle on which the liability to contribute should be ascertained. Their view was thus expressed: "We have to deal with the respective shares of the parties of which they were in possession from September, 1826, to July 25, 1854." And they found that "for the years 1826 to 1854 the plaintiff's share must be taken as 5 annas, the share of defendant No. 2 as 2 annas 10 gundahs, and the share of defendant No. 1 as 6 annas odd gundahs."

As to the money drawn from the Garo Hills Treasury also the learned judges differed from the Subordinate Judge, and they stated their reasons for doing so as follows:—

"There has been considerable discussion as to the share to which defendant No. 2 is entitled to credit; for, out of the sum drawn from Garo Hills Treasury and paid to the decree-holders in satisfaction of their decree, the plaintiff has given him credit for Rs.2,612.9.4.10, in respect of a 2 annas share, and the Subordinate Judge has accepted that estimate on the ground that the plaintiff was out of possession of the 1 anna 4 gundahs share at that time. It is not clear what time the Subordinate Judge refers to. The suit was brought by Uma Soondari, claiming a 3 annas 4 gundahs share, in 1870, and it was decreed in the High Court in 1874, and in the Privy Council in 1880. The money was drawn out of the Garo Hills Treasury in 1883. Certainly, at the time the money was drawn, defendant No. 2 was entitled to a 3 annas 4 gundahs share of it. We cannot, therefore, agree with the finding of the Subordinate Judge on

J. C.

1904

JOTINDRA  
MOHUN  
LAHIRIv.  
GURU  
PROBUNNO  
LAHIRI.

J. C.  
1904  
JOTINDRA  
MOHUN  
LAHIRI  
v.  
GURU  
PROSUNNO  
LAHIRI.

this point, but hold that defendant No. 2 is entitled to a credit out of the sum drawn from the Garo Hills Treasury proportionate to a 3 annas 4 gundahs, or one-fifth, share, that is to say, to Rs.4,181.11.9."

In accordance with these findings the learned judges retook the account between the parties, and, finding nothing due to plaintiff, dismissed the suit with costs.

Against that decree the present appeal has been brought; and for the appellant it has been contended that the learned judges were wrong upon both the points in which they differed from the First Court, and that their decree should be set aside, and that of the Subordinate Judge restored.

On behalf of the respondents it was argued that the learned judges were right on both the points just referred to. Reliance was again placed on the attempted defence to the suit on the ground of obstruction, as to which their Lordships' opinion has been already expressed, and another contention was urged, based upon delay, which will be dealt with immediately.

With regard to the basis upon which contribution should be estimated, even assuming the principle adopted by the High Court to be correct, namely, that it should follow the shares enjoyed from 1826 to 1854, not those at the date of the decree for mesne profits, still the conclusion drawn does not seem to follow. The shares stated by the learned judges do not seem to correspond in fact with those held at any time during the years in question. And the shares were not uniform during those years—the shares between 1826 and 1849 were different from those between 1849 and 1854; so that to apply the principle correctly an account would have to be taken of some complexity, and of a kind different from that taken in either of the Courts below. Their Lordships are of opinion, however, that the principle so laid down is not correct. The cause of action in the suit for mesne profits was the wrongful enjoyment by the 12-annas shareholders collectively, as a part of their family estate, of property that did not belong to them. The suit was brought against those who were co-partners at the time of its institution, and both in form and in substance it sought to charge them as such. The decree which followed

was against those who were co-partners when it was passed; it was in effect a decree against the estate. The execution proceedings were directed against the estate. If those proceedings had gone on to their legal conclusion the estate would have been sold, and the loss would have fallen on the co-partners according to their shares. That is the danger which hung over them if the decree were not satisfied otherwise, and which was averted by the payments made. It follows, in their Lordships' opinion, that the same shares form the proper basis for assessing contribution, and that is the basis on which the Subordinate Judge proceeded.

As to the second point upon which the learned judges of the High Court have differed from the Subordinate Judge, that is to say, the claim of the second defendant (represented by the second group of respondents) to be credited with a larger sum than had been allowed him out of the money received from the Garo Hills Treasury, their Lordships are again unable to agree with the learned judges. If the money in the Treasury had been held on a joint account to the credit of the estate or of the family, it might well be said that the parties should be credited with payment in accordance with their legal shares in the estate generally. But in fact the money was held on separate accounts to the credit of the several co-partners; and it cannot be said for the present purpose that the second defendant paid more than was his to pay—that is, the amount standing to his credit. The circumstances referred to by the learned judges shew at best that, if he had enjoyed his full legal rights, he would have been in a position to pay more. Whether he has a remedy on this account in any other form is a question which their Lordships have not to consider.

It remains to consider one objection urged on behalf of the respondents to the account as adjusted by the Subordinate Judge, which appears to their Lordships to be well founded. The payments by which the decree for mesne profits was satisfied were made at various times, between 1883 and 1889, by the several persons liable, and in different proportions, while all the time interest was running on the balance unpaid under the decree. The defendants would seem to have contributed

J. C.

1904

JOTINDRA  
MOHUN  
LAHIRIv.  
GURU  
PROSUNNO  
LAHIRI.

J. C.  
 1904  
 JOTINDRA  
 MOHUN  
 LAHIRI  
 v.  
 GURU  
 PRASUNNO  
 LAHIRI.

relatively more largely to the earlier payments and the plaintiff to the later, and thereby an injustice was done under the decree of the Subordinate Judge, which made no allowance for this distinction. Each payment on account, so far as it went, stopped the running of interest on the decretal amount; and the benefit of that cessation of interest ought to have gone in relief of those who made the payments, not of those who continued in default.

Their Lordships will humbly advise His Majesty that the decrees of the High Court and that of the Subordinate Judge should be discharged, and that the case should be remitted to the High Court, with a direction to retake the account between the parties on the principle of computing interest on the total principal of the judgment debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and then crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree in 1889. If upon taking the account on this footing it appears that anything was due to the plaintiff by either defendant, and is due by his representatives, a decree should be made against the latter for the amount so found due with costs in all the Courts in India. If in the case of either defendant it be found that nothing was due from him and is due from his representatives, the suit will be dismissed as against the latter with costs in all the Courts in India.

Neither party has wholly succeeded before their Lordships, and all parties will bear their own costs of this appeal.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

www.libtool.com.cn

SRISH CHANDRA ROY AND OTHERS . . PLAINTIFFS ;

AND

ROY BANOMALI RAI. . . . . DEFENDANT.

J. C.\*

1904

Feb. 24;  
March 23.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Specific Performance—Failure of Consideration—Admission of Title imports agreement not to dispute it.*

In a suit against a zemindar for specific performance of an agreement to grant a putni of certain villages, it appeared that the agreement was part of a compromise the principal consideration for which was that the plaintiff admitted the zemindar's title as validly adopted son to the last owner :—

*Held*, that this admission imported an agreement by the plaintiff to abstain in the future from questioning the validity of the adoption, and that by reason of his breach thereof there had been failure of consideration, and his suit had been rightly dismissed.

APPEAL from a decree of the High Court (July 9, 1901) affirming a decree of the Subordinate Judge of Pabna and Bogra (Jan. 31, 1899) dismissing the appellants' suit.

The appellants sued under the circumstances stated in the judgment of their Lordships, praying that the respondent might be decreed to execute and register a lease in favour of the appellants (a permanent ijara lease) in terms of an agreement of May 20, 1861, and that the Court might award specific performance of the said agreement in any other shape or manner, or award any other relief to the appellants which the circumstances of the case might justify.

The respondent in his written statement submitted that the appellants were not entitled to the benefit of the said agreement; that there had been a total failure of consideration therefor by reason of Krishna Behari Roy (the appellants' father) having, from the year 1862 to the year 1875, assailed the title of Banwari Lal Roy (the respondent's father) instead of supporting and maintaining the same in accordance with the ekrar and solehnama mentioned in the judgment, and thereby put him to great loss and expense; and that under no

\* *Present* : LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.  
1904  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

circumstances should the said agreement be enforced without payment of the actual loss and damage so incurred.

The Subordinate Judge, after saying that the delay in suing amounted to an abandonment of the agreement in suit, held that the conduct of Krishna Behari Roy in setting up his own title as the heir of Gour Sundar Roy (the last zemindar), and in strenuously disputing the title of Banwari Lal Roy, was a violation of the essentials of the agreement he had entered into, and disentitled him to the relief he sought from the Court. Referring to the ekrar, the judge held as follows:—

“The plaintiffs’ father by ekrar, dated the 10th Jeyt, 1268, solemnly covenanted never to deny the defendant’s father’s title. That promise is the sole consideration proceeding from the plaintiffs’ father, for which the defendant’s father, in return, confirmed the patni of Narsingpura and agreed to execute the lease in question. The plaintiffs’ father, unscrupulously and without any excuse whatever, broke that promise and kept the defendant’s father in anxious suspense of litigations for about fourteen years, involving his zemindari interest yielding an annual income of about 2½ lakhs of rupees. The plaintiffs’ father broke the most essential part of the contract. The contract, therefore, cannot be enforced (s. 28 (b) of the Specific Relief Act).”

The judge relied also on Fry on Specific Performance, p. 423, and also on a statement of Lord Cranworth in *Blackett v. Bates* (1), where it is said: “It is true that the intermediate period was filled up by legal proceedings which the plaintiff says he could not expedite, but they were proceedings in which the plaintiff was endeavouring to set aside the award. It is a strong thing to say that after a party has denied the validity of an agreement and taken proceedings to set it aside, he can, when the result of these proceedings has proved adverse, turn round and insist on specific performance.”

The High Court affirmed this judgment, saying: “Virtually from the moment the compromise of the 8th Jeyt, of which the agreement now in suit according to the plaintiffs’ own case formed a component part, was concluded, Krishna Behari

(1) (1865) L. R. 1 Ch. 126.

directed all his efforts to annulling its effect, and that upon allegations of fraud and unfair dealing on the part of Banwari Lal for which there would seem to have been not the slightest foundation; nor did he desist from these efforts until, in the year 1875, he was defeated in the Privy Council. Had he been successful, it is needless to say the agreement, which his heirs are now seeking to enforce, would have been waste paper. The whole of this long-protracted and, no doubt, costly litigation was in fraud of the compromise, and aimed, whether directly or otherwise does not seem to me under all circumstances to be material, at the rescission of the agreement and the subversion of the relation established by it."

J. C.  
1904  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

*Upjohn, K.C.*, and *Bonnerjee*, for the appellants, contended that Banwari Lal was shewn to have received the full benefit of the compromise come to between him and Krishna Behari. That agreement was fully carried out in all its terms; so also was the agreement between Banwari Lal and Govinda Peari for a present lease of certain properties. Banwari got his recorded admission of title, which had rendered his title practically unassailable at least by kinsmen. In fact, all that remained to be done was for Banwari or his heirs to execute on the death of Brajeswari Chowdhurani the permanent lease mentioned in the agreement sued on, and make over possession of the property to be comprised therein. Consequently Banwari Lal became and continued till his death a trustee for Govinda Peari of the interest agreed to be granted her on the said death. The respondent as heir to Banwari Lal was compellable as trustee to execute the lease in conformity with the agreement. The Court was bound to order him to do so in execution of his trust, and no question arose for the exercise of discretion. The compromise had been upheld by the Courts, and the heirs of Krishna or Govinda ought not to be deprived of a portion of the consideration to which they were entitled. Govinda's separate and independent rights under the compromise ought not to be lost sight of, and she ought not to suffer for Krishna's conduct.

*Asquith, K.C.*, and *C. W. Arathoon*, for the respondent,

J. C.  
1904  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

relied upon s. 28, clause B, of the Specific Relief Act, and contended that the Courts below were right in refusing specific performance as claimed. It was clear that Govinda was a mere name, and that the patni was in reality to be granted to Krishna, or for his benefit. In the events which had happened there had been a complete failure of consideration for the granting of the patni claimed. Banwari Lal's object was to get his title by adoption admitted, and to be secure from further molestation on that subject. Krishna's conduct in persistently litigating that title was amply sufficient to disentitle him to the patni claimed, and the agreement was one of which specific performance was rightly refused.

*Upjohn, K.C.*, replied.

1904  
March 23.

The judgment of their Lordships was delivered by LORD DAVEY. The suit out of which this appeal has arisen was one for specific performance of an agreement dated May 20, 1861, whereby Banwari Lal Roy, the father of the respondent, promised that when certain mehals (referred to in the case as Dhulauri) should come back into his khas possession he would settle the same on Srijuta Govinda Peari Dasi (the mother of the appellants) and her heirs in permanent ijara at a rental of Rs.1001. It is alleged in the plaint, and it is clearly established by the documents in evidence, that this agreement was part of a compromise made between Banwari Lal Roy and Krishna Behari Roy (the husband of Govinda and father of the appellants), and formed part of the consideration for that compromise. The respondent refuses specific performance on the ground of failure of consideration and other equitable grounds.

The facts of the case are as follows. Gour Sundar Roy died in February or March, 1834, childless, but leaving his mother, Hemlata Chowdhurani, and a widow, Brajeswari Chowdhurani, surviving. After his death Brajeswari adopted Banwari Lal Roy as the son of Gour Sundar. But for this adoption Krishna Behari Roy would have been the heir of Gour Sundar, and subject to the interests of the latter's mother and widow would have succeeded to his estate. Hemlata appears to have

assumed the management of the estate, and she purported to grant, but without any apparent authority to do so, four permanent leases of parts thereof, including leases of two mehals called Narsingpara and Sayandaha, to Krishna. After Banwari Lal came of age he made an arrangement with Brajeswari by which six annas of the estate were granted to her for her life for maintenance.

In the month of May, 1861, Banwari Lal instituted a suit against Krishna to set aside the *ijaras* or permanent leases granted to him by Hemlata; and also instituted similar suits against the holders of the other permanent leases granted by her. A compromise was thereupon come to between Banwari Lal and Krishna, the terms of which are contained in four documents dated May 20 and 22, 1861.

The documents dated May 20, 1861, were: (1.) The agreement now sued on. It should be mentioned that the property comprised in this agreement was included in the six annas granted to Brajeswari for her life, and would not therefore come into the khas possession of Banwari Lal until her death. (2.) A *patni pottah*, or permanent lease, of other mehals also in favour of Govinda, at a total rent of Rs.689.4, upon payment of a premium of Rs.1301.

An *ekrar* dated May 22, 1861, was then executed by Krishna in favour of Banwari Lal. It recited (amongst other things) that Brajeswari duly adopted Banwari Lal under the power contained in an *anumatipatra* executed in her favour by Gour Sundar on 28th Magh, 1240, B.S. It also recited the institution of a suit in 1858 by one Ganga Prosad Roy impeaching the *anumatipatra* and Banwari Lal's adoption, which was dismissed apparently on the ground that even if the adoption was invalid Ganga Prosad Roy had no title in the lifetime of Krishna. The *ekrar* then continues as follows:—

“I, of course, made no mention of the *anumatipatra* granted by the late Gour Sundar Roy, and of your adoption, in my application to intervene in the said suit. Still as I consider it necessary to give you some proof that I do not in any manner or mode deny or refuse to acknowledge the truth of the said events, I execute this *ekrar* in your favour, in which I say that

J. C.  
1904  
SHRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

J. C.  
1904  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

---

the said Gour Sundar Roy did, in fact, execute in favour of his wife Brajeswari Chowdhrani the said anumati-patra, and that in pursuance thereof, the said Chowdhrani, following the terms of the said anumati-patra, and with the permission and consent of her mother-in-law, the said Hemlata Chowdhrani, received you as a gift, under a deed of gift, and adopted you as a son according to the prescribed rites, and I, by way of attesting the said deed of gift as a witness, have placed my signature and affixed my seal amongst the witnesses, and I fully admit the truth of the anumati-patra executed by the late Gour Sundar Roy and of your adoption. And I also admit the correctness of the statement made by Brajeswari Chowdhrani to the effect that her husband, the said Gour Sundar Roy, had executed an anumati-patra in her favour to adopt a son, and that she had in pursuance thereof duly adopted you as a son, after having received you as a gift, and acknowledging you the lawful heir of the late Gour Sundar Roy, in her ekrar in your favour, dated the 29th Sraban 1264 B.S., which was filed in suit No. 36 of 1856 of the Court of the Principal Saddar Amin of this district. And you, as the adopted son of the late Gour Sundar Roy, now hold and will for ever hold to sons and grandsons and others in course of succession, as owner, having the rights of gift and sale, the movable and immovable properties left by him. To the said properties, I and my heirs do not have, nor will ever have, any claims or objection. If my heirs at any time in future do ever advance any claims it shall be rejected. To this effect I execute the ekrar. Finis, dated the 10th Jeyt."

On the same May 22, 1861, Krishna filed a solehnama in Banwari Lal's suit against him from which it appeared that Banwari Lal had agreed to ratify the lease of Narsingpara on receipt of a nazarana of Rs.1500, and Krishna, on the other hand, had surrendered the lease of Sayandaha. The document concludes as follows:—

"I file also with this petition the ekrar which I have executed to-day on proper stamp in favour of the plaintiff containing my admissions of the authority to adopt which the late Gour Sundar Roy executed in favour of his wife, Brajes-

wari Chowdhрани, and of the fact of due adoption by her of the plaintiff in pursuance thereof, and I pray that, on reading my petitions, &c., and also the petition which the plaintiff is filing, the plaintiff's claim for khas possession in respect of the aforesaid Sayaindaha mehal may be decreed, and his claim in respect of the remaining mehals may be dismissed."

J. C.  
1904  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.

It is stated in the judgment of Hill J., in the High Court, that Krishna in his defence to Banwari Lal's suit had impeached the adoption of Banwari Lal. And no doubt that was so, though the written statement is not in the record. But however that may be, it is plain from the documents which have been referred to that it was at least known or feared that Krishna intended to do so. And their Lordships have no hesitation in inferring that the principal object of Banwari Lal in entering into the compromise was to obtain from Krishna a clear admission of his title to the zemindari, and immunity in the future from attacks upon his title from that quarter.

Within a short time, however, after making this compromise Krishna applied for leave to intervene in Banwari Lal's then pending suits against the holders of the other permanent leases purporting to have been granted by Hemlata, and was made a defendant therein. He thereupon filed written statements in both suits impeaching the adoption, and alleging that the ekrar of May 22, 1861, had been obtained from him by fraud. The Court found against him on both points, and decrees were made in favour of Banwari Lal. Krishna appealed to the District Judge and thence to the High Court without success. In February, 1871, he instituted a suit of his own against Banwari Lal and his adoptive mother for the purpose of setting aside the adoption and obtaining a declaration of his own title as reversionary heir to Gour Sundar. His plaint and subsequent written statement contained charges of fraud and misrepresentation against both the defendants, the details of which it is unnecessary to consider. The suit was dismissed by the District Judge, and an appeal by Krishna to the High Court was also dismissed. He then appealed to Her late Majesty in Council, but without success.

Govinda died in 1878. Banwari Lal died in 1880, and the

J. C.  
1904  
~  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAI.  
—

present respondent is his heir. Brajeswari died in 1894, and Krishna died in 1895.

The present suit was heard by the Additional Subordinate Judge of Pabna and Bogra, who, by his decree dated January 31, 1899, dismissed it with costs. That decree was affirmed on appeal to the High Court, and the present appeal is from the decree of the latter Court dated July 9, 1901.

The appellants sue as heirs both of Govinda and of Krishna, and the first point of the appellants' counsel was that Govinda was entitled in her own right to the reversionary lease, and her title was not affected by the conduct of Krishna. In the High Court, Hill J. stated that the case of the appellants "here as in the Court below was, that the agreement was between their father and Banwari Lal, their mother, Gobinda Pyari Dasi, being named merely as a benamidar for the former, and it is in the character of his representatives that they sought, and still seek, to enforce the agreement." Without this statement their Lordships would have no difficulty in drawing the inference from the circumstances of the case that it was a benami transaction. In any case Govinda was not a purchaser from Krishna, and she could not have any better right or title than Krishna himself.

The second and principal point of the appellants was characterized by more boldness than plausibility. It was that Banwari Lal had received the full benefit of the compromise by being armed with the ekrar as a shield against the attacks of Krishna, and, therefore, the agreement in suit was for an executed consideration, with the result that the respondent was in the position of a trustee for them. Their Lordships are not prepared to lay down as an abstract proposition that there is any necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it. But in the present case they think that Krishna not only tried to deprive Banwari Lal of the benefit of the agreement, but in a large measure succeeded in doing so. The security of his title to the zemindari was of immeasurably greater importance to Banwari Lal than the mere question of the putni. And their Lordships have already expressed

their opinion that the principal consideration to Banwari Lal for the agreement was to obtain such security and immunity from future attacks. In short, they do not give the ekrar the restricted effect suggested by the learned counsel, but they think that its language necessarily imports an agreement by Krishna to abstain from questioning the validity of the adoption for the future.

Their Lordships are of opinion that there has been a failure of the consideration for the agreement in suit, and also that the conduct of Krishna was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and the appellants will pay the costs of it.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondent : *T. L. Wilson & Co.*

J. C.  
1904  
~  
SRISH  
CHANDRA  
ROY  
v.  
ROY  
BANOMALI  
RAL

J. O.\*

1904

Feb. 12;  
March 23.

www.libtool.com.cn

THAKUR GANESH BAKHSH . . . . DEFENDANT ;

AND

THAKUR HARIHAR BAKHSH . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH, LUCKNOW.*Oudh Rent Act, 1886, s. 141—Interest on Arrears of Rent by an Under-proprietor—Indian Contract Act, s. 73—Interest Act (XXXII. of 1839).*

Sect. 141 of the Oudh Rent Act of 1886 does not impose on an under proprietor, who is not a tenant within the meaning of that section, liability to pay interest on his arrears of rent; but it does not exclude liability thereto incurred apart from the Act.

Where the liability to pay rent is derived from the status of under-proprietor established by decree and not from contract with the taluqdar which had become merged in the decree, interest cannot be claimed as for breach of contract within the meaning of s. 73 of the Indian Contract Act.

Nor can interest be claimed under the Interest Act of 1839 where there is no written instrument prescribing a certain time for the payment of the rent, or containing any terms from which the time could be ascertained.

APPEAL from a decree of the Court of the Judicial Commissioner (Aug. 19, 1899) affirming a decree of the Deputy Commissioner of Sitapur (Aug. 19, 1898).

The respondent, a taluqdar, obtained a decree in the first Court against the appellant (and another defendant, Gadadhar Bakhsh, who did not appeal therefrom) for Rs.11,491 as arrears of rent in respect of certain villages of which the defendants were under-proprietors.

The questions at issue were whether the defendants were liable to pay rent jointly or separately in respect of their shares; and whether the appellant was liable to pay interest on arrears of rent, and, if so, at what rate.

Both Courts decided in favour of the joint liability of the defendants to pay rent, and also that they were liable to pay interest.

*De Gruyther*, for the appellant, contended that s. 141 of the Oudh Rent Act (XXII. of 1886) did not, according to its true

\* *Present* : LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

construction, impose on the appellant as an under-proprietor the liability to pay interest on arrears of rent. He was not a tenant within the meaning of that section. His liability to rent resulted from his status as under-proprietor, and was not created by contract. Interest, if unclaimable under s. 141, could not be claimed as damages for breach of contract. He referred to *Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan*. (1)

J. C.

1904

THAKUR  
GANESH  
BAKSH  
v.  
THAKUR  
HARIHAR  
BAKSH.

Ross, for the respondent, contended that there was evidence of a contract of tenancy between the parties, and that its breach rendered the defendants liable to pay interest as damages for the breach of it, and that under s. 12 of the Oudh Rent Act they would, in the absence of an agreement to the contrary, be liable to pay their rent one month before the date fixed for the payment of revenue. Reference was also made to s. 73 of the Contract Act and *Ganshiyam Singh v. Daulat Singh* (2); see also the Interest Act (XXXII. of 1839).

*De Gruyther* replied.

The judgment of their Lordships was delivered by

1904

March 23.

LORD DAVEY. The respondent, Thakur Harihar Bakhsh, is the taluqdar of Sarora in Oudh, and the appellant, Thakur Ganesh Bakhsh, is an under-proprietor on the same estate. The questions raised by the present appeal are whether the appellant is liable to pay rent jointly with one Gadadhar Bakhsh Singh, or each of them is liable separately for his own share only, and whether he is liable to pay interest on arrears of rent, and, if so, at what rate. The counsel for the appellant, however, admitted that the first question was *res judicata*, and the only question left for the decision of their Lordships is as to the interest.

In the year 1863 litigation took place in the Court of the Settlement Officer at Sitapur between Ganga Bakhsh, the father of the respondent, and the then taluqdar on the one side, and Bisheshar Bakhsh, his first cousin, and Uman Pershad, his paternal uncle, on the other. The claim is stated to have been for recovery of possession of certain

(1) (1898) L. R. 26 Ind. Ap. 41. (2) (1896) Ind. L. R. 18 Allah. 240.

J. C.  
1904  
THAKUR  
GANESH  
BAKHSR  
v.  
THAKUR  
HARIHAR  
BAKHSR.  
—

villages in possession of the latter parties, and the provision for them of maintenance in cash. A compromise was effected by an agreement dated May 4, 1864, on the basis of Bisheshar Bakhsh and Uman Pershad each taking one-fourth of the estate and paying to Ganga Bakhsh half of the Government revenue, with the addition of 10 per cent. taluqdari dues on the present Government revenue, or which might be fixed from time to time. The Settlement Officer made a decree dated May 6, 1864, according to the terms of the agreement, and directed the parties to file a statement shewing how they proposed to allot the undivided villages. This was done, and the Settlement Officer made his final decree on December 14, 1864.

Bisheshar Bakhsh died childless in November, 1865, and on the death of his widow Uman Pershad succeeded, after litigation, to Bisheshar's share of the under-proprietary estate. On the death of Uman Pershad the under-proprietary estate again became divided between his sons Jang Bahadur and the appellant, and on the death of the former he was succeeded by his son Gadadhar Bakhsh. A partition was effected between the appellant and Gadadhar Bakhsh, and they obtained separate possession of the villages allotted to them. Thenceforward the appellant and Gadadhar Bakhsh maintained that they were no longer jointly liable for the whole rent of the under-proprietary estate, but only for their separate shares. The respondent, on the other hand, insisted on holding them jointly liable for the whole. The under-proprietors tendered their shares of the rent and their tenders were refused, and suits for the rent were brought by the respondent against the appellant and Gadadhar in 1896, and again in 1898.

In the suit of 1896 the Deputy Commissioner, by his judgment dated April 8, 1896, decided that the appellant and Gadadhar Bakhsh were jointly liable for the rent, but that the taluqdar was not entitled to interest on the arrears. This judgment seems to have been affirmed on appeal, but Mr. Ross stated that the judgment, though printed in the record, was not put in evidence. It is, however, immaterial, because the judgment relied on as *res judicata* on the joint liability is that of the Deputy Commissioner.

In the suit of 1898 Mr. Chamier, the Second Additional Judicial Commissioner, by his judgment dated June 27, 1898, decided on appeal from the District Judge that the deed of compromise of May 4, 1864, was a contract to pay the rent, and that the respondent was entitled to recover interest by way of damages for the breach of that contract.

The present suit was also one for payment of rent under similar circumstances. The Deputy Commissioner, by his judgment dated August 11, 1898, held that the respondent was entitled to interest following Mr. Chamier's judgment in the previous case, and that the question of the joint liability of the defendants was *res judicata*. The decree founded on this judgment, which was dated August 18, 1898, was, on August 19, 1899, affirmed on appeal by the present appellant alone on the same grounds.

The judgment of June 27, 1898, was not, and probably could not have been, given in evidence by the respondent as an estoppel against the appellant, or in bar of the present suit. Their Lordships, therefore, are not precluded from deciding the question of interest on its merits.

In the argument before their Lordships the liability to interest was maintained by the respondent as well on the Interest Act of 1839 (Act XXXII. of 1839) as on s. 73 of the Indian Contract Act, 1872, and on the other hand it was contended that under s. 141 of the Oudh Rent Act of 1886 (Act XXII. of 1886) no interest was payable on arrears of rent by the under-proprietor, and the decision of this Board in *Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan* (1) was relied on.

By s. 141 of the Act of 1886 it is provided that when an arrear of rent remains due from any tenant he shall be liable to pay interest on the arrear at the rate of 1 per cent. per mensem. And it was decided by this Board that an under-proprietor is not a tenant within the meaning of that section. But there is nothing in the Act or in the decision referred to which excludes any liability for payment of interest which the under-proprietor might be under apart from the Act.

(1) L. R. 26 Ind. Ap. 41.

J. C.

1904

THAKUR  
GANESH  
BAKSH

v.  
THAKUR  
HARIHAR  
BAKSH.

J. C.

1904

THAKUR  
GANESH  
BAKSHI  
v.  
THAKUR  
HARIDHAR  
BAKSHI.

With regard to the Contract Act, their Lordships observe that ~~neither of the present~~ litigants was party to the deed of compromise, nor have they, in fact, made any contract with each other. The whole of the proceedings in the suit of 1863 are not before their Lordships, but the suit is said to have been "decided on 6th April, 1864," and the compromise which was subsequently come to may have been executed for settling details in order to carry into effect the previous decision of the Settlement Officer. But, however this may be, it appears to their Lordships that the terms of the agreement were carried into effect by the subsequent decree, and the agreement was, in fact, merged in the decree. In other words, the obligation of the appellant to pay the rent is derived from the status of under-proprietor, which was established by the decree, and not from the previous agreement, which furnished the materials upon which the decree is based. Their Lordships are, therefore, of opinion that this is not a suit for breach of contract within the meaning of s. 73 of the Indian Contract Act.

In order to avail himself of the provisions of the Interest Act of 1839, the respondent must shew that the rent was payable by the appellant "by virtue of some written instrument at a certain time." Neither the deed of compromise nor the decree prescribed any time for the payment of the rent, or contained any terms from which the time could be ascertained. But it was said that the Court should incorporate in, or read into, one or other of these instruments the provision contained in s. 12 of the Oudh Rent Act, 1886, that, unless otherwise agreed, the rent payable to the proprietor by the under-proprietor shall be held to become due one month before the date fixed for the payment of the revenue on account of the village in which the land is situate. It would be a novel proceeding to read into an agreement a section in an Act subsequently passed. Nor would it help the respondent in the present case. The Interest Act was passed for the purpose of extending to India the provisions of the English Act (3 & 4 Will. 4, c. 42), and the words above quoted are the same as those in the English Act. The English decisions on that Act may, therefore, be referred to as a guide in construing the

Indian Act. In *Duncombe v. Brighton Club and Norfolk Hotel Co.* (1) it was decided in the Queen's Bench (dissentiente Blackburn J.) that the actual day for payment need not be fixed in the instrument if the basis of the calculation which was to make it certain was to be found in the instrument itself. In *London, Chatham and Dover Ry. Co. v. South Eastern Ry Co.* (2) it was pointed out that this decision was inconsistent with a previous decision of the Exchequer Chamber in *Merchant Shipping Co. v. Armitage* (3), which appears to have been overlooked by the learned judges. In that case it was held that it was necessary that the actual day for payment should be fixed by the written instrument, and that was the view expressed by Blackburn J. in the case in L. R. 10 Q. B. Their Lordships have not to say which of these two decisions they prefer, for either of them is fatal to the argument of the respondent.

Their Lordships are, therefore, of opinion that interest is not payable on the arrears of rent found due from the appellant and Gadadhar Bakhsh Singh, and they will humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh dated August 19, 1899, be discharged, and instead thereof it be ordered that the decree of the Deputy Commissioner of August 18, 1898, as subsequently amended, be varied by omitting the direction therein contained for payment of interest on the sum thereby found due from the appellant and Gadadhar Bakhsh Singh, and that with this variation the decree be affirmed. As the appellant has failed on one point and succeeded on the other one, their Lordships will further advise His Majesty that there should be no costs of the appeal to the Court of the Judicial Commissioner. And there will be no costs of this appeal.

Solicitor for appellant : *R. T. Tasker.*

Solicitors for respondent : *Barrow, Rogers & Nevill.*

(1) (1875) L. R. 10 Q. B. 371.

(2) [1892] 1 Ch. 120.

(3) (1873) L. R. 9 Q. B. 99.

J. C.

1904

THAKUR  
GANESH  
BAKSH  
v.  
THAKUR  
HARIHAR  
BAKSH.

www.libtool.com.cn

J. C.\* DURGHA PROSAD SUREKA AND OTHERS . PLAINTIFFS ;  
 1904  
 Feb. 25 ;  
 March 23. BHAJAN LALL AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Indian Evidence Act, s. 92—Falsified Bought and Sold Notes—Proof of Contract.*

In India a contract of sale of goods can be proved by parol. Where bought and sold notes have been falsified they are not within s. 92 of the Indian Evidence Act, and the plaintiff may prove aliunde and by parol the true contract which they falsely purport to record.

APPEAL from a decree of the High Court (March 29, 1901) reversing a decree of Sale J. (July 25, 1900) and dismissing the appellants' suit without costs.

The question decided in the appeal was whether, under the circumstances stated in their Lordships' judgment, the appellants' suit was based exclusively on bought and sold notes, no evidence being admissible to prove an antecedent contract between the parties at variance with the notes. This contract related to 125,000 cases of Russian kerosene oil, being the whole of a cargo which had been sold by Messrs. Graham & Co. to the respondents, and by them were sold to the appellants. The notes, however, were limited to 100,000 only, and were drawn up by the brokers because Graham & Co. refused to transfer their contract to the appellants.

The plaint alleged a fraudulent insertion by the defendants in the notes of the lesser number of cases in lieu of the whole cargo, and prayed for delivery of the whole cargo at the contract rate of payment, and that if necessary the notes might be rectified by the substitution of the right figures.

The respondents denied the imputed fraud, alleged that the notes expressed the true contract, and contended that, if both parties were under a mistake of fact, there was no binding agreement.

\* Present: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

Sale J. found that the plaintiff had been induced to consent to the bought and sold notes being drawn up as they were by the deliberate and false representation of Ghanesham, the defendant. He decided that the plaintiff was not entitled to a rectification of the bought and sold notes, but found that the presumption that the bought and sold notes were intended to express the real obligation between the parties had been satisfactorily rebutted, and that the plaintiff was entitled to fall back on his antecedent agreement.

The High Court affirmed the finding as to Ghanesham's fraud, but was of opinion that the plaintiffs' suit was based on the bought and sold notes, and for their rectification; that no rectification could be allowed, as this relief had been refused by the Court below, and there had been no appeal by the plaintiffs from this portion of the decree. The Court decided that the suit was not based on any other contract, and that where the terms of a contract had been reduced to writing, no other evidence except the writing could be given of the terms of the contract. The Court also decided that the plaintiff was entitled to rescind the contract for fraud, but that relief the plaintiff did not seek.

*Asquith, K.C., Haldane, K.C., Phillips, and Bonnerjee*, for the appellants, contended that under proviso 1 of s. 92 of the Indian Evidence Act, and under s. 19 of the Indian Contract Act, 1872, the appellant was entitled to avoid the bought and sold notes and to rely on his original agreement. There was no necessity to rectify the notes; they were found not to express the true contract between the parties, but to have fraudulently misrepresented the true contract. Under these circumstances they were a nullity, and the appellants were entitled to prove the real arrangement which had been effected between them and the respondents. Reference was made to *Cowie v. Remfry*. (1)

*Cohen, K.C., Lawson Walton, K.C., and De Gruyther*, for the respondents, contended that no binding contract had been proved. The evidence shewed that both parties were under a

(1) (1846) 3 Moo. Ind. Ap. 448.

J. C.

1904

DURGA  
PROSAD  
SUREKA  
v.  
BHAJAN  
LALL.

J. C.

1904

DURGA  
PROSAD  
SUREKAv.  
BHAJAN  
LALL.

1904

March 23.

mistake of fact. Even if that were not so, and the bought and sold notes were invalidated, there was no sufficient evidence of any other contract between the parties, or whether the appellants had adopted all or any of the terms of Graham & Co.'s contract with the respondents.

The appellants were not heard in reply.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The facts in this case, as found by both Courts, are simple and very cogent.

In October, 1899 (the matter being brought to a final conclusion on October 30, 1899), the appellant Sureka bought from the respondents the whole of a certain cargo of Russian kerosene oil, which the respondents had themselves bought from merchants named Graham & Co. at 50 pence per case. Seeing that the market was rising, and repenting them of their bargain, the respondents, by fraud, inserted in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000. This opportunity of fraud came the respondents' way, because the original sellers (Messrs. Graham & Co.) did not fall in with, or at least were said by the respondents not to fall in with, the arrangement first proposed, namely, that the original sale by them should be simply transferred to the appellant Sureka as buyer. Accordingly, the bought and sold notes were signed, the appellant Sureka only discovering afterwards that instead of recording the contract they falsely stated it.

In this state of the facts, the right of the purchaser was indisputable, namely, to have the whole cargo, or damages. The trick practised on him in the bought and sold notes had no legal effect on his original right. Nor did that right depend either for constitution or for evidence on the bought and sold notes. In India a contract of sale of goods can be proved by parol; and, the bought and sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively by the evidence of the broker and by the telegrams.

The appellant Sureka came into Court on January 15, 1900, with a plaint, in which he prayed, *inter alia* :—

(a) That it be declared that under the said contract entered into by and between him and the defendants, dated the said 1st day of November, 1899, the plaintiff is entitled, at the rate of 50 pence per case, to the whole of the said cargo sold to the defendants as aforesaid.

(b) That the defendants be decreed to make over possession to the plaintiff of the whole of the said cargo, on his paying them for the same at the rate of 50 pence per case, which payment the plaintiff had always been and is now ready and willing and hereby offers to make.

(c) That, if necessary, the said bought and sold notes be rectified and varied by the substitution of words and figures "one full cargo containing say about (125,000) one lac and twenty-five thousand," in place of the words and figures "(100,000) one lac," now appearing therein.

\* \* \* \* \*

(h) That the plaintiff may have such further or other relief as the nature of the case shall require.

Upon this prayer, now that there has been all this litigation about it, it may be remarked that the plaintiff treats the falsified bought and sold notes with more ceremony than they deserve; that his first prayer ought to have made no reference to the date of those documents as the date of the contract, and that the second prayer was unnecessary. But their Lordships see no room for question that the prayers quoted afforded adequate means for rendering justice.

On July 25, 1900, Sale J. gave Sureka a decree declaring that by virtue of the agreement between the appellant Sureka and the respondents on October 30, 1899, Sureka was entitled to the entire quantity of cases of kerosene oil mentioned in the contract between the respondents and Messrs. Graham & Co., and giving the appellant, Sureka, damages.

On the case coming by appeal before the High Court a view of the case was taken which their Lordships consider much too narrow. The High Court treated the action as founded on the bought and sold notes; and, holding the appellant to his

J. C.

1904

DURGA  
PROSAD  
SUREKA  
v.  
BHAJAN  
LALL.

J. C.

1904

DURGA  
PROBOD  
SUREKA  
v.  
BHARAJAN  
LALL.

reference to them by date (November 1, 1899), in prayer (a), and to his application in prayer (c), that those should be rectified, they pointed out that he had been refused this relief and had not appealed against the refusal, or objected to the decree under s. 561 of the Code of Civil Procedure. Accordingly the High Court expressed their rather surprising conclusion as follows: "We think therefore that, inasmuch as under the circumstances it is not now competent to us to rectify the bought and sold notes, and since the plaintiff is precluded from proving his contract by any evidence other than the document itself, the appeal must be allowed and the suit dismissed."

The learned counsel for the respondents did not support this ground of judgment. The High Court was completely possessed of the case of the appellant Sureka; his case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence which, while disproving the bought and sold notes, proved the contract which they falsely purported to record. For this case no rectification was needed, and it was not touched by the 92nd section of the Evidence Act. Nor did the misconception which led to the mention of November 1, 1899, create any substantial obstacle in the way of justice being done or necessitate so unsatisfactory a conclusion as that which has led to this appeal.

In default of any defence of the judgment of the High Court, the learned counsel for the respondents suggested one topic which may be disposed of in a sentence. The telegrams, it was said, do not set out a complete contract, and, in particular, do not import the conditions of Graham & Co.'s contract. This argument, if it had any effect, is irreconcilable with the concurrent findings of both Courts. But the answer is, that if the telegrams do not prove what is said to be wanting, the broker's evidence does.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court reversed with costs, and the decree of Sale J. restored. The respondents will pay the costs of the appeal.

Solicitors for appellants: *Morgan, Price & Mewburn.*

Solicitor for respondents: *W. W. Box.*

www.libtool.com.cn

RANI SRIMATI AND OTHERS . . . . DEFENDANTS;

J. C.\*

AND

KHAJENDRA NARAYAN SINGH AND }  
ANOTHER . . . . . } PLAINTIFFS.

1904  
April 21, 22;  
May 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Concurrent Findings of Fact—Practice.*

Where the appellants fail to shew any miscarriage of justice or the violation of any principle of law or procedure, their Lordships will not, even in a case of difficulty, depart from their usual practice of declining to interfere with concurrent findings on a pure question of fact.

APPEAL from a decree of the High Court (Jan. 27, 1901) affirming a decree of the Second Subordinate Judge of Mozufferpur (March 25, 1898).

Both Courts concurred in finding that a son was born to Rani Srimati, and named Tejdhar Narayan Singh. The first Court dealt with the documentary evidence in great detail; the High Court arranged it in groups. The High Court said: "The groups of the plaintiff's documents above referred to establish to our satisfaction that, immediately after the birth of Tejdhar, in all the transactions in which we would expect his name to be mentioned his name was mentioned, and he was put forward as the heir to the property"; and they held this action to be "of far more weight and importance" than the subsequent conduct of the Ranis and their agents when (as they observed) "Durgabati had given birth to a son, and when Rani Srimati, at least, would be influenced by her affection for her daughter Durgabati and her son, the defendant No. 3, and inclined, or easily induced, to set up false allegations calculated to favour the latter's interest and claim."

The High Court also was of opinion that the oral evidence of the plaintiff was "far from being above suspicion"; that Rani Srimati and her witnesses were interested in suppressing the birth of the son, and that in consequence the decision of

\* Present : LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

J. C.  
1904  
RANI  
SRIMATI  
v.  
KHAJENDRA  
NARAYAN  
SINGH.

the case depended on the documentary evidence and the probabilities of the case. The High Court also admitted in evidence some of the documents; and considered that from them the birth of the son was proved, and that a legal presumption in the case existed that the said documents were binding on Srimati.

*Haldane, K.C.*, and *De Gruyther*, for the appellants, contended that the concurrent findings might in this case be reversed. They relied principally upon some of the documents which the Courts in India regarded as proof of the birth of a son to Srimati not being in law admissible for that purpose, and upon the admissible evidence being insufficient for that purpose. Upon the point of admissibility they referred to s. 32, sub-s. 5, of the Evidence Act, *Sangram Singh v. Rajan Bai* (1), and *Rai Jagatpal Singh v. Raja Jageshar Baksh Singh*. (2) They contended that there had been a gross miscarriage of justice.

*Asquith, K.C.*, and *Phillips*, for the respondents, contended that the Courts were right in concurrently finding that a son was born to Sridhar Singh after his death by his widow Srimati; and that no reason was shewn for relaxing the rule that concurrent findings of fact will not be disturbed except under special circumstances.

*Haldane, K.C.*, replied.

1904  
May 14.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether there ought to be a new trial of a pure question of fact which two Courts in India have decided against the appellants. Counsel for the appellants felt the difficulty of supporting an appeal under such circumstances, but they contended that there ought to be a new trial on three broad grounds, namely:—

1. That there had been a gross miscarriage of justice.
2. That a mass of evidence had been improperly received.
3. That a particular document (referred to as Exhibit 3),

(1) (1885) L. R. 12 Ind. Ap. 183.

(1902) L. R. 30 Ind. Ap. 27.

which was practically decisive of the case, if genuine, was so clearly proved to be a forgery that grievous injustice would be done if the decisions appealed from were allowed to stand.

Their Lordships heard counsel on all three points at considerable length, and have come to the conclusion that none of them ought to prevail.

The first ground really depends on the second and third, and their Lordships will so treat it.

The action which has given rise to the appeal was brought by the first respondent (the plaintiff in the action) to have it declared that he was entitled in reversion (on the death of a lady who has since died) to a large estate in the district of Tirhoot which formerly belonged to Raja Sridhar Narayan Singh. He died in 1844 intestate, without children born in his lifetime, but leaving a widow, Rani Srimati, who was with child. She gave birth to a daughter, and the defendants claim his estate and are entitled to it by the Mithila law if the widow had no other child. The plaintiff, however, alleged that the widow had twins, and that the twin child was a son named Tejdhara Narayan Singh, who died some six or seven months after he was born. If this is true, it is now conceded that the plaintiff (i.e., the first respondent) is entitled to the estate and ought to succeed.

On the death of Raja Sridhar Narayan in 1844 his widow was a mere child fourteen years old or thereabouts, and his mother took possession of the estate; but in 1867 she made over the bulk of it to the widow. The mother died in 1869. Since that time the widow and her daughter and the defendant claiming under them have been in possession of the estates. In 1893 the widow and daughter conveyed their interests in the estates to the appellant Sasidhar Narayan Singh and put him in possession, and he has been in possession ever since. The widow has died since these proceedings commenced. The burden of proving the plaintiff's title to the estates on the death of the Raja's widow was obviously on the plaintiff. A vast mass of evidence, both oral and documentary, was adduced at the trial. The oral evidence was extremely conflicting and by no means trustworthy. The documentary evidence was far

J. C.

1904

RANI

SRIMATI

v.

KHAJENDRA

NARAYAN

SINGH.

J. C.  
1904  
RANI  
SRIMATI  
v.  
KHAJENDRA  
NARAYAN  
SINGH.

more important, but was by no means consistent throughout; nevertheless, when carefully examined, both the Court of first instance and the Appellate Court came to the conclusion that it established the plaintiff's case, and their Lordships are not prepared to differ from them.

The documents which the appellant's counsel contended were not admissible against him were objected to on the ground that they were *res inter alios acta*, and did not come within any of the classes of evidence enumerated in s. 32 of the Indian Evidence Act, 1872. This would have been a formidable objection if the documents had not been admissible against persons through whom the appellant Sasidhar claimed. But when looked into, the documents objected to appeared to have been clearly evidence against the Raja's mother and widow. The most important were statements made by themselves, and are clearly admissible against Sasidhar himself, who claimed under them. This objection, therefore, falls to the ground.

The document Exhibit 3 is dated December 19, 1844, and is a petition for the appointment of a guardian for the protection of the Raja's estates against some execution proceedings. The petitioners were the Raja's mother and widow. The statements in it must, therefore, be regarded as their statements if the document is worth anything. As translated, the petition mentions the fact that the Raja's widow had a son, and that she and her mother were his guardians, but were not able to take care of the estates.

The original of this document, which was in Persian script, was produced before their Lordships, and it was plain that it was written on two pieces of paper fastened together and of very different textures. Affidavits recently obtained in this country from skilled witnesses were also tendered and read *de bene esse*, and without prejudice to any question. These affidavits stated that "son" in the translation should be "child," and that the handwriting on the lower part of the paper was not the same as that on the upper part; and that different pens were used. There can be no doubt that this is a very suspicious document, and their Lordships are far

from satisfied that in its present shape it is genuine throughout. But, correcting the word "son" and substituting "child," the fact remains that the top part of the document, the genuineness of which is not impeached, talks of guardians, and this points unmistakably to the existence of a son, and not of a daughter only. But what weighs with their Lordships more than anything else is that there is a later document, Exhibit 21, dated January 9, 1845, the original of which was produced in the Courts in India. This document refers to a petition which was apparently the Exhibit 3, and mentions a minor son of the Raja's widow, and that his grandmother and mother were his guardians. In the face of this document, which their Lordships see no reason to regard with suspicion, they feel that there are no sufficient grounds for overruling both the Courts in India and for sending the case back for a new trial.

The case is unquestionably one of great difficulty, but the appellants have failed to shew any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs of it.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Sanderson, Adkin, Lee & Eddis.*

J. C.  
1904  
RANI  
SRINATI  
v.  
KHAJENDRA  
NARAYAN  
SINGH.

www.libtool.com.cn

J. C.\*  
1904  
April 22, 26;  
May 14.  
THAKURAIN BALRAJ KUNWAR AND } DEFENDANTS;  
ANOTHER . . . . . }  
AND  
RAE JAGATPAL SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH.

*Oudh Estates Act (I. of 1869), ss. 14, 15, 22—Construction—"Person who would have succeeded according to the Provisions of the Act"—Descent of Taluq by the Ordinary Law—Half-brother—Marginal Notes to the Sections.*

*Held*, that on the true construction of s. 14, Act I. of 1869, the expression "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of s. 22 applicable to the particular case"; and does not include any person mentioned in s. 22 as a possible heir in a line of succession not applicable to the particular case.

Where a deceased taluqdar, younger son of his predecessor, had acquired the taluq by transfer from his predecessor, and died intestate:—

*Held*, that his widows were his next heirs and not the son of his elder brother, as being the eldest male lineal descendant of his father.

The transferee not being within the prescribed line of succession, his estate devolved at his death, under s. 15, as it would have done if he had purchased from a stranger; in other words, the fetter of the statutory order of succession no longer applied.

"Brother" in clause 6 of s. 22 includes half-brother.

Marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act.

A legatee in whose favour a bequest comes into operation before Act I. of 1869 was passed is not a legatee within the meaning of the Act.

APPEAL from a decree of the above Court (March 6, 1900) modifying a decree of the Subordinate Judge of Partabghur (Dec. 24, 1898), which dismissed the respondent's suit with costs.

The subject of suit was (inter alia) the right to succeed to a nine-twentieths share in the taluqa of Raepur Bichore, the last male owner of which was Rae Bisheshar Bakhsh Singh, who died on August 31, 1890.

\* *Present*: LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

After the annexation of the Province of Oudh, the estate of Raepur Bichore ~~was~~ summarily settled with Rae Pirthipal Singh, the father of Rae Bisheshar Bakhsh Singh and the grandfather of the respondent. He was the owner of the estate at the time, and after the confiscation of all proprietary rights in the soil of Oudh, which was effected by the proclamation of the Viceroy and Governor-General of India in March, 1858, obtained a taluqdari sanad, or title-deed, from Government.

On January 22, 1866, Rae Pirthipal Singh devised eleven-twentieths of the said taluqa to the wife of Rae Jagmohan Singh, his eldest son, and half-brother to Bisheshar, for the benefit of Rae Jagmohan Singh, who was suffering from mental infirmity. The remaining nine-twentieths share he devised to Rae Bisheshar Baksh Singh. He made two separate lists of the villages which were to constitute each of the said shares, and in his lifetime obtained the orders of the Revenue authorities to record the names of his sons in regard to these villages in the Revenue registers. In June, 1866, Rae Pirthipal Singh died.

On Bisheshar Bakhsh's death intestate, his widows, the appellants, and the respondent, who was the son of Jagmohan Singh, claimed to succeed. The Revenue Courts on December 12, 1890, placed the appellants in possession, and thereupon the respondent sued by his next friend to recover the said nine-twentieths share which was specified in List A annexed to the plaint. The other lists contained property which was not taluqdari property. He claimed as next heir to the taluqa under s. 22, clause 6, of Act I. of 1869, and to be next heir to the whole property by virtue of a special family custom of descent according to primogeniture.

The Subordinate Judge decided that Rae Bisheshar Bakhsh Singh had obtained his share in the said taluqa as legatee under the will dated January 22, 1866, and not under any family settlement or transfer inter vivos. As to the succession to the taluqa being governed by s. 22, Act I. of 1869, he considered that the Act did not apply, being of opinion, on the construction of ss. 14 and 15 of the Act, that Rae Bisheshar

J. C.

1904

THAKURAIN

BALRAJ

KUNWAR

v.

RAE  
JAGATPAL  
SINGH.

J. C.  
1904  
THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAE  
JAGATPAL  
SINGH.

Baksh Singh was not the person who would have succeeded Rae Pirthipal Singh if he had died intestate, and was, therefore, not the legatee referred to in s. 14. He said further that, if he had to decide the question, he should hold that the word "brother" in s. 22, clause 6, Act I. of 1869, included half-brother.

In appeal the Judicial Commissioners affirmed the finding that Bisheshar was a legatee of Pirthipal Singh within the meaning of Act I. of 1869. They then held that s. 22 of that Act did not directly apply, inasmuch as Rae Bisheshar Baksh Singh was a legatee under a will which had come into operation prior to the passing of Act I. of 1869. They were nevertheless of opinion that on the proper construction of s. 14 the succession would still be governed by the rules laid down in s. 22. They were also of opinion that in clause 6 of the said section the word "brother" included half-brother. In the result they modified the Subordinate Judge's decree of dismissal, and passed a decree in favour of the respondent for the villages constituting the nine-twentieths share of taluqa Raepur Bichore, as specified in List A annexed to the plaint, with costs in proportion.

With regard to the question whether the succession was governed by s. 14 or s. 15, they said: "It is contended for the plaintiff that the words in s. 14, 'a person who would have succeeded according to the provisions of this Act if the testator had died intestate,' mean a person who would, under s. 22, have a right of succession to the estate in the case of an intestacy. It is contended for the defendants that those words mean a person who would succeed to the estate if, at the time at which the bequest was made, the testator had died intestate . . . . The plaintiff says that the Court can look at the marginal notes to ss. 14 and 15 as an aid in interpreting them. The defendants say that the Court cannot do so."

On this point the judgment, after citing many authorities, proceeded:—

"I think that there is no doubt that when Act I. of 1869 was passed by the Governor-General of India in Council it was passed with the marginal notes which appear in the Act as

published by authority. I believe that it has always been the practice to pass Indian Acts in a printed form, with titles, marginal notes, and punctuation. The marginal notes, therefore, I think form part of the Act. Whether they ever are the subject of discussion in the Legislative Council I cannot say, but they clearly could be so, and so could the punctuation. I am of opinion that the Court can look at the marginal notes to ss. 14 and 15 of Act I. of 1869 for assistance in construing them."

Then with regard to the meaning of ss. 14 and 15 of Act I. of 1869 the judgment proceeded :—

"It seems to me that any person mentioned in s. 22 as a possible heir may be said to be 'a person who would have succeeded according to the provisions of the Act to the estate if the testator had died intestate' within the meaning of s. 14. The disputed words in s. 14 can admit only of such a meaning or of the meaning contended for by the respondents for this reason. The testator ought to be in a position to know whether or not his legatee will hold the estate subject to the same rules of succession as himself, because he may wish that his legatee should hold the estate subject to those rules of succession. He cannot give effect to such wish unless the words refer to a legatee who may possibly succeed to his estate if he were to die intestate, or unless they refer to a legatee who, if he, the testator, were to die at the time of the bequest intestate, would succeed to the estate. The construction contended for by the respondents involves the addition of the words 'at the time at which the bequest was made.' That on which the appellant relies does not necessitate the insertion of any words in the section. That construction is reasonable, while the contention for the respondents is not. Take the case of a taluqdar whose name is entered, say, in the second list mentioned in s. 8, who has two sons, the elder of whom is an idiot, without male issue. The taluqdar desires to make the younger son the legatee of his estate, at the same time desiring that the legatee should hold it subject to the same rules of succession as himself. He cannot give effect to the latter desire on the construction contended for by the defendants, for if he were to

J. C.

1904

THAKURAIN

BALEAJ

KUNWAR

v.

RAE

JAGATPAL

SINGH.

J. C.

1904

THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAE  
JAGATPAL  
SINGH.

die intestate at the time at which he made the bequest the younger son would not succeed to his estate. On the other hand, on the construction contended for by the plaintiff, the younger son is a person who may possibly succeed according to s. 22 in the case of his father dying intestate. The marginal notes to ss. 14 and 15 seem to me to favour the construction contended for by the plaintiff. The word 'heirs' in the marginal note to s. 14, I think, refers to the heirs enumerated in s. 22, i.e., persons in the line of succession. The marginal note to s. 15 refers to persons 'out of the line of succession,' i.e., persons not enumerated as heirs in s. 22. For these reasons I hold that the succession to 'hissa 9' is governed by the provisions of s. 14, and not those of s. 15.

"Under clause 6, s. 22, read with s. 14, in default of the heirs enumerated in the previous clauses, the plaintiff, as the male lineal descendant of Jagmohan Singh, would, had Jagmohan Singh and Bisheshar Bakhsh Singh been brothers of the full blood, be the heir to the estate of Bisheshar Bakhsh Singh. But Jagmohan Singh and Bisheshar Bakhsh Singh were brothers of the half-blood—that is to say, Pirthipal Singh was their father, but they had different mothers. In general, the term 'brother' would include a brother of the half-blood. There appears to be nothing in s. 22 or elsewhere in the Act which indicates that the term 'brother,' as used in s. 22, only means a brother of the full blood. I therefore think that Jagmohan Singh, as brother of the half-blood of Bisheshar Bakhsh Singh, was his 'brother' within the meaning of clause 6, s. 22."

*Haldane, K.C., Bonnerjee, and Ross*, for the appellants, contended that the Appellate Court was wrong in its interpretation of ss. 14 and 15 of Act I. of 1869. It remarked that in a previous case s. 14 had been construed as the appellants contend. It relied now on the marginal notes to those sections which it was well settled could not be referred to. They referred to ss. 13, 14, and 15, and contended that the words "would have succeeded" must be construed in the same way in ss. 13 and 14: see *Bhaya Tribhawandat Ram v. Bhaiya*

*Sambhadat Ram* (1) and *Itraj Kuar v. Bacho Mahadeo Kuar*. (2) They mean a person who "would have succeeded" if the testator had died intestate at the date of the will or bequest. The Act had no retrospective effect, and so did not operate on a will which took effect before the Act was passed: see *Mohammad Abdussamad v. Kurban Husain*. (3) The transfer to Bisheshar in 1866 was not such as is contemplated by s. 14. At that date he was neither taluqdar nor grantee, nor a person who would have succeeded to Pirthipal's estate or any part of it. The Appellate Court was wrong in holding that Bisheshar was a legatee within the meaning of s. 14 of Act I. of 1869, and that succession would be governed by the provisions of s. 22 of that Act. Moreover, even if s. 22 did apply in its entirety, the respondent could not succeed thereunder. He was only a half-brother to Bisheshar, and the term "brother" in clause 6 of that section must be read strictly and does not include half-brother. Reference was made to s. 23 of the Indian Succession Act. Succession to the property in suit was under the circumstances and having regard to s. 15 governed by the ordinary Hindu law, under which the appellants were entitled to succeed.

*De Gruyther*, for the respondent, contended that there were concurrent findings of fact that Bisheshar was a legatee under Pirthipal's will; and that the succession was governed by s. 22 of Act I. of 1869. The construction of the Act must be governed by its general object and intention, and regard must be had to the state of the law at the time that it was passed: see *In re Mew and Thorne*. (4) The taluqdars were absolute proprietors, the other holders only subordinate: see Sykes, pp. 13, 29, and 55; letter of October 10, 1859, scheduled to Act I. of 1869, paragraphs 2 and 5; and Government circular of January 18, 1860, Sykes, p. 391. The intention of the Oudh Estates Act was to secure the proprietary right of the taluqdars, and to enact that if they died intestate their nearest

J. C.

1904

THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAE  
JAGATPAL  
SINGH.

(1) (1892) Oudh Rulings, 1859-1893, p. 256.

(2) (1902) Oudh Cases, vol. v. pp 345, 352.

Vol. XXXI.

(3) L. R. 31 Ind. Ap. 30.

(4) (1862) 31 L. J. (Bank.)

J. C.

1904

THAKURAIN  
BALRAJ  
KUNWARv.  
RAE  
JAGATPAL  
SINGH.

male heirs in the line of primogeniture should succeed; and full power of alienation was given to them. It was not the intention to give the taluqdars greater powers than they would have had if there had been no confiscation. Reference was made to *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (1); *Jagatpal Singh v. Jageshur Baksh Singh* (2); *Achal Ram v. Udai Partab Addiya Dat Singh* (3); *Narindar Bahadur Singh v. Achal Ram*. (4)

It was contended that Bisheshar was a legatee of Pirthipal Singh within the meaning of the Act, notwithstanding that Pirthipal's death and will were dated before the Act came into force. In s. 13, clause 2 was a mistake, and probably was inserted to please the taluqdars, and may be disregarded. Sect. 15 must be read in connection with ss. 13 and 14. Then with regard to s. 14, it was contended that Bisheshar was a person who could have succeeded under Act I. if Pirthipal had died intestate; and that, therefore, the special rules of succession in s. 22 applied, and the respondent was entitled. It was immaterial whether he was the preferential heir under that section or not; if he were a person who had or might have under any circumstances a heritable right thereunder, he was a person contemplated by the section. It is a reasonable construction which the respondent puts upon the section, for it enables the testator to choose between his sons if for any reason it is desirable to displace one in favour of the other without altering the incidents of taluqdari tenure, which he may wish to preserve. The legatee will most probably be some one other than the preferential heir, and it unduly fetters the taluqdar's power of alienation, if his exercise of it in favour of any other person designated as competent to succeed removes the fetter of statutory succession on which his own estate is held, and on which he will probably wish that his legatee should hold. It was also submitted that the Court below was right in construing brother to include half-brother in clause 6 of s. 22.

*Bonnerjee* replied.

(1) (1890) L. R. 17 Ind. Ap. 173.

(2) (1903) L. R. 30 Ind. Ap. 27.

(3) (1883) L. R. 11 Ind. Ap. 51.

(4) (1893) L. R. 20 Ind. Ap. 77.

May 14. The judgment of their Lordships was delivered by

J. C.

LORD MACNAGHTEN. This appeal raises a question under the Oudh Estates Act, 1869, as to the succession to property which formerly belonged to Ræ Pirthipal Singh, who died in June, 1866, and whose name was entered after his death in List I. and List II. of the lists mentioned in s. 8 of the Act. List I. is a list of all persons who were to be considered taluqdars within the meaning of the Act. List II. is a "list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

1904

THAKURAIN  
BALRAJ  
KUNWAR

v.  
RÆ  
JAGATPAL  
SINGH.

The property in question was made over by Pirthipal Singh by will (as both the Courts below have held) or by transfer under a family arrangement (as the appellants contend) to his younger son Bisheshar Bakhsh. Bisheshar died in August, 1890, intestate, leaving two widows but no male issue.

The rival claimants to the property are—(1.) the son of Bisheshar's elder brother, the eldest male lineal descendant of Pirthipal Singh, who was plaintiff in the suit and is respondent to this appeal; and (2.) the two widows of Bisheshar who are appellants. They were defendants in the suit, and succeeded in the Court of the Subordinate Judge.

The sections of the Act which have the most direct bearing on the question in dispute are the following :—

"13. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to any person not being either—

"(1.) A person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such taluqdar or grantee, heir or legatee, had died intestate; or

"(2.) A younger son of the taluqdar or grantee, heir or legatee, in case the name of such taluqdar or grantee appears in the third or the fifth of the lists mentioned in section eight,

J. C.

1904

THAKURAIN

BALRAJ

KUNWAR

v.

RAJ

JAGATPAL

SINGH.

except by an instrument of gift or a will executed and attested, not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution.

*“ V.—Transfers and Bequests.*

“ 14. If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate to another taluqdar or grantee or to such younger son as is referred to in section thirteen, clause two, or to a person who would have succeeded, according to the provisions of this Act, to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.

“ 15. If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee or his heir or legatee shall hereafter transfer or bequeath to any person not being a taluqdar or grantee the whole or any portion of his estate, and such person would not have succeeded, according to the provisions of this Act, to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee.”

Besides these sections it is necessary to refer to s. 22, which provides for intestate succession in the case of the death of any taluqdar or grantee whose name is inserted in List II., List III., or List V., or the heir or legatee of such taluqdar or grantee. A number of cases are dealt with separately and

in order, beginning with the case where the deceased leaves an eldest son. In that case (clause 1) the estate is to descend "to the eldest son . . . . and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased." Then, after dealing in separate clauses with other cases, including the case of an adopted son, the section provides, in clause 6, that in default of such adopted son the estate is to descend "to the eldest and every other brother of such taluqdar, or grantee, heir or legatee, successively according to their respective seniorities and their respective male lineal descendants subject as aforesaid."

Now the contention on the part of the respondent is that on Bisheshar's death intestate he came into the property under clause 6 of s. 22. The appellants, on the other hand, maintain that Bisheshar was not legatee of Pirthipal Singh within the meaning of that word in the Act of 1869, and that, whether he was or was not a legatee in the ordinary sense of the word, the case is governed by s. 15, and that accordingly, on the death of Bisheshar intestate, the property devolved as it would have devolved if Bisheshar had bought it from a person not being a taluqdar or grantee.

The learned counsel for the respondent argued quite correctly that s. 15 must be read in connection with ss. 13 and 14. His contention was that Bisheshar was a person who would have succeeded, within the meaning of s. 14, if Pirthipal had died without having made a transfer of the property and intestate.

The real question is what is the meaning of the words "would have succeeded" in sections 13 and 14. Of course, if Bisheshar's case falls within s. 14, s. 15 can have no application to it.

Their Lordships think that the learned judges in the Court of the Judicial Commissioner have gone too far in holding as they did "that any person mentioned in s. 22 as a possible heir may be said to be 'a person who would have succeeded according to the provisions of the Act to the estate if the testator had died intestate' within the meaning of s. 14."

J. C.

1904

THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAJ  
JAGATPAL  
SINGH.

J. C.

1904

THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAJ  
JAGATPAL  
SINGH.

---

They think that the expression "would have succeeded" must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer, or, in the case of a gift by will, at the time when the succession opened. In short, they think that the expression "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of s. 22 applicable to the particular case." Their Lordships do not agree with the view of the learned counsel for the respondent that clause 2 of s. 13 was introduced by mistake, and may be disregarded altogether. On the contrary, they think that that clause throws a good deal of light on the words in dispute. A younger son of a taluqdar named in List III. or List V. is no doubt among the possible heirs of his father, but he is not within the prescribed line of succession if the father leaves an eldest son or a male lineal descendant of an eldest son.

The construction which commends itself to their Lordships gives a meaning to every part of the sections under consideration. If a transfer or bequest is made to a person in the prescribed line of succession, there is reason for placing the transferee or legatee in the same position with regard to succession to the estate as the transferor or testator, but if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the estate.

There are some minor points which were discussed in the judgment of the Judicial Commissioners, or argued before their Lordships, which ought perhaps to be noticed.

Their Lordships have no doubt that Pirthipal's eldest son, though born of a different mother, was a brother of Bisheshar within the meaning of the word "brother" in clause 6 of s. 22.

It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of

construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament.

In their Lordships' opinion it is immaterial to inquire whether Bisheshar took under a will or by transfer. Both the lower Courts have held that the title is derived under a will. The question seems to be one of some difficulty. It is not necessary to decide it. It is enough for their Lordships to say that they are not satisfied that the Courts below are wrong.

Their Lordships agree with the Judicial Commissioners in thinking that Bisheshar was not a "legatee" within the definition of that term in the Act of 1869. The bequest in his favour, if it took effect, came into operation before the Act was passed. He cannot, therefore, be considered a person to whom property was bequeathed under the special provisions of the Act.

Their Lordships will humbly advise His Majesty that the decree appealed from should be reversed, with costs, and the decree of the Subordinate Judge restored.

The respondent will pay the costs of the appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondent : *Young, Jackson, Beard & King.*

J. C.  
1904  
THAKURAIN  
BALRAJ  
KUNWAR  
v.  
RAJ  
JAGATPAL  
SINGH.

www.libtool.com.cn

J. C.\* UPENDRA KRISHNA MANDAL . . . DEFENDANT;

1904

AND

Feb. 16;  
July 26.

ISMAIL KHAN MAHOMED . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Permanent Tenure of Defendant—Onus Probandi—Evidence.*

Case in which it was held that a defendant in ejectment brought by the lessee from the matwali of a religious endowment had satisfactorily proved that his tenure was permanent by evidence of continued transmissions since 1826 of a heritable title in the land in suit on the part of his predecessors, and by their continuous possession at an unaltered rent notwithstanding progressive increase in the saleable value of the land:—

*Held*, also, that a kabuliyat accepted by a preceding matwali from a predecessor of the defendant was in recognition of his right by purchase, and did not operate as a fresh grant of title.

APPEAL from a decree of the High Court (Sept. 4, 1901) varying a decree of the Subordinate Judge of the 24 Pergunnahs (Feb. 19, 1900).

The question was as to the right of the plaintiff to eject the defendant from certain lands in Khidderpur, in the suburbs of Calcutta, treating him as a tenant at will, while the defendant claimed a permanent right of occupancy. The plaintiff was a lessee of four villages including Khidderpur under a lease for ten years dated November 4, 1895, executed by Syed Ashraf-ud-din Ahmed, who was appointed matwali of the Hoogly Imambara by order of the Bengal Government dated June 25, 1879. The lands in suit for many years were cultivated; in late years they have been covered with tiled huts owing to the extension of the city of Calcutta and the building of docks at Khidderpur.

The defendant's main pleas were—

(1.) That he was not a tenant at will liable to ejectment, but held a permanent interest in the land. (2.) That he had acquired a permanent right of occupancy in the land under

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

the rent law in force in Bengal and by long adverse possession. (3.) That the lands in suit were not endowed property of the Imambara, and that the plaintiff had acquired no right under this lease to eject. (4.) That the buildings erected on the land were with the acquiescence of the superior proprietor, who was estopped from ejectment, or at any rate from ejecting without paying compensation.

The Subordinate Judge found that the tenure was permanent, relying on the ancient documents produced, and also on a kabuliyat dated February 18, 1830. He was, however, of opinion that the present matwali was not bound by the acts of his predecessors, and that he could resume the lands on terms of bearing the legitimate consequences of the conduct of his predecessors—namely, he must make good to the defendant the damages which he is going to sustain by the very long acquiescence on the part of his predecessors.

The High Court, on the other hand, decided that a new tenure was created by the kabuliyat dated February 18, 1830; that the terms of the deed itself did not create a permanent tenure; and that the conduct of the parties was not material. It also decided that there had been no acquiescence creating an estoppel to eject, or a liability to compensate on ejectment. In the result, a decree for ejectment was made.

*De Gruyther*, for the appellant, contended that he was the holder of a permanent tenure; that the lands in suit had been shewn by the evidence to have been all along held at an unvarying rate of rent; that the transfers and succession had been recognised by the zemindars and their successors; that buildings had been erected thereon with their tacit acquiescence. With regard to the managers of the endowment, it had been shewn that the matwalis had realized one unvarying rent from the appellant's predecessors in title, and that they must be deemed to have recognised both the hereditary and transferable character of the holding. The High Court erred in its estimate of the documents adduced, and notably in regard to the kabuliyat of 1830, which it treated, contrary to its express terms, as the origin of title; they considered that so far as it

J. C.

1904

UPENDRA  
KRISHNA  
MANDAL  
v.  
ISMAIL  
KHAN  
MAHOMED.

J. C.

1904

UPENDRA

KRISHNA

MANDAL

v.

ISMAIL

KHAN

MAHOMED.

was in recognition of title it only recognised a bill of sale limited to the fixtures and buildings, and having no reference to the land. The sale, however, was in express terms of land, and the kabuliyat was granted in recognition of the purchase, and not as a fresh root of title. The evidence raised a clear presumption of a permanent tenure, and there was no evidence to rebut it. He referred to *Dhunput Singh v. Gooman Singh* (1), *Sutto Surrun Ghosal v. Mohesh Chunder Mitter* (2), *Ram Ranjan Chuckerbutty v. Ram Narain Singh* (3), and *Bhaiya Ardawan Singh v. Udey Partab Singh*. (4) Further, the tenure was in its inception agricultural, and under Act X. of 1859 and the previous law which the Act did not alter, the appellant had acquired a permanent right of occupancy: see s. 6, which was not affected by his acceptance of a pottah which was merely regarded as an acknowledgment. Reference was made to *Thakooranee Dossee v. Bisheshur Mookerjee* (5); *Ram Chunder Dutt v. Jughes Chunder Dutt* (6); *Ismail Khan v. Aghore Nath Mukerjee* (7); *Winterscale v. Surat Chandra Banerjee*. (8) Adverse possession since 1830 was proved; and see *Rampal Singh v. Balbhaddar Singh*. (9)

*Cohen, K.C.*, and *Bonnerjee*, for the respondent, contended that the Courts below had concurrently found against the appellant's permanent tenure. They relied upon the kabuliyat of 1830. Nothing more than a tenancy at will was either created or recognised thereby. When the terms of it are considered, they differ from what would have been used if the intention had been to grant a permanent tenure. Besides, it was executed by the matwali, who had no power to aliene or to bind his successors, and could not therefore grant a permanent tenure. There was no evidence that any of the successive matwalis had recognised the appellant's

(1) (1867) 11 Moore's Ind. Ap. Ca. 433, 463.

(2) (1868) 12 Moore's Ind. Ap. Ca. 263.

(3) (1894) L. R. 22 Ind. Ap. 60, 66.

(4) (1896) L. R. 23 Ind. Ap. 64, 72.

(5) (1865) Beng. L. R. Supp. Vol. 202, 230.

(6) (1873) 12 Beng. L. R. 229, 235.

(7) (1903) 7 C. W. N. 734.

(8) (1903) 8 C. W. N. 155.

(9) (1902) L. R. 29 Ind. Ap. 203.

holding as permanent: see *Ismail Khan Mahomed v. Jaigun Bibi*. (1) [www.libtool.com.cn](http://www.libtool.com.cn)

*De Gruyther* replied.

July 26. The judgment of their Lordships was delivered by

LORD ROBERTSON. The lands in dispute in this suit, which are about two bighas in extent, are situated in Khidderpur, a suburb of Calcutta within municipal limits. They are now covered for the most part with tiled huts and a one-storeyed building occupied as a house or shop. Some apparent complications are introduced into the case by a sub-division of the property; but this partition may be disregarded for the purposes of the present question.

The disputed ground admittedly falls within the confines of a lease granted to the respondent in 1895 by Syed Ashraf-ud-din Ahmed, who was matwali of the Hooghly Imambara; and the theory of the suit of ejectment brought by the respondent is that the appellant is a tenant at will. The appellant's answer is that he has, as against the respondent, an independent permanent right to the ground in dispute.

Various questions, much discussed in the Courts below, have been eliminated from the controversy, and it is no longer necessary to discuss the Bengal Tenancy Act, which does not apply. The true matter of controversy is whether the appellant has not made out that he and his predecessors have held under a grant of a permanent transmissible and inheritable right.

The case of the appellant rests, in the first place, upon a series of transmissions of the property by sale and mortgage which go back as far as 1826, and the continuous possession of his predecessors in title at an unaltered rent. It is unnecessary to examine these transmissions in detail; it is sufficient to say that what is sold and bought and what is mortgaged purports in each case to be a permanent inheritable right. The answer of the respondent is that these transactions are not recognised by his predecessors in title and are not binding on him; and the respondent has produced a *kabuliyat*, dated February 18, 1830, which he represents, and the High Court has held, to be

(1) (1900) Ind. L. R. 27 Calc. 570, 576.

J. C.

1904

UPENDRA  
KRISHNA  
MANDAL  
v.  
ISMAIL  
KHAN  
MAHOMED.

J. C.

1904

UPENDRA  
KRISHNA  
MANDAL

v.

ISMAIL  
KHAN  
MAHOMED.

the creation of the present holding of the appellant. Its terms, therefore, require close examination; and their Lordships are of opinion that, so far from supporting, it goes to negative the respondent's case.

The kabuliyat is, in the first place, presented to the matwali by one Udoy, who announces himself as the purchaser under a bill of sale. But then, say the learned judges, the bill of sale is referred to as a sale only of the fixtures and structures. This, however, is quite a mistake; what is described in the bill of sale as "situate in the village of mouzah Khidderpur within kismut pergunnah Magura under the possession of the Saheb" is "former holding of Jagomohan Shaha, deceased, fixtures and structures," Jagomohan Shaha having been, in fact, the predecessor (and husband and brother) of Udoy's vendors. And the kabuliyat goes on to describe the subject of his purchase (which the High Court think was only fixtures and structures) as "amounting to 2 bighas 18 cottahs," and afterwards as "the said land." The whole document is only some twenty lines of print, and is free from any ambiguity.

This kabuliyat is, therefore, a distinct recognition by the Saheb of the bill of sale as a transmission of the right. If, but only if, the kabuliyat was the origin of the appellant's title and was a fresh grant by the matwali, the limited nature of the granter's own rights would have to be considered. But the true view of the kabuliyat is that it is a recognition of an already existing right, over which the matwali had no control. Accordingly, this having occurred so long ago as 1830, and the receipts proving uninterrupted payment of the same rent, the question is whether (in the absence of evidence to the contrary) the appellant has not made out his case; and their Lordships consider that he has.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed and the decrees of both Courts set aside, and the suit dismissed with costs in both Courts. The respondent will pay the costs of the appeal.

Solicitors for appellant: *Watkins & Lempriere.*

Solicitor for respondent: *W. W. Box.*

www.libtool.com.cn

NILRATAN MANDAL AND OTHERS . . DEFENDANTS;

AND

ISMAIL KHAN MAHOMED . . . PLAINTIFF.

J. C.\*

1904

June 7, 8;  
July 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Permanent Tenure of Defendant—Onus Probandi—Evidence.*

*Held*, that a defendant in ejectment had satisfactorily proved the permanency of his tenure from before the foundation of the waqf under whose matwali the plaintiff claimed by evidence of various transmissions of a heritable title since 1804, and by the plaintiff's acceptance of an unaltered rent notwithstanding the increased value of the land.

The execution and interchange of pottah and kabuliyat in 1852 between the matwali and the defendants' predecessor must be treated, having regard to their terms, as a recognition of his purchase and acceptance of him as tenant, and not as a fresh grant of title.

APPEAL from a decree of the High Court (March 6, 1902) reversing a decree of the Subordinate Judge of the 24 Pergunnahs (March 29, 1900).

This case was similar to the last (1), and judgment was delivered in both on the same day.

The plaint recited the appointment of Syed Ashrrafuddin Ahmad as matwali of the Hooghly Imambara, that he granted the plaintiff a lease of the land in suit on November 4, 1895, and that the defendant was a tenant at will, liable to ejectment at any time.

The defendant pleaded that he was not a tenant at will, but held a permanent tenure.

The Subordinate Judge ruled in favour of the defendant. The High Court, however, was of opinion that a new tenancy was created in favour of Wali Sarang, the defendants' predecessor, by a pottah dated April 14, 1852, and that the terms of the said pottah did not grant any permanent interest; it also decided that the landlord was not estopped from denying

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

(1) *Ante*, p. 144.

J. C.  
1904  
NILRATAN  
MANDAL  
v.  
ISMAIL  
KHAN  
MAHOMED.

that the tenure was permanent, and was not affected by the mode in which the successive tenants had dealt with the property.

*Phillips and De Gruyther*, for the appellants, contended that their tenure was permanent, and had been dealt with as such by their predecessors in title, and so recognised by the plaintiff and his predecessors from 1804, or at least from 1852. They cited the same authorities as in the previous case, and relied upon the plaintiff's acceptance of a fixed rent for a long period, and acquiescence in their construction of buildings on the land.

*Cohen, K.C.*, and *Bonnerjee*, for the respondent, contended that the appellants' documents of title did not prove a permanent tenure. The exchange of pottah and kabuliyat in 1852 was inconsistent with it. The term "istifa" used in those documents shewed that the tenant surrendered his holding and the landlord made a fresh grant. It was not the case of an acceptance of a new tenant on the old terms. The matwali could not grant a permanent tenure. It must be shewn that local usage allowed the acquisition of a permanent tenure by such a transaction as that in 1852: see *Narayanbhat v. Davlata* (1) and *Babaji v. Nanaji*. (2) The non-interference with buildings on the land did not justify an inference as to the permanence of the tenure: see *Nabu Mondul v. Cholim Mullik* (3), *Colls v. Home and Colonial Stores* (4), and *Ismail Khan Mahomed v. Broughton*. (5)

*De Gruyther* replied, citing *Kalidas Laldas v. Bhaiji Naran*. (6)

1904  
July 26.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The suit in which this appeal arises was for ejectment of the appellants from some five bighas of land in Khidderpur, within the municipal boundaries of Calcutta.

(1) (1891) Ind. L. R. 15 Bomb. 647.

(3) (1898) Ind. L. R. 25 Calc. 896, 900.

(2) (1879) Ind. L. R. 3 Bomb. 340.

(4) [1904] A. C. 179.

(5) (1901) 5 C. W. N. 846.

(6) (1891) Ind. L. R. 16 Bomb. 647.

The Subordinate Judge of the 24 Pergunnahs decided, on March 29, 1900, in favour of the appellants, on the ground that the appellants' tenure is permanent. This judgment was reversed by the High Court on March 6, 1902.

The respondent is tenant of the taluq Khidderpur under the matwali of the Hooghly Imambara; and the five bighas in dispute are within the lands held by him. The claim of the appellants is that the disputed land has been held by them and their predecessors on a permanent tenure for a period which goes back long before the waqf was founded. In support of this contention, the appellants found on various transmissions of the disputed property beginning with a deed of sale in 1804. There is another deed of sale in 1810; then a deed of gift in 1850; then a deed of sale in 1851; some mortgages in 1873, 1881, and 1882; then a deed of sale in 1883. It may suffice to say of the terms of the deeds of sale that they unequivocally purport to convey a heritable and transmissible right, and that they all apply to the land in dispute. If it were necessary to go further back than 1804, there is adequate ground for believing that the seller of that year had possessed some land in the mouzah since 1773.

The next question is how far this claim of permanent tenure has been brought home to the knowledge of the respondent's predecessors in title and has been acknowledged by them.

Now the broader facts of the case are certainly strong. The land has been occupied by the appellants' predecessors at an unaltered rent for 100 years although its saleable value has been increased from Rs.300 to Rs.3000; they have built on it and have dealt with it, in its earlier and in its enhanced value, by sale and mortgage.

Of more direct recognition there is adequate documentary evidence. Their Lordships will assume against the appellants that a pottah of 1804 is a forgery, and will come at once to the year 1852. In that year there were executed a pottah and kabuliyat of the lands in question. The kabuliyat (which was produced by the respondent) sets out that Wali Sarang, who executes it, has purchased the land, and he declares that "I shall enjoy and continue in possession of the aforesaid land by

J. C.

1904

NILRATAN  
MANDAL

v.

ISMAIL  
KHAN  
MAHOMED.

J. C.

1904

NILRATAN  
MANDAL

v.

ISMAIL  
KHAN  
MAHOMED.

annually paying the rent." The kabuliyat and relative pottah make ~~anxious mention of~~ a piece of land being taken off for a road, and that there is to be no claim to abatement of rent on this account. (This stipulation, appropriate enough to a permanent right, is less appropriate if the title in which it occurs is a fresh grant.)

The High Court find in this pottah a fresh start of title. Now the primary function of the pottah and kabuliyat would seem to be rather to state the rent payable by the new tenant, and to recognise that it is to him that the landlord is now to look for its payment. But some special significance is supposed to lie in the reference in both instruments to an "istifa" or surrender. The istifa is of course by the seller, and must have been in the hands of the matwali; and it has not been produced by the respondent. This being so, no significance can be attached to what implies no more than that the seller acknowledges that he has parted with the land. The pottah and kabuliyat thus attest no more than that the landlord recognised the sale, with this added significance that, as the Subordinate Judge mentions (for the translation does not bring it out), the pottah speaks of the jumma as according to former custom and practice. That the matwali speaks of his act as operating "so long as my authority will last" bears neither for nor against the respondent, for this was the necessary quality of all and every of his acts as an administrator.

In these documents of 1852, therefore, their Lordships are unable to find any surrender by the tenant; and, on the contrary, the execution and exchange of those instruments bring home to the landlord knowledge and recognition of the tenants' transmission of the property by sale in an instrument which purports to convey a permanent and inheritable right. Taken along with the other facts of the case, before and after, the proceedings of 1852 tend to establish the appellants' case. The question here, as in other similar cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant. It was somewhat faintly argued by the respondent that a special

local custom must be proved ; but, on examination, the authorities cited relate to Bombay and not to the province from which this appeal comes.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court discharged with costs, and the decree of the Subordinate Judge restored. The respondent will pay the costs of the appeal, except the costs of the appellants' petition for further documents, which costs will be borne by the parties themselves.

Solicitors for appellants : *Miller, Smith & Bell.*

Solicitor for respondent : *W. W. Box.*

J. C.

1904

NILBATAN  
MANDAL  
v.  
ISMAIL  
KHAN  
MAHOMED.

www.libtool.com.cn

J. C.\* SHIVABASAVA KOM AMINGAVDA . . . PLAINTIFF ;

1904

AND

July, 1, 5, 29. SANGAPPA BIN AMINGAVDA . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

*Practice—Jurisdiction of High Court to set aside Finding of First Appeal Court—Civil Procedure Code, ss. 584, 585—Substantial Error of Procedure.*

Where a Court in first appeal, though it was admitted that the original Court had rightly found in favour of the fact of adoption and against its invalidity by reason of fraud, nevertheless found that the adoption was not real and of no binding effect:—

*Held*, that the High Court had jurisdiction to set aside this finding under ss. 584 and 585 of the Civil Procedure Code. It was upon a case not made by the parties, to which the evidence had not been directed, and must be treated as a substantial error or defect of procedure within the meaning of those sections. Further, there was no evidence on which the finding could properly be based.

*Anangamanjari Chowdhurani v. Tripura Soondari Chowdhurani*, (1887) L. R. 14 Ind. Ap. 101, followed.

APPEAL from an interlocutory judgment of the High Court (Dec. 2, 1896) setting aside a finding in first appeal of the District Court of Sholapur Bijapur and from a final decree of the High Court (Aug. 11, 1897) dismissing the appellant's suit.

The appellant, the widow, and as such sole heiress of Amingavda Desai, who died while a minor in 1876, sued the respondent, her adopted son, under the guardianship of his natural father Ramappa, praying for a declaration that he was not properly and legally adopted; for a further declaration that the ceremony of adoption of the defendant did not take place; otherwise, that the said adoption was ineffectual and invalid, inasmuch as misrepresentations were made to the plaintiff, and she was deceived and was prevented from getting proper information and proper advice.

The Subordinate Judge of Bagalkote found that the adoption of the respondent was real and valid so far as certain property

\* *Present* : LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

called the Desgat Watan was concerned, but that the appellant was entitled to a declaration that as regards property not being Desgat Watan the adoption would take effect only after the appellant's death.

J. C.  
1904  
SHIVABASAVA  
KOM  
AMINGAVDA  
v.  
SANGAPPA  
BIN  
AMINGAVDA.

The District Court found on the facts that there was no real adoption of the respondent by the appellant, and that the appellant was entitled to the declaration which she claimed, and passed a decree in accordance with such finding.

The High Court in second appeal passed an interlocutory judgment on December 2, 1896, by which it set aside the judgment of the District Court on the question whether the adoption of the respondent was real and restored the judgment of the Subordinate Judge on that point, and remitted the case to have the second issue raised in the District Court (namely, whether the adoption, if real, was binding on the appellant) determined by the District Court, and passed no decree.

The District Court thereupon found that the adoption of the respondent, if real, was binding on the appellant.

Accordingly the High Court reversed the District Court's decree, and dismissed the suit with costs.

*Cave, K.C., and A. F. C. Luxmoore*, for the appellant, contended that the High Court had no jurisdiction under s. 584 of the Civil Procedure Code to interfere with the finding of the District Court on first appeal, more especially as there was evidence to support it. Reference was made to *Anangaman-jari Chowdhrani v. Tripura Soondari Chowdhrani* (1); *Mussummat Durga Choudhrain v. Jawahir Singh Choudhri*. (2)

The evidence shewed that no real and binding adoption took place, or at least that the adoption, if it purported to have been made, was conditional, and consequently invalid. Mere execution of deeds is insufficient to effect an adoption. There must be an actual giving and taking of the child; ceremonies also were necessary, while those deposed to in this case were manifestly insufficient: see *Shosinath Ghose v. Krishna Soondari Dasi* (3); *Collector of Madura v. Ramalinga*

(1) L. R. 14 Ind. Ap. 101, 110. (2) (1890) L. R. 17 Ind. Ap. 122, 127.

(3) (1880) L. R. 7 Ind. Ap. 250.

J. C.

1904

SHIVABASAVA  
KOM  
AMINGAVDA  
v.  
SANGAPPA  
BIN  
AMINGAVDA.

*Sathupathy* (1); *Sri Raghunadha Deo v. Sri Brozokishoro Patta Deo* (2); *Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi* (3); *Ramchandra Bhagavan v. Mulji Nanabhai* (4); *Mahableshtar Fondba v. Durgabai*. (5) The purdanashin in this case did not have that degree of advice and protection which was necessary to give validity to her deeds, nor was there any proof of her intention to adopt, or of her understanding the nature and effect of the ceremony performed: see *Bayabai v. Balaurf Venkatesh Ramakant*. (6) There are English cases in which even marriage has been declared to be void when there was a want of understanding as to the effect of the ceremony: *Scott v. Sebright* (7); *Ford v. Stier*. (8) As to a conditional adoption being void and the effect of agreements contemporaneous with adoption, see *Chitko Raghunath Rajadiksh v. Janaki* (9) and *Bhaiya Rabidat Singh v. Indar Kunwar*. (10)

*Cohen, K.C.*, and *C. W. Arathoon*, for the respondent, contended that the High Court was right in holding that, having regard to the terms of s. 584 of the Civil Procedure Code, an appeal lay from the finding of the District Judge if it was shewn that it resulted from some substantial error or defect in procedure. The High Court addressed itself to that question, and not to the weight or credibility of evidence. They considered it was contended rightly that the District Judge came to a finding of his own on a case not made by the parties, not warranted by the pleadings, and to which evidence had not been directed. It was admitted before him that the adoption took place, that there had been no fraud, and that the immediate cause was an apprehension on the widow's part that otherwise the Desyat Watan might lapse to the Government, in accordance with the view entertained of certain resolutions of the Bombay Government. Reference was made to Mayne's Hindu Law, 6th ed. par. 196. The point as to the

(1) (1868) 12 Moore's Ind. Ap. Ca. 397, 440.

(2) (1876) L. R. 3 Ind. Ap. 154.

(3) (1876) L. R. 4 Ind. Ap. 1.

(4) (1896) Ind. L. R. 22 Bomb. 558.

(5) (1896) Ind. L. R. 22 Bomb. 199.

(6) (1866) 7 Bomb. H. C. R. Ap. 1, 21.

(7) (1886) 12 P. D. 21.

(8) [1896] P. 1.

(9) (1874) 11 Bomb. H. C. 199.

(10) (1888) L. R. 16 Ind. Ap. 53.

purdanashin not being properly protected was not taken in the Courts below, and did not arise on the pleadings or evidence or issues. From the evidence as it stood it appeared that the appellant well understood what she was doing. The question of motive was irrelevant.

*Cave, K.C.*, replied.

J. C.

1904

SHIVABABAVA

KOM

AMINGAVDA

v.

SANGAPPA

BIN

AMINGAVDA.

1904

July 29.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from two decisions, one interlocutory and the other final, of the High Court of Bombay. The suit disposed of by those judgments was originally brought in the Court of the Subordinate Judge of Bagalkote, and was one of a very peculiar character, being brought by a widow against her adopted son, adopted by herself, for the purpose of negating, or getting rid of the effects of, her adoption.

The story told in the plaint was that no adoption of any kind had in fact taken place, but that the plaintiff was induced by the fraud and duress of the defendant's natural father, and of her own wat-mukhtyar, to pretend to Government that she had adopted the defendant, and to execute what she called "a hollow deed of adoption," which acknowledged the adoption to have been made nine days before the date of the deed. She prayed for a declaration that the defendant is not her properly and legally adopted son, for a declaration that the ceremony of adoption did not take place, and, if the defendant should contend that the ceremony of adoption did take place, for a declaration that it is ineffectual and invalid by reason of fraud. The written statement affirmed the adoption, and traversed the allegations of fraud. The issues raised, so far as now material, were: (2.) Does she (plaintiff) prove that the deed of adoption and other documents in support of it were obtained from her by fraud or other unlawful means? (3.) Does she prove that the alleged adoption is false? and (4.) Is the adoption invalid on any ground?

The Subordinate Judge held that the ceremony of adoption had taken place with all necessary formalities. He arrived at

J. C.  
1904  
SHIVABASAVA  
KOM  
AMINGAVDA  
v.  
SANGAPPA  
BIN  
AMINGAVDA.

certain other findings now superseded, and in the result he decreed that the adoption was proved, that at present the adoption was limited in its effect to the Watan property, and that as to all other property it would take effect after plaintiff's death.

From that decree both parties appealed to the Court of the Assistant Judge of Bijapur. The learned judge in that Court stated the issues, as formulated before him, thus: (1.) Was there a real adoption? (2.) If so, is it binding on the plaintiff? (3.) To what relief, if any, is plaintiff entitled? He stated that the fact of the adoption was no longer disputed, and the charges of fraud were abandoned. He found the first of the above three issues in the negative. On the second he did not formally find. On the third he found that the plaintiff was entitled to a declaration that the adoption was not real and is invalid. He decided the case in favour of the plaintiff, resting his conclusion upon reasoning which is not altogether easy to follow, holding that, though the adoption was made in fact, and the charges of fraud were unfounded, the adoption ceremony was a mere farce, and of no binding effect. His decree cancelled the adoption.

The defendant took the case on second appeal to the High Court of Bombay. Such second appeal can lie only (ss. 584 and 585 of the Civil Procedure Code) on the ground of (a) the decision being contrary to some specified law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

The learned judges of the High Court held that under this section, if the Lower Appellate Court had made a new case for the parties not warranted by the pleadings and evidence, they had jurisdiction to interfere and to reverse its decree upon that ground, and they considered that this error or defect in procedure had occurred in the present case. They held further that they had jurisdiction to reverse the decision of the

Lower Appellate Court if its decision were without evidence to support its finding, and they considered that this was so.

In accordance with these views the High Court set aside the finding of the Assistant Judge that the adoption was not real, and restored that of the First Court, and remanded the case to the Lower Appellate Court to find upon the issue whether the adoption was binding upon the plaintiff. On this remand the Lower Appellate Court found the issue in the affirmative, and when that finding was returned to the High Court that Court by its final decree dismissed the suit.

Against these decisions of the High Court the present appeal has been brought. The substantial contention urged before their Lordships has been that the High Court had no jurisdiction under s. 584 to interfere with the finding of the Lower Appellate Court. Their Lordships agree with the learned judges of the High Court. They think the Lower Appellate Court did dispose of the suit upon a case not raised by the parties, and to which the evidence had not been directed, and that this was a substantial error or defect of procedure within the meaning of s. 584. They also agree with the High Court in thinking that there was no evidence before the Lower Appellate Court upon which that Court could properly arrive at the conclusion of fact at which it did arrive. In *Anangamanjari Chowdhurani v. Tripura Soondari Chowdhurani* (1) the rule was laid down in the following terms: "It was, in the opinion of their Lordships, within their jurisdiction" (that is to say, within the jurisdiction of the judges of second appeal) "to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the judge." The same rule was laid down in *Mussummat Durga Choudhrai v. Jawahir Singh Choudhri* (2), where the rule is treated from the negative point of view. "Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of

J. C.

1904

SHIVABASAVA  
KOM  
AMINGAVDA  
v.  
SANGAPPA  
BIN  
AMINGAVDA.

(1) L. R. 14 Ind. Ap. 101, 110.

(2) L. R. 17 Ind. Ap. 122, 127.

J. C. fact is final, if that Court had before it evidence proper for its  
 1904 consideration in support of the finding.”  
 SHIVABASAVA Some minor objections to the final decision of the High  
 KOM Court were raised in argument. As to these, it is sufficient to  
 AMINGAVDA say that they are all points covered by the findings of the  
 v. Courts in India, or which might and ought to have been raised  
 SANGAPPA in those Courts.  
 BIN  
 AMINGAVDA.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant : *Holman, Birdwood & Co.*

Solicitors for respondent : *T. L. Wilson & Co.*

J. C.\* DEBI PERSHAD CHOWDHRY AND } APPELLANTS ;  
 1904 OTHERS . . . . . }  
 July 1, 5, 26. AND  
 RANI RADHA CHOWDHRAIN AND } RESPONDENTS.  
 OTHERS . . . . . }

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Indian Evidence Act—Proof of Pedigree—Admissibility of Hearsay Evidence.*

Where the representative of the plaintiff's family for the time being was proved to have made on three suitable occasions public and undisputed assertion of his position as an agnate of the husband of a Hindu widow (who had aliened her husband's estate), and the plaintiff as his next reversionary heir brought a substantial body of hearsay evidence within the Indian Evidence Act from his own kinsfolk to prove the pedigree on which he relied :—

*Held*, that such evidence should not be rejected on the ground of relationship, the witnesses having been carefully cross-examined, and each having proved circumstances apart from the pedigree which supported his knowledge and credit.

APPEAL from a decree of the High Court (Feb. 13, 1900) reversing a decree of the First Subordinate Judge of Bhagalpur (July 12, 1897).

\* *Present* : LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

The appellant, Debi Pershad Chowdhry, sued as next reversioner to the Hila Bhatokher estate expectant on the death of Rani Radha Chowdhraïn for a declaration that certain alienations of the estate made by her, and more particularly a deed of gift executed by her on July 21, 1895, in favour of the respondents, would be inoperative as against him after her death. The main question decided was whether the appellant had proved that he is the next reversioner. On this point the Courts below differed; the Subordinate Judge found the pedigree proved; the High Court considered the evidence insufficient to establish the appellant's right.

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

On this question of pedigree the High Court found that Shibnag Chandi Nath was descended from Ghansham, who had two sons, Kamlapat and Deo Chand. It found also that the plaintiff's grandfather was Kirpa Nath. The connecting links from Deo Chand to Kirpa Nath depended on oral evidence; and on this point the judgment proceeded as follows:—

“What the plaintiff has to prove is that Kirpa Nath was the son of Shanker Nath, that Shanker Nath was the son of Manik Chand, and that Manik Chand was the son of Deo Chand. If he can establish these three links he has proved his case. Now, this part of the plaintiff's case entirely rests on his oral evidence, and, if his witnesses are to be fully believed, he has made out his right to the relief prayed for. The Subordinate Judge, while disbelieving the plaintiff's witnesses on many material points, has yet credited their statements as to the genealogy of the plaintiff, although it cannot be within their personal knowledge who were the father of Kirpa Nath, Shanker, and Manik. We are, however, unable to place so much reliance as the Subordinate Judge has placed on the statements of these witnesses. They cannot, we think, be regarded as disinterested or reliable witnesses. They are nine in number, and may be divided into two classes—the first class consisting of relatives of the plaintiff, the second of relatives and dependants of one Kartik Nath Pandey, a connection of the plaintiff by marriage, and who

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

is undoubtedly supporting and assisting him in the prosecution of this case. Now the witnesses of the first class are Gaibi Nath Pandy, who is the plaintiff's brother-in-law; (2.) Kedar Nath Upadhya, plaintiff's uncle's son-in-law; (3.) Shib Dyal Misser, plaintiff's paternal uncle's son; (4.) Rameswar Nath Dobay, plaintiff's brother-in-law; and (5.) Gaura Chowdhrani, the plaintiff's mother. The second class consists of (1.) Kartik Nath Pandy, connected with the plaintiff by marriage, who admittedly assists plaintiff in this case; (2.) Eknath Sukul, mother's sister's son of Kartik; (3.) Jag Lal Tewari, Kartik's cook and servant; and (4.) Durbari Lal Pandy, Kartik's raiyat. The Subordinate Judge has disbelieved these witnesses in so far as they say that the plaintiff's father, Gobind, performed the sradh of Shib Nag. He has found that this sradh was performed by the defendant No. 1 herself, and this we fully believe to have been the case; and yet he has believed them when they depose that they heard the plaintiff's genealogy recited on the occasion of religious ceremonies, and when they say, too, that the defendant No. 1 admitted the plaintiff to be her husband's nearest agnate, and that, with her assent, the plaintiff's father performed various religious ceremonies as the nearest agnate and heir of her husband. Now, in addition to the distrust in these witnesses' veracity, which we must feel owing to the false evidence they have given as to the performance of the sradh of Shib Nag, we must say that it seems to us very unlikely that the defendant would acknowledge the plaintiff's father as her husband's nearest agnate, and would allow him to perform religious ceremonies on her behalf during the lifetime of Harbans Tewari, admitted by both sides to have been a nearer agnate of Shib Nag's than the plaintiff's father, and we cannot accept as satisfactory the exposition of the reasons given by the Subordinate Judge, which probably induced the defendant No. 1 to act in this way. It is sufficient for us to point out that the Subordinate Judge himself does not entirely rely on the evidence of the plaintiff's witnesses as to these alleged admissions. For he says: 'Of other instances, when she is said to have described the relationship between

Gobind Pershad and her late husband, the one when she is said to have prevented Gobind Pershad from accepting an offer of marriage from Panday family of Pakour, may not be reliable. But there is not sufficient reason for disbelieving all of them.' The question would rather seem to us to be whether there is sufficient reason for believing them when they made so many statements which are clearly untrue. Are we able to sift the true part (if any) of their evidence from the false, and would we be justified in relying on them to such an extent as to interfere with the devolution of very valuable property upon persons who are certainly relations, and by no means very remote relations, of the last owner of the property? As to the religious ceremonies said to have been performed by the parents of the plaintiffs, and which are described in the Subordinate Judge's judgment, we cannot, on the evidence adduced by the plaintiffs, feel confident that they really took place."

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

*De Gruyther*, for the appellants, contended that the pedigree was proved. Some part of it was proved by the defendants' witnesses. The history of the family prepared at the end of the eighteenth century, rightly admitted by both Courts, proved that Deo Chand was the brother of Kamlapat. The connecting links between Deo Chand and Kirpa Nath was proved by evidence believed by the first Court and improperly discredited by the High Court. The denial of the pedigree was most general. No other pedigree was set up. There was no evidence of Kirpa Nath's ancestors other than those alleged. The plaintiff's evidence was corroborated by the history above mentioned, by the action of Kirpa Nath in 1812, by the uncontradicted allegations of Gobind, Mokund, and Jug Lal in 1863 and 1885 contained in petitions which could not have been put forward if this pedigree were inaccurate.

*Haldane, K.C.*, and *C. W. Arathoon*, for the respondents, contended that, for the reasons stated in the High Court judgment, the evidence of the plaintiff's witnesses as to the pedigree should be discredited.

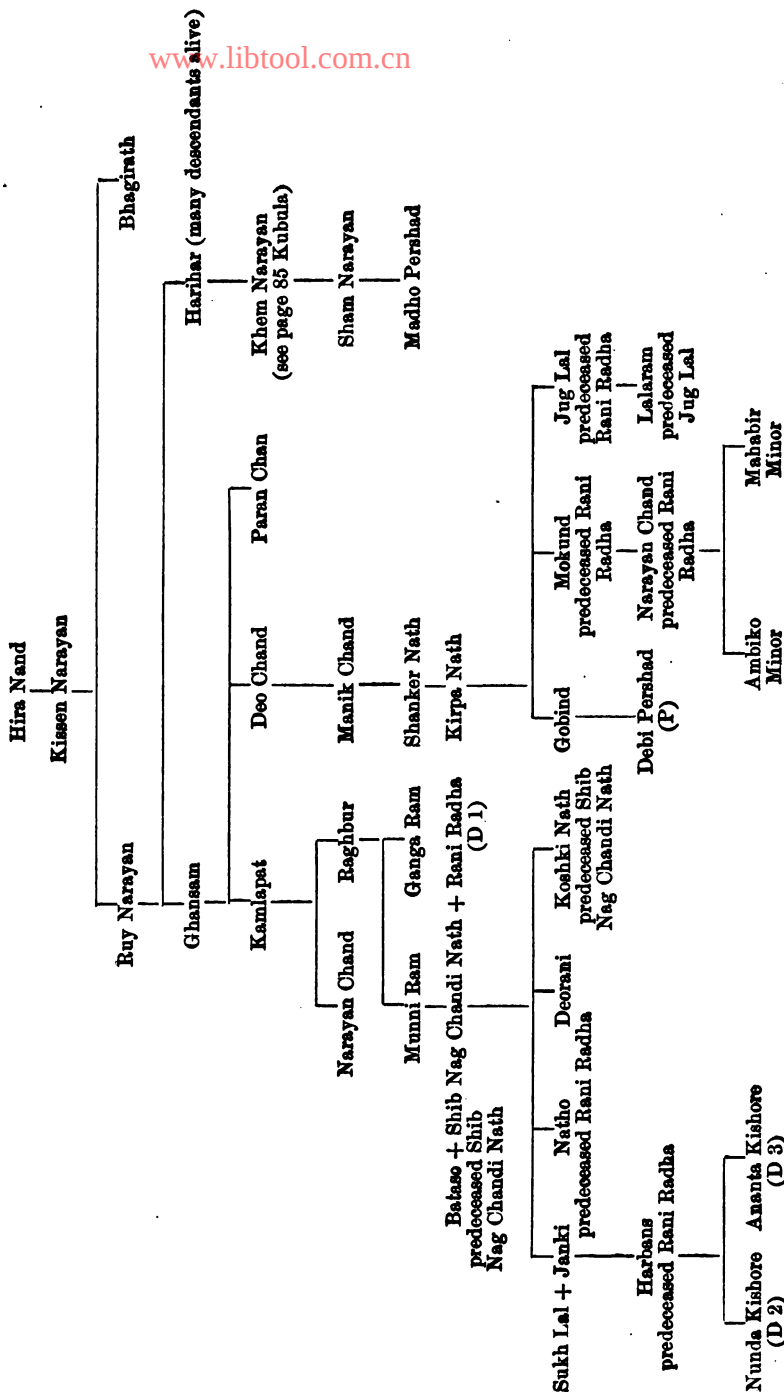
*De Gruyther* replied.

J. C. July 26. The judgment of their Lordships was delivered  
 1904 by [www.libtool.com.cn](http://www.libtool.com.cn)

DEBI  
 PERSHAD  
 CHOWDHRY  
 v.  
 RANI RADHA  
 CHOWDHRAIN.

LORD ROBERTSON. At the date of the suit out of which this appeal arises the respondents were in possession of the estate in dispute. Their title was a deed of gift in their favour dated July 21, 1895. This deed was executed by Rani Radha Chowdhraïn, widow of Shib Nag Chandi Nath Chowdhry, to to whom the estate had belonged. (This lady, who figures largely in the controversy, will be referred to as the Chowdhraïn.) The validity of this deed was immediately challenged by the appellant Debi Pershad Chowdhry, who, in the suit brought on September 12, 1895, claimed a declaration that he was next reversioner, and that the Chowdhraïn's gift was invalid and not binding on him.

Besides the Chowdhraïn and her donees, the appellant Debi Pershad impleaded one Ram Nath Chowdhry, who made pretensions to the estate which have now been finally negatived, and certain relatives who make no claim. The contest in the Courts below was between the plaintiff on the one hand, and the Chowdhraïn and her donees on the other. The Subordinate Judge decided in favour of the appellant Debi Pershad, but this was reversed in the High Court. After judgment had been given in the High Court the Chowdhraïn died, and the respondents in the present appeal are the donees. The second and third appellants are persons to whom the first appellant has sold some part of his interest. The respondents admit that their position as donees of a widow is untenable as against an agnatic relation of the husband of their donor. The whole question is whether the appellant Debi Pershad (who may hereafter be called the appellant) has proved his pedigree as nearest agnate of Shib Nag, and has thus shewn a title to eject them. This question is still further narrowed by explaining that the disputed steps in the following pedigree are those which make Kirpa Nath, who was admittedly the appellant's grandfather, to have been himself the great-grandson of Deo Chand, through Shanker Nath and Manik Chand. The pedigree is as follows :—



J. O.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDERY  
v.  
RANI RADHA  
CHOWDHRAIN.

---

Before examining the evidence on this controverted part of the pedigree it may be convenient first to mention the facts more immediately personal to the appellant. He and his father before him (Gobind Pershad) lived on the estate in dispute and were in the employment of, and well known to, the Chowdhrain. Kirpa Nath, the appellant's grandfather, also lived on the estate, and was well known to many of the witnesses, having lived to a great age and being, probably on that account, a noted character. The appellant's uncle, Mokund, a brother of Gobind, also lived on the estate, and, like the others of his family, was a quite well-known man. Accordingly, on the first view, the case of the appellant is not the case of a claimant who drops from the skies, but of a man who and whose people were well settled in the district and about whom everybody knew, including the people disputing their claim. The Chowdhrain, it is true, pretended in the witness-box to ignore them; but her denials of everybody and everything were so wholesale and indiscriminating that the respondents did not claim credit for her as a witness of truth. Of the true degree of intimacy between this very lady and the group of persons in question there is a very significant indication in an episode of her deposition, for her own pleader suggested that Gaibi Nath Panday (who married the appellant's sister and is an important witness for him) should "repeat the exact words in cross-examination," he being a person "before whom the witness appears."

Now of this family (namely, that of the appellant) thus well known it is certain that three times, namely, in 1812, in 1863, and in 1885, its representative for the time being has, occasion requiring it, made public assertion of his position as an agnate of the Chowdhrain's husband, and has never met with a denial. In 1812 Kirpa Nath, the appellant's grandfather, and in 1863 and 1885 Gobind Pershad, the appellant's father, came into Court in the quality of agnate. These judicial appearances have not the less significance that while Kirpa Nath came into Court adversely to the interests of the Chowdhrain, the intervention of the father, Gobind Pershad, was invoked by the Chowdhrain herself.

In face of these facts, it would be affectation to treat the thesis of the appellant as expressed in his pedigree as being in any high degree improbable; but it not the less must be adequately proved. Now the appellant brings a substantial body of evidence from his own kinsfolk, which is clearly within the Indian Evidence Act. This evidence derives special weight from the considerations explained in the following passage in the judgment of the Subordinate Judge in this case :—

“The plaintiff himself says, that amongst others he heard the names recited by his father and uncles and Durga Dutt Chowdhry. It is well known, as has been recorded in that first volume of the fifth report from the Select Committee, that Hindu boys are taught the names of their ancestors, paternal and maternal, by their parents and other relatives while they are very young, together with their gotras and prabars, &c. These instructions are given not merely as a matter of curiosity, but as a matter of necessity; for Hindus, and specially the Brahmins, are required to perform their srads annually and on parbana occasions, and to offer water oblations (tarpana) for a whole fortnight, or rather fifteen days of the dark side of the moon in the month of Bhadro. Their right of inheritance depends upon such ceremonies, and their marriages are regulated according to blood relationship. This way the names of the ancestors up to the seventh degree in ascent (the Sakulyas) at the least are taught, though in most respectable families the names up to the fourteenth degree in ascent (the Samanodakas) are also taught. So, there is nothing unusual in the plaintiff's statement.”

It cannot be doubted that, in its quality, this is admissible evidence. The singular criticism of the High Court is that it comes from relatives of the appellant; but it is difficult to see where else such evidence could be found, or that in the mouths of strangers it would have any value at all. Each of the persons who has spoken to this pedigree has been carefully cross-examined, and each proves circumstances, apart from the pedigree, which support his knowledge and credit. This is not the case of a pedigree learned by rote, but it is

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

J. C.

1904

DEBI

PERSHAD  
CHOWDHRYv.  
RANI RADHA  
CHOWDHRAIN.

circumstantially corroborated, as far as time and memory admit.

Their Lordships are unable to agree with the High Court in their appreciations of the evidence. For the reason already given, they do not think that the relationship of one class of the witnesses is a consideration which should inspire more than the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted. Again the High Court discards, or at least largely discounts, the rest of the appellant's witnesses because it appears that one of them, Kartik Nath Panday, besides being a relative, was "assisting the appellant" in the case, and the others are connected with this person by blood or service. Their Lordships do not consider this to be a safe or sufficiently discriminating way of dealing with the testimony of these witnesses. They observe that the Subordinate Judge describes Kartik Nath Panday as "a very respectable zemindar of this district"; and it is at least conceivable that he is supporting his kinsman because he knows his cause to be just. Nor do the instances in which the Subordinate Judge declined to accept specific statements of the witnesses seem to imply any reason for distrusting their testimony generally. The matter of the *sradh*, of which the High Court makes much, involves the credit of only one witness; and the other instances in which the Subordinate Judge has not acted on the evidence do not involve more than caution on his part or inaccuracy on the part of the witness.

In default of more substantial topics, the learned counsel for the respondents bestowed much attention on a supposed anachronism in a pedigree which is printed in the record. It is enough to say that it is adequately proved that there were two persons of the name of Kirpa Nath; and, if this be so, the difficulty disappears.

Their Lordships deem it unnecessary to refer to several ephemeral arguments naturally arising out of a case so voluminous.

Their Lordships are satisfied that the appellant has established his claim. They will humbly advise His Majesty that

the appeal ought to be allowed, the decree of the High Court discharged with costs, and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appeal.

Solicitors for appellants : *Watkins & Lempriere.*

Solicitors for respondents : *T. L. Wilson & Co.*

J. C.  
1904  
DEBI  
PERSHAD  
CHOWDHRY  
v.  
RANI RADHA  
CHOWDHRAIN.

BOMBAY TRAMWAY COMPANY, } PLAINTIFFS;  
LIMITED . . . . . }  
AND  
MUNICIPAL CORPORATION OF THE } DEFENDANTS.  
CITY OF BOMBAY AND OTHERS . . }

J. C.\*  
1904  
May 12, 13;  
June 3.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

*Bombay Tramways Act, 1874, s. 30—Power of the Municipality to delegate the Work—Power of Acquisition.*

There is nothing in the Bombay Tramways Act, 1874 (Bombay Council), which prohibits the municipal corporation, which has acquired tramways under s. 30, from arranging with a private individual to find the purchase-money and work the tramways, or which obliges the corporation to keep them in their own hands and work them themselves.

APPEAL from a decree of the High Court (Feb. 18, 1902) affirming a decree of Fulton J. (Sept. 26, 1901).

The plaint sought relief and a declaration of rights with reference to a purchase of the tramway company's property and business, which the corporation of Bombay claimed to have made under the Bombay Tramways Act, 1874 (Act I. of 1874 Bombay Council), s. 30 being set out in their Lordships' judgment.

The main subject of dispute was as to the validity of the notice given by the plaintiffs under s. 30.

The plaint disputed the validity of three notices given on the grounds—(1.) that the corporation did not authorize the affixing of their seal; (2.) that no one of the notices was "the notice

\* *Present*: LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

J. C.

1904

BOMBAY  
TRAMWAY  
COMPANY  
v.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

---

contemplated " by the Act or the agreement of 1873 scheduled to the Act, clause 15 of which was similar in its terms to s. 30 of the Act; (3.) that the Act did not contemplate a number of notices. But the principal contention was that the notice was ultra vires. The plaintiff disputed the right of the corporation to purchase under the circumstances set out in paragraph 24 of the plaint. These circumstances were that the corporation had, on March 11, 1901, entered into an agreement with Mr. W. G. Bingham, " by which," the plaint (paragraph 24) states, " the first defendant agreed to make the proposed purchase of the plaintiffs' property and business on behalf of and for and on account of the said Mr. Bingham "; that the said notices had all " been sent to the plaintiffs by the first defendant by reason of the said agreement with Mr. Bingham, and could not have been sent if the said agreement had not been entered into." And the plaintiffs submitted that the corporation had not " acquired any right to purchase the property," &c., of the plaintiff company; and that the Act and the agreement of 1873 " only contemplated a bonâ fide purchase by the municipal corporation . . . on its own account, and do not authorize a purchase or intention to purchase as the agent of or on account of a third person "; and that under the Act and the agreement of 1873 the corporation had no power to acquire the said property and business " save in the case of the first defendant's bonâ fide intending to acquire the said property and business for the municipal corporation of the city of Bombay with the bonâ fide intention of carrying on and working the said business themselves," and they charge that the corporation " has no such bonâ fide intention."

Fulton J. with reference to the arrangement with Mr. Bingham held that it did not constitute the corporation " the agents of Mr. Bingham in respect of the purchase of the tramways "; that " in giving notice of purchase the corporation are not acting for Mr. Bingham, for it is on the corporation and not on Mr. Bingham that the Legislature has conferred the statutory power "; and that the corporation in dealing with the tramway company were " exercising their own powers " and not powers derived from Mr. Bingham.

The High Court held that it was well established that any company authorized by the Legislature to take compulsorily the land of another for a definite object will if attempting to take it for another be restrained; and that statutory powers such as are essential to the working of a tramway undertaking are not capable of assignment, but that at the same time they could be exercised, not only by the original grantees, but also by every one within the particular designation contained in the Act—that is, in this case, by every one answering the designation of grantees, i.e., the executors, administrators, and assigns.

“By s. 31 of the Act it is provided that the grantees may sell their rights and powers to others. For the tramway company it has been contended that the provisions of s. 31 do not apply to a sale under s. 30, and that the corporation on a sale under s. 30 cannot claim to be assigns and so grantees within the definition of the Act. If this argument be well founded, as to which it is unnecessary that I should at this stage express my opinion, then obviously the corporation has no power to exercise the powers of “carrying on and working the business.” Be this, however, as it may, there is another obstacle in the way of its working the tramways: such a power is outside the corporation’s constitution, and it does not appear to me that it was the intention of the Legislature by the Tramways Act of 1872 to enlarge its constitution in this direction. The purpose of the Act is to sanction the invasion of the rights of the public, and not to extend the corporation’s powers by authorizing it to work the tramways.

“But if the corporation has no power to work the tramways, what is it to do when it has purchased the undertaking? It is important in this connection to bear in mind that it is not a body called into existence for the purpose of acquiring the tramways, and that it is not vested with the right to purchase for the purpose of private speculation and adventure, but to safeguard and advance the interests of the Bombay public.

“It cannot then have been intended that the corporation was to expend the large sums payable under s. 30 for no purpose, or that the whole tramway system of the city should on a

J. C.

1904

BOMBAY  
TRAMWAY  
COMPANYv.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

J. C.

1904

BOMBAY  
TRAMWAY  
COMPANY  
v.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

purchase under that section come to an end; it must have been contemplated that the undertaking should be continued by those to whom it was transferred or passed on by the corporation, in case it did not acquire the requisite power of working for itself. This, in my opinion, is the true view of the position, and it follows that the corporation were within their rights when they made the arrangement they did with Mr. Bingham. They did that which was prudent and proper under the circumstances, and, in my opinion, the notice was not vitiated by the ulterior purpose in view. To me it seems that there is no force in the suggestion that the agreement between the corporation and Mr. Bingham involves a breach of the provisions of the Penal Code, and so impairs the validity of the notice. Even assuming for the sake of argument that Mr. Bingham or his assigns will not be entitled to exercise the powers contained in the Act, or to work the tramways without further legislative authority, still this would not vitiate what the corporation has done; that is a matter between the corporation and Mr. Bingham, and may possibly release the parties to that contract from the liabilities they assumed; it would not make the notice bad as between the corporation and the tramway company."

*Jardine, K.C.*, and *Ross*, for the appellants, contended that the notice given by the respondents was not such a notice as was intended by s. 30 of Act I. of 1874 (Bombay). Compare s. 43 of the English Tramways Act, 1870 (c. 78). Power was given by s. 43 to purchasers to deal with the undertaking in the same way as their vendors. No such power was given by s. 30 in question. Consequently the corporation had no power to purchase with a view to transfer the undertaking to others. The evidence shews that that was the sole object in view; they took over the undertaking with no intention of working it themselves, but of transferring it to Bingham. They thereby exceeded their powers.

*Cohen, K.C.*, *Haldane, K.C.*, and *A. Phillips*, for the respondents, were not heard.

*Lynch*, for trustees of the debenture-holders.

June 3. The judgment of their Lordships was delivered by LORD LINDLEY. The questions raised by this appeal arise out of a purchase by the corporation of the city of Bombay of the undertaking of the Bombay Tramway Company. The purchase was made under the provisions of s. 30 of the Bombay Tramways Act, 1874 (Act I. of 1874). This section is as follows:—

“The said municipal corporation of the city of Bombay shall have the right of purchasing the said tramways with the plant, stores, rolling-stock, and everything connected therewith after the expiration of twenty-one years from the 12th day of March, 1873, upon declaring its intention so to do within six months after the expiration of the said twenty-one years, and shall have a renewed right of purchase at the end of every seven years after the expiration of the said twenty-one years upon similar notice being given; the amount to be paid in the event of such purchase shall be the actual bonâ fide value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith, and of the lands and buildings and all other the property of the grantees, such value in case the parties do not agree to be decided by arbitration as provided by the said agreement of the 12th day of March, 1873; and as compensation for the goodwill, premium, or compulsory sale and other consideration, the grantees shall be paid an amount equal to twenty-one years' purchase calculated on the average profits of the previous three years next preceding the purchase, 4 per cent. per annum on the bonâ fide value mentioned above being first deducted from such profits.”

On March 11, 1901, the corporation served notice of their intention to purchase the tramway company's undertaking; but there being some doubt whether this notice was regular in point of time, two other notices, dated respectively March 12 and 13, 1901, were afterwards served, and it is now admitted that no objection on the ground of date has to be considered.

The tramway company, however, contend that the notice is altogether invalid, because the corporation are acting beyond

VOL. XXXI.

J. C.

1904

BOMBAY  
TRAMWAY  
COMPANY

v.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

J. C

1904

BOMBAY  
TRAMWAY  
COMPANY  
v.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

---

their powers, namely, not for themselves, but for and on behalf and on account of a person named Bingham. When the facts are investigated, it appears that although the corporation have made arrangements with Bingham by which he is to find the money for the purchase and to work the tramways when acquired by the corporation, yet the corporation are acting as principals and not as Bingham's agents. There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction—nothing to shew that if the corporation exercise the power conferred on them by s. 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves. Whether they can carry out their agreement with Bingham without obtaining further powers is a matter which does not concern the tramway company. This point was elaborately dealt with both by the judge of first instance and by the learned Chief Justice of Bombay, and their Lordships think it unnecessary to say more than that they are satisfied that on this point the judgment appealed from was perfectly correct.

Then another question was raised by the tramway company, which was that the date to be fixed as the date of taking the purchase ought to be later than that mentioned in the judgment. If the proper date had to be determined by their Lordships, unembarrassed by what took place in India, their Lordships would have thought that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of a proper notice to purchase, i.e., in this case March 14, 1901. This was the view taken by the judge of first instance, Fulton J. But for some reason, which their Lordships do not appreciate, both parties appealed against his decision, and contended before the Appellate Court for a different date. Having regard to the course taken by both parties in the Court below, their Lordships do not consider that either party, without the consent of the other, can fairly insist now that the above date ought to be adopted. Under these circumstances their Lordships see no reason for disturbing the date fixed by the Appellate Court, i.e., the date of the award fixing the value of the corporeal

property of the tramway company. As pointed out both by Fulton J. and the Chief Justice, to fix the date of the execution of the conveyance would lead to great practical difficulties. The profits would vary from day to day, and the average profits for three years could never be ascertained.

Another point contended for by the tramway company was that what is called track rent payable to the corporation ought to cease on March 14, 1901. This contention is, however, disposed of by the fact that in March, 1901, it was expressly agreed between the tramway company and the corporation that the tramway company would continue to work the tramways pending the ascertainment and payment of the purchase-money on the understanding that they received "the income and profits of the tramway business during such period." It is plain that so long as the tramway take the profits, they must pay the ordinary expenses of workings and the rent in question.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellant company must pay the costs of the corporation.

Solicitors for appellants : *Blount, Lynch & Petre.*

Solicitor for respondents : *G. W. Oliver.*

J. C.

1904

BOMBAY  
TRAMWAY  
COMPANY

v.  
MUNICIPAL  
CORPORATION  
OF THE CITY  
OF BOMBAY.

www.libtool.com.cn

J. C.\* SHAM KUMARI . . . . . PLAINTIFF ;  
 1904  
 Feb. 24, 25; RAJA RAMESWAR SINGH BAHADUR }  
 June 7; AND OTHERS . . . . . } DEFENDANTS.  
 July 12.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Act XI. of 1859, ss. 37, 53—Purchase at a Revenue Sale by Proprietor—  
 Purchase subject to Incumbrances.*

Sect. 53 of Act XI. of 1859 must be construed as a proviso to or qualification of s. 37.

Where in a redemption suit by a second mortgagee the respondent first mortgagee pleaded that, as regards a particular mehal part of the mortgaged estate, he, as a purchaser thereof at a revenue sale on September 7, 1896, was entitled thereto free of the plaintiff's incumbrance, it appeared that default had been made in respect thereof on the preceding January 12, that the respondent had bought the same mehal on March 21, 1896, with relation back to January 13, at an execution sale under his own decree against the mortgagors to which the plaintiff was not a party:—

*Held*, that the respondent, by virtue of his purchase at the execution sale, was on September 7 a proprietor of the mehal within the meaning of sect. 53, and therefore bought subject to the plaintiff's second mortgage as an incumbrance existing at the date of revenue sale.

APPEAL from a decree of the High Court (Feb. 10, 1899) varying a decree of the Subordinate Judge of Mozufferpore (Sept. 30, 1896).

The suit was for the enforcement of two mortgage securities, one dated June 23, 1894, and the other December 30, 1894, executed by the respondents Birj Behari Lal and Gobind Lal in favour of the deceased plaintiff Birj Mohun Lal, the husband of the appellant. Birj Mohun Lal alleged in his plaint: (a) that he had on January 5, 1894, obtained from the Court of the Subordinate Judge of Monghyr a decree against the said Birj Behari Lal and his brother Gobind Lal on a mortgage or "teep" dated December 24, 1889, for Rs.22,500; (b) that pending the execution of that decree the said respondents

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

executed to him (on June 23, 1894) a fresh mortgage for Rs.40,000, including the amount due under the decree, and had also undertaken that the property so mortgaged was at the time of such mortgage free from all incumbrances whatsoever; (c) that the plaintiff after the execution of the later mortgage came to learn that the properties so mortgaged to him were not unincumbered, but were already subject to a mortgage in favour of the respondent Raja (whom the plaintiff, therefore, made the defendant second party to the said suit) for Rs.50,000; (d) that thereupon the plaintiff, to protect his own interests, procured the execution by the Lal defendants to himself of a supplemental bond on December 30, 1894; (e) that upon further inquiry the plaintiff learned that the Lal defendants, being greatly indebted to many creditors, had, under undue influence of the said Raja, and in collusion with him and without any consideration therefor, executed to him a mortgage bond of November 8, 1892, mortgaging all the properties in or over which they possessed any right or control; (f) that the Raja had thereafter fraudulently sued upon the said last-mentioned bond without joining the plaintiff as a party in such suit, and had obtained an ex parte decree therein on January 22, 1895, by which decree the plaintiff submitted that he was in no way bound or affected; (g) that the Lal defendants had also executed to the plaintiff at the same time as the bond of December 30, 1894, a deed of sale of a bond by two persons named Khoda Buksh, alias Chowbey, and Ilahi Buksh, alias Dobey, of January 1, 1888, for Rs.5500, by which deed it was stipulated that any sum that might be realized in respect of that bond should be applied in reduction of the debt due under the mortgage, but that the bond of January 1, 1888, had not been sued upon, nor any money realized in respect of the same, and it was prayed, inter alia—

(a) That a decree might be passed for Rs.44,893, the principal and interest due in respect of the said two mortgages, and that the plaintiff's right to realize the same from the mortgaged properties and all other property of the Lal defendants and from their persons might be declared.

(b) That the mortgage bond, dated November 8, 1892, in

J. C.  
1904  
SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

J. C.  
1904  
SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

favour of the respondent Raja might be declared fictitious and of no avail.

(c) That if the mortgage to the Raja should be held to be good, the properties mortgaged to the plaintiff might be sold under the said plaintiff's decree, subject to the Raja's rights as mortgagee.

(d) That the purchaser in execution of the plaintiff's decree might be declared entitled to redeem the mortgaged properties within six months from the date of the plaintiff's decree upon payment of the decretal amount due to the respondent Raja, or of the amount for which the property might be sold at such auction sale, whichever the Court might deem proper.

(e) That as pending the said litigation some of the properties belonging to the Lal defendants had been procured by the machinations of the respondent Raja to be sold for non-payment of Government revenue, and had been purchased by himself in the name of Isri Pershad, the fourth defendant, such sale might be declared to have conferred no rights upon the Raja prejudicial to the plaintiff.

The Raja in his written statement affirmed the bona fides and validity of his mortgage bond of November 8, 1892, and impugned the plaintiff's mortgages of December 24, 1889, and December 30, 1894.

The Subordinate Judge found in favour of the genuineness and validity of the mortgages on both sides, and held that the plaintiff, being a second mortgagee, was entitled to redeem the mortgaged property, but not the three villages of Bisfi Kaithahi, Bahadurpore, and Dullapore, all three of which he found had been purchased by the Raja at revenue sales thereof. In reference to this purchase he held that under the provisions of the revenue law he had bought them free from all incumbrances. He further ordered that the plaintiff should be credited with the surplus sale proceeds of the three properties.

The High Court held, as to the equities between the parties arising out of the Raja's purchase, that the respondent Raja was under no obligation to pay off the arrears of revenue which had fallen due before his purchase at the execution sale,

and that it was quite open to him to buy the properties at the revenue sale, which sale discharged the estate from all liabilities.

The High Court affirmed the decision of the Court below to the effect that the amount of Rs.5500 due under the sold bond should be deducted from the plaintiff's claim.

They then slightly altered the decree of the lower Court to bring it into accord with the provisions of s. 92 of the Transfer of Property Act (Act IV. of 1882) by inserting a direction in the decree of the lower Court, directing that in default of payment of the amount due to the respondent Raja within six months of the ascertainment of the same, the properties mortgaged to him other than the three properties purchased by him as aforesaid at the revenue sale should upon his application in that behalf be sold in satisfaction of his claim.

*C. W. Arathoon*, for the appellant, contended that the Courts below should have held that the purchase by the Raja respondent of mouzahs Bisfi Kaithahi, Dullapore, and Bahadurpore were subject to the mortgage to the appellant's husband. The respondent purchased in execution of his own decree, and thereby became a proprietor, within the meaning of s. 53 of Act XI. of 1859, whose duty it was to protect his purchased property from a revenue sale by paying the Government revenue thereon. The Raja admitted that the Government revenue had been purposely defaulted. The evidence shewed that the plaintiff was not aware of the revenue sale. He had not been made a party to the action under which the Raja obtained a decree in execution of which he purchased the property. Accordingly it was inequitable that the Raja should by his subsequent purchase at the revenue sale acquire the property discharged of the plaintiff's incumbrance. Reference was made to Act X. of 1859, ss. 55, 37, and 53. The purchaser at the revenue sale was an unrecorded proprietor, and therefore did not purchase free from incumbrance. He had done nothing to alter his position or to annul the incumbrance. Under s. 53 as unrecorded proprietor he bought subject to the

J. C.

1904

SHAM  
KUMARIv.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

J. C.  
1904  
SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

plaintiff's mortgage: see *Abdool Bari v. Ramdass Coondoo* (1); *Mahomed Gazi Chowdhry v. Leicester*. (2) If s. 37 applied, the mere sale would not avoid the incumbrances. They were in that case only voidable at the option of the purchaser, who must shew that he wished or intended to annul them: see *Jatra Mohun Sen v. Aukhil Chandra Chowdhry* (3), *Komul Kumari Chowdhraïn v. Kuan Chandra Roy* (4), and *Titu Bibi v. Moheshchunder Bagchi*. (5)

*Haldane, K.C., Phillips, and Bonnerjee*, for the respondent Raja, contended that the High Court rightly held that the respondent by his purchase of the three mouzahs in question at the sale thereof for arrears of revenue acquired the same free from all charges and incumbrances thereon. This is an entire estate with a separate towzi number, and s. 37 of Act X. of 1859 applies to it, and all charges thereon are avoided by the sale in question. Sect. 53 relates to shares of estates, and makes no difference between recorded and unrecorded proprietors. All the cases cited on the other side are cases under s. 53, which does not apply. Neither of the judgments of the Courts below refer to that section. Reference was made to *Mahomed Gazi Chowdhry v. Leicester* (6) and to *Jatra Mohun Sen v. Aukhil Chandra Chowdhry*. (3) The respondent at the date of his purchase at the revenue sale was not within the meaning of s. 53 a proprietor, because the default had been made before his purchase at the execution sale in February, 1896. His purchase, therefore, at the execution sale was subject to the consequences of default—that is, to the revenue sale. He bought, therefore, not the estate, but the right to the surplus proceeds at the revenue sale over and above the amount of the arrears. The sale, too, was with relation back to a date anterior to the execution sale. See the Partition Act (Bengal) VIII. of 1876, where “proprietor” is defined as a person in possession, and see s. 28 of Act XI. of 1859. The respondent

(1) (1878) Ind. L. R. 4 Calc. 607.

(4) (1898) 2 C. W. N. 229.

(2) (1871) 7 Beng. L. R. App. 52.

(5) (1883) Ind. L. R. 9 Calc. 683,

(3) (1896) Ind. L. R. 24 Calc. 334. 686, 687.

(6) 7 Beng. L. R. App. 52, 54.

was not liable to pay the arrears of revenue due on the estate for they were due for a period prior to his purchase at the execution sale.

*Arathoon* replied.

July 12. The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The suit out of which this appeal arises was brought by the plaintiff (now represented by the appellant) on July 18, 1895, in the Court of the Second Subordinate Judge of Tirhoot, to enforce two mortgage bonds dated June 23 and December 30, 1894. He joined as defendants (1.) his mortgagors, defendants of the first part, and (2.) the first respondent (hereinafter spoken of as "the respondent"), who claimed to be a prior mortgagee of the properties charged. The plaint alleged that the mortgage to the respondent was without consideration and invalid. It referred to a debt assigned to the plaintiff by the mortgagors, raising a question which will be dealt with hereafter. It also raised a point with respect to certain mouzahs, included among the mortgaged properties, which the respondent has purchased at revenue sales. It was contended in the plaint that by such purchases the respondent, for the reasons assigned, had acquired no fresh right prejudicial to the plaintiff's right. And relief was prayed for accordingly.

The mortgagor defendants did not appear to the suit, nor have they appeared on this appeal. The respondent appeared and filed his written statement, in which he in his turn attacked the validity of the plaintiff's mortgage bonds while maintaining the validity of his own. He said specifically that the plaintiff's account filed with his plaint was wrong in not giving credit as against the plaintiff for the amount of the assigned debt mentioned in the plaint. And he denied generally the allegations of the plaint.

Issues were settled, and the case came on for hearing before the Subordinate Judge. At the trial the evidence was mainly directed to the questions raised as to the validity of the mortgages of the plaintiff on the one side and of the respondent on the other.

J. C.

1904

SHAM  
KUMARI

v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

J. C.  
1904  
SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

The Subordinate Judge found that the plaintiff's and the respondent's mortgages were both valid. As to the assigned debt, he debited the plaintiff with the amount. With regard to the properties purchased by the respondent at auction sales, he held that that defendant by his purchases had acquired them under the Revenue Sales Act (XI. of 1859), free of incumbrances, including the plaintiff's charge, and that, therefore, the plaintiff's claim could not be enforced against them. The Subordinate Judge accordingly made a decree, the effect of which, so far as is material for the present purpose, was to ascertain the amount of the plaintiff's claim as second mortgagee, in ascertaining which he was debited with the assigned debt, and to entitle him to redeem the respondent's prior mortgage interest in respect of the mortgaged properties other than those purchased at revenue sales (which were exempted), with the necessary consequential directions.

On appeal to the High Court the whole case was reopened, but with the result that that Court affirmed the decree of the Subordinate Judge with a formal modification. And against that decision the present appeal has been brought.

The appellant's petition for leave to appeal to His Majesty in Council again sought to reopen a large part of the controversy between the parties, but in the argument before their Lordships the appellant's contentions were limited to two.

One question related to the assigned debt already referred to, and it arises in this way. At the time of the second mortgage in favour of the plaintiff the mortgagors also executed another deed, spoken of as a bechinama, by which they assigned to him a debt due to them from a third person. In taking the account of what was due to the plaintiff the Courts in India have debited the appellant with the amount of that debt. The appellant urged that it ought to be debited only if and when actually received. The respondent, through his learned counsel, disclaimed all interest in the question. In their Lordships' opinion, it lay upon the plaintiff to use reasonable diligence to recover the assigned debt from the debtor. But the High Court has found (and the finding is not impugned in fact) that

no serious attempt seems to have been made to recover any portion of it. This being so, their Lordships see no reason to dissent from the conclusion which has been arrived at in India with regard to this matter.

The remaining question raised on behalf of the appellant is a question of law and one of some general importance. One of the mehals purchased by or on behalf of the respondent at revenue sales, and which it was considered in India that he had acquired free from incumbrances and therefore free from the plaintiff's claim, is the mehal Bisfi Kaithahi. It appears, however, that as to that property the respondent's position is peculiar, because prior to the revenue sale he had already purchased the same property at an execution sale under the Civil Procedure Code.

The material facts are these: The respondent sued his mortgagors, who were also the mortgagors of the plaintiff, and on January 22, 1895, obtained an ex parte decree against them. The appellant was not made a party to this suit. That decree the respondent proceeded to execute by attachment and sale of Bisfi Kaithahi under the provisions of the Civil Procedure Code. The sale took place on February 17, 1896, when the respondent himself became the purchaser. On March 21, 1896, he obtained his sale certificate, and on April 29 he was put into possession. In the meantime, on January 12, 1896, default occurred in payment of Government revenue payable in respect of Bisfi Kaithahi. On March 25, 1896, that property and other properties were brought to sale under the Revenue Sales Act, and the respondent in the name of a benamidar became the purchaser of Bisfi Kaithahi. And, on September 7 following, the sale certificate in the name of the benamidar was granted which, in accordance with the law, declared that the sale took effect from January 13, 1896, the day after the last day fixed for payment of the kist in respect of which the default had been made.

The contention for the appellant is that, under these circumstances, the purchase of Bisfi Kaithahi by the respondent at the revenue sale was a purchase of an estate of which he was proprietor within the meaning of s. 53 of the Revenue Sales

J. C.  
1904  
SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

J. C.

1904

SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

---

Act, and that by the terms of the section he purchased subject to **incumbrances, including** the plaintiff's. For the respondent it was contended that the case was governed, not by s. 53, but by s. 37, and that under it he took free from incumbrances such as that of the plaintiff.

In the Courts in India the question was plainly raised whether the respondent by his purchase of Bisfi Kaithahi at the revenue sale, under the circumstances in which he did purchase, acquired it free from incumbrances or subject to the appellant's right to redeem; but so far as their Lordships could learn, when this appeal was first argued before them in February last, the bearing of s. 53 upon this question was a point then raised for the first time. For this reason their Lordships deferred giving judgment upon the appeal in order that the parties might have an opportunity of further considering and arguing the question. Their Lordships have now had the advantage of hearing the point fully argued. In the course of that argument it was made clear that, in the discussions before the Courts in India, the bearing of s. 53 upon the question in issue was not argued. It was further made clear that the research of counsel cannot bring to light any Bengal decision amounting to an express authority upon the exact point in controversy. This affords, perhaps, no great ground of surprise, for the circumstances of the case are peculiar, and such as probably do not often occur. The peculiarity of the case lies in the order of the events, which is this: first, default in payment of Government revenue in respect of an estate; secondly, sale of that estate in execution by a Civil Court; thirdly, sale of the estate at a revenue sale for the default in payment, and purchase by the same person who had bought at the execution sale. The question that arises upon these facts is whether by reason of s. 53 the latter purchase was subject to incumbrances.

The sections of the Act which are principally important are ss. 37 and 53, but it will be necessary incidentally to notice some other of its provisions. Sect. 37 says that "the purchaser of an entire estate in the permanently settled districts . . . sold . . . for the recovery of arrears due on account of the

same " purchases free of incumbrances generally, and may annul under-tenures with certain exceptions.

To bring a case, therefore, within the words of this section three things must concur: there must be a sale, first, of an entire estate; secondly, in the permanently settled districts; thirdly, for its own arrears. The cases excluded by the language of the section are dealt with elsewhere. Sales of shares of estates in ss. 10, 11, 13, 14, and 54; sales of estates not in permanently settled districts, in s. 52; sales of estates not for their own arrears in the latter part of s. 53.

The earlier part of s. 53 introduces another distinction depending upon the character of the purchaser at a revenue sale. It says (omitting certain words which had become obsolete and have been repealed): "Excepting sharers with whom the Collector, under ss. 10 and 11 of this Act, has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may purchase the estate of which he is proprietor or co-partner . . . shall by such purchase acquire the estate subject to all its incumbrances existing at the time of sale."

It seems to their Lordships obvious that this enactment cannot be construed in any such way that it shall not operate as a proviso to or qualification of s. 37. This was fully conceded upon the second argument. And the respondent when he purchased at the revenue sale the same property which he had previously purchased at the execution sale was apparently a proprietor purchasing an estate of which he was proprietor.

It was argued, however, in the first place, that the respondent, when he bought at the revenue sale, was not a proprietor of the estate although he had previously bought at the execution sale, because when he made the last-mentioned purchase default had already been made in payment of revenue, for which in the ordinary course it would be sold; so that what was really bought at the execution sale was not the estate, but the right to receive any surplus sale proceeds of the estate when it should be sold for revenue. But liability to sale is not the same thing as sale, and until a revenue sale takes place the ownership of the estate remains as it has been, except so far as

J. C.

1904

SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

J. C.

1904

SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.  
—

the provisions of the Act interfere with it. It is always open to the Collector under s. 18 to exempt the estate from sale if the arrears are paid up before sale; and it is a matter of common knowledge that this is a power which Collectors exercise freely. To regard an estate in respect of which default has occurred, and which is therefore liable to sale, as a lost estate would be quite contrary to the facts as they exist.

It was next contended that the proprietors mentioned in s. 53, and upon whom the disability is imposed, should be restricted to defaulting proprietors. It was said, and probably correctly said, that the principal object of the Legislature was to prevent defaulters from taking an unjust advantage of their own wrong; but the language of the section must be construed as it stands, and it does not contain the suggested limitation. If, too, we are to look outside the section itself for help in construing the words of s. 53, the other analogous provisions of the Act suggest a construction different from that contended for. The latter part of s. 53 dealing with sales of estates otherwise than for their own arrears, and s. 54 dealing with sales of shares of estates, impose limitations upon the rights of purchasers, in the one case identical with, in the other case similar to, those imposed in the case now in question, and in those cases the disability is certainly not confined to defaulters. On this point the case of *Abdool Bari v. Ramdass Coondoo* (1) seems to shew that the view which their Lordships adopt was that which in 1878 was accepted by the High Court.

It was further contended that the purchase at the revenue sale having by the terms of the sale certificate related back to January 13, 1896, the day after that on which the default occurred, that is the date to be looked at for the present purpose, and that at that date the respondent was not the proprietor because it was before the execution sale. It is true that under s. 28 and Sched. A the sale certificate is to specify, as the date from which title is to be deemed to have vested in the purchaser, the day after that fixed as the last date of payment, and that that is the date from which the purchaser becomes entitled to the rents and profits on the one hand, and

(1) Ind. L. R. 4 Calc. 607.

liable to pay the revenue on the other. But it would be a strained construction in any case to say that that is the date to be looked to in saying whether a purchaser was a proprietor when he purchased. And when the Act is considered as a whole it seems clear that when sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation. This is apparent from ss. 18, 20, 21, 23, and 27.

For these reasons their Lordships are of opinion that the respondent when he purchased Bisfi Kaithahi purchased it subject to its incumbrances, including the appellant's claim as second mortgagee, and that that property ought to have been included among those which the decrees of the Courts in India allowed the appellant to redeem.

They will accordingly humbly advise His Majesty that it ought to be declared that the respondent purchased Bisfi Kaithahi subject to the appellant's claim as second mortgagee, and that the decree of the High Court ought to be varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with such declaration in regard to the property which the appellant is allowed to redeem, the adjustment of costs consequent on the declaration, the taking of further accounts, and the fixing of a further period of redemption, and otherwise as the circumstances of the case may require.

There will be no order as to the costs of the appeal.

Solicitors for appellant : *Barrow, Rogers & Nevill.*

Solicitors for respondent : *Sanderson, Adkin, Lee & Eddis.*

J. C.

1904

SHAM  
KUMARI  
v.  
RAJA  
RAMESWAR  
SINGH  
BAHADUR.

www.libtool.com.cn

J. C.\*

1904

June 30;  
July 1, 26

MAUNG SHWE OH AND ANOTHER . . . PLAINTIFFS ;

AND

MAUNG TUN GYAW AND ANOTHER . . . DEFENDANTS.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

*Contract—Indian Evidence Act, s. 91—Oral contemporaneous Agreement.*

Where, in a contract of loan expressed to be for the payment of expenses in obtaining a grant of a forest, the respondent borrower agreed with the appellants to make his nephew, the second respondent, who was not a party thereto, "to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained" :—

*Held*, that by the true construction of the above clause it contemplated only the making of a further contract to which the second respondent should be a party, and, as the latter contract was never made, the appellants were only entitled to repayment of their loan and interest.

*Quære*, whether evidence of a verbal contemporaneous arrangement between the parties in substitution for that contemplated by the said clause would have been admissible under s. 91 of the Indian Evidence Act.

APPEAL from a decree of the Chief Court (Jan. 4, 1901) varying a decree of the District Court of Amherst (April 30, 1900).

The suit was brought by the appellants mainly to recover damages from both the respondents for having, in fraud of their agreement with the first appellant and one Ko Na Ouk, assigned their lease or permit of the forest of Maungpai to the Bombay Burma Trading Corporation, Limited, for a large sum of money, and "thereby deprived the plaintiffs of their right to work the said forest and of the large profits which they would have made therefrom"—rights which it was alleged had accrued to them under the said agreement, which was dated July 2, 1897, and annexed to the plaint as exhibit 1. The prayer was for an inquiry and an account as to the profits which would have accrued to them thereunder, an inquiry and an account as to the sum received from the said corporation,

\* *Present* : LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

and for such damages as were disclosed by such inquiries and accounts. [www.libtool.com.cn](http://www.libtool.com.cn)

There were concurrent findings of fact that the second respondent obtained the forest of Maungpai for himself and not for his father; also that the first respondent was not his son's agent in making the contract of July 2, 1897, set out in their Lordships' judgment.

The dispute in appeal turned upon the extent to which the first respondent had rendered himself liable on the true construction of the said contract.

The plaint alleged (paragraph 19) and the plaintiff asserted in his evidence that it was verbally arranged with the first respondent that the terms as to royalty and commission should be the same as before under Kannah, the deceased lessee of the forest. The plaint also stated that the only matter which was not settled at the time was the respective portions of the forest which the plaintiff and Ko Na Ouk would arrange to work, and for which the second respondent would have to give formal permits as the lease stood in his name (paragraph 20).

While the second respondent repudiated all liability thereunder, the first respondent had pleaded by his written statement that over and above his contract to repay the loan advanced with interest, the effect of it was that he only undertook to use his influence with his son to get him to consent to allow the plaintiffs and Ko Na Ouk to work the forest as hitherto.

The Courts below decreed in favour of the recovery of the unpaid amount of the loan, differing as to the rate of interest to be allowed.

*Jardine, K.C.*, and *De Gruyther*, for the appellants, contended that the first respondent was, on the true construction of the contract, and as he represented himself or claimed to be the sole beneficial owner of the forest, liable to them in the damages claimed, in that he had undertaken in return for the loan that they should have the right to go on working the forest as heretofore. The terms as to royalty and commission were settled verbally at the time of the contract, and the second respondent's duties were simply to give permits as directed by

J. C.

1904

MAUNG SHWE  
OR  
v.  
MAUNG TUN  
GYAW.

J.C.  
 1904  
 MAUNG SHWE  
 OR  
 MAUNG TUN  
 GYAW.

his father, the respective portions of the forest to be allotted to the parties, namely, the plaintiffs and Ko Na Ouk, in such way as they should themselves agree upon. Reference was made to Indian Evidence Act, s. 92 (2nd proviso), as to the admissibility of evidence respecting this verbal arrangement, which it was submitted was not inconsistent with the terms of Exhibit 1.

*Cowell*, for the respondents, contended that there was no completed contract at all as regards anything but repayment of the loan. A future agreement was contemplated as regards the working of the forest to which the second respondent was to be an effective party, and it could not be made without him. The alleged verbal contemporaneous agreement in substitution for that contemplated by the written contract was not proved, since it was denied by two of the alleged parties thereto. The plaintiff's evidence in favour of it was inadmissible under s. 91 of the Evidence Act.

*Jardine, K.C.*, replied.

1904  
 July 26.

The judgment of their Lordships was delivered by

LORD DAVEY. The action out of which this appeal arises was brought by the appellants against the respondents for recovery of a sum of Rs.35,000 and interest, and (in substance) damages, for breach of a contract alleged to have been made with the appellants by the first respondent either on his own behalf or on behalf of himself and the second respondent. The Courts below have given the appellants judgment for the sum claimed, with interest, but have held them not entitled to the other relief sought. The only question, therefore, before their Lordships is whether the appellants are also entitled to damages for breach of the alleged contract.

In order to understand the questions in issue between the parties it will be convenient to state shortly the relation in which the parties stood to each other, and the circumstances which led up to the transaction in question. All the parties are engaged in the timber trade in Burma and Siam. The appellants are brothers and co-partners. The first respondent is an uncle of the appellants, and the second respondent is his son. For some time prior to July 2, 1897 (the English date

of the alleged contract), the first respondent had been in the habit of borrowing large sums of money from the appellants for the purpose of his business, and by a deed dated September 24, 1895, had mortgaged his stock of timber, the elephants employed by him in the forests, and other property to the first appellant for three lakhs of rupees. The first respondent resided and conducted his business at Moulmein, and the second respondent, under a power of attorney from him, was working certain timber forests in Siam as his agent. Previously to and in the year 1896 the appellants were working timber in a forest called Maungpai, in Siam, under a permit from the lessee, one Payataga Kannah. But in the course of that year Kannah died, and his and the appellants' rights in the forest thereupon determined. The appellants on hearing of Kannah's death immediately instructed one Maung Shwe Yin, their local agent at Zimmai, the capital of the State in which the forest was situate, to apply for a six years' lease of it. The second respondent, who was in the country, also applied for the Maungpai forest, apparently through the same agent, and obtained a grant of it in his own name. In some way, which is not very clearly explained, a sum of Rs.15,000 belonging to the appellants, which was under Maung Shwe Yin's control, was advanced to the second respondent for the purpose of being used by him in part payment of the expenses of obtaining the grant of Maungpai. The second respondent informed his father that he had obtained the grant of the forest, and by a subsequent letter dated May 18, 1897, that he had to pay Rs.70,000 for the expenses of obtaining it, which sum he requested his father to send him. It also appears that a company called the Burma Trading Corporation were anxious to obtain rights in the forest, and had opened negotiations with the second respondent for the purpose. The breach relied on is a subsequent agreement made by the second respondent with this company.

In these circumstances the first respondent applied to the first appellant and one Paya-taga Ko Na Ouk to advance him the sum of Rs.70,000 (including the Rs.15,000 already advanced at Zimmai), which they agreed to do in equal shares on the

J. C.

1904

MAUNG SHWE  
OR  
v.  
MAUNG TUN  
GYAW.

J. C. terms of the letter of July 2, 1897, which is relied on by the  
1904 appellants as the contract in suit. That letter is as follows:—

MAUNG SHWE  
OH  
v.  
MAUNG TUN  
GYAW.

"To

"Nephew Maung Shwe Oh and Paya-tagá Ko Na Ouk.

"For the written permit obtained for the Maungpai forest in the Zimmai jurisdiction for six years, my son Maung Shwe Hle had to pay the owner of the forest Rs.65,000 as a present. The total of the various expenses incurred was Rs.5000 making in all Rs.70,000. The amount already taken by Maung Shwe Hle from Maung Shwe Yin, the agent of nephew Maung Shwe Oh at Zimmai was Rs.15,000. A letter dated the 3rd Waning of Kason 1259 B.E. (18-5-1897) from my son Maung Shwe Hle asking me to send balance Rs.55,000 soon was brought to me. I was unable to send the money. Will you, nephew and Paya-tagá, kindly pay half each. For so paying, I will not allow my son Maung Shwe Hle to let out the Maungpai forest or permit any person to fell (timber) within the period of six years for which written permit has been obtained for the forest; for he (my son Maung Shwe Hle) had obtained the written permit for the forest while acting as my agent. When Maung Shwe Hle returns to his original abode, Kaw Hnut village, I will make him to arrange for you, nephew and Paya-tagá, in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained. *If after the said business has been arranged, should any (of you) be dissatisfied (or disagree)* I and my son Maung Shwe Hle will pay the Rs.55,000 now advanced and the aforesaid sum of Rs.15,000 with interest due from the date of the advance to the date of repayment at the rate of Rs.2 per cent. per mensem. (We) will pay the principal and interest on the day on which they may be required. So please pay me the said sum of Rs.55,000 so as to enable me to send the same to my son Maung Shwe Hle. I and my son Maung Shwe Hle will hold ourselves responsible for the sums advanced.

Maung Tun Gyaw.

"Kaw Hnut Village.

"Dated the 4th Waxing of Waso, 1259 B.E. (2-7-97).

"Witness.

"Maung Shwe Hle's mother."

The learned District Judge certifies that the *perfect* English translation of the words in italics is—

“If in making the allotment of places for working in this way, there is any disagreement . . . .”

and their Lordships will so read it.

The respondents say that the second respondent was the only person interested in the permit to work the Maungpai forest, and, as he was not a party to the alleged contract, there is no effective agreement. In answer to this argument it was contended in the Courts below that the respondents were partners in the timber trade and the contract was in the course of the partnership business. Both the District Judge, by whom the suit was heard in the first instance, and the learned judges in the chief Court on appeal decided this issue in favour of the respondents, and it was not raised before their Lordships. It was then contended that the second respondent acted as the agent of the first respondent only in obtaining the permit to work the Maungpai forest, and that the latter was the only person entitled to the benefit of the permit. The evidence in support of this issue relied on by the appellants consisted mainly of the inferences to be drawn from the relation of the respondents to each other, the fact of the second respondent being a person without means, and the funds required being obtained on the credit of the first respondent, the contents of certain letters written by the respondent, and the language of the document of July 2, 1897, itself. On this issue also there is a concurrent finding by both Courts against the appellants; but as the question depends partly on the construction to be put on written instruments, their Lordships thought fit to hear the argument upon it.

It is no doubt a case of some suspicion, and there are expressions in the correspondence which are quoted by counsel on each side as being in their favour. A copy only of the letter of May 18, 1897, was put in evidence, but it was accepted by both Courts as a true copy, and if so, it certainly supports the respondents' view that the second respondent obtained the permit on his own behalf only. As their Lordships agree with the concurrent finding on this issue also of the Courts

J. C.

1904

MAUNG SHWE  
OR  
v.  
MAUNG TUN  
GYAW.

J. C.

1904

MAUNG SHWE

OH

v.

MAUNG TUN  
GYAW.

below, they do not think it necessary to discuss the letters in detail.

It remains to consider the contents of the document itself. It does not say that the second respondent had obtained the permit as agent for his father, but had done so while acting as his father's agent, which is true. The expressions chiefly relied on for the purpose of shewing agency were the words, "I will not allow my son to let out the Maungpai forest," &c., and "when Maung Shwe Hle returns . . . I will make him arrange." This language does not seem to mean more than "I will cause" or "induce." In any case the letter is not evidence against the second respondent, and could at most prove only the impression or belief of the first respondent. Their Lordships are of opinion that it is not proved that the second respondent obtained the permit for the Maungpai forest as agent for the first respondent. But quite independently of this question they think that the appeal fails on the ground that the terms of the proposed contract do not appear from the document, and that according to its true construction it contemplated only the making of a contract on the return home of the second respondent, and left all terms to be then arranged. The allotment of the forest between the appellants and Ko Na Ouk was expressly left for future arrangement, and the terms as to royalty or otherwise on which the forest was to be worked were also left open. "I will make him arrange for you in some way or other to go on working." The first appellant, indeed, said that the rates were verbally arranged at the same time. But that is not confirmed by the first respondent or by Ko Na Ouk, who may be treated as an independent witness, and cannot be accepted as proved. If it were proved, it is at least doubtful whether the evidence would be admissible under s. 91 of the Indian Evidence Act.

Their Lordships are of opinion that according to the true construction of the document the only bargain was that the appellants and Ko Na Ouk should be allowed to work the forest if they succeeded in making an arrangement to that effect with the second respondent, and if they failed to do so they were to get their money back with interest. This is how Ko Na

Ouk says he understood it, and their Lordships think he was right.

J. C.

1904

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed, and the appellants will pay the costs of it.

MAUNG SHWE  
OH  
v.  
MAUNG TUNG  
GYAW.

Solicitors for appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for respondents: *A. H. Arnould & Son.*

FAKIR CHUNDER DUTT AND OTHERS . PLAINTIFFS;

J. C.\*

AND

1904

RAM KUMAR CHATTERJI AND OTHERS . DEFENDANTS.

May 13;  
June 3.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Bengal Act VIII. of 1869, s. 66—Sale in Execution of a Rent Decree—Purchase by defaulting Shareholder—Construction—"Previous Holder."*

Where it appeared that the purchaser of a mokurruri lease at a sale in execution of a rent decree was himself beneficially interested in the said lease to the extent of 11½ annas share:—

*Held*, that he could not avoid intermediate tenures by proceedings under s. 66 of Act VIII. of 1869 (B.C.), being excluded from its benefits under the last clause as a previous holder in default.

"Previous holder" in the said section includes a person beneficially interested in the tenure, and accordingly it included the said purchaser although he had not been registered as a tenant. Default does not necessarily mean breach of contractual obligation, but simply non-payment of rent by a person capable of protecting his tenure by doing so.

APPEAL from a decree of the High Court (Jan. 27, 1897) affirming a decree of the District Judge of Bankura which reversed a decree of the Subordinate Judge of Bankura (June 30, 1896).

The suit which the Subordinate Judge decreed was brought by Chintamani Dutt, predecessor of Fakir Chunder Dutt, and the other appellants, against the mokurruridars, dur-

\* *Present*: LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

J. C.  
1904  
~  
FAKIR  
CHUNDER  
DUTT  
v.  
RAM KUMAR  
CHATTERJI.  
—

mokurruridars, se-mokurruridars, ryots, and other persons claiming interests in a mouzah called Makarkandi, in pergunnah Chatna, in the district of Bankura. The defendants were ultimately thirty-two in number, including the three respondents who appeared to the appeal.

The plaintiff claimed to be the purchaser at a sale, on November 7, 1884, in execution of a rent decree dated January 30, 1884, of the mokurruri tenure (tenure at a fixed rent), of which two of the defendants, Babu Lal Roy and Akhoy Roy, were the registered tenants; and he claimed to be entitled, by virtue of the purchase at the said rent sale and of the relinquishment by the Ghose defendants of their tenures, to set aside all subordinate tenures created by the said mokurruridars and to receive rent direct from the ryots and other immediate occupiers of the land of mouzah Makarkandi.

Sect. 66 of Bengal Act VIII. of 1869 provides as follows:—

“The purchaser of an under-tenure, under the provisions of ss. 59 and 60 of this Act, shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created or by the subsequent written authority of the person who created it, his representatives or assignees, provided that nothing herein contained shall be held to entitle the purchaser to eject khoodkhast ryots or resident and hereditary cultivators, nor to cancel bonâ fide engagements made with ryots or cultivators of the classes aforesaid by any holder of the under-tenure or his representatives, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor. Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof through whose default the tenure was brought to sale.”

Sects. 59 and 60 prescribe the procedure to be followed in bringing to sale for an arrear of rent a saleable under-tenure.

The facts of the case were found by the District Judge in first appeal, and were no longer capable according to the Code of being questioned. He said :—

“The plaintiff alleged himself to be the mokurruridar of mouzah Makarkandi, and the object of his suit, shortly stated, was this, that avoiding all intermediate tenures, he might be declared entitled to receive rent direct from the ryots in the mouzah. In order to understand this claim the position of the various parties to the suit, and the defences which they set up, it is necessary to refer to the previous history of the various tenures that have been established in the mouzah.

“The mouzah Makarkandi was by a pottah, dated 25th Pous, 1272, granted in mokurruri by the zemindar to Babu Lal Roy and Akhoy Roy. These two persons and their co-sharers are the defendants Nos. 1 to 9, and they all may, as the Subordinate Judge has styled them, be conveniently designated as the Roys. A month or two after obtaining their mokurruri lease Babu Lal and Akhoy, by a pottah dated 27th Magh, 1272, granted a dur-mokurruri lease of the mouzah to Sri Churn Ghose, who is now dead, and is represented by his three sons, Notobur, defendant No. 10, Behari, defendant No. 11, and Gobind, defendant No. 12. Sri Churn had a brother, Srimunt, who was admittedly a co-sharer in the dur-mokurruri with him. Against these two brothers, Sri Churn and Srimunt, a mortgage decree was passed in favour of one Broji Lal, nephew of Chintamoni, the present plaintiff, and in execution of that decree their dur-mokurruri rights were sold at auction and purchased by Chintamoni's gomashta, Nil Madhub Banerji, the defendant No. 16, on August 16, 1879. About eight months afterwards, in April, 1880, Nil Madhub Banerji executed two pottahs sub-letting the rights he had thus purchased; one of these pottahs covered  $9\frac{1}{2}$  annas of the mouzah and was in favour of Notobur, defendant No. 10, who was Sri Churn's eldest son, and the second covered the remaining  $6\frac{1}{2}$  annas and was in favour of Sri Churn's brother Srimunt, defendant No. 13.

“Meanwhile the plaintiff Chintamoni had acquired, either by private treaty or by public auction, various shares in the

J. C.

1904

FAKIR  
CHUNDER  
DUTT  
v.  
RAM KUMAR  
CHATTERJEE

J. C.  
1904  
~  
FAKIR  
CHUNDER  
DUTT  
v.  
RAM KUMAR  
CHATTERJI.

mokurruri rights in the mouzah, and by November, 1884, the extent of the rights so purchased by him amounted to no less than 11½ annas of the entire mouzah. In that month a sale was held in execution of a decree for arrears of the mokurruri rent. The mokurruri lease was sold, and was purchased by the plaintiff Chintamoni, who thus claims to be mokurruridar of the whole mouzah. He alleges that Nil Madhub Banerji verbally relinquished in his favour the rights that he had purchased in August, 1879, and that Srimunt and Notobur, sub-lessees of Nil Madhub, also gave up their sub-leases. In this way he claims that all intermediate tenures have been extinguished; that he is entitled to receive rent from the ryots direct. His cause of action is that in attempting to collect rent from the ryots direct he has met with opposition, and has had to bring against pattadar tenants suits for rent or khas possession, in which suits he has met with varying degrees of success. Accordingly, in this one suit his object is to have settled once and for all that his claim is well founded, and he has included in it the former mokurruridars, defendants Nos. 1 to 9, the dur-mokurruridars and purchasers from them, defendants Nos. 10 to 15, and the tenants on the land, defendants Nos. 17 to 32. His gomashtha Nil Madhub is, as I have said, the defendant No. 16."

The giving up of their sub-leases by Notobur Ghose and Srimunt Ghose, alluded to by the District Judge in the passage just quoted, was accompanied by the acceptance of tenures similar to the tenures they had formerly held, but subordinate in character, called se-mokurruri tenures.

The Subordinate Judge held that the Ghoses had lost their dur-mokurruri rights, but that under the pottah granted by Nil Madhub in April, 1880, they as se-mokurruridars were entitled to receive the rents from the respondents, and were bound under the terms of that pottah to pay rent to the plaintiff. The result of the District Judge's findings, on the contrary, was that the dur-mokurruri rights were held to be still subsisting.

Then with regard to the issue of law the First Court held that the plaintiff purchaser had precluded himself from exercising

the power of setting aside the se-mokurruris because "these se-mokurruris were his own acts; he cannot repudiate them; he granted certain leases, and he cannot cancel them."

The First Appellate Court held that the purchaser did not come within s. 66, and, as already stated, that the dur-mokurruris were not otherwise cancelled.

With regard to the plaintiff's position under s. 66, the First Appellate Court held that "the evidence shews that there was an arrangement that the dur-mokurruridars should pay the rent thereof direct to the superior landlord, and there is nothing to shew that any act of the plaintiff caused this arrangement to fall through"; and on this ground he held that "the entire mokurruri interest" had passed to the plaintiff—that is, the First Appellate Court found that the Ghoses, the dur-mokurruridars, ought to have paid their rent direct to the zemindar, and that the mokurruridars—of whom the plaintiff was one—were entitled to have the rent so paid by the Ghoses to the zemindar, in which case there would have been no arrear, and no sale. But it was held that this fact did not discharge the mokurruridars from liability, and that the plaintiff, whether in possession or not (although the learned judge thought he was in possession), was equally bound with the rest of the mokurruridars to pay the rent, and equally a defaulter by not paying, and that consequently he was, although not registered as mokurruridar, excluded from the benefit of s. 66 of Act VIII. of 1869 (B.C.).

The High Court held that the plaintiff, having been found to be the owner of a share in the mokurruri, was "one of the previous holders, and the default of one was the default of all." They added: "The mere fact that the holders of the subordinate tenure were, by the arrangement of the mokurruridars, bound to pay the rent to the zemindar, did not relieve Chintamoni or his co-sharers from the responsibility of paying the rent. The words 'through whose default' in s. 66 do not, we think, mean that it should be through the actual fault of the previous holder as opposed to the fault of any one else that the rent was not paid. If the persons who under the arrangement referred to should have paid the rent did

J. C.

1904

FAKIR  
CHUNDER  
DUTT

v.  
RAM KUMAR  
CHATTERJI.

J. C.  
1904  
~  
FAKIR  
CHUNDER  
DUIT  
v.  
RAM KUMAR  
CHATTERJEE

not pay it, the holders of the mokurruri tenure were bound to pay it: and if they did not pay, the default was theirs within the meaning of the section. They might, of course, have paid it at any time previous to the sale and so prevented the sale, but they did not do so."

They held that the Ghoses were entitled to rely on this objection to the plaintiff's claim, as, where the section applies, "it does not make any difference who the person raising the objection is; those facts being proved, the section becomes inoperative."

As regards the share of Notobur Ghose, they held that his relinquishment of his share "would not operate as a transfer of his right to the zemindar, to whom the relinquishment was made . . . . nor would it affect the entirety of the tenure held by the other co-sharers."

C. W. Arathoon, for the appellants, contended that the plaintiff Chintamoni, apart from any acts of his own affecting his rights, was on his purchase in 1884 entitled to avoid the subordinate tenures previously created by the mokurruridars, so far as those tenures were not protected by s. 66 of Act VIII. of 1869 (B.C.). He was not a "previous holder through whose default the tenure was brought to sale" within the meaning of that expression, for he was an unregistered holder not directly liable for payment of rent, and therefore was under no contract to pay revenue, and could not in consequence be deemed a defaulter. Reference was made to *Anundlall Mookerjee v. Bhugwan Chunder Mookerjee* (1); Act X. of 1859, s. 106; Bengal Act VIII. of 1869, ss. 62, 63; Act XI. of 1859, s. 53; *Doolar Chand Sahoo v. Lalla Chabeelchand*. (2) The appellant was therefore entitled to the benefit of s. 66 of Bengal Act VIII. of 1869. The Ghose respondents ought not to be allowed to rely upon the non-payment of rent as a default on the part of the plaintiff, for the failure to pay was a breach of duty on their part. The Ghose respondents moreover, and especially Notobur Ghose, recognised the plaintiff's right to avoid the dur-mokurruri tenures, and dealt with him on

(1) (1873) 12 Beng. L. R. 489, n.

(2) (1878) L. R. 6 Ind. Ap. 47.

that footing, and are now estopped from disputing that right. Moreover the evidence shewed that they relinquished their rights as dur-mokurruridars in favour of the plaintiff, thus virtually transferring them.

*De Gruyther*, for the three first respondents, who was heard only on the point of the validity of Notobur's alleged transfer of interest to the plaintiff, contended that there was no evidence thereof. Besides, a co-defendant of Notobur sets up a title as transferee thereof under a registered deed of sale from him, and so any real question as to title arises between co-defendants.

*Arathoon* replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In November, 1884, one Chintamoni Dutt (who is now dead and represented by the appellant Fakir Chunder Dutt) purchased at a sale in execution of a rent decree the mokurruri lease of mouzah Makarkandi. This lease had been granted in 1867 by the zemindar, the Rani of Chatna, to a family called "the Roys," two of whom only—Lal Roy and Akhoy Roy—were the registered tenants. The rent suit was brought against them.

After his purchase Chintamoni claimed to be mokurruridar of the whole mouzah and entitled to receive rent direct from the ryots. He took proceedings under s. 66 of Act VIII. of 1869 (B.C.) with the view of avoiding all intermediate tenures. He failed because it appeared that although he was not registered as a tenant, he was himself interested to the extent of 11½ annas in the mokurruri lease to the Roys. The High Court, affirming the First Appellate Court, held that he was excluded from the benefit of s. 66 by the last clause of the section, which declares that "nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof through whose default the tenure was brought to sale."

It was contended by the learned counsel for the appellants that Chintamoni was not a "previous holder" because he was not registered as tenant, that at any rate he was not "the previous holder" because he was not interested in the entirety of the property in lease, and that he was not a defaulter or in default because he was not directly liable to the zemindar and

J. C.

1904

FAKIR  
CHUNDER  
DUTT

S.  
RAM KUMAR  
CHATTERJI,

J. C.  
1904  
~  
FAKIR  
CHUNDER  
DUTT  
v.  
RAM KUMAR  
CHATTERJI

injured no one but himself by non-payment. It seems to their Lordships that there is no substance in any of these objections. They think that the expression which Mr. Arathoon criticized in detail must include a person beneficially interested in a tenure who is in a position to protect his interest by paying the rent into court, and yet omits to do so, with the result that the tenure is brought to sale by the superior landlord. "Default" which prevents the section from applying does not necessarily imply any moral obliquity or any breach of contractual obligation. It simply means non-payment—failure or omission to pay.

Another point was made on behalf of the appellants. It is dealt with in the judgment of the High Court, but not very satisfactorily explained. It was contended by Mr. Arathoon that the appellants were at least entitled to a decree against one of the dur-mokurruridars—one Notobur Ghose, defendant No. 10, because it was said that on being served with notice of Chintamoni's purchase he relinquished his interest in Chintamoni's favour. There is no proof of any transfer by him to Chintamoni. In fact, nothing is offered in proof of the appellants' contention as to Notobur's interest except a written statement by Notobur in another suit in which he says that on receipt of the notice of Chintamoni's purchase he voluntarily gave up possession to Chintamoni. On the other hand, another defendant, Godai Pal, defendant No. 32, alleges in his written statement in the present suit that he purchased Notobur's dur-mokurruri rights on March 7, 1895, by a registered deed of private sale, and that he has been holding the same since that time as the rightful owner and possessor thereof. The question, if there is a question, seems to be one between co-defendants which cannot properly be dealt with in the present suit.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for the three first respondents : *Watkins & Lempriere.*

www.libtool.com.cn

MAHARAJA JAGADINDRA NATH ROY } PLAINTIFF;  
BAHADUR. . . . . }

AND

RANI HEMANTA KUMARI DEBI . . . DEFENDANT.

J. C.\*

1904

June 29, 30;  
July 29.

### CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

*Idol—Sebait—Property vested in Idol—Right of Management and Suit vested in Sebait—Limitation—Act XV. of 1877, s. 7.*

Although an idol may be regarded as a juridical person capable as such of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the sebait.

Where the right to sue in ejectment had accrued to the plaintiff as sebait during his minority, and suits were brought within three years of his majority:—

*Held*, that under s. 7 of Act XV. of 1877 they were not barred, although the plaintiff's adoptive mother had after her adoption of him as son to her husband, his predecessor in title, taken a settlement of the property in suit as sebait in her own name, and might have sued as his guardian.

CONSOLIDATED APPEALS from decrees of the High Court (Aug. 29, 1900) reversing decrees of the Subordinate Judge of Mymensingh (March 28, 1895).

They arose out of two suits, one being to recover possession, by establishment of title, of an estimated area of 1400 bighas of land as appertaining to and included in a mehal or mouzah Gabshara, bearing No. 5249 in the Mymensingh Collectorate; the other being to recover possession of a smaller parcel of land in the same mouzah, estimated to be 340 bighas. The former was against Rani Hemanta Kumari alone, the other against Rani Hemanta Kumari and the two other respondents.

Both Courts arrived at the conclusion that the appellant had made out his title to the lands in suit.

The High Court, however, held that the suits were barred

\* *Present*: LORD DAVEY, LORD ROBERTSON; and SIR ARTHUR WILSON.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

o.  
RANI  
HEMANTA  
KUMARI  
DEBI.

by limitation on the ground that plaintiff did not claim proprietary interest in himself with respect to the lands in suit, but as sebaity of the idol, and quā sebaity was not entitled by s. 7 of the Indian Limitation Act to any extension of the period of limitation by virtue of his minority.

The material passages in the High Court judgment are as follows: "It will be observed that the plaintiff does not claim any proprietary interest in himself in respect of the lands in suit. That interest is admitted to be vested in Sri Sri Gobinda Deb Thakur, and indeed the settlements that were made by Government in 1868 and 1877 with Maharaja Gobinda Nath Roy and Maharani Braja Sundari Debi respectively were in the capacity of sebaitys of the said thakur. If that is so, the question arises whether the cause of action did not arise in 1282, or in Bysack 1283, whichever be the time of actual dispossession. We ought, perhaps, here to mention that the question of limitation, as depending upon the circumstance of the proprietary interest being vested in the thakur, and not in the plaintiff, does not seem to have been raised in the Court below, nor in the petition of appeal presented to this Court. But as it is a question which arises upon the face of the plaint, and upon the settlements under which the plaintiff claims, we are bound to take cognizance of it: see s. 4 of the Indian Limitation Act."

The judgment then referred to various decisions of the Judicial Committee of the Privy Council and other decisions relative to the application of the law of limitations with reference to property held by sebaitys or managers of idol or thakur property. It continued that in 1877, when Maharani Braja Sundari Debi obtained settlements from the Government, though probably she obtained them as representing the appellant (her husband's adopted son), who was then and remained until October, 1889, a minor, yet they were made with her as representing the idol, and there was consequently nothing to prevent a suit being brought on behalf of the idol represented by her as the sebaity. Accordingly it could not be successfully urged that the appellant, on his attaining majority and becoming the sebaity, obtained a fresh start of limitation.

The Court found that the respondents' adverse possession went on, and therefore the suits were barred by art. 142 or 144 of the Limitation Act.

The judgment then continued: "It was, however, argued on behalf of the respondent that the proprietary interest might not be wholly vested in the thakur, but that the plaintiff might have some beneficiary interest in the proceeds of the property, and that in this view he would be entitled to maintain a suit in his own right, and would be protected from the operation of limitation by the provisions of s. 7 of the Limitation Act. It was suggested that, if the question had been raised in the Court below, this matter might have been cleared up by evidence. But the matter seems to be so plain upon the face of the plaint and upon the settlement leases of 1868 and 1877, to which we have already referred, that there can hardly be any room for doubt in the matter, the proprietary interest being distinctly stated to be in the thakur, and there being no allusion whatever to any beneficiary interest in the plaintiff. We must, therefore, regard the suit as brought by the thakur, the plaintiff being only sebaite."

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

vs.  
RANI  
HEMANTA  
KUMARI  
DEBI.

*Sir W. Rattigan, K.C., and C. W. Arathoon, for the appellant, contended that the High Court erred in holding that the settlements made with Braja Sundari Debi, the appellant's adoptive mother, and previously with Gobinda Nath Roy, her husband, had been made with them, not as proprietors, but merely in the capacity of sebaites to the idol. The title and proprietary right were in their predecessors, and had passed to them by inheritance. On this point reference was made to *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee*. (1) But even though the property was vested in the idol and the sebaites had no beneficial interest therein, yet the right of management and the right to sue in respect of the property vested in the sebaite—that is, in the appellant immediately on his adoption. Whatever title his mother had as sebaite ceased on the adoption. The right of suit was in the appellant, who was protected from limitation by s. 7 of Act XV. of 1877 until three years had*

(1) (1889) L. B. 16 Ind. Ap. 137.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR  
v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

elapsed from the date of his majority. It is no answer to say that the right of suit could have been exercised by his mother as his guardian. That is admitted, but it does not intercept or modify the application of s. 7, or plaintiff's rights thereunder.

[They were stopped by their Lordships.]

*Cave, K.C.*, and *De Gruyther*, then contended that the suits were barred. They contended that there was no evidence of the terms of the dedication, and therefore it must be taken that the endowed property vested in the idol, and that his sebaity could sue in respect of it. The widow was the sebaity, and though on the plaintiff's adoption by her his beneficial interest accrued and her beneficial interest ceased, yet the idol could still sue through her as sebaity, and the suit in ejectment was barred by adverse possession against the persona in whom the proprietary right was vested without reference to the plaintiff's minority. He did not sue in his personal right; he sued as sebaity on behalf of the idol, and his right to sue in that capacity was barred because the idol was barred. Reference was made to *Prosunno Kumari Debya v. Golab Chand* (1); *Gnanasambhanda Pandara v. Velu Pandaram* (2); *Maharanees Shibessouree Debia v. Mothooranath Acharjo* (3); Act XV. of 1877, s. 4, and Civil Procedure Code, s. 562; *Murray v. Watkins*. (4)

Counsel for appellant were not heard in reply.

1904

July 29.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. In order to appreciate the points raised on these appeals, it is necessary briefly to trace the course of proceedings in the suits out of which they arise.

The principal suit was brought by the present appellant, as sebaity of an idol, against the first respondent. He alleged that "as sebaity" of the idol the proprietary right in certain taluqs (which, in fact, lie within the ambit of the defendant's pergunnah Pukhuria) was in him, that mouzah Gabshara included within these taluqs long ago became diluviated, that reforma-

(1) (1875) L. R. 2 Ind. Ap. 145, 152.

(3) (1869) 13 Moore's Ind. Ap. Ca. 272.

(2) (1899) L. R. 27 Ind. Ap. 69.

(4) (1890) 62 L. T. (N.S.) 796 (Ch. D.).

tion took place, and that the reformed lands were resumed by Government, and under the designation Khas Mehal Chur Gabshara were settled with the predecessors in title of the plaintiff for different periods successively; that the lands now in dispute became part of Chur Gabshara by reformation and accretion; that in 1864 the predecessor in title of the defendant (now respondent), with others, sued the plaintiff's predecessor in title to establish title to the lands in dispute and failed, whereby the right of the plaintiff's predecessors in title became established as against those whom the defendant represents; and on the strength of this title the plaintiff claimed to recover the lands in question, of which he said he had been dispossessed.

The written statement raised many points, of which two call for mention here. It alleged that the suit was barred by limitation; and it said that the lands now in dispute were not identical with those to which the litigation of 1864 related.

The second suit was brought to recover other lands adjoining those claimed in the principal suit. To this suit all the respondents were defendants. The main circumstances of the two suits were the same, and they were disposed of by the High Court upon the same ground.

The defence of limitation was based upon the case that the plaintiff had been out of possession for more than twelve years, and such is the fact, as found in both Courts. To this it was answered that the period of limitation was sixty years, as if the suit had been brought by the Secretary of State. This view found favour with the first Court, but was rejected by the High Court. It is enough to say that on this point their Lordships entirely concur with the learned judges of the latter Court. It was answered, secondly, that the dispossession on which this suit is based occurred after the plaintiff's title accrued but while he was a minor, and that the suit was brought within three years after he attained his majority. And both Courts have found that such are the facts.

In the High Court another ground of limitation was raised, and raised apparently by the learned judges themselves. In order to follow this point it is necessary to examine the facts of the case a little more closely than has been done so far.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

Although this suit is brought by the plaintiff as sebaite, there is no evidence on which any reliance could be placed as to who founded the religious endowment, or as to the terms or conditions of the foundation. The legal inference, therefore, is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder, as was laid down by this Board in *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee*. (1)

It is not necessary for the present purpose to go back very far in the history of the property. In 1859 a settlement for a term of years was made by Government with Maharani Krishto Moni, followed by similar settlements with Maharani Shibeswari. These ladies were members of the family now represented by the plaintiff appellant. There is nothing to shew under what right or in what capacity they obtained the settlements; nor does it appear that these settlements were expressed to be made with them as sebaits of the idol. In 1868 the property of the family now represented by the plaintiff was vested in Maharaja Gobinda Nath, and he obtained a settlement for five years of the lands in question, in which he was described as sebaite to the idol. The settlement pottah contained a provision by which the rent reserved might be realized by sale according to law of all the property of the grantee. It also contained a provision that if the grantee should die during the term, the Government should have power to determine whether the settlement should be continued to his heirs.

Maharaja Gobinda Nath died in March, 1868, leaving a widow, Maharani Braja Sundari. She in December, 1869, adopted the plaintiff as son to her husband, and thus the plaintiff became heir of Gobinda Nath. In January, 1877, Maharani Braja Sundari obtained a fresh settlement of the lands in question for thirty-two years, in which she was described as shikmidar of the taluq and as sebaite of the idol. This settlement, like that with her husband, purported to make all the property of the grantee liable for the jumma reserved.

After the adoption of the plaintiff, his adoptive mother,

(1) L. R. 16 Ind. Ap. 137.

Maharani Braja Sundari, was in no sense the heir or representative of her deceased husband, nor entitled to the family property. And their Lordships think the only inference that can properly be drawn is that, in taking the settlement of the lands in question, she acted as the guardian and on behalf of her adopted son, in whom the right lay. The dispossession complained of has been found to have taken place after the date of the plaintiff's adoption, and therefore the cause of action in respect of it accrued to him and to no one else, and it accrued according to the findings during his minority.

The first Court decided both cases in favour of the plaintiff. The learned judges in the High Court found in favour of the plaintiff upon every point except limitation, but they dismissed the suits as barred by limitation. Their ground was this—that the suit being brought by the plaintiff as sebaity, the interest was admitted to be in the thakur, that the settlements of 1868 and 1877 were made with the grantees as sebaitys, and that the suit must be regarded “as brought by the thakur, the plaintiff being only sebaity.” They further said: “The settlement in the year 1877 was . . . made with Braja Sundari Debi as sebaity of the thakur. It is quite possible that in taking that settlement she represented the plaintiff who was then a minor. But whichever view may be taken, it is obvious that the settlement was made with the thakur, represented, as the thakur then was, by Maharani Braja Sundari Debi. And we are unable to understand what there was to prevent a suit being brought on behalf of the thakur represented by Braja Sundari Debi as the settlement holder.”

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (1) and *Ashutosh Dutt v. Doorga Churn Chatterjee* (2) are instances of less complete dedications, in which, notwithstanding a religious dedication,

(1) (1859) 8 Moore's Ind. Ap. Ca. 66.      (2) (1879) L. R. 6 Ind. Ap. 182.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

---

property descends (and descends beneficially) to heirs, subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication not quite so simple as those to which reference has been made.

If it were necessary to determine the nature of the dedication in the present case, their Lordships would have felt great difficulty in doing so. On the one hand, the use of the term "sebait" in the settlement pottahs of 1868 and 1877, and in the plaint in this suit, points rather to a dedication of the completest character. On the other hand, the provisions in those pottahs which impose liability upon the grantees to the whole extent of their own property, and not merely to the extent of what they might hold as sebait, suggest a different conclusion. And so does the clause in the pottah of 1868 empowering Government to determine the term on death.

But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the sebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of s. 7 of the Limitation Act, which says that, "If a person entitled to institute a suit . . . be, at the time from which the period of limitation is to be reckoned, a minor," he may institute the suit after coming of age within a time which in the present case would be three years.

It may be that the plaintiff's adoptive mother, with whom the settlement of 1877 was made as sebait, might have maintained a suit on his behalf and as his guardian. This is very often the case when a right of action accrues to a minor. But that does not deprive the minor of the protection given to him by the Limitation Act, when it empowers him to sue after he attains his majority. For these reasons their Lordships are unable to concur with the learned judges in thinking that these suits are barred by limitation.

On behalf of the respondents their Lordships were asked to hold that the suits had been rightly dismissed on another ground altogether. It was contended that an examination of the Amin's map in the proceedings of 1864 and of that prepared in the present cases and a comparison of the two would shew that they had been misunderstood and misapplied, and that it ought to have been held that the lands now claimed were not the same as those upon which the adjudication took place in the suit of 1864.

The question of identity is one of fact. In the pleadings that identity was alleged on one side and denied on the other. Express issues were raised upon it. The first Court found those issues in the affirmative. The question was raised again in the grounds of appeal to the High Court. And the learned judges of that Court have deliberately concurred with the finding of the first Court upon this point. Their Lordships see no sufficient reason why these concurrent findings upon a pure question of fact should not be accepted.

Their Lordships will humbly advise His Majesty that the decrees of the High Court should be discharged with costs, and that the decrees of the Subordinate Judge should be restored, with the modification that in each decree, instead of wasilat being awarded for the period of claim, it be awarded for three years before suit.

The respondents will pay the costs of these appeals.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *T. C. Summerhays.*

J. C.

1904

MAHARAJA  
JAGADINDRA  
NATH ROY  
BAHADUR

v.  
RANI  
HEMANTA  
KUMARI  
DEBI.

www.libtool.com.cn

J. C.\*  
 1904  
 June 29;  
 July 12.

MUNNU LAL AND ANOTHER . . . . APPELLANTS;  
 AND  
 MAULVI SAIYID MUHAMMAD ISMAIL }  
 AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
 OF OUDH.

*Oudh Revenue Act, 1876, ss. 108 and 112—Liability of Owner of separate Chak for Revenue of Mahal—Oudh Laws Act, 1876, s. 9—Right of Pre-emption.*

*Held*, that the plaintiff as owner of a separate chak in a mahal, paying revenue therefor through the lambardars of the mahal, is under the combined operation of ss. 108 and 112 of the Oudh Revenue Act, 1876, liable for the revenue assessed on the whole mahal, and is therefore a co-sharer of the whole mahal within the meaning of s. 9 of the Oudh Laws Act, 1876, with a right of pre-emption thereunder. It is immaterial whether he resides in the village or is a member of the village community.

APPEAL from a decree of the above Court (Nov. 22, 1899) reversing a decree of the Subordinate Judge of Sitapur (June 24, 1898) which dismissed the suit.

The sole question was whether the first respondent, who was plaintiff in the suit, was entitled to pre-empt the village of Pahladpur, which had been sold by the second and third respondents to the appellants and the fourth respondent.

The right of pre-emption in Oudh is a statutory right, and provision is made therefor by Act XVIII. of 1876, Part III., c. 2. Sect. 9 of the Act is as follows:—

“If the property to be sold or foreclosed is a proprietary or under-proprietary tenure, or a share of such a tenure, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,

“1st. To co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor.

“2nd. To co-sharers of the whole mahal in the same order.

“3rd. To any member of the village community, and

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

"4th. If the property be an under-proprietary tenure to the proprietor." [www.libtool.com.cn](http://www.libtool.com.cn)

J. C.

1904

MUNNU LAL

v.

MAULVI  
SAIYID  
MUHAMMAD  
ISMAIL.

Sect. 10 of the said Act requires the vendor to give notice through the Court of his intention to sell; and by s. 11 the right of pre-emption is lost to any person who does not pay or tender the price mentioned in the said notice within three months of the date thereof.

The plaintiff recited the sale, that no notice was given under s. 10, that the price mentioned in the deed of sale was fraudulent, and prayed for a decree for pre-emption at the market value. The defence was that the plaintiff had no right to pre-empt, that a custom to that effect did not apply to the village in question, and that the plaintiff was not a co-sharer within the meaning of the above s. 9.

The Subordinate Judge decided that the plaintiff was superior proprietor of thirty-three acres in Pahladpur, and that the said tenure, together with the rest of the village, constituted one mahal. He was, however, of opinion that the plaintiff was not a co-sharer in the mahal or a member of the village community.

The judges of the Appellate Court said: "It is sufficient to hold that when the lambardar entered into a fresh agreement with Government to pay Rs.40 revenue on account of Rukn-ud-din's land, in addition to the revenue previously payable, and when Rukn-ud-din, i.e., the plaintiff's father, agreed to pay that sum to the lambardar, he thereby became a co-sharer with the lambardar in a perfect pattidari mahal." In construing s. 9 of Act XVIII. of 1876, they considered "that the existing legal position of the persons concerned is a sufficient guide to the meaning of the terms 'co-sharer' and 'member of the village community.' A co-sharer of the whole mahal is none the less a co-sharer merely because he may have become so by agreement with Government and other individuals, instead of by inheritance or purchase from original owners."

They also held that the suit was not barred under s. 11 of Act XVIII. of 1876, and that the formalities prescribed by Mahomedan law were not essential to the exercise of the right of pre-emption.

J. C.  
 1904  
 MUNNU LAL  
 v.  
 MAULVI  
 SAIYID  
 MUHAMMAD  
 ISMAIL.

*Bonnerjee*, for the appellants, contended that Act XVIII. of 1876 did not alter the law previously existing as to what constituted a co-sharer or member of a village community entitled to pre-emption. It was essential to such a relation that there should have been an original community of interest existing between and transmitted by inheritance or otherwise to the present holders of the land. Accordingly the plaintiff was neither a co-sharer in Pahladpur nor a member of a village community within the meaning of s. 9, clauses 2, 3. His position was that he held a small plot of land in the mahal as sole proprietor. He was not a member of the village community. To become such he must be resident in the village and subject to the control of the general body of the members of the community: see *Rahimuddin v. Rewal*. (1) Mahomedan law, moreover, only allowed the right of pre-emption in the same way as the Act, and made no difference to the plaintiff's position thereunder.

*De Gruyther*, for the plaintiff, the first respondent, was not heard.

1904  
 July 12.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The sole question in this appeal is whether the respondent Maulvi Saiyid Muhammad Ismail, who may be more conveniently referred to as the plaintiff, is entitled to pre-empt the village of Pahladpur, which had been sold to the appellants and the fourth and fifth respondents.

The village is in Oudh; and the appeal is against a judgment of the Judicial Commissioners of Oudh, who, reversing a decree of the Subordinate Judge of Sitapur, have held that the plaintiff has a right of pre-emption under the Oudh Laws Act (XVIII. of 1876). The facts are undisputed, and the question is entirely on the construction of the 9th section of the Act. Under that section, which admittedly applies to the sale of Pahladpur, the right of pre-emption is given to (among other persons) "co-sharers of the whole mahal" in order of their relationship to the vendor, and to "any member of the village community."

(1) (1903) L. R. 30 Ind. Ap. 89.

There is no question about the relationship of the plaintiff, and the only dispute is whether his connection with the village is such as to give him the right of pre-emption. The material facts are that the plaintiff is owner of a chak of thirty-three acres in Pahladpur; and, by the settlement under which he holds, he pays Rs.40 per annum of revenue, this being payable through the lambardars of the village; but he does not reside in the village.

The judgment of the Judicial Commissioner was that the plaintiff is a co-sharer of the whole mahal. This opinion is concurred in by the Additional Judicial Commissioner, who further held that the plaintiff is also a member of the village community.

In their Lordships' judgment it is clear that the plaintiff is a co-sharer of the whole mahal, in the sense of the 9th section of the Oudh Laws Act, 1876; and, this being so, it is unnecessary to discuss the question whether he is also a "member of the village community."

The Oudh Land Revenue Act (No. XVII. of 1876) is really decisive of the right of the plaintiff to be deemed a co-sharer of the whole mahal. In the case of every mahal, according to s. 108, the entire mahal is to be charged with, and all the proprietors jointly and severally shall be responsible to Government for, the revenue for the time being assessed on the mahal. The term "proprietors" for the purposes of that chapter of the Act includes all persons in possession for their own benefit, and the "chapter" is the whole of that relating to collection of the land revenue, and everything now to be referred to is in that chapter. The 112th section provides that if the settlement of any land has been made with a lambardar, and if there be an arrear of revenue due in respect of such land, both the lambardar and the co-sharers of the mahal from which the arrear is due shall be deemed defaulters. By s. 121 it is provided that, if an arrear of land revenue has become due in respect of the share of any member of a village community, such community, or any member thereof, may tender payment of such arrear, or may offer to pay such arrear by instalments. And in case of conflicting tenders or offers under this section

J. C.

1904

MUNNU LAL

v.

MAULVI  
SAFYID  
MUHAMMAD  
ISMAIL.

J. C. the co-sharer who, in case the share were sold, would have a  
1904 right of pre-emption under s. 9 of the Oudh Laws Act, shall be  
MUNNU LAL preferred.

v.  
MAULVI  
SAIYID  
MUHAMMAD  
ISMAIL.

This last enactment is important, because it expressly identifies "the co-sharer" of the 9th section of the Oudh Laws Act of the same year with every proprietor who, by the combined operation of ss. 108 and 112 of the Oudh Land Revenue Act, is liable for the revenue assessed on the whole mahal. If the various sections of this "chapter" of that Act be read together, it is plain that every "proprietor" liable for the revenue of the mahal is a "co-sharer." The plaintiff is exactly in this position. He is certainly a "proprietor" in the sense of s. 108 of the Land Revenue Act; and the settlement of his land has been made (on the face of his title) with a lambardar in the sense of s. 112. He is, therefore, liable just as much as every other proprietor in the mahal for the whole arrear of the mahal in case of default. Their Lordships accordingly consider that the fact that the share of the plaintiff in the mahal consists of a separate chak does not make him the less a co-sharer in the sense of this legislation, and the circumstance of his being non-resident does not seem to affect, or even bear upon, the language or the theory of the enactment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, and the appellants will pay the costs of the appeal.

Solicitors for appellants: *Young, Jackson, Beard & King.*

Solicitors for respondents: *Watkins & Lempriere.*

www.libtool.com.cn

MUSAMMAT SHAFIQ-UN-NISA . . . PLAINTIFF ;  
 AND  
 KHAN BAHADUR RAJA SHABAN ALI }  
 KHAN . . . . . } DEFENDANT.

J. C.\*  
 1904  
 July 7, 8.

ON APPEAL FROM THE COURT OF THE JUDICIAL  
 COMMISSIONER OF OUDH.

*Indian Evidence Act, ss. 4, 32, 90—Evidence of Hearsay—Discretion as to  
 calling for Evidence of Document more than thirty years ago.*

So far as evidence is hearsay the Courts in India were held to have rightly applied s. 32 of the Indian Evidence Act in rejecting it when the witnesses do not state from whom they derived their information, nor at what period they derived it.

The Courts in India having in their discretion under s. 4 of the Evidence Act called for evidence of the genuineness of a document, although, being more than thirty years old and coming from the proper custody, they were authorized by s. 90 to presume it:—

*Held*, that the discretion so exercised would not be overruled.

APPEAL from a decree of the above Court (April 6, 1899) affirming a decree of the Additional Civil Judge of Lucknow (July 12, 1897).

In an ejectment suit respecting the estates of Raja Nawab Ali Khan, whose name is entered in the first and second lists under s. 8 of Act I. of 1869, the main questions were whether the appellant is the niece and the respondent the legitimate son of the late Raja. It lay on the appellant to prove her relationship and the illegitimacy of the respondent, and there were concurrent findings of fact against her.

*Bonnerjee*, for the appellant, contended that his oral evidence to prove the appellant's relationship to the deceased was wrongly rejected. Also, a document, P 6, had been wrongly rejected. It was a letter produced from the Court of the Deputy Collector, being a letter from the deceased to a peshkar

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.  
1904  
MUSAMMAT  
SHAFIQ-UN-  
NISA  
v.  
KHAN  
BAHADUR  
RAJA  
SHABAN ALI  
KHAN.

dated April 25, 1865, and acknowledging the plaintiff's relationship as real niece. It was more than thirty years old, and came from the proper custody and should have been presumed to be genuine: see s. 90 of Act I. of 1872. Both Courts rejected it because no proof of its genuineness had been given.

*De Gruyther*, for the respondent, was not heard.

July 8. The judgment of their Lordships was delivered by

LORD DAVEY. In this case the appellant, who was the plaintiff in the suit, sued the respondent, who was the defendant, for recovery of possession of a taluq called Salempur, in Oudh. The respondent is in possession, and he claims to be entitled to the taluq as the son and next male heir of a former taluqdar, Raja Nawab Ali Khan. The appellant, however, alleges that the respondent is not the legitimate son of Nawab Ali, and that she is the elder daughter of the sister (now deceased) of Nawab Ali, and is entitled, according to Mahomedan law, by the Oudh Estates Act to succeed to the estate. The respondent denies the alleged relationship of the appellant to Nawab Ali, and as the appellant can only succeed on the strength of her own title, the first issue is whether the appellant fills the position she alleges. The learned judges of the Civil Court and of the Court of the Judicial Commissioner have given concurrent judgments against the appellant on this point. Under these circumstances it is not necessary for their Lordships to review all the evidence at length.

But the appellant suggests that the Civil Court and the Court of the Judicial Commissioner have given erroneous findings in matters of law. The only two points, however, to which counsel for the appellant directed their Lordships' attention were these. In the first place, he says that both Courts below have treated as inadmissible the evidence of certain witnesses on the ground that their evidence is hearsay only and has not conformed with the requirements of the Indian Evidence Act; and, secondly, he says that a certain document, marked P 6, was wrongly rejected in evidence.

As to the first objection, their Lordships are of opinion that no fault can be found with the mode in which the Courts in

India have dealt with the evidence in question. On the face of the evidence it is sometimes a little uncertain whether the witnesses purport to be speaking from their own personal knowledge, or from information which they have derived as members of the family or otherwise. But the Courts appear to have considered the evidence of the witnesses from both points of view. They say, either these witnesses are speaking from personal knowledge, or they are speaking from information which they have derived from others, and, if they are speaking from information which they have derived from others, they do not state the persons from whom they derived that information, nor—which is equally important—at what period of time they derived it; and, if they are speaking from personal knowledge, the learned judges point out inaccuracies and contradictions in their evidence which, in their opinion, render the witnesses unworthy of credit.

Their Lordships do not conceive it to be any part of their duty to criticise with any strictness the opinion which has been expressed by the Courts as to the credibility of the witnesses. That, in their Lordships' opinion, is eminently a question for the Courts in India. But their Lordships see no reason to differ from the estimate which both Courts have formed as to the weight to be attached to the statements made by the witnesses, and so far as the witnesses are speaking from information and not from personal knowledge, their Lordships see no reason to question the manner in which the Courts below have applied the provisions of s. 32 of the Indian Evidence Act.

The other question which has been put before their Lordships as a matter of law is the admissibility of the exhibit P 6. That document, if proved to be a genuine statement of Nawab Ali, would go a long way towards establishing the appellant's case. But both the Courts in India have rejected it. It is a document purporting to be dated on a Mahomedan date corresponding to April 25, 1865. It purports to be a letter written by Nawab Ali in his own hand, and signed by himself, addressed to the peshkar or keeper of the public records of the Collector. It is produced out of the custody of the Deputy Collector. Under these circumstances, the document being

J. C.

1904

MUSAMMAT  
SHAFIQ-UN-  
NISAv.  
KHAN  
BAHADUR  
RAJA  
SHABAN ALI  
KHAN.

J. C.  
1904  
MUSAMMAT  
SHAFIQ-UN-  
NISA  
v.  
KHAN  
BAHADUR  
RAJA  
SHABAN ALI  
KHAN.

more than thirty years old, the provisions of s. 90 of the Indian Evidence Act are applicable, and the Court may presume the genuineness of it without proof. Sect. 90 says : "The Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting." What is meant by "the Court may presume" a document to be genuine is shewn by s. 4 of the Act, which is in these terms : "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it." The learned judge in the Civil Court called for proof of the document, but no proof was forthcoming. It is one of the remarkable things in this case that the plaintiff did not give any evidence of her own, and no witness was called on her part who was acquainted with Nawab Ali's handwriting to say whether the document was in his handwriting or not. Therefore it may be taken that, unless it can be admitted to evidence under s. 90 of the Evidence Act, there is no proof of the genuineness of the document. On the other hand there are circumstances, both internal and external, which throw great doubts upon the genuineness of the document. It is said that the plaintiff was Nawab Ali's adopted daughter, brought up by him, and that she was in receipt of proper maintenance and support out of the income of his estate. There is no evidence of those facts, and, if evidence could have been given of those facts, one would have thought that the appellant would have given such evidence, as it might have a material bearing upon her case.

Under these circumstances, their Lordships are not surprised that the judges, both in the Civil Court and in the Court of the Judicial Commissioner, exercised the discretion which is vested in them by s. 90, by not admitting the document to evidence without formal proof, although it is more than thirty years old, and purports to come from the proper custody. It should be added that the Court considered that there was evidence in the case—which it is not necessary to go into, and to which, in fact, their Lordships' attention has not been

pointedly drawn—which raised great suspicions as to the document itself. Their Lordships would always be extremely slow to overrule the discretion exercised by a learned judge under s. 90 of the Act, and certainly this is not a case in which they would be disposed to do so.

If these questions are disposed of there is really no question of law left as regards this part of the case, and their Lordships therefore can do nothing else but adopt the concurrent findings of both Courts below, and hold that the appellant has failed to prove her title.

It is not necessary, of course, and their Lordships are not asked to do so, to give any decision on the second issue of the case, whether the defendant is, or is not, the legitimate son of Nawab Ali. This being an ejectment action, the plaintiff must succeed on the strength of her own title, and as she has failed to prove her title the suit was properly dismissed.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs of it.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Watkins & Lempriere.*

J. C.

1904

MUSAMMAT  
SHAFIQ-UN  
NISA

v.

KHAN  
BAHADUR  
RAJA  
SHABAN ALI  
KHAN.

www.libtool.com.cn

J. C.\* TURNER AND ANOTHER . . . . . DEFENDANTS;

1904

AND

May 17, 18, HAJI GOOLAM MAHOMED AZAM . . PLAINTIFF.  
31;  
June 22.

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

*Law of Shipping—Time Charter—Sub-charter—Bills of Lading—Goods within Bill of Lading not subject to Charter Lien—Construction of Contract.*

Under a time charter with power to sublet the shipowners retained legal possession of the ship through the captain appointed and paid by themselves, who was to be the agent in several respects for the charterers, and in particular to sign bills of lading at any rates of freight that they might direct "without prejudice to this charter," and they also were entitled to a lien upon all cargoes for freight or charter money due under the charter:—

*Held*, that bills of lading granted by the captain to the respondent, a sub-charterer from the charterers with notice of the time charter, were not mere receipts for goods, but contracts which bound the shipowners, and that the respondent, having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues.

*Colvin v. Newberry*, (1832) 1 Cl. & F. 283; 33 R. R. 437, distinguished.

*Held*, further, that the words "without prejudice to this charter" mean that the time charter remains unaltered as between the owners and the charterers, notwithstanding the bills of lading. They do not limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods comprised therein for freight payable under the time charter.

APPEAL from a decree of the Court of Appeal (April 19, 1901) reversing a decree of Russell J. (March 22, 1900).

The appellant Glanville was at all material times the registered managing owner of the steamship *Bombay*, and the appellant Turner her master. The *Bombay* was, by a charterparty dated August 20, 1898 (hereinafter called the time charter), let for six months to Messrs. Issabhoy Thaver & Co., and was by an agreement of August 26, 1898, which was subsequently embodied in a charterparty (hereinafter called the sub-charter) sublet by Messrs. Issabhoy Thaver & Co. to the respondent for a round voyage. By the time charter a lien was given to

\* *Present*: LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

the owners of the *Bombay* upon all cargoes for freight or charter money due under the charter. The respondent had notice of the time charter and its terms.

During the currency of the time charter, that is to say on February 2, 1899, the *Bombay*, in prosecution of the round voyage for which she was sub-chartered to the respondent, arrived at Bombay having on board of her two consignments of sugar, one of 13,431 bags and the other of 17,076 bags, which had been shipped by the respondent at Mauritius, and in respect of which the respondent was himself the holder of the bills of lading. There was then due to the owners of the *Bombay* a month's hire amounting to Rs.18,000, equivalent to 1197l., and for this freight or charter money the appellant Turner, on the instructions of his owners, exercised a lien on the said bags of sugar.

The respondent, on February 8, 1899, sued the appellant Turner and one Chabildas Lulloobhoy, afterwards changed to Glanville, as one of the owners of the *Bombay*. His prayer was for an order on the defendants for delivery to him of the said bags of sugar or for payment of five lacs of rupees, their value, and costs of suit, and such further or other relief as the nature of the case might require. The respondent alleged that the detention of the sugar was wrongful, that the bills of lading admitted that the freight was paid in Port Louis, and that he was entitled to receive delivery of the sugar without payment of any freight.

The appellant Turner by his written statement contended that he was lawfully entitled to exercise the lien given by the time charter for the hire of the steamer against the goods claimed by the plaintiff, and was also lawfully entitled to exercise a lien upon the said goods for freight for all the goods mentioned in the bills of lading specified in the list No. 3 annexed to the written statement. The appellant Turner also alleged that the respondent was aware of the terms of the time charter which conferred the lien, and, further, that he, the appellant Turner, was induced to sign the bills of lading without receiving any freight by a misrepresentation of the respondent's agents.

J. C.

1904

TURNER

v.  
HAJI GOOLAM  
MAHOMED  
AZAM.

J. C.

1904

TURNER

v.

HAJI GOOLAM  
MAHOMED  
AZAM.

The appellant Glanville by his written statement contended that all the cargo shipped by the plaintiff upon the said vessel was the subject of the lien given to the owners by the time charter, and that the captain rightly exercised the lien upon the cargo for the amount of Rs.18,000; and, further, that the captain had no authority to sign the bills of lading in the plaint mentioned without providing that the freight payable in respect of the goods shipped thereunder should be paid to the captain or the agents of the owner; and, further, that the signature of the captain to the said bills of lading was obtained at Mauritius by misrepresentation on the part of the agents of the respondent; and that without prejudice to any of the foregoing defences the respondent was bound to pay reasonable freight for the goods shipped under the bills of lading; and that the captain was justified in exercising a lien upon the goods of the respondent; and that the lien exercised by the captain was good at least for the amount of such freight.

The most material provisions of the time charter were as follows:—

By clause 4: That the charterers should pay for the use and hire of the vessel at the rate of 7s. 6d. per gross register ton per calendar month. This amounted to 1197l., or Rs.18,000, per month.

By clause 8: That payment was to be made in cash monthly in advance to owners' agents in Bombay, and that in default of such payment the owners or their agent should have the faculty of withdrawing the said steamer from the service of the said charterers.

By clause 14: That the captain (although appointed by the owners) should be under the orders and direction of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to this charter.

By clause 21: That charterers were to have the option of sub-letting the steamer.

By clause 22: That the owners should have a lien upon all cargoes for freight or charter money due under this charter.

The most material provisions of the sub-charter, under which freight was to be calculated upon the amount of cargo carried by the vessel from Saigon to Réunion, were :—

Clause 15 : The captain, if necessary, to sign bills of lading at any freight without prejudice to this charterparty.

Clause 24 : Time charterers to have a lien on the cargo for freight and demurrage (if any).

Russell J. declared by his decree that the appellants were entitled to the lien claimed, that the respondent was at all material times aware of the time charter and its terms, and that his goods were not exempt from the lien conferred by that charter; also that the bills of lading were signed by the master in the form employed without authority of the owners, and that the signature of the master was obtained by misrepresentation, and was affixed by mistake, and that the bills of lading had no validity as against the appellants. The learned judge further found that under any circumstances the respondent was not entitled to demand his cargo or to maintain the suit without tendering the amount due under the terms of the sub-charter, and that no tender was made by the respondent.

The Court of Appeal, on the contrary, declared that there was a lien against the respondent only for the balance of the sub-charter freight, which amount was to be determined thereafter; and that if on such inquiry it was found that the balance due was less than Rs.6000, then the respondent was to be entitled to damages to an amount to be ascertained. Further consideration and costs were reserved with liberty to apply.

With regard to the respondent having had knowledge of the time charter and its terms, the Court of Appeal was of opinion that this fact was in the circumstances immaterial, and that the shipowners having by the time charter authorized the sub-letting of the vessel, their lien was limited to the freight for which the time charterer had a lien—that is to say, for the freight due under the sub-charter. The Court was also of opinion that there had not been misrepresentation inducing the signing of the bills of lading, but in the view of the Court these bills of lading were mere acknowledgments of the

J. C.

1904

TURNER

v.

HAJI GOOLAM  
MAHOMED  
AZAM.

J. C.  
1904  
TURNER  
v.  
HAJI GOOLAM  
MAHOMED  
AZAM.

receipt of the goods, and the rights of the parties were fixed by the sub-charter.

*Carver, K.C.*, and *A. Adair Roche*, for the appellants, contended that this judgment was wrong, and that the judgment of *Russell J.* ought to be restored. They referred to *Hansen v. Harrold Brothers* (1), and contended that in the circumstances of this case the appellants were entitled to the lien which they claimed upon the respondent's goods. As regards the lien for the unpaid hire of the vessel, that was claimed by the appellants under the terms of the time charter of which the respondent at the date of shipment had notice. Notwithstanding, the power of the time charterers to sublet the vessel remained subject to the terms of the time charter, and accordingly both time charterer and sub-charterer, the latter having had effective notice or means of knowledge of its contents, were bound thereby: see especially clause 22. In the amount of lien, therefore, the appellants were not limited to the amount due under the sub-charter: see *Peek v. Larsen* (2) as to the effect of notice: *Ralli Brothers v. Paddington Steamship Co.* (3) Moreover, the terms of the sub-charter did not confer on the respondent any right to ship goods free from the operation of the lien conferred by the time charter. With regard to the relation to the shipowner of the man who ships his goods on board without contract except with the charterer, see *Delaurier v. Wyllie* (4); *Reynolds v. Jex* (5); *Small v. Moates*. (6)

Then with regard to the bills of lading, it was contended that they were signed by the master on the requirement of the respondent's agents claiming to be entitled thereto under the charterparty. They did not amount to an agreement with the respondent, or confer on him any right to have the goods free from the lien for unpaid hire. If the bills had any such effect, the master had no authority to sign them in that form. The only bills which he had power to sign were without prejudice

- |                                                   |                                     |
|---------------------------------------------------|-------------------------------------|
| (1) [1894] 1 Q. B. 612; S.C. 63 L. J. (Q.B.) 744. | (4) (1889) 17 R. 167, 191.          |
| (2) (1871) L. R. 12 Eq. 378.                      | (5) (1865) 34 L. J. (Q.B.) 251;     |
| 383.                                              | S. C. 7 B. & S. 86.                 |
| (3) (1900) 5 Com. Cas. 124.                       | (6) (1833) 9 Bing. 574, 579, 591-2; |
|                                                   | 35 R. R. 613.                       |

to the time charter, i.e. subject to its terms. The evidence shewed that his signature was induced by misrepresentation of the respondent's agents, and was given under a mistake as to the facts. Under all the circumstances of the case, the bills of lading were mere receipts for goods put on board, and were not contracts which overrode the terms of the charters. The respondent had had no contract with the ship at all freed from the provisions including lien contained in the time charters.

*J. A. Hamilton, K.C.*, and *Lauriston Batten*, for the respondent, contended that no right of lien had been made out in favour of the appellants as arising from any contract express or implied. The respondent's contract was with the time charterers. There was no proof that he knew the terms, but only the existence of the time charter. As regards the chartered hire, therefore, he was not a party to the time charter, nor bound by its terms. The respondent's liabilities were under his sub-charter. He made it on behalf of his firm in Mauritius, to whom he had paid his bill of lading freight on his own goods. They were discharged, therefore, of bill of lading freights. They were not subject to a lien for chartered freight either under the time charter or sub-charter; or if under the latter instrument, the respondent was always ready to discharge it. The respondent's contract was comprised in the sub-charter and bills of lading which the master had authority to make, and by those contracts he should be bound, free of all obligation under the time charter: see *Tharsis Copper Mining Co. v. Culliford* (1); *Small v. Moates* (2); *Gledstanes v. Allen*. (3) Misrepresentation was disproved, and the appellants were not entitled to repudiate the bills of lading, which were only such as the respondent was entitled to claim when he shipped the goods, and which bound the owners. Reference was made to *Kern v. Deslandes* (4); *Reynolds v. Jex* (5); and reliance was placed on *The Shillitto* (6); *Carver's Carriage by Sea*, s. 161. The real question is as to

J. C.  
1904  
TURNER  
v.  
HAJI GOOLAM  
MAHOMED  
AZAM.  
—

(1) (1873) 22 W. R. 47.

(3) (1852) 12 C. B. 207.

(2) 9 Bing. 574, 579, 591-2; 35 R. R. 613.

(4) (1861) 10 C. B. (N.S.) 205.

(5) 34 L. J. (Q.B.) 251.

(6) (1897) 3 Com. Cas. 44, 46-48.

J. C.  
1904  
TURNER  
v.  
HAJI GOOLAM  
MAHOMED  
AZAM.  
—

the terms on which the goods were carried. The consignee was entitled to delivery on payment of an amount certain, which might be less than that due under the time charter. The master had authority to receive goods on any terms "without prejudice to the charterparty"—that is, without prejudice to any rights as between the owners and the time charterers. In other respects his powers were not limited. Accordingly the bills of lading were evidence of separate contracts with the shippers into which the terms of the charterparty were not incorporated, either by actual reference thereto or by force of the law of notice: see *Peek v. Larsen* (1); *Sewell v. Burdick* (2); *Leduc v. Ward* (3); *Rodoconachi v. Milburn* (4); *Haywood v. Brunswick Building Society*. (5)

*Carver, K.C.*, replied.

1904  
June 22.  
—

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the appellants, who are shipowners, are entitled to a lien for freight payable under a time charter on the goods of the respondent, who was no party to that charter, but whose goods were carried in the appellants' ship under a sub-charter and bill of lading. The judge of first instance decided this question in favour of the appellants. His decision was reversed by the Court of Appeal in Bombay, and the present appeal is from the decision of that Court.

The undisputed facts are as follows:—

The appellant Glanville was the registered owner of the steamship *Bombay*, and the appellant Turner was her captain. By a charter dated August 20, 1898, and entered into by the agents of the owners and some Bombay merchants named Issabhoy Thaver & Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. She was placed at their disposal with a full complement of officers and men at Bombay for employment in the Indian

(1) L. R. 12 Eq. 378.

(3) (1888) 20 Q. B. D. 475, 479.

(2) (1884) 10 App. Cas. 74, 105.

(4) (1886) 18 Q. B. D. 67.

(5) (1881) 8 Q. B. D. 403, 406.

Ocean and other Eastern waters as the charterers or their agents should direct, on certain conditions of which the following are important: (2.) The owners were to pay the captain and crew. (4.) The charterers were to pay freight monthly in advance at the rate of 7s. 6d. per ton, which came to Rs.18,000. (8.) In default of such payment the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them. (14.) The captain, although appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter, and the captain was to attend daily, if required, at their offices to do so. The charterers were to indemnify the owners from all consequences or liabilities that might arise from the captain doing so except for short delivery. (21.) The charterers were to have the option of sub-letting the steamer. (22.) The owners were to have a lien upon all cargoes for freight or charter money due under the charter, and the charterers were to have a lien on the ship for all moneys paid in advance and not earned.

The 14th, 21st, and 22nd conditions are those which have given rise to the controversy between the parties; but before considering them it will be convenient to state what was done, and, for the purpose of avoiding confusion, the charterers under this charter will be referred to as the "time charterers" in order to distinguish them from the respondent, who is their sub-charterer.

Shortly after the time charter was made the ship was sub-chartered to the respondent for a round voyage from Saigon to Réunion and back from Mauritius to Bombay. She was to take rice from Saigon to Réunion and sugar from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate Rs.1 8a. per bag of 168 lbs., calculated only on the cargo shipped from Saigon to Réunion. There was to be no freight payable by the sub-charterer to the time charterer for any other cargo. On account of the freight thus estimated,

J. C.  
1904  
TURNER  
H. G.  
HAJI GOOLAM  
MAHOMED  
AZAM.

J. C.  
1904  
TURNER  
v.  
HAJI GOOLAM  
MAHOMED  
AZAM.  
—

Rs.37,500 were to be paid at Bombay before the steamer sailed from Saigon, Rs.25,000 at Réunion or Mauritius, and the balance was to be paid at Bombay after delivery of the cargo there.

It will be observed that neither of these documents took the ship out of the legal possession of the owners so as to deprive them of the power of detaining goods on board, and of enforcing any lien to which they might be entitled. The captain retained possession for the owners, and was in a position to enforce the lien expressly conferred by the time charter if it was properly enforceable against the goods in question.

The steamer completed this voyage, and on February 2, 1899, she arrived at Bombay, having on board a quantity of sugar put on board by the sub-charterer at Mauritius, and for which he had received bills of lading from the captain. The freight payable by these bills of lading was at the rate of 6 annas per 75 kilograms, and this freight was prepaid by the sub-charterer in Mauritius, so that when the ship arrived in Bombay nothing remained to be paid by the sub-charterer to the owners in respect of the bill of lading freight. It appears, however, that something was due from the sub-charterer to the time charterers for money payable under the sub-charter.

There was also due to the owners a month's freight, i.e., Rs.18,000 (1197L.), from the time charterers under the time charter, and the owners claimed a lien for this amount on the sub-charterer's sugar. Hence the dispute between the parties. The sub-charterer brought an action to recover his sugar, or its value, and damages for its detention, and the shipowners defended the action relying on their lien.

So far there is no dispute about the facts. The shipowners, however, also defended the action upon the ground of misrepresentation alleged to have been made by the sub-charterer to the captain before the sugar was shipped, and on the faith of which he is said to have signed the bills of lading.

This alleged misrepresentation was denied, and a considerable amount of evidence upon it was adduced. The judge of

first instance thought the defence proved. But the Court of Appeal took ~~a different view.~~ The evidence has again been laid before their Lordships, and they have carefully considered it. It appears that the sub-charterer had paid to the agents of the shipowners some of the freight payable in advance under the time charter, and there was undoubtedly some misunderstanding on the part of the captain as to similar payments being made in future. But their Lordships are not satisfied that the sub-charterer made any false statement to the owners' agents or to the captain, nor any representation or promise which could confer on the owners any lien on the sub-charterer's goods other than such as the documents above referred to entitle them to assert.

J. C.  
1904  
TURNER  
v.  
HAJI GOOLAM  
MAHOMED  
AZAM.

Their Lordships, however, agree with both Courts in India in their conclusion that the sub-charterer knew, in a general way, of the time charter, and that the freight payable under it by the time charterers was Rs.18,000, payable monthly in advance.

Bearing these conclusions in mind, their Lordships will consider the legal position of the parties.

The first question which arises is the effect of the bills of lading. Apart from them, there was no contract between the shipowners and the sub-charterer. But he shipped his sugar on board the steamer on the terms of those bills of lading, and the captain was authorized by the time charter to sign them. Whether he signed them for the shipowners or for the sub-charterer he had express authority from the shipowners to sign them. Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading. This distinguishes the present case from *Colvin v. Newberry* (1), where the bill of lading given by the captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the captain. Nor is the present case governed by *Small v. Moates* (2) and others of that class, where the holder

(1) 1 Cl. & F. 283; 33 R. R. 437.

(2) 9 Bing. 574; 35 R. R. 613.

J. C.

1904

TURNER

v.

HAJI GOOLAM

MAHOMED

AZAM.

of the bill of lading had no better title than the charterer who was himself the captain of the ship and the original shipper of the goods.

It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charterparty entered into between them and which the captain had no authority to depart from.

Unless, therefore, the fact that the sub-charterer had notice of the time charter makes a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight. This was decided in *Fry v. Chartered Mercantile Bank of India* (1), which was followed in *Gardner v. Trechmann*. (2) In both of these cases the bill of lading expressly referred to the charterparty, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it.

These cases, and others like them, shew that notice by a shipper of a charterparty has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charterparty shews that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charterparty. If the shipper knew that there was a charterparty, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. In the present case the time charterer had authority to let other persons have the use of the ship for six months for any voyage in the waters mentioned in the time charter. The captain was not only empowered to sign but was bound to sign bills of lading at any rate of freight which the charterers or their agents might direct, but without prejudice to that charter. These words introduce a difficulty. It is said that they limit the authority of the captain to sign bills of lading which do not preserve to the owners the power

(1) (1866) L. R. 1 C. P. 689.

(2) (1884) 15 Q. B. D. 154.

to withdraw the ship under condition 8 of the time charter and their lien on all goods under condition 22. This construction is a possible construction, but it has long ago been rejected both by commercial men and by judicial decision.

There can be no doubt that the sub-charterer must for this purpose be regarded as an agent of the charterer. The words "without prejudice to this charter" mean that the rights of the shipowners against the time charterers, and vice versa, are to be preserved. That this is the true meaning and legal effect of the words "without prejudice to this charter" has often been the subject of controversy and of judicial decision, and has long been treated as settled by authority. In *Hansen v. Harrold Brothers* (1) Lord Esher said its meaning was "that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." It means no more. Condition 8 in the time charter, empowering the owners to withdraw the ship, cannot mean that, after the captain has shipped goods for Bombay and given bills of lading for them to persons other than the time charterers, the owners can refuse to allow the ship to go to Bombay and deliver the goods there as agreed by the bills of lading. So as regards condition 22 giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of justice can be expected to recognise it.

If their Lordships had taken a different view of the legal effect of the bills of lading there might have been more difficulty

J.O.

1904

TURNER

v.

HAJI GOOLAM  
MAHOMED  
AZAM.

(1) [1894] 1 Q. B. 612.

J. C.

1904

TURNER

v.  
HAJI GOOLAM  
MAHOMED  
AZAM.  
—

in the case, for there is great force in Mr. Carver's argument that, if the bills of lading were mere receipts for goods put on board, the sub-charterer could have had no greater rights than those which the time charterers had themselves. It is not, however, necessary to solve the difficulties which would have arisen if there had been no bills of lading. For the reasons above stated their Lordships are of opinion that the claim of the shipowners cannot be supported, and that the order appealed from ought to be affirmed.

Their Lordships observe that the Court of Appeal gave the shipowners the benefit of any lien which the time charterers had on the goods of the sub-charterer. This seems right, and the sub-charterer's counsel did not contend that it was not.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs.

Solicitors for appellants : *Maples, Teesdale & Co.*

Solicitors for respondent : *Waltons, Johnson, Bubb & Whetton.*

www.libtool.com.cn

DURGA BAKHSI SINGH . . . . . PLAINTIFF; J. C.\*  
 AND 1904  
 MIRZA MUHAMMAD ALI BEG . . . . . DEFENDANT. July 8, 29.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
 OF OUDH.

*Suit for Cancellation of Mortgage Deed—Issue as to Insanity of Mortgagor—  
 Finding of Fact should be on Allegation and Evidence.*

Where in suits for cancellation of two mortgage deeds executed by the plaintiff's father the case made by the plaintiff was that the mortgagor was insane and that the deeds were obtained by fraud :—

*Held*, that, as the evidence which was directed to insanity in its crudest and most palpable form and to establish fraud failed, the suits must be dismissed. The first Court was not justified in commuting an insufficient case of insanity into a case of a helpless or facile mortgagor, and in consequence granting a decree for cancellation, except so far as consideration had actually passed.

APPEALS from decrees of the above Court (July 31, 1899) varying decrees of the Subordinate Judge of Sitapur (Oct. 27, 1898).

The suits were instituted for the cancellation of two deeds of mortgage, one for Rs.14,400 and the other for Rs.8000, executed on January 13, 1892, by Fateh Singh, the father of the appellant, in favour of the respondent, Muhammad Ali Beg. The cancellation was sought on the ground that Fateh Singh, at the time of executing the said mortgages, was insane, or at any rate of "weak intellect," and undue advantage had been taken of him.

The respondent denied that Fateh Singh was insane or of weak intellect, and that any fraud or undue influence had been resorted to in connection with the execution of either deed.

The Subordinate Judge found on the evidence adduced that "Fateh Singh was not insane, but he was quite helpless; he was not independent and was weak-minded." As to the mortgage deed for Rs.8000, he was of opinion "there is no doubt

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.  
1904  
DURGA  
BAKSH  
SINGH  
v.  
MIRZA  
MUHAMMAD  
ALI BEG.

as to the genuineness of this mortgage deed, for the money borrowed from the defendant was paid towards the debts due to the other creditors." As regards the deed for Rs.14,400, he found that "Rs.8000 is correct and legal, and the balance is illegal and capable of cancellation, and the mortgage deed for Rs.8000 is not cancellable."

The appellate Court reviewed the evidence adduced by the appellant to establish "that at the time of the execution of the deeds Fateh Singh was not of sound mind within the meaning of s. 12, Indian Contract Act, 1872"; they said the Subordinate Judge clearly did not believe the evidence, and he was quite right in not believing it. "It is improbable that Fateh Singh would suddenly fall into the mental condition described by plaintiff's witnesses . . . . The Subordinate Judge does not state from what facts he draws the inference that Fateh Singh was weak-minded, nor does he say what he means by Fateh Singh being weak-minded. If the evidence produced by the plaintiff shewing that Fateh Singh was insane is incredible, there seems to me to be no evidence at all which can be taken to prove that Fateh Singh was otherwise of unsound mind." They dealt with the mortgage deed for Rs.14,400, and held that the "Subordinate Judge was wrong in decreeing the plaintiff's suit as regards the balance of Rs.14,400, viz., Rs.6400." They affirmed the finding of the lower Court with regard to the other mortgage, and dismissed the suits.

*De Gruyther*, for the appellant, contended that it was proved that Fateh Singh was insane at the date of the deeds, and incapable of understanding the nature of the transaction; and that the mortgages were obtained by fraud. The onus of shewing that the transactions were bona fide was on the respondent, and had not been discharged by him either in whole or in part. The deeds ought to be cancelled.

*Bonnerjee*, for the respondent, relied on concurrent findings of fact to the effect that the mortgagor was not insane, and that the appellant was not entitled to relief as regards the deed for Rs.8000, or as regards the other to the extent of Rs.8000. The Subordinate Judge was wrong in cancelling the deed as regards

the balance of Rs.6400. No evidence was adduced of mental incapacity short of the total insanity, which was not established; it was not shewn that the mortgagor's mind was affected by age, illness, or mental or bodily distress. Both suits failed in their entirety.

*De Gruyther*, replied.

July 29. The judgment of their Lordships was delivered by

LORD ROBERTSON. The questions raised by these appeals arose in two suits, now consolidated, brought for the cancellation of two mortgage deeds granted to the respondent by Fateh Singh, the appellant's father, on January 13, 1892. The ground of action was the same in each case, namely, that Fateh was insane and that the deeds were obtained by fraud. At the same time it is necessary to bear in mind that the consideration of the mortgages was different, inasmuch as the one for Rs.8000 was granted for a fresh advance of cash paid down, while that for Rs.14,400 was granted as the result of a long series of former mortgages and decrees.

The Subordinate Judge, on October 27, 1898, held that the smaller mortgage could not be cancelled. As regards the larger one, he held it good to the extent of Rs.8000, and bad as regards the balance of Rs.6400. The Judicial Commissioners of Oudh, on July 31, 1899, held that the appellant had failed to establish his case in either suit, and dismissed both.

The essential weakness of the appellant's position is that both Courts have held Fateh not to have been insane, and the grounds upon which the Subordinate Judge gave him a limited decree in the Rs.14,400 suit are entirely unsupported by evidence. The theory of the Subordinate Judge was that, while Fateh was not insane, he was helpless and weak-minded, and the respondent defrauded him. Neither of these propositions is substantiated. All the testimony which goes to mental unsoundness in Fateh goes to insanity in its crudest and most palpable form, and there is no case of helplessness or weakness. Fateh was blind, and had been so for fifteen years. But the picture drawn of him by the appellant's witnesses is not of a helpless old man, but of a raving old man. Several

J. C.

1904

DURGA  
BAKSH  
SINGH

v.

MIRZA  
MUHAMMAD  
ALI BEG.

J. C.

1904

DURGA  
BAKSH  
SINGH  
v.  
MIRZA  
MUHAMMAD  
ALI BEG.

witnesses so describe him, and, having done so, leave their assertion unsupported by detail or circumstance. This account of Fateh found no credence in either Court, and had been contradicted by adequate and responsible testimony.

Now the case constructed by the Subordinate Judge and substituted for that advanced by the appellant is the case of a helpless or facile mortgagor, operated on by a fraudulent mortgagee. But then it is not legitimate to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence is something quite different; and, second, the appellant has entirely failed to make out any case of fraud at all. As regards the mortgage for Rs.8000, the materials were discouraging, this being a fresh advance of cash; and the mere circumstance that the money, or some part of it, was paid by Fateh to persons connected with the respondent comes to nothing, as this has not been followed up by shewing those payments to have been made sine causa. As regards the mortgage for Rs.14,400, the antecedent obligations of Fateh under old mortgages and decrees make it at least probable that he was really due that or some similar sum, the amount of which had been under negotiation. But it was for the appellant to bring this to a point by proving the state of the account; and on the face of the record this was one of the conditions of his succeeding. It is impossible to supplant this sort of case by a conjectural theory about the machinations of two taluqdars, such as has been supplied by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeals ought to be dismissed. The appellant will pay the costs of the appeals.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Barrow, Rogers & Nevill.*

www.libtool.com.cn

|                                                                                                                |                            |
|----------------------------------------------------------------------------------------------------------------|----------------------------|
| MAHARAJAH MADHAVA SINGH. . . APPELLANT;<br>AND<br>THE SECRETARY OF STATE FOR }<br>INDIA IN COUNCIL . . . . . } | J. C.*<br>1904<br>July 26. |
| RESPONDENT.                                                                                                    |                            |

ON APPEAL FROM THE COURT OF THE VICEROY.

*Practice—Special Leave to Appeal—Conviction by a Commission appointed by the Viceroy.*

Special leave to appeal from a decision of the Governor-General of India in Council removing the petitioner from the Government of the State of Panna refused; also from the conviction of the petitioner of a criminal offence by a Commission appointed by the Viceroy which was held to be not in any sense a Court from which an appeal would lie.

THIS was a petition by the Maharajah of Panna for special leave to appeal from the report of Commissioners appointed on November 5, 1901, by a resolution of the Government of India in the Foreign Department to inquire into the circumstances of the death within the limits of the Panna State of the petitioner's uncle Rao Khuman Singh, and to afford to the petitioner an opportunity of freeing himself from the grave imputation that "Rao Khuman Singh had been poisoned by persons instigated thereto by him." It stated that the Commissioners were vested with powers to try any person other than the petitioner on any charge which might be presented against him, and in case of conviction to pass sentence according to the law of British India. It further alleged that five persons were charged with murder or conspiracy to murder; that one absconded, one was convicted and hanged, and three were acquitted; that no charge was brought against the petitioner; but that an inquiry into his conduct was combined with the trial of the accused, with the result that the Commissioners reported (Jan. 25, 1902) that the imputation against the petitioner was true—that he was a member of a conspiracy to murder his uncle. The Government resolved in

\* *Present*: LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.

1904

MAHARAJAH

MADHAVA

SINGH

v.

SECRETARY OF  
STATE FOR  
INDIA IN  
COUNCIL.

the Foreign Department that this finding was correct, and deposed him from the chiefship of the Panna State.

The petition submitted that the report of the Commissioners purported to be a conviction by a Court established by His Majesty's Government and exercising jurisdiction conferred by the same authority; that no definite charge had been brought against him specifying what person or persons he instigated or conspired with, or when, where, or by what means he did so; that the investigation had been conducted as a collateral inquiry during the trial of five persons against whom definite charges had been brought, and except as regards one of them had not been established; that it had not been regulated by any recognised method of procedure, and that the view of the evidence had been accompanied by a finding that the petitioner had a very strong motive for getting rid of his uncle, which strong motive had been neither alleged nor proved; and it prayed for special leave to appeal from the report convicting him as aforesaid and from the order of the Viceroy confirming the same.

*Haldane, K.C.*, and *Cowell*, in support of the petition, contended that the Commissioners were a judicial body appointed under the Foreign Jurisdiction Act, 1879 (No. 21, s. 4), and that having regard to 3 & 4 Will. 4, c. 41, s. 3, and 7 & 8 Vict. c. 69, s. 1, an appeal lay to the King in Council provided special leave was given. They contended also that the irregularities of the inquiry were a sufficient ground of leave.

*Cohen, K.C.*, and *Phillips* contended that the proceedings were political, and the appointment of the Commission an act of State, not cognizable by judicial authority.

The judgment of their Lordships was delivered by

LORD DAVEY. (In this case the petitioner, the Maharajah, seeks to obtain leave to appeal to His Majesty in Council against an act of the Governor-General of India in Council removing him from the Government of the State of Panna. That is clearly a political act—an act of State—done by the Viceroy in Council in the interest of the State of Panna, and

the inhabitants of Panna, and for the peace and good government of India generally. Their Lordships are precluded by a long series of authorities and by well-established principles from entertaining a petition for leave to appeal against an act of that character. Mr. Haldane has contended that the appeal is against a conviction of the Maharajah ; but it is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the petition. There will be no order as to costs.

Solicitors for petitioner : *Gill, Pugh & Davey*.

Solicitor for respondent : *Solicitor, India Office*.

J. C.

1904

MAHARAJAH  
MADHAVA  
SINGH

v.  
SECRETARY OF  
STATE FOR  
INDIA IN  
COUNCIL.

[www.libtool.com.cn](http://www.libtool.com.cn)

# INDEX.

**ABATEMENT OF APPEAL:** *See* CIVIL PROCEDURE CODE, ss. 398, 582.

**ACT XI. OF 1859, ss. 37, 53—Purchase at a Revenue Sale by Proprietor—Purchaser subject to Incumbrance.**

Sect. 53 of Act XI. of 1859 must be construed as a proviso to or qualification of s. 37.

Where in a redemption suit by a second mortgagee the respondent first mortgagee pleaded that, as regards a particular mehal part of the mortgaged estate, he, as a purchaser thereof at a revenue sale on September 7, 1896, was entitled thereto free of the plaintiff's incumbrance, it appeared that default had been made in respect thereof on the preceding January 12, that the respondent had bought the same mehal on March 21, 1896, with relation back to January 13, at an execution sale under his own decree against the mortgagees to which the plaintiff was not a party:—

*Held*, that the respondent, by virtue of his purchase at the execution sale, was on September 7 a proprietor of the mehal within the meaning of s. 53, and therefore bought subject to the plaintiff's second mortgage as an incumbrance existing at the date of revenue sale. **SHAM KUMARI v. RAJA RAMESWAR SINGH BAHADUR** - - - - - 176

*See* SALE FOR ARREARS OF LAND REVENUE.

**ACT I. OF 1869, ss. 8, 10—Talukdar entered in Lists 1 and 3 after his Death—Right of Heirs under ordinary Law.**

In a suit by the heirs under Mahomedan law of a deceased talukdar to recover a moiety of his estate from the appellants, who defended their possession as statutory heirs under Act I. of 1869, it appeared that the talukdar died in 1865, but that his name had been entered in lists 1 and 3 under s. 8:—

*Held*, that although s. 10 rendered such lists conclusive evidence that the deceased was a talukdar within the meaning of the Act, yet that the Act had no retrospective operation so as to divest rights of inheritance which had accrued before it was passed. **MOHAMMAD ABDUSSAMAD v. KURBAN HUSAIN** - - - - - 30

**ACT XV. OF 1877, s. 7:**

*See* IDOL.

**MADRAS RENT RECOVERY ACT (VIII. OF 1865).**

**ACTIVE CONFIDENCE:** *See* INDIAN EVIDENCE ACT, s. 111. 1.

**ADMISSIBILITY OF HEARSAY EVIDENCE:** *See* INDIAN EVIDENCE ACT. 3.  
EVIDENCE, EFFECT OF.

**ADMISSION OF TITLE IMPORTS AGREEMENT NOT TO DISPUTE IT:** *See* SPECIFIC PERFORMANCE.

**BENGAL ACT VIII. OF 1869, s. 66—Sale in Execution of a Rent Decree—Purchase by defaulting Shareholder—Construction—"Previous Holder."**

Where it appeared that the purchaser of a mokurrdrri lease at a sale in execution of a rent decree was himself beneficially interested in the said lease to the extent of 11½ annas share:—

*Held*, that he could not avoid intermediate tenures by proceedings under s. 66 of Act. VIII. of 1869 (B.C.), being excluded from its benefits under the last clause as a previous holder in default.

"Previous holder" in the said section includes a person beneficially interested in the tenure, and accordingly it included the said purchaser although he had not been registered as a tenant. Default does not necessarily mean breach of contractual obligation, but simply non-payment of rent by a person capable of protecting his tenure by doing so. **FAKIR CHUNDER DUTT v. RAM KUMAR CHATTERJI** - - - - - 195

**BENGAL TENANCY ACT, 1885, ss. 93, 98 sub-s. 3—Power of Manager to mortgage—Powers of Co-owners during Management—Construction.**

*Held*, that a manager appointed under s. 93 of the Bengal Tenancy Act of 1885 has power, with the sanction of the District Judge, to sell or mortgage the estate under his management.

While the estate is under co-management the co-owners jointly cannot exercise the powers which under s. 98, sub-s. 3, are entrusted to the manager. But any co-owner can alienate his share with the result that it vests for all purposes in the alienee subject to the management, and therefore to every charge created by the manager. **AMAR CHUNDER KUNDU v. SOSHI BHUSAN ROY** - - - - - 24

**BILLS OF LADING:** *See* LAW OF SHIPPING.

**BOMBAY TRAMWAYS ACT—Power of the Municipality to delegate the Work—Power of Acquisition.**

There is nothing in the Bombay Tramways Act, 1874 (Bombay Council), which prohibits

**BOMBAY TRAMWAYS ACT—continued.**

the municipal corporation, which has acquired tramways under s. 30 from arranging with a private individual to find the purchase-money and work the tramways, or which obliges the corporation to keep them in their own hands and work them themselves. **BOMBAY TRAMWAY COMPANY, LIMITED v. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY** - - - 169

**CIVIL PROCEDURE CODE, ss. 368, 582—Abatement of Appeal.**

By ss. 368 and 582 of the Civil Procedure Code an appeal abates if the appellant does not within the statutory period of six months from the date of the death of a deceased respondent apply to substitute his legal representative, unless he satisfies the Court that he had sufficient cause for not doing so. **RAJ CHUNDER SEN v. GANGADAS SEAL. RAMGATI DHUR v. RAJ CHUNDER SEN** - - - 71

— s. 44, rule A: *See* PARTITION.

— ss. 584, 585: *See* PRACTICE. 3.

**CONCURRENT FINDINGS OF FACT—Practice.**

Where the appellants fail to shew any miscarriage of justice or the violation of any principle of law or procedure, their Lordships will not, even in a case of difficulty, depart from their usual practice of declining to interfere with concurrent findings on a pure question of fact. **RANI SRIMATI v. KHAJENDRA NARAYAN SINGH** 127

**CONSTRUCTION:**

*See* BENGAL ACT VIII. OF 1869, s. 66.

BENGAL TENANCY ACT, 1885, ss. 93, 98, SUB-S. 3.

MADRAS RENT RECOVERY ACT VIII. OF 1865.

ODDH ESTATES ACT I. OF 1869, ss. 14, 15, 22.

**CONSTRUCTION OF CONTRACT:** *See* LAW OF SHIPPING.

**CONSTRUCTION OF LEASE GRANTED BY THE COLLECTOR:** *See* MADRAS REGULATION VII. OF 1817.

**CONTRACT—Indian Evidence Act, s. 91—Oral contemporaneous agreement.**

Where, in a contract of loan expressed to be for the payment of expenses in obtaining a grant of a forest, the respondent borrower agreed with the appellants to make his nephew, the second respondent, who was not a party thereto, "to arrange for you in some way or other (or by any means) to go on working the forest within the years for which written permit has been obtained":—

*Held*, that by the true construction of the above clause it contemplated only the making of a further contract to which the second respondent should be a party, and, as the latter contract was never made, the appellants were only entitled to repayment of their loan and interest.

*Quere*, whether evidence of a verbal contemporaneous arrangement between the parties in substitution for that contemplated by the said

**CONTRACT—continued.**

clause would have been admissible under s. 91 of the Indian Evidence Act. **MAUNG SHWE OH v. MAUNG TUN GYAW** - - - 188

**COSTS OCCASIONED BY DELAY:** *See* PRACTICE. 1.

**DECREE OF MESNE PROFITS—Suit for Contribution—Shares of Liability—Principle on which Interest should be charged in the Accounts.**

A decree was obtained in 1882 for mesne profits for the years 1826-1854 in respect of their wrongful enjoyment of property as part of their family estate against the shareholders therein, and was fully satisfied in 1889 by payments made by the co-sharers in execution proceedings, which were in effect directed against the family estate.

In an action for contribution amongst the co-sharers:—

*Held*, that the proper basis of assessment was according to the shares held by them respectively at the date of the decree, and not according to the shares enjoyed during 1826-1854.

In taking the account interest should be computed on the total judgment debt to the date of its final extinguishment without regard to the sums from time to time paid on account, and interest at the same rate should be credited on each contributory payment in favour of the contributor from the date of payment to the date of final satisfaction. **JOTINDRA MOHUN LAHIRI v. GURU PROSUNNO LAHIRI** - - - 94

**DESCENT OF TALUQ BY THE ORDINARY LAW:** *See* ODDH ESTATES ACT (I. OF 1869), ss. 14, 15, 22.

**DISCRETION AS TO CALLING FOR EVIDENCE OF DOCUMENT THIRTY YEARS OLD:** *See* INDIAN EVIDENCE ACT. 4.

**DISCRETION OF THE LOWER COURT:** *See* SPECIFIC RELIEF ACT, s. 93.

**DESCRIPTION OF WITNESS:** *See* EVIDENCE, EFFECT OF.

**EASEMENT—Ryot's Rights of Pasturage—User—Putnidar's Rights of Cultivation and Improvement.**

Where it was found that the plaintiffs, as cultivators by occupation, had a right of pasturage from time immemorial over the waste lands of the villages to which they belonged, and in some cases over waste lands of adjoining villages, a legal origin for that right will be readily presumed. Such a right is not in gross, and their Lordships, in restoring the decrees of the lower Courts, directed an amendment to the effect that they are not to prevent the putnidars from cultivating or executing improvements upon the waste lands so long as sufficient pasturage is left, with liberty to the parties to apply from time to time in case of difference. **BHOLANATH NUNDI v. MIDNAPORE ZEMINDARY COMPANY, LIMITED** - - - 75

**EFFECT OF CESSER OF COMMENSALITY:** *See* PARTITION.

**EFFECT OF DECREE RENDERED FINAL BY CONSENT:** *See PRACTICE. 1.*

**EVIDENCE:**

*See PERMANENT TENURE OF DEFENDANT.*

1, 2.

INDIAN EVIDENCE ACT, s. 111. 1.

**EVIDENCE, EFFECT OF—Heading of Deposition—Description of Witness—Admissibility.**

The description given of a witness in the heading of a deposition is no part of the evidence given by the witness on solemn affirmation. It may have been filled in by a subordinate official prior to the evidence and may never have been read over to the witness.

Where credible evidence supported the alleged divorce and remarriage of a Mahomedan woman, *held* that the description of her as wife to the former husband given in the heading of a deposition made subsequent to the remarriage, even if admissible in evidence, was entitled to no weight. *MUSAMMAT MAQBOOLAN v. AHMAD HUSAIN* 38

**EVIDENCE OF HEARSAY:** *See INDIAN EVIDENCE ACT. 4.*

**EXECUTION SALES—Sale of Right, Title, and Interest—Intention of the Parties—Title sold depends upon Interpretation of Law at date of Sale.**

Where the right, title, and interest of a judgment debtor, holder of an impartible zemindari, was sold in 1873 and 1876 in execution of a decree for debts, for which the debtor's joint family was not liable, and the accepted interpretation of the law at the time was that an impartible estate was inalienable, except for the life of the holder or under special circumstances:—

*Held*, that the Court must be deemed to have intended to sell and the purchaser to buy the right, title, and interest as then understood—namely, as one which ceased at the debtor's death; and this notwithstanding that the interpretation of the law then prevailing has been subsequently overruled. *ABDUL AZIZ KHAN SAHIB v. APPAYASAMI NAICKER* - - 1

**FAILURE OF CONSIDERATION:** *See SPECIFIC PERFORMANCE.*

**FALSIFIED BOUGHT AND SOLD NOTES:** *See INDIAN EVIDENCE ACT, s. 92. 2.*

**FINDING OF A COMMISSION APPOINTED BY THE VICEROY:** *See PRACTICE. 4.*

**FINDING OF FACT SHOULD BE ON ALLEGATION AND EVIDENCE:** *See SUIT FOR CANCELLATION OF MORTGAGE DEED.*

**GOODS WITHIN BILL OF LADING NOT SUBJECT TO CHARTER LIEN:** *See LAW OF SHIPPING.*

**HALF-BROTHER:** *See OUDH ESTATES ACT (I. OF 1869), ss. 14, 15, 22.*

**HEADING OF DEPOSITION:** *See EVIDENCE, EFFECT OF.*  
VOL. XXXI.

**IDOL—Sebait—Property vested in Idol—Right of Management and Suit vested in Sebait—Limitation—Act XV. of 1877, s. 7.**

Although an idol may be regarded as a juridical person capable as such of holding property, especially where the dedication is of the completest character, yet the possession and management of the dedicated property with the right to sue in respect of it are vested in the sebait.

Where the right to sue in ejectment had accrued to the plaintiff as sebait during his minority, and suits were brought within three years of his majority:—

*Held*, that under s. 7 of Act XV. of 1877 they were not barred although the plaintiff's adoptive mother had after her adoption of him as son of her husband, his predecessor in title, taken a settlement of the property in suit as sebait in her own name, and might have sued as his guardian. *MAHARAJA JAGADINDRA NATH ROY BAHADUR v. RANI HEMANTA KUMARI DEBI* 203

**INDIAN CONTRACT ACT, s. 73:** *See OUDH RENT ACT, 1886, s. 141.*

**INDIAN EVIDENCE ACT—Proof of Pedigree—Admissibility of Hearsay Evidence.**

Where the representative of the plaintiff's family for the time being was proved to have made on three suitable occasions public and undisputed assertion of his position as an agnate of the husband of a Hindu widow (who had aliened her husband's estate), and the plaintiff as his next reversionary heir brought a substantial body of hearsay evidence within the Indian Evidence Act from his own kinsfolk to prove the pedigree on which he relied:—

*Held*, that such evidence should not be rejected on the ground of relationship, the witnesses having been carefully cross-examined, and each having proved circumstances apart from the pedigree which supported his knowledge and credit. *DEBI PERSHAD CHOWDHRY v. RANI RADHA CHOWDHRAIN* - - 160

2. — ss. 4, 32, 90—*Evidence of Hearsay—Discretion as to calling for Evidence of Document more than Thirty Years ago.*

So far as evidence is hearsay the Courts in India were held to have rightly applied s. 32 of the Indian Evidence Act in rejecting it when the witnesses do not state from whom they derived their information, nor at what period they derived it.

The Courts in India having in their discretion under s. 4 of the Evidence Act called for evidence of the genuineness of a document, although being more than thirty years old and coming from the proper custody, they were authorized by s. 90 to presume it:—

*Held*, that the discretion so exercised would not be overruled. *MUSAMMAT SHAFIQ-UN-NISA v. KHAN BAHADUR RAJA SHAHAN ALI KHAN* 217

3. — s. 91: *See CONTRACT.*

4. — s. 92—*Falsified Bought and Sold Notes—Proof of Contract.*

In India a contract of sale of goods can be proved by parol. Where bought and sold notes have been falsified they are not within s. 92 of

T

**INDIAN EVIDENCE ACT, s. 92—continued.**

the Indian Evidence Act, and the plaintiff may prove aliunde and by parol the true contract which they falsely purport to record. *DURGA PRASAD SUREKA v. BHAJAN LALL* - 123

**5. — s. 111—Active Confidence—Evidence.**

Where a Hindu widow claiming succession to her husband's estate had recourse to a money-lender, the respondent, who assisted her in her litigation, and after final decree in her favour transferred her estate to her two grandsons, who thereupon mortgaged the same to the respondent and others in satisfaction of prior charges created in their favour, and finally conveyed in conjunction with the widow the whole property to the appellants:—

*Held*, in a suit by the respondent to enforce his mortgage against the grandsons and the appellants, that whatever may have been the relations between the respondent and the widow pending litigation, there was no evidence during the later transactions of any relation of active confidence between him and the grandsons within the meaning of s. 111 of the Indian Evidence Act. *CHAUDHRI THAKUR DAS v. CHAUDHRI JAIRAJ SINGH* - - - - 46

**INTENTION OF THE PARTIES:** See EXECUTION SALES.

**INTEREST ACT (XXXII. OF 1839):** See OUDH RENT ACT, 1846, s. 141.

**INTEREST OF ARREARS OF RENT BY AN UNDER PROPRIETOR:** See OUDH RENT ACT, 1886, s. 141.

**ISSUE AS TO INSANITY OF MORTGAGOR:** See SUIT FOR CANCELLATION OF MORTGAGE DEED.

**JURISDICTION OF HIGH COURT TO SET ASIDE FINDING OF FIRST APPEAL COURT:** See PRACTICE. 3.

**LAW OF SHIPPING—Time Charter—Sub-charter—Bills of Lading—Goods within Bill of Lading not subject to Charter Lien—Construction of Contract.**

Under a time charter with power to sublet the shipowners retained legal possession of the ship through the captain appointed and paid by themselves, who was to be the agent in several respects for the charterers, and in particular to sign bills of lading at any rates of freight that they might direct "without prejudice to this charter," and they also were entitled to a lien upon all cargoes for freight or charter money due under the charter:—

*Held*, that bills of lading granted by the captain to the respondent, a sub-charterer from the charterers with notice of the time charter, were not mere receipts for goods, but contracts which bound the shipowners, and that the respondent, having paid his bill of lading freight, was entitled to his goods free of lien for the time charterer's dues.

*Colvin v. Newberry*, (1832) 1 Cl. & F. 283; 33 R. R. 437, distinguished.

*Held*, further, that the words "without pre-

**LAW OF SHIPPING—continued.**

judice to this charter" mean that the time charter remains unaltered as between the owners and the charterers, notwithstanding the bills of lading. They do not limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods comprised therein for freight payable under the time charter. *TURNER v. HAJI GOOLAM MAHOMED AZAM* - - - - 222

**LIABILITY OF OWNER OF SEPARATE CHAK FOR REVENUE OF MAHAL:** See OUDH REVENUE ACT, 1876.

**LIMITATION:** See IDOL.

**LIMITATION DOES NOT RUN TILL RATE OF RENT ASCERTAINED:** See MADRAS RENT RECOVERY ACT (VIII. OF 1865).

**MADRAS REGULATION VII. OF 1817—Powers of Collector as Manager of a Temple—Construction of Lease granted by the Collector—Purakudis.**

The effect of Madras Regulation VII. of 1817 is to supersede the powers of managers to alienate charitable property, to sanction the revision of existing appropriations if unduly made, and to render the creation of a fixed rent for all time in the absence of justifying circumstances a breach of duty in the manager.

In 1820, V., being the assignee of permanent leases of temple lands granted by the manager in 1813, obtained a permanent lease of the same land to himself purporting to confer a permanent and heritable title.

In 1832-3, V. and S., not claiming under these grants, but describing themselves as purakudis, that is tenants of a temple from year to year, obtained from the Collector, as representing the Board of Revenue under the regulation, a muchilika from year to year of the lands in suit, which had been comprised in the grants of 1813 and 1820.

In an action by the temple manager to eject the respondents, who were in possession thereunder:—

*Held*, that they had no permanent rights of occupancy. The muchilika must be treated as creating a new tenure, and not as confirmation of the antecedent grants, which were liable to objection under the regulation and had not been insisted upon before the Collector. *SEENA PENA REENA SEENA MAYANDI CHETTIYAR v. CHOKKALINGAM PILLAY* - - - - 83

**MADRAS RENT RECOVERY ACT (VIII. OF 1865)—Act XV. of 1877, art. 110—Construction—Limitation does not run till Rate of Rent ascertained.**

Although in most cases the point of time at which rent becomes due is the close of the period for which it is to be paid, yet under the procedure prescribed by the Madras Rent Recovery Act no rent becomes due while the rate of rent is in suspense and until it has been ascertained.

In suits to which the said Act applies, brought to recover balances of rent due for certain holdings for the Fasil years 1295, 1296, 1297, 1298,

**MADRAS RENT RECOVERY ACT—continued.**

at rates determined by a decree of the High Court dated October 29, 1889:—

*Held*, that under the true construction of art. 110 of the Limitation Act of 1877 prescribing three years, reckoned from the time when the arrears became due, limitation ran, not from the close of the respective Fasli years mentioned, but from October 29, 1889. *KAJA RANGAYYA APPA RAO BAHADUR v. BOBBA SRIRAMULU* - 17

**MALIKANA INCLUDED IN LAND REVENUE:**

See SALE FOR ARREARS OF LAND REVENUE.

**MARGINAL NOTES TO SECTIONS OF AN ACT:**

See OUDH ESTATES ACT (I. of 1869), ss. 14, 15, 22.

**NEW POINT IN APPEAL:** See PRACTICE. 1.

**NOTICE:** See SALE FOR ARREARS OF LAND REVENUE.

**ONUS PROBANDI:** See PERMANENT TENURE OF DEFENDANT. 1, 2.

**ORAL CONTEMPORANEOUS AGREEMENT:** See CONTRACT.

**OUDH ESTATES ACT (I. OF 1869), ss. 14, 15, 22**  
—Construction—"Person who would have succeeded according to the Provisions of the Act"—Descent of Taluq by the Ordinary Law—Half-brother—Marginal Notes to the Sections.

*Held*, that on the true construction of s. 14, Act I. of 1869, the expression "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of s. 22 applicable to the particular case"; and does not include any person mentioned in s. 22 as a possible heir in a line of succession not applicable to the particular case.

Where a deceased taluqdar, younger son of his predecessor, had acquired the taluq by transfer from his predecessor, and died intestate:—

*Held*, that his widows were his next heirs and not the son of his elder brother, as being the eldest male lineal descendant of his father.

The transferee not being within the prescribed line of succession, his estate devolved at his death, under s. 15, as it would have done if he had purchased from a stranger; in other words, the fetter of the statutory order of succession no longer applied.

"Brother" in clause 6 of s. 22 includes half-brother.

Marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act.

A legatee in whose favour a bequest comes into operation before Act I. of 1869 was passed is not a legatee within the meaning of the Act. *THAKURAIN BALRAJ KUNWAR v. RAN JAGATPAL SINGH* - - - 132

**OUDH LAWS ACT, 1876, s. 9:** See OUDH REVENUE ACT, 1876, ss. 108, 112.

**OUDH RENT ACT, 1886, s. 141—Interest on Arrears of Rent by an Under-proprietor—Indian Contract Act, s. 73—Interest Act (XXXII. of 1839).**

Sect. 141 of the Oudh Rent Act of 1886 does not impose on an under-proprietor, who is not a tenant within the meaning of that section, liability to pay interest on his arrears of rent; but it does not exclude liability thereto incurred apart from the Act.

Where the liability to pay rent is derived from the status of under-proprietor established by decree and not from contract with the taluqdar which had become merged in the decree, interest cannot be claimed as for breach of contract within the meaning of s. 73 of the Indian Contract Act.

Nor can interest be claimed under the Interest Act of 1839 where there is no written instrument prescribing a certain time for the payment of the rent, or containing any terms from which the time could be ascertained. *THAKUR GANESH BAKHSI v. THAKUR HARIHAR BAKHSI* - - - 116

**OUDH REVENUE ACT, 1876, ss. 108, 112—Liability of Owner of Separate Chak for Revenue of Mahal—Oudh Law Act, 1876, s. 9—Right of Pre-emption.**

*Held*, that the plaintiff as owner of a separate chak in a mahal, paying revenue therefor through the laubardars of the mahal, is under the combined operation of ss. 108 and 112 of the Oudh Revenue Act, 1876, liable for the revenue assessed on the whole mahal, and is therefore a co-sharer of the whole mahal within the meaning of s. 9 of the Oudh Laws Act, 1876, with a right of pre-emption thereunder. It is immaterial whether he resides in the village or is a member of the village community. *MUNNU LAL v. MAULVI SAITID MUHAMMAD ISMAIL* - 212

**PARTITION—Right of Hindu Mother to a Share—Effect of Cesser of Commensality—Practice—Civil Procedure Code, s. 44, rule A.**

Cesser of commensality is an element which may properly be considered in determining whether there has been a partition of Hindu joint family property, but it is not conclusive.

*Mussumat Anundee Koonwur v. Khedon Lal*, (1872) 14 Moore's Ind. Ap. Ca. 412, followed:—

*Held*, in this case, notwithstanding the unsatisfactory character of the oral evidence had it stood alone, that the finding of the High Court in favour of partition, though overruling that of the lower Court, should be affirmed.

According to the Mitakshara as applied in Bengal, a mother is entitled, if a partition takes place between her sons, to a son's share in property which is ancestral or acquired by the employment of ancestral wealth, and is not bound by a partition effected in disregard of her right. Her rights may be declared under the partition, which is not rendered invalid by the omission to reserve her share.

Notwithstanding s. 44, rule A, of the Civil Procedure Code, there is nothing irregular in seeking to recover in one suit immovable and movable property as the cause of action is the

**PARTITION—continued.**

same in respect of both. CHOWDHRY GANESH DUTT THAKOOR *v.* MUSUMMAT JEWACH THAKOORAIN - - - 10

**PERMANENT TENURE OF DEFENDANT—Onus Probandi—Evidence.**

Case in which it was held that a defendant in ejectment brought by the lessee from the matwali of a religious endowment had satisfactorily proved that his tenure was permanent by evidence of continued transmissions since 1826 of a heritable title in the land in suit on the part of his predecessors, and by their continuous possession at an unaltered rent notwithstanding progressive increase in the saleable value of the land:—

*Held*, also, that a kabulyat accepted by a preceding matwali from a predecessor of the defendant was in recognition of his right by purchase, and did not operate as a fresh grant of title. UPENDRA KRISHNA MANDAL *v.* ISMAIL KHAN MAHOMED - - - 144

**2. — Onus Probandi—Evidence.**

*Held*, that a defendant in ejectment had satisfactorily proved the permanency of his tenure from before the foundation of the waqf under whose matwali the plaintiff claimed by evidence of various transmissions of a heritable title since 1804, and by the plaintiff's acceptance of an unaltered rent notwithstanding the increased value of the land.

The execution and interchange of pottah and kabulyat in 1852 between the matwali and the defendants' predecessor must be treated, having regard to their terms, as a recognition of his purchase and acceptance of him as tenant, and not as a fresh grant of title. NILRATAN MANDAL *v.* ISMAIL KHAN MAHOMED - - - 149

**PERSON WHO WOULD HAVE SUCCEEDED ACCORDING TO THE PROVISIONS OF THE ACT. See OUDH ESTATES ACT (I. of 1869), ss. 14, 15, 22.****PETITION FOR DIRECTIONS IN REGARD TO AN ORDER IN COUNCIL. See PRACTICE. 2.****POWER OF ACQUISITION: See BOMBAY TRAMWAYS ACT.****POWER OF MANAGER TO MORTGAGE: See BENGAL TRAMWAY ACT, 1885, ss. 93, 98, SUB-S. 3.****POWER OF THE MUNICIPALITY TO DELEGATE THE WORK: See BOMBAY TRAMWAYS ACT.****POWERS OF COLLECTOR AS MANAGER OF A TEMPLE: See MADRAS REGULATION VII. of 1817.****POWERS OF CO-OWNERS DURING MANAGEMENT: See BENGAL TRAMWAY ACT, 1885, ss. 93, 98, SUB-S. 3.****PRACTICE—New Point in Appeal—Costs occasioned by Delay—Effect of Decree rendered Final by Consent.**

In a suit by the appellant to enforce a mortgage of 1886, it appeared that the respondent was a purchaser under a sale decree (to which the appellant was not a party) upon a mortgage

**PRACTICE—continued.**

of 1884, and also claimed under a decree, to which both appellant and respondent were parties, upon a yet earlier mortgage in 1882, having paid off the amount found due thereunder, together with a further sum by way of compromising the mortgagee's appeal against the decreed reduction of the stipulated rate of interest:—

*Held*, that it was too late to contend for the first time on appeal that the appellant should have enforced as party defendant to the suit on the mortgage of 1882 the rights now claimed by him; and also, in reversal of the High Court, that the respondent was only entitled to be allowed the sums actually paid thereunder at the reduced rate of interest decreed thereby.

The appeal not having been set down for hearing till nearly three years after the transmission of the record, costs, if any, occasioned by the delay were disallowed to the appellants. KEDAR MAL MARWARI *v.* DEWAN BISHEN PERSHAD - - - 57

**2. — Petition for Directions in regard to an Order in Council.**

Case in which their Lordships, pending an appeal from an order of the High Court in execution of an Order in Council, expressed their opinion as to the intention of the said Order in Council in a sense contrary to that of the High Court. RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYADU *v.* RAJA YARLAGADDA DURGA PRASADA NAYADU. *Ex parte* RAJA YARLAGADDA DURGA - - - 64

**3. — Jurisdiction of High Court to set aside Finding of First Appeal Court—Civil Procedure Code, ss. 584, 585—Substantial Error of Procedure.**

Where a Court in first appeal, though it was admitted that the original Court had rightly found in favour of the fact of adoption and against its invalidity by reason of fraud, nevertheless found that the adoption was not real and of no binding effect:—

*Held*, that the High Court had jurisdiction to set aside this finding under ss. 584 and 585 of the Civil Procedure Code. It was upon a case not made by the parties, to which the evidence had not been directed, and must be treated as a substantial error or defect of procedure within the meaning of those sections. Further, there was no evidence on which the finding could properly be based.

ANANGAMANJARI CHOWDHURI *v.* TRIPURA SOONDARI CHOWDHURI, (1887) L. R. 14 Ind. Ap. 101, followed. SHIVABASAVA KOM AMINGAYDA *v.* SANGAPPA BIN AMINGAYDA - - - 154

**4. — Special Leave to Appeal—Conviction by a Commission appointed by the Viceroy.**

Special leave to appeal from a decision of the Governor-General of India in Council removing the petitioner from the Government of the State of Panna refused; also from the conviction of the petitioner of a criminal offence by a Commission appointed by the Viceroy which was held to be not in any sense a Court from which an appeal would lie. MAHARAJAH MADHAVA SINGH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - 239

**See CONCURRENT FINDINGS OF FACT. 2. PARTITION.**

**"PREVIOUS HOLDER":** See BENGAL ACT VIII. OF 1869, s. 66.

**PROOF OF CONTRACT:** See INDIAN EVIDENCE ACT, s. 92.

**PROOF OF PEDIGREE:** See INDIAN EVIDENCE ACT. 3.

**PROPERTY VESTED IN IDOL:** See IDOL.

**PURAKUDIS:** See MADRAS REGULATION VII. OF 1817.

**PURCHASE AT A REVENUE SALE BY PROPRIETOR:** See ACT XI. OF 1859, ss. 37, 53.

**PURCHASE BY DEFAULTING SHAREHOLDER:** See BENGAL ACT VIII. OF 1869, s. 66.

**PURCHASE SUBJECT TO INCUMBRANCE:** See ACT XI. OF 1859, ss. 37, 53.

**PUTNIDAR'S RIGHTS OF CULTIVATION AND IMPROVEMENT:** See EASEMENT.

**RIGHT OF HEIRS UNDER ORDINARY LAW:** See ACT I. OF 1869, ss. 8, 10.

**RIGHT OF HINDU MOTHER TO A SHARE:** See PARTITION.

**RIGHT OF MANAGEMENT AND SUIT VESTED IN SEBAIT:** See IDOL.

**RIGHT OF PRE-EMPTION:** See OUDH REVENUE ACT, 1876, ss. 108, 112.

**RYOT'S RIGHTS OF PASTURAGE:** See EASEMENT.

**SALE FOR ARREARS OF LAND REVENUE—** ACT XI. OF 1859, s. 5—*Notice—Malikana included in Land Revenue.*

Revenue and malikana are classified together, and a notice under Act. XI. of 1859, s. 5, sub-s. 3, is not necessary in respect of malikana as being an "other demand." They need not be calculated separately in ascertaining the amount of a year's demand.

And where a notice specified the arrears at Rs.529 while the Collector sold on account of Rs.656, including arrears subsequent to the notice:—

*Held*, that the sale was not vitiated thereby, and that as the Collector acted under s. 31 his action could not under s. 33 be questioned, no objection having been taken thereto either in the Court below or before the Commissioner. MAHARAJ KUMAR BAGHESWARI PERSHAD SINGH v. KHAJA MAHOMED GOWHAR ALI KHAN - 52

**SALE IN EXECUTION OF A RENT DECREE:** See BENGAL ACT VIII. OF 1869, s. 66.

**SALE OF RIGHT, TITLE, AND INTEREST:** See EXECUTION SALES.

**SEBAIT:** See IDOL.

**SPECIAL LEAVE TO APPEAL:** See PRACTICE. 4.

**SPECIFIC PERFORMANCE—***Failure of Consideration—Admission of Title imports Agreement not to dispute it.*

In a suit against a zemindar for specific per- VOL. XXXI.

**SPECIFIC PERFORMANCE—continued.**

formance of an agreement to grant a putni of certain villages, it appeared that the agreement was part of a compromise the principal consideration for which was that the plaintiff admitted the zemindar's title as validly adopted son to the last owner:—

*Held*, that this admission imported an agreement by the plaintiff to abstain in the future from questioning the validity of the adoption, and that by reason of his breach thereof there had been failure of consideration, and his suit had been rightly dismissed. SRISH CHANDRA ROY v. ROY BANOMALI RAI - - - 107

**SPECIFIC RELIEF ACT, s. 42—***Discretion of the Lower Court.*

The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under s. 42 of the Specific Relief Act.

Though the execution of a will by a limited owner such as a Hindu widow may not as a general rule justify the exercise of such discretion in favour of the reversionary heir, it will not be interfered with when the case made by the defendants denies any present or future rights of the plaintiff or any other heir. A decree so made leaves the actual right to succeed at the death of the widow unsettled. THAKURAIN JAIPAL KUNWAR v. BHAIYA INDAR BAHADUR SINGH - - - - - 67

**SUB-CHARTER:** See LAW OF SHIPPING.

**SUBSTANTIAL ERROR OF PROCEDURE:** See PRACTICE. 3.

**SUIT FOR CONTRIBUTION:** See DECREE OF MISNE PROFITS.

**SUITS FOR CANCELLATION OF MORTGAGE DEED—***Issue as to Insanity of Mortgagor—Finding of Fact should be on Allegation and Evidence.*

Where in suits for cancellation of two mortgage deeds executed by the plaintiff's father the case made by the plaintiff was that the mortgagor was insane and that the deeds were obtained by fraud:—

*Held*, that, as the evidence which was directed to insanity in its crudest and most palpable form and to establish fraud failed, the suits must be dismissed. The first Court was not justified in commutating an insufficient case of insanity into a case of a helpless or facile mortgagor, and in consequence granting a decree for cancellation, except so far as consideration had actually passed. DURGA BAKHSH SINGH v. MIRZA MUHAMMAD ALI BEG - - - - - 235

**TALUQDAR ENTERED IN LISTS 1 AND 3 AFTER HIS DEATH:** See ACT I. OF 1869, ss. 8, 10.

**TIME CHARTER:** See LAW OF SHIPPING.

**TITLE SOLD DEPENDS UPON INTERPRETATION OF LAW AT DATE OF SALE:** See EXECUTION SALES.

**USER:** See EASEMENT.

U

*See 1872 N*

[www.libtool.com.cn](http://www.libtool.com.cn)

LONDON :  
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,  
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

2

[www.libtool.com.cn](http://www.libtool.com.cn)

[www.libtool.com.cn](http://www.libtool.com.cn)

[www.libtool.com.cn](http://www.libtool.com.cn)

