

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nilcomul Lahoree and others v. Gonomonee Dabea and another from the High Court of Judicature, at Fort William, in Bengal ; delivered 21st January, 1871.*

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Present :

LORD CAIRNS.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

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SIR LAWRENCE PEEL.

THERE is some obscurity and difficulty in this case, arising chiefly from the length of time during which the litigation has unfortunately continued, and from some of the proceedings in the course of that litigation not having been conducted with the perfect regularity which would have been desirable. But disembarrassing the case as far as possible from those difficulties, the facts appear on examination to be simple, and the law applicable to them to be without doubt.

Now what their Lordships find is this. So long ago as the year 1828, there was a controversy between the two persons whom I will term the Appellant and Respondent, although there has been a change of interest since that time, and there are now more Appellants than one, and more Respondents than one. The Appellant apparently had become possessed by purchase of the Zemin-dary in question, and had sold a four annas share of it to the Respondent. The Respondent appears to have desired the fulfilment of that bargain, to be let in topossession and to have the Wasilat or mesne profits for the four annas share during the

time he had been kept out of possession, and he instituted a suit for that purpose, and obtained a decree from the Court of First Instance. He was ordered to be put into possession. The owner of the larger share appealed to the Sudder Court, and pending the appeal the possession of the Respondent was suspended, and the Appellant was left in possession of the whole. In that state of things, the parties, apprehending the delay and expense of the prosecution of the case in the Sudder Court, and the owner of the smaller share being anxious to get into possession of his property, came to an agreement which is upon record at pages 25 and 26. The substance of that agreement was this. The facts that I have stated were recited. The agreement provided that there should be an immediate possession given to the Appellant and to the Respondent of portions at all events of cultivated land—an immediate separate possession of portions of the cultivated land which were taken provisionally, and only provisionally, to be as near as then could be ascertained the proper proportion to which each was entitled, viz. a share of twelve annas, and a share of four annas. Those proportions were mentioned by some general names and descriptions which need not now be specified. But then, as it was apparently obvious to both parties that that division and that possession would not be accurate with regard to the real rights of the parties, it was carefully stipulated that it should be only provisional, and that it should be subject to rectification. The parties, therefore, proposed that the rectification should take place in this way. If either desired it in the course of the ensuing twelve months, he was to have an arbitrator appointed, that is to say, he was to propose some person who would be acceptable to the other person concerned, and the rectification was to take place by the award of the arbitrator, but if the arbitrator was not appointed, then the person who was injured by his not being appointed, was to have liberty to appeal to what is termed the Hakim, which has been very properly considered to be the proper tribunal, whatever it might be—to appeal to the proper tribunal for the purpose of having effect given to this agreement as to the rectification of shares. There was a provision that

the Appeal in the Sudder Court was not to be proceeded with, and that an application was to be made to the Sudder Court to have that Appeal dismissed, and this instrument of compromise put upon record in place of the decree. Then the agreement contained this clause. It is a clause relating to Wasilat, but it is a clause which, as their Lordships think, is not a clause to be read as giving a right in certain cases to Wasilat, but as defeating a right to Wasilat which it is assumed would exist if it is not taken away. It was natural to suppose, and it would naturally follow, that if upon the rectification of the provisional arrangement made by this agreement, it should appear that one or other had been for a time in possession of a larger share of the Zemindary than his proper proportion, the person so in possession of the larger share would have to pay Wasilat or back rents—mesne profits—to him who had had the share, which was not adequate to that to which he was entitled. It was provided, therefore, in these words,—“Should any one amongst us both, “ through negligence, fail to appoint an arbitrator, “ then he who should think this injurious to his “ right, shall, within the said period, apply to the “ Judges of Court”—that is the Hakim—“ for determination of the matters above mentioned, if by “ not doing this within the said limited period, any “ one should bring a suit for the excess after the “ expiration of the limited period, then he shall “ have no claim for Wasilat, of the same which “ had accrued during the period of dispossession ; “ if the claim for Wasilat be made, that will not “ be valid.”

I repeat their Lordships think this is clearly a clause of defeasance, of forfeiture of that which otherwise would plainly be the right of the person in possession, of the share less than he was entitled to. It is obvious that an arrangement of a different kind might have been made. The rents might have been impounded, they might have been kept *in medio*, or in the hands of some third party until it was ascertained what was the true proportion which each should be put in possession of. That would have been clearly inconvenient to both parties; that was the very thing they wanted to avoid. Both parties, therefore, were put into possession

of that which was the nearest estimate that could be made of their respective rights, in order that they might enjoy the advantages and the profits of the land, but that was all subject to rectification as to the quantity, and therefore subject also to making good to the party injured any excess of profit which the other might have derived.

That being the agreement made in 1826, we have next to consider what took place in the twelve months which followed the date of the agreement. The agreement was dated the 22nd September, 1826. What followed was this: On the 26th June, 1827, both parties applied by petition to the Commissioner of the district in which they both lived, putting before him this deed of compromise and asking him to send it to the Sudder Court. The Judge to whom the application was made thought this was an irregular proceeding, that they ought themselves to forward it to the Sudder Court, if they desired it. But two days afterwards, on the 28th June, 1827, the Respondent presented a petition in his own name to the same Commissioner, the local Judge, asking that effect might be given to this arrangement, and that proceedings might be taken in substance to rectify in his favour the division that had been made of the land by the agreement. The Commissioner gave in substance the same answer which he had given to the former petition, that the suit was before the Sudder Court, and that the application should be made to the Sudder Court.

Now at this point of the case their Lordships must express their opinion that the application of the Respondent being in the nature of an original claim founded, not on the former cause of action, but upon the agreement made in 1826 and the special terms of that agreement, the application to the original Judge might well have been entertained by him, and at all events they are not prepared to say that that application was made so improperly, so irregularly, to a person so entirely devoid of jurisdiction, as to lead to a forfeiture under the clause to which reference has been made, on the score that the Respondent had not applied within twelve months to the proper Hakim on the subject. Their Lordships are of opinion that the Commissioner to whom the

application was made might well either have entertained the application himself as an original suit, or at all events might have kept possession of it until a petition had been presented to the Sudder Court to make this agreement entered into in 1826 a proceeding of that Court, and to have an order giving effect to it by way of compromise. However, the Commissioner took a different view; but that in their Lordships' opinion cannot, if the proceeding was a proper proceeding on the part of the Respondent, have the effect of subjecting the Respondent to forfeiture under the clause of the agreement.

On the 13th September, 1827, it appears that application was made to the Sudder Court by the Appellant to make the compromise a proceeding or record of that Court and to give directions for carrying it into effect, which the Sudder Court on the 28th February, 1828, ordered accordingly. That of course was after the expiration of the twelve months.

Their Lordships, therefore, are of opinion on this part of the case that the decision of the High Court from which the present appeal is brought was a correct decision, and that the High Court were warranted in holding that there had been no forfeiture of the right to Wasilat under this clause in the agreement, by reason of the Respondent not taking the proceedings within the twelve months.

It is necessary now to refer to the subsequent proceedings in order to dispose of the second part of the case as to the Statute of Limitations. On the 28th August, 1828, the Respondent applied to the local collector for a rectification of partition of the Zemindary. That was not in the form of a plaint or of an original action, but in the form of a petition. The collector thought that the Sudder having had seisin of the appeal in the original cause, he had not jurisdiction to entertain this petition, and accordingly an application was made in the year 1832 to the Sudder Court by the Respondent to rectify the division of the land. It is somewhat difficult to understand whether this is to be looked upon as an original proceeding or as a proceeding carrying out and continuing the chain of the former proceedings in the case. Their Lordships are

disposed to think that it is in the latter point of view that it ought to be looked at. There was the original suit in 1826, to which I have already referred; there was the compromise, there was the petition in the Sudder Court to have effect given to the compromise, and there was then this further proceeding in the Sudder Court to give that particular effect to the compromise which consisted in the rectification of the division of the Zemindary. On the 28th July, 1853, that is, after a lapse of twenty-one years, a scheme for the rectification of the partition was submitted to the Sudder Court by the officer who had been assigned for the purpose, and on the 25th April, 1854, the Sudder Court confirmed that scheme. On the 25th July, 1854, the Respondent, who had been found by that scheme to be entitled to a very considerably larger share of the Zemindary than he had been in possession of, was put into possession of the additional portion to which he thus was found to be entitled.

Now I have stated already that their Lordships are of opinion that, consequential upon the agreement of 1826, there would be the right of claim for Wasilat or mesne profits, if it should be ascertained that either party had not, according to the provisional partition then made, been put into possession of the share to which he was rightfully entitled. Whether either party was in possession of a larger share than his proper share could not be ascertained, and was not ascertained, until the rightful and proper partition was finally made. Until that period it was a matter of doubt and uncertainty whether there would be any claim for mesne profits or Wasilat at all, and of still greater uncertainty, necessarily, what the amount of that claim might possibly be. On the other hand, when once it was ascertained that either party had been in possession of a share smaller than his own, his right to Wasilat would follow as a matter of course, unless barred by some special impediment which at present does not appear in the case. Therefore, in the year 1854, when possession was given to the Respondent of the additional share to which he had thus become entitled, his right *prima facie* would be also to receive from the Appellant that proportion of the mesne profits of the land which

would represent the excess, in possession of which the Appellant had been, and out of possession of which the Respondent had been kept. Their Lordships are not prepared to say, that without any substantive or original proceeding, and merely by means of an application to carry into effect the compromise in the suit, this right to Wasilat might not have been asserted and enforced. But the course which was taken by the Respondent was this:—He did not apply by petition, or in the original chain of proceedings, but he commenced, on the 28th January, 1862, a separate and original suit to recover this Wasilat, but to recover it as a claim which flowed out of the former proceedings. Now, putting aside for a moment the lapse of time between July, 1854, and January, 1862, their Lordships, although they do not affirm the regularity or the necessity for the plaint of 1862 as an original proceeding, are, notwithstanding, of opinion that if there is any irregularity, there is not such an irregularity in originating that separate proceeding as should disentitle the Respondent to his claim for Wasilat, if he otherwise was entitled to it, and that he was otherwise entitled to it their Lordships have already expressed to be their opinion.

Is, then, the claim of the Respondent limited in any, and what way, by any Statute of Limitation? Their Lordships are of opinion that it is impossible to show that the Statute of Limitations, the Act of 1859, which cuts down a right in cases of this kind to six years, was in force in Assam at a period which would make it applicable to this suit, and that therefore may be put aside. The other period of limitation is the limitation of twelve years. If the law of limitation on that score is applicable at all, it could only be by analogy, and not by any positive words of the law. But when their Lordships consider all the circumstances of this case, they are of opinion that it would be contrary to the spirit and object of the Statute of Limitations to apply that law, even by analogy, in the present case. Their Lordships do not desire to treat this case as a case of trust, as it appears to have been viewed by the High Court from whom the appeal comes. Their Lordships are unable to see that the Appellant and Respondent stood to each other in the position of

trustee and *cestui qui* trust. But their Lordships consider, as they have already said, that the right to Wasilat was a right distinctly flowing out of and consequential upon the right to the rectification of the partition, that the right could not have been ascertained or enforced until the rightful partition was completed, that is to say, in the year 1854, and that it is to the year 1854 they must look as the period when the right to Wasilat would accrue. If that is so, their Lordships do not think the lapse of time between 1854 and 1862 should disentitle the Respondent to that which he otherwise would be entitled to. In saying this, their Lordships do not mean to affirm that it may not be in the power of the Appellant to show any special circumstances which he may be able to show which should limit, as a matter of equity on the part of the Court, the claim of the Respondent to mesne profits to some period short of the whole number of years between 1854 and 1826, during which the Respondent was kept out of possession of the larger share to which he was entitled. They desire to leave that question open. It will be open to the Appellant, in taking the account for which the case has been remitted to the Court of First Instance by the High Court to show any special case (if he is able to show it), by way of appeal to the equity of the Court to shorten the account which otherwise would have to be taken of the mesne profits. Their Lordships leave that view of the case, if it can be presented by the Appellant, entirely untouched by what has now been said.

On the whole, therefore, their Lordships are of opinion that in substance the decision of the High Court is correct; they think that the present appeal ought not to succeed, and they will humbly advise Her Majesty that it should be dismissed with costs.