

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of Pirthi Pal Singh and Uman Pershad Singh (sons of Hardeo Buksh, deceased) v. Jawahir Singh and others (two Appeals and a Cross Appeal, consolidated), from the Court of the Judicial Commissioner of Oude; delivered 19th February 1887.

Present :

LORD HOBHOUSE.

LORD HERSHELL.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The parties to the suits which are the subject of these consolidated appeals are members of a Hindu family in Oudh, being the sons and grandson of three brothers, Hewanchal Singh, Bhawani Singh, and Fateh Singh. One of them, Hardeo Buksh, died pending the appeal to Her Majesty in Council, and the Appellants are his sons and representatives. Prior to the annexation of the kingdom of Oudh the family was joint, the Respondent, Jawahir Singh, being the head of it, and the manager of the family property. The lands which belonged to the family were confiscated to the British Government by Lord Canning's Proclamation of March 1858, and on the 28th of April 1858 a summary settlement of them was made with Jawahir Singh. He was consequently included in the list of talukdars in accordance with the Government letter of the 10th of October 1859,

and a sanad was granted to him. After the passing of Act 1 of 1869 he was also registered in List No. 1 under Section 8 of that Act, and in List No. 5. On the 28th of August 1865 Hardeo Bukhsh and Parbat Singh brought a suit in the Settlement Court, which then had jurisdiction in the matter, against Jawahir Singh by a petition of plaint, in which they stated that since the death of their fathers they had been, according to the old order of things, living together, their expenses being paid out of the profits of the estate, the Plaintiffs continuing in possession of the taluka, and the kabuliat standing in the name of the Defendant; that he intended to dispossess them and keep them out of their permanent right to the profits; and they prayed that after inquiry proper orders be passed so that they be not deprived of their rights. In a written statement, dated the 6th of October 1865, they stated that they had been compelled by an order of the Criminal Court, dated the 15th of September 1865, to give up possession, but that previously to that time they had held continuous possession. The Defendant in his written statement alleged that he had held possession of the land without any co-sharer, and that a summary settlement had been made with and a sanad granted to him alone. The Courts in Oudh decided in favour of Jawahir Singh, and Hardeo Bukhsh appealed to Her Majesty in Council. It is unnecessary to refer to the judgements of the Oudh Courts, as the rights of the parties were determined by the final order of Her Majesty in the appeal. The case was twice before this Committee, and is reported in Law Rep., 4 I. A., 178, and 6 I. A., 161.

On the first occasion their Lordships, after referring to two previous cases (*Thukrain Sookraj Koowar v. the Government and others*, 14 Moore, I. A., 112; *Shunkar Sahai v. Rajah Kashi*

Pershad, not then reported but since reported, Law R., 4 I. A., 198), say :—

“ Their Lordships are of opinion that, up to the time of Lord Canning’s proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the Petitioner and Purbat Singh and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case, on the 8th of July 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and Purbut Singh, who were his partners, should claim, they would get their shares divided. He said, ‘ They at present live with me, and receive food and clothing.’ It does not appear clearly from the latter words whether the estate was held as joint family property or whether the Defendant merely made an allowance to the Plaintiff.”

Their Lordships then, after saying that the Lower Courts appeared to have decided the case merely upon the ground that the Defendant was protected by the sunnud, advised Her Majesty that the Commissioner should be directed to try, or to refer to the Settlement Officer for trial, the issue whether the Respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or the rents and profits thereof, in trust for the Appellant and Parbut Singh, or either of them. Her Majesty’s Order in Council was made accordingly.

On the 13th of December 1877 the Commissioner found that “ there is no proof of any fresh act or agreement on the part of the Respondent by which he became bound to hold the villages alluded to in the issue set in trust for the Appellant and Parbut Singh, but that they were an undivided Hindu family up to 1865, and that the joint interest extended to the whole estate then in possession, ancestral and acquired.”

The appeal came before this Committee again in January 1879, and judgement was delivered

on the 1st of March. It is sufficient to quote the following passages from it. Having stated the finding of the Commissioner, and that it was fully warranted by the evidence, it says:—

“ Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement, to the effect that Hardeo Bux was his partner, and with his deposition of the 8th of July 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and Parbut Singh, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate, subject to the law of the Mitakshara.”

Their Lordships then state the reasons for their opinion, that the Act 1 of 1869 did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate, and conclude by saying:—

“ The plaint does not allege that the Plaintiffs have been dispossessed of their rights, but merely that the Defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that they be not deprived of their right.

“ Their Lordships must deal with the case as it stood at the commencement of the suit. At that time there does not appear to have been any complete separation or division of the family, and the Plaintiffs do not pray for a partition of the estate. Hardeo Bux was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindu family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal, and to reverse the judgements and decrees of both the Lower Courts, and to declare that the Defendant holds the villages in suit in trust for the joint family, and as a joint family estate governed by the rules of the Mitakshara, and to order and decree that the Defendant do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly. . . . Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in

respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit, subsequent to the commencement thereof."

Any member of a joint Hindu family may sue for a partition of the family estate, unless there is a family usage or a special law which makes it impartible. Jawahir Sing had himself said in 1859 that the estate was partible, and this is one of the grounds upon which it is said that up to the time of the quarrel in 1865 it was his intention that the villages included in the summary settlement and sanad should be held by him in trust for the joint family, and as a joint family estate. Their Lordships notice that the Plaintiffs did not pray for a partition of the estate, and therefore say they cannot do more than advise Her Majesty to declare that the villages were held in trust for the joint family, and as a joint family estate. The order which followed this was applicable to a joint family property. There does not appear to be any reason for thinking that it was considered that the estate was impartible, and was to be held as such in trust for the family.

The order of Her Majesty in Council is dated the 22nd of March 1879. In or about May 1879 Hardeo Bukhsh applied to the Court of the Deputy Commissioner of Sitapur for execution of it. The Deputy Commissioner made an order, from which there was an appeal to the District Judge, and from him to the Judicial Commissioner, who, on the 11th of November 1879, ordered proclamation to be made by beat of drum in each of the 113 villages forming the subject of the suit of what had been declared by the Order in Council. On the 2nd of June 1880 Hardeo Bukhsh applied, under Act 17 of 1876, the Oudh Land Revenue Act, Sections 57 and 58, to have his name entered as a co-sharer in the taluqa in the register which the Deputy Commissioner of each district is by the 56th section of the Act

directed to keep. And on the 4th of June 1880 the Deputy Commissioner ordered that—

“The name of Thakur Hardeo Bakhsh will therefore be entered in the register of co-sharers (the extent of his interest being one third) in the joint family estate, consisting of the villages mentioned in the judgement of the Privy Council.

“Thakur Jawahir Singh will remain manager and lambardar.

“This order refers to the following villages :—

“1. Villages comprised in the Summary Settlement - - - - -	78
“2. Villages granted in reward for services during the mutiny (afterwards demarcated as 12) - - - - -	20
“3. Villages acquired from the profits of the estate after Summary Settlement - - - - -	15

113

“Afterwards demarcated as - 105

“Thakur Jawahir Singh will pay applicant's costs.”

This order was affirmed on appeal on the 13th of July 1880, but the Judicial Commissioner, on an appeal from another order relating to the execution, held that, in execution of the Order in Council, Hardeo Bakhsh could not obtain an account from Jawahir Singh of the rents and profits of the taluq from the commencement of the litigation, but for that purpose must proceed by suit. This was on the 2nd of August 1880, and on the 14th of December 1880 Hardeo Bakhsh instituted the first of the suits which are the subject of these appeals.

The plaint, after stating the facts, and that on the 30th of May 1879 the Defendant refused to determine the amount of wasilat (amount collected), and to adjust accounts of the profits which had accrued during the pendency of the suit, and with which considerable additions had been made to the family estate, and to fix the exact extent of the share to which the Plaintiff was entitled, prayed that a “bazdawa” (petition of withdrawal of suit), dated 5th February 1874, executed by Parbat Singh and Ganeshi Singh in Jawahir Singh's favour, was invalid and of

no effect as against a previous agreement of 23rd March 1870, executed in the Plaintiff's favour, and that the Plaintiff was entitled, as against Jawahir Singh, to recover Parbat Singh and Ganeshi Singh's share in addition to his own; that the Plaintiff should be put in separate possession by partition to the extent of the aforesaid shares of the 113 villages, and all the property which had been acquired by Jawahir Singh, with the profits of the joint estate and the joint property not included in the former suit, a list of which was attached to the plaint. It also prayed that, to the extent of the above-mentioned shares, the Defendant should be ordered to render accounts of the profits during his management, and to pay all the money that might be found due after deducting all proper charges and costs of purchasing estates, with the exception of so much profits of the third share of the 113 villages for which the Plaintiff's name had been entered in the Revenue records, and for which he could seek his remedy from the Rent Court, since 1288 F., the time when his name was entered. The lists attached to the plaint contained the names of 144 villages, in addition to the 113, also a number of debts due to the estate on mortgages, a large number of bond debts, and moveable property of various kinds of considerable value.

Jawahir Sing, in his written statement, said that by the bazdawa of the 5th of February 1874, and by way of family compromise, Parbat Singh and Ganeshi Singh relinquished all rights and claim to a share in the taluka in his favour, and declared themselves satisfied with and accepted from him certain property as and by way of maintenance which had been awarded to them on the 11th July 1869 under an arbitration of the British Indian Association; that the claim to property in his possession at the date of the institution of the suit in 1865 was barred by the

law of limitation as well as by Section 43 of Act X. of 1877; that the Plaintiff was not entitled to any accounts from 1865 or any other date, and was in the position of an ordinary sharer suing a co-sharer who would have his remedy in the Rent Courts and in respect of three years' profits only; that the Plaintiff was not entitled to the partition prayed for, and that he, Jawahir Singh, held the taluka as an integral impartible estate according to the rule of primogeniture without any trust in respect of such talukdari rights and status, though, as ruled by Her Majesty in Council, subject to a trust in respect of a portion of the profits in favour of the Plaintiff. The plaint was then amended by making Parbat and Ganeshi Singh Defendants, and praying that if the Plaintiff was held to be not entitled to their full share it might be decreed that as a joint property it was divisible in equal shares between him and Jawahir Singh.

The District Judge in his judgement dated the 3rd of January 1882 held that the suit was not barred by the law of limitation. This, in their Lordship's opinion, was right. The Plaintiff had, in 1879, been declared by the Order in Council entitled to share in the 113 villages and the proceeds thereof as a joint family estate. It was preposterous to allege, as the written statement did, that his claim to that was barred by the law of limitation. It clearly was not. It was equally preposterous to allege that he had his remedy in the Rent Court for the profits of the estate received by Jawahir Singh whilst the suit of 1865 was pending and that he could only recover three years' profits. The provision in the Oudh Rent Act (19 of 1868) supposed to be applicable is Clause 15 of the 83rd section, which gives exclusive jurisdiction to the Courts of Revenue in Oudh over suits by a "sharer against a "lumberdar or co-sharer for a share of the

“ profits of an estate or any part thereof, or for
 “ the rendering and settlement of accounts in
 “ respect of such profits.” And by the 106th
 section, suits for the recovery of a share of
 profits are to be instituted within three years
 from the date on which the share of profit
 claimed shall have become due. A member of a
 joint Hindoo family cannot sue for a share of
 profits, as he has no definite share until partition.
 These provisions might apply to the profits of
 the 113 villages after Hardeo Bukhsh had been
 entered in the register as a co-sharer under the
 order of the 4th of June 1880, but they are
 applicable only to co-sharers, and it seems only
 where the co-sharers and lamberdar are entered
 in the register, and therefore they could not
 apply to the 144 villages, and certainly not to the
 moveable property of the family. Moreover,
 this defence is inconsistent with the defence that
 the taluqa is impartible, for by the entry in the
 register Hardeo Bukhsh was made a co-sharer
 to the extent of one third. That entry still
 remains, and Hardeo Bakhsh may fairly contend
 that there has been a partition of the 113 vil-
 lages. This is the reason for his excepting from
 his prayer for an account the profits of those
 villages since the entry in the register.

The District Judge in considering the question
 of the partibility of the estate took this view of
 the entry in the register, and said the Revenue
 authorities had acted upon an interpretation
 which they had placed upon the Order in Council.
 He then proceeded to dispute that interpretation,
 and quoting only the passage in the judgement of
 this Committee, “ and the Plaintiffs do not pray
 “ for partition of the estate. Hardeo Buksh was
 “ not entitled to any definite portion of the
 “ estate, but merely to the right of a member of
 “ a joint Hindu family ;” he says “ the Plaintiff
 “ could not, therefore, upon the strength of the

“ Privy Council’s decision, claim a partition of the
“ estate to the extent of his share in the profits,
“ for the Privy Council has distinctly recorded
“ that the Plaintiff is not entitled to any definite
“ portion of the estate.” This seems to their
Lordships a rather strange misapprehension, for
until partition no member of a joint Hindu
family is entitled to a definite portion of the
family estate, and if that be a reason for his not
being able to claim a partition of the estate a
partition could never be claimed. Independently
of the construction which the District Judge thus
put upon the judgement of this Committee, he
pronounced his own opinion that under the Act 1
of 1869, or the sanad, the estate was not partible.
The District Judge then proceeded, erroneously
in their Lordships’ opinion, to treat the claim for
an account of the proceeds of the family estate as
a claim for mesne profits, and quoted the pro-
visions of the Code of Procedure as to mesne
profits. These provisions are intended for and
are applicable to suits for land or other property
in which the Plaintiff has a specific interest, and
not to the suit which was instituted in 1865, or
to a suit for a partition where he has no specific
interest until decree. He then said that as
there was no doubt the principal parties in the
case stand in the position of co-sharer and lam
berdar respectively, the claim to any share in the
profits of the estate must be preferred in the
Revenue Court. So far as regards the 113
villages after the entry of the names this might
be true, but the Rent Court had no jurisdiction to
take an account of the family property, con-
sisting of the proceeds of those villages and of
other property, and to make a partition of the
whole. The most it could do would be to make
a partition of the 144 villages, or any others
that might have been purchased, and become
family property. Finally, after deciding that

the agreement of the 23rd March 1870 did not give Hardeo Bakhsh a title to Parbat Singh's share, he dismissed the suit with costs.

Hardeo Bakhsh appealed to the Judicial Commissioner, who, on the 12th of September 1882, gave his judgement. He agreed with the District Judge that Hardeo Bakhsh had not acquired a right to the shares of Parbat Singh and Ganeshi Singh, and he held that Hardeo Bakhsh, having had his name entered in the revenue registers as a co-sharer, showed that he had ceased to be a member of the joint Hindu family, and that his claim to an account for a share of the profits and for a share of the property purchased with the profits was barred by the law of limitation, because he had failed to sue to enforce his right to share or for partition in 1865. It is difficult to see how it could be thought that he failed to sue to enforce his right. In their petition to the Settlement Court in 1866, by which the suit was begun, he and Parbat Singh prayed that, after inquiry, proper orders might be passed so that they should not be deprived of their rights, and the Order in Council declared that Jawahir Singh held the 113 villages as a joint family estate, and that they and their proceeds should be applied accordingly. After that there could be no application in the present suit of the law of limitation to those proceeds.

The Judicial Commissioner then held that Hardeo Bakhsh was not entitled to any benefit from the resignation by Parbat Singh and Ganeshi Singh, because he had ceased to be a member of the joint family. The bazdawa was executed on the 5th of February 1874, and their Lordships are unable to understand what ground there was for saying that Hardeo Bakhsh had then ceased to be a member of the joint family

as regards the estate, though in other respects there might have been a separation. Finally, the Judicial Commissioner held that it was not necessary to go into the question of the partibility of the estate, and dismissed the appeal.

Their Lordships have indicated their opinion that the conclusions of the Lower Courts in the first suit, except that of the District Judge on the question of limitation, are erroneous, and it is now necessary to refer to the second suit. This was brought by Jawahir Singh against Hardeo Bakhsh on the 4th of August 1881, and the plaintiff prayed for a declaration of the share the Defendant was entitled to in the villages named in the schedules, which were said by the District Judge to be identical with the property in suit in 1865, and that it might be further declared that the Plaintiff was entitled to hold the property mentioned in the schedules as an integral impartible and indivisible estate or taluka, subject to the beneficial interest of the Defendant in respect of the profits thereof to the extent of his share as declared by the Court. The District Judge adhered to the opinion he had declared in the first suit, that the estate was impartible, and said that Hardeo Bukhsh was only entitled to one third of the profits of the property. The Judicial Commissioner, on an appeal to him, had to decide the question of partibility, which, in the first suit, he had left undecided. In his judgement on the 16th of July 1883, he decided that Hardeo Buhsh should "be declared entitled to have one third
" of the estate separately apportioned to him,
" the one third share so allotted to him to be
" held by him as a sub-proprietor, and subject to
" the payment of the Government revenue, plus
" 10 per cent."

The decree which was passed upon this judgment cannot be allowed to stand. It does not give to Hardeo Bakhsh the right which by Her Majesty's Order in Council he was declared entitled to. The villages and the proceeds thereof were by that order declared to be a joint family estate, governed by the rules of the Mitakshara, and one member of the family could not rightly be made a sub-proprietor to another member of his share of the family property. Also the contention of Jawahir Singh in this and in the first suit, that he held the taluka as an integral impartible estate to himself and his heirs according to the rule of primogeniture, subject to a trust in respect of the profits, is inconsistent with the estate being governed by the rules of the Mitakshara. The direction that he should cause and allow the villages and the proceeds thereof to be managed and dealt with and applied "accordingly," that is, as a joint family estate, shows that the declaration that he held the villages in trust for the joint family was not intended to give him an impartible estate. He did hold them in trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee, he is bound to allow the partition to be made. Notwithstanding Hardeo Bakhsh's clear right to a share of the profits of the villages, Jawahir Singh has pertinaciously refused to give any account of what he has been receiving since 1865, and their Lordships regret to see he has succeeded up to this time in not doing so. The suit for partition and an account stands dismissed by both the Lower Courts, and Hardeo Bakhsh has only been declared in the second suit to be a sub-proprietor of one third share, against which declaration he appealed to Her Majesty in Council. It is unnecessary to consider whether he became entitled as he claimed

to part of the shares of Parbat Singh and Ganeshi Singh, because, in their Lordships' opinion, he was concluded from claiming more than one third share in the family property, by obtaining the order for the entry of his name as a co-sharer of one third in the 113 villages, which order was affirmed on appeal, and is treated in the plaint in the first suit as a subsisting order. The second suit was unnecessary, as the questions raised in it might have been decided upon the issues framed in the first suit. Their Lordships think that the second suit should be finally disposed of by reversing the decrees of both the Lower Courts, and ordering the suit to be dismissed with costs in those Courts and that the cross appeal should be dismissed with costs. The first suit should be remanded to inquire what the joint property of the family consists of, including therein the villages held by Parbat Singh and Ganeshi Singh, and for that purpose to take the usual accounts, and when that has been done to allot to Hardeo Bakhsh a third part thereof, and to order that he recover the third part of the moveable property, with the costs of the suit, up to the making of but not including the costs of the inquiry, from Jawahir Singh; and to order that the costs of the inquiry, and taking the accounts, and of the partition, be paid out of the estate, and also to order that Hardeo Bakhsh be at liberty to apply under Sect. 57, Act XVII. of 1876, the Oudh Land Revenue Act, to have his name entered as a co-sharer with Jawahir Singh in the immovable property, to the extent of one third. The Judicial Commissioner may remand the suit to the District Judge to do what is above directed, and their Lordships, under the circumstances, are of opinion that if any application should be made under the provisions of the Code of Civil Procedure for the appointment of a manager or

receiver of the estate during the inquiry and taking the accounts, and until the partition, it would be a proper case for granting it. Their Lordships will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree remanding the suit to the effect and containing the directions before stated. The costs of these appeals and of the cross appeal are to be paid by Jawahir Singh.

