

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Parbati, deceased (now represented by Musammat Bhu Devi and another) v. Chaudhri Naunihal Singh, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 13th May, 1909.

Present at the Hearing :

LORD ATKINSON.

LORD COLLINS.

LORD GORELL.

SIR ARTHUR WILSON.

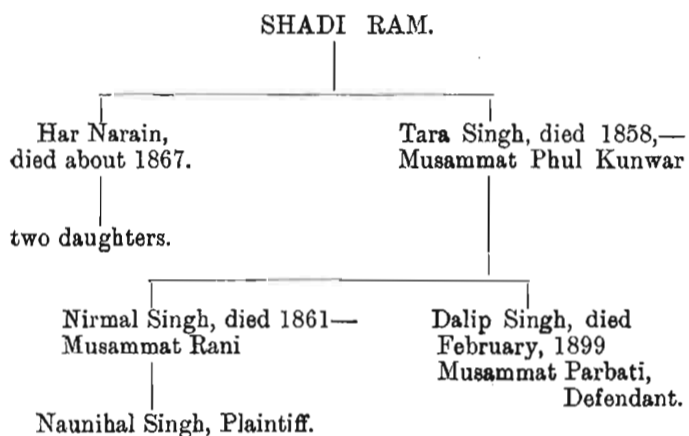
[*Delivered by Lord Atkinson.*]

In this case the Respondent, Chaudhri Naunihal Singh, the only son of Chaudhri Nirmal Singh, deceased, on the 28th September, 1900, instituted in the Court of the Subordinate Judge of Aligarh, a suit in the nature of an ejectment against the Appellant, Musammat Parbati, widow of his paternal uncle, Chaudhri Dalip Singh, deceased, to recover possession of the lands fully described in the schedule attached to his plaint, and for other relief.

He based his right to the relief he sought on two alleged facts, (1) that his late father and his late uncle, Dalip Singh, were the two male members of a joint Hindu family of which he (the Plaintiff) was the surviving male, and (2) that the property which was sought to be recovered

belonged to that family jointly. The Defendant resisted this claim on the ground, among others, that all the joint family property had, by agreement between the then existing members of the family, been partitioned in interest in the year 1861, though not then, and only to a small extent afterwards, partitioned by metes and bounds, and that the land sought to be recovered was the separate property of her husband, Dalip Singh, who died the owner in possession thereof on the 1st February, 1899.

The following pedigree shows the relationship of the several parties to the suit.



The two daughters of Har Narain have not been made parties to the action, and do not apparently claim any interest in this property, and the precise nature of Har Narain's right to or interest in it (if any) does not appear. The Subordinate Judge decided in favour of the Defendant and dismissed the action, holding that there had been a partition of the family property in 1861, and that the Plaintiff was not joint owner with Dalip Singh at the time of the latter's death, and, consequently, was not entitled to succeed him. The High Court at Allahabad by their decree of the 27th May, 1904, set

aside this decree "with the exception of Mahal " Dalip Nagar partitioned in 1870, and the " Mahals partitioned to Dalip in 1890 and 1893 " in Shamilat, Shikarpur, and in Khandwaya, " to which the defendant is entitled for a " widow's estate," and declared that, as to " all the rest of the property claimed, " the family was a joint Hindu family during the " lifetime of Dalip Singh, that since his death the " plaintiff has been the owner and in possession of " the aforesaid property as survivor, and that the " defendant has no right to it." Against this decree the Defendant has lodged the present Appeal.

The several partitions mentioned in the decree of the High Court were partitions by metes and bounds of the joint property, carried out under orders of competent tribunals.

Though the question for decision by their Lordships is one of fact, its proper determination turns upon the application of certain legal principles to the facts proved, and the true conclusion to be drawn from these facts viewed in the light of these principles.

It is much to be regretted, therefore, that the attention of the High Court was not directed to the two authorities in which those principles have been laid down—in the first by Lord Westbury, and in the second by Lord Davey—namely, the cases of *Appovier v. Rama Subba Aiyan* (11 Moo. I.A. 75) and *Balkishen Das v. Ram Narain Sahu* (L.R. 30 I.A. 139). In both these cases the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing providing, in the first case, that part, and, in the second case, that the whole, of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of

this was held to be that, as to the property so dealt with, there was a division of rights; the status of the family was changed; the tenancy of the property severed and converted from something, to use the language of English law, like a joint tenancy into a tenancy-in-common, and the previously undivided family became by operation of law divided.

At p. 89 of the report of the first case, Lord Westbury is reported to have expressed himself thus :—

“ According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he—that particular member—has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.”

At p. 91 he proceeds to say :—

“ It is necessary to bear in mind the twofold application of the word ‘division.’ There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although in some portions that

“ division of right was not intended to be followed up
 “ by an actual partition by metes and bounds, that
 “ being postponed till some future time when it would
 “ be convenient to make that partition.”

And again at p. 92 there is the following passage :—

“ Then, if there be a conversion of the joint
 “ tenancy of an undivided family into a tenancy in
 “ common of the members of that undivided family,
 “ the undivided family becomes a divided family with
 “ reference to the property that is the subject of that
 “ agreement, and that is a separation in interest and
 “ in right, although not immediately followed by a *de*
 “ *facto* actual division of the subject-matter. This
 “ may at any time be claimed by virtue of the
 “ separate right.”

In the last-quoted passage Lord Westbury stated he used the terms of English law, “ joint tenancy ” and “ tenancy-in-common, ” by way of illustration. In the second of the above-named cases this decision was approved and followed, and on the question of the binding effect of such a deed, or agreement, as is above mentioned, on the interest of a minor who was by and through his parent a party to it, Lord Davey, at p. 150 of the report, expresses himself thus :—

“ There is no doubt that a valid agreement for
 “ partition may be made during the minority of one
 “ or more of the co-parceners. That seems to follow
 “ from the admitted right of one co-parcener to claim
 “ a partition and (as has been said), if an agreement
 “ for partition could not be made binding on minors,
 “ a partition could hardly ever take place. No doubt,
 “ if the partition were unfair or prejudicial to the
 “ minor’s interests, he might, on attaining his majority,
 “ by proper proceedings set it aside so far as regards
 “ himself.”

There is not a suggestion in either of the above-mentioned judgments that the agreement to partition the joint family property in interest

and right must be embodied in a deed or instrument in writing. It might be a parol agreement.

The question for decision in this case accordingly resolves itself into this: Did the members of this joint Hindu family—namely, Dalip Singh, Musammat Rani, acting for herself and also on behalf of her infant son, the plaintiff, and Musammat Phul Kunwar, the plaintiff's grandmother—on or before the 13th June, 1861, agree amongst themselves that their joint family property should thenceforth be the subject of ownership in the defined shares mentioned in their Petition, dated the 13th June, 1861, to the Tahsildar to have their names entered in the village papers: that is, Phul Kunwar to enjoy Patti Shadi Ramwala for life, and, subject thereto, one-half of the entire property, as well ancestral as newly purchased, to be taken as divided into equal shares, half and half, one half or share to be enjoyed by Dalip Singh, and the other by the plaintiff and his mother. It cannot be suggested that these shares were not sufficiently "defined" within the meaning of the above-quoted authorities, or that the agreement which the petition purports to embody is not unambiguous, precise, and clear in its language, nor can it be successfully contended that, having regard to the position of the family and the rights of its respective members, this division of the family property was in itself unnatural or unjust. Dalip Singh must then have been 17 or 18 years old, since he describes himself on the 16th June, 1867, as 24 years of age. He was, therefore, of age according to Hindu law. The Plaintiff was an infant two years old. Had a suit for partition of the joint property been instituted on his behalf by a duly appointed guardian *ad litem*, as it might have been, or had it been instituted by Dalip Singh, there would

primâ facie have been allotted to each widow a portion of the property adequate for her maintenance, and, subject to that, the whole property would have been divided between the Plaintiff and Dalip in equal shares. Little more than this is done by the agreement, since it is by no means certain that the Plaintiff's mother would, under such an agreement as this interpreted by Hindu law, get more than what was sufficient to maintain her out of the half of the property allotted to her and her son. In addition to the provision for the division of the property, the petition contained a provision that Dalip Singh was to be lambardar in certain mauzas therein named, and Musammat Rani, under the sarbarahkarship of Dalip Singh, lambardar in certain other mauzas, and Musammat Phul Kunwar in the Patti, namely Shadi Ramwala in Shikarpur. This petition purports to be presented by Dalip Singh and Musammat Rani, on behalf of herself and "as guardian and patron of her minor "son Naunihal Singh," and Musammat Phul Kunwar,—Musammat Rani through her brother, Shib Charan, and Musammat Phul Kunwar through her son Dalip Singh. On the same day, the 13th June, 1866, an order was made by the Deputy Collector setting forth that the Tahsildar had been "asked to submit a report relating to the "lambardarship and sarbarahkarship of the "widow of Nirmal Singh," and directing the application (*i.e.* the petition), to be also sent to the Tahsildar "asking him to give the particulars "in detail." On the 1st July, 1866, the Tahsildar reports that—

"The Kanungo verified the contents of this
 "application (*i.e.*, the petition) from Musammat Phul
 "Kunwar and Musammat Rani . . . who stated
 "that the dispute between them had been settled, and
 "that the applicants had filed the application after

“settlement of the matter, and that it should be filed
“with the record.”

Upon this the Deputy Collector, on the 2nd July, 1866, ordered the application to be brought forward with the Record. The Petition was thus treated as a serious business transaction by the officers before whom it came. Entries were made in the village papers in accordance with it, and continued to be so made up to the death of Dalip Singh, in 1899, *i.e.* for a period of 38 years. Yet it is this petition that is now impeached by the Plaintiff in paragraph 8 of his Plaint as “a mere “paper proceeding,” and the management by Dalip Singh under it described as in no way affecting “the property and business of the joint “Hindu family.” The High Court deals with it in the following passages of its judgment :

The petition, in our opinion, amounts to no more than a compromise between the two widows, an arrangement for the management of the estate for the time being, and for the purpose of supplying the revenue authorities with the names of persons to be appointed lambardars of the several villages comprised in it, and the nominal apportionment of shares between the Plaintiff and Dalip can be considered to be no more than an expression of the ladies' opinion that *that* was the measure of their interest in the family estate. Musammat Phul Kunwar takes care that her interests (though she really had no greater interest than as mentioned above) shall be safeguarded, and in that she is imitated by Musammat Rani . . . We cannot find that it had the effect of working a separation in a family which it is now admitted was joint at the time when this petition was prepared.

In another passage of the judgment of the High Court it is said that the statement with which the petition opens—namely, that after the death of Nirmal Singh disputes arose between the applicants in connection with the estate of Tara Singh, the ancestor of the executants, which has been settled by mutual consent in

this way—"supplies the key to and explains " why the petition was presented." The most natural and effectual way, however, of terminating such disputes would have been to divide the property between the different members of the family in definite shares, each member becoming entitled to the profits and bearing the losses of his allotted share, substantially as the law would have done. This is precisely what this settlement purports to effect. The High Court fail altogether to explain how the empty form of getting the applicants' names entered in the village papers as lambardars of distinct mouzahs—the property remaining joint and continuing under the management of Dalip Singh—would have conduced to the settlement of any disputes, or how the desire which they attribute to the two widows to appropriate a large portion of the income of the property could be gratified by such means, unless the partition was a real transaction, intended by the widows and Dalip Singh to be operative from the first. The settlement secured to them no benefit whatever, and therefore, the more rapacious they were, the greater the probability that the partition was a real transaction.

With all respect to the learned Judges of the High Court their Lordships are quite unable to concur in their view. The parol evidence is to a great extent worthless. Many of the witnesses depose to matter of which they obviously can know nothing. In some instances they go the length of stating what was the nature of a certain lawsuit instituted by the parties to the present Appeal, or by Dalip Singh. No attested copies of the proceedings in those suits were produced, nor was any excuse given for their non-production. But of the numerous documents given in evidence many are absolutely inconsistent with the con-

tinuance of the family as a joint Hindu family owning the family property jointly; none are inconsistent with the partition, in interest and right, of that property in the manner indicated in the petition; and some are inexplicable on any other assumption.

If there be one thing more than any other inconsistent with the existence of a joint Hindu family, it is that the eldest male, and manager for the family, should treat one member as the owner of his share of the entire property, and account with that member for the income of the property on that basis. Yet the very first business transaction which takes place between Dalip Singh and Musammat Rani after the presentation of the petition is conducted on these lines. She, who is a parda-nashin lady, had on the 6th June, 1866, executed a power-of-attorney appointing her brother Shib Charan and Lalji Mal as her "general attorneys and representatives" "for the management of the property and for looking after the Court business." This document was registered on the 23rd July, 1866, her execution of it having been first verified in proper form.

One of the villages, a portion of the joint estate, named Khandwaya, had been mortgaged for a sum of Rs. 2000. Dalip Singh was anxious to redeem the mortgage. In order to effect this, Musammat Rani and Dalip Singh came apparently to the following arrangement. On the taking of accounts between them in respect of the income of "her share" of the family property, a balance was found in her favour of Rs. 1000 or Rs. 1100; the amount is differently stated. She authorized him to apply that balance, with an equal sum of his own, in redemption of the mortgage, and two deeds were executed, each bearing date the 16th June 1867, one by

Musammat Rani, "by the pen of Lalji Mal, general attorney," called a "receipt," and the other a complementary deed by Dalip Singh, described as 24 years of age, by which instruments the parties became bound to carry out their respective parts of the arrangement. Both these instruments were duly registered. At the foot of each is given a list of all the villages of the zamindari. In the deed executed by the Rani, the sum of Rs. 1000 is described as her share of these villages, "after deducting the Government revenue, household expenses, expenses of the servants, and those incurred on occasions of marriages and deaths." And it is provided that this is to be left with Dalip Singh "for the redemption of the zamindari share in Mauza Khandwaya." The deed executed by Dalip Singh contains a declaration by him that "Rs.1100 out of the profits due to Musammat Rani, guardian and *sarparast* of Naunihal Singh, her minor son, for the zamindari share" of the villages mentioned at the foot of the deed "were in deposit" with him, and provides that should he not succeed in redeeming the mortgage, he should return the sum of Rs. 1100, and that "after the return of the said sum the parties shall be liable for the mortgage money in proportion to their shares." The deed contains the further statement that with the exception of this money "there is no longer any account between me and the Musammat in respect of the amount to be taken and paid up to the Kharit crop, 1274 Fasli," as well as other passages dealing with the respective rights and liabilities of the parties. These deeds are amongst the things proved in the case as to which the Subordinate Judge was of opinion that they "would not have been thought of were the family a joint Hindu family."

Their Lordships concur with him in this opinion. If they are genuine, and the trans-

actions they record and carry out are real transactions, they are crucial in this case. The High Court gets rid of them summarily. It states that the argument mentioned in each of them "would seem to have been concocted between "Dalip Singh and Lalji Mal," and points out that neither deed is signed by Musammat Rani (who, by the way, appears to be unable to write), and that there is nothing to show whether either document was ever communicated to her. The High Court do not suggest, however, what purpose could be effected, or what end subserved, by this concoction, or what would be the use of inserting into one of the deeds provisions as beneficial to the Rani as those which the deed executed by her agents on her behalf undoubtedly contains, if the purport and effect of the instrument never was to be, and never was, communicated to her. Why should Dalip Singh state under his hand, in an instrument duly registered, that he owed Musammat Rani Rs. 1,100, unless he, in fact, owed that sum to her? And if he did owe it to her, on what account could he have owed it unless, as he says, it is on account of her share of the rents of the property? Again, 15 receipts were given in evidence bearing dates from June, 1867 to March, 1875, signed on behalf of Musammat Rani by either Lalji Mal or Shib Charan, or sometimes by both. They each bear the signatures of two or more witnesses. On the face of them they purport to contain statements of account between the lady and Dalip Singh in respect of her half-share of some income from the estate. They are, if genuine documents recording real transactions, inexplicable on any hypothesis other than that the partition of the joint estate, at least in right and interest, had actually taken place. The High Court disposes of them by holding that neither Lalji Mal nor Shib Charan had, under the instru-

ments appointing them, power to settle accounts with, or receive money from, Dalip Singh on behalf of their principal; and therefore she, Musammat Rani, would not be bound by these receipts. That is not, however, quite so clear as is assumed; but even if it were so, that criticism might be very just if Musammat Rani were suing Dalip Singh or his representatives for an account of the profits received by him on her account, and he were insisting on getting credit for the sum acknowledged by the receipt to have been paid; but it fails altogether to show the effect and weight of these documents as pieces of evidence in the present case. It is impossible to believe that these two agents of the Rani were engaged for 14 years in the manufacture of fictitious receipts. The concoction would effect no conceivable object. If they are genuine documents, they record a course of dealing which no ingenuity can reconcile with the continuance of the joint ownership of this family property.

It is unnecessary to examine all the other documents in the case. Few, if any, of them are inconsistent with the Defendant's case; many of them are quite inconsistent with that of the Plaintiff. The High Court examined them in great detail. They dealt with them, however, in what, in their Lordships' opinion, was an erroneous method. They apparently only considered whether each document was by itself sufficient to rebut the *primâ facie* presumption that, as the Plaintiff's family were admittedly a joint Hindu family before 1861, it continued to be joint, and omitted to take into account the cumulative effect of all these documents.

In their Lordships' opinion, there is no hypothesis on which all the transactions of the thirty-eight years from 1861 to 1899 can be reconciled and made consistent but one, and that

is, that the petition of 1861 was a genuine document, and that the agreement it embodies and in furtherance of which it was presented, was a real agreement. The Plaintiff does not deny that money was paid by Dalip Singh to his mother, but says it was for maintenance. The receipts refute this. He does not deny that a compromise was made before the petition of 1861 was presented, but seeks to limit the extent of it. Their Lordships concur with the Subordinate Judge in thinking that the Plaintiff acted upon the partition effected in 1861, that he took advantage of it, and never repudiated it during Dalip Singh's lifetime. He is, therefore, bound by it now.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be allowed, that the decree of the High Court should be reversed with costs, and that the decree of the Subordinate Judge should be restored.

The Respondent must pay the costs of this Appeal.