

Nitya Nand and others - - - - - *Appellants*

v.

Rai Bahadur Lala Karam Chand - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE
NORTH-WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH MARCH, 1939

Present at the Hearing :

LORD ROMER

LORD PORTER

SIR GEORGE RANKIN

[*Delivered by* LORD ROMER]

These consolidated appeals owe their origin to certain partition proceedings in the Court of the District Judge, Peshawar, which were begun as long ago as the 17th August, 1926, and do not appear to have yet reached a conclusion. Among the plaintiffs in that suit were the present appellants (6) and (7) Lal Chand and Sant Ram who were the sons of a predeceased son of one Lorinda Mall who had died in 1901. The defendants to the suit included the respondent Karam Chand and Parma Nand (since deceased), the only other sons of Lorinda Mall. The appellants 1 to 5 now represent the interest of Parma Nand. It was alleged by the plaintiffs, Lal Chand and Sant Ram, in their plaint, that Lorinda Mall and his sons and grandsons formed a Hindu joint family governed by the Mitakshara law and they sought partition of all the moveable and immovable properties belonging to the joint family and mentioned in the plaint, and for possession of the one-third share to which on this footing they were entitled. Parma Nand, who on the same footing was entitled to another one-third share, supported the plaintiffs and claimed partition, but Karam Chand, who was entitled to the other one-third, contested the suit on the ground (among others) that the family was separate.

On the 10th March, 1927, the District Judge framed eight issues, of which the only ones necessary to be mentioned are the following:—

“ (1) Does the household of the parties constitute a joint and undivided Hindu family? . . .

“ (4) Does the family of the parties follow Hindu law or custom in the matter of the division of the property?

“ (5) What are the proper shares of the parties and in what property? ”

In April, 1928, an order was made under the provisions of Schedule 2 to the Code of Civil Procedure appointing Colonel Garstin as arbitrator in the suit to decide "all matters at issue between the parties." It may be a question whether this was intended to refer to him every question at issue in the suit, including the question of how the family property if partible was to be divided among the parties, or whether it was intended merely to refer to him the issues that had been framed by the District Judge. But there can be no doubt that the arbitrator himself took the narrower of the two views as to his position. For in his award, to which reference must be made hereafter, he said this:—

"In April, 1928, it was referred to me as arbitrator for the decision of the following issues as found by the District Judge Peshawar, on 10th March, 1927."

And he then proceeded to set out the issues in full, of which, of course, not a single one was directed to the manner in which a partition of the property should be made.

Evidence upon these issues was in due course taken by the arbitrator. The proceedings were, however, unavoidably delayed through one cause or another and the litigation seemed likely to be protracted and expensive. The arbitrator accordingly made a praiseworthy attempt to bring about a compromise between the parties—a compromise that would result in an agreed division of the property among them. For this purpose, with the consent of the parties, he associated with himself two other gentlemen, Rai Bahadur Dina Nath and Captain Hissamuddin Khan. The lines upon which these three gentlemen proceeded were these. Each item of the family property was to be valued and allocated to one or other of the one-third shares in severalty as at an agreed date, the owner of the share to whom the allocation was made being treated as though he were at that date the purchaser from the owners of the two other third shares of their interests at two-thirds of the agreed value. In some cases the whole of the purchase money was treated as being payable on demand; in some cases it was treated as being payable by instalments; and in many cases the purchase money was to carry interest from the date of the so-called purchase. It is sufficient to take as an illustration one item of the property. It is the item with which the present appeal is concerned, and consisted of a bungalow in Peshawar Cantonment. This was allocated to Karam Chand who was treated as having purchased each of the other two-thirds at the price of Rs.37,286 11a. 3p. on the 1st December, 1929. In the statement of the arbitrator dated the 12th January, 1931, to which reference will be made later, these two sums are stated to be payable on demand with interest from the 1st December, 1929.

This attempt to bring about a division of the family property by agreement unfortunately failed. About seven-eighths of the property was allocated in the way described to one or other of the one-third shares, but no agreement as to the allocation of the remainder could be arrived at.

In these circumstances the arbitrator made his award on the 20th December, 1930. He found upon the first issue that the household of the parties constituted a joint and undivided Hindu family. That issue having been so decided, it was admitted by everyone that the property was to be divided into three equal shares of which Karam Chand was entitled to one share, Parma Nand to another share and Lal Chand and Sant Ram to the remaining share; and the arbitrator decided the fourth and fifth issues accordingly. He found also that all the moveable and immoveable property mentioned in the plaint was joint with a certain exception that is now immaterial. He referred at some length to the attempts that he had made to bring about a compromise between the parties, and said that he had made it clear to the parties that the division of the joint property that he had made had been made without prejudice to the main question in the suit, namely, whether the family had or had not the status of a joint Hindu family. He then added this:—

“ I had hoped by taking the course I did that a compromise would be effected and further litigation in Court would be brought to an end: if I failed then nothing I had done would in any way prejudice the question of jointness or not of the family. . . . I much regret to admit that in the end I have not succeeded in bringing about a compromise. I can claim that, as one of the parties remarked to me, ‘ fourteen annas in the rupee ’ have been decided: the remaining ‘ two annas ’ I may say have been the rock on which we have come to grief.”

At the end of his award he made a further reference to the attempted compromise in these words:—

“ Before concluding I must express my keen regret and disappointment at having failed to effect a compromise between the parties whereby this long drawn out dispute would have been settled for all time. I can only hope that the many hours which I and the two gentlemen associated with me have given to these proceedings will not have been entirely in vain.”

Then, after expressing his thanks to those gentlemen, he concluded his award by saying that he was sending separately a statement showing what division of joint property he had been able to make.

This statement, which is dated the 12th January, 1931, is headed “ Arbitrator’s report re division of joint property ” and is sub-divided into seven sub-statements. Each of the first six purports to show the amount due from the owner or owners of a one-third to the owner or owners of another one-third in respect of the property allocated to the former in the way already described. The seventh sub-statement is headed, “ The following items remain to be settled ” and sets out all the items of family property not included in any of the six preceding sub-statements. The only two of these preceding six sub-statements that are material for the present purpose are those numbered 3 and 5 respectively. The former of these is headed, “ Amounts due to Lala Parma Nand by Rai Bahadur Karam Chand ”: the latter

is headed, "Amounts due to Lals Lal Chand and Sant Ram by Rai Bahadur Karam Chand." Each of them contains (amongst others) this item in the first column:—

"One-third of Rs.1,11,860-1-9 (made up as follows) on account of purchase price of bungalow in Peshawar Cantonment."

And opposite to it in the second column is the sum of Rs.37,286-11-3. Then there is set out in the first column details showing how the sum of Rs.1,11,860-1-9, representing the value of the bungalow, was arrived at, and then follows the statement already referred to that the item of Rs.37,286-11-3 was payable on demand with interest at $4\frac{1}{2}$ per cent. per annum, commencing from 1st December, 1929.

The meaning and effect of this award and statement would not seem to admit of any great doubt. The award is one upon the issues that had been framed by the District Judge and which, rightly or wrongly, the arbitrator considered to be the only matters referred to him, and upon nothing else. The statement, on the other hand, would seem to be no more than a record of the extent to which the negotiations for a complete compromise of the whole suit had proceeded. These negotiations had unfortunately broken down, and none of the co-sharers in the family property was bound or in any way prejudiced by the incomplete partition recorded in the statement. If and when the Court should pass a decree for the partitioning of the family property it might well be that this incomplete partition would be utilised in whole or in part as the arbitrator had hoped would be the case; but it is difficult to see how any of the parties could be bound by what had taken place during the negotiations for a compromise that was never effected. This, however, was not the way in which the matter was regarded by Parma Nanda or by Lal Chand and Sant Ram. The statements 3 and 5 had shown, amongst other things, a sum of Rs.16,792-5-9 due to them from Karam Chand, and on the 10th December, 1930, a letter was sent by them to Karam Chand demanding payment of this sum and adding:—

"Besides this we also draw your attention to the money due on other items as well, which we hope you will kindly make it a point to remit on due dates and not necessitate reminders."

They were in fact insisting upon the carrying out by Karam Chand of the tentative agreements made during the compromise negotiations, and recorded by the arbitrator in his statement of the 12th January, 1930.

Karam Chand for his part treated the matter quite differently. In the objections to the award that he filed on the 20th January, 1931, he contended that the award was not a complete award and was therefore void. When this objection was developed by his counsel before the Senior Subordinate Judge it was found to mean that it was the duty of the arbitrator to effect a division of the whole family property, and that as he had not done so the award was

incomplete and should be set aside. But he also objected, and apparently in the alternative, that the partition proceedings formed no part of the award, that they "were taken without prejudice and out of Court and are void." As to the arbitrator's award on the first issue he objected that the arbitrator had not given him or the other parties "any opportunity for arguments or for making a representation in respect thereof." This last objection was somewhat summarily overruled by the Senior Subordinate Judge of Peshawar when the matter came before him on the 19th February, 1932. As to the first of the two former objections he held that the actual division of the property was not one of the matters referred to the arbitrator. "There was no issue," he said, "on the point of division of the property, he did not settle it in his award." He accordingly overruled the objection. But he did not deal with the latter and alternative of the first two objections; and it is not clear from his judgment whether or not he regarded the division recorded in the statement of the 12th January, 1931, as being binding upon the parties. Nor does the formal decree that was drawn up throw any light upon this question. It is, so far as material, in these terms:—

"It is ordered that a preliminary decree be and the same is hereby passed in accordance with the terms of the award for the partition of the property and for accounts."

The property here mentioned would seem to mean the whole property; but the learned Judge may have intended that the partition should follow the lines of the partition made by the arbitrator so far as the property comprised in that partition was concerned.

From this judgment Karam Chand appealed. In his grounds of appeal he again put his case as to the division in alternative ways. He said (*a*) that the Subordinate Judge was in error in holding that the arbitrator was not required to divide the whole of the property, (*b*) that the division of the property effected was no part of the award in the case but was a separate proceeding. He does not seem on this occasion to have contended that the division was void, but his contention (*b*) seems to indicate that he read the decree for partition pronounced by the Subordinate Judge in the way suggested above. He also repeated his contention that he had not been permitted to argue upon the first issue referred to the arbitrator, namely, the issue whether the family was a joint Hindu family.

On the 17th May, 1933, the Judicial Commissioners pronounced their judgment upon the appeal. They held that the objection of Karam Chand as to the first issue had not been sufficiently considered by the Court below. They accordingly set aside the order confirming the award and directed the Court below to reconsider the matter. But they agreed with the Court below that nothing was referred to the arbitrator beyond the eight issues and that he was not concerned with the actual division of the property. They

accordingly overruled Karam Chand's objection (a). As to his objection (b) they said this:—

“ Objection No. 17 is to the effect that the partition which has been effected with the consent of the parties through the intervention of Colonel Garstin and the gentlemen whom he asked to assist him cannot be regarded as part of the award. This objection is, of course, entirely inconsistent with the objection that the award is incomplete, but on that former objection we have already given our decision in agreement with the Court below that actual partition of the property was not a matter referred to the arbitrator. It follows that the actual partition of a portion of the property consented to by the parties and assisted by the efforts of Colonel Garstin and others as mediators did not form part of the arbitration proceedings and cannot be covered by any judgment or decree in the present suit. That incomplete partition of the property has certainly been effected with the consent of the parties and has resulted in the contested subject-matter of the suit being very greatly reduced, but otherwise, though very beneficial in the interests of the litigants, it can have no effect upon the suit before us.”

Pausing here it seems clear that the present appellants had throughout regarded the incomplete partition as binding upon all parties and had been trying to have the terms of that partition enforced by a decree of the Subordinate Judge in the partition proceedings. It is otherwise difficult to understand why in those proceedings Karam Chand was endeavouring to obtain a decision that the arbitrator had failed in his duty in not completing the partition, and alternatively that the incomplete partition was no part of the award.

Now this decision of the Judicial Commissioners—from which no appeal was ever brought—must be taken as having finally decided that the incomplete partition effected by the arbitrator was binding upon the parties; they could not otherwise have held that the properties comprised in it no longer formed the subject-matter of the suit. But they also held that it could not be enforced in those proceedings. If, therefore, it was to be enforced at all, a separate suit would have to be instituted; and accordingly on the 15th July, 1933, the present appellants filed their plaint in the suit that is now before their Lordships. By the suit they sought to recover from the respondent Karam Chand the moneys shown to be payable by him to them in the statement of the arbitrator of the 12th January, 1930, including the sum of Rs.74,573-6-6, the price of their shares in the bungalow in Peshawar Cantonment. This is the only item claimed in the suit with which their Lordships are now concerned. It will be remembered, however, that according to the statement this sum was payable on demand with interest at $4\frac{1}{2}$ per cent. per annum from the 1st December, 1929. Karam Chand accordingly pleaded that the claim to this item was barred by the Indian Limitation Act, 1908. He also disputed most, if not all, of the other items claimed by the appellants in the suit and issued a so-called counter-claim in respect of sums that he alleged were payable to him under the partition.

On the 11th May, 1935, the Subordinate Judge delivered judgment in the suit and counterclaim which had been consolidated by order of the Court. He found that on balance there was due from the respondent to the appellants the sum of Rs.4,74,227-13-11. This sum included the above-mentioned sum of Rs.74,573-6-6 in respect of the bungalow, together with interest thereon from the 1st December, 1929, to the 5th July, 1930, amounting to Rs.2,004 or Rs.76,577-6-6 in all. The Subordinate Judge, basing his decision on section 14 (1) of the Limitation Act, held that the claim of the appellants to this item was not barred by lapse of time, inasmuch as time under the Act did not begin to run until 17th May, 1933, being the date on which the Judicial Commissioners had given their judgment in the partition suit. The subsection in question is in these terms:—

“Section 14.—(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in the Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.”

From this judgment of the Subordinate Judge both parties appealed to the Court of the Judicial Commissioner on a great number of points, and both parties appear to have been partially successful. In particular, the respondent was successful in his plea of the Limitation Act as a defence to the claim in respect of the bungalow. “The cause of action on which the present suit is based,” said the Judicial Commissioners, “had nothing to do with the cause of action which was the basis of the previous suit in which the award was given.” The result of the appeals was that on the 27th March, 1936, the appellants were given a decree for Rs.5,77,861-3-2 from which had to be deducted the sum of Rs.1,12,953-12-3 decreed to the respondent on his appeal, leaving a net balance of Rs.4,64,907-6-11 due to the appellants with effect from the 11th May, 1935 (the date of the decree of the trial Judge). As both parties had been partially successful, each of them was ordered to pay his own costs of the appeals.

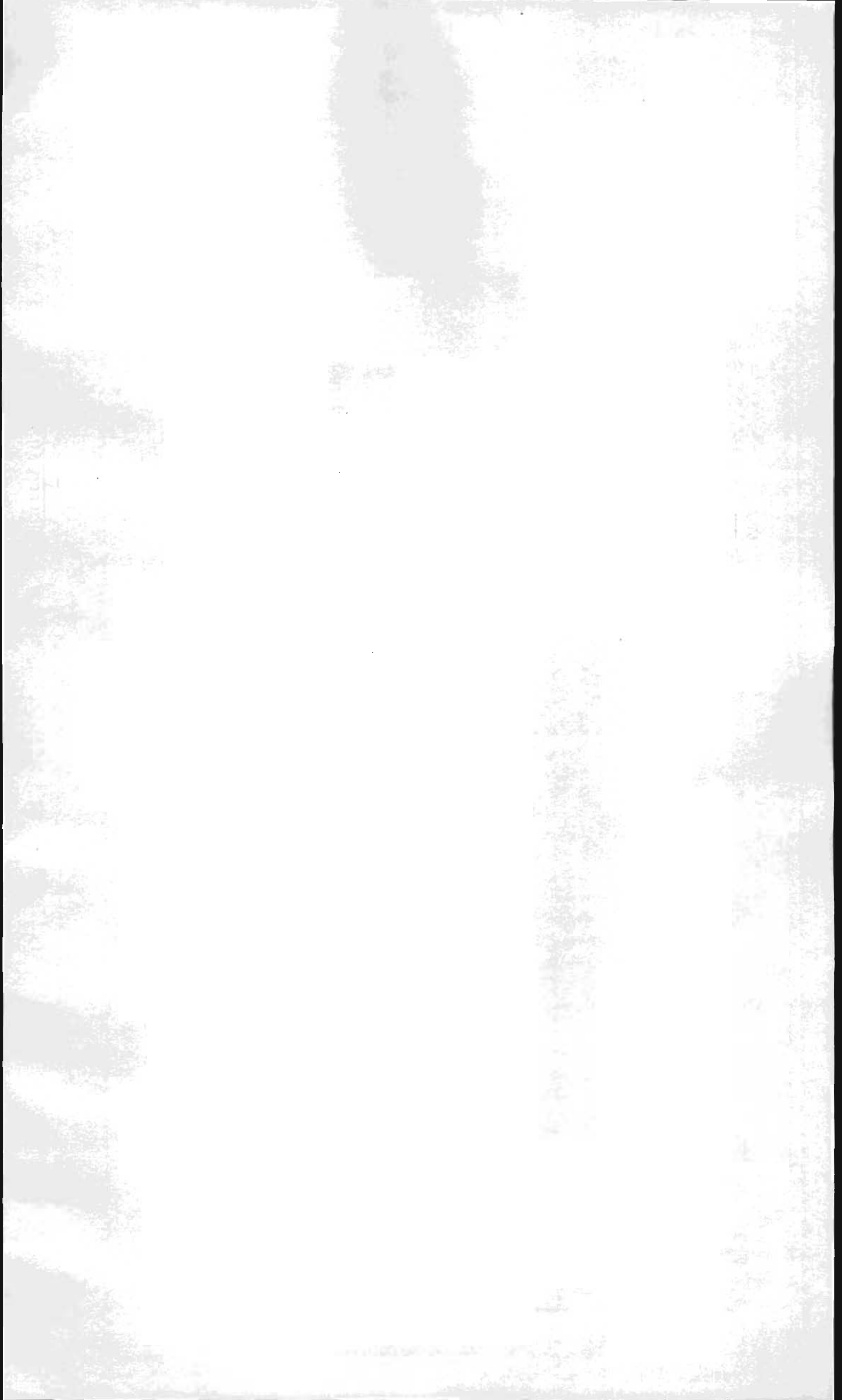
From this judgment of the Judicial Commissioners, so far as it relates to the claim of the appellants in respect of the bungalow, an appeal has now been brought to His Majesty in Council.

Their Lordships are unable to agree with the Judicial Commissioners that the Limitation Act enables the respondent to evade payment for the appellants' shares in this item of the joint property which he acquired under the partition made by the arbitrator. It is unnecessary for their Lordships to consider which article of the Act is applicable to such a suit as the present one; for in their Lordships' opinion the Subordinate Judge was right in holding that, whatever may be the period of limitation prescribed for such a suit, that period did not begin to run until the 17th

May, 1933. Their Lordships have already given their reasons for thinking that up to that date the appellants were seeking to enforce the incomplete partition by means of the partition proceedings. They were therefore founding themselves upon precisely the same cause of action as that upon which the present suit is founded. But on the 17th May, 1933, it was held by the Judicial Commissioners that the effect of the incomplete partition was to remove all the properties with which it dealt from the purview of the suit; in other words that they had no jurisdiction in that suit to deal with any claims under such partition. No one can suggest that in seeking to enforce the partition in the earlier proceedings the appellants were not acting with due diligence or in good faith. The case accordingly falls within the very words of section 14 (1) of the Indian Limitation Act, 1908.

For these reasons their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be allowed, and that the decree of the Judicial Commissioners of the 27th March, 1936, should be varied by adding the sum of Rs.74,573-6-6 with interest thereon at the rate of $4\frac{1}{2}$ per cent. per annum from the 1st December, 1929, to the 11th May, 1935, to the sum thereby decreed to the appellants.

The respondent must pay the costs of this appeal.



In the Privy Council

NITYA NAND AND OTHERS

v.

RAI BAHADUR LALA KARAM CHAND

DELIVERED BY LORD ROMER

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