

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Rao Kurun Singh v. Nawab Fyz Ali Khan, and Kooer Gholab Singh v. Rao Kurun Singh, from the late Sudder Dowanny Adawlut at Agra, North-West Provinces; delivered July 12th, 1871.*

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Present:—

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

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SIR LAWRENCE PEEL.

THEIR Lordships, in delivering their Judgment in these two cases, will begin with that which was first argued, namely—the case of *Kooer Gholab Singh v. Rao Kurun Singh*.

The Plaintiff in the suit and the Respondent in this Appeal sued in the Zillah Court of Allygurh, in the North-West Provinces, as heir of one Duleep Singh, to set aside certain alienations of the immoveable estate that had been Duleep Singh's up to the time of his death, made by his widow, who succeeded to the estate as his heir. The Defendants were respectively the persons claiming under these alienations, and the mother of Duleep, who had concurred in them. The mother survived the widow, and was entitled, at the death of the latter, to succeed as heiress to her son Duleep. The Zillah Court decreed the suit in favour of the Plaintiff. At the date of the Decree the mother was dead, but she was alive at the time of the commencement of the suit.

The Plaintiff and Duleep descended from a com-

mon ancestor. The Plaintiff was fifth in degree, counting from that ancestor. In his line was his grandfather, who still lived, but was a lunatic at the time of the institution of the suit, and at the time of Duleep's death. The Plaintiff's father was then dead. On Appeal to the late Sudder Dewaney Adawlut at Agra, that Court affirmed the Decree. From that decision this Appeal is now brought.

On the argument of the Appeal, nothing was addressed to the Court on the facts to show that these alienations were valid, but the whole argument was addressed to the competency of the Plaintiff to question them. The learned Counsel for the Appellant objected that at the time of the suit the Plaintiff was not entitled to the possession, and that the suit was one for possession, that he sued as guardian of his grandfather, and that he was not duly so constituted, and lastly, that he had shown no title as heir.

As to the first objection, the answer is, that this suit in its main object was brought to set aside certain alienations, and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And, as it appeared that when the Decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers to it; first, that the grandfather was not the heir, but the Plaintiff, and that if the latter had been obliged to sue on the grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the Plaintiff's title as heir, which was taken in the Court below, on the ground of its remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below, necessarily assumes the Plaintiff to be claiming as heir to the son, and to urge on the hearing of the Appeal for the first time that the real title of heirship must be derived from the mother and not from the son, was to start a new ground of objection to title, which the Plaintiff had had no oppor-

tunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a sister may inherit to a brother, and that that line of descent through the assumed sister from the brother was not exhausted by the Plaintiff's proof. To admit such a line of argument would be also to expose the Plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the district, and by the want of proof that the person claiming to be the son of a sister, did in fact stand in that relation to the *praepositus*. It will be found from the Judgment of the Sudder Court, p. 53, that what the Court understood to be the questions raised before them, and the sole issues raised before them were, first, "Should the Plaintiff's cause of action be held to have arisen on the death of Duleep Singh or of Koondon Kooer, and is the suit within time or not? Second, Was Koondon Kooer competent or not to alienate the property in question? Third, Is the Plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the bar that the Plaintiff was not the heir, but that the person who appears in the pedigree, and who was a Defendant on the Record, was a nearer heir of Duleep, depends first upon proof that Duleep was the sister's son, and next, of course, upon the point of law whether the sister's son is capable of inheriting. That it is by no means clear that Duleep was the sister's son, would appear from the statement which precedes the Judgment of the Sudder Court, in which the Judges say that "in 1856 Moosumat Toolsa," that is the mother, "is said to have likewise executed a *Hibanamah*, bestowing *Mouza Mohood Khera* on her husband's sister's son, Doolut, and her own nephew Buldeo," there treating Doolut not as the sister's son, but, in fact, as the Aunt's son. There was, therefore, no real proof before the Court of the relationship of this party to the *praepositus*, and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the *Metacshara*, to inherit. There was nothing to show

that the interpretation of the ancient text of the law on which Mr. Pritchard relied, even assuming the relationship to be made out, did obtain in the North-West Provinces, and there is every reason to suppose from what has taken place in this case, that it has not been received there. The silence of the Defendant, supposing him to be in that degree of relationship which it is asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the sister and her descendants find no place in the tables of succession, according to the law of the Metacshara, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late Prossonno Coomar Tagore. The learned Counsel for the Appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact; but he contended that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of Ballam Bhatta. But it is entirely opposed to the spirit of the Hindoo race to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the courts of the country, and it seems to their Lordships that it would be extremely mischievous to disturb upon points taken here for the first time any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise her Majesty to dismiss the Appeal with costs.

In the other case two questions were raised; the first upon the Decree of the High Court, which dismissed the suit of the Plaintiff, the Appellant, in this case, upon the ground that the case fell within the 7th Section of the Act VIII. of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be, whether there has been a splitting of the cause of action; and it is therefore necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various Defendants to impeach certain alienations made by the widow and mother of Duleep Singh. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependants of the two ladies, so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside and impeach a mortgage which had been granted by the ladies to the Respondent in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different; in the one case the widows, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the Defendants in the first suit. In the other case, the issue was whether they had duly exercised the limited power which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended that these two claims against distinct persons and of a very distinct nature really form parts of one cause of action, is founded upon the circumstance that in the first suit the Defendant sued for the possession of the lands, the argument being that these mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not

properly brought and could not properly be brought at the time it was first instituted for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the Judgment delivered in the other case, to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the Plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities, which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to consider whether, the decree of the Sudder Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal Sudder Ameen.

The case made is that this mortgago was granted by the widows, and that it was not within the power of a Hindoo widow to grant it, the money not being raised for any of those purposes for which the widow is allowed to pledge the estate. In such a case whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person, having only a limited power to grant it, are bound to show, *prima facie* at least, that the money was raised for a legitimate purpose. The Defendants accordingly plead at page 4, "The real circumstances of the case stand thus:— Moosumat Koondun Kooer and Toolsa Kooer, the heirs in possession of the entire property left by Rao Duleep Singh, borrowed 13,000 rupees from our ancestor, under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property." Upon that pleading it is to be remarked that no

distinction is made between any of the items making up the 13,000 rupees, that the Defendants pledged themselves to the borrowing of the whole sum for the purposes therein mentioned, and that in those purposes it is not very distinctly stated that any part of the mortgage money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the bar to-day, however, is that the mortgage is at all events partially good, inasmuch as 3000 rupees, part of the claim, was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected that those who have to support the affirmative of such a case, should give some clear testimony by witnesses as to the nature of the transaction; and it is very remarkable that in this case the oral testimony on the part of the Plaintiff is so entirely worthless that neither of the learned Counsel for the Appellants thought fit to refer to it. That some evidence as to the nature of the transaction might have been given one would have supposed, because although the Respondents are the children or remoter descendants of the original mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged bond for 3000 rupees, it is stated that it was taken in the name of Kullyan Doss, cashier of the Respondent's ancestor. Kullyan Doss is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trustworthy person whatever employed in the family of the Defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir Roundell Palmer. But what is the documentary evidence, if evidence it can be called, as to the 3000 rupees, which is in fact the only item on which any substantial question seems to arise? It is the document at page 13. That is a plaint filed in a suit brought by the mortgagee against the two women, the widow and the mother of Duleep Singh, seeking to be maintained in possession as mortgagee. The account that it gives of the transaction is this: "The Plaintiff files a regular suit in this Court

"against Moosumat Toolsa Kooer, the mother, and  
 "Koondun Kocour, the widow of Duleep Singh, the  
 "proprietors of Pergunnah Burowlee, to be main-  
 "tained in possession as mortgagee, by insertion of  
 "his name as such in the revenue records of this  
 "district, and by allowing him to pay the Govern-  
 "ment revenue in respect of Mouzah Fuzulpoor, in  
 "Pergunnah Burowlee, assessed at 506 rupees, and  
 "to recover 328 rupees, the interest up to the end  
 "of the month of Jeith, 1254 Fuslee, as well as  
 "242 rupees, the mesne profits for the rainy season  
 "crop for 1255 Fuslee, which the Defendant has  
 "forcibly realized from the lessees of the village,  
 "notwithstanding her having already given up its  
 "possession to Plaintiff, according to the terms of  
 "the registered deed of mortgage dated 30th July,  
 "1846, engrossed on stamp paper, which is the  
 "basis of this action. Total value of suit, 1076  
 "rupees. He founds his claim on the assertion  
 "that on the demise of Rao Duleep Singh, the pro-  
 "prietor of the talooqua of Burowlee, the aforesaid  
 "Defendants became his heirs; and as owners of  
 "the entire talooqua and all other property left by  
 "him, and in the certificates of death filed in the  
 "revenue department in respect to every one of the  
 "villages forming the zemindaree of the deceased,  
 "the names of the ladies were entered as his suc-  
 "cessors." That mutation of names took place, as  
 "is shown by the proceeding of that date, on the  
 "22nd February, 1847; and on the face of the pro-  
 "ceeding as well as by evidence which has been  
 "given in the cause, it appears that the proceeding  
 "was one which followed upon certain litigation be-  
 "tween the widow, who was the immediate heir ac-  
 "cording to the Hindoo law, and the mother, who  
 "contested her title, which at last ended in a com-  
 "promise, whereby one took two-thirds and the other  
 "one-third of the estate. This plaint goes on to  
 "state: "They then, for the payment of the Govern-  
 "ment revenue, asked the Plaintiff for a loan, and,  
 "according to their request, he lent them 3000  
 "rupees." Certainly the inference one would draw  
 "from this statement is that the loan was a joint  
 "transaction, that it was subsequent in date to the  
 "determination of the litigation by the compromise  
 "and the insertion of the names of the two ladies as  
 "the registered owners of the talook.



Then, again, this deed which is said to have been executed by them, and to have been registered on the 3rd of August, 1846, which is a date not quite reconcilable with what has just been said, or with what one would infer, is not produced. Neither that nor the mortgage for rupees 13,000 has been produced. And their Lordships, looking at this documentary evidence on which the Respondents rely, and contrasting it with the account given by the witnesses for the Appellant, think that the case deposed to by the witnesses for the Appellant, to whom credit was given by the Principal Sudder Amcen, is far more likely than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion that the Respondents have failed to support that burden of proof which the law casts upon them, of showing that the mortgage was given in any part for the purposes for which the widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this Appeal be allowed, that the Decree of the High Court be reversed, and that in lieu thereof a Decree be made dismissing the Appeal to the Sudder Court and affirming the decree of the Zillah Court, with costs. The Appellant in this suit and the Respondent in the other suit must have the costs of both the Appeals.





