

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hyder Hossain v. Mahomed Hossain and others, from Oude ; delivered 15th January, 1872.*

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Present :

SIR JAMES W. COLVILE.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

THIS is one of the Appeals that have lately been brought from Judgments or Orders of the Revenue Officers engaged in making the settlement of the Land Revenue for the province of Oudh. The present case has been before several of the Revenue Authorities who have passed conflicting decisions upon it.

In October 1864, the Respondents claimed to be entitled, as proprietors, to one moiety of a village named Belowlie with its appurtenant hamlets, and to be treated accordingly in the settlement then in progress. This claim was originally advanced by distinct complaints or petitions in respect of different hamlets, but these were consolidated into one suit by an order of the Extra Assistant Commissioner Mahomed Hossain Khan, dated the 23rd of February, 1866 ; and the subject matter of the litigation may be treated as the village Belowlie.

The title asserted by the Respondents was, that the village had originally belonged to one Sheikh Aleemoolah, their great grandfather ; that he had a daughter Khyreeyutoonissa, who left two sons, viz., Lootf Hossain, the father of the original Appellant,

and Enayut Hossain the father of the Respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the Appellant was that, on the death of the common ancestor, Aleemoolah, the entire interest in the village had somehow become vested in his widow; that she, about the end of the last century, transferred it by deed of gift to Lootf Hossain, who thenceforward held it as sole proprietor up to the time of his death when it passed to his son, the Appellant; and that during all that period the Respondents and their father had no proprietary interest in it, being at most dependents of the other branch of the family.

It was admitted, or hardly disputed on the part of the Respondents, that, after Aleemoolah's death, his widow first, and after her death, Lootf Hossain, and after him the Appellant had been registered as the persons responsible for the revenue assessed from time to time on the village; and, so far, as the ostensible proprietors of it. But it was insisted that this was merely an arrangement for fiscal purposes, and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed that a suit so framed, though tried by the Revenue Authorities, and in the course of proceedings for effecting a settlement of the public revenue, does not in the province of Oudh merely determine who is to be Lumberdar, or the persons entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act XVI of 1865, which, though passed after the commencement of this particular suit, seems to have a retroactive effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under the review of their Lordships:—

The issues originally settled in the suit were,

1st. Did the Plaintiffs (the Respondents) ever receive the profits of the village or not?

2ndly. Did the Plaintiffs live in common with the Defendant or separately?

3rdly. Did the Defendant give the Plaintiffs 881 rupees for their sister's marriage in 1264 F. or not?

4thly. Did Mussumut Hyat Bebee make over this village with others to the Defendant's father Lootf Hossain, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of Enayut Hossain, and after his father's death, did the Defendant himself remain in uninterrupted possession, or not?

On the 1st of February, 1866, Mahomed Hossain the Extra Assistant Commissioner decided the case in favour of the Respondents (p. 17).

On the 19th of June, 1866, this decision was reversed by the Settlement Officer, Major Chamier, on the ground that it was partly based upon the result of inquiries made out of Court, and the case was remanded for trial on the following issues:—

1. Whether up to 1263 F. (1856) commensality existed between Plaintiff and Defendant, and did Plaintiff participate in the profits?

2. If so, did the Plaintiffs enjoy the said portion of profits by right or by favour?

3. Whether estoppel is created by Plaintiffs having enjoyed Seer (p. 29)?

On the 7th May, 1866, Mahomed Hossain having tried these issues again decided the case in favour of the Respondents (p. 25).

There was a second appeal to the Settlement Officer, who, on the 19th of June, 1866, reversed the decision of this native officer and dismissed the Respondent's claim (p. 31).

This order was confirmed on appeal by the Commissioner of the Lucknow Division (Major Barrow) on the 21st of September, 1866 (p. 33).

The cause in the ordinary course of things would next have gone before the Financial Commissioner, but Major Barrow having been intermediately raised to that office, it was transferred to the Judicial Commissioner, Sir George Couper, who, on the 16th of September, 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. Davies, reversed the orders of Major Chamier and Major Barrow, and affirmed the decision of the Court of First Instance in favour of the respondents.

This ruling was afterwards reviewed by Mr. Tucker, who succeeded Sir George Couper as Judicial Commissioner, and was confirmed by him on the 2nd December, 1868.

These conflicting judgments, and the argument

addressed to their Lordships on behalf of the Appellant, clearly show that the question between the parties is not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The Judgments of Major Chamier and Major Barrow proceed upon certain former rulings of the Revenue Courts in Oudh. These are not before their Lordships, but their effect seems to be that the principle of the settlement was to be based on the maintenance of the proprietary right as it existed prior to and at the time of the annexation of the province to British India in 1856; that if, under the Kings of Oudh, one member of the family had been registered as the sole owner of the estate, and the person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show not merely that they had received some indefinite and casual sums out of the profits, or even certain Seer lands by way of maintenance, but that the ostensible owner of the estate had accounted to them for the aliquot share of its profits receivable by the owners of the share claimed. These two officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest given by the Respondents in the Court of First Instance, to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the Appellant allowed to prevail.

The decision, however, of Mr. Davies, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings. It is printed at p. 39 of the Record.

In that case it appeared that the party claiming a joint interest against the party, who was the ostensible proprietor, had held 71 beegahs Seer land, and had also received sums averaging 86 rupees. And Mr. Davies' judgment, after stating the question to be whether the Respondent had, by the adverse possession of the Appellant, been excluded from his inheritance under the Mahomedan Law, proceeds thus: "Under the Mahomedan Law grandsons are entitled to equal shares. Under the custom of the country one shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of



the year. No safe inference against a shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take only a sufficient sum for their own expenses; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favour of a grandson claiming against another grandson, and that the onus of proof should properly be placed on the one claiming to be sole possessor contrary to law and custom; and, secondly, that in the case before him the Appellant had cut the ground from under his feet by paying to the Respondent, in addition to Seer, a sum of money of fluctuating amount.

If their Lordships are called upon by the present Appeal to overrule the decision of Mr. Davies, and to restore the rule supposed to be established by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir George Couper and by Mr. Tucker; the principle which it lays down, having been thus sanctioned, has probably governed other settlement cases since decided; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of Oudh, it receives some corroboration from the findings of the Mahomedan officer (presumably conversant with such customs) who tried this case, in the first instance, before the date of Mr. Davies's Judgment.

It remains to be considered whether the principle of that Judgment has been correctly applied to the present case.

It was argued for the Appellant that he has not been allowed an opportunity of proving the alleged deed of gift to his father. There was nothing, however, to prevent him from proving this deed, if he had the means of doing so, on either of the two trials before the native officer. He chose, however, then to rest his case on the Order, or copy

of the Order, set out at page 11, of the Record, which, at most, proves no more than that with the consent of the family at the time the village, which had been entered in the Revenue Register in the name of the widow of Aleemoolah, was, transferred into that of Lootf Hossain on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it under the ruling of Mr. Davis, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burthen of proof lies.

It is no doubt true that before Major Chamier, the Appellant's pleader, proposed to give further evidence in support of his client's title under the alleged gift; and that that officer, who had decided the other issues in favour of the Appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at this late stage of the case." But their Lordships are far from thinking that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And however that may be, it appears to them that no substantial injury has been done to the Appellant by it. For it is clear that the real issue between the parties is, whether, notwithstanding the title registered on the revenue records, both branches of the family continued as a joint family to possess and enjoy the village. If that were made out, very little credit would be due to an ancient deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession and enjoyment of the estate.

Have then joint possession and enjoyment been established in the degree which satisfies the ruling in Mr. Davies's case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native officer. But they are of opinion that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the Seer land was enjoyed by the Respondents of right and not by favour, and that their status was not that of dependents but of

co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. Davies, though it might not satisfy the requirements of the earlier cases on which Major Chamier and Major Barrow proceeded.

Their Lordships, in considering this Appeal, have felt that, in cases of this nature, wherein the procedure is somewhat loose, and the merits depend much upon local custom and local inquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation provinces to act on the principle of not disturbing the Judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the Appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of Oude and dismiss this Appeal with costs.

