

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Mirza Ahmed Abbas Khan v. Sah Muthra Dass and another, from Oude; delivered 13th May, 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE Appellant and the first Respondent are the respective representatives of the Plaintiff, Ikbalooddowlah, and of Benarsee Dass, Defendant No. 1 in a suit brought in the Court of the Civil Judge of Lucknow against Benarsee Dass, and the Plaintiff's brother Mokurumooddowlah, to recover nine Government promissory notes of the amount of 27,000 rupees, which the Plaintiff alleged to have been wrongfully sold and transferred by the brother to Benarsee Dass.

Although these transactions took place some time between November 1857, and March 1858, the Plaintiff in this suit was not filed until the 6th September, 1864.

The Civil Judge dismissed the suit, and his decision was affirmed on Appeal by the Judicial Commissioner. The Plaintiff having appealed to Her Majesty in Council, these judgments were reversed, and a rehearing ordered, with liberty to the parties to amend their pleadings and evidence. Further written statements were accordingly filed

and further evidence given, and after several hearings, remands, and rehearings, the Courts in India have concurred, but for different reasons, in dismissing the suit.

Before adverting to the evidence bearing on the question upon which their Lordships' decision will turn, it will be convenient to refer to the general history of the case, which is shortly stated in the judgment of this Committee in the former Appeal, and reported in 12 Moore I. A., p. 507, as follows:—

“The Plaintiff was the eldest son of his mother (Sitara Begum), who died possessed of a considerable property, consisting of land, moveables, and certain promissory notes, of which those in question are part. It was a Mahomedan family. The family consisted of two sons and a married daughter. The eldest son (the Plaintiff), claimed the land under an alleged gift from his mother in her life-time, a gift the validity of which was disputed by his brother at least. The sister survived her mother but a few days [this is an error; she in fact survived her mother about three years]; the brother and sister were entitled to the mother's property as heirs under the Mahomedan law; the brothers taking equally each the double of their sister's share, and on their sister's death they took certain shares with her husband in the sister's share. Soon after the mother's death, the sons and daughter proceeded to make some division of the moveables; the elder son claimed the land, and that title was litigated by the younger brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper amounting to 59,100 rupees, in which each son's share would be of the value of 23,640 rupees, and the daughter's of 11,820 rupees. The daughter is stated to have received her share of this part of the property; the daughter's husband appears to have disclaimed.]

“The Plaintiff's right of suit in this action is founded upon an alleged illegal dealing by the younger brother with his elder brother's share of this property, and he seeks to extend his right and remedy against the first Defendant by treating him as an illegal purchaser under and consequent upon his brother's alleged spoliation. The mode in which the Plaintiff alleges this wrong to have been effected is this, viz., that the notes were secured under the separate seals of the heirs in a house belonging to the estate, in which the mother died, and her sister continued to reside; that the younger brother, about the commencement of the Mutiny, broke the seals, carried off the property, and alone sold and purported to transfer it.”

The Judgment proceeds thus:—

“If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first Defendant's letter of the 30th of July, 1865 [the real date of this letter is the 19th December, 1863], it follows that the first Defendant

would be under the legal obligation of shewing title to the notes purchased. The law applicable to the acquisition of title to notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels."

The result of the proceedings in India, prior to the first appeal to Her Majesty, was as follows.

The Civil Judge of Lucknow had dismissed the suit on the grounds that it was barred by limitation, and that the Plaintiff had recovered judgment against his brother in a former suit, in which a purchaser of other notes, named Sheonath, had been joined as a Defendant. The Judge also found there was collusion between the brothers in bringing this and the former suit. The Judicial Commissioner had based his judgment on the short, and if taken alone, insufficient ground that Benarsee Dass was a *bonâ fide* purchaser for value of the notes.

This Committee recommended Her Majesty to reverse these judgments, because, in their opinion, the Courts in India had not sufficiently considered the nature of these Government notes, which required indorsement to pass the property, observing that there was no distinct evidence of the state of the indorsements on the paper, and that no evidence was given of any legal transfer of it. They held also that the claim was not barred by limitation, nor by the decree in the former suit. The Judgment pointed out the requisites of a legal transfer by indorsement, but added the following remarks, which have an important bearing upon the present appeal:—

"An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer being exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently the Plaintiff's case requires an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the brothers, would, if alleged and proved, have constituted a valid defence."

It is added—

"A Plaintiff, however, ought not to have a defence of this sort urged against him at the hearing, without due notice by the pleadings and issues of a case of fraud."

In conclusion, their Lordships were of opinion that the facts ought to be inquired into on proper

pleadings and evidence, and that if the Plaintiff should prove a *prima facie* title to the notes, "the Defendant ought to be called on to show if he can title in himself, or some grounds displacing the Plaintiff's right to complain of his acts."

Upon a review of the evidence and judgments in the Record now sent up, their Lordships are clearly of opinion that the Plaintiff has failed to prove such indorsement of the notes as would be sufficient in itself to transfer the legal property in them. Whether the indorsements were open or special does not appear, but, whichever they were, they were made by affixing the seal of the mother, to whom it seems the notes were made payable. This act was done after her death, by the hand of the Plaintiff's brother, under the circumstances hereafter mentioned, and it is nowhere suggested that the indorsement purported to be other than the mother's.

Much evidence has been given with a view to show that ladies of rank commonly indorsed Government notes by putting their seals on them, and that it was not unusual for purchasers to buy notes, bearing such seals, from members of their families in the confidence that the seals were properly affixed. The Courts below have found that Benarsee Dass bought these notes in the *bond fide* belief that the seal had been properly affixed, and their Lordships are not disposed to dissent from that finding; but this alone cannot avail, for it is obvious that a purchaser, however *bond fide*, can gain no title by an unauthorized use of the seal.

The defence, therefore, must rest upon the ground which was principally relied on at the bar, viz., that special circumstances are shown which in equity preclude the Plaintiff from defeating the sale. It is clear that the Plaintiff's brother who sold, or took part in the sale of the notes, as papers bearing genuine indorsements, is precluded from asserting that such indorsements are not genuine; and the contention for the Defendant is that, as between the brothers, the Plaintiff has acquiesced in what was done with the notes, and that both are now acting in collusion to set up a false case with a view to obtain their value from the Defendant. If this is made out, it cannot be disputed that it would be inequitable to allow the Plaintiff to succeed

in the suit. And the question, which is mainly one of fact, is, whether such a case has been established.

It would be difficult to arrive at a satisfactory conclusion on this defence from the conflicting and obscure evidence of the witnesses who were examined on different occasions and in various stages of the cause, without the light to be obtained from a review of the acts and conduct of the brothers.

The case of the Plaintiff, made by the plaint and other proceedings, was that just before the battle of Chinhut (in one proceeding it is said two days before) the brother broke open the lock and seals of the box in the family house in which the notes were kept, took away the notes with the mother's seal, and afterwards sold the notes. The motive suggested for this trespass was the claim made by the Plaintiff to the immovable property under an alleged gift from the mother.

This case, which, in effect, represents that the brother, taking advantage of a time of anarchy, seized the notes with the intention of appropriating them to his own use, is not supported by the evidence. What really appears to have happened is very different. The rebellion was breaking out, and the family house, being near the Residency, was in a position in which it was likely to be exposed to military occupation. The notes would obviously have been unsafe in this house, and it appears that the brother removed them to his own. He gave the married sister her share of the notes, about 12,000 rupees. On the next day both brothers appeared before the High Priest, and, so far from the Plaintiff's brother then desiring to appropriate the notes to himself, he offered to place them in the hands of the High Priest. He, however, declined to take charge of them, and they remained in the brother's possession.

What next followed is the subject of much conflicting evidence. A few general facts, however, distinctly appear. The rebel forces being in possession of the city, the leaders of the rebel Government required the native nobles to contribute money to its support. The Plaintiff and his brother were related to the family of the ex-King of Oudh, and were called on for heavy contributions. It appears that the Plaintiff was more reluctant than his brother to comply with these demands. A guard

was placed at the door of his house, and he was for some time imprisoned, no doubt with the object of inducing him to submit to them. It appears, however, he must have been released before the notes were sold to Benarsee Dass, which, according to Gooroo Mull the broker, was only eight days before the British forces recaptured Lucknow.

There is no doubt that the notes got into the hands of the rebel leaders, and that they were sold, and the Begum's seal affixed to them by the brother at their instance, the proceeds finding their way to the rebel Treasury. It is also clear that other property of the Plaintiff was attached and sold by the rebel Government, and the proceeds disposed of in the same way. These facts appear in the testimony of several witnesses, and especially of Wajid Ally, one of the leaders of the rebellion.

The notes were sold at a considerable discount; but the full price then attainable for them appears to have been paid. The sellers were those who believed in the probable success of the rebellion, whilst those only who had faith in the restoration of British rule were willing to become purchasers.

It appears that none of the nobles yielded very willingly to the demands of the rebel Government, and that the contributions were in some measure forced from them. Wajid Ally says :—

“ All the ameers (nobles) had in fact to supply money to the State. I do not think they would have paid voluntarily. The money was demanded, and they made it good as best they could.”

He also says, with apparent truth :—

“ There were three or four motives for this :—1st. If the party did not give voluntarily, the State would have used force; 2ndly. The party wished to propitiate the then existing Government; and, 3rdly. People were in hopes, if the rebellion was successful, that by assisting the State in its difficulties they would be recompensed afterwards.”

It is not satisfactorily shown that the Plaintiff was personally concerned in delivering the notes to the rebel Government, or that he personally took part in the sale. Some witnesses examined before the Civil Judge after the last remand to prove his actual participation in the disposal of the notes do not give satisfactory evidence on the point.

Other witnesses were called to show that at all events the Plaintiff knew of the sale to Benarsee Dass. The Collector of Mehsool, a tax of 5 per cent., which appears to have been levied by the rebel Government on the transfers of notes, proved that he applied to the Plaintiff for the mehsool payable on the transfer of these notes, and was told by him that Benarsee Dass was responsible for it. Another witness corroborates this statement. Even if these witnesses are not altogether to be relied on, it is difficult to suppose, looking at the whole case, that the Plaintiff was really ignorant of the manner in which these notes were dealt with, and that they were sold at the instance and for the benefit of the rebel Government.

It may be that the notes were obtained and sold under such circumstances of duress on the part of the rebel Government that the Plaintiff might have impeached the sale. But he has not put forward that case. If such a case had been made, questions would have arisen whether he, as well as his brother, had not yielded, however reluctantly, to the exactions of the rebel Government, and acquiesced from some of the motives referred to in Wajid Ally's evidence in the sale dictated by its leaders.

The conduct and proceedings of the Plaintiff and his brother, after the restoration of British rule, are next to be considered.

The first attempt to recover the notes sold to Benarsee Dass was made, not by the Plaintiff, but by his brother. As early as October 1858 Mokurumooddowlah applied to the Assistant Commissioner of Lucknow in a summary proceeding to obtain possession of them from Dhunput Roy, one of the persons engaged in the sale. Dhunput's answer was, that Mokurumooddowlah sold the notes, through his agency, to Benarsee Dass. Wajid Ally was called as a witness for the defence, and at that early period stated that the sale took place as a contribution to the wants of the rebel Government. The Assistant Judge was of opinion that "the notes were apparently sold, and not stolen as Plaintiff represents, and that the Plaintiff was a principal in the matter," and he dismissed the claim as one fit for a civil tribunal. Although the Plaintiff does not appear as a party in this proceeding, it may be properly used to show that his brother, with whom the Plaintiff is now

said to be colluding, and on whose evidence he relies, was the first to make an effort to recover the notes sold to Benarsee Dass, and that he did this on false grounds. This proceeding is also important as showing that the sale to Benarsee Dass was openly discussed, and could hardly have remained unknown to the Plaintiff, and further that the British Courts were open as early, at least, as October 1858. Lord Clyde had re-captured Lucknow in March, Lord Canning's Proclamation had been issued in April, and the British rule had been restored throughout the province of Oudh in the early part of that year.

No step whatever appears to have been taken by the Plaintiff until the 21st May, 1860. He then applied to the Assistant Commissioner, stating that his brother had "got the notes as a plunder," and praying that, "after they are compared with the register, the purchasers of the stolen notes may be called for, and the notes restored;" and he prayed that "his brother may be dealt with according to law."

The Commissioner declined to interfere, saying that the dispute should be decided by a competent Court. The Plaintiff was apparently conscious that the lateness of the application required explanation, and he therefore stated, as a reason for the delay, that, "shortly after the rebellion broke out, he was unable to take any step for their recovery, and was obliged to keep himself quiet." If this means that he was obliged to keep quiet during the rebellion, the necessity ceased upon the restoration of British rule; if, on the other hand, it means that he was afraid of the British Government, the excuse is obviously a pretence, for his brother, who was, apparently, a more pronounced partizan of the rebel Government than himself, did not fear to appeal to the British Commissioner as early as October 1858.

No further proceedings, either criminal or civil, were taken by the Plaintiff at that time against his brother, nor, indeed, were any ever brought by him against his brother alone.

In November 1862, the brother, and in April 1863, the Plaintiff, applied for a Certificate of succession to the mother's estate. Both applications were refused, on the ground that the Certificate could be granted to neither until their respective

claims had been decided in a regular suit. The Judge of the Civil Court, Mr. Fraser, in his first judgment in the present suit, describes these applications as "a sham fight" between the brothers. Whether this description be true, must depend on the inferences arising upon the rest of the case.

The suit to be now adverted to, and the proceedings in it, are strongly relied upon by the Respondent's Counsel to prove collusion. It was a suit brought by the Plaintiff against his brother and one Sheonath, a native banker, in March 1863, to recover the Plaintiff's two-fifth shares of the notes, viz., rupees 26,340, from his brother, and 2,500 rupees from the other Defendant, Sheonath, as the purchaser of notes of that value. It appears from the judgment of the Civil Judge, Mr. Fraser, that the brother made admissions which established the Plaintiff's case. These admissions of the brother were to the effect that he had broken the seals, taken away the notes, and carried them to his own house, because of the Plaintiff's claim to the immovable estate, and that he was afterwards induced by the rebel Government to give them up, and affix the mother's seal. Sheonath made no defence. Accordingly the Judge, acting on the brother's admission, made a decree against him for 23,640 rupees, and ordered two notes of the value of 2,500 rupees in Sheonath's hands to be sold, and the proceeds divided among Sitara Begum's heirs.

This Decree is dated on the 24th April, 1863, only six weeks after the plaint. The rapidity with which this Decree was obtained, and the facts that it was passed upon admissions, that Sheonath made no defence, and allowed a Decree to pass against him for the entire value of the notes in his hands without deducting Mokurumooddowlah's share, and that no execution was taken out by the Plaintiff against his brother, are relied on as circumstances showing the suit to have been collusive.

This Committee, in adverting on the first appeal to this suit, alluded to the fact that the Plaintiff had taken no steps to enforce this judgment against his brother, observing, "there is no proof that the brother is insolvent, or incapable of satisfying that Judgment." Notwithstanding this intimation, no attempt was made by the Plaintiff upon the remand

ot show the inability of his brother to satisfy the Judgment, or to account for his not enforcing it against him.

To add weight to the inference arising from this circumstance, it has been proved on the remand that whilst the above suit was going on, another was pending in which the brother sued the present Plaintiff for 15,000 rupees as the value of his share of the mother's immovable property. It appears that this suit was compromised on the 13th May, 1863, upon the terms that the present Plaintiff should pay his brother 3,000 rupees, viz., 1,700 rupees in cash, and 1,300 rupees when the present plaintiff got all the mother's notes, which had been lost. A strong inference arises from this compromise that the Judgment obtained by the Plaintiff against his brother for 23,640 rupees on the 24th April was, as between themselves, collusive and illusory, when it is found that the Plaintiff instead of issuing execution, or otherwise enforcing it, compromised the other suit by making a present payment to his brother of 1,700 rupees. The other part of the compromise, viz., the agreement of the Plaintiff to pay a further sum when he got the notes which had been sold, is a still stronger indication that the brothers were then acting in concert to get back the notes, or their value, from the purchasers, since this further payment is made to depend on the attainment of that object.

Another circumstance in this suit against the brother and Sheonath bears directly on the present. On the 22nd October, 1863, the Plaintiff petitioned the Court that the notes for 27,000 rupees which Benarsee Dass had bought should be attached and sold in execution of the Decree against his brother. And on the 11th December, an officer of the Court issued an injunction to Benarsee Dass not to part with the notes until further order, and to bring forward any objections he might have. In answer to this order Benarsee Dass wrote, on the 19th December, stating that the notes (a list of which he inclosed) had been purchased by him during the rebellion, and afterwards resold in Calcutta.

This irregular injunction appears to have been issued without the sanction of the Judge. It was undoubtedly an attempt to obtain by indirect means possession of the notes in the hands of Benarsee

Dass, and it is said by the Respondent that this was the main end and object of the suit.

The present suit was then brought in September 1864. The first hearing was before Mr. Fraser, the Judge who had decided, in the Plaintiff's favour, the suit brought against the brother and Sheonath. He came to the conclusion that the brothers were acting in collusion. Referring to the former suit, he intimated that he had been imposed upon in it; and that he was satisfied that it had been collusively brought to assist the attack intended to be made on Benarsee Dass, who was the largest purchaser of the notes, and not to obtain satisfaction from his brother.

Although the Civil Judge having heard both suits was certainly in a favourable position to form a correct opinion on the conduct of the parties, it was thought by this Committee that his decision was based on an issue not sufficiently raised, and upon evidence insufficiently developed.

On the first hearing upon the remand, and after an issue raised, and further evidence taken, the then Civil Judge, Mr. Lincoln, after an elaborate review of the history of the suit, came to a distinct finding that there was collusion between the brothers.

On appeal the Judicial Commissioner (Mr. Capper) thought further evidence was necessary and remanded the cause. His opinion appeared to be that the gist of the case was, whether the mother's estate had been completely divided.

Mr. Lincoln, having taken the evidence of Dhunput Roy, again found that, in his opinion, collusion was conclusively proved. Another appeal led to a further remand by the then Judicial Commissioner (Mr. Couper) who thought the question should be tried, whether the Plaintiff sanctioned or was aware of the sale.

Mr. Lincoln again took further evidence, and reported thus :—

“The evidence now adduced conclusively proves that if the Plaintiff was not a party, he was fully aware of the sale of the notes by his brother.”

He further reported—

“There is reason to believe the proceeds were appropriated by the rebel Government as the contribution of the brothers towards

the support of the *de facto* Government, of which they were members, and in the maintenance of which they were equally interested."

On a third appeal to the then Judicial Commissioner (Mr. Currie), the Decree of the Civil Judge was affirmed, but upon the ground that as the Lower Court had found that a division of the notes had taken place, and that it had not been proved that the notes in question fell to the Plaintiff's share, and as that finding had not been traversed on appeal, it must be taken to be admitted by the Plaintiff. Their Lordships are constrained to say that the ground on which Mr. Currie bases his decision cannot be supported. It was clearly open to the Plaintiff to question this finding upon appeal, though it may not have been distinctly traversed, and in their view the finding, when looked at, is not supported by the evidence.

But their Lordships, after considering the inferences arising from the evidence, and the conduct of the parties, to which they have already adverted in some detail, see no sufficient grounds for overruling the finding of Mr. Lincoln that the Plaintiff was aware, during the rebellion, of the sale of the notes, and of the circumstances under which they were sold, and that the brothers have since been acting in collusion to recover the notes or their value from the Defendant.

Collusion of this kind, with knowledge of the facts, being found, it ought to be presumed against the Plaintiff, even if it were not directly proved, that he acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale. Consequently, this suit, in which, moreover, he has put forward a case not resting on the real facts, but in which he has treated his brother as a delinquent, in his dealings with the notes, cannot, in their Lordships' opinion, be sustained. They have, therefore, to state that their advice to Her Majesty will be to dismiss this appeal with costs.