Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Shankar Bakhsh v. *Hardeo Bakhsh and others, from the Court of the Judicial Commissioner of Oudh, Lucknow ; delivered November 15th,* 1888.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR RICHARD COUCH.
MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Lord Hobhouse.*]

THE principal question raised in this case is whether certain estates which belonged to Dariao Singh, Talukdar of Rampur Kalan, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of Rampur Kalan. It was an estate which was subject to the common Hindoo law of Oudh—the Mitakshara law. It was confiscated with other Oudh estates, and it was restored to the family by sunnuds. The only material difficulty that exists in the case is owing to the circumstance that two different sunnuds were granted for the purpose of the restoration, one recognising a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against form of the sunnud; because, although it was maintained in the courts below that the primogeniture sunnud was to prevail against all

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inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. Doyne has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it, and that he would take the title of Talukdar, and have the management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate; and that they could not displace the head of the family from that position.

It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindoo law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Bakhsh* —that of *Pirthi Pal Singh and another* v. *Thakur Jewahir Singh*, in the 14th volume of Indian Appeals, very much the same sort of contention was set up. Let us take the statement of the Defendant's contention—he was the head of the family—from page 60 of the report. Jewahir Singh prayed a declaration that he was entitled to

hold the property "as an integral, impartible, and "indivisible estate or taluka subject to the "beneficial interest of the Defendant in respect "of the profits thereof to the extent of his share "as declared by the court." Sir Richard Couch delivered the Judgement of the Committee, and observes that Jewahir Singh did hold the estates in "trust for the joint family, but "as a joint family estate they were subject "to partition, and as a trustee he is bound to "allow the partition to be made."

Their Lordships then ask what is the evidence in this case to show that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed, it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which by the desire of Dariao Singh, the then head of the family, was in the names of his three sons Anant, Bulwant, and Hardeo, and a grandson, who was a son of Bulwant. Bulwant and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definite shares, nearly equal, but giving a slight preference of three pies to Anant, the eldest son.

It next appears that a sunnud, of which we have no copy, was issued on the 25th of October 1859, in the terms of that temporary settlement. In December 1860 came the circular that was issued to the Oudh Talukdars, calling upon them to elect whether they would take their sunnuds according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that

circular without seeing that the officials then were desirous that the Talukdars should choose the primogeniture sunnuds. To that circular Dariao made a reply to this effect:—"That at the time "of the settlement of 1264 F., in order to avoid "future dispute, and according to the custom "prevailing in his family, he caused a kabuliat "to be executed;" and then he states that it was executed in the manner which has been mentioned, "The sunnud dated 25th October 1859 "has been granted by the Chief Commissioner "according to the above terms. The petitioner "has now no occasion to apply for a fresh "sunnud, because the aforesaid sunnud is enough "for them." Therefore he distinctly elects to take a sunnud which recognises the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of Rampur Kalan though they have since become part, Saraian and Piprawan. Those were granted by Government to Dariao Singh in consideration of loyalty; and as to those he prays that:—"Saraian and Piprawan "be after the Petitioner's death in the name of "Anant Singh, the eldest son, in addition to the "5½ annas shares out of taluka Rampur Kalan." Daraio Singh knew perfectly what he was about, and he elects that as to Rampur Kalan it shall go in shares, and as to the two other villages they shall go according to primogeniture.

It is a very strange thing that in answer to that request of Dariao Singh, the officials should have sent him a primogeniture sunnud; but they did so. It was dated, strange to say, before the date of Dariao's answer. Dariao's answer was on the 29th of January 1861; and the sunnud is dated on the 11th of October 1860. It was cut and dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December 1860

and the 14th of April 1863. No remark was made upon it. Whether he did not observe that the wrong sunnud had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sunnud at that time.

Only one event took place between Dariao's death and the receipt of the sunnud having any bearing on the question, and that is, that Dariao personally accepted and agreed to pay the Government Jumma, and it would seem that his name was entered in the Collector's books as the Talukdar.

Nothing further occurred until the 2nd September 1867, when Dariao died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of Saraian first.

On the 13th of November 1867, the Tahsildar of the district made a statement regarding the death of Dariao, "Lambardar of village Saraian," and, after showing that his heirs were his three sons, he names as the heir able to become Lambardar, Anant Singh, that is the eldest son. Then he enters a remark, "Dariao Singh, Lambardar. "has left three young sons; Anant Singh, the "eldest son of the deceased is able to become a "Lambardar"; and he states that: subject to notice, Anant Singh's name deserves entry in the register. But Anant Singh was not willing to accept that position, and he presents a petition. In that petition he says that "there has been

" unanimity without 'any feeling of estrange-
" 'ment' between him and his brothers, and he
" prays that their names may be entered along
" with his in the column 'Name of Lambardar.'"

It is difficult to trace the exact proceedings further in respect of Saraian; but it is clear that in the result Saraian, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to Rampur Kalan, we again find that Anant Singh was not desirous of appearing as the sole Talukdar. He was called upon to present a fautinama for mutation of names on his father's death. He sends one as to Saraian, and excuses himself as to Rampur Kalan. The three brothers present a petition on the 7th of April 1868 saying, "that the kabuliat of " Ilaka Rampur Kalan has stood in the name " of the Petitioners, and a sunnud has also " been granted in their name, such being the " case a fautinama should not be called for in " respect of Rampur Kalan," meaning that no alteration of name was necessary. A fautinama however appears to have been insisted on, and one is sent on the 11th April, but with a protest in the shape of a deposition by Anant He there states that his father's name was entered as proprietor for Saraian only, but since 1264 Fusli "my name " and the names of Bulwant Singh and Hardeo " Baksh, my brothers, have been entered in the " column 'Name of Proprietor,' in respect of the " rest of taluka Rampur Kalan. The deceased's " name was not there; moreover the Govern-" ment has granted a sunnud in the name of " us three brothers." Then he adds his desire that, "The names of the three brothers be also " entered in the column 'Name of Lambardar.' " Since 1264 F. the names of us three brothers " have been entered in respect of all the villages " of taluka Rampur Kalan which are situated in

" Tahsil Biswan; and our names were also " entered " in respect of certain other villages, " but as Dariao Singh my father used to remain " with the settlement officer, and was my superior, " therefore at the time of assessment of the " present settlement Jama his name was entered " in respect of these villages; I now desire that " jointly with my name the names of Bulwant " Singh and Hardeo Bakhsh my brothers be " entered as before in equal shares in these " villages also;" a most distinct return to the state of things which existed before this primogeniture sunnud was sent wrongly to Dariao Singh, and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April 1869, when an order was issued in this form by the Deputy Commissioner:—" The case is before me for an order as " to mutation of names. There is no one to " dispute the title of these sons. The hitch, if " any, is the fact that Jagan Nath (Bulwant " Singh's son) is entered in the Malguzari " Register: it must remain there." He was an infant at that time. " Mutation of names is to " be in the name of all four: Anant Singh; " Bulwant Singh; Hardeo Bakhsh, and Jagan " Nath."

The same sort of proceedings took place in respect of Piprawan but it is not necessary to follow them out with the same particularity. The result is summed up by the Deputy Commissioner in the year 1841 in a Judgement which he delivered on an application for partition, which is quoted in the District Judge's Judgement in this case, page 443 of the Record. He says:—" In the Khewats prepared at regular " settlement the shares in the whole Ilaka, and " also in the grant were defined as follows:

" Anant Singh 6 annas, and the other two sons " 5 annas each. These shares are slightly " different from what was stated by Dariao " Singh in his letter of 19th January 1861." That was in answer to the circular about the sunnuds. " By this new arrangement the eldest " son, Anant Singh, gave up his exclusive right " to two Mauzas, and he was recorded as " proprietor of a 6 anna share in the whole " estate instead of $5\frac{1}{2}$ anna share in part of it. " The Khewats were signed by Anant Singh " with his own hand."

That was the result. These proceedings show exactly the footing on which the family stood. It is not a question whether Anant Singh made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to Piprawan and Saraian he did most distinctly make a conveyance because those were granted according to the law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to show that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sunnud, as an estate which was held in the shares designated in Dariao's letter.

There are many other things in this record which show the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things, which according to the contention of the Appellant would lead to the contrary inference. Mr. Doyne in his argument referred to three circumstances. One was that Anant Singh has rested his title, not entirely on the earlier sunnud, but on both sunnuds. Another is that in the lists of Talukdars that were made out, Dariao Singh's name was entered in

respect of Rampur Kalan, in list No. 3, which is one of the primogeniture lists. Another is that in the Wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent, of the three brothers, they claim that the succession is to go according to section 22 of the Oudh Estates Act, which relates to the primogeniture estates.

With respect to the reliance on the two sunnuds, that is contained in a statement which is called a petition; but it is a statement of Anant Singh's made on the 9th of July 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sunnud, and then he says that, "a fresh sunnud in English and Persian " in the name of the Petitioner's father (de- " ceased) has been granted as an additional " favour, so the taking effect of both the sunnuds " is the cause of further stability of the (ilaka) " estate." He then goes on to reiterate the case for partition:—"From 1263 F. up to 1266 F., " and up to this day, the settlement of Ilaka " Rampur Kalan has been in the name of the " Petitioner, Bulwant Singh, Hardeo Bakhsh, " and of Jagan Nath Singh, son of Bulwant " Singh, and in the registers of the Collector's " Court, and of the Tahsils, the above-mentioned " names are entered all along; such being the " case under the rule laid down in the Directions " of the Revenue Officers, mutation of names " should be effected without any alteration in the " names entered as proprietors." That is the occasion on which he mentions both sunnuds. But on the very same occasion he also states that the estate is held in coparcenery according to the family arrangement, and there is not the least appearance upon the face of this document that Anant Singh was considering that there was any conflict between the primogeniture sunnud and

the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sunnud which was in contravention of the family arrangement.

In March 1869 the sunnuds were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition signed by the three brothers, they prayed that under Rule No. 3 "Our names may be entered in list No. 3"; and the order made by the Deputy Commissioner was:—"Enter names in the list." That order was made on the 10th of March 1869. Again we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3, as prayed, the name of Dariao, then dead, was entered in the list No. 3, so that according to the effect of that list the estate would go by the rule of primogeniture, and go to Anant alone, instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3, and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of Dariao's name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document relied on is the Wajib-ul-arz which was framed on the 1st January 1870; and there, no doubt, occurs a passage that "as the proprietors are Talukdars succession will be regulated by section 22, Act 1 of 1869." Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was.

They state:—"From the death of Dariao Singh "the sons, the present Talukdars, have continued "in possession of the Taluk"; and then lower down they say:—"This village"—that is Rampur Kalan, the whole estate,—"is in the "possession of Talukdars as a joint zemindary; "the shares being as follows": a table shows the shares: Anant Singh six annas; Bulwant and Jagan Nath five annas; Hardeo Bakhsh five annas. "All the co-sharers live in commen- "sality: accounts of profits and losses are not "rendered. Anant Singh as head of the family "manages the work of collection and assess- "ment." Now that document is an extremely important document as regards the statements of fact. As regards the statement of law, the succession descending according to section 22, it is of little value. The document is a strong assistance to the case of the Plaintiff, and bears directly against the case of the Defendant. In fact every group of facts that Mr. Doyne has referred to as leading to the inference that the estate was to be held by the head of the family as an entire estate, excepting the one fact that there was an improper entry in list No. 3 of the Talukdars, strengthens the case for the co-sharership.

Only one other remark has to be made, which is, that during the life of Anant Singh, no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture. Both courts have decided against that claim. Their Lordships entirely agree with them; and they think that the Plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family,

mesne profits are not recoverable, as was pointed out in the judgement at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir Richard Couch says:—"These provisions are intended "for, and are applicable to, suits for land or "other property in which the Plaintiff has a "specific interest, and not to the suit which was "instituted in 1865, or to a suit for a partition "where he has no specific interest until "decree." The Talook here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and not accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit there seems to have been some inconsistency in the Defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The Plaintiffs claimed between them a 10 annas share of mesne profits. An issue was stated which is perfectly precise upon the point, "For what period "are Plaintiffs entitled to mesne profits, and "what were the aggregate collections for the "period claimed?" A commission of inquiry into that question was ordered, but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by

the Defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the Judgement of the District Judge, on the issue that has just been read, the 13th, he finds "that the Plaintiffs are entitled to Rs. 20,797 as profits upon the Defendant's own admission." That is in the first Judgement which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the Lower Court should have held "that the Plaintiffs were not entitled to any "profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and, on the remand, the District Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less, but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.