

Judgment of the Lords of the Judicial Committee of the Privy Council on the three consolidated Appeals of Thakur Basant Singh v. Mahabir Pershad, from the Court of the Judicial Commissioner of Oudh (P.C. Appeals Nos. 68, 69, and 70 of 1912); delivered the 14th March 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY LORD ATKINSON.]

These are three consolidated Appeals from three Decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th of March 1909 and the other two the 29th of March 1911.

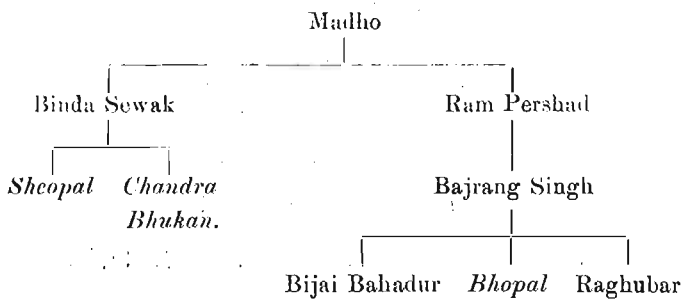
By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated the 22nd of July 1908, were in part affirmed and in part reversed, and by the two latter a judgment and decree of the District Judge of Rae Bareli, dated the 5th of February 1910, was also in part affirmed and in part reversed.

By this decree of the 5th of February 1910 a previous decree of the same Subordinate Judge, dated the 3rd of August 1909, was in part affirmed and in part reversed. •

The facts out of which all this litigation has arisen are shortly as follows:—

A certain estate in five villages in the Partabgarh district was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Pershad, the share of the said Binda Sewak's branch being 7 annas 2 pies and that of Ram Pershad's branch 8 annas 10 pies.

A geneological table set out in the Respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed:—



The persons whose names are printed in italics are Plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukhan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Pershad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a Plaintiff.

By two deeds, dated respectively the 2nd of January 1900 and 3rd of October 1901, Binda Sewak purported to sell to Basant Singh (the Appellant) his share of the joint family property.

Thereupon Ram Pershad, as co-sharer in the family estate, instituted two pre-emption

suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds dated the 4th of June 1903 and 3rd of August 1903 respectively, purported to sell and convey to the same Basant Singh (the Appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6 annas share of his own share of the family property. In addition he, by deed dated the 4th February 1907, mortgaged this latter 6 annas share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of 25 years. Sheopal Singh, Chandra Bhukhan Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as being, on several grounds, void according to Hindu Law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April 1907, were accordingly entered into between them and Mahabir Pershad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Pershad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the Court of the Subordinate Judge of Partabgarh, the first on the 10th of August 1907, in which Sheopal Singh, Bhukhan Singh, and Mahabir Pershad were Plaintiffs, and Basant Singh, Binda Sewak Singh, and Ram Pershad Defendants, praying for "a decree for proprietary and actual possession of 4 annas " 9 pies $6\frac{2}{3}$ karants under proprietary share" in five villages therein named and for Rs. 1,704.14.9 $\frac{3}{8}$ mesne profits. In other

words, it was an action of ejection and for recovery of mesne rates.

In the second suit Bhopal Singh and Mahabir Pershad were Plaintiffs, and Ram Pershad and his grandsons Bijai Bahadur Singh and Raghubar Singh Defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Pershad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Pershad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal Defendant in the first suit, by deed dated the 22nd of April 1908, compromised with the two principal Plaintiffs in that suit, namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these Plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed was filed in Court, and on an application made under Section 375 of the Code of Civil Procedure, the suit was dismissed as against these Plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly dismissed as against him. Mahabir Pershad thus became the sole Plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these Plaintiffs. Even if all the impeached deeds were absolutely void he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover

the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgment delivered upon the 22nd of July 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said, "The suit, however, cannot fail altogether, as was contended by Defendant 1. Plaintiff 3 has acquired an interest as to half the property." This seventh issue ran thus: "To what relief, if any, are the Plaintiffs entitled?" Owing to the compromise, that issue came to mean, to what relief is the third Plaintiff, Mahabir Pershad, entitled? And the last of the reasons stated in the Appellant's case lodged in these appeals is that the Respondent, Mahabir Pershad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though raised, was not much discussed, or not at all discussed on the hearing of the Appeals before the Court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the Plaintiff's case is founded; their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained from discussing in the Court from which the Appeal to His Majesty had been taken a vital point plainly appearing on the very face of his

written proofs, and plainly raised as this point has been in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them.

It is elementary law that a Plaintiff in an action of ejection must recover by the strength of his own title, not the weakness of his adversary's.

What may be the rights or interests, if any, which the Plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore is, did the agreement in the first action confer upon Mahabir Pershad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows:—

1. That in the share of each declarant amounting to 2 annas 4 pies and $13\frac{1}{3}$ Karant, Mahabir Pershad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the Declarants, as follows:—

Sheopal Singh - 2 annas 4 pies $13\frac{1}{3}$ rd karant share.
Chandra Bkukhan
Singh - - 2 ,, 4 ,, $13\frac{1}{3}$ rd ,, ,,

2. We, the Declarants, and Mahabir Pershad, will be bound by the following conditions:—

(a) That Mahabir Pershad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal then Mahabir Pershad will have to defend the appeal also with his own costs.

- (b) That in case of success Mahabir Pershad will be entitled to proprietary possession of the share entered in para. 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Pershad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the *Zemindari* share decreed.
- (c) That Mahabir Pershad will remain a co-sharer and proprietor like ourselves in all the *sir* and *khudkasht* lands and all *Zemindari* rights relating to the *Zemindari* share like ourselves, and we will have no right to keep separate possession over any *sir* and *khudkasht* land, nor will we raise any plea as to expropriatory right.

In the view of their Lordships these provisions did not confer upon Mahabir Pershad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated litigation had been achieved. Success has not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Pershad, should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lal Achal Ram v. Raja Kazim Hussain Khan* (32 I. A., p. 113) is wholly different from the present. There the sole

owner of certain lands, who had already sold one-half of them, executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lackh and a half of rupees." He acknowledged the receipt of one lackh, the balance has to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was no doubt exaggerated. But the vendor, never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the Judgment of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned, says at p. 121 of the report: "Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate giving a good title to the Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the Respondent Mahabir Pershad any present right to recover the possession of the share of the property mentioned in it which he claims to recover. They accordingly think that these Appeals should be allowed, that the three Judgments and

Decrees of the Court of the Judicial Commissioner, dated the 19th of March 1909 and the 28th of March 1911 respectively, should be set aside, that the two Judgments and Decrees of the lower Courts, namely, that dated the 3rd of August 1909 of the Subordinate Judge, and that of the District Judge of Rae Bareilly, dated the 5th February of 1910, should also be set aside, and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The Respondent must pay the cost of these consolidated Appeals.

In the Privy Council.

THAKUR BASANT SINGH

v.

MAHABIR PERSHAD.

DELIVERED BY
LORD ATKINSON.

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