

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Ram-
hurry Mondul and others v. Mothoor Mohun
Mondul, from the High Court of Judicature
at Fort William in Bengal; delivered 31st
July 1873.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

THE Appellants in this case are Ramhurry Mondul for self, and as guardian of Judoonath Mondul and Dhurroonohar Mondul, and Ramgopaul Mondul, and the Respondent is Mothoor Mohun Mondul, who was the Plaintiff in the suit. The Plaintiff obtained a decree of the High Court, and the Appellants object to it.

The suit was commenced on the 8th July 1865, by Mothoor Mohun Mondul claiming in his own right and as heir of the late Bulloram Mondul. It was brought against Khamankaree Dossee, the widow of the late Mookondram Mondul, Ramhurry Mondul, Ramdoolaul Mondul, and Ramgopaul Mondul to recover possession of a 12 annas share of certain talooks mentioned in the schedule to the plaint.

The suit was founded upon a decree passed by the High Court on the 29th September 1863, in two suits; one in which Bulloram sued the Appellants and the Respondent, and the other in which the Appellants sued Bulloram and Mothoor Mohun, the Plaintiff in this suit. Bulloram's suit was brought on the 22nd March 1861, and in that suit he sought to recover possession of an eight annas share of certain talooks

which were mentioned in the schedule to his plaint. He stated that his father, the late Nityanund Mondul, had two sons of whom the late Gridhur Mondul was the eldest, and he the second; that they were two brothers, and lived ijmallee; that they had joint possession of the property left by their father, and with the proceeds of a joint trade in salt, &c., acquired the following talooks and putnee in the name of the eldest brother (see Record, p. 27). That suit was brought merely for an eight anna share of property which had been purchased in the name of Gridhur Mondul, and for an eight anna share of Boicheram Chuck standing in the name of Mokoondram.

With reference to the suit brought by the Appellants, we have not the plaint before us, but the substance of it is stated in the judgment at page 32, line 20. It is there said "In suit No. 18 of 1861, Ramhurry, Ramdoolal and Rangopaul" (Ramdoolal is now dead) "sought to recover an eight annas share in chucks Gourang, Gohurdhunpore, Bahoobalpore, Boicheeram Chuck, and other property, which it is not now necessary to mention on the ground that this property had been acquired by Gridhur and Mothoor Mohun when those two were in ijmalee occupation, independent of Bulloram, who was a mere pensioner."

That suit included three of the mehals which are now the subject of the present suit and were not included in Bulloram's suit. The suit of Bulloram included only one of the mehals which is the subject of the present suit, but it is to be observed that in the present suit the Plaintiff is suing not for a 12 annas share of the mehal which was included in Bulloram's suit, but merely for a four annas share of that mehal, admitting that the eight annas share belonging to Bulloram is now in his the Plaintiff's posses-

sion. With regard to mehal Boicheram chuck, which was one of the mehals mentioned in Bulloram's suit, he says, "Towjee No. 491, in the name of the late Mokondram Mondul, Sudder jumma, is Rs. 2,077 odd annas, of which, deducting eight annas share in possession, the remaining Sudder jumma of the four annas in my own right is Rs. 519." So he is not suing to recover any portion of the eight annas share of that mehal which was recovered in Bulloram's suit. Nor is he now asking to have execution with regard to any portion of that share.

The two suits were heard together by Mr. Justice Elphinstone Jackson, who gave judgment, which is set out at page 6 of the Record. He considered that the property was joint property belonging to Bulloram and Gridhur Mondul, but that the parties were bound by an award by which only a four annas share had been awarded to Bulloram. He says, "I therefore decree that arbitration award to be binding upon all parties, and Bulloram, Ramhurry, and his brothers, and Mothoor Mohun Mondul, to be entitled to a four annas, six annas, and six annas share respectively."

An appeal was preferred against that decision; Khaman Kharee Dossec, who was the widow of Mookondram, also appealed upon the ground that it had been held that the property standing in the name of Mookondram was joint family property. She contended that it was the separate property of Mookondram.

The case then went up to the High Court, and the judgment, which is set out at page 20 of the Record, was given by a division Bench. They considered that the parties were not bound by the award, and they held that Bulloram was entitled to his full legal share of the joint undivided family property, namely, one half; and then as regards the appeal of Khaman

Kharee, the widow of Mookondram, they say,
 “ we have carefully considered all the arguments
 “ adduced by the counsel, Mr. Paul, but we find
 “ nothing to induce us to interfere with the
 “ decision of the judge to the effect that Mookon-
 “ dram’s acquisitions were obtained with family
 “ funds, and were for the family at large, and
 “ not for himself individually. This being the
 “ case, and the property having been acquired
 “ while Mookondram was living in commensality
 “ with the rest of the family, and on default
 “ of proving separate means sufficient to give
 “ separate acquisitions, it is legally to be pre-
 “ sumed that the property standing in his name
 “ was acquired for and belonged to the family in
 “ general. We, therefore, decree the appeal of
 “ Mussamut Gourmoney Dossee, the widow of
 “ Bulloram, and, in modification of the decision
 “ of the judge, award her one half, or eight annas
 “ share of the family property. The appeals of
 “ Ramhurry and his brother, and of Mussamut
 “ Khaman Karee are dismissed, with costs.”
 Upon that a decree was drawn up in Bulloram’s
 suit in favour of the widow of Bulloram, by
 which it was awarded that the decision of the
 Lower Court should be modified to the extent of
 awarding to the special Appellant Gourmoney
 Dossee one half or an eight annas share of
 the property which was the subject of that
 suit.

It was contended in argument that this suit
 is brought for the purpose of executing that
 decree; but the suit in which it was made
 did not include any of the property which
 is the subject of the present suit, except the
 mehal Boicheeram, in respect of which the
 Plaintiff is now suing only for the four annas
 share which belongs to him in his own right,
 and not for the eight annas share which descended
 to him as the heir of Bulloram.

Upon a motion for a review of judgment Mr. J. Bayley, upon refusing to admit the review, makes use of this expression, speaking of the shares in the three mehals which were not included in Bulloram's suit: "Because Gourmoney
" did not sue for these shares, she cannot have
" them in this suit;" but then unfortunately, the learned judge went on to say, "then they
" would go half and half to the Plaintiff Ram-
" hurry and to Mothoor Mohun, and his repre-
" sentatives" (Record, p. 30). At page 24, it appears that the case was again brought before Mr. Justice Bayley on an application for a review of that judgment. He there says, speaking of himself and Mr. J. Roberts, who had joined in the original judgment, "We have
" both broadly held that as the title to the
" three villages was based solely on the alle-
" gation of self acquisition, and that as we held
" that the whole property was one of a joint
" undivided character, we ruled that the ad-
" mission by Bulloram of his not claiming
" those three villages would not render the title
" of self-acquisition good. We consequently
" decided that as Bulloram did not sue for those
" villages, they must merge in the general joint
" property as joint, and so go with the other
" joint shares, but could in no way be admitted
" to be what they were claimed to be, self-
" acquired."

Now it is contended that the effect of the decisions in the two former suits is sufficient to bar the Plaintiff under section 2 of the Code of Civil Procedure from recovering more than an eight anna share of the mehals which are the subject of the present suit, inasmuch as it is contended that it was decided therein that the sons of Bacharam were entitled to an eight annas share, whereas if they were entitled to an eight annas share, the Plaintiff in this suit could

be entitled only to an eight annas share and not a 12 annas share.

It appears to their Lordships that what was said by the learned judge on the two occasions when a review was applied for and refused, was not a decision to that effect nor an alteration of the judgment which had already been given. A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the judge says, with reference to his refusal to grant the review, can be binding so as to alter such judgment or decree.

Their Lordships are therefore of opinion that there is no valid decision as between the parties; that the Appellants Ramhurry and others, and Mothoor Mohun were each entitled to an eight annas share of the property. The decision really was, that the property was joint family property of which Bulloram was entitled to an eight annas share and the Appellants and Respondents each to a four annas share; and there was no decision in the former suit which would bar the Plaintiffs, under section 2 of the Code of Civil Procedure, from claiming in this suit the eight annas share which descended to him from Bulloram.

That disposes of the second plea in this suit, which is set out at Page 5, that "a moiety of the property standing in the name of the late Mookondram, included in the claim in the suit brought by us, and not included in the claim of Bulloram, was declared by the High Court to belong to the Plaintiff, and the other moiety to us. Against the same the Plaintiff has again instituted this suit. Such a suit cannot be entertained under Section 2 of Act 8 of 1859."

The other defence was the defence set up by the first plea. The Defendants say that as Bulloram did not include in the former suit a claim

to recover a share of the mouzahs, which are the subject of the present suit, the Plaintiff as his heir is barred by reason of Section 7 of the Code of Civil Procedure. That section provides 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."

Now Bulloram was suing in respect of property purchased in the name of Gridhur Mundul which he claimed to be joint property in respect of which he was entitled to a share. But the present suit has to do with other property which was bought in the name of Mookondram at another time, and it appears to their Lordships that those are not the same cause of action, and that the present claim to property purchased in the name of Mookondram is no part of the claim arising out of the cause of action in respect of other property purchased in the name of Gridhur.

Their Lordships are therefore of opinion that the Plaintiff is not barred by section 7 from recovering Bulloram's share in the mouzahs which are the subject of the present suit, upon the ground that Bulloram omitted to include them in the suit which he brought in respect of property purchased in the name of Gridhur Mondul.

With regard to the case cited from 11 Moore's Indian Appeals, Buzloor Ruheem v. Shoomsoon-essa Begum, their Lordships are of opinion that it is not applicable to the present case.

In that case their Lordships held that on their construction of Section 7, Act 8 of 1859, the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that the section included accidental error and involuntary omission of the

subject of the new suit; that is to say, that if the matter was omitted to be brought in the former suit through error or mistake, that would not prevent the operation of the section. There there was one conversion by the husband of several Government securities belonging to his wife. It was one entire conversion and one cause of action and not a separate cause of action in respect of each of the Government securities.

It appears to their Lordships that that case is not applicable to the present, and that the cause of action in the present case is not part of the cause of action in respect of which Bulloram was suing.

The third answer was, that "in the answer filed in the previous suit brought by us, and in the plaint in this case, the Plaintiff has admitted the talooks standing in the name of our father to be his self-acquired property, and he must now be held as bound by his former admission."

There is nothing in that objection. Indeed their Lordships understood that Mr. Doyne did not press it, and that the property was admitted to be joint family property.

Their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty to affirm that decision, and to dismiss this Appeal, with costs.