

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nilcomul Lahiree v. Bhoobunnessuree Debia, No. 37 of 1869, from the High Court of Judicature at Fort William in Bengal; delivered 23rd March, 1874.

Present:

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

SIR LAWRENCE PEEL.

THIS Appeal arises out of Suit No. 27, 1867, which was heard together with Suits Nos. 19 and 20 of that year.

The Plaintiff prayed for an account from the Defendant of the sole management of the movable and immovable properties of her two minor sons, from the 16th Joesto, 1268, to the month of Srabun, 1272.

She also sought, amongst other things, to recover the amount of moneys alleged to have been taken by the Defendant from the cash of her deceased husband, the amount of a loan which the Defendant was said to have recovered, and also the proceeds of certain elephants; and to establish that they, the Defendant and his wife had no share in Chur Manicka and the golah appertaining thereto.

The Plaintiff alleged in her Complaint that, from the date of her husband's death, she entrusted to the Defendant, Nilcomul, all the movable and immovable properties; that he accepted the management, transacted all the business under his sole superintendence, and kept the income and expenditure in his own charge.

The Principal Sudder Ameen dismissed the Plaintiff's suit. The High Court upon Appeal reversed that Judgment, and decreed an account.

They said :—

“The case must be remanded to the Lower Court in order that an account may be taken of the moneys due from him in respect of any part of the profits of the zemindaries exceeding his own share, which have come to his hands.

“The Plaintiff should be prepared to show what have been the total profits of the zemindaries during the period from Joistee 1268 to Srabun 1272, how much she has received, how much is now remaining in the hands of the joint *amlah*, and how much the Defendant has appropriated for himself.

“But, in the first instance, the Defendant must render an account of all moneys received by him belonging to the joint estate, and must account for such moneys by showing how he expended them; and as to any balance remaining in his hands he must show whether he is entitled to retain the whole, or any, and what part, on account of his share of the profits of the zemindaries. He must render an account of all money received by him for the sale of elephants.

“He must render an account of the money, namely, rupees 5,000, received for the purchase of the *jote*. The Defendant must be called on to verify the accounts rendered by him, as he would verify any other written statement. The Subordinate Judge will take the accounts and return the case with his findings upon them to this Court.

“The Plaintiff will of course be at liberty to surcharge the account by proving items omitted in the Defendant's accounts, and to contest the correctness of any charges made therein; for that purpose, after her pleaders shall have inspected the accounts filed by the Defendant, she must file her objection in Court within fourteen days after the Defendant's accounts shall have been filed. The Plaintiff must verify her objections to the Defendant's accounts.”

Their Lordships have examined carefully all the evidence in the cause, and are of opinion that there is no sufficient proof that Nilcomul had the sole management of the infants' properties or that he received any portion of their share of the income. He, no doubt, superintended the management of the estates in which he as well as the infants and other members of the family had undivided shares. He was, as stated by Kalikant Lahiree, one of the witnesses, the general superintendent, that is to say, the person who remained in the family as chief and under whose advice and orders all business was transacted. It was the widow's duty under the will which she set up as the will of her husband, and which has been established in the appeal arising out of Suit No. 19, to take care of the movable and

immovable property. But it was directed by the testator that as the widow was a secluded woman and unable to do all the acts without the assistance of others, Nilcomul was to be entrusted with the charge of the special management of all affairs, and that the affairs were to be managed unanimously.

Raj Chunder Chuckerbutty (38) proved that, from the death of Shibnath to the Poonyaha of 1272, he and Bolanath were the Gomastas. That Nilcomul did not take any of the money due to the other co-sharers. That the funds coming from the Zemindary were collected jointly and kept with the Gomastas, and that the money was divided amongst the co-sharers after deducting the joint expenses.

Bholanath (p. 40) and other witnesses gave evidence to a similar effect. Raj Chunder also proved that, after the Poonyaha of 1272, the collections of the widow were made separate from the other co-sharers. That was the time at which the widow says she took the management from Nilcomul's hands. The only difference that appears to have been made at that time was that the share of the sons was collected separately from those of the other shareholders. The Plaintiff does not even allege that after that time Nilcomul received any portion of the sons' shares; and it is remarkable that the Plaintiff, if she received from the time of her husband's death in 1861 only so small a portion of the income of her husband's estate as she alleges, should have remained so long after Nilcomul's dismissal and the collection of the income was separate before commencing her suit.

Nilcomul, according to the Plaintiff's own showing, was dismissed in Bhadro 1272 (August 1865), and the suit was not commenced until March 1867.

Nilcomul gave evidence in the cause and denied having received any portion of the income of the infants' shares.

The Plaintiff was not examined as a witness to prove that she had not received their shares.

As to Chur Manicka and the golah appertaining thereto to the entirety of which the Plaintiff laid claim, the High Court held that Nilcomul must be held liable to make good to the Plaintiff the sum of 1,865 rupees, and to account for any other moneys which may have come to his hands as profits of the golah.

They say, page 69 :—

“The next question is as to the *golah* in Manicka chur. The recital in the draft agreement between Bhoobunessuree and Nilcomul show that the separation took place in 1262. The written statement of the Defendant in this very suit shows that Shibnath and Nilcomul separated in that year. The Defendant's pleader says this was a mistake for 1264. It is true that some of the Defendant's witnesses say that the separation was in 1264 ; but that variance between the Defendant's written statement and the evidence of his witnesses does not increase the confidence in the suggestion of the Defendant's pleader, or strengthen our belief in the truth of the evidence of the witnesses. On the other hand, there is the evidence of other witnesses that the separation took place in, or prior to, 1262, and the *farkhuttee* between Shibnath and Nilcomul in 1262 makes it probable that the separation had taken place in 1262. The evidence of Pitumber Chuckerbutty and Taramohun Chuckerbutty shows that the *golah* was established in 1262 by Shibnath out of his own funds. During his lifetime it always stood in his name ; he claimed it as his own, and enjoyed the profits of it. In Aughran 1268 Nicomul caused the name of his wife, Kissoree, with that of Bhoobunessuree, to be substituted for the name of Shibnath. According to Nicomul's own admission, since the death of Shibnath, Bhoobunessuree has received out of the profits of this *golah* 8,500 rupees ; a large portion of this money went in payment of a debt due from Shibnath in his lifetime. Nilcomul himself has taken only 1,865 rupees. It is not the least likely that Nilcomul would have permitted the plaintiff to take a share so much larger than that taken by himself if he had believed that the *golahs* belonged to him jointly with Shibnath. The other co-sharers, mere lay figures, whom he puts forward as interested jointly with himself, do not pretend that they ever received any share of the profits of the *golah* purchased some twelve years before the suit. We have no doubt that the *golah* was the sole property of Shibnath, and there will be a declaration to that effect.

“Nilcomul must be held liable to make good to the Plaintiff the sum of 1,865 rupees, and to account for any other moneys which may have come to his hands as profits of the *golah*. He must make an account of such moneys.”

Now Pitumber Chuckerbutty, on cross-examination, stated that he could not remember in what month the *golah* was founded, p. 18. And Nilcomul, upon his cross-examination, said “Shib Baboo was the head of all the co-sharers and he established the barn during the period of his management.” Shibnath has said that the barn is his own. He told me that thing in 1263 (p. 22). It was proved by Bolanath that the *golah* was founded with joint funds (p. 40) and his evidence is fully corroborated by the Jummah-Khurruch accounts (see the account at p. 97). That account is headed “Jummah-

Khurruch" of the trade and cash in hand, &c., relating to Manika Chur, belonging to Shibnath Lahiree the zemindar, Pergunnah and Thannah Koorgebarree "carried on in the 12-anna share" from the 1st Bysack, that is Bysack 1264, to this 31st Cheyt, 1265.

This was before Shibnath's death and whilst he, as head of the family, was manager, and it must be borne in mind that, although Manika Chur is described as the property of Shibnath, it is added that the trade was "carried on in the 12-anna share," it is admitted that Shibnath was not entitled to the whole of the 12-anna share, but only to a 5-anna portion of that share. (See plaint, p. 2, schedule.) Their Lordships are of opinion that the golah was not the sole property of the minor sons of Shibnath, or of the Plaintiff, and that there is no sufficient evidence to show that Nilcomul received any portion of the profits beyond his own share, or that he is liable to render an account for the profits of the golah, or to pay over to the Plaintiff the 1,875 rupees admitted to have been received by him. As to the 5,000 rupees their Lordships do not believe the Plaintiff's witnesses. Kaleemohun Chuckerbutty (p. 16) says: "Nil Baboo took from the Plaintiff 2,000 rupees in the month of Srahun 1268, and 3,000 rupees in the month of Bhadro for the purpose of purchasing the jote of Kazil Mundle. Kandora (p. 15) says:—

"The servant Juggunnath brought 2,000 rupees in two bags, one after another, from the apartment of Bhoobunessuree, and gave the same to Nil Baboo. Nil Baboo and Kaleemohun Chuckerbutty counted the money. Nil Baboo told me that he took the said money from Bhoobunessuree, and told me to carry the said money to Rungpore. I had refused to do so. He brought the said money in order to purchase the *jote* of Kazil Mundle.

"Stated, on being questioned by the Defendant's pleader:— Nil Baboo sat facing the east at the time of taking the money. Jugunnath gave the money while standing with his face to the west. I was at the distance of three cubits, sometimes standing and sometimes sitting, with my face towards the west. I did not see the separation take place, but I have seen them living separately. The said money was given in the month of Srahun 1268."

The evidence of Kandora is wholly unworthy of credit.

As to the 3,000 rupees, other part of the 5,000 rupees, it was proved by Rajchunder Chuckerbutty

that the Plaintiff gave that amount to Nilcomul in cash, together with some articles for his share in the funds and property belonging to the family.

The particulars of the 5,000 rupees in the Plaint is in the following words: "gradually taken from the funds in the house, *i.e.*, 2,000 rupees in the month of Srabun, and 3,000 rupees in the month of Bhadro, 1268; total 5,000 rupees."

Nothing is said as to those moneys having been advanced by the Plaintiff or taken by the Defendant for the purchase of a jote.

The Plaintiff did not ask for an account of the 5,000 rupees, or of the moneys alleged to have been received for the sale of elephants, but she sought to recover payment of specific amounts alleged to have been received on those accounts.

The High Court merely directs the Defendants to render an account of those moneys. They say:—"He must render an account of all money received by him for the sale of elephants," and "he must render an account of the money, namely, the 5,000 rupees received for the purchase of the jote." Their Lordships are of opinion, that the elephants were not the separate property of the widow or infants. The suit respecting the elephants, for which a Decree was obtained against Rajlukee Chowdranee of Shoupore, was commenced by Shibnath in his lifetime, whilst he, as head of the family, was manager.

Upon the whole, their Lordships are of opinion, that the Plaintiff is not entitled to the account ordered by the High Court, or to recover the sum of 1,865 rupees, and that the Decree of the Principal Sudder Ameen dismissing the Plaintiff's suit, was correct.

They will therefore humbly advise Her Majesty that the Decree of the High Court be reversed, and the Decree of the Principal Sudder Ameen affirmed, and that the Respondent do pay the costs of this Appeal, and the costs of the Appeal to the High Court.