Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Maharajah Ram Kissen Singh v. Rajah Sheonundun Sing and, on his attaining his majority, Rajah Deonundun Singh, from the High Court of Judicature at Calcutta; delivered 25th March, 1875.

Present:

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

MAHARAJAH RAM KISSEN SING (the Appellant) brought this suit in the Civil Court of Zillah Sarun, so long ago as the year 1852, to recover shares of numerous villages in Pergunnahs Mahashee, and Bibrah, which he claimed as maternal grandson and heir of Rajcoomar Radha Mohun Sing, who died on the 24th December, 1850.

The principal Defendants, the now respondents, Rajah Sheonundun Sing and Rajcoomar Deonundun Sing, are the grandsons of Rajah Dost Doon Sing, an elder brother of Radha Mohun. Sheonundun is sued as guardian of his minor brother, Deonundun. Rajah Dost Doon died before Radha Mohun, leaving two sons, Rajah Rughoonundun, who survived his uncle, Radha Mohun, and died childless on the 16th September, 1852, and Judoonundun, who was the father of the two Defendants, and died in Radha Mohun's lifetime.

It appears that Radha Mohun had a son, Hurnundun, who died in his lifetime, leaving a widow, Munroop, and a daughter, Jaukee. These

ladies were made Defendants in the suit, but do not appear in this appeal.

The family was one of distinction, and had formerly possessed considerable estates. It appears that the bulk of their property had been sold under Government and execution sales, but much of it had been again acquired by them through the powerful aid of the Rajahs of Benares, who were related to the family by marriage, and seem to have taken great interest in its welfare.

The family is governed by the law of the Mitacshara.

The Plaintiff bases his claim on the ground that the property was the separate estate of Radha Mohun, to which as the son of a daughter, in dafault of descendants in the male line, he was, by this law, entitled to succeed as heir.

The Defendants oppose to this claim two defences: (1) that the family was joint and the property undivided, and that, consequently, on Radha Mohun's death it devolved on Rajah Rughoonundun and themselves, as the male descendants of his brother, Rajah Dost Doon; and (2) that if this were not so, Radha Mohun made a deed of gift or will by which he declared his grand nephew, Deonundun, to be his heir, and gave all his property to him.

It may be observed in the outset that the disposition in this alleged will (which in the commencement of the litigation was the ground of defence principally relied on) constituting Deonundun sole inheritor, to the exclusion of his uncle and brother, is not very consistent with the theory that the property with which it deals was joint and undivided family estate. It is true that the uncle and brother seem to have been consenting parties to the will, and in that way validity might have been given to it; but if the property had been really joint, it is highly improbable that such an arrangement would have been thought of.

The origin of the separation of the estate appears to have been an award of Maharajah Odeet Naram, a former Rajah of Benares, made in April 1819, by which a large part of the possessions of this family was divided into two unequal shares of 10 annas, and 6 annas; the larger share being allotted to the sons of Rajah Dost Doon,

the elder brother, and the smaller to Radha Mohun.

This award is recited at length in some later proceedings before a succeeding Rajah of Benares the Maharajah Isree Pershad. This recital states that disputes having arisen between Rughoonundun and Judoonundun, sons of Rajah Dost Doon (deceased), on the one side, and Radha Mohun on the other, respecting a share of the zemindaree of certain villages, the parties had executed an ikrarnamah to the effect "that the Maharajah has the full power to fix our title and divide our shares, and whatever he should think proper to assign for any party none of the other parties shall object thereto." It states that the Maharajah, "in order to remove doubts for ever," accepted the ikrarnamah and drew up and passed a decision, the effect of which is set forth as follows:—

"The villages detailed below in Purgunnahs Mahaihee and Bibrah, which had been purchased at auction in the names of Rajah Dost Doon Sing, Baboo Radha Mohun Sing, Baboo Ruggoonundun Sing, and others, and were, till then, in the joint possession of both the brothers, without specification of shares.

"Now, as Rajah Dost Doon Sing is dead, and there appear indications of disagreement between Baboo Radha Mohun Sing and the sons of the said Rajah, therefore it is settled to divide the shares; whereas these auction-purchased villages were not their ancestral property, but were acquired with the aid and assistance of the Maharajah—both the above persons knowing me as the real owner, and leaving the determination of the shares to my judgment and decision—have appeared and executed an ikrarnama to the above effect, under their own seals, therefore, in order to the preservation, agreement, and management of both houses, in consideration of the title of both parties with respect to this Sircar and old usage, and the consideration always shown to them, judgment and decision were made to this effect—that, after defraying collection expenses, and paying the Government revenue, and debts due to creditors, and costs of the Courts in the joint suits instituted previously and recently, which were joint from the lifetime of the said Rajah, whatever profits of the said villages might remain, Baboo Radha Mohun Sing, and Hurnundun Sing, his son, shall take 6 annas per rupee; and Rajah Ruggoonundun Sing and Baboo Joddonundun Sing, sons of the said Rajah, 10 annas per rupee; and none of them shall deviate from, or refuse this partition, and both the brothers shall remain in union with each other as they are up to the present moment. Any person who shall be appointed by the judgment of both parties shall make collections from the villages detailed below, and, after defraying the above-mentioned expenses, pay in the profits according to the division of both parties. The said villages shall remain in the name of the party

in whose name they were purchased, and whose name is entered in the settlement book. With respect to the name, no one party will be able to alter or deviate from this decision, and decrease or increase the share, because the decision and division of shares is made with respect to all the villages specified below."

There is abundant evidence that this award was acted on.

The division was notified to the Collector of Sarun, as appears from the copy of a Kyfeut or "Memorandum of the shares of villages of Rajah Rughoonundun and Judoonundun deceased proprietors of Pergunnahs Mahashee and Bibrah," found in the Collectorate, in which the division into shares of 10 annas and 6 annas is stated, and the 6 annas are referred to as Radha Mohun's share.

From the account books in evidence it appears that, whilst the collections for the villages were joint, the net proceeds were divided into shares in accordance with the mode of collection and partition prescribed by the award.

In several transactions Radha Mohun acted as owner of the 6 annas share. In 1842 he mortgaged, by way of conditional sale, his 6 annas share in some of the villages. This mortgage was foreclosed, in 1845, and a mutation of names effected, without the intervention of the other sharers.

Again, on the 6th February, 1846, Radha Mohun made another conditional sale by way of mortgage to Sheonundun himself. The deed disclosed the fact that the other 10 annas belonged to Rughoonundun and Sheonundun. There was afterwards a suit to foreclose followed by a Decree. It is evident that in this transaction the parties were treating the shares as separate estate.

Besides the above, other mortgages were made by Radha Mohun of his 6 annas share.

Some leases to indigo planters and others were put in evidence by the Defendants which the proprietors of the 10 annas shares and Radha Mohun joined in granting. But their so joining is in no way inconsistent with their being owners of separate shares. Until an actual partition of the land, they were in the position of tenants in common in England, and would for convenience

join in granting leases. Besides it is to be remembered that the collections were, by the terms of the award, to be joint.

The cases which have been recently decided by this tribunal on questions touching the separation of the joint property of a Hindoo family establish the principle that there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds; and, therefore, that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

The question of intention, as was pointed out in the latest of these decisions, must arise in all such cases, and be determined in each upon its own circumstances. (See Appovier *v.* Rama Subba Aiyan, 11 Moore, I. A. 75. See also 3 cases in 13 Moore, I. A., pp. 113, 181, and 497, and another in L. R., 1 Indian Appeals, 55.)

Applying these principles to the evidence, it appears to their Lordships to be clear, both from the terms of the submission to the Rajah of Benares, and of his award of 1819, and also from the subsequent conduct of the parties, that their intention was that the shares specified by the Rajah should be the subjects of separate ownership.

The recital of the agreement to refer states it to have been to the effect that "the Maharajah has full power to fix our title and divide our shares." Then the award, which the recital says was made "to remove disputes for ever," states that the villages which it was proposed to divide had been purchased at auction, and were not the ancestral property of the parties, but acquired with the aid of the Maharajah. It further states that the parties knowing the Maharajah to be the real owner, had left the determination of the shares to his decision; and then the award, after determining the shares of the profits which each should take, directs that none shall "deviate from or refuse the partition."

This award carefully excludes ancestral estates,

which would therefore remain joint as before, and deals only with newly acquired property, which, being purchased with his aid, the Maharajah deemed himself to be, in some sense, entitled to dispose of. It discloses throughout a general intention to give a separate ownership in the specified shares. The passage that "both the brothers should remain in union with each other as they are up to the present moment," which was relied on by the Respondents as having a contrary tendency, is not sufficient to rebut this general intention. It is not at all clear that the words mean more than that the brothers should remain in concord. They would be satisfied also by supposing that the brothers were to remain joint as to the ancestral family property. But, be this as it may, the whole tenor of the rest of the award shows that, as regards the purchased estates, a final division into separate shares was intended to be made.

The evidence already referred to of the dealing with the property, and the conduct of the parties subsequent to the award furnish very strong proof that from the first they understood the arrangement to mean a separation of ownership.

The principal Sudder Ameen came to the opinion that this separation had been effected, in which opinion, for the reasons above given, their Lordships concur, disagreeing on this part of the case with the Judgment of the High Court which overruled it.

Coming to the second defence, that Radha Mohun had executed a deed of gift or will constituting his great nephew Deonundun his heir, their Lordships find that both the Courts in India, upon a full review of the evidence, have arrived at the conclusion that the execution of the instrument propounded by the Defendants has not been established. Their learned Counsel, adverting to the general practice of this Committee, admitted that no special grounds existed on which they could hope to disturb on appeal these concurrent judgments upon a question of fact; but they attempted to show that, independently of the particular instrument, the evidence was sufficient to warrant the conclusion either that a previous disposition of the property had been made by Radha Mohun to the effect of that contained in the will, or that he had so acted

as to estop him and his representatives from denying that such a disposition existed.

It is to be observed that this is a new case, set up for the first time at their Lordships' Bar, the Defendants having throughout the suit, in all its previous stages, propounded a particular will executed by Radha Mohun, as they alleged, on the 7th September, 1849.

The defence now suggested is raised neither by the Defendant's answer, the issues, nor the grounds of appeal. It would, therefore, be improper to give effect to it, unless the evidence to support it was so clear and uncontradicted that it could not, without manifest injustice, be disregarded.

But this is far from being so. It appears, no doubt, that a strong effort was made in the family to induce Radha Mohun, after the death of his son Hurnundun, to come to such an arrangement. He had, it seems, incurred debts, and mortgaged some of his property, and there was a desire on the part of Rughoonundun, representing the other branch of the family, to prevent the descent of his estate in the female line.

With this view it was agreed to submit to the advice of the then Rajah of Benares. The parties accordingly attended him, and there is evidence that it was then arranged that Radha Mohun should execute a wussyutnamah or will to the effect of that propounded, and a draft of it was prepared. This took place in June 1848. It is said that Radha Mohun took away this draft, but it is not at all clear he had then determined to execute it, for, although the matter was urgent, it is not alleged that he, in fact, executed the will until fifteen months afterwards (the 7th September, 1849).

A good deal of evidence was given by the Defendants of acts alleged to be done by Radha Mohun in his lifetime, to corroborate the proof of the *factum* of the will. The facts disclosed in this evidence are undoubtedly deserving of consideration; but they were investigated, and the inferences sought to be drawn from them answered by the Judges of the Indian Courts in determining the question of the validity of the will. On the other hand, Mr. Cowie, for the Appellant, referred to the mortgage from Radha Mohun of the 29th October, 1848, and also to the fact that on the 18th January, 1849, Sheonundun took proceedings to foreclose Radha

Mohun's mortgage to him of the 6th February, 1846, already adverted to, as being acts altogether inconsistent with the supposition that, at the time they took place, the arrangement contemplated in the month of June 1848 had been finally agreed upon.

In this state of the evidence, and of the findings of the Indian Courts upon it, their Lordships think it is not possible for them, in this final stage of the suit to give effect to the new ground of defence raised by the Respondent's Counsel.

For these reasons their Lordships must hold that the Plaintiff, as heir of his maternal grandfather, Radha Mohun, is entitled to recover such of the villages enumerated in the plaint as were his grandfather's separate property.

Their decision is founded mainly on the arrangement evidenced by the award of 1819, to divide certain villages into shares of 10 and 6 annas. This award is confined to the villages "detailed below," described as having been purchased at auction by the aid of the Maharajah in the names of Rajah Dost Doon, Radha Mohun, Rughoonundun, and others, and which, it states, "were not their ancestral property." This is a clear indication that ancestral villages were to remain joint as before, and there is no evidence of any subsequent partition of such villages. The principal Sudder Ameen seems to have been of opinion that the sons of Rajah Dost Doon were separate in food and had ceased to form a joint family; but their Lordships think the evidence is insufficient to support this conclusion. The limited partition of 1819 is inconsistent with an intention wholly to destroy the joint family, and no subsequent agreement to that effect is shown.

Unfortunately the detail of the villages which formed part of the Award is not in the Record. The Respondent's Counsel have contended that, at the most, only the villages contained in this detail were separated, and that there is no proof that any of the villages mentioned in the plaint were included in it. On the other hand, the Appellant's Counsel have urged that the villages enumerated in the plaint being the same as those in the schedule of the alleged will which was put forward by the Respondents, it must be assumed that the plaint contains only

such separate property as Radha Mohun could have disposed of by will.

In their Lordships' view neither of these contentions is well founded. It appears to them, with reference to the contention of the Respondents that, although the detailed list contained in the award is not forthcoming, there are means in the Record of distinguishing the newly purchased from the ancestral villages; and, with regard to the argument of the Appellants, derived from the schedule in the alleged will, they think it cannot be assumed that it contains only separated property. Looking at the object the parties had in view in putting forward this document, it is probable that they would so prepare it as to include all the villages in which Radha Mohun had any interest, whether joint or several. Indeed, it was contended by the Respondents that this will would be valid, even with regard to joint estate, by reason of its being made with the consent of the other members of the family.

This Tribunal is no doubt placed in some difficulty in this matter, as they are without the assistance of the opinion of either of the Courts in India upon it. The High Court having dismissed the suit it was unnecessary for them to consider it, and the Principal Sudder Ameen made no distinction in his final Decree between ancestral and purchased property, thinking, apparently, there had been an entire separation between the brothers. Their Lordships, however, are reluctant to prolong a suit, which has been already pending upwards of twenty-two years, by directing further inquiries, especially as they think the result of the proceedings on remand, in an early stage of the cause, will enable them to dispose of the question.

These early proceedings show that the original positions taken up by the parties have been considerably shifted in the course of the litigation. In his first Judgment the Principal Sudder Ameen found that this family were separate in food and estate, and then decided two things according to a bywastha:—(1) that the Plaintiff, as a maternal grandson, was Radha Mohun's heir; and (2), assuming, apparently, that the villages were ancestral, that Radha Mohun could not disinherit him by will. Upon this view of the case he did not think it necessary to decide on the the *factum* of the will,

although he expressed great doubt of its authenticity.

The Defendants appealed to the Sudder Court, one of their main grounds being that the villages were not ancestral, but purchased by Rajah Dost Doon and his brothers, and thus were the self-acquired property of Radha Mohun, which he was competent to alienate by will.

The Sudder Court thought the Judge below had overlooked this distinction, and remanded it to him for re-trial, and especially "to determine whether any and what portion of the property sued for was acquired personally by Radha Mohun, and specifically to distinguish that from the portion which is ancestral."

A new issue was accordingly framed as follows:—" Out of the property in suit, the estate " of the maternal grandfather of the Plaintiff, what " was the ancestral property of Radha Mohun Sing, " deceased, and what was acquired by the deceased " himself?"

The Judgment of the principal Sudder Ameen on this issue will be found at page 624 of the Record. It appears from his finding, which, although made for a somewhat different object, seems to be in substance sufficient for the present purpose, that, as their Lordships understand the Judgment, twenty-six of the lots mentioned in the plaint, that is to say, Nos, 1, 11, 12, 18, 19, 24, 25, 33, 49, 53, 56, 74, 80, 81, 87, 96, and 105, which the Judge groups together; Nos. 13, 31, 34, 40, 50, and 51, which he places in another group; and Nos. 60, 62 (being Chuk Fatima, in Pergunnah Mahashee), and 108, which last three lots he deals with separately, were ancestral property; and that all the remaining lots were acquired by means of various purchases in the ostensible names of Rajah Dost Doon Sing, Radha Mohun, Raghoonundun, Sheonundun, and others.

The ancestral property was, as already shown, clearly excluded from the partition in 1819, and their Lordships therefore think, for the reasons already given, that the Plaintiff is not entitled to recover in respect of the above twenty-six ancestral villages or lots, and that his suit as regards them ought to be dismissed.

But, with regard to the remaining lots found to be newly purchased, they think the Plaintiff is

entitled to maintain this suit. The bulk of these villages would seem to have been acquired before the award of 1819, which referred to large purchases then recently made; and it is reasonable to presume that the lots which were subsequently acquired were purchased and held by the brothers and their descendants in the shares specified in the award, since neither the parties themselves nor the Principal Sudder Ameen appear to have made any distinction between the villages purchased before and after the award. They are all placed in his Judgment in the category of newly-acquired estates, as distinguished from ancestral.

In the result their Lordships will humbly advise Her Majesty that the Decrees of the Indian Courts be reversed, and that in lieu thereof it be decreed that, so far as regards the twenty-six lots found as above to be ancestral property, the Plaintiff's suit be dismissed, and that, as to the remaining lots, that the Plaintiff is entitled to a six annas share in such lots, and to possession thereof, and that the costs of the litigation in India be apportioned between the parties in the usual way, according to the value of the property to which they have been held to be respectively entitled, and in case either of the parties shall have received from the other a larger amount of costs than he would have received if the costs had been apportioned as above, the difference is to be ascertained and refunded.

There will be no order as to the costs of this Appeal.

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