Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Phoolbas Koonwur and another v. *Lalla Jogeshur Sahoy and others from the High Court of Judicature at Fort William in Bengal; delivered 1st February,* 1876.

Present:

Sir James W. Colvile.
Sir Montague Smith.
Sir John B. Byles.

THE suit out of which this Appeal has arisen concerns a moiety of the undivided share of one Bhugwan Lall Sahoo, in certain immovable property situate in Zillah Sarun. Bhugwan Lall Sahoo, who died in 1860, was the member of a Hindoo family which was descended from a common ancestor named Deepa Sahoo, and was governed by the law of the Mitacshara, the general law of the province in which it was domiciled. He died childless, but left two widows, Moheshee and Parbuttee. They therefore would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired, or was held by him as separate estate. On the other hand, if the status of the family continued at the time of his death to be that of a joint and undivided Hindoo family, his interest in the joint family property survived to his male coparceners. The only persons who answered that description were Sudaburt Pershad, and the Plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but

according to the pedigree set out in the Appellant's case, and apparently proved in the cause, they were his first cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that Bhugwan at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The Judgment of the Zillah Judge, confirmed on Appeal by the High Court, on the 10th of March, 1863, made the distinction above stated between the properties acquired before, and those acquired subsequently to 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that owing either to the frame of this suit, or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into possession of one moiety of Bhugwan's share in the joint family property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April, 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution sales under the decrees against the widows. The Defendants to that suit were the widows, the different purchasers under the execution sales, and, under the description of "Precautionary Defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the Plaintiff in the former suit. As such Defendant Sudaburt filed the written statement at page 18 of the Record, in which he disclaimed all interest in the suit, on the ground that under the decree in his own suit he had been put in possession of his share

in the property in dispute. The cause was tried between the Plaintiff and the other Defendants, and a decree was made by the Principal Sudder Ameen on the 9th of April, 1866, which, in so far as it related to the particular properties which are the subject of the present Appeal, was in favour of the Plaintiff. Against this decree the parties Defendants, who were affected by it, appealed to the High Court. Their appeals were necessarily separate, inasmuch as the suit was so framed as to embrace interests, not only dependent on different titles, but confined to particular portions of the property in dispute. The High Court decided many of these appeals in favour of the Defendants, upon grounds of which some will be afterwards considered. This Appeal to Her Majesty in Council originally embraced only eleven of the separate decrees so made. And of these Mr. Cowie has given up one—viz., No. 237. Accordingly their Lordships have now only to deal with the questions involved in the ten appeals, numbered respectively 178, 224, 235, 239, 244, 234, 243, 238, 240, and 245.

The course of proceeding in the High Court with respect to these appeals was as follows:—The Division Bench before which they came, conceiving that they involved points of law on which the authorities were conflicting, referred the following questions to the consideration of the full Bench :—

1. Bhugwan Lall, a member of a Hindoo family living under the Mitakshara law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows, him surviving. After the death of Bhugwan Lall, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these Decrees, an interest in certain portions of the joint family property, to the extent of the share to which Bhugwan Lall was entitled in his lifetime, has been sold by auction, and the purchasers have taken possession. Can the nephew of Bhugwan Lall, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them ?

2. Bhugwan Lall, in his lifetime executed an ordinary zurpeshgee mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it?

The first of these questions the full bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir Barnes Peacock, at the close of his Judgment:—"I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the Decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the Decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think, then, that the question must be answered in the affirmative; that Plaintiff has a right to sue the purchaser under the Decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the Decree against the widows is an invalid title."

Upon the second and more difficult question the Chief Justice, after reviewing the authorities, came to the conclusion that, according to the law of the Mitakshara, as settled by authority in the Presidency of Bengal, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the full Bench to say whether the nephew Bhugwan Lall could recover from the mortgagees, without redeeming the same, possession of the mortgaged share, or any portion of it. The other

members of the full Bench also concurred in this opinion.

The appeals, the parties not consenting to have them decided by the full Bench, necessarily went back to the Division Bench, and were thus dealt with. Mr. Justice Markby, after going through the facts in each case, held that Nos. 170, 224, 235, 239, and 244, were wholly governed by the answer of the full Bench to the first question, inasmuch as in each the title of the Appellant Defendant depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the Appellant that the property claimed, Mouzah Telpakhoord, was subject to a Zurpeshgee lease, executed by Mukhun Sahoo, a member of the joint family who predeceased Bhugwan Lall. Mr. Justice Markby, however (Record, p. 466), seems to have found that the title of the Appellant did not depend on this alleged Zurpeshgee, from which he had been ousted, but on a purchase at a sale in execution of the Decree which he had obtained against the widows; and consequently that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting Zurpeshgee lease, created by Bhugwan Lall; and in this case, therefore, there necessarily arose the further question, whether the Plaintiff could recover this parcel of land without redeeming the mortgage on it. And the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the full Bench to the second question, held that it would entitle him to do so. There remained three other cases, viz., Nos. 238, 240, and 245, which would have fallen into the first of the before-mentioned classes, if the learned Judge had not held, for reasons which will be presently considered, that the Plaintiffs' claim in respect of them was barred by the one year's rule of limitation, prescribed by the 246th section of Act VIII of 1859. If then the case had rested there, the result would have been a Decree in favour of the Plaintiff on all the Appeals now in question, except the three last. Mr. Justice Markby however proceeded to lay down a principle which governed all the cases, and,

as it seemed to him, justified in each, the dismissal as against the Appellant of the Plaintiffs' suit. That principle will be afterwards more fully stated and considered.

Mr. Justice Kemp, the other Judge of the Division Bench, concurred with Mr. Justice Markby on this last point, but expressed no opinion on the question of limitation which was raised in Appeals Nos. 238, 240, and 245. A decree was accordingly made in favour of the parties appellant in each of the ten appeals. And this consolidated appeal is against those decrees.

Their Lordships propose in the first instance to consider whether the Appeals Nos. 238, 240, and 245 have been rightly disposed of on the ground of limitation. The facts proved are that in each of these cases the Plaintiff through his guardian, preferred a claim to the property, when attached, under the 246th section of Act VIII of 1859; that that claim was rejected; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit, had the party preferring the claim been an adult; and the only question to be determined was whether the Plaintiff, being under the disability of infancy, could claim the benefit of the 11th section of Act XIV of 1859, which empowers him or his representative to bring a regular suit within the same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, Mr. Justice Markby observed, involved several contested propositions, viz.:—

1. That sections 11 and 12 of Act XIV of 1859 apply to section 246 of Act VIII of 1859.

2. That the Plaintiff is under disability within the meaning of these sections.

3. That the benefit of these sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favour of the Plaintiff; upon the third he held that whatever benefit the minor was to have, was to accrue to him not during the disability, but when the disability might cease; and accordingly that the present suit being brought by him, whilst still a minor through his guardian, must fail.

Upon the second of the propositions stated by Mr. Justice Markby, their Lordships cannot see how, in face of the plain language of the 12th section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that sections 11 and 12 of Act XIV of 1859 do apply to the 246th section of the Act VIII of 1859.

The two Statutes were passed in the same year, the assent of the Governor-General being given to Act VIII on the 22nd of March, to Act XIV on the 4th of May, 1859. The object of the first was to enact a general Code of Procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supercession both of the regulations which had governed those Courts, and of the English Statutes which had regulated the practice of the Courts established by Royal Charter. Looking to the fifth sub-section of the first section, and the 3rd and 11th sections of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 246th section of Act VIII should in the case of a minor, be modified by the operation of the 11th section of Act XIV; and that this construction has obtained in the Courts of India appears from the case cited from the "Third Weekly Reporter," C. R., p. 8.

In coming to this conclusion, their Lordships have not failed to consider the recent decision of this Board in the case of Mohummud Behadoor Khan *v.* the Collector of Bareilly (L. R., 1. Indian Cases, p. 167). That case, however, they think, is distinguishable from the present. It arose upon a very special Statute, and upon that ground the judgment rests. Their Lordships there said: "It was argued that the clauses in the General Statute, Act XIV, 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV is a Code of Limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it. And they proceeded to observe that the application of the Statute (if it did apply) would not assist the Appellants, who would not even in that case have brought their suit in proper time.

This being so, the only other point to be considered on this question of limitation is whether the learned Judge was right in holding that an infant cannot after the expiration of the year bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which it would appear from the cases cited by Mr. Bell (Ramchunder Roy *v.* Umbica Dossee, 7 W. R., 161 ; Ramghose *v.* Greedhur Ghose, 14 W. R., 429 ; and Suffuroonissa Bibee *v.* Noorul Hossein, 17 W. R., 419) has not been accepted or followed by the Courts in India. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late; and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th section must be altered by making the words "after the disability shall have ceased" precede, instead of following, as they do, the words "within the same time." Their Lordships are therefore of opinion that the Plaintiff's suit is not open to the objection that, in so far as it concerns the properties in question in Nos. 238, 240, and 245, it has not been brought within the proper time.

The next point to be considered is whether the High Court was right in allowing all the ten appeals, and in dismissing the Plaintiff's suit as to those portions of the joint family estate which were the subject of them, on the ground that the suit was wrongly framed.

It is to be observed that the objection taken by the Division Bench to the frame of the suit, assumes the correctness of the answer given by the full Bench to the second of the questions referred to it, and is in the nature of a corollary from the proposition therein affirmed. The learned Judges of the Division Bench argue that if it be true that a member of a joint and undivided Hindoo family cannot alienate his undivided share in the joint family property without the consent of his co-sharers, it follows that he cannot alone sue for his separate share. And they rely upon a decision in the "12th Weekly Reporter, page 83," in which it was ruled that two only of the members of a joint and undivided family could not sue to set aside a charge created by one member of

the family, and to recover their particular shares in the property charged, but that the suit must be brought by or on behalf of all the members of the joint family. Their Lordships do not mean in any way to impugn the authority of that case, or to dispute the general principle affirmed by it. They do not, however, think that the principle is applicable to the peculiar circumstances of, or ought to govern, the present case.

In this case Sudaburt, the only other member of this joint family, has, under the practice which was then allowed to prevail in the Courts of India, succeeded in recovering, and has been put into possession, of his share of the joint family property. He cannot be said to have any beneficial interest in respect of which he could now sue as Plaintiff; and supposing him to have an interest, the present Plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as Plaintiff can be brought before the Court, *i.e.*, by joining him as a Defendant. In that character Sudaburt has disclaimed all interest in the subject matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals the title of the substantial Defendants is founded on execution sales confined to that moiety of Bhugwan's share which, on a partition, would now fall to the Plaintiff. The objection to the frame of the suit was not taken by the substantial Defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance; for it cannot be said that if it does not prevail, the Defendants (Sudaburt being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the Defendants will remain in possession of property to which, after full trial, they have been found to have no title; and the Plaintiff will be left to the chances of another suit, in which he may be met by objections well or ill founded on the lapse of time, or the effect of the Decrees under Appeal as *res judicata*. Their Lordships are of opinion that they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this

Appeal in favour of the Appellant, so far as it relates to the Decrees of the High Court in the nine Appeals numbered respectively 170, 224, 235, 239, 243, 244, 238, 240, and 245.

There is, however, as has been already stated, a further question as to the Appeal numbered 234, and at the hearing it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that if the Respondents had appeared, they might, without a cross Appeal, have contested the correctness of the answers given by the full Bench to the questions referred to them, answers which are not in the form of a Decree, or even of an interlocutory order. To the answer to the first question their Lordships think no objections could have been urged successfully. The second question, however, involves a point of Hindoo law, upon which the authorities are not altogether consistent; nor are their Lordships satisfied that the principle laid down by the full Bench would, if correct, govern this particular case, of which they will now proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the Schedule to the Plaint at page 8 of the Record. The village is specified as Tulmanpore Bhada in two kalums (items). The share of the joint family is stated to be one of ten annas and eight pie. Of this five annas and four pie are deducted as the share of Sudaburt Pershad, which reduces the share claimed by the Plaintiff to five annas and four pie. The column of remarks contains the following statement: "This Mouzah was held in Zurpeshgee lease under a Zurpeshgee deed executed by Saligram Sahoy and Ramruchea Sahoy. It was sold at an auction on the 18th of November 1862, and purchased by the Defendant Bikramajeet Lall for 3 rupees. The Zurpeshgee and lease are fit to be cancelled."

Bikramajeet Lall and another defendant were the Appellants in No. 238, which seems to have covered the whole of the five annas and four pie share of Talmanpore Bhada with other portions of the property in dispute. From what has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a Decree against the widows, is defective; that the right of the

Plaintiff to impeach it is proved, and accordingly their Appeal ought to have been dismissed. This, however, does not determine the rights of the Plaintiff as against the Zurpeshgeedars. He may be entitled either to recover so much of the property as is covered by the Zurpeshgee by setting aside the Zurpeshgee lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in Appeal No. 234.

The Appellants on that Appeal were the original Zurpeshgeedars Saligram Sahoy, and Ramruchea Sahoy. The Zurpeshgee deed is at page 423 of the Record, and appears to have covered originally only 5 annas and 4 pie of the entire 16 annas of Mouzah Tulmanpore Bhada. If then it be true that Sudaburt Pershad has succeeded in recovering one moiety of this, the subject of the dispute on this Appeal is the remaining moiety or a 2 annas and 8 pie share. And this appears to have been the view of the High Court, for their Decree on this Appeal (see pp. 479-80) is limited to a 2 annas and 8 pie share. If on the other hand Sudaburt has not succeeded in his suit in setting aside the Zurpeshgee as against him, or in otherwise wresting possession of his share from the Zurpeshgeedars, it follows that the question of the validity of this Zurpeshgee remains to be determined between the latter on the one side, and him and the present Plaintiff on the other.

The Plaint in this suit alleged no special grounds for setting aside the Zurpeshgee of the 9th December, 1859, and indeed contained no special mention of it. The written statement of the Defendants Saligram and Ramruchea (p. 31) set up that deed, and insisted on their rights under it. But none of the issues are specially pointed to the validity of the deed. Nor do the Judgment or the Decree (p. 439) of the Principal Sudder Ameen deal with that question. All that they decide with respect to the share claimed in Talmanpore Bhada is that " Plaintiff be put in possession thereof in the manner in which possession has been given by the Decree of the 5th of April, 1862 " (to Sudaburt).

This reference to the suit of Sudaburt makes it material to consider whether there really was any adjudication upon this question in that suit. The

suit, it will be remembered, involved the right of succession to the whole of the property of which Bhugwan Lall died possessed as between his widows and the surviving members of the joint family. The plaint which is set out at page 226 of this Record, contains no specific statement touching the Zurpeshgee deed of the 9th of December, 1859, unless it be in the Schedule (at p. 231), where in the columns of remarks it is said "the deed to the extent of Plaintiff's share, ought to be amended." The judgment of the Zillah Judge (p. 55) put the share in Tulmanpore Bhada into the first parcel which it found to be joint family property. So far it affirmed the title of Sudaburt and Hurreenath, and negatived the title of the widows, to whatever interest in it belonged to Bhugwan Lall at the time of his death. But in answer to the 11th issue it expressly found (p. 571) that the deeds executed by Mukhum, Bhugwan, or the other partners were valid. The Decree was a general decree for possession over the properties in the first list. The High Court, on appeal, simply affirmed this Judgment and Decree of the Zillah Court. Can it be said that this Judgment and Decree import any adjudication touching the invalidity of the deed of the 9th of December, 1859 as against the surviving members of the joint family, even if the Plaintiff in this suit could claim the benefit of such an adjudication. The Judgment, so far as it goes, is on the face of it the other way. The terms of the Decree may import only that the Plaintiff Sudaburt was, so far as his share was concerned, to be put into possession of the rights of Bhugwan. If in the execution of that Decree, he has contrived, it may be wrongfully, to dispossess to the extent of his share, the Zurpeshgeedars, that circumstance cannot give title to the Plaintiff.

Again, what has been found by the High Court with respect to this Appeal? The answer of the full Bench expressly stated that the facts were not sufficiently stated to enable them to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it. That statement, taken in connection with the general principle affirmed by them, imports that there was

no *constat* that the execution by Bhugwan of the deed was without the consent of his co-sharers, or not for the benefit of the family. Mr. Justice Markby (at p. 466) does not consider this latter question, but simply says "As no objection was made to the reference to the full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the Appellants have failed to establish their title."

In these circumstances there appears to have been no real trial of the question between the Plaintiff and the Appellants in No. 234; and therefore, assuming the principle enunciated by the full Bench in its answer to the second question to be strictly correct, their Lordships do not feel themselves at liberty to reverse the Decree in favour of the Appellants, and to make a Decree in favour of the Plaintiff. This being so, they abstain from pronouncing any opinion upon the grave question of Hindoo law involved in the answer of the full Bench to the second point referred to them, a question which, the Appeal coming on *ex parte*, could not be fully or properly argued before them. That question must continue to stand, as it now stands, upon the authorities, unaffected by the Judgment on this Appeal.

Their Lordships have felt some doubt as to the form of the Order which ought to be made on Appeal No. 234. The Plaintiff has failed to establish his title to recover the land against the Zurpeshgeedars. He might, however, have established such a title even in this suit, had a proper issue been framed and determined. On the other hand, he has established his title to the property, subject to the Zurpeshgee. His rights may be prejudiced by the Decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against Defendants having no common interest. Their Lordships have come to the conclusion, that the dismissal of the present suit against the Appellants in No. 234 ought to stand, but that the Decree of the High Court on that Appeal ought to be varied by adding a declaration, that it is to be without preju-

dice to the right of the Plaintiff to recover the lands in question on satisfaction of the Zurpeshgee. This Appeal, so far as it relates to No. 237 (the case given up by Mr. Cowie) must be dismissed, and the Decree made by the High Court in that case affirmed. In the other nine cases, the Decrees of the High Court must be reversed, and an Order made, dismissing in each case the Appeal to the High Court, with the costs of the Appeal in that Court, and affirming the Decree of the Principal Sudder Ameen as to the parcels of property which are the subjects of those Appeals. The above will be the substance of the Order which their Lordships will humbly recommend Her Majesty to make.

Their Lordships think that there should be no order as to the costs of this Appeal.

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