Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Bannoo and others v. *Kashee Ram, from the Court of the Judicial Commissioner of Oudh; delivered Friday, 7th December*, 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is a suit brought in the Court of the Civil Judge of Lucknow, by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussumat Bannoo and Mussumat Munna, the widows of Ram Dyal, and Munna Lall his grandson, the son of his daughter. The claim is for an eight annas share or one half of all the property in possession of Ram Dyal at the time of his death. The property consists principally of moveable property, but the claim includes a pacca house and shop.

The claim is based on the foundation that Ram Dyal at the time of his death was a member of a joint family, consisting of himself, and of the Plaintiff Kashee Ram and his brother Kasho Ram,—those two being the sons of Ram Buksh, a brother of Ram Dyal. Kasho Ram did not join in this suit. The state of the family was this: Ram Gholam left four sons, Sheo Buksh, Ram Bilas, Ram Buksh, and Ram Dyal. Sheo Buksh and Ram Bilas are dead; one dying without a widow or children, and the other leaving a widow only. Ram Buksh had two sons, Kashee Ram, the Plaintiff, and Kasho Ram. Ram Dyal had no son. The

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Plaintiff admits in his plaint that his grandfather Ram Gholam divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but Sheo Buksh and Ram Bilas took one half jointly and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present Appellants, the Defendants, it is stated that the division by Ram Gholam was not into two parts, as Kashee Ram contends, but that each of the sons took a separate share.

There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the Plaintiff that at all events the family was divided into two groups at that time. It further appears that in the lifetime of Ram Dyal, Kashee Ram, the Plaintiff, and his brother Kasho Ram, as between themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Gholam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindoo family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the Plaintiff's case, and therefore as he seeks to recover property which was in the possession

of Ram Dyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, viz., that the property was joint property to which he and his brother Kasho Ram, as surviving members, were entitled.

It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the Plaintiff joint with Ram Dyal at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the Commissioner upon the appeal from the Civil Judge, and was also made by the Judical Commissioner when the question came before him on the right of appeal.

Now the evidence upon which the Civil Judge mainly relied in giving judgment in favour of the Plaintiff consists of a statement in his petition, which it is said was admitted by Ram Dyal. That petition occurred in this way: it seems that eight annas of a mouzah called village Uttardhona had been purchased in the name of Ram Dyal. Kashee Ram applied to have a four annas share of that village entered in his name in the khewat; and his petition, which contains the statement relied on, is this: "The eight annas share in the village "Uttardhona was purchased from joint ancestral "money; that by virtue of inheritance the "Petitioner is also sharer of four annas in the "same—nay, the Petitioner is up to this day in "possession of the entire eight annas; that on "the land belonging to the village, Petitioner "has also established a gauj, &c.; that as the "khewat has not, as yet, been financially "prepared, the Petitioner prays that, out of the "eight annas share possessed by him, four annas "may be recorded in his name in the khewat." Before commenting on this petition, it may be as well to see what Ram Dyal said in answer to it in

his counter petition filed in the Settlement Department, which he afterwards verified by his deposition. His statement is to this effect: "That "the Plaintiff's nephew, Kashee Ram, had, on the "11th September 1868, instituted a claim in your "Honour's Court, to have the four annas share "out of the eight annas in village Mansipur "entered in his name; that the Plaintiff admits "the claim; that the Plaintiff has amicably "divided the above village into two equal "shares; that as the khewat of the aforesaid "village is now under preparation, the Plaintiff "files this petition as a confession of the claim, "and prays that the four annas share may be "entered in the name of the Plaintiff in the "khewat register." In his deposition he added, "That the four annas share claimed by Kashee "Ram, Plaintiff (who is the real nephew), may "be recorded in the khewat in equal shares, in "the names of both Kashee Ram and Kasho "Ram, who are real brothers, and that he agrees "to this, and has no objection whatever." An order was made upon these petitions, which is this: "As Ram Dyal has admitted that four annas "belongs to him and the other four annas belongs "to Defendants, ordered that four annas be "recorded in equal shares in the name of Kashee "Ram and Kasho Ram (the real brothers), and the "other four annas in the name of Ram Dyal "alone."

The contention on the part of the Plaintiff is that he, having stated that the eight annas of the village was purchased with joint ancestral money, and that statement not being denied but admitted by Ram Dyal, there is proof that at that time the estate was joint. Their Lordships think that the statement in the petition was receivable in evidence. It was objected that it was not admissible, because it was a mere statement by Kashee Ram himself.

If it had remained so, the objection must have prevailed; but it is a statement admitted and assented to by Ram Dyal, and an order, founded upon what is called an amicable settlement, was made upon it. It was, therefore, clearly admissible in evidence, and the only question is as to the effect of it and of the transaction itself.

Undoubtedly, it is an admission that at the time of the purchase, whenever that was, there was joint ancestral money, out of which the price came. The date of this purchase nowhere appears; but from the statement which occurs in the petition, it probably was in the lifetime of Ram Buksh, the father of Kashee Ram. Giving a reasonable construction to that statement, it by no means establishes that the whole of the property held by Ram Dyal was joint. It merely proves that there was some joint ancestral money which furnished the funds for this purchase. Taking, therefore, the admission alone, it is by no means conclusive or even satisfactory evidence of the case which the Plaintiff must establish before he can succeed in this suit.

But the further statements in this petition, and the transaction itself, really make in favour of the Defendant's case. Kashee Ram, the Petitioner, whilst he says that the eight annas were purchased out of joint ancestral money, asserts that he is a sharer of four annas, and a sharer by virtue of inheritance. Now if the family were really joint at this time, he would not be entitled to any specific share of this property, and to come in and demand to have his name entered on the khewat for four annas, as his specific share; he would be in the position of a joint sharer in the whole, like any other member of the family. But he claims a specific share, as if, although there had not been a partition by

metes and bonds, the family had previously agreed to divide the property into specific shares. His petition is assented to in those terms, and the order is made in conformity with it. But if this were not the inference to be drawn from the statement in this petition, the transaction itself by which they divide this property shows that they had then become separate, and leads very strongly to the presumption that they were not, from that time at least, a joint family. It should be stated that Kasho Ram did not join in the proceedings, but it appears that the fourth share was entered in the joint names of the two brothers.

Ram Dyal remained the owner of the other fourth, and this transaction afterwards took place regarding it. He entered into an arrangement with Kashee Ram to transfer to him these four annas, Kashee Ram engaging to pay Rs. 100 a year to Ram Dyal for his maintenance, and upon his death Rs. 50 a year to each of his widows,—the survivor to receive the whole 100*l*; and further, if the estate was sold or mortgaged, he was to have half of the price if sold, or of the money raised upon it if mortgaged. That transaction was carried out by the proceedings for mutation of names, which are set out in the Record at page 20. In his deposition in these proceedings, Kashee Ram stated that Ram Dyal "has a four annas share "in the above village, which has been awarded "to him by the Settlement Court, and recorded "in the khewat." This transaction again seems utterly inconsistent with their remaining joint as to their property. The shares in this estate, which appears to have been of some value, were treated as the separate property of each; Ram Dyal dealing with one-fourth entirely as his own, transferring it to Kashee Ram, who put himself under the obligation to pay a price which may be taken as a good consideration for the transfer.

Then Ram Dyal's subsequent conduct is consistent with his supposing that he was the owner of the property which remained in his possession. On the 14th December 1869 he made the deed of gift to his grandson Munna Lall, which the present suit seeks to set aside. It was a gift of all his property, when he was desirous of constituting his grandson, who lived with him, his heir. He being then old, was apparently desirous of placing his property in the hands of those whom he wished to succeed to him. He had, as already stated, transferred to his nephew, upon the terms which have been adverted to, his share in the village; and the rest of his property, which was principally personal, he gave to his grandson.

That deed was made in the year 1869, and was registered immediately after its date, namely, on the 17th December. Kashee Ram certainly knew of the deed, because he filed a petition objecting to its registration. His petition is dated on the 17th December, the day on which the deed was registered, and in it he no doubt states that Ram Dyal and the Petitioner's father had a joint interest in the property, but he contented himself with filing that petition, and took no proceedings whatever during Ram Dyal's lifetime to set aside the deed.

Now, if he was satisfied of the justice of his claim and his ability to prove it, one would have expected that in Ram Dyal's lifetime he would have taken some step to get rid of this deed, which dealt with property to which he was, according to his own case, entitled. However, he took none until Ram Dyal, who could have given the best explanation of the *status* of the family and nature of the property, was dead.

This being the state of things when Ram Dyal died, the Plaintiff's case is certainly not assisted by what subsequently took place. On

the contrary, presumptions against the truth of his case arise from some of these proceedings, The first proceeding is a petition under Act XIX of 1841,—a petition by the two brothers Kashee Ram and Kasho Ram, in which they claim as nephews of Ram Dyal to be his legal heirs. Their statement is "Ram Dyal, our uncle, died on "the 6th April 1873, and we, the Petitioners, "are the legal heirs," and they pray in that petition to have a list of the property made, and that it may be placed in their charge, suggesting that the widows would squander it.

In the first place, the claim thus made is not in its terms a claim as surviving members of a joint family. They claim as Ram Dyal's legal heirs; but proceedings in Oudh not being always carefully and technically expressed, much reliance is not to be placed on that circumstance. But the remark which was made in one of the Courts below, that the Plaintiffs did not seem to know what property there was at the time of Ram Dyal's death, certainly affords ground for an inference against their claim. It appears that one of them at least was a man of business. Kasho Ram was a money lender. There was a shop in which at one time the nephews seem to have had an interest; and if they had really during Ram Dyal's lifetime held all the property jointly with him, it is incredible that they should not have interfered with it during his lifetime to such an extent at least as to be able to say what it was at the time of his death. It appears from the evidence of the witnesses who were called by the Plaintiff that the business of the shop was given up some time before Ram Dyal's death. There appears to have been no demand for any account or any interference with what remained of the stock of the business, nor any claim to the profits which may have been derived from it.

The widows applied for the certificate of heirship, and, though opposed by Kashee Ram, the certificate was granted to the widows by the Court in June 1873. Then there was a suit by the widows for the Rs. 100 a year, which, under the arrangement before referred to, Kashee Ram was under an obligation to pay to them, and they succeeded in that suit. It is to be remarked that a defence was set up in that suit, which entirely failed,—a fraudulent defence, that by a subsequent deed Ram Dyal had cancelled the deed to Kashee Ram, and released him from the annuity, and had made a gift of the four annas to Kasho Ram. The Judge found that no such deed had been executed.

This is all the documentary evidence in the case. Beyond it there is some parol evidence by two witnesses; but when that evidence is looked at, it is utterly insufficient to sustain the Plaintiff's case. Indeed, much of it is contradictory of it; and whilst it would be difficult to say that it proves the case of the Defendants, there is no difficulty in asserting that it does not prove that of the Plaintiff. The first witness, a man called Cheytram Chowdhri, says he knew the parties. He says "I cannot say if their "business were separate or joint, but when they "worked by his advice it looks as if it were "joint. I did not see any division, nor did I "ever hear of division from ancestors." And then, lower down, he says, "Ram Dyal's dealings "had ceased six months before the gift to "Munna; he was ill; *he had no ancestral pro-*"*perty.*" If this man had any means of knowledge, he negatives the Plaintiff's case; if he had no means of knowledge, he cannot prove it.

The other witness was a partner of Ram Dyal, and he says, "I and Ram Dyal were partners up "to five or six years ago. It lasted five years "after the mutiny. I and he got eight annas

" share each." Therefore it seems that this witness had one half of the business. "I worked; money " was credited in the name of Ram Dyal and " Kasho Ram in Nowabee; after the mutiny " Kasho Ram and Kashee Ram's names only " were used." That may have been for some reason arising out of the mutiny. " No division " occurred; he kept the shop for the boys. " I can't remember their father's name." Now the utmost that this witness's evidence goes to prove is that the nephews had some interest in the shop; but that may have been the case without their being interested in the general property in the possession of Ram Dyal as ancestral property. They may have been partners in this shop, and if so, they would be entitled to a share of the proceeds; but this suit is not brought to ascertain the profits of the shop; and, as has been already said, if there were any profits of the shop it is strange they should not have been asked for and ascertained in the lifetime of Ram Dyal.

On the whole, therefore, their Lordships, if they had to form their opinion of the evidence as a Court of first instance, would have come to the conclusion that it was insufficient to sustain the Plaintiff's case.

With regard to the judgments, they are not of a nature to induce their Lordships to act on their authority, after the opinion they have themselves formed of the evidence. The Judges evidently felt great hesitation in coming to a conclusion in the Plaintiff's favour, and their reasons for it are not altogether satisfactory. The Civil Judge appears to have based his decision upon the ordinary presumption of Hindoo law applicable to a joint family. He says the presumption of law is that property is ancestral and not self-acquired,—is joint and not separate. This, no doubt, is the ordinary presumption; but the Judge does not appear to

their Lordships to have given sufficient weight to the circumstances of this family, which rebutted the ordinary presumption. If the Judge had not acted upon the presumption, it is plain that the evidence taken alone would have been insufficient, in his own opinion, to have led him to the conclusion at which he arrived.

Then the judgment of the Commissioner sustaining that of the Civil Judge is also placed on infirm ground. It will be sufficient to read the concluding paragraph, "The case is not "a very satisfactory one, and I do not think "Ram Dyal and Kashee Ram were joint at the "death of the former, but there is fair proof "that they were joint within limitation, and no "separation is alleged. I therefore decline to "interfere with the finding of the Lower Court, "and dismiss the appeal, with costs." If this judgment is taken literally, it negatives the issue which was raised in the case; but what the Commissioner evidently means is, that there being, as he thinks, fair proof that the family were joint at the time of the proceedings respecting the entry in the khewat to which reference has been made, there was no subsequent evidence of separation. Well, if it could be taken as an ascertained fact that the family were joint at that time, there might not be sufficient evidence to show a subsequent separation; but, when the proof comes to be analysed, the error of the Commissioner's judgment seems to be in assuming that fact as a safe point of departure upon which he might decide the case.

The subsequent judgments of the Commissioner and of the Judicial Commissioner merely turn upon the question of the right to appeal to Her Majesty,—a question which has become immaterial in consequence of the special leave which has been obtained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to reverse the judgments of the Courts below, and to direct that the suit be dismissed, with costs in all the Courts below; and the Appellants will have the costs of this Appeal.