

Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Amanat Bibi, Babu Lachman Parshad, and Babu Narotam Das v. Imdad Husain from the Court of the Judicial Commissioner of Oudh; delivered March 16th, 1888.

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

THIS is an appeal from a judgement of the Judicial Commissioner of Oudh, affirming a decision of the District Judge of Fyzabad, by which he granted a decree for redemption of certain property said to be in mortgage. The mortgage deed is not produced, but there has been produced a memorandum under the seal of a predecessor in title of the Appellants, which stated upon the face of it that the property had been mortgaged and was subject to redemption. That memorandum has been held by two courts to be a genuine document, and to be sufficient evidence of the alleged mortgage. The sole ground of appeal is, that the Respondent's suit ought to have been held barred by what took place in certain Settlement proceedings, for two reasons: (1) because the issue in this suit was substantially determined by the determination of an issue in those proceedings; and (2) because the Respondent was bound to have brought forward, in the previous proceedings, the mortgage transaction on which he relies in the present suit.

▲ 53730. 125.—4/88. Wt. 328. E. & S.

The Settlement proceedings may be stated very shortly. The Respondent in 1866 brought a claim to establish an alleged sub-proprietary right. That claim was dismissed on an admission by the Respondent that he never had held as sub-proprietor under the talukdar during the native rule, or during the term of limitation, that is the period from 1844 to 1856. The dismissal was confirmed by the Commissioner and also by the Financial Commissioner, Mr. Barrow. After that proceeding had come to an end a Government circular was issued, Book Circular 4 of 1867, which is known as "The Hard Case Circular," and thereupon the Plaintiff applied for a review of his case. The Financial Commissioner entertained the application and remanded the matter to the Settlement officer. The Settlement officer made a most minute and elaborate examination into all the circumstances. He found that the property had been conveyed to the talukdar by a conditional deed of sale, under which the purchase money was to be repaid within the period of eight months, and that on the expiration of that period the sale became absolute. He also found that the talukdar had paid up certain arrears of Government revenue which ought to have been paid by the Respondent or his predecessors in title. The Financial Commissioner accepted the report of the Settlement officer, and refused to disturb the previous orders. Their Lordships are of opinion that proceedings under the Hard Case circular cannot be treated as judicial proceedings. It appears from the circular that the talukdars had engaged to take cases of proved hardship into their favourable consideration. But relief was to be granted not as a matter of right, enforceable by process of law, but as a matter of concession in a spirit of fairness and liberality. His appeal on the ground of hardship having been rejected, the Respondent then sought to avail himself of another circular,

Adopting the finding of the Settlement officer that the talukdar had paid arrears of Government revenue, he sought to treat those arrears as paid on his account, and he brought a suit to recover the property under the terms of Circular No. 106 of 1869. That suit was dismissed. But it may be assumed for the purposes of this judgement that in that suit—which was a judicial proceeding—the Settlement officer reaffirmed his previous findings and determined that the property had been transferred to the talukdar by a deed of sale, which was dated in February 1853, and became absolute eight months after its date.

Is that determination a bar to this suit, founded, as the suit is, on a mortgage recognised as subsisting in 1854?

The section of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms: “No court shall try any suit
 “ or issue in which the matter directly and sub-
 “ stantially in issue, having been directly and
 “ substantially in issue in a former suit in a
 “ court of competent jurisdiction between the
 “ same parties or between parties under whom
 “ they or any of them claim, litigating under the
 “ same title, has been heard and finally decided
 “ by such court.” Now what was the question in issue in the former suit? The question was whether the Plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the Respondent’s right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor. But if it be established that the Respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an

earlier date he may have had no right to the property at all?

Then comes the question was the Respondent bound to have brought forward his present claim in the former suit? Section 7 of Act No. 8 of 1859 is in these terms:—"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. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." That section has already been under the consideration of this Board in the case of *The Rajah of Pittapur v. Sri Rajah Venkata Mahipati Surya*, L. R. XII., Indian Appeals, page 116; and the commentary upon it at page 119 is:—"That section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought." The Respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit.

Moreover it appears to their Lordships that the fair result of the evidence is that at the date of the former suit the Respondent was not aware of the right on which he is now insisting. A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of the section in question.

On the whole, therefore, their Lordships are of opinion that the judgement of the Judicial Commissioner was correct, and that the appeal ought to be dismissed, and they will humbly advise Her Majesty in accordance with that view. The Appellants will pay the costs of the appeal.