Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Deo Kuar v. *Man Kuar, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 14*th July* 1894.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This is a family dispute. The Defendant, who is the present Respondent, has been placed in possession of half the family property, and the Plaintiff who is Appellant, and who is in possession of the other half, claims the whole. The family whose property is in question were Gujrati Banias who some time back migrated from Baroda to Banda, but retained some property in Baroda, and had relatives there. They were a joint Hindoo family subject to the law of the Mitakshara. In the year 1868 Pransukh Ram the then head of the family died at Banda. He left surviving him his widow Jarao Bai, and one son Uttam Ram, and two daughters. He had another son Ganga Ram, who predeceased him, leaving no issue. Uttam Ram, who took the whole inheritance, died on the 30th October 1875, leaving no male issue. The Plaintiff is his widow. The Defendant is the widow of Ganga Ram.

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There is now no question but that on Uttam Ram's death the whole inheritance devolved on the Plaintiff. She then thought she was pregnant and might have a son, but those hopes were delusive. In this suit it has been contended that the Defendant was entitled to share in the inheritance on the ground of some local or caste custom applying to the family; but it has been found that there is no such custom, and there is no evidence that the Plaintiff's right to inherit was ever seriously brought into question prior to this suit.

The Plaintiff's claim is denied, and the Defendant's title is rested, on the ground that by a long series of transactions which will be passed in review, the Plaintiff transferred to the Defendant a moiety of the Plaintiff's property. The Subordinate Judge held that there was no such transfer and gave the Plaintiff a decree. The High Court thought differently and dismissed the suit. From that decree the Plaintiff now appeals.

The first transaction is an application by Jarao, the widow of Pransukh and the mother of Uttam, made on the 20th December 1875 to have her name substituted for that of her son in the settlement records. The evidence of the proceedings on this application is contained in the recitals to an order dated the 25th November 1876 relating to the lumberdarship of one of Uttam's mouzas, and begins at p. 121 of the Record.

It appears that the Plaintiff was then in the family house at Barnagar in Baroda, and that the presiding Settlement Officer communicated with her through the British Agent at Baroda. On the 12th June 1876 the Settlement Officer received a letter from the Agent as follows :—

"I send herewith the original deposition, in Gujrati, of "Mussammat Diwali Bai, widow of Uttam Ram, with an "English translation thereof. She has given her consent to

"the entry of the name of the mother of Uttam Ram in the "settlement papers in place of her deceased son, on the "following conditions :—'I am with child, in the first place. "'In the event of a son being born his name shall be entered "'as the heir to the estate of Uttam Ram ; secondly, if a son "'be not born my name shall be entered after the death of the "'mother of Uttam Ram.'

Upon that he delivered the following opinion :—

"As Diwali Bai, the widow of Uttam Ram, deceased, does "not relinquish her right, it appears necessary that the names "of both the Mussammats, with a detail of their shares, be "entered; but by way of precaution it may be ascertained "from the Collector if there is any harm, in his opinion, in "entering the names of both the Mussammats. It is clearly "to be stated that the whole management will rest with the "mother of Uttam Ram. By the time the papers are prepared "it will have been ascertained whether Mussammat Diwali "Bai has given birth to a son."

On the 20th June 1876, the Collector sent an answer of a very extraordinary character. He said that in his opinion there was no harm in entering the names of Jarao and also that of the Defendant. Why the Collector took upon himself to introduce, quite gratuitously it seems, the name of the Defendant, is nowhere explained. It appears to have been the beginning of a series of errors.

The Settlement Officer indeed acted correctly, for on the 4th July he directed that the office should make an entry of names according to the order of the 12th June. But the case was transferred to the Settlement Court of Banda, when the following proceeding took place, apparently on the 12th August :—

"Mussammat Jarao Bai, the mother of Seth Uttam Ram "deceased, presented a petition to the Settlement Officer for the "entry of her name alone in place of Seth Uttam Ram. The "order passed thereon was that there were three heirs to this "estate, viz.—(1) Mussammat Jarao Bai, the widow of "Pransukh Ram deceased; (2) Diwali Bai, the widow of "Uttam Ram deceased ; and (3) Mussammat Banke Bai, "widow of Ganga Ram deceased ; and that therefore it was "expedient to enter the names of all the three with this con-"dition, that the management of the whole estate should be

" entrusted to Mussammat Jarao Bai for her life, and that when " a new khewat would be prepared the names should be en- " tered according to this order in equal share."

In this way it seems that the Revenue Court, misled by the Collector's letter, gave the Defendant a position to which she had no right, which was not conceded to her by the Plaintiff, and was not demanded either by herself or by Jarao on her behalf.

The order of the 25th November 1876, in the preamble of which the above stated proceedings, and some subsequent proceedings in September and November, are narrated, was made for the purpose of settling a dispute in the mouza of Jeorahi. The question was whether one Bhura, a shareholder, or the heirs of Uttam should be entered as lumbardar. The Settlement Deputy Collector decided in favour of the heirs; in entering the heirs he followed the error of the order of August. In his judgment he states that the heirs are the three widows, and in his order he directs that their names should be entered in equal shares with the following conditions:—

" That the whole management of the estate will be entrusted " to Mussammat Jarao Bai during her lifetime, and that in the " event of a son being born to Mussammat Diwali Bai, who was " with child at the time of the death of Seth Uttam Ram, the " name of the son would be entered as successor to Seth Uttam " Ram deceased, in respect of the property."

It is not clear upon the record in how many of Uttam Ram's mouzas, 26 in all, the above procedure was followed when the names were changed. It would seem that in some the name of Jarao alone was entered; in some, the plaint says three, the names of Jarao and the Plaintiff; and in some, as in Jeorahi, the three names. That inquiry is not now of importance. The point is that the true heir, the Plaintiff, was not in any case entered in lieu of Uttam. There is nothing to show that she knew

her rights or received any independent advice. But even if she did know what she was doing when she made her deposition in May 1876, the orders of August and November 1876 were wholly at variance with her intentions as expressed in that deposition, and with the directions of the Settlement Officer made upon it on the 12th June and the 4th July. It is in the opinion of their Lordships beyond doubt that at this time the Plaintiff might have maintained a suit for the correction of the Records by the insertion of her own name as sole heir.

The next stage in the transactions took place during the year 1877, and is quite as extraordinary as the first stage. It terminated in a document dated the 9th October 1877, purporting to be an Award of Arbitration by Seth Kishan Chand and Lachhman Shankar Bhat; but the circumstances which led up to this award are left in deep obscurity. The arbitrators recite that the three widows have appointed them "for the settlement of their respective con- "tentions in respect of the right of ownership" over Uttam's property. But they do not settle any such contention, nor do they intimate what contentions there were. They recite thus:—

"Mussammat Jarao Bai was asked by us in what manner "she wished the partition to be made; to which she replied that "she wished Mahal Pransukh Ram, situated in mauza Chhanon, "pargana Sihonda, to be given to her for her maintenance, and "that as regards the remaining zemindari villages and property "and chattels held in common, she wished that they should be "divided in two equal shares, and one-half given to each of her "two daughters-in-law, and that this course would be agreeable "to her."

And then they go on to express Jarao's wishes in the form of an award; directing as to most of the mouzas that they shall be held by the two younger widows in equal moieties, and as to some giving them to one or to the other in entirety, but so as to give about the same value to each.

The agreement to refer has not been proved. A copy was tendered but rejected by both Courts. Both the arbitrators have given evidence in the suit, apparently with great candour. Neither of them mentions what the point of dispute was. According to both the award originated with Jarao. Neither of them had any communication with the two younger widows about the award, either before it or after. Kishan Chand says, "As to the arbitration I "had asked Jarao Bai what was the award to "be;" and then he did as she bid him. Lachmi Shankar says, "We, the arbitrators, did "not make the award according to our own judg- "ment. We made the award as asked by Jarao "Bai." It is obvious that such a proceeding is not an award at all, but is entirely devoid of legal effect, as it was treated by the Subordinate Judge. The right which the Plaintiff had to sue for her inheritance prior to the award remained to her undiminished by the award.

It is not indeed contended by the Defendant's Counsel that the award by itself can have any legal effect. Nor do their Lordships understand that the learned Judges of the High Court so treated it, though they lay a good deal of stress upon it. They hold that there was "a family arrangement in settlement of the "contentions between the ladies," and that this arrangement was "carried out in the way of "an award in accordance with the wishes of the "three ladies as to the settlement of their "respective claims to the estate." That seems quite a legitimate use to make of the award, if only the evidence supports it.

But first, their Lordships cannot find what contentions or claims there were to be settled. They pressed the Defendant's Counsel on this point, and he could not point out any indication of any such contention or claim except the

general statement in the award itself. What the evidence shows is that there was personal friction between the two younger widows, which they palliated by setting up separate domestic arrangements, but which the division of Uttam's property had no tendency to allay. They were not less likely, perhaps more likely, to fall out in taking accounts of the shares due to each, than in settling the maintenance to which the Defendant was entitled. And secondly, there is no evidence to connect the award with the wishes of the three ladies. It embodied the wishes of Jarao. But we know nothing of the Plaintiff's wishes except by her deposition of May 1876, and that gives no countenance to the award.

In opening the Defendant's case Mr. Mayne frankly admitted that there was no award in any legal sense, and that he could not find any consideration passing from the Defendant to the Plaintiff so as to support his client's case on the ground of contract. But he contended that the whole series of transactions between Uttam's death and the institution of this suit, of which the award is an important item, supports the conclusion that for some motive or other the Plaintiff deliberately intended that her sister-in-law should have an equal share in the property. And he subjected the whole evidence to a very careful examination to prove that point. That in effect puts the Defendant's case on the footing of a free gift by the Plaintiff, and Mr. Mayne accepted that issue. This is not the issue raised by the pleadings, nor the issue presented to the Subordinate Judge; but as it may have been in the mind of the High Court their Lordships have considered this view of the evidence. In order to succeed upon it the Defendant must show that the Plaintiff, knowing her rights and knowing that she was making a free gift to her sister-in-law, did so make it.

Their Lordships have already shown that prior to the award the evidence is not favourable but adverse to the theory of such a gift. The award itself adds to the adverse evidence; for if the Plaintiff wished to make a gift, why should Jarao set up the fictitious machinery of an arbitration? If their Lordships are to find evidence for a gift they must find it in circumstances subsequent to the award. And that brings us to the third stage of the history.

On the 13th November 1877 Jarao died. During her life no mutation of names was made in pursuance of the award; but that period was so short that no importance can be attached to the omission. On the 25th November (Rec. p. 184) the karinda of Jarao applied to the Settlement Court stating that she was the zemindar of mouza Malathu, one of Uttam's mouzas, and that the Plaintiff and Defendant were the heirs; and he asked that their names should be entered in lieu of hers as mortgagees of a large number of parcels. That mutation was ordered accordingly; "by right of inheritance" as the order expresses it. On the 7th December 1877 (Rec. p. 187) one Khan Muhammad, calling himself karinda and mukhtar of the two widows, applied for mutation of names in Semaria, another of Uttam's mouzahs. He puts into their mouths the statement that Jarao was proprietor and owner of the entire 16 annas, and that her daughters-in-law are her heirs. Similar applications were made in other mouzas by other karindas. So far as they are given in the Record they are to the same effect as the two just stated. The result of the evidence is that the names of the Plaintiff and Defendant came to be entered jointly in respect of the properties now sued for, within a few months of Jarao's death, on the statement that she was the owner and that they were her heirs.

Pausing again, we may ask how the mutations of names in 1878 support the theory of a gift by the Plaintiff, or if it is preferred so to put it, of the existence of wishes on the part of the three widows which the award correctly expressed. The answer is, that the mutations are not in accordance with the award, and instead of supporting it throw discredit on it.

Take for instance mouza Baragaon, which is one of those now held in moieties, and is put in suit accordingly, but the award gives it to the Plaintiff in entirety. So mouza Keri was awarded to the Defendant in entirety, but is held in moieties. There is at least one other mouza in the same position, probably more, but it is not easy to trace the whole list.

Independently of those variations, not material as regards value, but material as showing that it was not the award which the agents of the parties took for their guide, the whole claim for the mutations of 1878 was founded on statements which differ as widely from the award as they do from the truth. The statement that Jarao was owner and proprietor contradicts everything that preceded it. By the Plaintiff's consent in 1876 Jarao was let in to be joint owner and manager; possibly for such an interest as would be ascribed to the widow of Pransukh if he had died without male issue. By the award she took no interest in any part of the property except in one mouza for life. Luchmi Shankar is quite right in saying, "The arbitration-award "was not acted upon. Mutation of names was "not made according to it. . . ., the names "of Man Kuar and Deo Kuar were entered in "respect of equal shares by right of inheritance. "The names were entered by right of inheritance "from Jarao Bai." (Rec. p. 130.)

Now those who allege that a gift is to be inferred from a series of transactions, should be

able to show a reasonable amount of consistency in the transactions on which they rely. We have seen that the mutations of 1876 were contrary to the Plaintiff's wishes expressed in her deposition of that year, and that the award was equally contrary to the deposition, and to the mutations of 1876. Now it appears that the mutations of 1878 were just as contrary to the deposition, and to the former mutations, and to the award. So far the evidence appears to their Lordships to be destructive of the theory now put forward on behalf of the Defendant.

An attempt is made to support the award or the arrangement expressed in it by showing that Chunni, a daughter of Jarao, who was awarded an annuity of Rs. 50, sued the Plaintiff and Defendant for it, and got a decree. But supposing those proceedings to be evidence in this suit, the answer is that the suit was undefended and the decree made *ex parte*, and there is neither proof nor probability that the Plaintiff knew anything about them. Luchmi Shankar, who acted for her, says that he did not tell her about the suit. He adds, "all the suits were brought in con-"sultation with me and Gobind Das. It was a "work connected with the shop. There was no "occasion to refer to Deo Kuar and Man Kuar." Rec. p. 130. The same kind of observation applies with nearly as much force to the two documents filed in the Tehsildar's Court in 1880. One is said to bear the Plaintiff's mark, the other her full signature. But no proof is offered that any explanation of the documents was given to her, or that she gave any intelligent assent to them. The Subordinate Judge observes of all this class of evidence that the whole affair is the work of agents and mukhtars, and that no care appears to have been taken such as the

law requires in the case of purda-nashin ladies. Their Lordships think that those remarks are justified by the evidence.

Great reliance has been placed upon the fact that in the year 1878 a partition was effected, through a punchayet acting on behalf of the two younger widows, of a family house and some chattels in Barnagar. This operation, it is argued, is exactly in accord with the doings in Banda,—and not only so, but by the Farkhati, or deed of release made between the parties (Rec. p. 216) the partition in Banda is expressly affirmed. Certainly if all this was brought home to the Plaintiff, and it were shown that with full information and intelligence she authorized such a partition and signed such a deed, it would tell for the Defendant. But there is no evidence to that effect. The Plaintiff's name was signed by one of her uncles; and the deed of release sets out with a serious mis-statement. The property is represented as that of Pransukh, who stood in an equal relation to his two daughters-in-law. But it was in fact the property of Uttam the Plaintiff's husband. Whatever may be the local customs of Baroda (and none are proved) it is impossible to suppose that the descent from Pransukh to Uttam ought to be passed over in silence, or that the Plaintiff understood her true position. Indeed it is a most remarkable phænomenon in this case, that wherever we come across statements or entries referring to title, they are based on error. Their Lordships are of opinion that the Barnagar transactions are of very little, if any, help to the Defendant's case.

The real strength of her case is her possession, which appears to have continued for about eight years before suit. It is not long enough to afford a defence by mere lapse of time. It is one of the circumstances to be taken into consideration in estimating the theory of the

Plaintiff's wish to make a gift to her sister-in-law; a very important one doubtless, and such as might reasonably incline a Court of Justice in the Defendant's favour if the prior history of the case was in her favour. But their Lordships have shown reasons for concluding that the prior transactions are not only not favourable, but are decidedly adverse, to the Defendant. In their judgment the evidence shows that, either from the influence of Jarao, or from carelessness or mistakes on the part of officials and of family agents, a number of unwarrantable liberties were taken with the Plaintiff's name and interests; and that the Defendant thereby gained a position to which she was not entitled. It is clear to them that, at least as recently as the mutations of 1878, the Plaintiff might have sued to have her property restored to her, and that to such a suit there could have been no substantial defence. Her inaction is not explained except by her statement in the plaint that she had only then discovered what had been done. Very likely that is an exaggerated statement of her ignorance. But even supposing that she learned the Defendant's position in the course of 1878, and that she was supine for eight years, that is no sufficient reason for imputing to her wishes and intentions which all the other circumstances of the case contradict.

There is a minor point respecting the malikana of Mouza Pachanahi, which amounts to Rs. 1,500 per annum. As between the Plaintiff and Defendant, it stands in exactly the same position as the other property, but the Subordinate Judge considered that the jurisdiction of the Civil Court is taken away by the Pensions Act, 1871. The Plaintiff made it the subject of appeal to the High Court, but of course it was there merged in the larger issue decided adversely to her. She has raised the question again on this

appeal. Mr. Mayne declined to argue it on the Defendant's behalf. Mr. Branson submitted rather than argued it on behalf of the Plaintiff; but he cited no authority, and their Lordships have not been able to find any bearing directly upon the subject.

The Pensions Act 1871 enacts that "Except "as hereinafter provided, no Civil Court shall "entertain any suit relating to any pension or "grant of money or land-revenue conferred or "made by the British or any former Govern- "ment, whatever may have been the consideration "for any such pension or grant, and whatever "may have been the nature of the payment, "claim or right for which such pension or grant "may have been substituted." The expression "grant of money or land-revenue" is interpreted to include anything payable on the part of Government in respect of any right, privilege, perquisite, or office.

Mouza Pachanahi was taken into the hands of the Government and held khas in or before the year 1880, and by a deed dated in September of that year the Plaintiff and Defendant formally made over to Government their proprietary rights on consideration of receiving Rs. 2,000 per annum as malikana in perpetuity. Malikana is the allowance made to proprietors so dispossessed. By Regulation VII. of 1822 it might vary from 5 to 10 per cent. of the income realized. That Regulation was repealed as regards the North-West Provinces by Act XIX. of 1873, and fresh provisions for allowances to dispossessed proprietors were substituted. It does not appear under what circumstances the mouza was taken into khas management, but it cannot be doubted that the allowance stipulated for and granted was of the nature indicated by the term malikana, *i. e.*, a grant of a portion of the revenue in lieu of pre-existing proprietary rights.

It is at first somewhat surprising that a property which has been the subject of bargain and of formal grant should be excluded from the cognizance of Civil Courts. But it cannot be denied that it falls within the literal construction of the words of the Pensions Act, *i. e.*, it is something payable on the part of Government in respect of a right. And the decision of this Committee in *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (L. R. 4 Ind. App. 119) and again in *Maharaval Mohansingji Jeysingji* v. *The Government of Bombay* (L. R. 8 Ind. App. 77) shows that the language of the Act applies to cases in which the grant has been made in consideration of prior rights vested in the grantee. In the former case the subject of the suit was a grant made by the Peishwa to an hereditary deshmukh authorizing him to levy dues from the ryots, which dues were subsequently collected by the British Government and paid over to the deshmukh. In the latter case the subject was a *to da garas hukk*, which, though originating in blackmail, had long been recognized as property capable of alienation and of seizure and sale in execution; and the liability for which had been assumed by the British Government. In both cases it was held both by the Courts below and by this Committee that the Civil Courts were incapacitated by the Pensions Act from entertaining suits. It is not for their Lordships to examine into the relations between the Government, the farmers, the ryots, and the grantees of malikana, or the previous state of the law, or the other considerations which may have dictated the policy of the Pensions Act. It is enough if its effect is expressed in clear terms. The Plaintiff might have applied for a certificate which would have enabled the Court to make some declaration of right as between her and the Defendant, but

she did not do so, and must submit to the disability which the Act imposes upon the Court.

The Plaintiff fails to get the decree of the Subordinate Judge altered in her favour in this respect, but it does not appear that her claim to do so has had any effect on the costs of this appeal. Their Lordships will humbly advise Her Majesty to discharge the decree of the High Court, except in so far as it disallows with costs the objections of the Plaintiff to the decree of the Subordinate Judge; to dismiss the Defendant's appeal to the High Court with costs; and to restore the decree of the Subordinate Judge. The Defendant must also pay the costs of this appeal.