PRIVY COUNCIL.

RUN BAHADUR SINGH (PLAINTIFF) *v.* LUCHO KOER (DEFENDANT.)

P. C.*
1884
November 25, 27, 28, 29, *December* 13.

[On appeal from the High Court at Fort William in Bengal.]

Res-judicata—Act VIII of 1859, *s.* 2—*Act X of* 1877, *s.* 13—*Cross Appeal—Practice.*

The decision in a suit in order to be final and conclusive, as *res-judicata*, upon an issue raised in another suit, must be the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive.

This proposition stated in the judgment in *Mussumat Edun* v. *Mussumat Bechun* (1), and affirmed by the Judicial Committee in *Misir Raghobardial* v. *Sheo Baksh Singh* (2), is applicable equally to cases under Act VIII of 1859, s. 2 (as supplemented by the general law), and to cases under the more complete enactment in Act X of 1877, s. 13, which is not to be construed as having altered the former law.

A suit was brought in the Court of a Subordinate Judge by a Hindu against the widow of his deceased brother, claiming his property by right of survivorship, the issue being whether, at the death of the latter, the ownership of the brothers was joint or separate. An order under Act XXVII of 1860, granting a certificate to the widow did not, on the above issue, operate as *res-judicata* in the widow's favour, being a proceeding of representation, and not otherwise of title.

Held, also, that a decision of the same issue in a Munsiff's Court in a rent suit brought by the widow, the surviving brother, on his application, having been made a party defendant under s. 73 of Act VIII of 1859, did not constitute *res-judicata* in her favour.

Krishna Behari Pal v. *Brojeswari Chowdhrani* (3) referred to and followed.

Held, also, that the brother having appealed against a decree dismissing the suit as *res-judicata* (the judgment which that decree followed having, nevertheless, found that the widow was disentitled by reason of the brothers having been, in fact, joint in estate), the widow could have supported the decree, without filing a cross appeal as to that finding, on the ground that the decree had been rightly made, (though not for the reason given) in her favour.

**Present:* LORD FITZGERALD, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) 8 W. R., (F. B.,) 175; 2 Ind. Jur., N. S., 265.
(2) I. L. R. 9 Calc., 439; L. R., 9 I. A., 197.
(3) L. R., 2 I. A., 283; I. L. R. 1 Calc., 144.

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APPEAL, and cross appeal, from a decree (August 30th, 1880) of the High Court (1), affirming a decree (January 21st, 1878) of the Subordinate Judge of Gaya.

In the suit out of which this appeal arose, the survivor of two brothers, Raja Run Bahadur Singh and Murlidhar, sons of Bishen Singh, of whom Murlidhar died in 1872, claimed by right of survivorship the share in the family property which had been Murlidhar's. The defendant, the widow of Murlidhar, alleged that the brothers were separate in estate, having been divided in the Fasli year 1270 (1862-1863) nine years before the death of her husband.

At a later stage the defence of *res-judicata*, as to this separation not having taken place, was set up by the widow. The family property which had been acquired by Bishen Singh, who died in 1869, consisted of mouzahs in the districts of Gaya and Patna, in some of which the *milkiut* had been acquired by him, while others were held under *mokurrari* grants from the Tikari Raj. From Bishen Singh they descended to his sons, and the property in suit was valued in the plaint at more than Rs. 1,70,691.

At the hearing before the Subordinate Judge, the defendant, setting up the defence of *res-judicata*, gave in evidence an order of the District Judge, maintained on appeal by the High Court in July 1875, granting to her a certificate to collect debts, as widow and representative of Murlidhar. To establish the same defence, she also relied on the decree of a Munsiff's Court (6th January 1875), maintained on appeal (25th August 1875), against a tenant occupying land in one of the mouzahs, the subject of one of the *mokurrari* grants. That suit was for rent, and whilst it was pending, on the 13th August 1874, Run Bahadur filed an objection, stating that Murlidhar had till his death been joint with him, that the widow was not entitled, and asking to be made a defendant. This was granted, and Run Bahadur was made a party defendant, under s. 73 of Act VIII of 1859.

The Munsiff having fixed an issue raising the question whether the plaintiff's husband had received, till his death, the rent jointly with

(1) *Run Bahadur Singh* v. *Lucho Koer*, I. L. R., 6 Calc., 406.

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Run Bahadur, or separately, adjudicated on the title as between the widow and Run Bahadur, to the entire *mokurrari*, under which was held the mouzah in respect whereof the rent suit was brought. His judgment (6th January, 1875) was that the brothers were separately in possession of their shares, and that Murlidhar had been in separate possession of this mouzah—a decision which was upheld on appeal by the Subordinate Judge (28th August 1875). Upon this and other evidence given in the present suit, the Court of first instance, the Subordinate Judge of Gya, concluded that the separation between the brothers was neither *res-judicata*, nor had it been established as a fact.

Against this decision the plaintiff, Run Bahadur, appealed to the High Court, and the defendant filed her cross-appeal, maintaining that the separation of the brothers, her late husband and the plaintiff, was *res-judicata*, under Act VIII of 1859, s. 2. The High Court (*Pontifex* and *McDonell* JJ.) was of opinion that this issue of separation had been directly and substantially raised in the rent suit decided in 1875; and that, although the Munsiff would not have been competent to try the present suit, he was competent to try, and did try, at the instance of the present plaintiff, when he tried the rent suit, the issue on which the present suit depended. The High Court held that the rule of *res-judicata* must be held to apply as between rent suits and other suits, as the intervention of claimants of title was permitted; and it concluded that the judgment in the rent suit of 1875, on the substantial issue of separation between the brothers, must be regarded as *res-judicata* governing the present suit. The appeal of the plaintiff was, therefore, necessarily dismissed, although the High Court on the evidence came to a conclusion opposite to that of the Subordinate Judge, and was of opinion that the brothers held the family property jointly down to the death of Murlidhar.

The judgment of the High Court is reported, at length, in I. L. R. 6 Calc., 412.

The plaintiff having appealed to Her Majesty in Council against the decree of the High Court based on the above view of the question of *res-judicata*, the defendant filed a cross-appeal,

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as to that part of the judgment which related to the brothers having been joint.

Mr. *T. H. Cowie*, and Mr. *C. W. Arathoon*, for the appellant, contended that the judgment of the High Court was erroneous in treating the issue as to separation as *res-judicata*, under s. 2 of Act VIII of 1859. In the rent suit the tenancy of the tenant was tried rather than the title of his lessor, while the claim of the intervenor was only incidentally tried. Nor was the Court of the Munsiff a Court of competent jurisdiction within the meaning of s. 2 of Act VIII of 1859 of which the words meant a Court which would have had jurisdiction over the matter in issue in the subsequent suit in which the defence of *res-judicata* might be set up. This jurisdiction the Munsiff's Court, which tried the rent suit, had not. The Court, giving the judgment which had been set up, afterwards as conclusive, in another Court, should also have had concurrent jurisdiction with that other Court, both as regards pecuniary limit, and authority to deal with the subject-matter of the suit—*Mussumat Edun* v. *Mussumat Bechun* (1.) Neither of these conditions existed in regard to the judgment in the rent suit of 1875. Reference was made to *Misir Raghobardial* v. *Raja Sheo Baksh Singh* (2); *Flitters* v. *Allfrey* (3.)

Mr. *Graham, Q.C.*, and Mr. *R. V. Doyne*, for the respondents argued that not only was the case of *Misir Rajhobardial* v. *Raja Sheo Baksh Singh* (2) distinguishable, inasmuch as it related to Act X of 1877, s. 13, but also on the ground that the principle on which it was decided had reference to the pecuniary limit of the jurisdiction exercised by a Subordinate Court—a limit which in that case would have excluded from the cognizance of the first Court the question that was tried in the second. But here the rent case was one in which the Munsiff had jurisdiction to try the very question upon the decision of which the adjudication in the present suit must depend. It mattered not that the Court, into which this question had come for investigation a second time, had a jurisdiction more extended

(1) 8 W. R., (F. B.) 175; 2 Ind. Jur. N. S., 265.
(2) I. L. R. 9 Calc., 439; L. R. 9 I. A., 197.
(3) L. R. 10 C. P. 29.

than that of the Court which had already tried the question. It had been raised as a question of title in the rent suit; and the Munsiff not only had jurisdiction, but was bound to try the issue as to the separation of the brothers. Suits for rent had been heard between 1859 and 1869, by Deputy Collectors under Act X of 1859, with the right of intervention secured to adverse claimants of rent, and a proviso that the decision should not affect title. When these suits were transferred back to the Civil Courts, by Beng. Act VIII of 1869, this proviso was not re-enacted. The decision of the Civil Court, receiving its due effect, was, therefore *res-judicata*, as to the title.

That the effect of such a decision was to constitute *res-judicata* did not depend only on the construction of the Acts above referred to. That the judgment of a Court not competent to try the subsequent suit, on which that judgment might be pleaded as *res-judicata* must nevertheless be held to be the judgment of a Court of competent jurisdiction, appeared from the decision in *Flitters* v. *Allfrey* (1).

Upon the question of *res-judicata*, Counsel for the appellant were not called upon to reply. But their Lordships directed that the question on the merits (also raised by the cross-appeal), as to the finding of the High Court that the brothers were joint in estate, should be argued.

On this Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* were heard for the cross-appellant.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* were heard for the cross-respondent.

On a subsequent day, December 13th, their Lordships' judgment was delivered by

SIR R. P. COLLIER.—In this case Run Bahadur Singh sued Mussumat Lucho Koer, the widow of his deceased brother, Murlidhar Singh, to recover possession of the property held by Murlidhar, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindu widow's estate in the property. She further maintained that this

(1) L. R. 10 C. P., 29.

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question had been conclusively determined in her favour in a former suit between her and the plaintiff.

The Subordinate Judge decided the plea of *res-judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res-judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into the question of fact, and held that the brothers were joint in estate.

From this decree Run Bahadur has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross-appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res-judicata* arose in this way:

After the death of her husband she applied for a certificate, under Act XXVII of 1860, enabling her to collect the debts of her husband. This application was opposed by the plaintiff, who set up the case of joint ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as constituting *res-judicata*, Counsel at their Lordships' bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the Munsiff against a tenant for the recovery of rent, to the amount of Rs. 53,

Run Bahadur intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, *viz.*, joint interest and ownership. An issue was framed in these terms:—

"Did the plaintiff or her deceased husband realize the rent of the 8 annas separately and in a state of separation before this, or did the plaintiff's husband during his lifetime realize the rent with Run Bahadur jointly and after him, did Run Bahadur alone receive rent of the entire 16 annas?"

Witnesses were called on both sides, and the Munsiff decided in favour of the present defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of the Court of the Munsiff is limited to Rs. 1,000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X of 1859, exclusive jurisdiction was conferred on Collectors to determine rent suits, with an express limitation of their power in cases of intervention (s. 77) to determine the "actual receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII of 1869, s. 33 (of the Lieutenant-Governor of Bengal in Council), rent suits were re-transferred to the ordinary tribunals, to be regulated like other actions, by the Code of Civil Procedure (Act VIII of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

It has been contended on behalf of the defendant that this being so the Munsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the plaintiff, having intervened and raised an issue directly involving the question of title, is bound by the judgment.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the Munsiff is not conclusive.

The Indian Act in force relative to estoppel by *res-judicata*

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was at the time of the institution of this suit Act VIII of 1859, s. 2, which is in these terms:—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

With reference to this enactment it has been observed by the Board (1):—

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, . . . and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res-judicata* founded on the principle *nemo debet bis vexari pro eadem causa*."

The same view has since been expressed by this Board. (2)

A similar view had been expressed by Sir *Barnes Peacock*, then C. J. of Bengal, in the well-known case of *Mussumat Edun* v. *Mussumat Bechun*. (3)

He there adopted the definition of judgments conclusive by way of estoppel given by *De Grey*, C.J., in the *Duchess of Kingston's case*, in answer to questions put by the House of Lords: "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court," and Sir *Barnes Peacock* proceeded thus to define "concurrent jurisdiction":—

"In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court "which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as "conclusive."

This doctrine has been expressly affirmed in a recent case before this Board, (4) decided since the judgment appealed against.

It is true that when the suit in this last mentioned case was

(1) *Soorjomonee Dayee* v. *Suddanand Mohapatter* 12 B. L. R., 304.

(2) *Khrishna Behari Roy* v. *Brojeswari Chowdranee*, L. R. 2 I. A. 283; I. L. R. 1 Calc. 144.

(3) 8 W. R., F. B., 175.

(4) *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*, L. R., 9 I. A. 197; I. L. R. 9 Calc. 439.

brought the governing statute as to *res-judicata* was Act X of 1877, s. 13, which is in these terms :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction, in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs. 1,600, on a bond for Rs. 12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs. 5,000; the Assistant Commissioner held that the real amount for which the bond was given was Rs. 4,790, and not Rs. 12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgment was not *res-judicata* as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir *Barnes Peacock* above quoted, and proceed to observe: "In "their Lordships' opinion it would not be proper that the decision "of a Munsiff upon (for instance) the validity of a will or of "an adoption, in a suit for a small portion of the property affected "by it, should be conclusive in a suit before a District Judge "or in the High Court, for property of a large amount, the "title to which might depend upon the will or adoption;..... "by taking concurrent jurisdiction to mean concurrent as "regards pecuniary limit as well as the subject-matter, this evil "or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.

Assuming, therefore, that the question of title was directly raised in the rent suit, their Lordships are of opinion that the judgment in that suit is not conclusive in this.

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Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of Murlidhar the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this country to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgment in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the Munsiff and the Subordinate Judge, both natives who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit, in which the plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in a proceeding before a Magistrate requiring the plaintiff to enter into recognizances to keep the peace. All the Native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it.

The following facts require to be stated in order to the understanding of the merits of the case. Bishen Singh was the father of the plaintiff and of Murlidhar; the three, together with a grandson, formed a joint Hindu family. Bishen was the reversionary heir to the Raj of Tikari, the estates appertaining to which had descended to two brothers, Hetnarain and Modenarain, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died; Hetnarain leaving a widow, Rani Inderjit, who adopted a son, Ramkishen; Modenarain leaving two childless widows. Inderjit (called in the case "the Maharani") had granted to Bishen a *mokurrari* lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or

1861, Bishen left his home on a religious pilgrimage, his whereabouts was long unknown, he was vainly sought by his sons, and did not return until about 1868.

During his absence the following occurrences took place. His two sons brought a suit in his name under the alleged authority of an *am-muktarnama* from him against the Maharani, her adopted son, and the widows of Modenarain, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court on the ground that the *am-muktarnama* was not genuine.

The Maharani had, on the *mokurrari* rent not being paid, seized the property, put it up for sale, and bought it herself.

It is further alleged by the defendant, and denied by the plaintiff, that the brothers separated in estate in 1862 or 1863 (Fasli, 1260).

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged on the written statement of defendant) is not satisfactorily proved: indeed, whatever might have been the desire of the brothers to live and act separately, they could not effect a partition of the family property without the consent of their father; but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances, he came to an arrangement with the Maharani and Ramkishen, which is stated by the defendant to be as follows:—

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only on his claim in reversion to the 7 annas. And in consideration of this the Maharani and Ramkishen were to regrant the land (in Patna district), the subject of the former *mokurrari*, together with other lands in Gaya by another *mokurrari*. Bishen, however, having devoted himself to a religious life, desired to relinquish

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his property to his sons, whom he described as "men of this world," in equal and separate shares; but according to the inveterate practice of Hindus desired this to be done in the form of grants to *fursidars*, one *fursidar* in each grant to be the servant of and to represent one of his sons, the other *fursidar* the other son. His reason for this is said to have been to defeat any claim against them by one Munshi Amir Ali, who had advanced the money to conduct the suit which has been mentioned.

In pursuance of this arrangement Bishen executed two *ladavi ikrarnamas*, in very nearly the same terms, on 2nd August 1868. He therein states that he undertook a long pilgrimage after the death of Hetnarain, and proceeds: "Having gone to different *tiruths* I was so deeply engaged in the worship of God that there remained no knowledge of the circumstances of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by Ramkishen, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and Ramkishen execute on the same day another *ladavi ikrarnama*, admitting his reversionary claim to 7 annas.

The *mokurrari pottahs* follow on on the 4th of August 1868.

That relating to Gaya confers on Bunwari Rawat and Kewal Rawat certain property of large extent, "from generation after generation, at the definite and consolidated annual uniform *jama* of Rs. 1,709 in equal shares." That relating to Patna is to the same effect, the grant being to Mitan Rawat and Ducki Rawat These grants are made by the Maharani and confirmed by Ramkishen. The grantees are household slaves, and it is admitted on both sides that they were *fursidars*. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the defendant has been stated, *viz.*, that the two brothers were the real *mokurraridars*, and were to hold separately

That of the plaintiff is that they were the real *mokurraridars* and were to hold jointly.

The High Court are of opinion that Bishen was the real *mokúrraridar*, a case set up by neither party.

The defendant called the Maharani the only surviving principal of the transaction except the plaintiff, Ramkishen having died before the evidence was taken in this suit. But the Maharani and Ramkishen had both given evidence for the defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties, their evidence is clear, throughout consistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes:—

"Both Babu Run Bahadur Singh and Babu Murlidhar Singh were *mokurraridars* in equal shares, *i.e.*, at the time of taking the *mokurrari* Babu Bishen Singh had divided the property to both the above Babus in equal shares, that the brothers might not fall out with each other, and with this view the name of a man of each of them was entered fictitiously in the *mokurrari*. . . . . Babu Run Bahadur Singh and Babu Murlidhar Singh were separate, and therefore the name of a man of each of them was mentioned fictitiously."

It is true that the *fursidars* gave evidence on behalf of Run Bahádur, the more powerful party (as he has acquired by purchase from the widows of Modenarain a present interest to the amount of 7 annas in the Raj), that they were slaves of Bishen, but, in their Lordships' opinion, this evidence cannot countervail the much stronger evidence that each was the slave of one of the brothers.

The Maharani further states that Bishen had told her that the "two brothers were fighting with each other; he had made a partition between them."

Ramkishen states:—

"At the time of taking the *mokurrari*, Babu Bishen Singh took it in the name of Kewal Rawat, servant of Run Bahadur Singh, and in the name of Bunwari Rawat, servant of Murlidhar Singh. The Rawats are not the real parties. Babus Run Bahadur Singh and Murlidhar Singh were *mokurraridars* in equal shares. For this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons."

Again:—

"Babu Bishen Singh took the *mokurrari* for Babu Run Bahadur and Babu Murlidhar. At the consultation held on that and other subjects of

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jamá, and the selection of *mokurrari* moujahs, Run Bahadur and Murlidhar were both present. Babu Bishen Singh was the person who actually took the *mokurrari*."

On being asked,

"How came you to know that Babu Bishen Singh made over the *mokurrari* to Babus Run Bahadur and Murlidhar?"

the witness answered,

"I know having been told by Bishen Singh and Run Bahadur and Murlidhar."

In other parts of their evidence these statements are in substance repeated.

Run Bahadur was called as a witness, and, although he in general terms denied that there was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which Ramkishen alleged he was present, nor did he deny having said to Ramkishen what Ramkishen deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the defendant may be set off who deposed that they lived and messed separately.

The evidence of the Maharani and Ramkishen is confirmed by Hafiz Syed Ahmed Reza, a pleader and zemindar, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says Babu Bishen Singh said "these men are of the world," therefore, according to his wish, the *mokurrari* was granted to Run Bahadur and Murlidhar in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction Bishen Singh retired to Benares, where he died.

The evidence of the Maharani and Ramkishen, though accepted by the Sub-Judge, has been discredited by the High Court; that of Reza, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and Ramkishen the High Court observe: "They, no doubt, have deposed to statements made by "Bishen Singh, Run Bahadur, and Murlidhar admitting separation;

"but we think their evidence in this respect, though important, "must be taken with very great reserve. They were both witnesses in the rent suit, and it is not often that in a suit of that "character people of their standing come forward to give evidence, "unless they have a strong feeling in the matter. Reading their "evidence we find, in our opinion, a strong bias in favour of the "defendant."

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that Run Bahadur was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit, instead of their discredit, that they should overcome their reluctance to give evidence in order to protect her. Bias in a witness may be inferred from his being found to misstate facts, from his telling monstrous or improbable stories, or showing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the plaintiff had declared his intention, and instituted a suit, to set aside the compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent suit, before he had declared such an intention.

With respect to Syed Ahmed Reza, the High Court observe:—

"The Subordinate Judge has relied on the following statement by the witness: 'At the time of the execution of the *mokurrari* there was a talk between Run Bahadur and Morlidhar, with respect to the mention of the names of the *benami* persons, each enquired of the other which of his men would stand *benamidar* for him. At last the names of those nominated by each of them were entered.' But the Subordinate Judge has failed to consider this gentleman's statement in cross-examination, 'I do not recollect whether I had made a draft of the *mokurrari pottah* in favour of the plaintiff and Murlidhar. I do not know where that deed was engrossed in stamp, or where it was signed, but several had witnessed it here. When the deed was written and read I was not at Tikari (the place of execution);

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when the deed was presented to our signature as witnesses there was no mention made as to whose *benamidars* are the persons whose names are mentioned in the deed.'

"So this gentleman contradicts himself, and though practising as a vakil seems wilfully to have followed the too common custom of this country of attesting a deed subsequently and at a different place to its execution."

For these reasons they place no reliance whatever on his evidence.

The High Court suppose Reza to have been a witness to one of the *mokurrari pottahs* but this is a mistake, he was a witness only to the *ladavi ikrarnamas*; therefore the accusation of having witnessed a deed where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed they seem by no means irreconcileable. The consultation as to the choice of *benamidars* must almost necessarily have been before the actual execution of the document, and the witness, speaking of a transaction many years ago, may well have meant by "the time of execution of a deed," the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which if his attention had been called to it he might have been able easily to explain.

Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the *mokurrari pottahs*, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated, or attempted to separate, before they received the *mokurrari* grants in severalty, and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the *pottahs* and the death of Murlidhar in February 1872, it is enough to say that in the opinion of their Lordships the evidence of the defendant preponderates; proof is given of separate payments by

some tenants, and separate receipts, and some *jumma-wasil-baki* papers are produced by tenants showing that they held under separate landlords.

Their Lordships cannot concur with the High Court in accusing the defendant of "manufacturing" certain *jumma-wasil* papers; the rent accounts, not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After Murlidhar's death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by Run Bahadur till her application for a certificate in 1874, when, for the first time, he set up his present case. During that time Run Bahadur only claimed the right to deal with his own half share; he raised money on mortgages of that half share only; he brought several actions in the name of Ducki Rawat, his *fursidar*, in respect of that share only, in the plaints to which actions it is stated that the property was held in separate moieties. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed the High Court find, in agreement on this point with the lower Court, that, after Murlidhar's death, the plaintiff and defendant enjoyed the property separately. But the High Court explain this by the supposition that "Run Bahadur, who seems to have "been a somewhat easy-going person, was willing that the defen- "dant should enjoy the 8 annas by way of maintenance."

An "easy-going person" appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is to be observed that this was not his case—that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes: "After the death of Murlidhar Singh, Run Bahadur "Singh, for some time considering him separate, took proceedings "only in respect of a moiety."

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For these reasons their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property, all point to the conclusion that the brothers were separate at and before the death of Murlidhar; that consequently the finding on this question of the Subordinate Judge was right; and that of the High Court was wrong. Therefore, although the defendant is not entitled to a decree on the issue of *res-judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the defendant has succeeded on the merits of the case, she should have the costs of these appeals and the costs of the appeals to the High Courts.

Solicitor for the appellant: Mr. *T. L Wilson.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

Appeals dismissed.

PRIVY COUNCIL.

P. C.* 1884 *November* 18 *and* 19. *December* 3, 5 *and* 6

THAKUR ROHAN SINGH (DEFENDANT) *v.* THAKUR SURAT SINGH (PLAINTIFF.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Tenancy under the Taluqdari Settlement—"Oudh Sub-settlement Act," XXVI of 1866*—Tenancy-at-will—Right of resumption—Absence of under-proprietary right.*

At the confiscation and restoration of Oudh lands in 1858, it was intended to settle and restore, under Regulation, to the taluqdars, with certain excep-

* *Present at the first hearing of this appeal*: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

Present at the second hearing: LORD FITZGERALD, SIR B. PEACOCK, SIR M. E. SMITH, and SIR A. HOBHOUSE.

During part of the argument the LORD CHANCELLOR (THE EARL OF SELBORNE) was present.