1903

MAQBULAN v. AHMAD HUSAIN.

and on the paper when put into the hands of the Magistrate for him to take down the evidence of the witness. Again it may have been read over to the witness by the Magistrate when the evidence of the witness was completed, or the Magistrate may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act.

In these circumstances, even assuming that there was no slip or accidental omission in the heading of the document, and that there was no confusion between the two husbands in the mind of the person who took down the heading, and assuming that the document is admissible in this suit as evidence against Maqbulan's claim, their Lordships are of opinion that it is not entitled to any weight.

Differing from the Judicial Commissioners on the only ground upon which they appear to have relied in reversing the Court of first instance, their Lordships see no reason for not accepting the finding of the Subordinate Judge.

Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner ought to be reversed with costs and the judgment of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the respondents—Messrs. *T. L. Wilson & Co.*

J. V. W.

P. C.
1903
November 10, 11, 25.

MUHAMMAD ABDUS-SAMAD AND OTHERS (DEFENDANTS) v. QURBAN HUSAIN AND OTHERS (PLAINTIFFS).

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

Act No. I of 1869 (Oudh Estates Act) section 10—Taluqdar who died before Act came into operation, but whose name had been after his death entered in lists 1 and 3 prepared under the Act—Estates of taluqdar vested in his heirs under Muhammadan law—Effect of Act coming into operation.

An Oudh taluqdar with whom a summary settlement had been made in May 1858, but who never received a sanad, died in 1865. On the coming

Present:—Lord MACNAGHTEN, Lord LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BOWSER.

1903

MUHAMMAD ABDUS-SAMAD v. QURBAN HUSAIN.

into operation of the Oudh Estates Act (I of 1869) his name was found to be entered in lists 1 and 3 of those prepared under that Act entitling him under section 10 to be considered a taluqdar within the meaning of the Act, and to have the succession to his estates regulated by its provisions. *Held* that retrospective effect could not be given to Act I of 1869 so as to alter the succession to the estates which had on his death become vested in his heirs under the ordinary Muhammadan law.

APPEAL from the judgment and decree (10th May 1899) of the Court of the Judicial Commissioner of Oudh, affirming a decree (26th May 1896) of the Subordinate Judge of Hardoi.

The suit out of which the appeal arose was brought against Muhammad Abdus-samad, Muhammad Kamil, Muhammad Akil, and Muhammad Fazil, the present appellants, to recover certain villages which had been, when she died on the 19th of December 1894, in the possession of one Imtiaz Fatima. The plaintiffs were Qurban Husain, the first respondent, the brother of Imtiaz Fatima, and Bintul Fatima her sister, now represented by the other respondents; and the suit was brought on the allegation that Imtiaz Fatima was in possession as absolute owner, and that on her death the estate of which the defendants had taken unlawful possession, devolved by Muhammadan Law upon the plaintiffs as her heirs.

The facts were that the Gopawan estate, which included the villages in suit, was, on the 1st of May 1858, summarily settled with one Murtaza Bakhsh, who died on the 18th of January 1865. He left surviving him his mother Muniran Fatima, two widows, Bhagbari the elder widow, and Imtiaz Fatima the younger, and three cousins Muhammad Amir, Muhammad Mubarak and Muhammad Ahmad who were brothers of his elder widow Bhagbari. On the 21st March 1865, by order of the Deputy Commissioner of Hardoi, the name of Muniran Fatima was recorded in the Revenue registers in place of that of her deceased son Murtaza Bakhsh. On the 12th of January 1869 the Oudh Estates Act (I of 1869) was passed. The lists prepared under section 8 of that Act were published on the 20th of July 1869 and the name of Murtaza Bakhsh was entered in the 1st and 3rd of such lists.

Muniran Fatima died on the 24th of November 1870. Proceedings for mutation of names were taken, and on the 24th of

April 1871 the Deputy Commissioner made the following order:—

"It appears from the papers that Muniran Fatima had declared both her daughters-in-law to be the heirs to the estate, and both these daughters-in-law are in possession. It is therefore ordered that in accordance with the provisions of the wajib-ul-arz mutation of names be effected in favour of Bhagbari and Imtiaz Fatima. With regard to the objection of Muhammad Amir, taluqdar, no order can be passed at the summary settlement. If he has any claim, he may seek remedy in a competent Court."

On the 27th of April 1871, Muhammad Amir brought a suit against Bhagbari and Imtiaz Fatima to obtain a declaration of his right to the estate by inheritance; but it was dismissed as being insufficiently stamped.

On the 23rd of June 1873, Muhammad Amir and Muhammad Mubarak for himself and as guardian of Muhammad Abdus-samad, son of Muhammad Ahmad, brought a suit for the removal of the name of Imtiaz Fatima from the register of proprietors by cancellation of the order for mutation of names passed on the 24th of April 1871; but on the 25th of September 1873 the plaintiffs in that suit asked for and obtained leave to withdraw the suit, with permission to bring a fresh suit.

On the 24th of January 1888, Bhagbari died, and thereupon her half share in the estate was recorded in the revenue register in the name of Imtiaz Fatima.

On the 23rd of August 1889, Muhammad Amir, Muhammad Mubarak and Abdus-samad son of Muhammad Ahmad brought a suit against Imtiaz Fatima and others to whom she had alienated portions of the estate for possession of the property. The plaint, however, was returned for amendment, and not having been amended within the time fixed by the court was rejected by the District Judge of Hardoi on the 8th of April 1893, under section 54 of the Civil Procedure Code. An appeal was preferred from that decision, but was withdrawn on the 7th of June 1895, it being stated that Imtiaz Fatima had died on the 19th of December 1894 and that on her death Muhammad Amir, Muhammad Mubarak and Abdus-samad had obtained possession of the property in suit from the revenue authorities. Hence their present suit, which was instituted on the 14th March of 1895 by the heirs of Imtiaz Fatima to recover possession of the estate.

1903

MUHAMMAD ABDUS-SAMAD v. QURBAN HUSAIN.

The defendants in their written statement denied the right of the plaintiffs to sue them for possession of the property; and pleaded that succession to it was governed by the provisions of the Oudh Estates Act (I of 1869); that Bhagbari was in possession of the estate for her life-time, and that it was on account of friendship that she had allowed the name of Imtiaz Fatima to be recorded in the revenue registers along with her own name; that on the death of Bhagbari the defendants became entitled to the property left by Murtaza Bakhsh; and that if Imtiaz Fatima was entitled to possession it was for her life only and no right could devolve upon her heirs after her death.

Of the issues raised only three are now material:

"(2) Whether Imtiaz Fatima was in possession of the property in suit jointly with Bhagbari for a period of 12 years before her death?

"(3) If so, did she hold the estate for her life-time only or as its absolute proprietress?

"(4) Are the plaintiffs entitled to succeed to the property of Imtiaz Fatima?"

The Subordinate Judge held that with respect to section 10 of Act I of 1869 Murtaza Bakhsh was a taluqdar who had acquired a permanent heritable and transferable right in the estate which was settled with him on the 1st May of 1858; that the entry of his name in the 3rd of the lists prepared under section 8 of Act I of 1869 was *ultra vires* as no sanad or grant was given to him by the Government; that the lists were by section 10 of Act I of 1869 conclusive evidence that the persons named therein were taluqdars, but not that a particular mode of succession would regulate their estates; and that the succession to Murtaza Bakhsh's estate was not governed by the provisions of section 22 but by those of section 23, *i. e.* by the ordinary Muhammadan Law. He was of opinion that Muniran Fatima held possession of the estate as absolute owner and adversely to the defendants' predecessors in title; that Bhagbari and Imtiaz Fatima similarly held possession of the estate as absolute owners with equal shares in it after the death of Muniran Fatima, so that Imtiaz Fatima held proprietary possession of half the estate from November 24th, 1870, the date of Muniran Fatima's death, up to the date

of her own death on the 19th December of 1894, her possession being adverse to the defendants; that on the death of Bhagbari her half share in the estate devolved by inheritance under the ordinary Muhammadan Law upon the defendants, and on the death of Imtiaz Fatima her half share which had been in her possession for more than 12 years adversely to the defendants, devolved upon her heirs, the plaintiffs.

The defendants appealed from this decision to the Court of the Judicial Commissioner of Oudh, and that Court on the 10th of May 1899 gave judgment ordering that the appeal should be dismissed.

The material portion of the judgment was as follows:—

"When the succession opened in 1865, on the death of Murtaza Bakhsh the persons entitled to succeed to his estate under the ordinary Muhammadan Law were his mother and his two widows (legal sharers), and the residuaries (Muhammad Amir and his two brothers) the predecessors of the defendants. The residuaries admittedly made no claim, and did not obtain any share in the estate. The estate came into the possession either of one (the mother) or of all (the mother and two widows) of the legal sharers. For the determination of this appeal it appears to me immaterial to determine whether Muniran Fatima alone succeeded to the entire estate and held it adversely to the other legal sharers, the two widows, or whether, as is contended by the learned counsel for the appellants, the three ladies succeeded jointly to the estate. In the former case, the estate must be considered to have passed out of the possession of the taluqdar, and into possession of a person who was not the heir of a taluqdar within the meaning of section 22 of Act I of 1869, before that Act came into force, and was not, therefore, an 'estate' to which the provisions of section 22 were applicable. Upon the death of Muniran Fatima, after the Act came into force, her daughters-in-law, the two widows, succeeded to the possession of the estate in accordance with the declaration made by her in the wajib-ul-arz. In the latter case also the provisions of section 22 could not be applied, as the property had passed by inheritance into the possession of the legal 'sharers' under Muhammadan Law and had ceased to be the 'estate' of a taluqdar, or of his 'heir' before Act I of 1869 came into force. In both cases, the two widows took an absolute interest in the estate of the deceased, and not a life-interest under the provisions of section 22.

"I am unable to accept the contention of the learned counsel for the defendants appellants that Murtaza Bakhsh's heirs, under the Muhammadan Law, came to an arrangement with each other, when he died in 1865, that the estate should not be treated as one which had vested in them under the Muhammadan Law of inheritance, but should be treated as an estate, the succession to which should be regulated by the rule of primogeniture descendible to the deceased's male heirs after the life-estates of the widows, and that it was by reason of this family arrangement that the name of the deceased was

1903

MUHAMMAD ABDUS-SAMAD *v.* QURBAN HUSAIN.

entered subsequently in list 3. There is no evidence proving that any such arrangement was made. The mere facts that the residuaries advanced no claim on the death of Murtaza Bakhsh in 1865, and acquiesced in the succession of the deceased's mother either exclusively or jointly with the deceased's widows, and that Muniran Fatima caused it to be recorded in the wajib-ul-arz that upon her death her two daughters-in-law, the deceased's widows, would succeed to the estate, are insufficient to prove that any such family arrangement was made. The terms of the entry which was made in the wajib-ul-arz at the instance of Muniran Fatima, show that she did not consider that she held only a life-estate, and that in her opinion her interest was that of an absolute owner.

"As Murtaza Bakhsh's estate had lawfully vested in persons who were his heirs under the ordinary Muhammadan Law of Inheritance, and who were not his heirs within the meaning of Act I of 1869 before that Act came into force, the provisions of section 22 cannot be applied to the succession, and it is unnecessary to consider the effect of the entry of Murtaza Bakhsh's name in list 3, in connection with the provisions of section 10. It appears to me, however, that the contention of the learned counsel for the defendants appellants has much force, namely that the entry of Murtaza Bakhsh's name in list 3 is, by section 10, conclusive evidence that he was not only a taluqdar, but also a taluqdar to whom a *sanad* had been given by the British Government, declaring that the succession to the estates comprised in the *sanad* should thereafter be regulated by the rule of primogeniture. But we are at once faced with this difficulty, that as no *sanad* was as a matter of fact given to him, it is impossible to ascertain the estates, the succession to which is to be regulated by the rules of primogeniture. It appears to me that the rule of succession enacted in section 22 is, in the case of a taluqdar whose name is entered in list 3, applicable only to the estates comprised in the *sanad*.

In the case of *Shankar Bakhsh* v. *Hardeo Bakhsh* (1) their Lordships of the Privy Council held that an entry in list 3 had been improperly made, and, notwithstanding the provisions of section 10, did not give effect to it. That was a case in which the first summary settlement of 1856 had been made with the three sons of Daryao Singh, the then head; a *sanad* had been issued in 1859 in the terms of that settlement and of Daryao Singh's reply to the Circular of 1860; there was a family arrangement by which the estate was treated as one owned by the members of the family as co-sharers; a second *sanad* was subsequently given to Daryao Singh on 11th October 1860, containing the rule of primogeniture, although Daryao Singh had stated that he was satisfied with the previous *sanad*, and that he did not wish to have a *sanad* according to the law of primogeniture; and in 1869, when the lists were prepared, the name of Daryao Singh, then deceased, was entered in list 3, notwithstanding that his three sons had expressed a wish that their names should be so entered Having regard to these facts, their Lordships found it impossible to attach importance to the proceeding by which the name of Daryao Singh was entered in list 3, and held that there was an improper entry in that list.

(1) (1888) L. R., 16 I. A., 71; I. L. R., 16 Calc., 397.

"Similarly, in the present case, I think that importance cannot be attached to the entry of Murtaza Bakhsh's name in list 3, and that his name was improperly entered in that list.

"His application for a *sanad* had been rejected by the Chief Commissioner in 1862, on the ground that he was not a proper person to receive such a document. The learned counsel for the defendants appellants admitted that his clients were unable to show that any circular regarding the succession to the estates of taluqdars was issued to him. It is admitted that no *sanad* was given to him. He had died in 1865, and his estate had then vested in his heirs under the ordinary Muhammadan Law. There is no evidence that any inquiries were made from the members of the family at the time of the preparation of the lists.

"As the provisions of section 22 of Act I of 1869 did not, in my opinion, govern the succession to Murtaza Bakhsh's estate, and the ladies, Bhagbari and Imtiaz Fatima, owned an absolute, and not a life-interest in the property in suit, this appeal fails. I would dismiss it with costs, and confirm the decree of the Lower Court."

On this appeal.

Mr. *G. E. A. Ross* for the appellants contended that the Courts below were wrong in holding that the Oudh Estates Act (I of 1869) did not apply to the succession to the estate of Murtaza Bakhsh. From the fact that his name had been entered in the 1st and 3rd of the lists prepared in accordance with the provisions of that Act, those entries were, by sections 8 and 10 of the Act, conclusive proof that he was a "taluqdar" under the Act, and also a taluqdar to whom a *sanad* had been granted declaring the estates comprised in it to be governed by the rule of primogeniture. Reference was made to the cases of *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1), and *Shankar Bakhsh* v. *Hardeo Bakhsh* (2), the latter case being distinguished on the ground that there a family arrangement had been come to by which the succession by primogeniture was to be excluded, it being agreed that the estate was to be held by the family as co-sharers. There might well have been, it was submitted, some such family arrangement in the present case that the succession under Act I of 1869 should be followed, namely that provided in such a case as this by section 22 of the Act, by which the estate would go to Bhagbari and Imtiaz Fatima for their lives with reversion to the heirs of Murtaza Bakhsh, and the facts

(1) (1883) L. R., II I. A., 51 (55): I. L. R., 10 Calc., 511 (517, 518).

(2) (1888) L. R., 16 I. A., 71: I. L. R., 16 Calc., 397.

1903

MUHAMMAD ABDUS-SAMAD v. QURBAN HUSAIN

that on his death the heirs consented to the entry of his mother Muniran Fatima's name in the registers, and that the entries of Murtaza Bakhsh's name were eventually made in the lists prepared under section 8 of Act I of 1869, were referred to as pointing to the conclusion that a family arrangement had been come to. The Oudh Estates' Act (I of 1869) sections 2, 3, 8, 9, 10, 22 (clause 7) and 30 were referred to. The rights given to Murtaza Bakhsh as a taluqdar by section 3 of the Act were acquired by virtue of the settlement with him in 1858, the words of section 3 being "every taluqdar with whom a settlement was made or to whom before the passing of this Act a taluqdari *sanad* has been granted shall be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliat executed by such taluqdar when such settlement was made." As to the nature of "conclusive proof" the Evidence Act (I of 1872) section 4 and the illustrations to sections 112, 113 were referred to. On the construction of Act I of 1869 the cases of *Brij Indar Bahadur Singh* v. *Jankee Kuer* (1), *Achal Ram* v. *Udai Partab Addiya Dat Singh* (2), *Hurpurshad* v. *Sheo Dyal* (3) and *Shankar Bakhsh* v. *Hardeo Bakhsh* (4) were referred to, it being contended that portions of the Act had been applied retrospectively in those cases.

Mr. *L. DeGruyther* for the respondents referred to the History of the Oudh Estates Act (I of 1869) and the policy of the Government regarding taluqdars: reference was made to Sykes, Taluqdari Law, pages 51 and 54, paragraph 34, and the case of *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (5). Act I of 1869 only applied to those with whom settlements had been made as taluqdars, not to those who were merely zamindars. By the letter of the Government of the 10th of October 1859 (see Schedule I to Act I of 1869) it rested entirely with the Government to decide who were to be taluqdars; it was not a right conferred on every landholder (Sykes' Taluqdari Law, pages 96, 286, 389 and 391.) In Murtaza Bakhsh's case they in their

(1) (1877) L. R., 5 I. A., 1 (12).
(2) (1883) L. R., 11 I. A., 51 (54) : I. L. R., 10 Calc., 511 (517).
(3) (1876) L. R., 3 I. A., 259 (270).
(4) (1888) L. R., 16 I. A., 71 : I. L. R., 16 Calc., 397.
(5) (1873) L. R., I A., Sup. Vol., 220 (237).

discretion refused to grant him a sanad. The entry of his name in the lists prepared under the Oudh Estate Act must, it was contended, have been made by mistake, and was *ultra vires.* He was therefore (notwithstanding section 10 of that Act) not a taluqdar within the meaning of the Act. In *Shankar Bakhsh* v. *Hardeo Bakhsh* (1) the Judicial Committee declined to give effect to an entry which they were of opinion had been improperly made in list 3 under the Act, and in the present case the entries might be so treated and be disregarded. On Murtaza Bakhsh's death in 1865, he having received no *sanad,* and being not a taluqdar under the letter of the Government of the 10th of October 1859, his estate vested in his heirs by Muhammadan Law, and it was submitted that an estate so vested was not liable to be divested by the coming into operation of the Oudh Estates Act 1869 four years later.

Mr. *Ross* replied.

1903, *November* 25th.—The judgment of their Lordships was delivered by LORD LINDLEY:

The appellants in this case claim one-half of certain estates in Oudh as the statutory heirs of one Murtaza Bakhsh, who was a Muhammadan taluqdar and who died on the 18th of January 1865. The respondents claim the same half as his heirs by Muhammadan Law, and it is conceded that they are entitled to it unless the succession was altered by the Oudh Estates Act of 1869 and what was done after his death.

Murtaza Bakhsh in his life-time was a taluqdar, and in May 1858 a summary settlement of the estates in question was made with him.

The Oudh Estates Act 1869 was founded on, and was passed to give effect to, certain orders of the Governor General of India made in October 1859 and set out in the first schedule to the Act. Under those orders lists were to be prepared of the taluqdars with whom summary settlements had been made, and sanads, *i. e.* grants, were to be issued to them. Forms of these sanads were prepared and many were granted. In January 1862 Murtaza Bakhsh applied for a *sanad* from the English authorities and his application was refused. He never in fact

(1) (1888) L. R., 16 I. A., 71: I. L. R., 16 Calc., 397.

1903

MUHAMMAD ABDUS-SAMAD v. QURBAN HUSAIN.

obtained any *sanad* in his life-time; and his name was never in his life-time entered on any list of officially recognised taluqdars.

Under these circumstances it seems plain that when Murtaza Bakhsh died, he had acquired a permanent hereditary and proprietary right recognised by the Indian Government in the estates in question; but the succession to them not having been altered by any sanad was governed by the ordinary Muhammadan Law which was the only law applicable to the case.

The appellants, however, rely on what happened after his death, and it is necessary to consider what this was. When he died, he left his mother and some cousins and two widows; and in March 1865 his mother's name was entered in the Collector's books in substitution for his own, and she was recorded as sole owner. This appears to have been done with the consent of his two widows and the cousins under whom the respondents claim. The Estates Act 1869 came into operation in January of that year, and in July 1869 the name of the deceased appears in two of the lists directed to be made by the Act. How it got there is not known. But there it is. In November 1870 the mother died. She appointed the two widows her successors, and in April 1871 the names of the two widows who were in possession were substituted for hers in the Collector's books. Their right, however, to be so recorded was disputed by the cousins and litigation ensued; but both widows died before it ended, and it is unnecessary to refer further to this matter.

The present suit was instituted in March 1895. The plaintiffs (now represented by the respondents) were the heirs, *viz.* brother and sister of the last surviving widow, *i.e.* the second wife of Murtaza Bakhsh. They claimed under the ordinary Muhammadan Law. The defendants (*i.e.* the appellants) claim under his first wife and under the Act of 1869. The Subordinate Judge held that the entry of Murtaza Bakhsh's name in the lists was *ultra vires* and of no effect; that the mother held the estate as absolute owner; that after her death the two widows held as absolute owners in equal shares; that on the death of the first wife one-half of the estate descended on the

1903

MUHAMMAD ABDUS-SAMAD *v.* QURBAN HUSAIN.

defendants in accordance with ordinary Muhammadan Law, and that on the death of the second wife her half descended on the plaintiffs by the same law. The plaintiffs were content with this decision, but the defendants appealed from it. The decision was, however, affirmed by the Judicial Commissioner and the defendants have appealed from his decision.

Their Lordships have no hesitation in affirming it. The whole case turns on the entry of Murtaza Bakhsh's name in two of the lists ordered to be made by the Act of 1869. Section 10 of the Act compels the Courts to regard such lists as conclusive evidence that the persons named therein are taluqdars or grantees within the meaning of the Act. When the lists referred to are looked at, it will be found that there are six lists (*see* section 8). Murtaza Bakhsh's name is in the first and third. The entries therefore by sections 8 and 10 are conclusive evidence (1) that he is to be considered as having been a taluqdar within the meaning of the Act (*see* section 2 and section 8, list 1): and (2) that he was a taluqdar to whom a sanad had been made declaring that the succession to the estates comprised in it should be regulated by the rule of primogeniture (*see* section 2 and section 8, list 3).

These enactments are clear and peremptory, and would be decisive if they applied to this case.

It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe sections 8 and 10 so as to deprive the successors of the estates of a person who had died before those sections came into operation of rights which they acquired on his death. Entries of the names of deceased persons in the lists mentioned in section 8, do not appear to have been contemplated by the Act, but such entries have no doubt been made, and they are practically harmless if the names were already in former lists made under the orders in Council, or if the entries do not alter the previously acquired rights of anyone. This was the case in *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1). But no decision has been referred to which supports the contention that the entry of the name of a person who died

(1) (1883) L. R., 11 I. A., 51; I. L. R., 10 Calc., 511.

1903

MUHAMMAD ABDUS-SAMAD v. QURBAN HUSAIN.

before the Act came into force can divest rights previously acquired on his death. In this case the death occurred in 1865, and the successors then acquired their rights under the ordinary Muhammadan Law. The Oudh Estates Act did not come into operation until 1869; and to construe its provisions as altering the succession would be not only unjust but plainly contrary to well-settled legal principles.

The able counsel for the appellants endeavoured to surmount this difficulty by suggesting that there must have been some family arrangement to the effect that the entries in question should have been made, and that the succession should be changed. But there is no evidence from which any such conclusion can be drawn. The only evidence bearing on the subject is the consent of the heirs to the entry of the mother of Murtaza Bakhsh in the Collector's books shortly after his death. But when she died, the entry of the names of her two daughters-in-law was objected to and litigation followed. The issues settled in the action do not raise the question whether any such arrangement was in fact come to, and their Lordships cannot adopt the suggestion of the learned counsel as a basis for their decision.

Their Lordships therefore will humbly advise His Majesty to dismiss this appeal and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants.—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the respondents.—Messrs. *Watkins and Lempriere.*

J. V. W.

P. C.
1903
November 11, 12.
December 2.

THAKUR DAS AND OTHERS (DEFENDANTS) *v.* JAIRAJ SINGH (PLAINTIFF).

[On appeal from the High Court of Judicature at Allahabad.]

Act No. 1 *of* 1872 (*Indian Evidence Act*), *section* 111—*Position of active confidence—Mortgagor and mortgagee—Burden of proof—Proof of consideration for mortgage bond.*

On the facts of this case which was a suit on two mortgage bonds. *Held* (affirming the decision of the High Court) that the plaintiff was not in a

Present :—Lord MACNAGHTEN, Lord LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.