P. C. 1869.

RAJA SURANENI VENKATA GOPALA NARASIMAH ROY BAHADUR v. RAJA SURANENI LAKSHMI VENKAMA ROY.

" to the decision of the Privy Council in the *Shivagunga* case (1), " be entitled to the whole estate ; so that, whether the plaintiff's " own view or that which we here take is correct, the plaintiff " is not entitled to succeed in this action." Now that seems to proceed upon a singular misapprehension of the effect of the *Shivagunga* case. It is immaterial, as was said before, to the decision of this case, because it is admitted that the zemindari was not impartible ; but the *Shivagunga* case was this,—the family was shown to be undivided, but the impartible zemindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the zemindari should follow the course of succession as to separate property, although the family was undivided, but if that zemindari had been shown to have been an ancestral zemindari, as in this case, the judgment of the Board would, no doubt, have been the other way.

Their Lordships think it necessary to make this observation in order to avoid future misconception as to what was decided here in the *Shivagunga* case.

They must humbly recommend Her Majesty to dismiss this appeal with costs.

P. C.* 1869 *July* 13.

GANESH SING *v.* RAM RAJA AND OTHERS.

ON APPEAL FROM THE LATE SUDDER DEWANY ADAWLUT AT AGRA.

Evidence—Unopposed Testimony—Suit for Compensation for Damages—Responsibility of each person forming the Common Assembly.

In a suit to recover damages caused by the defendants plundering the house of the plaintiff, the Court of first instance passed, upon the evidence of two witnesses, a decree in favor of the plaintiff. On appeal by some of the defendants, the Judges of the Sudder Dewanny Adawlut of Agra held that the fact of Plunder was not proved, and dismissed the suit as against all the defendants.

Held by the Privy Council that as the defendants did not come forward to exculpate themselves by their own evidence, and as the evidence in support of the charge was unopposed, the decree of the Court of first instance could not be set aside.

* *Present*: SIR JAMES W. COLVILE, SIR JOSEPH NAPIER, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.

(1) 9 Moore's I. App., 539.

P.C. 1869

GANESH SING v. RAM RAJA AND OTHERS.

Held, that in a suit for compensation for damage done to property, each and every one of the persons was equally responsible to make compensation for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and not in proportion to his share of the plunder received or of the damage done by him. Coercion to form a member of the assembly or bear a part in the damage is no excuse from responsibility in civil suit for compensation.

IN this case their Lordships are of opinion that the judgment appealed against cannot be supported.

In their judgment the Judges of the Court of the Adawlut express their opinion that the whole foundation of the claim of the complainant fails. The parties that they had before them were only a portion of the defendants against whom the decree of the Principal Sudder Ameen had been made. They say in their judgment:—"We are of opinion that the plaintiff, respondent, "so far from establishing his claim against the defendants, "appellants, has not even proved that the acts of plunder com-"plained of ever occurred. We are, therefore, compelled to "differ from the Principal Sudder Ameen, and, reversing his "decision, to dismiss the respondent's claim, not only against "those defendants who have appealed, but all those defendants "who have been included in the decree of the lower Court, as it "would not, in our opinion, be consistent to allow this decree "to stand against these latter parties, while the entire claim pre-"ferred by the plaintiff, respondent, has been declared by us "unfounded and unestablished."

Now that decision seems rather an indiscriminating decision, for thirteen of the defendants had confessed to their having been present at the plundering, and some of them had partaken of the booty; twenty-seven did not appeal.

Their Lordships cannot entertain a reasonable doubt, on the whole of the evidence, that there had been a plunder of the plaintiff's property to some extent, and that it was a joint transaction. During the time of the mutiny the chiefs of some villages collected people together with a preconcerted purpose of plundering the plaintiff's property, and it is quite plain upon the evidence that all were acting with a common purpose of plunder, that they went to the plaintiff's house for the purpose of plundering, and each co-operated more or less; and where parties

P.C.
1869
Ganesh Sing
v.
Ram Raja
and others.

go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility.

Well, then, taking it as plainly established upon the evidence that there was a plunder of the property, that it took place in pursuance of a common design of all these parties who co-operated in carrying it out, the only question was to identify any of the persons who were present cooperating in that common design. In a criminal matter punishment may be apportioned, but in a matter of this description, where the plaintiff is to be compensated for the loss he has sustained, the law does not allow men to apportion their own wrong, and does not apportion it for them. Each and every person cooperating to any extent in a plunder of this description is responsible to recoup the party plundered for the loss he has sustained.

That being the case, there was no question in reality that involved difficulty in decision, but to identify the persons who were present, and formed part of that plunder party. No doubt in the circumstances of the country at the time there was a great temptation to accuse, and, perhaps, considerable facility in charging particular persons suspected, or upon whom it might be desired, from any motive, to impose responsibility. But there is this fact as was very properly observed by Mr. Wood, that none of those parties who now belong to the group of respondents tendered his own evidence to contradict the evidence of the two witnesses required by the Principal Sudder Ameen. His principle seems to have been, that he would not attach responsibility to any individual who had not been shown by two witnesses at least to have been present on the occasion. Then when persons so accused do not think fit to avail themselves of the opportunity they have had of exculpating themselves, by their own evidence, from the charge made against them, surely that general reluctance to meet by their own evidence the evidence brought forward against them justifies the Court in relying on such unopposed testimony. Some of them in the defences which have been made seem to have imagined, that because, they had not got a large share of the plunder, or because, as they

allege, they were coerced to join in the transaction, that excuses them from responsibility. If the matter were to be disposed of in a criminal proceeding, where the Judge had to inflict a punishment or a fine, all that might be taken into account ; but here, in a civil proceeding to obtain compensation for the loss the plaintiff sustained, by a transaction for which all who joined in it are responsible, in the eye of the law, you have nothing to do but simply to see that, in point of fact, the parties accused were part of that common assembly which had, and executed, a common purpose of plundering this man's house, and are bound, each and all, to make him compensation for the loss that he has sustained by the demolition and abstraction of his property. It is very likely that at first, in the confusion of the whole thing, and the difficulty of proof, there was exaggeration in the claim which was made, but the claim in respect to the jewels and other things has been reduced, and the plaintiff has certainly confined it within reasonable bounds. It certainly does appear on the evidence that he was plundered at least to the extent at which he now lays his claim, and perhaps considerably more. The judgment appealed against states that the *entire claim* was unfounded and unestablished, and that the decree was wrong against all the parties. But, confining it to the case of parties who had appealed, they were parties who, instead of giving their own evidence before the Principal Sudder Ameen to exculpate themselves and show that they did not form a part of that plundering party, instead of simply doing this and putting their own evidence against that of the two witnesses who were brought forward against them, they appeal to the superior Court, and argue upon the whole transaction, and get the Court of the Adawlut not to institute a discriminating inquiry into the credit of the witnesses in each case, but to come to the conclusion that there was no foundation for the claim at all. There could not have been any adequate sifting of the evidence, and it does seem to be an unreasonable conclusion of the whole of the evidence, to say or suggest that the plaintiff had not been plundered at all.

Under these circumstances, their Lordships feel no difficulty in saying that, in their opinion, the judgment of the Adawlut ought to be reversed. The Principal Sudder Ameen had the

P. C. 1869

GANESH SING v. RAM RAJA AND OTHERS

advantage of having had the witnesses examined before him, and their evidence not having been contradicted by any of the parties themselves, his judgment may be safely adopted.

Their Lordships, therefore, will humbly recommend Her Majesty that the judgment of the Court of Sudder Dewanny Adawlut be reversed, and that the judgment of the Principal Sudder Ameen should be affirmed with costs. The appellant is to have the costs of the appeal.

P. C.* 1869 July 15.

WATSON AND OTHERS v. THE COLLECTOR OF ZILLA RAJSHAHYE AND OTHERS.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Dismissal of Suit—Issue—Non-Production of Evidence.

See also 13 B.L.R. 153

The power to dismiss a suit with liberty to bring a fresh one for the same matter is limited to cases where the suit fails by reason of some point of form: such liberty should not be given, here, after issue joined, the plaintiff has failed to make out his case.

A transfer of his tenure by a patnidar is not binding on the zemindar, unless made strictly in accordance with the provisions of Regulation VIII. of 819.

THEIR Lordships have formed so clear an opinion on both the points on which the determination of this appeal depends that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question raised by the case of the appellants is, whether the Hight Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a patni talook which took place as long ago as 1849. There was considerable sdelay, even in the institution of the former suit to set aside that ale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the appellants, the plaintiffs in the suit, to impeach proceedings which took place so long ago and under which so many fresh rights may have accrued.

* *Present* :— SIR JAMES W. COLVILE, THE JUDGE OF THE HIGH COURT OF ADMIRALTY, SIR JOSEPH NAPIER, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.