583 of the Code is not confined to cases where the restitution desired is provided for by the decree itself. 1894

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It follows from all the cases that we have referred to that the successful appellant is entitled by way of restitution to the mesne profits recovered by the plaintiff during the time of his unlawful possession, by an application in the suit itself, whether it be by reason of the power conferred upon the Court which made the decree under section 583, as held by the Madras High Court, or by reason of the inherent right that the Court has to order restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal, as held by Petheram, C.J., in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (1). As we have already said the cases in this Court are all in one way, and therefore it is now too late to ask us to disturb the current of rulings upon the subject.

The result is that this appeal will be dismissed with costs.

J. V. W. *Appeal dismissed.*

PRIVY COUNCIL.

UMRAO BEGUM (PLAINTIFF) *v.* IRSHAD HUSAIN AND ANOTHER (DEFENDANTS.)

P. C.* 1894 *June* 7, 9, & 30.

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

Oudh Estates Act (I of 1869), section 22, sub-sections 4 and 7—Taluk inherited by a daughter's son—Revivor of an appeal which had abated.

The *taluk* to which the succession was in dispute was one of those entered in the first and second of the lists prepared in conformity with section 8 of the Oudh Estates Act, 1869, descending to a single heir by primogeniture. The last *talukdar* died without leaving a son, but left a widow, and by a former wife two daughters of whom the elder had a son. The widow's claim to an estate for life, under sub-section 17 of section 22 of the above Act, was met by the defence that the daughter's son, having been treated by his maternal grandfather in all respects as his own son, was, under sub-section 4, entitled to inherit the *taluk*. The Courts below decided in his favour,

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR R. COUCH.

(1) I. L. R., 14 Calc., 484.

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Held, that the Courts below were right as to the treatment of the daughter's son, in regard to sub-section 4. *Pertab Narain Singh* v. *Subhao Kooer* (1) did not show that sub-section 4 had been construed to require evidence on that point attaining to any special degree.

Leave to revive the widow's appeal, which abated on her death before the hearing, was obtained by the younger daughter of the deceased *talukdar*, one of the defendants; she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed.

Held, that the appellant by revivor must be restricted to the suit for the *taluk*, and could not advance, on this appeal, any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the *talukdari* estate.

APPEAL from a decree (21st March 1888) of the Judicial Commissioner of Oudh, affirming a decree (25th April 1887) of the District Judge of Lucknow.

This appeal related to a *taluk* named Narauli in the Bara Banki district, to which the succession was regulated by the Oudh Estates Act, 1869, the *taluk* having been entered in lists I and II, prepared in conformity with section 8, as one of those which, on and before the 13th February 1856, ordinarily devolved upon a single heir. The last owner had died without a son, leaving a widow, and two daughters by a former wife, the elder of the daughters having a son who survived his maternal grandfather. The *taluk* fell within one or other of the sub-sections of section 22. The widow claimed her estate for life in it under sub-section 7; and the main question on this appeal was whether or not the lower Courts had rightly decided that her claim to the *taluk* had been defeated by the daughter's son having been brought within the operation of sub-section 4, that son having been treated by the late *talukdar*, in all respects, as his own son. The suit was brought on the 30th July 1886 by the widow, Ahmadi Begum, through her father Saiyad Mahomed Abud, she being of unsound mind. Her husband, the last *talukdar*, Chowdhri Raza Hossein, died intestate on the 22nd November 1885, having inherited the *taluk* from his father Husain Buksh, whose name, as *talukdar*, was entered in the lists. Besides the *taluk*, the plaint claimed a life estate, "according to custom," for the widow in lands not *talukdari*, and in the moveables.

(1) I. L. R., 3 Calc., 626; L. R., 4 I. A., 228.

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Of Raza's two daughters, Sarfraz and Umrao, the former, the elder, was married, but lived in her father's house, where a son named Sajjad was born to her. He was in his fifth year when Raza died, and in his name, on the 4th June 1886, *dakhil kharij* of the *taluk* was made. Both he and his mother died while this suit was pending in the Court below. In lieu of Sajjad the name of Irshad, his younger brother and next heir to the *taluk*, was entered on the record. The defence made for Sajjad was that he had a title under sub-section 4. It was also alleged for him that the plaintiff, as a childless widow, was not entitled under the Imamia law, the parties being Shias, to the immoveable property of her husband, and that by custom also the moveable property followed the *taluk*. The District Judge found that it had been shown that Raza so exceptionally treated his daughter's son Sajjad as to give him in the family the place and pre-eminence which would have belonged to the *talukdar's* son had one existed ; and was of opinion that this indicated that the *talukdar* desired that Sajjad should be his successor. This was ascertained by reference to statements of witnesses, to documents, admissions, and conduct at ceremonies. He therefore dismissed the suit for the *taluk*. As regards the other property referring to the Shia law that a childless widow cannot inherit (for which he cited *Asloo* v. *Umdutoonissa* (1), he held that this was governed, as regarded the *taluk*, by sub-section 17. As to the moveables he referred to part of the judgment in *Ishri Singh* v. *Baldeo Singh* (2), to the effect that there was no evidence to show that the family property, other than the *taluk*, followed a line of devolution different from that of the *taluk*, holding that there was a resemblance in the cases on this point.

The Judicial Commissioner, dismissing an appeal on behalf of Ahmadi, found that Raza treated Sajjad in all respects as his own son, so far as so young a child could be treated ; and that he had taken occasion many times to declare openly that Sajjad was to be his successor. He confined his judgment to the question as to the *taluk*.

On the 30th November 1891 Ahmadi died. Her appeal, which

(1) 20 W. R., 297. (2) I. L. R., 10 Calc., 792, at p. 807.

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proceeded on the ground that Sajjad had not, in fact, been so treated as to render sub-section 4 applicable, abated on her death. On the 30th July 1892, an application was made by Umrao Begum, the surviving daughter of the late *talukdar*, for leave to revive the appeal.

Mr. *J. D. Mayne*, who appeared for the petitioner, relied on her being first in the order of possible heirs if, on the decision of the appeal, the judgment of the Courts below, as to the treatment of Sajjad, should be reversed. He referred to *Kattama Nauchear* v. *Rajah of Shivaganga* (1), in which case an order of revivor was made, giving leave to a daughter and her sisters to prosecute an appeal on grounds like the present. After hearing Mr. *J. H. A. Branson* for the objector, their Lordships granted the leave.

On the revived appeal,—

Mr. *R. B. Finlay, Q. C.*, and Mr. *J. D. Mayne* for Umrao Begum, argued that no preferential title had been established in the daughter's son, within sub-section 4, over that of the surviving daughter. They referred to the judgment in *Pertab Narain Singh* v. *Subhao Kooer* (2), and argued that the treatment of the daughter's son by the *talukdar* must, in order to render sub-section 4 applicable, conform to the general construction put in that case upon this exceptional provision. Here, however, its treatment had been no other than would ordinarily be that of one only grandson, born in the house of a *talukdar*, and could not be referred to an intention to create the right of inheritance. That treatment had been only consistent with the *talukdar's* affe tion ; and, as the child was already within the line of succession, and a possible heir, there was no such conduct towards him on the part of the *talukdar* as to give him the position of heir next entitled. This applied to the presentment of the child to the tenants. Mere statements and expressions, not accompanied by acts, would be insufficient. It was not an uncommon thing in that part of the world for a married daughter to live with wealthy parents. It was necessary, in order to establish the defence, that the evidence should come up to the standard indicated in the case cited. It was submitted that the

(1) 9 Moo., I. A., 539. (2) I. L. R., 3 Calc., 626 ; L. R., 4 I. A., 228.

daughter was entitled to the *taluk*, and to that share of the whole estate of the late Raza which, according to Mahomedan law, would descend to his daughter.

Mr. *A. Cohen, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, were not called upon.

Their Lordships' judgment was afterwards, on June 30th, given by

LORD HOBHOUSE.—The original plaintiff in this suit was Ahmadi Begum, the only surviving widow of Raza Hossein, *talukdar* of Naraulí, who died in the year 1885, leaving no son. He had two daughters who survived him; the elder named Sarfraz, and the younger named Umrao, who is the present appellant. Sarfraz married Ahmed Hossein, who is one of the respondents, and at the death of Raza she had a son named Sajjad Hossein, then less than five years old. The original defendants in the suit were Sajjad, Sarfraz, and Umrao.

The *taluk*, being entered in lists 2 and 3 under the Oudh Estates Act, is one of those which descend to a single heir by primogeniture, and which fall under the provisions of section 22 of that Act. On Raza's death a claim was preferred on behalf of the child Sajjad, that he was entitled to the *taluk* under sub-section 4, inasmuch as he had been treated by Raza in all respects as his own son. On that claim Sajjad got possession, and soon afterwards Ahmadi instituted this suit. The title is governed entirely by the question whether Sajjad was treated by Raza as a son. If he was, the *taluk* passed to him and his male lineal descendants by virtue of sub-section 4. If not, it passed to Ahmadi for her life by virtue of sub-section 7.

Ahmadi, Sarfraz, and Sajjad have all died since the institution of the suit. Sajjad has been replaced on the record by his brother Irshad. On the death of Ahmadi the appeal abated, and Umrao was allowed to revive it under circumstances on which their Lordships will presently make some remarks.

It is common ground that Sajjad's mother, Sarfraz, was after her marriage taken into Raza's house, and that Sajjad was born there, and from that time till Raza's death he was treated as a child of the house. Evidence was given of a number of inci-

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dents, some apparently trivial and some important, for the purpose of showing that Raza's treatment of Sajjad was that of a son. On Ahmadi'a side it was contended that all those incidents were sufficiently accounted for by the circumstance that Sarfraz and her son were inmates of Raza's house, and that Sajjad was his grandson, and in the line of succession. The case appears to have been very elaborately examined by the Courts below; first by the District Judge of Lucknow, and afterwards by the Judicial Commissioner of Oudh. Both Courts held that Sajjad had been treated as a son by Raza, and that Ahmadi's claim must be dismissed.

This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be especially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The Counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree.

To do this, they made some comments on the use made by the Courts below of Raza's oral statements, but those comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility. The only question of law or principle which they could suggest was founded on the language used by this Committee in deciding the well-known case of Man Singh's estate [*Pertab Narain Singh* v. *Subhao Kooer* (1).] It appears to have been pressed upon the Committee that the treatment required by the Oudh Estates Act must be something of the nature of adoption. In answer to that suggestion their Lordships pointed out that the section applies, not to Hindus alone, but to all religions, and they continue as follows :—

"It is necessary, then, to put a genera as well as rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their

(1) I. L. R., 3 Calc., 626 ; L. R., 4 I. A., 228.

Lordships are of opinion that wherever it is shewn by sufficient evidence that a *talukdar*, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question."

Upon this passage Mr. Finlay argued that the Committee intended to lay down an authoritative interpretation of the language of sub-section 4 of universal application; that treatment, which does not conform to the description there given, cannot rightly be held to fall within the sub-section; and that the Committee meant to indicate that the acts of treatment must be absolutely unequivocal and not by possibility referable to any other relationship than that of a son. But this argument puts a strained and unnatural construction on the words of the Committee. Their expression "general construction" clearly refers to the propriety of so construing the Act that it may apply to Mahomedans and others as well as Hindus. The rest of the passage is only a statement in abstract form of circumstances which will clearly bring a case within sub-section 4. In the sequel of the judgment they show that those circumstances exist in the case before them. There is nothing to show that the Committee intended to set up a standard to which all cases must conform, or that they demanded more demonstrative proof for this kind of question than for any other.

Their Lordships hold that, whenever the evidence shows that a daughter's son has been treated by the *talukdar* in all respects as his own, it is sufficient to bring the case within sub-section 4; that the question is one of fact, and must be tried and determined by the same methods as other questions of fact; and that it is very difficult, if not impossible, to lay down a test for such a question in terms less wide than those of the Act itself.

Their Lordships do not comment on the evidence in detail, because they think it important to maintain the general rule as to concurrent findings of fact. But as during the discussion their attention has been called to several points in the evidence, they think it right to add that nothing has been brought forward to

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induce them to think that the Courts below have taken any wrong view.

As regards the *taluk* the appeal fails. But Raza was possessed of other property not belonging to his *taluk*, both moveable and immoveable. Ahmadi claimed the whole; and Umrao now claims that, whatever the decision as to the *taluk*, the rights of the parties to the *non-talukdari* property should be dealt with in this appeal. It appears that by her plaint Ahmadi claimed the whole property in block as devolving to her by force of sub-section 7 of the Oudh Estates Act and by custom; that, being a Shia and a childless widow, she was not entitled to any interest in the immoveables; and that in Court she did not press any claim to the moveables. What interests Umrao may have independently of Ahmadi is a question that has not been argued, because their Lordships are of opinion that the revived appeal is confined to the question raised between Ahmadi and Sajjad with regard to the *taluk*.

On Ahmadi's death Umrao, being in the line of succession, applied to the Judicial Commissioner of Oudh to be allowed to revive and prosecute the appeal. That learned Judge felt difficulty in acceding to her application, but directed the proceedings to be forwarded to the Registrar of the Privy Council as a Supplementary Record. Umrao then applied to Her Majesty in Council for an order of revivor and substitution. Their Lordships also felt difficulty, and in fact the case is peculiar and novel. But it appeared to them that the question of Sajjad's *status* must be settled, even if it should only affect the past income; that it would be simpler and less expensive to try it by the existing appeal than by a new suit; and that the Oudh Estates Act so far created a unity of interest between the persons in the line of succession as to justify the substitution, at least in such a case as this, of the more remote claimant for the nearer one. The application was not heard *ex parte*. Mr. Branson appeared for the respondents, and agreed that the substitution of Umrao would be more beneficial to them. The order therefore was made at the wish of both parties. But nothing was said in the petition or at the bar about *non-talukdari* property. The reasons for the revivor apply only to the *taluk*; and it would obviously be improper and

dangerous to allow Umrao to use the position she has obtained as the substitute of Ahmadi for the purpose of advancing her personal claims. Whatever claims Umrao has against any part of the estate she must enforce by suit on her own behalf. The present appeal wholly fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.

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Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson & Beard.*
For the respondent: *The Solicitor, India Office.*

IMAMBANDI BEGUM (PLAINTIFF) v. KAMLESWARI PERSHAD (DEFENDANT.)

P.C.* 1894 *April* 18. *June* 9.

[On appeal from the High Court at Calcutta.]

Landlord and Tenant—Apportionment of rent—Decree apportioning rent, reserved in a mokurari lease, to the land transferred—Lessee sitting possession of less land than stated in lease—Right of lessee to abatement of rent.

A decree had determined that lands, leased in *mokurari* to a lessee, with a fixed rent thereon, were less in extent than they were specified to be in the *pottas* that comprised them, the lessors not having title to the whole; and the lessee had obtained possession of the less estate. *Held*, that the lessee was entitled to a corresponding abatement of the rent reserved.

The revenue-paying *mehal*, within which were the lands subject to the *mokurari*, such lands being shares of *mouzas* therein, was afterwards sold for arrears under Act XI of 1859. The purchaser at that sale was sued by the *mokuraridar*, to make good her incumbrance under section 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the *pottas*, and the lessee obtained possession of that part only.

In this suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that, as the lessee had not proved that she, having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when, in her suit for possession, part only was decreed to her, and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore, had the same equity for an apportionment as if she had been evicted.

On the facts it was rightly found by the first Court that the leases were

* *Present*: LORDS HOBHOUSE, ASHBOURNE and MACNAGHTEN, and Sir R. COUCH.