P. C. * 1889 *November* 6.

RAM SINGH AND ANOTHER (PLAINTIFFS) *v.* DEPUTY COM. OF BARA BANKI (DEFENDANT).*

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

Oudh Talukhdars—Title obtained by Talukhdar under his sanad—Effect of confiscation of 1858 upon previous gift—Attempt to establish trust for claimants as to part of talukhdari estate—Claim to sub-proprietary right distinguished.

The sanad granting a talukhdar's estate confers *prima facie* an absolute title upon the grantee.

A gift of villages by a talukhdar to collateral relations, if effectively made in 1850, and whether absolute or only for the maintenance of the donees out of the rents and profits, was rendered, by the effect of the confiscation of 1858, inoperative after that event to establish an interest as against the talukhdar holding under a sanad comprising the villages.

Where a claim was based upon the principle that the conduct of a sanad-holding talukhdar and of his predecessor had been sufficient to establish against him a liability to make good, out of his taluk, interests, as to which ground was supposed to have been given for his relations to claim: *Held*, that such a claim was not established merely by the claimants having been left in possession of villages, and having paid to the talukhdar only the proportion of the revenue assessed upon them, during the whole time of the troubles in Oudh, and afterwards. *Held*, also, that the question of the claimants having an under-proprietary right in such villages was entirely irrelevant to a claim for a declaration that they had proprietary right therein, on which latter title they sought to found a right to have their names entered in the settlement record; and *held*, that, although there are cases in which the claimant of a proprietary right may be allowed to maintain, on the same facts, that he is an under-proprietor, this claim was not one of them.

APPEAL from a decree (5th April 1886) of the Judicial Commissioner of Oudh, affirming a decree (30th October 1885) of the District Judge of Lucknow, dismissing the suit of the appellants with costs.

In the suit out of which this appeal arose, the plaintiffs sought a declaration that they were in full proprietary possession of six villages in Pergunnah Haidargarh, part of the Pokhra Ansari Taluk, of which the Deputy Commissioner of Bara Banki was

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

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Manager on behalf of the talukhdar, a minor under the Court of Wards. They claimed under a deed of gift to their father, Babu Gurdeo Singh, from his nephew Rajah Sahaj Ram Buksh, then the talukhdar, executed in 1258 (Fasli), corresponding to 1267 (Hijri), and to 1850 (Christian). This alleged donor was the deceased elder brother of the present minor talukhdar. The question on this appeal was, whether they had established their proprietary right, it being insisted against them that the mere fact of their possession for many years was consistent with the villages having only been given to them for their maintenance; and that, according to the defendant, was what had occurred. The plaintiffs alleged that they were entitled to mutation of names in the settlement record, but had only recently required and applied for it; having lately mortgaged parts of the villages, which rendered it necessary for them to have their names recorded as proprietors.

The defendant, the Deputy Commissioner of Bara Banki, as Manager of the Pokhra Ansari Estate, on behalf of the minor talukhdar, admitted that the parties were descended from a common grandfather Rajah Surkam Singh; but alleged that the taluk descended by old family custom, and in accordance with the Oudh Estates Act I of 1869, to a single heir, while the *chutbhayas* (or cadets of the family) were entitled only to maintenance; the plaintiffs holding the disputed villages as *guzaradars* (or holders) of subsistence allowance. He disputed the deed of gift of 1850, which, as he contended, was of no operation, in consequence of the confiscation of the 15th March 1858, the revival of the talukdari system in place of the village system, the summary settlement of 1859, the talukhdari-sanad, and the legislation of the Oudh Estates Act I of 1869. The minor talukhdar was entitled, according to the defendant, to an absolute proprietary right, without being liable in respect of any trust, express or implied.

At the hearing, upon issues raising the questions of the genuineness of the deed of gift, and the effect of the plaintiffs' long possession, it appeared that the latter held possession, paying to the talukhdar only the revenue assessed upon the villages, some of their witnesses describing their tenure as *pukhtadari*.

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The District Judge, without finding that the alleged deed of gift was genuine, decided that, if it was, it would have been inoperative, for the reasons above stated. Although the sanad, and the law, protected inferior rights, this suit having been brought for the full proprietary right, being to all intents and purposes a suit for the partition of the taluk, could not be maintained for the under-proprietary right.

On an appeal, urging that the talukhdar had by his conduct constituted himself a trustee for the appellants, who also, failing their rights as proprietors, were entitled to a declaration of their rights as under-proprietors, the Judicial Commissioner, intimating that he had no doubt of the genuineness of the deed of gift of 1855, said:—

"But I am of opinion that under the terms of Lord Canning's proclamation of the 15th March 1858, the deed of gift ceased to be of effect from the date of that proclamation. The words of the proclamation are clear. 'With the above-mentioned exceptions the proprietary right in the soil of the province is confiscated;' and the plaintiffs' right is not among the exceptions. If the plaintiffs had a right to a sub-settlement, their right was no doubt protected by the letters printed in the Schedule to Act I of 1869; but the plaintiffs cannot bring themselves within the terms of Act XXVI of 1866, and what they claimed in this suit was the proprietary right in the villages. The statement that under-proprietary right only was claimed is an after-thought put forward for the first time at the hearing of the appeal.

"I am unable to find that 'the evidence shows that the talukhdar by his conduct constituted himself a trustee for the plaintiffs.' The trust must [*Hardeo Baksh* v. *Jawahir Singh* (1),] have been created at some time after the grant of the talukhdari-sanad, and I can find nothing in the evidence to suggest the creation of any such trust. The evidence goes no further than to show that plaintiffs were allowed to hold the villages as cadets of the family. When attempts at alienation were made, they were resisted: and in 1871 the talukhdar endeavoured to get the villages made liable for his debts"

"The appeal fails and is dismissed with costs."

On this appeal,

Mr. *J. H. A. Branson*, for the appellants, adverted to their uninterrupted possession, and that of their father before them, of the villages, in which he contended that they certainly had rights.

(1) I. L. R., 3 Calc., 523; L. R., 4 I. A., 178; L. R., 6 I. A., 161.

The family connection of the parties, their payment only of the Government revenue, the acquiescence of the talukhdar for the time being in a state of things favourable to the plaintiffs' claim, went far to show that he had recognized a trust for them. At all events, the appellants had shown themselves entitled to rights as under-proprietors. He referred to the judgment in *Gauri Shunker* v. *The Maharaja of Bulrampore* (1), showing that a plaintiff, seeking by his plaint a direct settlement in superior-proprietary right, might modify his claim to one for a sub-settlement of an under-proprietary right. The appellants were entitled to a decree stating what their rights had been found to be, and that there ought to be a sub-settlement with them.

Mr. *W. F. Robinson, Q.C.*, and Mr. *C. C. Macrae*, for the respondents, contended that the only ground on which the plaintiffs could maintain the claim which they had made, upon the issue which they had raised, had failed entirely, leaving them no right of falling back on the claim to a sub-settlement. The case cited was distinguishable, and the present claim was, in effect, disposed of by what their Lordships had said in *Haidar Ali Khan* v. *Nawab Ali* (2). The plaintiffs could not, on this record, rely, for a decree, upon any title they might have as under-proprietors, which might or might not be brought forward, but had not been put in issue.

Mr. *J. H. A. Branson* replied.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The villages which are the subject of this suit are part of the defendant's taluk, and are included in the sanad under which he holds that taluk. The plaintiffs claim to be proprietors of the villages by virtue of a deed of gift, which was dated in the year 1850, and of possession taken under that deed, and continued up to the present time. The deed of gift was made by the son of the then Rajah, or talukhdar, who was the manager of the estate, and made to the brother of the then talukhdar, who is the father of the plaintiffs. The genuineness of the deed is disputed; but it has been held to be genuine by

(1) L. R., 6 I. A., 1; I. L. R., 4 Calc., 839.
(2) L. R., 16 I. A., 183; I. L. R., 17 Calc., 311.

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the Judicial Commissioner; and for the purposes of the present appeal the correctness of the holding may be assumed. But there is no doubt that the deed of gift (whether it is an absolute gift, or one for maintenance only, is a matter of dispute) was displaced by Lord Canning's proclamation; and that the sanad of the taluk conferred an absolute title upon the grantee *primâ facie*

The plaintiffs base their claim upon the principle of those decisions of this Committee, in which it has been held that the conduct of the holder of a sanad has been sufficient to establish against him a liability to make good, out of his sanad, interests in the property which he has by that conduct either granted to other people, or given them ground to claim. But the plaintiffs do not show that there has been any such conduct beyond the fact that they have been left in possession of the property during the whole time of the troubles in Oudh, and down to the present time.

The talukhdar has paid to the Government the revenue for the whole taluk, and the plaintiffs have paid the talukhdar that share of the revenue which would be payable for the villages that they hold.

They are now desirous of selling or mortgaging the property. They have attempted to do so, and they have failed because they cannot get a mutation of names; and the present suit is a declaratory suit, in which they seek a declaration that they are the proprietors of the property in order that they may obtain a mutation of names.

Their Lordships are of opinion that the mere fact of possession, which is consistent with an intention to give maintenance as well as proprietorship, does not establish any case against the talukhdar obliging him to make the plaintiffs proprietors of that portion of his taluk.

Other cases are now set up. One is that the plaintiffs have a good title by adverse possession. Possession may be adverse or not, according to circumstances; and the question of adverse or non-adverse possession is mainly a question of fact. But there has been no allegation of adverse possession in the plaint, and no issue raised as to it before the Court below. Their Lordships think that it is impossible now to suggest a case of adverse possession.

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Then the plaintiffs claim that, if they are not proprietors, they have at all events a sub-proprietary right; and there are cases in which it would be quite just and proper to allow one who comes to claim recovery of villages, or the right to a settlement in villages, on the ground of a proprietary right, to maintain upon the same facts that he is in effect a sub-proprietor; but this is not such a case. The question of sub-proprietary right is entirely irrelevant to the relief claimed in this suit, which is for a declaration of right on which to found a mutation of names in order that effect may be given to the dealing with the estate by the plaintiffs.

Their Lordships, thinking that the suit fails upon the main point, hold that it also fails upon the other points; and the result will be that they will humbly advise Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

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

Solicitor for the respondents: *The Solicitor, India Office.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Pigot.

GUBBOY (PLAINTIFF) *v.* AVETOOM (DEFENDANT).*

1890 *January* 15.

Principal and agent—Contract Act (IX of 1872), s. 230—Undisclosed principal.

A broker gave to one Gubboy the following sold note:—"Sold this day by order and for account of E. E. Gubboy, to my principal, G. P. Notes for Rs. 2,00,000 (two lacs) at Rs. 98-11.

"(Sd.) A. T. A.
Broker."

This note was endorsed—"A. T. A., for principal."

In a suit by Gubboy against the broker for failure to take delivery: *Held*, that there was nothing in this contract to rebut the personal liability of the broker.

* Small Cause Court Reference No. 7 of 1889, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 8th July 1889.