

Lordships therefore will not make any order as to his costs (if any) of this appeal. 1897

Appeal allowed.

Solicitors for the appellant, Lalit Mohun Singh Roy : Messrs. *Withers & Withers.*

Solicitor for the appellants, Bepin Mohun Singh, Priambada Roy and Habul Chunder Roy : Mr. *James T. Withers.*

Solicitors for the respondent, Chukkun Lal Roy : Messrs. *T. L. Wilson & Co.*

C. B.

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LAL
ROY.

RAM AUTAR AND OTHERS (DEFENDANTS) v. MAHAMMAD MUMTAZ ALI (PLAINTIFF). P.C.*
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February 19
& 24.
March 20.

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

Minor—Wrongful admission of title against a minor—Suppression of facts by a Manager appointed by the Court of Wards—Order of Settlement Court cancelled.

At a settlement of a district in Oudh a sub-settlement was decreed in conformity with Act XXVI of 1866, which legalizes rules as to claims in respect of subordinate rights to land. The claimant alleged himself to be, in virtue of a *birt* tenure, held by him, under-proprietor of a village within the *taluk* of a *talukdar*, then a minor, whose estate was under charge of the Court of Wards, whose representative, the Deputy Commissioner of the District, had appointed a manager of the estate. This manager having reported favourably on the claim, the Deputy Commissioner sanctioned its admission ; whereupon a decree for sub-settlement was made on the 30th June 1871. The present suit was brought by the *talukdar*, after attaining full age, to have that decree set aside as having been obtained by fraud and collusion. That the manager was brother of the alleged *birt*-holder, and that he was family shareholder with him in the village, facts which the manager had suppressed, were facts proved in this suit. The defendants attempted, but failed, to establish by evidence the existence of the alleged *birt*.

Held, that the admission in the Settlement Court in 1871 was not binding on the plaintiff, and that, even assuming that the defendants' ancestor had been in some way in occupancy before 1857, the evidence was quite insufficient to show that a grant of a perpetual under-proprietary right had been obtained. The decree of the lower Appellate Court, cancelling the Settlement Court's order, was therefore upheld.

APPEAL from a decree (3rd July 1891) of the Court of the

* Present : LORDS WATSON, HOBHOUSE and DAVEY, and SIR B. COUPEL.

1897 Judicial Commissioner, reversing a decree (6th January 1890)
of the District Judge of Fyzabad.

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The plaintiff in this suit, now respondent, was Raja Muhammad Mumtaz Ali Khan, *sanad*-holding *talukdar* of Bilaspur in the Gonda district including the *taluk* of Utrauli. Within the latter was situate *mouzah* Mahammadpur Banjarha, as to which this litigation arose. Of this village Ram Ghulam, son of Jawahir Lal, and grandfather of Ram Antar, the first defendant in this suit, obtained in 1871, at a settlement in progress in the Gonda district in that year, a sub-settlement as under-proprietor within Act XXVI of 1866, the Oudh Sub-Settlement Act. Ram Ghulam alleged at the settlement that he held a *birt* tenure of the village which had been granted to Jawahir Lal, his father, in the year 1838 by Raja Muhammad Khan Jeo, then the *talukdar*, who died in 1865.

Jawahir Lal was also father of Salig Ram, the second defendant in this suit, who died while this appeal was pending, and was now represented by his sons, who were substituted for him on this record on the 21st November 1895.

The order, dated 30th June 1871, made by a Deputy Collector as settlement officer, was headed "*Ram Ghulam v. Raja Mumtaz Ali Khan, talukdar*," and referred to an *ikbalidawa* filed on that day by Salig Ram, general agent, manager, as admitting the claim. *Birt* right over the village Mahammadpur was then decreed to Ram Ghulam.

The Raja was then an infant aged but a few years. His estate, entered in the lists I and II, prepared under the Oudh Estate Act, 1869, was under charge of the Court of Wards, represented, in conformity with Regulation X of 1793, by the Deputy Commissioner of the district, who appointed a manager of the estate, as that law directs. The manager thus appointed was Salig Ram, who had managed the estate under the preceding *talukdar*. This manager, when called on by the Deputy Commissioner to report as to the claim made before the Settlement Officer, reported in favour of it, suppressing the fact that being Ram Ghulam's own brother he was entitled to a fourth share in village Mahammadpur with him. The Deputy Commissioner, on the manager's representation, sanctioned the filing of the above admission of the claim.

On this appeal, the principal questions were whether the admission, upon which the decree of the Settlement Court was based, and the decree, were binding upon the Raja. It was also in dispute whether the defendants had to discharge the burden of proving that the *virt* tenure existed; and, if so, whether, or not, they had given sufficient evidence of it.

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On the Raja's coming of age in 1886, the Court of Wards made over charge of the *talukdari* estate to him. On the 8th March 1889 he brought this suit to have the settlement decree of 1871 set aside, as having been founded on an admission which was false and collusive, and an unproved claim.

All the facts appear in their Lordships' judgment, as well as the substance of the cases made by the plaintiff and the defendants.

The District Judge in his judgment arrived at the conclusion that the Court of Wards had been properly made defendants in the settlement suit of 1871, and that the claim of the plaintiff in that suit had been admitted by an officer having the powers of a Court of Wards; and that, therefore, the settlement decree was valid and binding between the parties. Referring to the fraud and collusion charged, the Judge said that, no doubt Salig Ram had a direct interest in the sub-settlement, and the under-proprietary right as *virtia*, being decreed to his brother Ram Ghulam with whom he was co-sharer in estate; and his not having mentioned these facts in his report "told strongly against his *bona fides* in the whole transaction." But, on that ground alone, the Court could not presume that he had been guilty of fraud. Under section 111 of the Indian Evidence Act, 1872, it was incumbent on the appellants to prove the good faith of the transaction. But the answer to this was that it was a true claim that had been admitted and not a false one. This last proposition was derived from the consideration of the whole of the documentary evidence, upon which the Court found that Ram Ghulam had been proved to be *virt*-holder. The plaintiff's suit was dismissed with costs.

The Appellate Court (the Judicial Commissioner and the Additional Judicial Commissioner) reviewed the evidence, finding that the materials on which the Deputy Commissioner, as

1897 representing the Court of Wards, sanctioned the admission of
 RAM AUTAR the claim in 1871, were meagre and insufficient.

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 MAHAMMAD They considered that there had been want of care of the in-
 MUMTAZ ALL terests of the ward, contrary to the injunctions and intent of
 Regulation X of 1793, section 16. They referred to the remarks in
 the judgment in *Luchmeswar Singh v. Chairman of the Darbhanga
 Municipality* (1). They decided that in the present suit the defen-
 dants had failed to establish a right to an under-tenure such as
 could be recognized by law (Act XXVI of 1866). They referred
 to section 2 of that Act, and the rules scheduled as an appendix to
 it. Also to *Drig Bejai Singh v. Gopal Dat Panday* (2). They
 reversed the decree of the first Court, and decreed the village
 to the plaintiff.

On the defendant's appeal,—

Mr. A. F. Murison for the appellants argued that there was no sufficient proof of the fraud charged in the plaint. The decree of the Settlement Court had been regularly obtained in 1871, and ought to be regarded as valid. Setting aside the question of the admission and its effect, the evidence in the suit was sufficient to establish a title in Ram Ghulam and his heirs in virtue of the *birt*. In the judgment of the Judicial Commissioners there had been a presumption of fraud against the manager, which had not been warranted by the evidence, and had been in excess of just inference. The general rule that fraud was not to be presumed had not been kept in view. Again, regard had not been paid to the title of the appellants having been one which was not established by or through the rights of the *talukdar*; but was, in effect, independent of the title of the latter. This was shewn by the letters of the Government (10th and 19th October 1859), as scheduled in the Act XXVI of 1866, relating to under-proprietary rights, and to sub-settlement with those possessed of subordinate rights of property. Further, it had been shown that, irrespectively of the decree of the Settlement Court of 1871, the appellants were entitled to hold as *birtias*: and it was submitted that, even if the right of the

(1) I. L. R., 18 Calc., 99; L. R., 17 I. A., 90.

(2) I. L. R., 6 Calc., 218; L. R., 7 I. A., 17.

appellants to sub-settlement had not been established, they were not, in consequence of that state of things, liable to be dispossessed of their holdings. Reference, in regard to the effect of the manager's admission, was made to *Muhammad Mumtaz Ali Khan v. Sheoruttangir* (1).

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Mr. J. D. Mayne, and Mr. C. W. Arathoon, for the respondent, were not called upon.

Afterwards, on the 20th March, their Lordships' judgment was delivered by

LORD WATSON.—The respondent Rajah Mahammad Mumtaz Ali Khan succeeded on the death of his uncle the Rajah Umrao Ali Khan to the Bilaspur estate in district Gonda, which includes the *taluka* of Utraula. At that time the respondent was a mere infant: and his estate remained under the charge of the Court of Wards from the end of the year 1865 until October 1886 when he attained majority. In March 1889 he instituted the present stit before the District Court of Fyzabad against Ram Autar, Salig Ram and others, in which he prays for (1) a decree for possession of the entire village Mahammadpur Banjarha which is within *taluka* Utraula; (2) cancellation of an order passed by the Settlement Court on the 30th June 1871 which decreed the village Banjarha "for *virt.*" to one Ram Ghulam; and (3) a decree for mesne profits.

The appellants are the original or substituted defendants in the suit; and with the exception of one who has acquired by purchase a share in the interest claimed by the others they are the lineal descendants of one Jawahir Lal to whom they allege that a perpetual under-proprietary right in the village was granted in or about the year 1838 by the Rajah Mahammad Khan Jeo, a predecessor of the respondent. Jawahir Lal had four sons, the eldest being Ram Ghulam the grandfather of the said Ram Autar, and the youngest Salig Ram who was an original defendant in this suit. On the death of Jawahir it is said that the members of his family succeeded to his under-proprietary interest in village Banjarha. Ram Ghulam obtained from the Settlement Court in 1871 the order sought to be cancelled as representative and for behoof of the whole of the members of the family. For many

(1) I. L. R., 23 Calc., 934; L. R., 23 I. A., 75.

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years prior to the death of Raja Umrao Khan in 1865, Salig Ram was employed by him as manager of the estate; and he continued to act in the same capacity during the whole period of its administration under the Court of Wards.

The case maintained by the respondent is in substance that Jawahir Lal had no grant of under-proprietary right from his ancestor, and that the defendants have no such interest in village Banjarha; that the decree of the Settlement Court in favour of Ram Ghulam was obtained by fraud and collusion; that no evidence was produced and no inquiry made as to the existence of the right then asserted by Ram Ghulam, and that the latter caused or induced his brother Salig Ram to give an admission on behalf of the Court of Wards in respect of which the decree passed. In their written statement the appellants allege that the original *birtpatr* of 1838 by Rajah Mahammad Khan Jco to Jawahir Lal was produced at the summary settlement, but that the file of papers, including that document, had been destroyed during the Mutiny. If so the production of the document in the Settlement Court must have been of an earlier date than 1871. They also denied the respondent's allegations of fraud and collusion, and averred that the admission of Ram Ghulam's claim was made "in accordance with instructions of the manager of the Court of Wards, who had after inquiry given him (*i.e.*, Salig Ram) instructions to admit the same"; and that they and their predecessors had, since 1838, been in possession of the village as proprietors, under the *talukdar* of Utraula.

Four issues were adjusted by the District Judge for the trial of the cause: (1) Is not plaintiff bound by the decree of 1871? (2) If not, is the present claim barred by limitation? (3) If not barred, are the defendants not entitled to hold the village as *birt*-holders? (4) If not so entitled, to what relief, if any, is the plaintiff entitled? The learned Judge, in their Lordships' opinion erroneously, laid the onus of establishing the third issue upon the respondent. In the event of its being held that the decree of 1871 was not such as to constitute a bar to the action, the duty of proving their own title *aliunde* was incumbent upon the appellants. Upon the issue of limitation, both Courts below found against the appellants; and no question has

been raised with regard to it in this appeal. The District Judge, on the 6th January 1890, found for the appellants upon the first and third issues; in consequence of which findings, it became unnecessary to consider the fourth issue, and the respondent's suit was dismissed by him, with costs. Upon an appeal by the respondent, the Judicial Commissioner reversed the decision of the District Judge upon the first and third issues, and found upon both of them for the respondent. He accordingly gave the respondent a decree for possession of the village Mahammadpur Banjarlia in terms of his plaint. He dismissed the prayer of the plaint in relation to mesne profits, because no evidence had been adduced at the trial in support of the fourth issue; and he deprived the respondent of his costs in both Courts below, because forged interpolations had been made in certain documents put in by him, connected with the Settlement Court proceedings of 1871.

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When the judgments delivered by the District Judge of Fyzabad and the Judicial Commissioner are examined, it becomes apparent that the only real difference of opinion between them was in regard to the third issue. The learned Judge of the District Court was of opinion that the appellants would not have been entitled to a finding in their favour upon the first issue, if it had stood alone. But seeing that, in his opinion, they were entitled to have a finding, under the third issue, that they were possessed of a valid under-proprietary right, independently of the decree of 30th June 1871, he appears to have thought that the decree of 1871 ought to be regarded as sufficient, inasmuch as, in his opinion, Ram Ghulam would have been entitled to, and would have obtained it, if due investigation had been made at the time, instead of its proceeding upon an admission given by Salig Ram, who was himself interested, to the extent of a 5 anna 4 pie share, in the right claimed by his brother Ram Ghulam. The reasoning of the learned Judge does not appear to their Lordships to be altogether satisfactory. If the circumstances attendant upon the granting of the decree of June 1871 were such that it could not be set up by the appellants as a title sufficient to exclude the possession of the *talukdar*, the finding upon the first issue ought to have been to that effect: and it would not have prejudiced the appellants' defence, in the event of their being able to

1897 establish under the third issue, that they had obtained an under-
 RAM AUFAR proprietary right from one of the respondent's predecessors.

^{v.}
 MAHAMMAD It does not, in their Lordships' opinion, admit of reasonable
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 settlement decree cannot be regarded as binding upon the respon-
 dent who was at its date a minor under the guardianship of the
 Court of Wards. The local manager of his estate under the
 Court of Wards was Salig Ram, for behoof of whom, as well as
 of himself and of other members of Jawahir Lal's family, the
 petition of Ram Ghulam was presented. Yet Salig Ram was the
 only person who appeared in the Settlement Court to represent
 the Court of Wards, and to protect the interests of the respon-
 dent against possible encroachment by Jawahir Lal's descendants.
 It is obvious that the Deputy Commissioner, who was the chief
 officer of the Court of Wards in that district of Oudh, was
 induced to sanction the admission of their right, in consequence
 of representations made to him by his servant Salig Ram, whom
 he directed to report upon the application. It is hardly conceiv-
 able that an official in his position would have entrusted such an
 inquiry to Salig Ram, or would have acted upon his report, if he
 had known the reporter's relationship to the applicants, or his
 personal interest in the success of their application.

Salig Ram, as might naturally have been expected in
 these circumstances, made a report in all points favourable to his
 brother's claim. It states that the village Banjarha was *birt*
 of Ram Ghulam; that, in the commencement of 1844, he had
 cleared and populated the jungle according to the grant previously
 made by the Rajah; and that, from and after the time of the
 grant, he had possession by receipt of *haq-i-chaharum*, and by
 payment of the Government revenue to the Rajah; that, in 1857,
 settlement of the village was made with him as *birtia*, on the
 same terms; that settlement was again made with him in 1859,
 recognising his *birt* tenure; and that, from the time when its
 administration began, the Court of Wards continued his posses-
 sion, upon his payment of the Government revenue due for the
 village, under deduction of one-fourth, as *haq-i-chaharum*.
 Acting upon the faith of these representations by his manager,
 the Deputy Commissioner authorised an admission of the claim,

which was duly filed by Salig Ram ; and, in respect of it, the Settlement Court issued its order affirming the under-proprietary right of Ram Ghulam. Notwithstanding the assertion made by the appellants in their written statement, there is no trace of the *birpatra* or any similar document having been laid before the Settlement Court either in 1857 or in 1859. On both these occasions, the village was temporarily settled with Jawahir Lal's descendants ; but there was no inquiry into the question of their alleged under-proprietary right. These settlements were probably made because they were found in possession, and they may have been facilitated by the fact that Salig Ram was then, as he was in 1871, manager of the estate.

Salig Ram was examined as a witness in his own behalf in this suit, and he explained that, in reporting upon his brother's application to the Settlement Court, " I did not think it necessary to say that Ram Ghulam was my brother, as everyone knew he was my brother ;" but he does not explain why he failed to communicate the fact that the application was partly made for his personal benefit, and that he had a substantial pecuniary interest in its success. What he does state in evidence amounts to nothing more than this, that those persons who happened to be acquainted with Jawahir Lal's family were aware of his relationship to the petitioner Ram Ghulam. Their Lordships agree with the observation of the District Judge that " this amounts to an admission that he did not report that Ram Ghulam was his brother, and this fact tells strongly against his *bona fides* in the whole transaction." Their Lordships may add that, in their opinion, it is sufficient to justify a suspicion that, in 1871, Salig and his brother Ram Ghulam were not possessed of documents showing the under-proprietary right which they claimed, or at least that they had some good reason for desiring to avoid submitting their documents to the examination of the Settlement Court. Their Lordships must assume that the Deputy Commissioner was kept in ignorance of the facts which made Salig Ram an interested and unreliable adviser. Had he known these facts, his acceptance of Salig Ram's report would, in their opinion, have constituted a grave breach of duty, sufficient in itself to prevent the decree of the Settlement Court from becoming binding upon the respondent.

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The only question remaining to be considered is, whether the respondents have succeeded in establishing an under-proprietary right in the village Banjarha, derived from the *talukdar* of Utraula, before the Mutiny? Upon that point, the learned Judges of the Courts below have come to opposite conclusions.

It appears to be the fair result of the evidence, and may be assumed, that Jawahir Lal and his family were in the occupation under some title or other, of the village in dispute, from the year 1838 until the Mutiny. The question between the parties is therefore narrowed to the issue, whether the occupation which they had during that period was attributable to a tenure under the Rajah, of a temporary character or in perpetuity. The respondents, besides leading oral testimony, which is *per se* inconclusive upon the matter of title, have produced and founded upon a mass of documents, some of which are not proved at all, and others of which are of no value as evidence, in a question with the *talukdar*; whilst the genuineness of other documents, which bear most directly upon the nature of the appellants' title, is disputed by the respondent.

One main reason which induced the learned Judge of the District Court to come to a conclusion favourable to the appellants upon the third issue, is expressed in the following sentences: "The others (*i.e.*, documents) prove beyond any doubt that one Ram Ghulam held possession of this village as *virt*-holder from before the Mutiny until 1861; and this is not denied by the plaintiff, but evidence on behalf of the plaintiff has been given to show that the Ram Ghulam who held the village was one Ram Ghulam, *Misr*, and not the Ram Ghulam who obtained the decree in 1871, who is a *Kayesth*. The plaintiff when he filed this suit never asserted that the village had been held by one Ram Ghulam, *Misr*, and it was only on 16th November 1889, when the remarks in Column 16 of the *muafi* statement for the village in suit were read, that this contention was raised on behalf of the plaintiff. It is perfectly clear to me that the remarks in Column 16 are a clerical error. Another village called Amhawa was held by one Ram Ghulam, *Misr*, and the clerk who drew up the two statements thought that both the Ram Ghulam of Amhawa and Ram Ghulam of Mahammulpur were one and the same person, hence the error."

Their Lordships see no reason to doubt that the entry in the *muafi* statement which represents Ram Ghulam of Banjarba as a *Misir* by caste, was due to an error of the clerk who prepared it. The statement was made up in the year 1861, at a time when the same Ram Ghulam, who subsequently obtained the decree of 30th June 1871, had been placed in temporary possession by the Settlement Court. But they are of opinion that the learned Judge erred in assuming, as he appears to have done, that the respondent had, in the course of the suit, practically admitted that Ram Ghulam must be held to have possessed the under-proprietary title which the appellants claim, if it could be shown that the Ram Ghulam, called a *Misir*, was in reality a *Kayesth*. Their Lordships can find nothing in the record to warrant that assumption. The *muafi* statement of 1861, if evidence of title at all, is a mere adminicle of proof, and, *per se*, inconclusive. It is not shown upon whose information it was prepared, or that its terms were known to the Rajah, although they may possibly have been within the knowledge of his manager Salig Ram. The sole object of the evidence led by the respondent to which the learned Judge refers—that of Gupta, the son of Ram Ghulam, *Misir*—was to show that the document produced in aid of the appellants' title did not support it.

The most important by far of the writings produced and relied on by the appellants are three in number, all purport to be documents emanating from the Rajah, the only documents of that character which are to be found in the record. As stated by the learned Judge, "their genuineness was disputed

years, the

Rs. 282, and it

should without any

(lands), settle, and got others to

ment revenue year by year, and instances by instance and should take $\frac{1}{4}$ out of the Government revenue as his zamindari due."

The receipt of 1838 is, in their Lordships' opinion, quite insufficient to show that Jawahir Lal in that year obtained from the Rajah a perpetual grant of an under-proprietary right to the village as the appellants assert. The existence of such a right is inconsistent with the fact that Jawahir Lal subsequently accepted from the Rajah, in 1844 and 1850, leases, for a short period, of

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contains these words : "Hence this receipt has been executed so that it may remain as a *sanad*." The document is represented by the appellants to be an acknowledgment by the Maharajah for the sum paid to him by Jawahir Lal as consideration for the grant of a perpetual under-proprietary right to the village. It must be observed, however, that no mention is made in it, either of the conditions of the tenure or of its duration. These are supposed to have been expressed in the deed of grant itself, or *birtpatr*, which the appellants allege to have been produced at the summary settlement, and to have been destroyed during the Mutiny.

The second document is a lease of 1844 in favour of Jawahir Lal, under the seal of the Rajah Umrao Ali Khan, for clearing jungle in "village Mahammadpur *alias* Banjarha," the area of which "is one thousand five hundred and five (1,505) bighas, standard." The duration of the lease is thus defined : "He may for seven years enjoy free of rent (*khanti bunti*) the forest produce and after seven years he shall have to divide (with me) the grain produce at the *batai* rate prevailing in jungle villages, and he may take his *hissa chuharum* ($\frac{1}{2}$ share) on account of his zamindari *birt*, out of his Government revenue."

The third document is a lease, dated in 1850, also under the seal of the Rajah Umrao Ali Khan, and in favour of the same Jawahir Lal. It demises to the latter, for the period of four years, the same village Mahammadpur Banjarha, on a *jama* of 1,505 bighas, and provides that "he (*i.e.* Jawahir Lal the tenant) shall with all anxiety cultivate and bring under tillage the land, and settle there, and pay the Government revenue of which the *birt* is one-fourth, and are the same as found in the *sanad* in both Courts below, and it has not in this appeal been decided against the respondent. The Judicial Commissioner has decided against the appellants upon the assumption, and without deciding, that they were genuine; and their Lordships, upon considering the tenor of the documents, are not prepared to differ from the result at which he arrived.

The first of these documents purports to be a receipt granted to Jawahir Lal, dated in the year 1838, under the seal of the Maharajah Muhammad Khan, for Rs. 141, "on account of *birt* zamindari of village Mahammadpur *alias* Banjarha." It also