PRIVY COUNCIL.

UDWANT SINGH AND OTHERS *v.* TOKHAN SINGH AND OTHERS.

[On appeal from the High Court at Fort William in Bengal.]

P. C. 1901 *Feb.* 15, 26.

Practice—Decree—Execution proceedings—Jurisdiction—Decree cannot be varied in the execution department.

A decree of the High Court declared the title of the plaintiffs to shares in all the properties described in the schedules thereto, excepting in two mouzas, which were declared to belong to the defendants.

In execution the objection was taken that certain parcels sued for and decreed as kasht, or jote, lands were in reality kamat lands, which necessarily, from the character of that holding, must have belonged to the proprietors of the mouzas, within the limits whereof those parcels were situated, the proprietors of the mouzas being declared in the decree to be the defendants. The executing Court disallowed this objection as distinctly involving a variation of the decree. But the objection was allowed by the High Court's decree now appealed from.

Held, reversing the order of the High Court, that it was beyond the jurisdiction of the executing Court to vary the decree, which plainly awarded the parcel as jote or kasht lands lying within the villages, and defined by measurements; so that there was no doubt as to their identity. To re-open the decree, because the defendants raised a new question regarding the nature of the relation of these parcels to the mauzas, would be to re-hear the suit on that matter. That would be an error of procedure of a substantial kind, calculated to cause great irregularity in the conduct of suits.

APPEAL from a remand order of the High Court (August 10, 1893) and an order of the High Court (February 11, 1897) reversing with costs a finding on remand of the Subordinate Judge of Monghyr (January 12, 1895), and also the original order for execution of the Subordinate Judge (April 9th, 1892) made in the suit, in which the decrees of the above Courts have been made respectively on March 25, 1889 and June 2, 1891.

This appeal arose in the execution of a decree of the High Court, dated the 2nd June 1891, which affirmed, with a variation as to part of the property claimed, a decree of the Subordinate Judge of Monghyr of the 25th March 1889 in a suit between two branches of a Hindu family descended from a common ancestor. The suit was for shares in the family estate; and was,

* *Present:* LORDS HOBHOUSE, DAVEY and LINDLEY and SIR RICHARD COUCH.

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with the exception of two mouzas part of the estates in land which had been decreed below, decreed as to the rest in favour of the plaintiffs by the Appellate Court.

The decree-holders were now the petitioners in execution and the appellants. The judgment-debtors were the counter-petitioners and were the respondents on the present appeal. The properties excepted by the decree, and awarded exclusively to the latter, were two mouzas, named (1) Ramchanderpur, and (2) Alibali. The respondents objected in the execution proceedings that certain parcels described in the schedule to the decree as kasht or jote, amounting in all to about 1223 bigahs, ought not in execution to be made over to the appellants. The reason alleged was that the parcels, being in reality kamat † land within the mouzas excepted could, from the nature of such holdings, only belong to the proprietors of the mouzas.

There was no issue settled for trial specially dealing with the plots, which were the subject matter of this appeal. The first order of April 9th, 1892, was for execution of the decree of June 2nd, 1891, and expresses the point in contest on the present appeal. The Subordinate Judge said :—

"The judgment-debtor urges that properties Nos. 519 and 520 are kamat lands in mouza Ramchunderpore and Alibali, which have been decreed to defendants, and that, inasmuch as kamat lands belong to the proprietors, the decree-holder cannot get possession of them. The plaintiffs claimed the jote lands, and the mouzahs separately, and he got a decree for both in the First Court, but the High Court dismissed his claim in respect to the mouzas only; therefore the decree to properties Nos. 519 and 520 stands unaffected, and plaintiff must get possession according to his decree.

† The terms "kamat," "jote" and "kasht" are thus defined in Wilson's glossary :—

Kamat: The cultivation which a cultivator carries on with his own stock, but by the labour of another : the land which a zemindar or landowner keeps in his own hands, cultivating by labourers in distinction to that which he lets out in farms. (Wils., p. 254, col 1.)

Jote : Tillage, cultivation ; tenure of a cultivator. (Wils, p. 242, col. 1).

"*Kasht*" : Cultivation, agriculture, tillage. (Wils, p. 267 (1), col. 1).

In the execution of the decree it cannot be enquired into as to whether the Court would have dismissed the claim in respect of these properties, if it had been proved that they were kamat lands. The objection is not tenable, and this Court cannot now go behind the decree."

On an appeal preferred by the counter-petitioners against this order, the High Court, by an order of August 10th, 1893, remanded the proceedings to the Subordinate Judge, who was executing the decree. The material part of the High Court's order was as follows :—

"The plaintiffs seek to execute the decree against the kasht lands included in the mouzas aforesaid on the ground that the High Court, whilst dismissing their claim for a share of the mouzas themselves, did not make any declaration as to their right in respect of the jotes. The defendants object that the lands are included in their subsequently acquired property, and not covered by the High Court decree. The Judge in the Court below has overruled the objections of the defendants simply on the ground that the High Court, while it disallowed the claim of the plaintiffs as against the mouzas, did not say anything as against the jote lands

"In this Court, the learned counsel for the defendants has objected that, as the properties themselves were acquired after the separation, and as the High Court has disallowed the plaintiffs' claim with regard to these properties, the kamat lands, which are included in these properties cannot possibly have been allowed to the plaintiffs, and certainly there is no reference to them either in the judgment or in the decree of the High Court. The respondents' pleader contends that the kasht lands were shown in the schedule to the plaint attached as having belonged to the family previous to Ram Sahai's death ; that the plaintiffs obtained a decree in respect of these kasht lands in the First Court, that the High Court did not deal with that portion of the First Court's decree, and that therefore they are entitled to have execution of the decree as against these lands."

They concluded this part of the judgment as follows : "We must therefore remand the case to the Lower Court for an enquiry

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whether or not the kamat lands, regarding which the decree is sought to be executed, belonged to the family by proprietary right before the purchase by the defendants, or whether they held it under zurpeshgi, as is contended for by counsel for defendants. The parties will be at liberty to adduce evidence on the question."

Acting under this order the Subordinate Judge found that the disputed lands, alleged by the objectors to be kamat, were not shown by any evidence, that could be so called, to have been acquired by them in virtue of their proprietary rights in the mouzas. He found that the parcels were the khod kasht or jote lands of the members of the family.

The present respondents filed their memorandum of objections to the above finding. The appeal was heard by a Division Bench of the High Court on the 11th February 1897. They pointed out that in the former judgment of the High Court, it had been stated that "if the kamat lands were acquired after the family had separated, and formed part of the purchases made by the defendants after Jeyt 1292 (May 1885), then the decree-holders had, under the High Court decree, no claim in respect of this; but that, if, on the other hand, the lands were held by the family independently of the zurpeshgi" (usufructuary mortgage) . . . . "then the plaintiffs would be entitled to execute the decree against those lands," and that the case had been remanded for the Lower Court to carry out the enquiry directed by the remand. That the Subordinate Judge had done as he was directed, and had made his return in favour of the decree-holders. The High Court were of opinion that the latter were bound to show that these jotes Nos. 519 and 520 of Schedule A, Part I, were acquired by the family, either before the first usufructuary lease of the estates of Ramchunderpore and Alibali, or during one of the breaks between one usufructuary lease and another; and that, as the decree-holders had, in the Court's opinion failed to show such acquisition, the appeal must be decreed, and the lands in dispute declared not subject to the decree.

Against this order of the High Court the decree-holders now appealed.

Mr. *J. H. A. Branson*, for the appellants. The appellants

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were entitled to have execution of the decree of the High Court of the 2nd June 1891, which had affirmed the decree of the Subordinate Judge, dated the 25th March 1889, as to the lands in question. These were clearly identified as Nos. 519 and 520 of Schedule A. of the plaint. Neither at the trial of the case before the first Court, nor at the hearing of the appeal by the High Court, had the defendants set up any special defence, or any defence at all, other than the general denial which covered all the property in the end decreed, in regard to the plaintiffs' share of the land afterwards alleged to be kamat and alleged to be owned by the defendants as proprietors of Ramchunderpur and of Alibali, the villages in which the parcels 519 and 520 of Schedule A were situated. Under these circumstances, seeing that the disputed properties were plainly decreed to belong to the plaintiffs, the executing Court had no right to depart from the strict terms of the decree, which it had to enforce. It was not open to the High Court in execution proceedings under that decree to order any variation of it, as the result of further enquiry, whatever that enquiry might disclose. Accordingly the remand order of the 10th August 1893 was not well founded. There was no procedure in the Code adapted to the alteration of a subsisting decree by the action of the executing Court. The decree of the 2nd June 1891 could only be open to appeal or rehearing on proceedings taken for that purpose.

Mr. *C. W. Arathoon*, for the respondents. Although a decree could not be varied or amended by a Court in the execution of it, the matter of construing a decree is a different question. Here the decree-holders and the judgment-debtors differed as to the effect of the exception of the two mouzas from the decree for the plaintiff, the defendants contending that the kamat land comprised in the two mouzas excepted from the decree must be comprehended in the effect of the order giving those mouzas to the defendants. Referring to the judgment of 2nd June 1891, which the decree to be executed followed, it was far from clear that the distinction of kamat land from khod-khast, or jote had been observed; and it might be that it had not been understood. The contention for the respondent was, that the proprietors of the mouza were the only per-

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sons, who could hold the kamat lands comprised in the mauzas (excepted from the general decree in favour of the plaintiffs), on account of the nature of the holdings and the direct relation of the proprietors of the mouzas to the cultivators employed upon the kamat land. The judgment of the High Court should therefore be maintained.

Mr. *J. D. A. Branson* was not called upon to reply.

1901, FEBRUARY 26th. Their Lordships' judgment was delivered by

LORD HOBHOUSE.—*The appellants, who were plaintiffs below,* sued the defendants, now respondents, for their shares of a joint family estate ; and they obtained a decree on the 25th March 1889. The property sued for was described in schedules attached to the plaint. Schedule A. specified every parcel of land by serial numbers and where necessary by quantities, and Schedules I., II., III. contained the same parcels, also specified by numbers and quantities, but classified according to date of acquisition by the family. The decree declared the plaintiffs' right to a share of the properties mentioned in Schedules I., II. and III with the exception of some properties, not now in dispute ; and it ordered that the plaintiffs should be put into possession.

The defendants appealed, and the High Court passed judgment on the 2nd June 1891. After varying the decree of the First Court in some particulars, which will be presently examined, the High Court ordered that, save and except as aforesaid, the said decree should be affirmed. Upon this decree of the High Court proceedings were taken in execution, in the course of which questions have been raised as to certain parcels of land, which are the subject of this appeal.

Part I. of Schedule A. is headed "Schedule of properties such as milkiats (proprietary) and mokurruri interests and houses and kasht (occupancy rights)." No. 519 is described as "kasht lands in mouza Ramchanderpore." Its area is stated as 967 biggahs, 5 cottas, and it corresponds in description and measurement with two parcels entered in Schedules I. and II. under the numbers 21 and 117 respectively. Schedule I., Part II. is headed "List

of properties of the kasht (jote) class acquired, &c."; and the area of kasht-jote land in mouza Ramchunderpore is stated under No. 24 at 755 biggahs 10 cottahs. Schedule II., Part II. is headed "kasht lands and purchased ryoti occupancy rights" and the area of kasht lands in Ramchunderpore is stated under No. 117 at 211 biggahs 15 cottahs. The plots, which make up the areas, are also described in all three schedules by their boundaries and by the names of persons in some way connected with them.

In those schedules therefore is shown twice over, according to different classifications, the exact description, measurement and boundaries of the kasht or jote (the words appear to be synonymous) lands sued for in mouza Ramchunderpore. The mouza itself was also claimed in the suit; and it appears as a separate subject of claim, described as such without any measurement or boundaries in Schedule I., Part I. No. 6, Schedule II., Part I. No. 31; Schedule III., Part I. No. 289 and in Schedule A., No. 597 and other numbers.

Other parcels of kasht land are situate in Mouza Alibali containing in the whole 257 biggahs 7 cottas. It is sufficient to say of them, that they and the mouza itself are entered in the Schedules I. II. III., and A. just in the same way as has been shown for Ramchunderpore and the kasht lands within it.

The plaintiffs clearly sought to recover the two mouzas and also certain well defined parcels of land situated within the limits of the mouzas and held by some species of subtenure or recognised mode of enjoyment; and clearly the Subordinate Judge affirmed their title to all the properties, as described in the schedules. The High Court held that the plaintiffs were not entitled to the mouzas, but only to part of the funds employed in acquiring them. In varying the Subordinate Judge's decree they struck out so much as awards to the plaintiffs Nos. 306 and 308 mentioned in the schedule, and also certain other numbers not shown in the portions of the schedules inserted in the present record, and apparently not material to the present purpose. The schedule referred to by the High Court is Schedule III, and Nos. 306 and 308 are numbers denoting the two mouzas Ramchunderpore and Alibali. The numbers denoting the kasht lands within the two mouzas are left untouched.

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In the execution proceedings the defendants alleged that the parcels sued for as kasht land are kamat land; that kamat land can only belong to the proprietors of the mouza, in which it lies, and that, as the plaintiffs' claim to the mouzas had been negatived, they could have no claim to the parcels in question. The Subordinate Judge pointed out, how the case stood upon the pleadings and decrees; intimated that it was not for him to inquire how the High Court would have acted, if it had been proved that the land claimed as kasht was really kamat; and held that the plaintiffs must get possession according to the decree under execution. Accordingly he passed an order for execution on the 9th April 1892.

The defendants appealed, and, by order of the 10th August 1893, the High Court remanded the case for further inquiry. They treat the lands sued for under the title of kasht as being kamat; and they say that the High Court decree of June 1891 makes no reference to these kamat lands: and that the Court while disallowing the plaintiffs' claim to the mouzas, did not make any declaration as to their right to the jotes. They cannot say, whether the lands are included in the decree or not.

This inability is not intelligible to their Lordships except on the hypothesis that the documents were presented to the Court in some imperfect fashion. As they stand in this record, nothing can be plainer on their face, than that the High Court of 1891 deprived the plaintiffs of certain scheduled items bearing numbers, which denoted the mouzas, and awarded to them other items bearing numbers, which denote kasht or jote lands lying within the ambit of the mouzas and defined by measurements, boundaries and personal names. It is nowhere suggested that there is any difficulty in identifying the parcels so awarded. To say that the plaintiffs shall not have them, because in the process of execution the defendants raise a new question as to the nature of their relation to the mouza, is to rehear the decree, not to execute it.

The learned Judges conclude as follows:—

"We must therefore remand the case to the Lower Court for an enquiry whether or not the kamat lands, regarding which the decree is sought to be executed, belonged to the family by proprietary right before the purchase by the defendants, or whether they held it under zurpeshgi, as is contended for by counsel for defendants. The parties will be at liberty to adduce evidence on the question."

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On this remand the Subordinate Judge, the successor of the Subordinate Judge of April 1892, took a large amount of evidence, and made an order on 12th January 1895. He referred again to the earlier proceedings to show that the lands, being claimed as jote or kasht, were not suggested to be kamat, till after the decree of June 1891. On the evidence he found that they are actually jote. On appeal the High Court came to a different conclusion and on the 11th February 1897 they made an order dismissing with costs the plaintiffs' application as to these lands.

Their Lordships have not examined the evidence taken on remand, so far as to form any clear conclusion of their own, as to the character of the parcels in dispute; but the judgments below show that it cannot be put higher for the defendants than as a very doubtful matter. It is not necessary for them to decide it, because, as the foregoing remarks have shown, it is concluded by the decree of June 1891, affirming the decree of March 1889. To re-open the question in execution was an error of procedure; and one of a substaintial kind, calculated to cause great irregularity in the conduct of suits.

In the judgment of their Lordships the proper course will be to discharge the orders of the High Court, dated 10th August 1893 and 11th February 1897, and that of the Subordinate Judge dated 12th January 1895; and to direct that the defendants shall pay to the plaintiffs all costs of the litigation subsequent to the Subordinate Judge's order of 9th April 1892. Their Lordships will humbly advise His Majesty in accordance with this opinion. The effect of the discharges will be to set up again the Subordinate Judge's order of 9th April 1892, which indeed the High Court did not disturb in any respect, but that of the kasht lands.

The respondents must pay to the appellants the costs of this appeal, including those of an application made by them for delay on the ground that an appeal preferred by them from the High Court decree of June 1891 was pending before this Board.

Appeal allowed.

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

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

C. B.