*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Sri Mahant Govind Rao* v. *Sita Ram Kesho and others* (*an Appeal and Cross-Appeal consolidated*), *from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 24th June* 1898.

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Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The question raised in these appeals arises out of transactions following on the merger of the Native State of Jalaun into the dominion of the East India Company. The earlier history of the case, which goes back so far as the year 1840, is stated both succinctly and lucidly by the learned Chief Justice of Allahabad, and their Lordships need not re-state it except in bare outline until they come to the documents on which the Courts have differed. There has been very little dispute as to matters of fact; and now, as the appeal to the High Court was a second appeal, the facts found by the Commissioner of Jhansi, the First Appellate Court, are conclusively found; but the three Courts below have taken different views as to the proper treatment of the case upon those facts.

The property in dispute is the riasat or estate of Gursarai, consisting of 60 villages and some other particulars. It was part of Jalaun,

one of the subordinate Mahratta States or chieftainships within the large territory of Bundelcund, the sovereignty of which passed to the Company by treaties with the Peishwa. The chieftainship was continued to the existing chief, called the Rao, and to his family, which became extinct in the year 1840. The estate of Gursarai was managed for the chief by Dinkar Rao, the head of a noble family, till his death in 1831. He had two sons Balkrishen and Kesho. Balkrishen, having no issue, adopted his nephew Atma, one of Kesho's sons; and he died about the time of the change of dominion. When the Company's officers came to make the requisite arrangements they found Kesho in occupation of the estate.

It is conclusively established in this suit that Dinkar Rao and his sons had no proprietary interest in the estate; they were only managers, accountable to their Chief for the revenues and bound to deal with the estate as he ordered. It is probable that the officers of the Company who came to deal with the Jalaun lands were, as both the Deputy Commissioner and the Commissioner of Jhansi have intimated, under a misapprehension on this point, and thought that Kesho enjoyed some proprietary holding on a favourable rent, called locally an obari tenure. We need not examine this hypothesis very closely. It would account for some inaccurate expressions which occur in the official correspondence, but it does not affect the official acts of the authorities. Kesho made himself acceptable to the British Government and, though no sunnud or grant of any kind was made to him, his possession of Gursarai was continued, and his jama was assessed at the low rate of Rs. 22,500.

The earliest official document in the Record which relates to Gursarai is a letter dated 8th October 1852 from the Government of India to

the Bundelcund Agent (Rec. p. 47). The material passage is as follows :—

"Case No. 1, Book 7.—Family arrangements of this descrip-
"tion, His Lordship in Council observes, particularly where no
"deeds are executed, are in general open to revision on the
"death of incumbents. The present incumbent has done good
"service, and his rights should not be touched during his life-
"time, but on his death, His Lordship in Council desires the
"case should be reported for orders."

There is no clue to the meaning of the terms "family arrangement" and "his rights." There may have been, as above observed, some misapprehension. But the important point to mark is that whatever benefit was given to Kesho the present incumbent was for his life only, and that everything beyond that was reserved for further orders.

Kesho has had seven sons. The eldest, Tantia, rebelled in the year 1857, but he must have made his peace with the Government afterwards, though not admitted to favour. The second, Jey, is dead and is represented in this suit by his adopted son Madho one of the Plaintiffs. Atma was the third. He was the sole Defendant in this suit, and Appellant in the first appeal to the Queen in Council, but he has since died and has been replaced by his eldest son Mahant Gobind. The four younger sons are Plaintiffs in this suit. Two of them were born subsequently to the transactions now about to be mentioned.

On the 31st July 1866 Atma and his four then existing brothers signed an agreement to the effect that Atma, being the descendant of Balkrishen the eldest son of Dinkar, was sharer of half the riasat, and the four others were sharers in equal shares of the other half (Rec. p. 50). This agreement is of no legal validity in itself; if only because it was not registered; but it is of importance as leading up to and explaining that which has legal validity.

On the 4th August 1866 Major McNeile, then Commissioner of Jhansi, wrote to the

Provincial Board of Revenue intimating that Kesho was anxious to obtain the orders of Government regarding the terms on which his estate was to descend to his sons (Rec. p. 90.) The letter relates not only to Gursarai but to other villages which it seems had been granted to Kesho for his loyalty during the Mutiny. The writer mentions the agreement between the brothers thus :—

"All parties interested in the matter have consented that "Atma Ram shall take half the estate on his father's death and "the other four brothers one-eighth each, and this may be "considered as finally adjusted."

He then goes on to suggest what shall be done with what he calls the quit-rent, meaning the obari or reduced jama. He goes into many particulars which need not be detailed now because they are summed up in a document of higher authority, which was not produced to the two lower Courts but was before the High Court.

That document is a letter from the Board of Revenue to the Government of the North-West Provinces (Rec. p. 143). The material passages are as follows :—

"The Raja's eldest son, who was a rebel in 1857, has been "set aside by a family arrangement, duly executed by all "parties and attested before the Deputy Commissioner; and "Atma Ram, the third son of the present Raja, has been "declared to be the heir to the Raj by virtue of an adoption on "the part of his uncle, the late Raja.

"The rebel son of the present Raja is consequently excluded "from the succession, and there would therefore appear to be "no reason why the Government should not authoritatively "declare its intention in regard to the tenure upon which the "estate is to be held after the death of the present Raja."

"The proposals submitted by the Commissioner, and to 'which the Board see no objection, are as follows :—

"The family compact is that Atma Ram shall succeed to the "Raj and to one-half of the estate as adopted son of the "late Raja Balkrishen.

"That the other four sons of the present Raja shall each "take one-eighth of the estate.

"The Commissioner's proposals in regard to the estate, are :—

"1st. That the villages in Jalaun, granted in reward for the "loyal services of the family, be at once resumed.

"2nd. That on the death of the Raja, the present obari *jama*
" be raised from Rs. 22,500 to Rs. 25,000 per
" annum, and be continued to the family in
" perpetuity.

"3rd. That this obari grant be continued on the condition of
" the estate remaining in joint undivided possession
" of the family, and that if any member of it should
" cause his share to be divided off, such share be
" liable to assessment at full *jama*.

"4th. That Atma Ram be recognised as the heir to the title
" and privileges enjoyed by the present Raja, the
" latter (privileges), which consist in the exercise of
" police and judicial powers, to be dependent upon a
" proper exercise of them by the Raja for the time
" being."

It may be observed here that the chieftainship of Atma in succession to Kesho, did not form a term of the written agreement between the brothers, nor does it seem to have been at this time the wish of Kesho himself (Rec. p. 53). But both Kesho and his sons recognized Atma as the son of Dinkar's eldest son; and in later years Kesho treated him as head of the family.

There are no letters in the Record showing the transmission of the proposals through the regular stages to the Governor General in Council, and to the Secretary of State in Council. They were probably pure formalities. The answer of the Secretary of State is dated 25th February 1867, and is as follows:—

" Having considered in Council the letter of Your Excellency's
" Government, No. 190, dated 23rd November 1866, in which
" you suggest the continuance to the loyal members of the
" family of Kesho Rao Dinkar of Gursarai in Bundelkhand,
" of the entire estate now held by him, on the term set forth
" by the Board of Revenue of the North-West Provinces and
" Commissioner of the Jhansi Division, I have to signify to
" you the ready assent of Her Majesty's Government to the
" indulgence now accorded to the family of this meritorious
" chieftain.

" You will of course take measures to prevent the
" occurrence, on the death of the aged chief, of any dispute
" relative to the succession of the second son."

Nobody has doubted that by the term "second son" Atma is meant. It is to be observed that this letter is not only the effective source of

whatever title Kesho's descendants have, but is also the most accurate statement of the true nature of the grant to them. Previous documents in 1852 and 1866 use some inapt and inaccurate expressions such as "family agreements" "rights" "descent" of the estate, and so forth. The facts as we now know them were, that such grant as was made or can be implied to Kesho was for his life only; that there was no heritable interest to descend; that the reversion was vested absolutely in the Secretary of State in Council; and that his grant is described with exact precision as a continuance to Kesho's family of the estate then held by him, and as an indulgence to them, on account, it is hinted, of his merits.

The record contains other letters which passed between Kesho, Atma and the officers, but they do not give any additional light unless it be to show that Kesho himself was quite conscious that the enjoyment of the property after his death was entirely in the discretion of the Government, only he claimed favourable consideration on account of his services. He lived long, and died in the year 1880. In 1878 or 1879 he entrusted the management of the estate to Atma, and declared him in a formal letter to be head of the family (Rec. pp. 96, 97). Some family disputes occurred, but were composed, at least for the time, by the officials. On Kesho's death Atma took, or more probably retained, possession. The Government accorded the title of Raja to him, and the jama of the estate was raised, as intended, to Rs. 25,000.

How soon afterwards disputes took their present form is itself a matter of dispute, but at some time Atma refused to allow that his brothers owned shares in the estate, and they commenced this suit in March 1887. The Plaintiffs claim the entire estate, as having been acquired by and inherited from Kesho; omitting mention of

Tantia, and claiming to exclude Atma on the score that he had been adopted by Balkrishen. They refer to the agreement of 1866, but only to contend that it is void. The Defendant Atma also claims the whole estate on the ground that it belonged to Balkrishen and had descended from him. He referred to the agreement of 1866 and to some order of Government in so obscure a way that it is difficult to know what he founds upon them. In fact both sides put forward unsustainable claims, and neither put forward the true case. When however the issues came to be settled the effect of the proceedings of 1866 was brought into question. The issue was not clearly defined, but it was clear enough for both parties to go fully into evidence, and for the Courts to treat it as being the substantial point of dispute in the case.

The Deputy Commissioner who formed the Court of First Instance shows that the family of Dinkar Rao were simply managers, and that the Plaintiffs failed to prove any grant except that of the Secretary of State, which he calls the sanad on which the Defendant bases his claim to succession. He dismissed the claim with costs.

On appeal the Commissioner found (Rec. p. 144) that the estate was acquired by Kesho, and that the Plaintiffs as heirs of Kesho had a title superior to that of the Defendant; and he decreed accordingly. His view, to state it very briefly was, that in some way not now apparent the ownership of the estate had become absolutely vested in Kesho, and that the official correspondence and acts in 1852 and 1866 are explained by confining the discretionary action of the Government to the obari or favourable jama. That view has been supported by Mr. Cowell in argument at this Bar. It is true, as before observed, that some expressions in official letters tend to imply that the writers ascribed to Kesho some proprietary interest which it is

shown that he did not in fact possess. It is also true that the estate and the jama are not always clearly distinguished. But their Lordships find it impossible to read even one of the material letters without seeing that it refers to both estate and jama; and the correspondence as a whole would lose the greater part of its meaning if it were supposed that the Government was not exercising the discretion which it had to determine how the estate should be enjoyed after Kesho's death.

To this effect was the opinion of the High Court which reversed the decree of the Commissioner and dismissed the suit, but with a declaration the effect of which and the reasons for it are explained in the following passage at the end of the judgment of the learned Chief Justice :—

"I would allow this appeal with costs, and dismiss the suit "with costs in all Courts, with this exception that in order if "possible to prevent further litigation between these parties, "I would make a declaration, but without costs, that the "Defendant Atma Ram is entitled to a moiety only of the "Gursarai estates, and that the Plaintiffs *inter se* are entitled "to the other moiety. It is true that no such declaration was "asked for in the plaint, and that, as a general rule, according "to the decisions of their Lordships of the Privy Council "which have been cited to us, a relief a right to which is not "disclosed in the plaint, and which is not asked for in the "plaint, should not be granted. Mr. Reid, who has appeared "before us on behalf of the Plaintiffs, has pressed us to make "a declaration, declaring the rights of the parties in the "Gursarai Estate, and has informed us that the Plaintiffs "raise no question of their rights *inter se*. Mr. Reid also "asked us for a decree for possession to the extent which "might be covered by the declaration which we might make. "This latter request we should not, in my opinion, accede to. "The estate has not been partitioned and this is not a suit for "partition. Should the estate be partitioned, then the "Plaintiffs can get possession of those portions of the estate "which may be allotted to them on partition."

The Defendant's appeal is for the purpose of getting rid of this declaration.

Their Lordships quite agree with the High Court that as a rule relief not founded on the pleadings should not be granted. But in this

case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule. As between Plaintiff and Defendant the case has been thoroughly tried out. Indeed Mr. Mayne for the Defendant does not now dispute that the other members of the family are entitled to a moiety. It is quite right to make a declaration on the subject. But then their Lordships think that the terms of the declaration may be advantageously modified, and that the Court may found on the declaration an inquiry into the Plaintiffs' title.

According to the letter of the 17th August 1866 paragraphs 6 to 10 (Rec. p. 148) the persons entitled to the four shares, each to a separate share, are "the other four sons of the "present Raja." Two of those sons are Plaintiffs, and one being dead is represented by his adopted son who is a Plaintiff. Tantia the eldest is passed over in silence. But under the family compact which is the basis of the grant, Tantia takes a share. It was his claim by primogeniture which was set aside, not his claim as a sharer, as is clearly shown by Major Macneile's letter (Rec. p. 91). What has become of his share does not appear. The two youngest sons took no share under the compact. It may be that by agreement of the brothers the Plaintiffs are entitled as their Counsel state, but there is no proof, and no other allegation of it. The declaration should be founded on the grant by the Secretary of State, but that will not of course preclude the effect of any agreement between the brothers by which the younger brothers have

been or may be admitted to a share, or other transfer of interest created.

The same reasons which support the declaration also show the propriety of giving in this suit such effect to the declared title of the Plaintiffs as circumstances may admit. The High Court has made a declaration in favour of the Plaintiffs, but it has dismissed the suit. Neither Atma Ram nor his son has shown any disposition to yield anything which the law does not exact. If the title of the Plaintiffs is still disputed, they must bring a new suit, which would certainly increase expense; and in which, considering the peculiar nature of the grant, the lapse of time, and the uncertainty whether a declaration in a dismissed suit can supply a fresh starting ground, the Plaintiffs would run substantial risks of miscarriage. Instead of dismissing the suit, the better course will be to direct an enquiry who are the persons now entitled, and to reserve further directions, under which it will probably be found possible to place them in legal possession and so to terminate this unfortunate litigation. The High Court has quite rightly refused to make any order for possession under present circumstances.

The decree does not notice the personal position of Atma as head of the family. He is now dead, and it does not appear that the title of Raja or any other position of dignity which the Crown may confer has been conferred on his successor. The provision against partition appears also to concern the Treasury alone, which was not willing to continue the favourable jama to any sharer who would not hold his share in an undivided state.

With regard to costs their Lordships think it just that both parties should bear their own. Both have made excessive demands. The Plaintiffs have persisted in theirs up to the present moment.

The Defendant persisted in his before the three Lower Courts, though in the High Court he made an alternative case that he was at all events entitled to a moiety. Even now, though he does not claim the entirety, his whole appeal is grounded on his objection to any declaration as to the moiety which is not his. And he has excluded his co-sharers at least till the High Court judgment was delivered, if not later.

Though their Lordships agree with the High Court on the substance of the case, and indeed are doing little more than to apply the views of the learned Judges in a more ample way, it will be simpler in point of form to discharge their decree and to substitute a decree to the following effect:—Reverse the decree of the Commissioner of Jhansi. Declare that the Defendant Atma Ram was entitled to a moiety only of the Gursarai estate, and that his successors in title are now entitled to a like moiety. Declare that the other moiety belongs to the persons entitled thereto by virtue of the letter of the Secretary of State in Council dated 25th February 1867 and according to the terms of the letter of the Board of Revenue dated 17th August 1866 (that is to say) the four brothers of Atma then living referred to in the last-mentioned letter or those who represent them in title. Enquire who having regard to the above declaration are either directly or by inheritance transfer agreement or otherwise entitled to the last-mentioned moiety. Declare that as regards all proceedings in the Courts below, the parties are to bear their own costs respectively. Reserve further directions, and costs subsequent to this decree.

As regards these appeals both parties are in the wrong and they must bear their own costs.