

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Udwant Singh and Others v. Tokhan Singh and Others, from the High Court of Judicature at Fort William in Bengal; delivered 26th February 1901.*

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD LINDLEY.

SIR RICHARD COUCH.

[*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. (Rec. p. 266.)

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. (Appendix p. xxii) is headed "Schedule of properties such as "milkiuts (proprietary) and mokurruri interests "and houses and kasht (occupancy rights)." No. 519 is described as "kasht lands in Mouza "Ramchunderpore." Its area is stated as 967 beegahs 5 cottas, and it corresponds in description and measurement with two parcels entered in Schedules I. and II. under the numbers 24 and 117 respectively. Schedule I. Part II. (Appendix p. xii) 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 beegas 10 cottas. Schedule II. Part II. (Appendix xv) is headed "kasht lands "and purchased ryoti occupancy rights" and the area of kasht lands in Ramchunderpore is stated under No. 117 at 211 beegas 15 cottas. 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 these 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 measurements or boundaries in Schedule I., Part I. No. 6 (Appendix p. xi), Schedule II. Part I.

No. 31 (Appendix p. xiv), Schedule III Part I. No. 289 (Appendix p. xix), and in Schedule A. No. 597 and other numbers (Appendix pp. xxii to xxv).

Other parcels of kasht land are situate in Mouza Alibali containing in the whole 257 beegas 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, (Rec. p. 35), 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 (Appendix p. xxv). The numbers denoting the kasht lands within the two mouzas are left untouched.

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.”

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 reopen the question in execution was an error of procedure; and one of a substantial 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.

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