*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rai Nursingh Doss* v. *Rai Narain Doss and others, and Rai Narain Doss* v. *Rai Nursingh Doss, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 21st July* 1876.

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Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS Appeal and cross Appeal have arisen out of the peculiar and somewhat complicated arrangements of a Hindoo family descended from one Rajah Putnee Mull. The Rajah had two sons, Sree Kishen and Ram Kishen. Sree Kishen was the father of the Plaintiff in the suit, Rai Nursingh Doss, of Rai Narain Doss, who is the principal Defendant, and of a third son, Hurree Doss, who died in his father's lifetime. Seeta Ram and the other Respondents, who have not appeared on the Appeals, are the descendants and representatives of Ram Kishen's branch. It may, their Lordships think, be taken to be established for the purposes of these Appeals that the descendants of Ram Kishen have become generally separate in estate; although, in respect of certain properties, viz., the banking firm afterwards mentioned and the other properties which remain undivided, they continue to be joint with the Sree Kishen branch. On the other hand, their Lordships think it must be taken to be also established that Nursingh Doss and Narain Doss have

continued to be generally joint in estate. There is no evidence that the two brothers have ever come to a formal partition. On the other hand, it appears that on those occasions on which there has been a partial partition of family property between the two branches of the family, the properties to be divided were divided into eight lots, of which four were taken by Narain Doss and Nursingh Doss jointly, or by Narain Doss for himself and his brother; but that there has been no subdivision of those lots between them. It also appears that up to a comparatively recent period they messed together, and were joint in food and worship, as well as, generally speaking, in estate.

With respect however to the whole of the family, it seems clear that the joint family property has chiefly come out of the transactions of a certain trading or banking firm founded by the common ancestor, Putnee Mull, under the style of "Rai Sreekishen and Rai Ramkishen," and that the interests of the different members of the family in this firm have for a long period been upon a somewhat peculiar footing. It appears that in Rajah Putnee Mull's lifetime he either estimated the assets of the firm at four lacs, or separated and set aside that sum; that he divided two lacs of this between Sree Kishen and his three sons, and the remaining two lacs between the four sons of Ram Kishen, who was then dead, placing to the separate account of each in the books of the firm the sum of 50,000 rupees. This is said upon the one side to have been merely an indication of the share and interest which in the event of a partition each was to take. On the other hand, it has been contended, and that contention is certainly supported by the accounts, that it was intended to give to each a separate interest, and a power of drawing upon separate

account, which is not ordinarily possessed by the members of a joint and undivided Hindoo family carrying on trading transactions.

The relations of the members of the firm, however, do not depend solely on this arrangement of Putnee Mull, whatever be the effect of it. Upon the 19th of May 1845, after the decease of Rajah Putnee Mull, but during the lifetime and management of Sree Kishen, a family council was held, at which the adult members of the family agreed to the document at page 165 of the Record, upon which so much discussion has taken place. That document, after reciting that the general expenses of the family had hitherto been defrayed by Sree Kishen, but that objection had been taken to this extravagant expenditure upon the occasion of the tonsure of Lakhmi Chund, states, "It was consequently resolved "by all that from and after the month of June "1845 each member should bear his own ex- "penses, and that the messing, as well as "servant's charges, should at present be left "as they are. Whereupon all objected that "the interest of Rupees 50,000 only would not "be sufficient; they should therefore be allowed "the liberty of drawing in their respective "names from the firm any sum of money they "liked, and getting the same entered in their "respective accounts." Of course, if the instrument had stopped there, it might be supposed to relate only to sums to be drawn for private expenditure; but it goes on, "each is at liberty to carry on his own business, "and to defray each his own expenses out of "the profits arising therefrom. Some discussion "having taken place as to interest, it was unani- "mously agreed by all, that if the members "were to be charged with interest at the usual "rate of the firm, they would save nothing, so

" the interest of any sum which may be drawn " should be paid at the rate of 4 per cent., as " was allowed by the Rajah Sahib for the money " deposited. This was agreed to, with the " proviso that as each member will take the " profits arising from his trade, so likewise the " firm will have nothing to do with the loss " sustained by any of them (the members). It " shall be incumbent to repay the sum to the " firm with interest. And the business of the " firm shall continue as before; but if any mem- " ber, contrary to this agreement, shall engage " in any business for the firm without the " permission of all, he alone will be responsible " for the loss, and will have to repay the money " to the firm." Therefore, the effect of this agreement was to entitle each partner to draw money at his discretion out of the firm, and to employ that money in his separate trade or separate speculations, the firm not being responsible for the losses sustained, and not being entitled to share in the profits arising from those speculations; but, subject to this modification, all the members of the family retained the interest which they previously had as joint members of the firm. Indeed, at one of the subsequent meetings of the family, at which a partial division of jewels and other property took place, it was expressly stipulated that the firm should remain joint. That will be found at page 178 of the Record.

It has, their Lordships think, been conclusively established that this document was executed by those by whom it purports to be executed, and that it was afterwards acted upon. Two points however are taken by the Plaintiff in the suit. He says that he, being a minor, was not a party to this document, and has more or less contended that he was not bound by the arrangement which it embodied. He further contends that if it is binding upon him at

all, it is only binding upon him as a member of his branch of the family, which has continued to be joint, and for whose joint benefit the arrangement must be taken to have been made; that all that was drawn out of the firm under it by Sree Kishen, or afterwards by Narain Doss, and employed by either in separate speculation, must be taken to have been so drawn out and employed by the managing member of the joint family, consisting now of himself and his brother, and that all such separate acquisitions, no matter in whose name they stand, must be taken to be their joint property.

These are the two chief questions raised by the principal Appeal. The District Judge and the High Court have concurrently determined them against the Appellant, in judgments of which their Lordships think it right to remark that both are remarkably able and well considered. Mr. Henderson, the district judge of Benares, in dealing with the first question, after showing that some of the other Defendants, Bishen Chund and others, the descendants of Ram Kishen, had recognised, at all events, the practice established by the roobokaree of the 19th of May 1845, though one disputed his signature to the document, says: "The Plaintiff also in claiming half share "of the acquisitions made with the sums drawn "from the firm by Narain Doss, whether in joint "names or in his own name, to the exclusion "of the other members, does actually con-"cede the fact of such an arrangement,"—an observation which seems to their Lordships to be perfectly unanswerable. He then deals with the evidence of the Gomashtas and the books of the firm, which he finds to be in accordance with that view, and he ultimately finds that the Plaintiff must be taken to have had full knowledge of this arrangement, and that

as a member of the firm he must be taken to have admitted that it was properly acted upon. He then deals with the question between the two brothers, whether the acquisitions of the two are to be brought into hotch-potch and divided equally, and upon the evidence he comes to a conclusion adverse to the Plaintiff. These findings are more succinctly embodied and stated in the judgment of the High Court at page 906 of the Record. They say, "We "therefore concur with the Judge in holding "that the Appellant has recognised and "acquiesced in the arrangement whereby the "individual members of the family engaged in "transactions for their separate benefit with "moneys taken on loan from the firm. It is "shown from his account with the firm, that he "has, in virtue of this arrangement, himself "taken moneys from the firm to make purchases "and carry on loan transactions of which he "derived the whole benefit, and while there is "evidence to show that at one time the "Respondent Narain Doss, had it in his mind "to make his brother a partner with himself "in all his transactions, we find that so long "ago as in the year 1849 he changed his inten-"tion, and asserted his right to treat the "acquisitions made by him as his sole property, "and we also find that the Appellant, although "he had ample opportunity of informing "himself of his brother's proceedings, and was, "as we believe, aware of them, took no "exception to them until the year 1865. "Under these circumstances we hold that the "Appellant cannot now be allowed to maintain "a claim to the acquisitions made by his brother "with moneys borrowed from the firm."

Their Lordships, who, if the case of the Appellant had been stronger than it is, would have hesitated to set aside the concurrent

judgments of the two Courts, upon what is very much a question of fact, feel bound to say, notwithstanding the long and able argument of Mr. Doyne, that the conclusion is one to which they themselves would have come upon the evidence to which their attention has been directed. There is no doubt in this, as in all cases arising between members of a joint family, a good deal of ambiguity as to the character of their dealings; and that ambiguity has been increased by the practice, the reason of which does not clearly appear, of using sometimes the name of one brother when the transaction was in fact the transaction of the other. But their Lordships conceive that the relation of these brothers cannot be taken to be strictly that of the members of a joint and undivided Hindoo family; for although they were joint as to their general concerns, in some sense joint as members of a firm, yet that relation was qualified by the provision that each member of the firm might take out and use assets derived from the firm for the benefit of his sole and separate speculations. It is contended, however, that as between these brothers this must be taken to be only a provision that the brothers might do this jointly for their joint benefit. And it is no doubt shown that for a short time after this young man, Nursingh Doss, came of age, or at all events, for some short time after the father's death, Narain acted upon this footing. But then it is sworn by the Gomashtas, and the Judges have given credit to that evidence, that Narain afterwards determined that he would cease to do so; and thenceforward speculated on his separate account, as, according to the terms of the arrangement, he was at liberty to do. This evidence is confirmed by the fact appearing on the Commissioners summary of the accounts, that while Narain drew out and

employed money on the joint account of himself and his brother, the moneys which he so drew out were debited to the joint account of both brothers; whereas it is perfectly clear upon the evidence of the Gomashtas, and on the face of the accounts, that after a certain date separate accounts were opened for each brother, each being separately debited with the particular sums drawn out for the purposes of the different transactions now found to have been on his separate account. Again, it appears that one transaction was originally treated as the separate investment of Nursingh Doss; but that he, for some reason or other, did not care to retain it; that the other brother took to it; and that thereupon the accounts of the firm were corrected and the sum which had originally been debited to Nursingh Doss was transferred to the debit of Narain Doss.

Now that transfer of account if proved—and their Lordships see no reason to doubt the truth of the evidence given to prove it—is inconsistent with the notion that the brothers used their separate accounts for their joint purposes, putting, as they saw fit, this transaction to one account and that transaction to the other account; whereas it is perfectly intelligible on the theory that the debit in the books of the firm was intended to show on whose separate account the transaction had been made.

Their Lordships, therefore, having given every attention in their power to the case, feel it impossible to dissent from the conclusion of the two Courts, that Nursingh Doss has failed to make out his right to throw his acquisitions and the acquisitions of the other brother into hotch-potch, and to claim an equal division of them; and that, therefore, the general principle upon which the account was ordered to be taken is correct.

There only remain, therefore, to be considered the points raised by the cross Appeal, and though there is some little complication as to the particular transactions to which that Appeal relates, their Lordships are of opinion that the High Court has taken a correct view of them. The agreement which their Lordships have found to be binding on all the members of the firm was certainly a very extraordinary one, leaving it as it did in the power of each member to draw to an unlimited amount upon the assets of the firm, an arrangement of which the abuse could only be corrected by a dissolution of partnership. Their Lordships would not be inclined to extend the operation of such an agreement one iota beyond its terms; and they are therefore of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm. Therefore, as to those profits (which do not seem to be very large or important, further than as involving a question of principle) which have been found to belong to the firm, and of which the Plaintiff can only claim one-fourth, they are not disposed to disturb the decree of the High Court.

The result is that both the Appeals must be disallowed; and their Lordships will humbly advise Her Majesty to dismiss both the Appeal and the cross Appeal, and to affirm the decree of the High Court; and, considering the nature of the case, and that each party has to a certain extent failed, they think that each should bear his own costs.