Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakoor Hardeo Bux v. *Thakoor Jawahir Singh, from the Court of the Commissioner of Seetapore, in Oudh; delivered 9th June,* 1877.

Present:

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

THIS is an Appeal from a Decree of the Commissioner of Seetapore, in Oudh, dated the 10th June, 1872, affirming a decree of the Settlement Officer of that district, dated the 21st of December, 1871.

When the Appeal was called on for hearing, Mr. Doyne, the learned Counsel for the Respondent, took a preliminary objection, and contended that the Commissioner had no legal authority to admit the Appeal. In support of his contention, he referred to the Oudh Civil Courts Act (No. 32 of 1871), and to Act No. 2 of 1863. By the 4th section of the former Act, five grades of Civil Courts in the Province of Oudh were established, of which that of the Judicial Commissioner was the highest. By section 15, clause 3, of the same Act, an appeal from a Decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by section 4 it was enacted that if the Court of First Appeal confirms the decision of the Court of First Instance, such decision shall be final.

By section 1 of Act 2 of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the non-regulation provinces in India, the right of appeal

was limited to final Judgments, Decrees, or Orders made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the Appellant that, as the Judgment of the Commissioner affirming the Judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of Highest Civil Jurisdiction in the province. It should be remarked that, in the Privy Council Appeals Act of 1874, which was passed after the Appeal in the present case was allowed, and which repealed Act No. 2 of 1863, the words "Court of Final Appellate Jurisdiction" are used in place of the words, "Court of Highest Civil Jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of Highest Civil Jurisdiction in the province within the meaning of Act 2 of 1863, notwithstanding the decision of the Commissioner was final. If the Commissioner had reversed the Decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of Civil Jurisdiction in the province—viz., to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of Highest Civil Jurisdiction in any Province," in Act 2 of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of Highest Civil Jurisdiction in the Province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to a higher Court in the province, a Court of Small Causes would be equally a Court of Highest Civil Jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the Appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*,

and that course was assented to by the learned Counsel on both sides and adopted.

Under the special leave a Petition of Appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by Hardeo Bux, the Appellant, and Purbut Singh against the present Respondent. Purbut Singh has not joined in this Appeal.

The Plaintiffs in their plaint stated that during the King's time the Talukas of Bassaindeeh and Sijaolia formed one Taluka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned Taluka Sijaolia from Bassaindeeh; that Taluka Bassaindeeh formed the share of Havanchal Singh, father of Hardeo Bux, Plaintiff, Fateh Singh, father of Parbat Singh, Plaintiff; and Bhawani Singh, father of Jawahar Singh, the Defendant; that the Plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the Defendant treated them as his superiors, and never interfered in the affairs of the estate; that Defendant's father was junior, and was treated by the Plaintiffs' fathers as if he were their own son; that they (the Plaintiffs' fathers) got the Kabooliat executed in his name with the view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said Taluka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living together and their expenses paid out of the profits of the same estate; that the Plaintiffs had continued to enjoy the possession of the Taluka while the Defendant had been the Kabooliatdar; that as the Defendant was Kabooliatdar the Sunnud had been granted to him; that for one or two months, the Defendant had, under the Sunnud, given rise to enmity, and intended to dispossess them, and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right, while the said Sunnud did not contemplate to destroy the rights of the Plaintiffs; that in the arbitration case of Bishashar Bux and Ganga Bux,

Talookdars of Sorara, the Defendant had, in his own deposition, stated that in case of his (Defendant's) brothers claiming their shares he would not decline to give them their shares; that the Defendant had altogether forgotten this written admission. Wherefore the Plaintiffs prayed that, after proper inquiry, orders be passed that they be not deprived of their right.

In their written statement dated the 6th October, 1865, at p. 32 of the Record, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th September, 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that under the conditions laid down in the Sunnud, in cl. 2, Circular 2 of 1861, the Government of India, letter No. 23, dated the 19th of October, 1859; and Circular No. 6 of 19th June, 1861, justice be done to them, and that they might not be deprived of their right.

The Defendant, in his written statement, alleged that the Taluka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kabulyat; that he had held possession without any one as co-sharer; and that he of his own free-will had been assistiug his near relations with food, &c. without their having any right; and that a summary settlement had been made with, and a Government Sunnud granted to him alone (see Record, p. 41).

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the Defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the Defendant was protected by Act No. 1 of 1869. He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the Plaintiff relating to another matter, the Financial Commissioner stated, "That the Defendant was protected by his Sunnud; that the Plaintiffs could get nothing, and that it was perfectly useless their continuing litigation" (Record, pp. 95, 96).

The Plaintiff Hardeo Bux appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the Appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. (Record, p. 100). Subsequently, upon an application by the Plaintiff to the same Commissioner for a certificate that the case was a fit one for Appeal to the Privy Council, the Commissioner made the following remarks :—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on an application from the Appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to Talukas in Oudh previously taken by the Courts of the Financial and Judicial Commissioners; and, though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the Appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this Order will be filed with the Record."

The suit was commenced long before Act 1 of 1869 was passed, viz., as far back as the 28th of August, 1865, but the Judgment of the Settlement Officer, the Court of First Instance, was not pronounced for upwards of six years afterwards. Some of the proceedings which were taken in the meantime are detailed in the Judgment of the Settlement Officer, and well might he describe them as "most extraordinary!"

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March 1858, which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th October,

1859, set out in the 1st Schedule to Act 1 of 1869, it was declared that every taluqdar, with whom a summary settlement had been made since the re-occupation of the Province has thereby acquired a permanent hereditary and transferable proprietary right in the Taluqa for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the Taluqa.

By section 3 the Governor-General in Council desired that the Chief Commissioner of Oudh should have ready a list of the Taluqdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, viz., on the 24th April, 1858, a summary settlement of the lands had been made with the defendant. He was consequently included in the list of Taluqdars, and a Sunnud was granted to him. After the passing of Act 1 of 1869 he was also registered in List No. 1 under Act No. 1 of 1869, section 8, and also in List No. 5 (Oudh "Government Gazette," August 7th, 1869).

The order for the summary settlement with the defendant was made by Colonel Barrow, the then Special Commissioner. The Defendant, in his application for the summary settlement, stated that he had no partner other than the Plaintiff Hardeo Bux.

On the 4th April, 1866, pending the investigation of the case, the then officiating Settlement Officer, Mr. Wood, the Court of First Instance, wrote to Colonel Barrow, the Commissioner of the Lucknow Division, a letter, of which the following is a copy (p. 85);—

"Sir,

"You doubtless recollect Thakoor Jawahar Singh, of Bassadhee, who was rewarded for his loyalty during the late disturbances.

"2. I find that you, as Special Revenue Commissioner, on re-occupation directed that the Thakoor was to be admitted to engage for his Taluka.

"3. In Statement A, the Thakoor admitted to you that his cousin, Hardeo Bux, was his sole co-sharer. Notwithstanding this admission, you directed that settlement was to be made with Jawahar Singh. Do you recollect whether you intended such settlement with him alone, as Sadur Malgoozar, as a matter of convenience,* and that Hardeo Bux, the acknowledged co-

* Circular 6 of 1862, par. 6.

sharer, was to be recognized at this settlement according to the nature of the rights.

"4. An early answer will oblige."

To that letter Colonel Barrow, on the 8th April, 1866, sent the folllowing answer :—

"Sir,

"Referring to your letter without No., dated 4th instant, in the case of Thakoor Jawahar Singh, of Bassadhee, I have the honour to request you will be so good as to forward to me the Summary Settlement file with Special and Chief Commissioners' orders thereon, as it will enable me better to remember the circumstances, if I see what was written.

"2. It is within my recollection that settlement was made solely with Jawahar Singh, because he had given active assistance to Government in 1858."

Subsequently, on the 25th September, 1866, Colonel Barrow wrote to the Settlement Officer as follows (p. 86) :—

"Sir,

"I have now received the vernacular papers of the summary settlement of the estate of Jawahar Singh, of Bassadhee, and regret they do not afford much information.

"2. Jahawar Singh was one of those who early tendered allegiance after the rebellion, and afforded active assistance to the British Government. I have little doubt but that, in consequence of this, the estate was conferred on his name alone, and it was the meaning and intention of the settlement of 1858, not only to have but one head in each estate, but that those estates should remain for ever undivided. This latter condition, as you are aware, was departed from under the orders of the Governor-General making all estates heritable and transferable, under which order Talukdars can now divide and will away their villages as they like. It is a question, though, whether any one can or not be admitted to share in a Taluk.

"3. The policy of the summary settlement was to create and maintain large and undivided estates, a system, I believe myself, admirably suited to this country, but, as that is no longer possible, there can be no reason why sharers should be barred, and provision ought to have been made for their cases by those who departed from one of the principles of the settlement of 1858-59."

Upon the receipt of that letter, the Settlement Officer being, as he stated, at a loss how to proceed, recorded a memorandum dated 23rd October, 1866, and forwarded it on the same day to the Commissioner of the Seetapore Division for orders. The following is a copy of the memorandum (Record, p. 87) :—

"At length I have received Colonel Barrow's reply to my letter of the 4th of April last. The delay arose from his not

having received the Summary Settlement file from the Financial Commissioner's Office.

"As I am at a loss how to proceed with this case, I submit the proceedings for the orders of the Commissioner, as to whether such a claim is cognisable or not under existing circulars.

"I must state that, in the case marginally noted,* it was proved beyond a doubt that a division of the Taluka was effected about twenty years prior to annexation, when four of the seven brothers held their share jointly in common, and three held their share in like manner. The Commissioner will see *that the parties to the suit had lived together as an undivided family up to last year*, when, through an accident (the Sadar Monsarim's Report, under Circular 37 of 1864), a dispute broke out, and Jawahar Singh broke off his connection with his cousins.

"I beg to refer the Commissioner to the vernacular papers filed by the Plaintiffs, including an attested copy of Jawahar Singh's statement as an arbitrator in the case marginally noted,† wherein he admitted the Plaintiffs' right to separate their shares if they desired it.

"As I am seeking the Commissioner's instructions in the case, I withhold the expression of my opinion on the merits of the claim.

"*October* 23, 1866."

Three months after the date of the memorandum the Commissioner sent it to the Financial Commissioner in a letter dated 22nd January, 1867 as follows (p. 88):—

"Sir,

"I have the honour to submit for orders a memorandum, dated 23rd October, 1866, with annexures from the Officiating Settlement Officer, Seetapur, respecting the claim of Hardeo Bux to a share of Taluka Bassadhee, for which Jawahar Singh holds a Sanad.

"2. Some of the villages held by Jawahar Singh under the Sanad are ancestral, some acquired, while others again, having been decreed to Jawahar Singh at Regular Settlement, are not covered by the Sanad. Jawahar Singh admitted before Colonel Barrow, on the 24th April, 1858, that his cousin, Hardeo Bux, was his sharer. This admission was made on the Summary Settlement Statement, and manifestly referred to the whole estate, and not as Jawahar Singh now pleads, to a single village. Further, in the case of Gunga Bux and Bishashar Bux, Jawahar Singh deposed, on the 7th July, 1859, that it was the custom in his family to allow partition, if any sharer desired it, and several partitions were made prior to annexation, showing that this has erroneously been considered a Taluk.

"3. The Settlement Officer made a reference in this case to Colonel Barrow when Commissioner of Lucknow (*vide* his

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* Darrao Singh, &c., *v.* Khurram Singh.

† Bisheshur Bux *v.* Ganga Bux.

replies, No. 597 of 6th April, 1866, and No. 1913 of 25th September, 1866), which show that Jawahar Singh has some special claims, as having been one of the first to tender his allegiance, and as having rendered active assistance to Government ; but, as the Settlement Statement of April 1858 contains a distinct admission by Jawahar Singh that Hardeo Bux was his sharer, the question arises (*vide* paragraph 6 of Settlement Circular No. 6 of 1862) whether the settlement in the name of Jawahar Singh only and the grant of a Sanad to him bars the claim of Hardeo Bux to a share? I recollect that a case was referred to Government in 1862, in which it was held that a settlement had been made with a Rannee as Saddar Malgoozar only, but the particulars may have differed in some respects."

To that letter the Officiating Financial Commissioner on the 26th January in the same year sent the following reply (p. 90) :—

"Sir,

"In reply to your No. 31 of the 22nd instant, I have the honour to state that the proceedings show that Hardeo Bux got maintenance in the Nawabee ; but nothing on the Record tends to distinctly prove *that he had proprietorship over any particular portion of this estate in the Nawabee*, but, at present, it will not be necessary to enter on the subject of what Hardeo Bux should get as a relative, the Chief Commissioner having under consideration new rules that will provide for Talukdars' relatives who are barred by the Sanad. In the meantime, it would not, perhaps, be a bad plan to give the management of the villages—to the Jamma of which Jawahar Singh objects—to Hardeo Bux, if he accepts the assignment, as he would appear to do.

"2. The general question between the two must remain pending in the Settlement Court until the issue of the new rules. All proceedings are, accordingly, returned."

In the succeeding April the Settlement Officer again applied for instructions, and the Financial Commissioner replied that "no orders could be passed until the measures then under consideration in regard to the claims of co-sharers in Taluqas should be completed." (See Judgment of Settlement Officer, p. 94.)

In consequence of these orders the proceedings appear to have been suspended until the 13th December, 1871, when the Plaintiffs presented a petition praying for final orders. In the meantime Act 1 of 1869 had been passed. The then Settlement Officer took up the case, and on the 21st December, 1871, held, as before stated, that the Plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon

the irregularity of many of the above proceedings. They cannot attach any weight to Colonel Barrow's recollection to which he refers in his letter of the 6th April, 1866. If any information from Colonel Barrow was considered necessary he ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th September 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel Barrow does not appear to have always entertained the opinion that the settlement was made with Jawahar Singh for his benefit alone, for in his Minute, dated 11th April, 1868 (Record, p. 115, and see p. 193), he says :—

"I have been much troubled by this case in many ways, and Jawahar Singh, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and Hardeo Bux. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6, p. 39: "The Courts are open to all and must be guided by their own rules."

Colonel Barrow had no authority to stay until the issue of new rules the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer in his Judgment treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I of 1869.

If the Settlement Officer had acted at once upon

his own Judgment, instead of referring for instructions or orders, the probability is that his Judgment would have been given before Act 1 of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the Plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. 1 of 1869?

In support of the Appeal the case of Thukrain Sookraj Koowar *v.* The Government and Others, 14 Moore's Indian Appeals, p. 112, was referred to.

In that case the Plaintiff's husband, the younger branch of the great Oude family of Bhinga, had up to the time of the annexation of Oudh, been in the undisturbed and absolute possession of an estate called Deotaha, which had been united in the time of the Native Government with the large Talook of Bhinga, of which the Rajah of Bhinga, the representative of the elder branch of the family, was the Talookdar, the Plaintiff's husband paying to the Talookdar his proportion of the jumma assessed upon the whole Taluqa.

Upon the making of the summary settlement in 1858-59, after the suppression of the Mutiny, the Plaintiff was about to apply to the British Government for a summary settlement of the Mehal which belonged to her husband, and which had descended to her. She was, however, dissuaded by the Rajah of Bhinga from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave the protection of her interest to him, and pledged himself that her possession of the Mehal should be respected and safe. The summary settlement was acccordingiy made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire Mehal of the Appellant as part of the one-half of his estates, and the Plaintiff's estate called Deotaha was taken by Government, and the greater part of it made over to Oudh loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th October,

1859, constituted the Talookdar the absolute owner of the whole estate, including the Appellant's estate, Deotaha, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering Judgment Lord Justice James, speaking of the Government letter of the 10th October, 1859, said (p. 127): "In English language it gave the registered Talookdar the absolutely legal title as against the State and against adverse claimants to the Talookdary; but it did not relieve the Talookdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the Appellant was the acknowledged *cestui que* trust of the registered Talookdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in Oudh; and that the cruel wrong of which this lady has been the victim is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under proprietary right being the interest to which the Appellant was entitled at the time of the annexation of Oudh was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the Talookdar prior to the summary settlement to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the Talookdar prior to his obtaining the summary settlement, but merely a representa-

tion by him that he had no partner except the Plaintiff.

In the case of the widow of Shunkur Sahai *v.* Rajah Kashi Pershad, decided in the Privy Council 29th July, 1873, there was also no written agreement signed by the Talookdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of Shunkur Sahai was entitled as co-partner with Rajah Kashi Pershad to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as Talookdar of twenty-six villages, including the seven in which the Plaintiff was interested. In his application for the settlement he stated that in 1264 Fuslee the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. (See Record on that case, p. 45.) In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as Talookdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. (Same Record, pp. 46 and 47.) The Sunnud of the Talookdary, including the seven villages, was under the letter of 10th October, 1859, granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued for proprietary and also for under-proprietary rights. It was held by the Court of First Instance that her suit for the former was barred, by the Sunnud being in the name of Rajah Kashi Pershad only; and that she could not recover under-proprietary rights because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was no ground for holding that the summary settlement and the subsequent order of 1859 conferred Talookdary rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in

many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the Judgment which does not appear to have been yet reported. They say:—

"The construction which their Lordships would put upon the words 'and that the name of Shunkur Sohai's widow be recorded as a shareholder' is not that the Settlement Officer gave or intended to give the widow the right of making a summary settlement as Talookdar but simply desired to place on record for her benefit her admitted benefical interest in some and some only of the villages which made up the settled Talook."—Printed Judgment, p. 13.

* * * *

"Mr. Capper seems to have admitted as to the seven villages that though the Appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the Talookdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed, and that, accordingly, the relation of trustee and *cestui que* trust having so to speak been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a Talookdar under Act 1 of 1869, and has thereby acquired a Talookdaree right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the Talook for another, and be liable to account accordingly.

In that case the *cestui que* trust was a stranger. In this the Plaintiffs claimed as persons constituting with the Defendant a joint Hindoo family.

It appears that the Respondent in his application for a summary settlement in the case now under consideration stated that there was no partner of his other than Hardeo Bux (p. 6), but he said nothing as to Purbut Singh.

On the 22nd March, 1866 (Record pp. 78 and 79), the Plaintiff deposed that he, Purbut Sing, and the Respondent all lived together, *and had everything in common up to January then last*, which was nearly eight years after the date of the summary settlement, and more than six from the date of the Sunnud.

Their Lordships are of opinion that, up to the time of Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the Petitioner, and Purbut Singh, and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th July, 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and Purbut Singh, who were his partners, should claim they could get their shares divided. He said, "They at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property or whether the Defendant merely made an allowance to the Plaintiffs.

The Defendant in his deposition deposed that his statement made at the time of the summary settlement referred to Monza Gungoa only (p. 83). But that seems to be at variance with the statement A, p. 6 of the Record, which refers to the eighty-two villages mentioned in column 3.

The Lower Courts appear to have decided the case merely upon the ground that the Defendant was protected by the Sunnud, without adverting to section 15 of Act 1 of 1869, or inquiring whether, notwithstanding the Summary Settlement, the Sunnud, and the Statute, the Plaintiffs or the Appellant had, either before or after the passing of Act 1 of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to

the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The Defendant's Sunnud is not on the record. They have no evidence of all the circumstances under which the Summary Settlement was made, nor of those under which the Sunnud was granted, nor of what was done with respect to it or the property comprised in it before the registration of the Defendant under Act 1 of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the Respondent has in any and what manner agreed or become bound to hold the villages comprised in the Summary Settlement and Sunnud, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the Appellant and Pertub Singh, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

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