

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Thakur
Debi Singh and another v. Kalka Singh and
another, from the Court of the Judicial Com-
missioner of Oude; delivered February 15th,
1883.*

Present:

LORD BLACKBURN.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

THIS is a suit which was brought by the Appellants for the recovery of possession of seven sixteenths of the ilaqua Baniamow, and for cancelment of Orders dated the 15th December 1875 and 16th of March 1876, as being fraudulently obtained by the Defendants, who are the Respondents in the Appeal. The two Orders in question are those which gave to the Respondents the seven sixteenths of the ilaqua of which they are in possession, and of which the Appellants seek to deprive them. The Order of the 15th December 1875 was passed by the Commissioner of Sitapur, and the Order of the 16th March 1876 was passed by the Judicial Commissioner on appeal, affirming the Order of the Commissioner.

To explain the alleged fraud, a very brief history may be given of the family property which is in dispute and the disputes which have occurred about it. The ilaqua Baniamow was a family property as to which questions arose amongst the members of the family whether it was a partible property, or whether it was impartible, to be held by the head of the family only

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under condition of giving maintenance to the younger branches. When these disputes began the state of the family was this: its male representatives were the Appellants who were sons of Runjeet Singh, and the Respondents who were sons of Khulluck Singh the brother of Runjeet Singh. They were therefore first cousins. Debi Singh the Appellant was the head of the family. His brother Daryao was his only brother, and the Respondents represented the younger branch. The first dispute began between the Appellant Debi and his brother Daryao, and Daryao succeeded in obtaining a decree against Debi on the 3rd July 1865. He did not claim half of the property against Debi, because in consideration of Debi being the head of the family he received one anna more; but Daryao in the dispute between himself and his brother was held to be entitled to seven sixteenths. Debi appealed first to the Commissioner, and then to the Financial Commissioner, against the decree of the 3rd of July 1865, and upon both those appeals he failed. Afterwards he applied for a review of the order of the Financial Commissioner, and in that application he succeeded. So that the effect was that Debi, as far as this litigation in India went, succeeded against his brother Daryao, and was held entitled to hold the whole property, only giving his brother maintenance. That decree was made on the 27th August 1868. There was an appeal to the Queen in Council, but that appeal was not decided till the 4th November 1873.

In the meantime there was a concurrent litigation instituted by the younger branch of the family against the elder branch, and that dispute depended upon precisely the same principles as those which were in question in the dispute between Daryao and his elder brother. This

second litigation, in which the present Respondents were the Plaintiffs, first came before the Assistant Commissioner, Mr. Boys, on the 10th October 1866. At that time Daryao had obtained a decree against Debi not yet disturbed by the action of the Financial Commissioner; and Mr. Boys, following the principle of that decree, gave to the present Respondents a decree against the elder branch, the present Appellants, for seven sixteenths of the property. Debi appealed from that decree, and upon his appeal Colonel Reid, finding that there was an application for review in the concurrent suit pending before the Financial Commissioner, ordered the case to stand over. After the Financial Commissioner had delivered his opinion in the first branch of the litigation, the case came on again before the Commissioner, who was then Mr. Tucker, and he transferred the case to the Settlement Officer for the Orders of the Financial Commissioner, a proceeding which may have been irregular, though in point of substance no doubt he was right in supposing that, as the Financial Commissioner had decided in the case of Daryao against Debi, so he must decide in the litigation by the sons of Khulluck against the sons of Runjeet.

The effect was that Debi was still held entitled to the property, but that he was bound to give maintenance both to his younger brother and to the sons of Khulluck the present Respondents. The maintenance for the Respondents was fixed at 600 rupees, and the Order fixing the maintenance was made on the 15th December 1868. At that time it appears that, Chait Singh being a young boy, Kalka Singh acted for him. In the first instance Kalka Singh objected to the maintenance on the ground that he might prejudice his rights to the estate, but after a year or so

had passed he was what is commonly called starved out. He presented a petition saying he could not hold out any longer, that he was in great distress, and therefore he asked for the maintenance. That maintenance he got, and the next year he and his brother signed a receipt for their maintenance. In the meantime the petition of appeal by Daryao before this Board proceeded, and it was heard on the 4th November 1873. It resulted in a reversal of the decree made on review by the Financial Commissioner, and the restitution of Daryao Singh to the seven sixteenths which were decreed to him by the Lower Courts in India. That put the present Respondents in a totally different position, because the principle applying to them was the same as the principle applying to Daryao, and sometime afterwards the Respondents petitioned the Commissioner to put them in possession of the seven annas share that they sued for. Now that is the document which is stated to be the inception of the fraud committed by the Respondents, and it may be as well to read it. The Petition is this: "That this Court passed an Order in the above case,"—the above case being the suit between the two branches of the family—"on the 5th September 1868, to the effect that Debi Singh's appeal against Daryao Singh regarding a share of ilaqua Baniamow was pending in the Financial Commissioner's Court, and that the Order which should be passed in that case would govern this case also." So far that is perfectly correct. The Financial Commissioner, having modified the Orders of the Lower Courts, passed a decree in favour of Debi Singh; but the Lords of the Privy Council have reversed the Financial Commissioner's decision, upheld that of the Lower Court, and passed a decree in favour of Daryao Singh. Therefore the Petitioners pray

“ that a decree be likewise passed in favour of
 “ applicants for seven annas share of ilaka Bania-
 “ mow, and the case disposed of.”

The Order made upon that petition by Mr. Macandrew was simply that “ the Petitioner
 “ should apply for execution of Mr. Boys’ decree
 “ dated 10th October 1866,” which it is said was kept in abeyance by Mr. Tucker’s Order of 5th December 1868, as it depended on the Privy Council decision in *Daryao Singh v. Debi Singh*, which is dated 20th November 1873. The fraud alleged is that the Respondents did not state on the face of that petition that they had applied for maintenance, and had received maintenance under the Order of the 15th December 1868. Now whether the receipt of that maintenance was a material circumstance in the case has not been argued, for the case did not reach that point; and their Lordships express no opinion upon it. The question which must be decided in the Appellants’ favour, before the argument can usefully proceed any further, is the question whether there was any fraud committed on them by the omission from this petition of the matters affecting the receipt of maintenance. The course that the petition took was this: The Deputy Commissioner, before whom the matter came, considered that he had no jurisdiction in the case, and he dismissed the application with costs. Whether that hearing was *ex parte* or not does not appear; but if it was, no harm was done to the Appellants by the *ex parte* application, because it was dismissed with costs. Then there was an appeal to the Commissioner of Sitapur, Mr. Macandrew. He says that he is unable to understand the reasoning of the Deputy Commissioner, and reverses the Order of the Deputy Commissioner, and orders that the decree holders—that is, the holders of Mr. Boys’ decree,—
 “ will each be put in possession of a three anna

and six pie share of the estate of Baniamow." There again is a dispute whether that hearing was *ex parte* or not. Whether it was *ex parte* or not, what came afterwards was certainly not *ex parte*, because the present Appellants then appealed to the Judicial Commissioner. They state nine grounds of appeal, and they do not state that any fraud had been committed upon them or that they had been taken in any way by surprise; and it is impossible to suppose that if they had felt they were surprised by any *ex parte* proceedings, much more if they had felt there was any fraud in the matter, they would not have put that in the forefront of their appeal. They do state that the Respondent had received maintenance, and that, as he had kept quiet and did not appeal, he cannot now be considered a decree holder. Therefore they raise the question on this Appeal whether the receipt of maintenance would or would not be a bar to the execution of Mr. Boys' decree.

Upon that appeal the Judicial Commissioner decides against the Appellants. He says:—"I decline to admit a second appeal in this case. It is quite clear that effect must be given to the decree of the Privy Council which affirms the rights of the decree holders." Then he says they have been kept long enough in suspense and the appeal is rejected.

Now it is alleged that Mr. Currie, the Judicial Commissioner, did not go into the question upon the appeal; but if that were so, the grounds of appeal were all before him, and the proper course would have been, if he erred in making that decree, to appeal to the Privy Council. That course was not taken, and the decree of Mr. Currie has become a final decree; and now it is sought, in an entirely different proceeding, to set aside that decree for fraud. Their Lordships are unable to see that there is the least ground

for alleging fraud in obtaining that decree. If there was any ground for alleging fraud in obtaining the decree of the 15th December 1875, then that ought to have been alleged either in those proceedings or by some proceeding taken immediately afterwards. The course which the present litigation took ended by the Judicial Commissioner dismissing the suit; and their Lordships think he was right in so doing.

Upon every ground,—that the suit was not brought until the 25th March 1879, that there is no reason to suspect any fraud whatever or any surprise or any concealment, and that if there were this is not the proper mode or the proper time to challenge it,—their Lordships think that the Appeal fails, and they will therefore humbly advise Her Majesty to dismiss it.

The Appellants must pay the costs.

