Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Asghar Ali Khan v. *Kurshed Ali Khan and Another* (*Three Appeals Consolidated*) *from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 27*th July* 1901.

Present at the Hearing:
LORD HOBHOUSE.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Robertson.*]

This litigation between the Appellant and the Respondents has lasted for fifteen years; it has increased in volume and complexity as it proceeded in the devious courses recorded in the printed book; and yet the essential facts are not of unusual complication. It would be unprofitable to recite all the stories, true and false, which have gathered round the transactions of the two brothers, Kurshed and Asghar, and it is only necessary at first to ascertain what were the relations of the one to the other out of which the disputes have arisen.

First of all then, in 1875, the uncle of the two brothers, Husain Ali Khan, paid to the elder of them, Kurshed, the sum of Rs. 74,800, being

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the amount due to the two as their share of the profits of estates which their father and Husain, and afterwards the two brothers and Husain, had held jointly. From 1875 there was separation between Husain and the two brothers; but the two brothers remained joint in all their estate until 1882 and in business until the present dispute arose. Before speaking however of the relations between the two brothers as to estate and business generally it is convenient to complete the narrative of the Rs. 74,800 which came from the uncle into the hands of Kurshed. In a case abounding in mutual accusations of forgery and perjury, the main facts about this money are undisputed. That the greater part of it, viz., Rs. 60,000, was deposited in the Bank of Upper India and the rest, viz., 14,800, with two native firms of bankers at Meerut is certain. The sequel as to the Rs. 60,000 needs only to be told briefly in order to its being dismissed from further consideration. It was given by Kurshed to the other Respondent, Muzaffar, his son, but as Kurshed admits his liability to account for it, the whole history of Muzaffar's dealings with it has no further relation to the present dispute. There was a dispute as to what became of the Rs. 14,800 but this is the sole controversial survival of the subject matter of the first suit, viz., the Rs. 74,800 which came to the brothers from their uncle Husain, and it is ultimately dealt with in the account.

Turning now to the general relations between the two brothers the facts are simple. They were joint in estate (as has already been said); they owned considerable property in the district of Muzaffarnagar; both were in Government service, employed in different districts, and one was at home at one time and another at another.

It resulted from these mutual relations and similar engagements, that the one acted for the other in the receipt of the profits of their estate, and, when necessary for more important matters, powers of attorney were granted by the one to the other. This is common ground and the fierce controversies in this suit are as to which brother in certain specified cases collected monies belonging to both. In 1882 the greater part of the landed property belonging to them was divided between them; but they continued joint in other matters; and the growing distrust between the two did not produce an actual rupture until the litigation began in 1885.

In this state of facts the resulting liability of either party to account for his receipts is clear; and, given appropriate action or actions to enforce those liabilities, then the questions are (1) is either claim to account barred by limitation (2) or by settlement of accounts, and if not (3) what is the state of accounts? It will be found that in whatever other social or legal duty the parties have come short, they have not failed to sue enough actions to determine their rights, and some of the questions which were agitated as a defence to the first action are entirely superseded by the ample means ultimately afforded the Courts for doing complete justice.

The first suit (No. 189 of 1885) related to the Rs. 74,800 which Kurshed received from Husain. The plaint was filed by Asghar on 22nd December 1885 and asked for a decree against Kurshed for Rs. 37,400 being half of the Rs. 74,800, with interest, other decrees being asked to the effect of tracing and attaching the money in the form in which it had been invested by Kurshed's son, Muzaffar, who was made a

Defendant. For reasons already indicated it is only necessary to follow the progress of the litigation between the two brothers, for the claim against Muzaffar comes to nothing. Kurshed's written statement presented a perfectly definite theory of the case. So far from his being indebted to Asghar, Asghar was largely indebted to him, to the amount of more than a lac of rupees, the details of which were given in an account produced. This being so, the Rs. 74,800 which came from Husain had, to the extent of Rs. 60,000, been justly appropriated by Kurshed and as it happened had been given to Muzaffar. The rest (Rs. 14,800) had been spent by Asghar and Kurshed jointly. On this statement of facts, besides limitation, Kurshed pleaded that the brothers had been joint owners, that there must be a general account between them as partners and that no action could lie for what was only one item in an account. On this last point it is sufficient to say that, whether good or bad, it is superseded by the fact that a cross action was brought by Kurshed to enforce the claims originally stated in support of his defence. A minor incident of this defence must here be noted, as it bears very directly on one of the keenest controversies in the case. With Kurshed's written statement he produced a letter dated 9th November 1885, written by himself and expressing a wish for a prompt settlement of accounts and having endorsed on it a reply by Asghar acquiescing and saying, "Please settle the account. I am responsible "for what may be found due by me." This document was filed on 23rd February 1886 and of its relevancy in support of the claim for an account there can be no doubt. The Court called on the Appellant (Plaintiff) for a replication

and on 31st March 1886 he filed a written statement in which (*inter alia*) he denied the partnership and the receipt of any of the Rs. 14,800, "does not accept the correctness of "the Defendant's allegations (*a*) that the "Plaintiff received Rs. 108,040 from the De- "fendant in accordance with the enclosed list" and (after other non-admissions) the replication proceeded :—

"6. The fact is this, that all the accounts were "settled between the parties subject to the "qualifications and statements contained in the "plaint after inspecting and examining the siahas "and registers of account (which the Defendant "has refused to produce on the Plaintiff's appli- "cation) as detailed in the list signed by the "parties annexed to the written statement, and "that the sum due by either party were set-off, "and that the Defendant executed the enclosed "note-of-hand in favour of the Plaintiff as a "memo. to secure the above-mentioned item. "The present allegations of the Defendant, after "such clear and distinct proceeding, are very "surprising."

Along with this replication, *i.e.*, on 31st March 1886, was produced the following letter :—

"My dear brother, dearer than life, Saiyed Asghar Ali. "May he live long !

"With prayers for your long life I inform you that what- "ever account was between you and me has been settled, *i.e.*, "I have received the entire amount due and have understood "my private account, the account of my son Muzaffar, the "*joint account and the account of the siaha deeds, &c. The "whole of the aforesaid account with the exception of the "joint money amounting to Rs. 74,800, received on 8th June "1875, and deposited in the Bank and credited with mahajans, "and the deed of Ganga Charan has been settled. Nothing "has remained unpaid.

"I have therefore written this memo. and affixed one anna "stamp to it.

"(Sd.) ————(Illegible.)

"Dated 13th March 1885."

And also the following "list" :—

No. 160.—List of items realised by Saiyed Khurshed Ali Khan and Saiyed Asghar Ali Khan, which were allowed credit for at the time of the private adjustment.

Receipts on account of items due to Saiyed Khurshed Ali Khan by Saiyed Asghar Ali Khan on private account.	Rs.	A.	P.
On account of the decree passed against Musammat Jaibi Begam, wife of Enayet Husain, raïs of Kwol (?)	9,743	7	4
On account of bond executed by Raja Raza Ali, raïs of Bundora	10,500	0	0
On account of the sale-deed of Nagla, &c., executed by Raja Raza Ali	1,200	0	0
On account of the receipt from the shop of Bansidhar and Sheo Parshad, bankers of Meerut. Out of Rs. 22,110 after deducting Rs. 30 which were paid for the Umballa journey under the account of the said bankers	11,025	0	0
On account of the profits of the villages for 1,283 Fasli	1,799	8	9
Total	34,268	0	1

Receipts on account of items due to Saiyed Asghar Ali Khan by Saiyed Khurshed Ali Khan on private account.	Rs.	A.	P.
On account of the price of the house, situate in Meerut. Out of Rs. 6,000 Saiyed Khurshed Ali Khan received from Saiyed Husain Ali Khan	5,000	0	0
Out of Rs. 7,374 on account of the bond executed by Saiyed Ewaz Ali, mukhtaram of the parties (Rs. 3,687) were paid to Lala Harsahai Mal, banker of Meerut	3,687	0	0
On 4th April 1881, received (Rs. 2,847. 12) out of Rs. 5,694. 8 on account of the proportionate balance of the judgment-debt, due by Saiyed Wazarat Husain	2,847	12	0
On 4th April 1881, Saiyed Khurshed Ali Khan received (money) on account of the judgment-debt due by Basharat Husain. Out of it Rs. 10,000 was credited to the shop of Bansidhar, Sheo Parshad. A moiety of Rs. 9,346. 2. 3	4,673	1	3
On account of bond executed by Nawab Azmat Ali Khan, raïs of Karnal	20,000	0	0
Total	34,207	13	0

The following were the issues settled :—

"1. Whether the objection taken on behalf of Muzaffar Ali "Khan, Defendant, as to misjoinder of claims and parties is "correct?

"2. What were the relative positions of the parties when the "money was drawn from Husain Ali Khan and deposited at "another place, and is any portion of claim affected by "time?

"3. Whether the parties were partners and whether a "settlement was made as to the item objected to, or a full "adjustment of the former accounts had been made under the "rukka, dated 13th March 1885, referred to by the "Plaintiff?

"4. Whether the item in question was deposited in the "Meerut Bank in the names of the parties or in the name of "Defendant No. 1, whether the Plaintiff was a sharer and "entitled to the extent of one-half of it, or with reference to "the account produced by Defendant No. 1 nothing was due "to the Plaintiff out of the aforesaid item, and whether the "said deposit item was drawn and transferred *malâ fide* and "secretly, or with the knowledge of the Plaintiff?

"5. Whether the item of Rs. 14,800 held in deposit by the "firms was drawn by the parties or by the Defendant alone?

"6. Whether the Defendant can, under Section 111, claim a "set-off of the items set up by him in the Plaintiff's account, "and whether the items alleged by the Defendant are also "affected by time?

"7. Whether the Plaintiff has, as alleged by him, a right for "hypothecation as to the property mortgaged by Chaudhri "Shere Singh and others on account of the money due to him, "and whether the mortgage was taken for this very "money?

"8. Whether the claim for interest is correct according to "practice?

"9. What decision should be made as regards the Defen- "dant's application for costs?"

The Defendant being called on to admit or deny certain documents declared the rukha of 13th March and the "list of items" to be fabricated. In like manner the Plaintiff put among the documents not admitted by him the rukha of 9th November 1885 with reply. On 9th November 1888 a cross action (No. 211) was brought by the Respondent Kurshed against the Appellant. It claimed rendition of accounts and payments of Rs. 74,030. For practical purposes the state of accounts upon which this sum was brought out was the same as that set out in the defence to the Suit of the Appellant.

This action merely restated the controversy between the parties in another form and it is only necessary to note that the Appellant in defence pleaded limitation.

Another suit was brought by the Appellant against the Respondents but it is unnecessary to deduce the procedure. The evidence taken was made to apply to all three suits and the suits were kept together in the subsequent procedure The appeals ultimately taken have been consolidated. It will simplify the narrative if in the meantime the original action be mainly attended to.

Evidence was taken before the Subordinate Judge and many witnesses were examined whose credibility has been vehemently impugned. It was not until 15th September 1890 that the Subordinate Judge pronounced his first judg-

ment and by it he dismissed the suit (189) on the ground of limitation. Against this the Appellant (Plaintiff) appealed to the High Court and on 16th January 1893 the High Court set aside the decree and remanded the case under Section 562 of the Civil Procedure Code to be tried promptly on the merits and according to law.

On 15th September 1893 the Subordinate Judge decided in favour of the Appellant for the full amount of his claim as against Kurshed but dismissed the suit as against Muzaffar. On appeal the High Court on 24th April 1896 referred the case to the lower Court for the purpose of finding which if any of the items set forth in the list appended to the written statement filed by Kurshed are due to him by Asghar. They added, "Such finding will be "irrespective of any plea of limitation that may "be raised on behalf of Asghar Ali." Their Lordships in passing must observe that while in the present instance it may not have led to miscarriage this was not the proper order to be pronounced, and it was irregular to take the account irrespective of the plea of limitation.

The High Court however did much more than appears from the mere terms of this remand, for by their judgment leading up to the remand they decided, adversely to the Appellant the most important question in the case, viz., the alleged settlement of accounts in March 1885. They held on the evidence that no settlement had taken place and they reached this result by holding that the ascertained facts about certain items of the list or state (set out above) on which the settlement was said to have proceeded made it incredible that the settlement took place.

The Appellant with some plausibility argued that the High Court has attached less importance to the positive evidence of the settlement than

to antecedent improbabilities arising out of complicated transactions. He points to the substantial body of evidence of persons apparently of good repute who say they were present at the settlement and who depone to the writing and signature of the rukha, and he comments on the evidence being all one way as to the resemblance of the disputed writing to the undisputed signatures of Kurshed. He has examined with great elaboration the evidence bearing on the questions as to which of the disputed documents were forged and which of the witnesses are perjured, and whether an *alibi* has been made out by Kurshed. After very careful consideration their Lordships have come to the conclusion that the High Court was justified in rejecting the rukha on the grounds which are stated in their judgment. They consider the evidence as to certain of the items in the state to be conclusive to the contrary of what is set out in the list and to be inconsistent with the existence of the alleged settlement. It is in their judgment less credible that Kurshed should have agreed to an acknowledgment to the direct contrary of known and recent facts of capital importance than that the documents are fabricated, and it has to be remembered that the opposite theory involves the believing a similar amount of fabrication and perjury to have taken place on the other side about the document of 9th November 1885. Their Lordships the more readily adopt the conclusion thus stated when they remember that the rukha and list of March 1885 were first heard of after the production by Kurshed of the rukha of November 1885 in support of his counter-claim. For while it is true that in strictness they were not necessary to the plaint and appropriately supported the replication, yet it cannot escape notice that if they had been in existence they would inevitably have been in the

mind of the Plaintiff and would naturally have formed the starting-point of the narrative of his plaint, and the subsequent procedure before the Subordinate Judge indicates a similar lack of confidence by the Appellant in a controversial weapon which if authentic was conclusive.

There remains the question whether Kurshed's claim is barred by the Limitation Act. The Subordinate Judge dismissed the suit as time-barred but the High Court on 9th March 1897 reversed this decree and gave decree for Rs. 25,075 with interest. The question of limitation does not present much difficulty. Given the relations (which have been already stated) between these two brothers as regards their joint property, and it is apparent that they were agents the one of the other in dealing with the joint estate. Their Lordships are of opinion that the 89th article of the 2nd schedule of the Limitation Act 1877 applies, for they hold the words "moveable property" to include money. The evidence of Asghar shows that the relation of agency continued down to the institution of the suit and accordingly the plea of limitation fails. In this view it is unnecessary to rely on the acknowledgment of November 1885 or to consider the attempt to read the date as being in fact 1884 instead of 1885. The sequel of the suit after this judgment of the High Court showed that the question of accounts was little controverted and their Lordships were not asked to consider it.

The result of the whole matter is that Kurshed is entitled to what has been awarded him and that Ashgar fails in his suits. The several actions have been disposed of by the High Court in the appropriate manner. Their Lordships will humbly advise His Majesty that the Appeals ought to be dismissed; and the Appellant will pay the costs of the Consolidated Appeals.