Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheonath alias *Burray Kaka* v. *Ramnath* alias *Chotay Kaka, from Oudh; delivered 22nd December,* 1865.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THE Appellant and Respondent are first cousins, and natives of Lucknow, and were formerly jointly interested in certain ancestral property, and in the business of three kotees, or firms, the styles of which were Hurjus Roy and Gungaram, Gungaram and Juggurnath, and Sheonath and Ramnath. Each appears to have been also possessed of separate property.

In 1859 they made a partition, as far as they then could, of their joint property; and on the 16th of September of that year they interchanged farigh-khuttees, or instruments of mutual release, of which that executed by the Respondent is at page 4 of the Record. This document, after stating that the two parties were jointly interested in the before-mentioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, &c.; and after formally abandoning all claims on account of the said firms against the Appellant and his heirs,—contained this passage, "But I have a claim to an equal share of

such moneys as may be realized on account of debts due to these firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these firms up to this date."

In 1861 there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the firm of Sheonath and Ramnath; and they agreed to refer the matters in dispute to the arbitration of five persons, named Hyder Hosein Khan, Meer Wajid Ali, Mr. Jacob Johannes, Sah Mukhun Lall, and Girdharee Lall. A written agreement to this effect was executed by each on the 8th of May, 1861, and both documents are in the Appendix; but the Appellant afterwards drew back from his agreement, and refused to have it registered; and nothing came of this attempt to settle the dispute by arbitration.

In September 1861 the Respondent Ramnath instituted this suit against the Appellant. The Plaint sought a general account and partition; it alleged that no account had ever been settled between the parties; it mentioned the execution of the farighkuttees, but alleged that there had been no partition as stated in them; that the partition was intended to take effect after a settlement of accounts, when the farighkuttees were to have been registered; and that, in the meantime, they had remained with the Appellant as incomplete instruments. It referred, also, to the agreement for a reference to arbitration, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of Lucknow, with the assistance of a jury, and his Decree, founded on the findings of the jury, established that there had been an actual partition and division of the joint property; that the farighkuttees had been executed on the footing of it, without taint of fraud and that the Respondent had failed to prove that he had any interest in a fourth firm which the Appellant carried on under the style of Ramnath Rughonath. It also decided against the Respondent a question in the suit touching the profits made by the Appellant by means of sale and purchase of Government notes during the rebellion.

The Respondent appealed against this decision to Mr. Campbell, then the Judicial Commissioner, who,

by his order of the 15th of May, 1862, affirmed it on all the points raised by the Appeal. His judgment, however, contained these passages: "But it seems clear that there is one account between the parties still quite unadjusted, viz., the division of the outstandings, which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to Plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again, "There was something very considerable to be settled that still remains to be settled, and I trust that, in accordance with my order, the Judge will manage, by a successful arbitration, to give the Plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this order was conclusively to limit the claim of the Respondent to his share in the outstandings of the three firms; and to direct, or at all events to suggest, that that claim should be enforced not by taking the accounts upon the footing of the farighkuttees in the regular way; but by giving him a lump sum as the value of his interest therein, and that such value should be fixed by the award of the arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that officer on the 7th of June, 1862, made an order whereby he referred to four out of the five arbitrators formerly named (the fifth, Girdharee Lall, having left Lucknow) the decision of the following questions: first, what accounts remained unadjusted between the parties; second, what amount of outstandings remained then unrealized and undivided; third, what amount should be given to the Plaintiff (the Respondent) as an equitable acquittance of his share therein. He directed the arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The Appellant did not acquiesce in this order. On the 10th of June, 1862, he petitioned the Judicial Commissioner against it. In his petition he stated that he had no objection to the order of

the Appellate Court referring the question of joint but divisible debt to arbitration, but that he objected, on the grounds therein stated, to the arbitrators to whom the Civil Judge had referred the case, and requested that other arbitrators might be selected by the parties, and that his case be referred to them. The order of the Judicial Commissioner on this petition was in these words: "It is in the Judge's discretion to employ the arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated account can be settled by a jury."

The Appellant being thus referred back to the Civil Judge, presented on the 13th of June a petition to that officer, in which he reiterated his objections to the arbitrators named, and begged the Judge, as authorized by the Judicial Commissioner, to dismiss them, and to order "other arbitrators to be named, composed of such parties as I and the Plaintiff may select." This application was on the 23rd of June, 1862, rejected by the Judge, who gave the following reasons for his decision: "I see no reason to change. I acted on the Judicial Commissioner's order, and transferred the case to the old Punches. If their work, when it comes in, prove open to suspicion, or is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partizans, and go in favour of Plaintiff unduly, they will still have to show grounds. If they go against the Plaintiff, whose friends they are said to be, it will be all the more satisfactory to the Defendant." Against this last order the Appellant appealed by petition dated the 25th of June, 1862, to the Judicial Commissioner, whose order thereon was in these words, "I will not interfere in this stage."

The Appellant afterwards, and before any award was made, presented two further petitions to the Civil Judge. The first of them is dated the 22nd of July, the other the 19th of August, 1862. In these, after referring to his ineffectual protests against the nomination of the particular arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceeding. And in the last petition, he expressly asked that

their award might be set aside, and that new arbitrators might be appointed in their stead, by which means justice might be done him.

The arbitrators filed an award about the 20th of August, 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was that the amount which the Respondent could fairly claim from the Appellant in respect of the outstandings was 66,090 rupees, besides one moiety of a judgment debt which had been recovered in the Civil Court of Cawnpore, and was described as the Rusdhan Decree. On the 4th of September the award was discussed before the Civil Judge. He overruled the Appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the Plaintiff was entitled in respect of these must be referred back to the arbitrators. His Decree was to this effect: "I accept the decision of the arbitrators, awarding 66,090 rupees to Plaintiff as equivalent for all outstandings except the mortgages, and half of the Rosdhan Decree."

Against this Decree the Appellant, on the 16th of October, 1862, appealed to the Judicial Commissioner. The order passed by him on the following day was in these words: "Case is not completed. Appeal will be heard when the whole is complete."

On the 20th of December, 1862, the arbitrators, to whom a fifth (Ihtimamood Dowlah) seems to have been added, made their award in respect of the mortgages. The effect of it was that a further sum of 15,000 rupees should be paid on this account to the Respondent by the Appellant.

On the 22nd of December, 1862, the Civil Judge adopted this finding in spite of the Appellant's objections, and ordered that he should within three months make good this sum, as well as those which by the Decree of the 4th of September he had been ordered to pay.

The Appellant appealed also against this Decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of March, 1863, states, amongst other things, that the arbitrators had been challenged by him both in the Lower Court and in the Judicial Commissioner's Court. This

appeal, and that against the Decree of the 4th of September, 1862, of which the consideration had been postponed, was brought before Mr. Couper, who had then become Judicial Commissioner, in the place of Mr. Campbell, and he, on the 3rd of July, 1863, upheld the awards of the arbitrators, and affirmed both the Decrees of the Civil Judge.

Against this decision the present Appeal is brought.

Their Lordships will assume, and such is, in fact, their opinion upon the facts before them, that if the questions which the arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their award have been established. It has, however, been strongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his order of the 15th of May, 1862, the rights of the parties under the farig-khuttees, and to impose on the Appellant the obligation of purchasing the Respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of Appeal chiefly insists—is, that the nomination of the particular arbitrators by the Judge without the consent and against the repeated protests of the Appellant was altogether irregular, and that their award is therefore not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the first point, but they are nevertheless of opinion that the determination of this Appeal must depend upon the validity of the second objection; because if the nomination of the arbitrators were regular there is evidence in the petition of the 10th of June, and in other parts of the proceedings, that the Appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the Respondent should be settled on that principle and by arbitration.

That both points are open to the Appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of Maharajah Moheshur Sing *v.* the Bengal Government (7 Moore's I. A.,

p. 302). The Appeal is, in effect, to set aside an award which the Appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award.

Was it, then, competent to the Judge to refer the decision of this question to arbitrators selected by him against the will and in spite of the repeated remonstrances of the Appellant? When the suit was commenced the powers and procedure of the Courts in Oudh were still regulated by the rules and ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in the province on its first annexation? These were substantially the same as those which had previously been in force in the Punjab, and were known as the Punjab Code. But on the 6th of August, 1861, the Governor-General in Council, by a notification issued under the 385th section of Act VIII of 1859, extended to the Province of Oudh the provisions of that Act (which is generally known as the Code of Civil Procedure), subject to certain exceptions and provisions, as from the 1st of January, 1862. The exceptions are only five in number; they are modications of the 3rd, 17th, 111th, 172nd, and 205th sections of the Act, and none of them have any bearing on the questions raised by this Appeal. At the date, therefore, of the Judicial Commissioner's Order of the 15th of May, 1862, the Code of Civil Procedure had thus been extended to and was in force in Oudh.

The 388th section of that Code provides that from and after the time when this Act shall come into operation "in any part of the British territories in India, the procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and except as otherwise provided by this Act, by no other law or regulation." The only exception as to suits pending at the time when the Act shall come into operation is contained in the preceding section, and is in these words: "If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would

deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act VIII of 1859 by virtue of the provision last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself in the proceeding at page 61 of the record, appealed to certain sections of the Act as establishing the finality of the award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the Punjab Code must be held to have been superseded on the 15th of May, 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th section of the Act provides that if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th section provides that the arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, *and the parties are desirous that the nomination shall be made by the Court*, the Court shall appoint the arbitrator or arbitrators.

These sections clearly import that the parties must either name the arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court

to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion. It may be observed that the Punjab Code, Part II, Section 2, Clause 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and the appointment of, arbitrators.

Their Lordships need hardly observe that if the appointment of the arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the Appellant had on a former occasion agreed to refer the matters then in dispute between him and the Respondent. That agreement to refer had proved abortive ; the Respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court ; and the question referred to the arbitrators was an entirely new question suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider whether this case could be brought within the principle of those authorities which establish that a defect in the nomination of arbitrators may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision. Their Lordships are, however, of opinion that the Appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

Their Lordships, therefore, however much they regret the necessity of re-opening this litigation, feel bound to allow the present Appeal.

It is not improbable that the Decrees impeached give no more to the Respondent than upon a proper adjustment of the accounts will be found to be his due. But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to arbitrators who were not duly authorized to determine it. The consent

of the Appellant was essential both to the form of the issue and to the constitution of the tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what directions this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the Order of the 15th of May, 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to arbitrators duly appointed under the Act of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to and from the three firms at the date of the farighkhuttees, and of what has been received and paid in respect thereof, and by whom; and by inquiring whether any and which of the debts due to or from the said firms remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is due from either and which of the parties to the other of them. Act VIII of 1859, section 92, seems to give to the Court the power of appointing a receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the Decree of the Judicial Commissioner of the 3rd of July, 1863, and that of the Civil Court of Lucknow of the 4th of September, 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three firms pursuant to the farighkhuttees, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the Appellant is entitled to the costs of this Appeal, and also to the costs of the order of the 15th of May, 1862, and of the proceedings following upon it.