Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Sadut Ali Khan v. *Khajeh Abdool Gunnee and Khajeh Abdool Gunnee* v. *Mussumat Zamoorudoonnessa Khanum from the High Court of Judicature at Fort William in Bengal; delivered 22nd January* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

IN delivering judgment upon these appeals their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahommedan zemindar in the district of Mymensingh, died on the 16th of December 1824, leaving two widows and a son. The son is the Appellant in the first, and the husband of the Respondent in the second appeal.

The widows were Shums-oon-nessa and Reazoon, who was the mother of the Appellant Sadut Ali Khan. Fyz Ali Khan, upon the occasion of his marriage with Shums-oon-nessa Begum, had contracted to give her a certain dower, of which one third was to be prompt; and it appears to have been agreed on the same occasion, that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a kabinnamah, 22 villages forming part of his zemindary. A partition was then in the course of being made between him and his co-sharers in the larger

zemindary of which that property which, for the purposes of this suit, may be called his zemindary, was part; on that partition three of the villages comprised in the kabinnamah fell to the lot of one of his co-sharers; and it is contended on the part of Sadut Ali, that thereupon an ikrarnamah was, a year after the marriage, executed by Fyz Ali, by which he substituted three other villages forming part of his zemindary in the place of those three villages, and created a sub-tenure or dependent talook out of the 22 villages as then constituted under the name of Russoolpoor, on which he received a gross rent of Rs. 49.

In the second suit a considerable contest has been raised as to the genuineness of the ikrarnamah, but it is perfectly certain that by some means or another the substitution of the three new villages for the three former villages did take place; and that whereas the kabinnamah was silent as to the reservation of any rent, the 22 villages were afterwards held upon the terms of paying a rent of Rs. 49.

It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the ikrarnamah when their Lordships come to consider that suit, and to assume that, either by the ikrarnamah or some other means, the 22 villages really did become a sub-tenure paying one rent of Rs. 49.

Immediately upon the death of Fyz Ali there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would fain hope is singular even in India. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to shew the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by Reazoon Begum, on her own behalf and as guardian of her infant

son Sadut Ali, against Shums-oon-nessa Begum, who had got into possession of the whole estate; and had called in question the marriage of Reazoon with Fyz Ali and the legitimacy of Sadut Ali in order to establish the right of herself and her son to share in the estate.

That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final Order affirming the decisions of the Indian Courts, which were in favour of the rights claimed by the Plaintiffs.

Pending that litigation, Khajeh Alli Mollah, the father of the party who is the Respondent in the first appeal and the Appellant in the second appeal, had made advances to Reazoon for the purpose of enabling her to carry on her suit; and, as is usual in India, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by Sadut Ali Khan upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that although the agreement was originally for one moiety, which would be 7½ annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of Reazoon and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only 7 of the 15 annas. It is therefore clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they then were, the rights of the parties would have

stood thus: Reazoon Begum would have been entitled to one anna of the zemindary right; Shums-oon-nessa Begum would have been entitled to another anna of the zemindary right and also to the talookdary interest in the villages; Sadut Ali Khan would have been entitled to seven annas of the zemindary right; and Khajeh Abdool would have been entitled to seven annas of the zemindary right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the corpus of the estate, subject of course to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindary between Reazoon and her son on the one side and Shums-oon-nessa on the other was accordingly made on that footing.

The position of the parties, however, was afterwards changed. Shums-oon-nessa Begum had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother Hedayetoolah; and he having failed to pay, pursuant to the Order in Council, the costs of the appeal, her interest in Fyz Ali's estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by Sadut Ali, who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the Respondent in the second appeal.

There is some evidence that in the first instance the Khajeh was put into some kind of constructive possession of the seven annas of the zemindary which had been assigned to him; disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favour in 1853. Thereupon the rights and position of the parties seem to have been as follows: The

wife of Sadut Ali Khan, Zamoorudoon-nessa, as the holder of the sub-tenure was entitled to the beneficial interest therein; but whatever rent was payable by her to the zemindary was divisible between those entitled to the zemindary according to their respective shares; the Appellant, being entitled to seven annas of that rent, whatever it might be. As soon as the decree had been made in his favour, he seems to have conceived the notion that he was entitled as zemindar to enhance that rent; and he took prodings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last doubt was thrown upon his title to claim a zemindary right in respect of the villages included in the sub-tenure. Thereupon he instituted the suit out of which the first appeal has arisen. The Defendants in that suit, Sadut Ali Khan and his wife, although, as will presently be shewn, they had on a former occasion admitted the Plaintiff's right to share in the rent reserved on the 22 villages, saw fit to contest that right, and alleged that no zemindary right in respect of the village had passed under the purchase to Khajeh Allim Oolah.

They also contended that if any had passed the Plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than 12 years his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the Bar by Mr. Leith that he cannot support the first of them. It is then conceded that, by reason of the transfer to the Khajeh of the seven annas share in the zemindary, he became entitled to a proportionate share of the Rs. 49 reserved upon the 22 villages.

It was however contended and fully argued

by Mr. Doyne that the suit was barred by the Statute of Limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied that the Statute of Limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court and made the principal ground of their judgment, was that in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from Sadut Ali Khan to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think Rs. 70,000, which sum was actually paid to him within the 12 years. It was argued, however, by Mr. Doyne that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than 12 years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the annas of that rent within the 12 years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of this suit.

The case, however, of the Respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold; and it certainly appears that in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the Defendants was this:—"True, you are entitled "as zemindar to a proportionate share of the "existing rent of this talook, but you are not "entitled to enhance that rent." Therefore it appears to their Lordships that this is not a case to which the Statute of Limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in India. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the Bar was twofold: first, that no such suit would lie unless some consequential relief could be granted as ancillary to it; and secondly that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised. The Respondent in his last suit for enhancement had been turned round on the ground that he had not any zemindary right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision

of the English statute is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the Appellant's case that he had failed to show any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now it is not unimportant with reference to the second appeal to see what that decree was. It is in these words:—"It is ordered and decreed by the said Court that "this appeal be decreed, and the decree of "the Lower Court be reversed. And it is "declared that the 22 villages in the suit "comprise a tenure situated within and being "part of and paying a rent of Rs. 49 to the "proprietors of the zemindary No. 10 on the "Towjee of the collector of Mymensingh, comprising five annas, one gundah, one cowrie, and "one kraut of Pergunnah Ateeah. And it is "further declared that Plaintiff is a proprietor "of seven annas out of 15 annas of that "zemindary, and that as proprietor is entitled to "a share of the rent of this tenure in proportion "to his interest in the estate." It seems to their Lordships impossible for the Appellant who was the Plaintiff in the second suit to go behind that decree, and to say that the 22 villages did not constitute a tenure within the zemindary, on which a gross rent of Rs. 49 was reserved to the zemindars.

Having got this decree the Khajeh proceeded to bring his suit for enhancement against Zummoorudonessa Begum as the holder of the tenure. Among the issues settled in that suit there were these: 1st. Whether the notice had specified the particulars required by law to be specified, and whether it had been duly served. And the second, which was the material one, is in these words: "Are the villages in question "liable to enhancement of rent as stated by the "Plaintiff, or fit to be exempted from increased "assessment, being held by Defendant at a fixed "rate in perpetuity under a lekhun granted by "the former zemindar." The notice, it was admitted, was a notice which was necessarily given under the 13th section of Act X. of 1859. In the view their Lordships have taken of the second issue it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector who tried the case in the first instance considered that it was sufficient. Some doubt was thrown upon that by Mr. Justice Phear in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second issue, viz., whether the rent is enchanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the kabinnamah; and the transaction upon the face of the kabinnamah was a transfer of the 22 villages included in it to Shuns-oon-nessa in satisfaction of the one- third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction

affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when, in lieu of that she took a grant of the villages the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the Khajeh's title, because when she died her heir, who was appointed to carry on the suit in her place, did so, and the decree contains a direction concerning these villages, notwithstanding her demise, which implies the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time.

It may seem strange that no provision was made expressly in the instrument for the payment of the Government revenue. But the zemindar may have been willing to take the whole of the Government revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which the third of the dower was to be given up. Of course such a transaction might be impeached by a purchaser of the zemindary for arrears of Government revenue. But it is nevertheless good against all who claim title under Fyz Ali Khan.

Nor can the fact that the instrument is silent concerning the payment of the Government revenue affect the questions raised by this Appeal; because even if the grant be taken to be a grant of the villages subject to the payment of the Government revenue, and the zemindar may have paid the Government revenue on account of the tenant, his right to recover what he has so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the ikrarnamah is now to be

considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The Plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the kabinnamah; or that the 22 villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the Defendant, and he fails to show by what means other than the ikrarnamah the substitution of the villages and the creation of the tenure took place.

Therefore, it seems to their Lordships that they must accept the ikrarnamah as established, and act upon it accordingly. If they do that, it appears to them that inasmuch as the ikrarnamah declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each Appeal, with costs.