Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajendronath Dutt and others v. *Shaik Mahomed Lal and others, from the High Court of Judicature at Fort William, in Bengal; delivered, May* 13*th* 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE suit in this Appeal was brought by certain persons to recover a mouzah called Kesubpore; and the case stated in the plaint is that the predecessors of the Plaintiffs, being five brothers, had dedicated certain lands to family idols; that Manickram Dutt, the eldest of the brothers, being the sebaet, was managing the seba of the idols out of the proceeds of the consecrated properties and was superintending the debutter properties, and that after the death of two of the brothers he acted improperly with reference to the debutter properties, and apportioned out of them a lot called Pilkhundi as the share of Gopinath Dutt, one of the brothers, and the mehal Kesubpore, the subject of the present suit, to Bykantnath Dutt, the son of Kasinath Dutt, deceased, another of them. The Plaintiffs sue for possession of the whole as debutter.

The property which had been so dedicated was the subject of a suit which was commenced in 1857, and ultimately came by appeal before this Board. The nature of the suit is stated in the judgment which was then delivered. The plaint in it is set forth in the record in this suit.

Q 6482. 125.—7/81. Wt. . E. & S. A

It appears to have been brought by Hurinath Dutt, the son of one of the five brothers, against all the other members of the family. Amongst them was Bykantnath Dutt, who is said in the present plaint to have had Kesubpore apportioned to him. The judgment (14 Moore, I. A., 299) states that the suit was for possession, but not for possession in the ordinary character of proprietor of lands; that the Plaintiff made title to the possession on the ground that the lands had been dedicated to the religious service of the family idols by virtue of two instruments of dedication in the years 1813 and 1820, which still at the time of the suit impressed on the lands a trust which the Plaintiff by the suit sought to have declared. He also asked to be appointed sebaet or manager of the lands so dedicated.

It appears from the judgment that, amongst other matters of defence which were set up by the Defendants, was a deed of partition, which was said to have been a deed by which a different arrangement was made of the family property. Certain other property was devoted to the family idols, and the property originally dedicated was divided between the members of the family. Their Lordships, in that case, considered that this was not a genuine deed. They said with regard to it, "The second deed, "however, does afford ground for suspicion. It "makes no reference whatever to the first deed; "it professes to be the ordinary partition of a, "till then, joint family property. It appoints "as a sabaet one whom no prudent person "would appoint a trustee, one an actual "insolvent. Such an appointment, indepen-"dently of its obvious impropriety, would be "little likely to be made by a Hindoo family "having several and more competent members, "from the fear of the scrutiny to which it

" might lead if the creditors of the sebaet traced " the property to his possession. Again, as a " dedication in fact was to be defeated by it, " some difficulty on this ground alone would " present itself to the minds of those who might " meditate on the change which the deed seeks " to effect. All comparison, therefore, supports " the deed prior in time, which priority alone, " in a balanced state, would establish the first " instrument:" and they proceeded to say, " A decision against the Plaintiff generally in " this suit would be, in substance, deciding " against a trust *primâ facie* well established " on evidence of a subsequent deed of revo- " cation, not only not proved, but on every " examination of it discredited." Their Lordships in the result declared " that the lands specified " in the schedule to the plaint,"—which included the mouzah Kesubpore, and also the lot Pilkhundi,—" were and continue dedicated, under " the instruments of dedication of 1813 and " 1820, to the religious uses specified in those " instruments of endowment." And they added a declaration that the decree was to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper sebaet.

A question has arisen as to whether the whole of mouzah Kesubpore was dedicated. In the deed of dedication only 11 annas were mentioned. Subsequently 5 annas seem to have been purchased by Manickram the sebaet, and it would rather appear to have been assumed that the whole 16 annas had become subject to the dedication. In the view which their Lordships now take of the case, it is unnecessary to determine whether this judgment must be considered as a binding decision upon the parties as to the dedication of the entire 16 annas, or

only of the 11. What was contemplated is that, the property being shown to be debutter property and dedicated to family idols, a proper sebaet should be appointed, who might bring a suit, or take other proceedings, to have the trusts so declared enforced, and so this declaration was added.

This judgment was delivered in 1871. The parties appear not to have done anything immediately; but, on the 22nd of August 1873, they professed to appoint the sebaet. They executed what they call a deed of settlement for the management of the seba of the gods, by which, after reciting that Gopinath Dutt had died without any heir, and that as heirs of the remaining four brothers they each held a 4 annas share, they say:—"We do hereby covenant "that we, being in possession as sebaets of the "properties mentioned in the schedules of the "two deeds of endowment aforesaid, and besides "[the properties mentioned in] the arpannamas "of the properties acquired out of the proceeds "of the debutter properties and of the pro-"perties which are used to meet the expenses "of the deb-seba, and which are embodied in "the schedule of the plaint of the former suit, "No. 6; and, in addition to these, of those "properties which are debutter for the expenses "of the deb-seba,—the whole of these being "entered in the schedule below.—will manage "the duties connected with the seba of the Jius "according to fixed arrangement." They then make a provision for what is to be done with the different moneys, and give particular directions with regard to the appointment of persons to make collections. The result is that all the members of the family, including Bykantnath, all the persons who had an interest in the property, or would have had an interest in it if there had been no dedication to the idols, are

made sebaets. The trust is mixed up with the private interest, and there remains outside no person who would have an interest or duty to see that the trusts were properly executed. All the persons interested are themselves made trustees and managers for the execution of the trusts. That certainly does not seem to have been the kind of appointment which was contemplated by their Lordships.

The objection was taken by the Defendants in the present suit that Bykantnath, who, by this deed of August 1873, was appointed one of the sebaets, and took a fourth share of the property as sebaet, is not a party to it. The Defendants say he ought to have been joined as a Plaintiff, or, if he would not become a Plaintiff, he should have been made a Defendant. The Plaintiffs say that he would not consent to become a Plaintiff with them. If he would not consent to that, they might have made him a Defendant. The objection being taken in the First Court, the Judge overruled it. He does not appear to have said much on the subject, but he held that it was not necessary that Bykantnath should be a party. The Defendants appealed from that judgment, and in their grounds of appeal they distinctly take the objection. The first is:—"For that the Court "below ought to have held that there has been "no proper appointment of the Plaintiffs as "sebaets, and that in any event the present suit "could not be successfully maintained by the "Plaintiffs on the record in the absence of "Bykantnath." The learned Judge who delivered the judgment of the High Court says with respect to this objection:—"I think that "Bykantnath Dutt should certainly be a party "to this case. The suit is to do away with a "sale effected by him, and for which he received "full value of the property in suit. Full justice

" could scarcely be done without having him before " the Court in his personal capacity. The Judge " below remarks that Bykant is substantially a " co-Plaintiff, because he is a member of the body " of the sebaets; but he ought to be on the " record substantially as a Defendant in his " personal capacity, and answerable for the costs " of the proceedings arising out of his alleged " misconduct. As it is, he has been allowed to " make away with endowed property, appropriate " the value of it, and then to be a substantial, " but unseen, co-Plaintiff in recovering it from " the purchaser, to whom, however, the Lower " Court finds that it can award no compensation, " because he should get it, if at all, from the " vendor in his private capacity, and not from " the Plaintiffs, who sue as sebaets." The judgment refers to many of the substantial reasons why Bykantnath should have been a party to the suit. Their Lordships will mention presently the transactions which are alluded to. It was evidently the opinion of the High Court that he ought to have been made a party to the suit. The Judges appear to have thought that he might be considered to be a Plaintiff, because he was a member of the body of the sebaets; but although he might indirectly gain benefit from the suit, the fact that the other sebaets were suing did not make him also a Plaintiff. They do not profess to sue on his behalf. He really was not a party to the suit at all; and no decree could be made in it which would bind him. Whatever might be necessary in order to do complete justice between the parties, so far as it would affect Bykantnath, could not be done. It would appear that the Judges of the High Court intended to decide the case in favour of the Defendants upon this objection as well as upon the bar of limitation. They said:—" We are of opinion therefore that, " under the

"circumstances of the case, and regard being "had to the sort of debutter which is in "question and to the fact that the family "generally were parties to the division of the "debutter property, Bykantnath Dutt should "have been personally a party to the suit; and "that if the Plaintiffs be entitled to recover the "property from the Defendants, Appellants, they "should be required to reimburse them the "purchase money, and that Bykantnath should "have been saddled with all the costs. And "the same consideration would induce us to "refuse any decree for mesne profits." They then considered the question of the law of limitation, and held that the Defendants were bonâ fide purchasers, and were, therefore, protected by it.

Under those circumstances, the Respondents say, in support of the decision of the High Court, and in answer to the present Appeal, that the nonjoinder of Bykantnath is not an objection of form only,—that the Court ought, in a suit of this kind, to have him before it, so as to be able to bind him and to do complete justice. The Appellants have not, on any occasion, sought the assistance of the Court, as they might have done under section 73 of Act 8 of 1859, to make him a party to the suit. It was not the province either of the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, from motives of their own, deliberately abstained from making him a party to the suit. It is certainly not a case in which the Court should make an exception to the general rule which would require him to be a party.

That motives for keeping Bykantnath out of the suit existed may be seen from the nature of the previous transactions. He is said in the

plaint to have been put in possession of Kesubpore by Manickram, who was at that time the sebaet; but it would seem, from the case made in the former suit, that though the deed of partition was discredited in the former appeal, it was under colour of some deed of partition executed between the members of the family that Bykantnath obtained the possession of Kesubpore as early as 1841, and so through the act of the very persons who are Plaintiffs in the present suit. Having thus obtained possession, he subsequently made a conveyance to Anund Gopal, his nephew, on the 17th of September 1861. Whether this conveyance was only a benami transaction, and Bykantnath continued to be still the owner of the property, or whether, which is possible, Bykantnath sold it for a sum much under its value, as an advancement to or in order to benefit his nephew, is not clear; nor is it necessary now to say which was the real nature of the transaction. There is evidence that Anund Gopal exercised acts of ownership, that he made leases of and received rent for some portions of the property, and that he was apparently the owner of it. Being apparently the owner, he, on the 8th of March 1869, sold a moiety of it to some of the Defendants for Rs. 5,200, and the other moiety to the other Defendants, on the 15th of July 1871, for Rs. 6,000. It is clear, and is not disputed, that these prices represented the full value of the property. The Defendants gave the full value, and held the property for some time. Then came the appointment of sebaets of the 22nd of August 1873 of the whole family, including Bykantnath, by virtue of which this suit is brought. Now, the Defendants having paid the full value to Anund Gopal, and there being this case with regard to Bykantnath, whose acts could not have been unknown to the Plaintiffs

when they appointed him joint sebaet, that he had parted with the property, which was debutter, and, through his conduct in so parting with it, it had come to be sold to the Defendants, the Plaintiffs, the other members of the family, seek to set aside the transaction—to recover back the property, it is true as debutter, but under circumstances which raise a considerable suspicion whether the object is to treat it when it is recovered as debutter, or to have the benefit of it for themselves. The whole transaction seems to be of such a character that, if there is a case in which it is just and proper to give effect to the general rule that all the parties interested in the subject matter of a suit should be joined in it, this appears to their Lordships to be one.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed, and the Appeal be dismissed; and the Appellants will pay the costs of the Appeal.