Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lalla Baijnath Sahoy v. *Baboo Rughonath Pershad Singh, from the High Court of Judicature at Fort William, in Bengal, delivered 25th April* 1882.

Present :

SIR BARNES PEACOCK.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Appellant in this case is the registered owner of one third part, or 5 annas 4 pies, of the Mouzah Hardeya, in the district of Shahabad. The question is, whether he is also the beneficial owner or only benamidar for the Respondent. That question was decided by the Subordinate Judge of Shahabad in favour of the Appellant, and by the High Court in favour of the Respondent.

The property in dispute belonged to a family who in this litigation are called the Singhs; and, at the time when the transactions giving rise to the present question commenced, there were five branches of the family, co-sharers of the property. The shares of three have been subjected to a different course of dealing from the shares of the other two.

For the present purpose it will be convenient to speak of the 5 annas 4 pies as the five-anna share, of the three fifths as the three-anna share, and of the two fifths as the two-anna share. It will also be convenient to speak

of proceedings taken by any representative member of the family as proceedings of the Singhs collectively.

The Appellant and his father Mannu Lal carried on the business of bankers in partnership together at some place in the district of Arrah, and throughout the transactions now under review there has been identity of interest between the two. Whether the name of the one or the other is used in any transaction it must be taken that, up to the time of Mannu's death, both were equally concerned in it.

There is another joint family who play a large part in the history of the present dispute, the family of the Sahus. They appear sometimes by one representative and sometimes by another. It will be convenient also to speak of proceedings by any of the Sahu family as proceedings by the family collectively.

In the year 1852 the Singhs mortgaged their five annas to the Sahus, to secure Rs. 21,213. This mortgage was effected by a lease called a zaribhurna lease granted to the Sahus for 20 years, and a sub-lease called a kutkina lease granted back again by the Sahus to the Singhs at a certain rent.

On the 7th June 1858 the three-anna share was put up to sale by auction, under a decree obtained by one Sri Ans Koer against the co-sharers who owned it, and it was bought by Mannu for the sum of Rs. 1,350. At that time the property of the Singhs, who were implicated in the rebellion, was under attachment by the Government, and the Government took objection to the sale. That objection was overruled, and the sale to Mannu was established by the grant of a certificate and an order for delivery of possession, which is dated the 1st of December 1858. On the 21st November 1859 the Revenue Commissioner made an order

by which the property was released from confiscation, and on the 6th February 1860 such release was publicly notified. At that time the Singhs petitioned the Deputy Collector that he would order the tenants to pay rent to them; but he prudently declined to do that, and intimated that they and the auction purchasers should enter into a mutual settlement.

In the year 1859 Mannu brought five suits against a ryot named Obhoy Pandey and four other ryots of Hardeya for rent of small portions of the three-anna share. In these suits, or in one of them, the Singhs appeared and objected. The issue was, whether or no Mannu had obtained possession. .It was held by the First Court on the 10th April 1860, and by the Judge of Shahabad in appeal on the 15th December 1860, that he had obtained possession, and decrees for rent were granted to him in the five suits.

Pending this litigation Mannu applied to the Collector of Shahabad to effect a mutation of names in the Register. The Singhs opposed the application, and the suit was heard on the 30th April 1860. The Collector decided that mutation follows possession; that Mannu had dispossessed the Singhs and got possession for himself; and that he was entitled to be registered accordingly. It appears that the five-anna share stood in the name of Koer Singh. The actual operation effected in the books was first to enter the names of the three co-sharers of the three-anna share along with Koer Singh, and then to expunge their names and enter that of Mannu in their stead.

This proceeding left the Singhs at liberty to assert their title in a suit framed for the purpose, which they did without much loss of time. They sued Mannu to recover from him the three-anna share on the ground that the sale of the 7th June 1858 was made during the con-

fiscation and was therefore invalid. Of that opinion was the first Court, which gave the Singhs a decree on the 7th March 1861. It is observable that the suit was not for recovery, but for confirmation, of possession; and that the decree did not purport to give possession, but to confirm it.

At the same time, the Singhs sued Baijnath to recover a mouzah called Manyan, and also sued Baijnath and one Sunder Dass to recover another mouzah called Manaich. These two mouzahs were purchased some time in the year 1858, at an execution sale held in pursuance of a decree obtained against the Singhs by Mussumut Kunder Koer. The first Court dismissed this suit.

Mannu appealed from the decree dismissing theHardeya suit, and the Singhs appealed from the decree dismissing the Manyan and Manaich suit. Before the appeals were heard, and on the 13th of February 1862, the parties came to an agreement that the titles of the execution purchasers should be affirmed, and that the suits should be stopped, each party paying their own costs. In accordance with this agreement, and on a petition of the Singhs expressly admitting the validity of the sale of Hardeya, the Judge at Shahabad on the 7th May 1862 reversed the decree of the 7th March 1861. It is alleged by the Respondent that the real meaning of this compromise was that Manyan and Manaich should be abandoned by the Singhs to Mannu and Baijnath, but that Hardeya, though apparently abandoned likewise, should really be held by Mannu as benamidar for the Singhs. The motive suggested for placing the property in a fictitious name is that the creditors of the Singhs might be thereby baffled.

Up to this time there were no relations between Mannu and the Singhs except the hostile ones above narrated. But simultaneously with the compromise and by an ikrarnama dated

the 15th February 1862, Dulhin Badam Koer and Dulhin Champa Koer, acting on behalf of the Singh family, opened a banking and agency account with Mannu's house in respect of a talook called Ruppur.

In the month of December 1858 the Sahus sued the Singhs for arrears of rent due upon the Kutkina lease; and Mannu, who had then purchased the three-anna share, was made a defendant to the suit. The Singhs disputed the validity of the zaribhurna and kutkina leases. The Sahus however obtained a decree against them, and in the first instance against Mannu; but on appeal the decree against Mannu was discharged, and all questions between him and the Sahus were left open. This suit was finally decided on the 17th June 1861.

In the meantime, and on the 5th March 1860, the Singhs' five-anna share in Hardeya was put up for sale by auction at the suit of Mahessur Bux Singh, and was purchased by the Sahus. This purchase was made with notice of the previous purchase of the three-anna share by Mannu. The Singhs objected to the sale upon the same ground on which they impeached the previous sale of the three-anna share of Hardeya, viz. the confiscation. But before the sale to the Sahus the land had been released from confiscation and the objection was overruled. On the 13th June 1860 an order was made for confirmation of sale and delivery of possession.

In the month of October 1865 the Sahus instituted a suit against the Singhs and Mannu for possession of the five annas, and to have the name of their representative Chooni Sahu registered as owner. They relied entirely on their purchase of the 5th March 1860, and not on the mortgage of 1852. The battle was fought with various fortune up to the High Court, who

on the 1st February 1867 made a decree which as regards this suit was final. The result was that the Sahus failed in getting a decree for possession of the three annas purchased by Mannu, but succeeded as to the two annas not so purchased.

The next stage in the contest was a suit by Mannu against the Sahus to recover the sum of Rs. 62. 10, due for the costs of the suit of 1865. Under the decree in this suit the Sahus' interest in Hardeya was put up to sale, and was purchased by Mokund Lal on the 28th April 1868, for the sum of Rs. 120. Mokund was the brother-in-law of Mannu, and it is clear now, and not disputed by the Appellant's counsel, that his name was used on Mannu's behalf.

Just after this sale was effected, viz. on the 6th May 1868, the Sahus instituted a suit against Mannu and the Singhs for possession of the three-anna share, by setting aside the order of the 7th May 1862 on the ground of collusion between the parties to the compromise. On the face of the proceedings it does not appear that the Singhs took any active or separate part in defending this suit. The Moonsiff dismissed the suit mainly on the ground that the Sahus interest was gone out of them by Mokund's purchase of the 28th April 1868. He also considered that the question was settled by the High Court decree of the 1st February 1867. On appeal the first Subordinate Judge of Shahabad agreed with the Moonsiff on both points. On special appeal the High Court remanded the case. The judgment on this appeal does not appear in the record, but from the judgment of the High Court in the present suit it would appear that the direction to the Court below was to inquire whether the sale to Mokund was a fraud, and whether Mokund was

benamidar for Mannu. Mokund was thus made a party to the suit.

On remand the Moonsiff gave the Sahus a decree, which was reversed by the Subordinate Judge, who dismissed the suit on the ground that no interest passed to the Sahus on the 5th March 1860 because of Mannu's previous purchase. The Sahus then appealed to the High Court, where the case was compromised.

The Sahus instituted another suit against Mannu and Mokund to recover possession of the two-anna share by setting aside the sale of the 28th April 1868. This suit also found its way up to the High Court, was remanded, and travelled up to the High Court again, where it was compromised along with the suit for the three-annas.

The terms of the compromise were as follows:—That the Sahus should receive Rs. 12,000; that the validity of Mokund's purchase should be affirmed; that the Sahus should abandon all claims against Hardeya under the zaribhurna and kutkina leases, and under the decree of the 17th June 1861; that they should retain their personal remedies against the Singhs in respect of the zaribhurna and kutkina leases; and that all claims for costs and mesne profits should be given up on all sides. As there were three appeals, one by the Sahus, one by Mannu, and one by Mokund, this compromise was carried into effect by three orders, one in each appeal, and each dated the 30th June 1871.

The Rs. 12,000 were duly paid to the Sahus, and on the 10th July 1871 an ikrarnama was executed by them, acknowledging the receipt of the money and reaffirming the terms of compromise. It is contended by the Respondent, who has come to represent the Singh family, that the Singhs were the substantial Defendants in the suits brought by the Sahus, and that the

compromise was effected entirely on their behalf. This contention, and the contention with respect to the compromise of 1862, are the main questions in the present appeal, but before discussing them some further legal proceedings must be stated.

On the 8th July 1872 Mokund executed a deed of sale of the five-annas to Mannu in consideration of Rs. 13,000. This must be taken as a purely formal transaction.

On the 13th December 1872 the name of Mannu was registered instead of the names of two Singhs, who had till then remained registered in respect of the two-anna share. Mannu died shortly afterwards, and on the 15th April 1873 the name of Baijnath was substituted for that of his father. These mutations were made without any objection by the Singhs or any other person.

In June 1873 the Appellant sued five ryots of Hardeya for rent of portions of the five-anna share. Three of them disputed his title, and it is stated that these three were Defendants to the rent suits brought by Mannu in 1860, though, with the exception of Obhoy Pandey, the names are different.

The Respondent intervened in the suits as an objector to the Appellant's title. The proceedings in the suit against Obhoy Pandey are given in the Record. Obhoy pleads that he has paid his rent to another, meaning the Singhs. The Respondent alleges that neither the Appellant, nor his ancestor, nor their vendor, nor the Sahus, were ever in possession of this share (the five annas), by receipt and enjoyment of rent; that great confidence and friendship existed between Mannu and the Respondent's ancestors; and that with a view to avoid certain dangers this share was advisedly allowed to stand in the name of Mannu, without giving him the

beneficial enjoyment of the same; that the Singhs remained in actual enjoyment of the share, and that the Appellant's suit was in violation of trust and confidence. The suit followed the course which appears to have been customary with the property in question. The Moonsiff decided for the Defendant, the Subordinate Judge for the Plaintiff, and then came a special appeal to the High Court.

On the 16th August 1875 that Court held that the sole question was who was in possession and in actual receipt of rent; and inasmuch as the Subordinate Judge had found that issue of fact in favour of the Appellant, he was entitled to a decree. As to the Respondent, the High Court held that he had no right to intervene for the purpose of proving the Appellant to be his benamidar, which was his real object. "If the Appellant," said the Court, "desires "to raise that question and have it decided "judicially he will have to bring a suit for the "purpose."

The Respondent did not bring any such suit. But it appears that contests arose between his partisans and those of the Appellant, and that the Magistrate of Shahabad was called upon to quiet the possession under the Criminal Procedure Code. On the 10th December 1875 he decided that the Respondent was in possession of the five-anna share, except the holdings of the five ryots against whom the Appellant had obtained a decree; and he ordered that such possession should be maintained, and that both parties should enter into recognizances to keep the peace.

After that decision the Appellant instituted the present suit for recovery of the property, except the holding of the five ryots. In his plaint he relies on the transactions of 1862 and 1871 as being in substance what they were in form. As regards the transactions of 1862, the Re-

spondent alleges that it was intended that Mannu should give up Hardeya but that owing to the pendency of a dispute with the Sahus it was settled that the property should remain in Mannu's name as furzidar. He also alleges that Mannu never obtained possession of Hardeya at all, but that the Singhs continued all along to hold possession of it. As regards the compromise of 1871, he alleges that the sale to Mokund in Mannu's suit was all effected by the Singhs, that the Sahus suits were defended on their behalf, and that Mannu and Mokund were merely nominal parties throughout. He states that he entered into the final agreement with the Sahus. He does not make any specific allegations as to the source from which the Rs. 12,000 paid to the Sahus and the costs of suit were defrayed. The Subordinate Judge decided the substantial issues in favour of the Appellant, and the High Court in favour of the Respondent. Hence the present appeal.

It is not to be denied but that very great obscurity hangs over every part of this case, and the counsel on each side have to admit that there are circumstances bearing against them which they cannot explain. To a certain extent this quality of the case inclines the mind to a belief in the truth of the Respondent's contention, because secrecy, and therefore obscurity, is characteristic of benami transactions; whereas if it be true that the Appellant's absolute title to the three-anna share dates from February 1862, and to the two-anna share from July 1871, there seems to be no reason why he should not tell a plain and straightforward story from beginning to end. This remark will be found to gain in significance when the case made by the Appellant and the evidence adduced by him comes to be considered.

Still it is incumbent on each party to dis-

charge the burden of proof which rests upon him. The Respondent, who alleges that the certified purchaser and registered owner is a benamidar, must give substantial proof of that allegation. On the other hand the Appellant has been found by a tribunal of competent jurisdiction to be out of possession, and it is for him to prove that either that finding is wrong, or, if right, the possession of the Respondent is a wrongful one, and should be displaced in the Appellant's favour.

Now this question of actual possession, that is to say possession by actual receipt of rents and profits, is by no means a clear one. But it appears to their Lordships that amid the great intricacies and obscurities of the case, the group of facts relating to possession stands out in clearer light than any other group, and affords the firmest standing ground for a decision. They proceed therefore to inquire in whom the actual possession of the property in dispute has remained since the purchase by Mannu in the year 1858.

The Appellant alleges in his plaint that his father was placed in possession by virtue of the order of the 1st of December 1858. And in order to prove the possession from that time the Appellant put in a number of jummabundi papers, purporting to have been kept by Jota Lal and others his motsuddis and to show regular payments of rent to them by the ryots for a number of years beginning with the month of September 1858.

On these papers the High Court have made a number of detailed criticisms leading up to the following conclusion : " It appears to us that " these jummabundis afford no evidence of pos- " session, they are clearly full of inaccuracies, if " they are not, as the Defendant contends they " are, fabricated documents."

Agreeing with the criticisms of the High Court so far as they go, their Lordships consider that the spurious character of the papers in question is more conclusively proved on a different ground. For among the few matters of fact which come out quite clear in this case, is the fact that in June 1868 and down to the 21st November 1869 the Government were in possession of the whole of the Singhs' interest in Hardeya. They collected the rents by their own surbarakar, and retained, if not the whole, at least a large portion of them, to pay a fine of Rs. 3,500 inflicted upon the Singhs. It is impossible then that there should have been such collections as shown by the earlier jummabundi papers. They must be forgeries, and the same taint must affect all the papers of the same character proceeding from the same quarter.

Unfortunately the discovery of falsehood in a portion of a case is not in Indian litigation so conclusive as to the whole as it is apt to be in England. But it is a highly material circumstance that the Appellant, who has been personally engaged in the transactions from beginning to end, sets out with a false allegation and supports it by forged papers.

The next incident is the litigation set on foot by Mannu against the five ryots, and, when the Singhs intervened, against them too. The precise date at which this litigation commenced does not appear, but it was probably late in the year 1859, and it may have been just after the Government released the estate. In these suits, and in the simultaneous suits for the mutation of names, judgment went in favour of Mannu and against the Singhs, on the ground that the former was in possession. It is not quite clear what the Courts meant by possession in these cases. In the rent suits it does not appear that any evidence

of actual possession by receipt of rents and profits was given. No evidence is specified by either Court except Mannu's purchase deed and the order of possession which followed it, and it is quite clear that the Court of Appeal rested on these documents alone. In the mutation proceedings it appears that three witnesses were cited by Mannu, who, it is said, "all speak with "one voice that he has holding and possession of "the property in dispute." But upon this it is to be observed that the Collector's business was to decide whether the title had been duly transferred, and not to proceed upon the basis or to decide the fact of possession.

Two of the five decrees against the ryots were actually executed, and the sum of Rs. 23. 11 was recovered on the 2nd of December 1861. This sum is entered in one of the Appellant's accounts, on which some observations will presently be made. It there appears to be the earliest receipt by the Appellant's house on account of Hardeya. It appears also that the enforcement of the decrees led to a serious affray, in which one Padarath, the putwari of the mouzah, took part on the side of the Singhs and against the Appellant. For this conduct an order was passed on the 21st December 1861 dismissing him from his office, but it seems that the dismissal was not enforced. Probably the proceedings taken against him were discontinued as part of the compromise effected about that time.

The state of things then between the release of the property by the Government and the compromise of 1862 was this:—Mannu had a legal title which was impugned by the Singhs, and he was striving to get possession in the sense of receiving rents. The Singhs were holding him at bay and encouraging the tenants to resist payment while they proceeded by legal methods to destroy his legal title. It has been before

observed that the suit which was brought by the Singhs for this purpose and the decree which they obtained therein both assume that possession is in the Singhs. It is not necessary to decide with any precision what might be the legal effect of a disputed possession of this kind, because it is after and not before the compromise that the fact of possession becomes critical for the purposes of this suit. But it is important to show the actual condition of things for two reasons; first, because it proves that the regular collection of rents shown by the Appellant's jummabundi papers was nearly as impossible up to the date of the compromise, as it was prior to the release of the estate by the Government; and secondly, because in their Lordship's opinion it tends to show the true nature of the compromise.

The arguments in favour of the Appellant's theory of the compromise are as follows:—That the Singhs had a hopeless case; that they escaped the costs of the two suits; that they gave up nothing substantial, because the sale to the Sahus in March 1860 had dislodged them from their position in Hardeya whether as old proprietors or under the kutkina lease; and that it is highly unlikely that of all persons in the world they would choose their active adversary to be their secret trustee.

To this it is answered that the case made by the Singhs to impeach the sale of Hardeya was at least an arguable one; that whatever it was they had actually got a decree; that the costs were a mere trifle, probably under Rs. 100; that though the Sahus had bought their interest, the Singhs were keeping them out of possession and disputing their title; that the Singhs certainly believed they had a substantial interest, as is conclusively shown by their bringing the suit against Mannu after the purchase by the

Sahus; that Mannu also was afraid of the Sahus; that all parties believed that the decree obtained by the compromise was an obstacle in the way of the Sahus, as is shown by the course of the subsequent litigation; and that the choice of a trustee is fully explained by the circumstance that at the same moment the Appellant's house became the bankers and agents of the Singhs.

If this were all, the probabilities relied on by the Appellants would at least be balanced by those relied on by the Respondent, and there would remain the great improbability that the Singhs should give up the whole subject of contention merely to escape a possible trifling liability for costs. Such a balance of probability would no doubt be insufficient to discharge the burthen of proof which lies on the Respondent if it were not aided by other things; but it is so aided.

It is a slight circumstance, but not wholly insignificant, that the petitions for compromise of the suit relating to Manyan and Manaich pray that the purchasers may be put into and continue in possession of those mouzahs, whereas the petitions and the order relating to Hardeya are wholly silent about possession. This may be an accident, but it tallies curiously with the Respondent's contention.

Again, the direct evidence is not such as to bear much strain upon it, but it cannot be wholly disregarded. Harihar Churn Singh says that he was present at a meeting which took place at Baijnath's house, between Mannu, Baijnath and Kissen Pershad Singh, when Mannu proposed that he should give up Hardeya and that the Singhs should give up Manyan and Manaich, and that, with reference to the claims of the Sahus, Hardeya should remain in Mannu's name; and he says that Kissen Pershad accepted those terms. Lungut Singh who was present on the same occasion substantially confirms this account

though in different words. This is very weak evidence to prove a trust, and standing by itself would be quite insufficient; but so far as it goes it is not discredited by cross-examination or contradicted by other evidence.

The accounts, which have been the subject of much discussion both in the High Court and here, come before the Court in this way. The Appellant has produced no accounts on his own behalf. At the instance of the Respondent the Court below made an order that the books of the Appellant should be examined by two persons, who extracted such figures as they thought expedient in the Respondent's interests, and without any reference to the Appellant. The High Court found the abstracts so made to be worthless, and declined to use them except when they were admitted by both sides. But they sent for the original books and examined them for themselves. In the record we now have full copies of two accounts extracted from those books for the two years beginning with September 1861 and ending September 1863. The two accounts are the Singh's account which was opened in February 1862, and another account called the Hardeya Gaon account, of which the Appellant says that it was a private account of his family, and the Respondent says that it was kept on behalf of the Singhs.

There are many difficulties in these accounts which it is impossible to explain, and the High Court have used them very strongly against the Appellant. But after repeated examination of such accounts as are contained in the record, and with every endeavour to extract some trustworthy conclusion from them, their Lordships are unable to do so in any instance. It would take a long time, and be an unprofitable use of it, to show in detail how this negative conclusion

is reached. But upon the accounts as a whole this general observation is to be made: that the Respondent, having by his agents free access to the Appellant's books, and having at the hearing such extracts as those agents thought it expedient to make, has examined the Appellant, but has not called his attention to any of the difficulties now pressed against him. It is obvious that great injustice may be done by treating a banker's accounts in such a fashion.

Of more importance is the fact that the Appellant has not chosen to bring forward any accounts in his own behalf. Such a thing can be done in India. By the 34th section of the Evidence Act of 1872 it is enacted that, "Entries in books of "account regularly kept in the course of business "are relevant whenever they refer to a matter "into which the Court has to inquire." It is impossible to suppose that this firm of bankers did not keep regular books of account showing all that they received and spent out of such a property as Hardeya. But the Hardeya Gaon account does not show that. It shows a quantity of receipts, and some small outgoings all for estate expenses. In the first year there is a balance of receipts amounting to Rs. 516, in the second year a balance of Rs. 1,680. It does not appear to whose account these balances were placed, or who ultimately got the benefit of them. And there is one, but only one, payment for revenue, viz. a sum of Rs. 16 appearing towards the end of the second year. If the Appellant had produced accounts showing that he, and not the Singhs, paid the revenue for Hardeya, and that the balances went into his private cash book, or were applied to his private purposes, such evidence would have been admissible for him in an inquiry whether or no the estate was held benami. The admissibility of such evidence does not shift the burden of proof,

but its nonproduction in such a case as the present one by a person in the Appellant's position is a circumstance which, when placed in the balance of probabilities, must weigh against him.

After all, however, their Lordships rest chiefly on the fact of possession, in the sense of receipt of rent, which they think must be decided in favour of the Singhs. It is certain that after the compromise peace settled down upon the disturbed village; and it is very difficult to suppose that such would have been the case if this combative family, who still continued to resist the apparently indisputable legal claims of the Sahus as to the two-annas, had been deprived of their rents. Such a supposition is all the more difficult because Padarath, the strong partizan of the Singhs and opponent of Mannu, was continued in his office of patwari, though previously condemned to lose it. This time of peace which continued for the remainder of Mannu's life, is explicable on the theory that the mouzahs in dispute were shared between the Singhs and the Appellant's house, but is not explicable otherwise.

It will be clearer at once to pass on to the subsequent evidence of possession, though in so doing we must anticipate much that relates to the two-anna share and the compromise of 1871.

No doubt the Appellant succeeded in his rent suits of 1873. But their Lordships think that the Subordinate Judge who decided in the Appellant's favour has given a far less satisfactory opinion upon the fact of possession than the Moonsiff who decided against him. The Subordinate Judge rests his decision almost entirely upon the decrees in the rent-suits of 1859, though he does add, but without referring to any evidence, that the Plaintiff has been receiving rent at least from those tenants whom he has sued. But in a very elaborate, and their Lordships must add a very clear judgment, the Moonsiff

examines the evidence, both oral and documentary, and weighs the witnesses one against another. He remarks that, except two of the Defendants who admitted his case, the Appellant did not produce a single ryot to prove payment of rent, nor a single receipt for payment. The Moonsiff's conclusion is, "that the "possession of the Plaintiff is confined to the "papers alone, and not in actual collection of "rent and enjoyment of it."

It is true that the finding of the Subordinate Judge, which was binding upon the High Court in special appeal, is binding still as between the parties to the rent suits, and as regards the lands therein comprised. It is true also that the benami question, which the Moonsiff discusses incidentally, was not in issue. But it is difficult to say that the question of possession was not in issue. Of course it was in issue as regards the three ryots who resisted the Appellant, and the dispute was of a nature to bring in the evidence that was actually given as to the possession of other lands in the Mouzah. And viewing the proceedings in those suits in their bearing upon the present case, their Lordships think that they go to prove the possession of the Respondent, and not that of the Appellant.

It is remarkable that so convinced were the Government officers of the possession of the Singhs, that in the month of May 1875, after the decision of the Subordinate Judge in favour of the Appellant, an order was issued under the seal of the Magistrate of Shahabad directing the Singhs as proprietors of Mouzah Hardeya to build a school house.

An entirely independent inquiry was made by Mr. Vowel the Officiating Magistrate, who in December 1875 was called upon to maintain the possession of the person whom he should find to be in possession. He found that issue in favour of the

Respondent. On that occasion the Appellant produced the evidence of many ryots and receipts for rent. But the Magistrate reasonably enough looked with suspicion upon evidence not produced two years before in the same dispute before the Civil Court.

The result of this examination is to bring their Lordships to a reasonably clear conclusion that from the time of the compromise of 1862 till after the death of Mannu the Singhs were in undisturbed possession of the three-anna share of Hardeya. And adding to this fact the other evidence above-mentioned as bearing upon the nature of the compromise, they are of opinion that the possession is referable to a rightful title, and that Mannu was benamidar for the Singhs. It remains to decide what is the true position of the rest of the property under the compromise of 1871.

That compromise embraced the whole five-anna share which was conveyed or released by the Sahus to Mokund and by Mokund to Mannu. But with respect to the three annas it follows from what has before been said that Mannu was in a fiduciary relation to the Singhs, and therefore could not without their concurrence acquire any interest in that share except for their benefit. As regards the two annas, the first thing to be considered is the question who has had the possession?

With regard to this share there is no doubt that however valid the title of the Sahus may have been they never succeeded in getting possession. The Singhs remained in possession during the long litigation, and were in possession in July 1871 when the Sahus released the property. After that event there was mutation of names, as above stated, but that is quite consistent with the retainer of possession by the Singhs. With respect to actual possession after the compromise,

the evidence relating to this share is the same with the evidence relating to the other share. Baijnath's rent suits, the order for erection of a school, and the decision of the Magistrate, apply to both shares alike. In one respect the case made on behalf of the Appellant in the Courts below, though it is not made by his Counsel here, with respect to the two annas fails more decidedly than that made with respect to the three annas. For in his plaint he sets up Mokund as a substantial owner, alleging that he sold to Mannu and put him in possession. And several of his witnesses state that the share of rent was for a time paid to Mokund, and afterwards to Mannu. All this must be pure fiction, for it is now no longer denied that Mokund is nothing but a shadow.

Their Lordships therefore draw the conclusion that the two-anna share also has remained in the possession of the Singhs up to the present time. Their possession after the acquisition of the apparent ownership by Mannu is not nearly so long as their possession of the other share, and therefore does not afford the same evidence of a rightful title. But it lasted from June or July 1871 till the death of Mannu, which must have been about the end of 1872 or beginning of 1873; a period of some 18 months, during which it is not likely that Mannu would remain wholly passive if he was being kept out of his property. And once having established a benami transaction for one share, it becomes a much easier process to conclude that there was a similar transaction for another.

The real difficulty on this part of the case, and their Lordships do not underrate the magnitude of it, is that the Respondent has given no substantial evidence to prove payment by the Singhs of the Rs. 12,000 received by the Sahus. There is no question but that this money was

paid by the Appellant's bank. The Respondent makes no specific allegation in his written statement about it, and he gives no evidence personally. The only attempt made to prove payment by the Singhs is contained in the evidence of one Gomani Lal, a servant of the Singhs. He says that in Cheyt or Bysack 1278, corresponding to March or April 1871, an interview took place between the Appellant and Respondent, at which it was agreed that the money should be paid to the Sahus, that the Respondent should find as much as he could, that the Appellant should advance the remainder, and that the Respondent should have given to him the property which was in the furzi name of the Appellant. Then he says that the Respondent sent Rs. 1,500 at that time through Hazari Lal, and Rs. 15,000 or Rs. 16,000 by five or seven instalments to the Kooti at Arrah (the Appellant's bank) from 25th Jeyt to 12th Assar 1278, *i.e.*, from the 29th May to the 13th June 1871. The Kooti granted receipts of acknowledgment on every occasion. He adds that the receipts were returned on a settlement of accounts. Such a statement coming from a man who does not appear to have taken any personal part in any of the alleged payments and not supported by any kind of voucher, or by the Respondent himself, is hardly worthy of attention. And this defect of evidence would be fatal to the Respondent's case if it were not for blemishes in the case of the Appellant, which afford a counterpoise to it.

The Appellant's house were at this time acting as bankers of the Singhs and their agents in the management of Ruppur. They were in frequent receipt of money from the Singhs and their servants in respect of this business. Therefore they had the means of repaying themselves without any formal

passing of money for the particular occasion. The importance of this relation between the parties has been felt on the Appellant's side, because several of his witnesses say, and apparently have been tutored to say, that the banking and agency transaction had come to an end before the compromise of 1871. Thus Mothura Lal, who is a mukhtar, says, the transaction with Mannu's house had ceased since two or three years before the compromise with the Sahus. And several other witnesses speak to the same effect. But the mutual releases by which the Singhs and the Appellant's house closed their transaction have been proved and are found to bear date some time in September 1872.

Another badge of insincerity in the Appellant's case is his anxiety to set up Mokund as having a substantial interest. The statement in the plaint has been referred to before. In his evidence the Appellant says, "Before the kobala (the "conveyance) of Mokund Lal, the income "three annas and odd pie share is entered in my "'bahi' (account). The income of Mokund "Lal's share, which sometimes used to come "used to be sent to him, and sometimes used to "be entered in his name." Such an attempt to set up the phantom Mokund as the real owner of the two-anna share, supported as it is by the oath of the Appellant who knows all the facts, cannot fail to throw great suspicion over the Appellant's title.

Moreover, the arguments before drawn from the rules of evidence in India apply even more strongly to the present part of the case. It may well be that the Singhs did not keep accounts, but we know that the Appellant's house has kept minute and elaborate accounts, and it is impossible to suppose that the payment of Rs. 12,000 was not entered in their books in the ordinary course of business, so as to show exactly

from whose funds it came. If the payment was as the Appellant alleges, why should he not have taken the simple course of producing his books to show it ?

Under all these circumstances, their Lordships think that they have no safe guidance except that which is afforded by the possession, and that however strongly they may feel the difficulty and obscurity of this part of the case, they ought to hold that the Appellant is benamidar for the whole five-anna share of Hardeya, and that the decree of the High Court in favour of the Respondent is correct. They will humbly advise Her Majesty to affirm that decree and dismiss this appeal; and the Appellant must pay the costs.