Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gossain Dalmir Puri v. *Moonshi Gopi Nath and others, from the High Court of Judicature at Fort William in Bengal; delivered* 18*th February* 1893.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Appellant was Plaintiff in the Lower Court. His case was this:—Kowakole, a large talook in Zillah Gya, belonged in moieties to two families, or rather to two branches of one family descended from a common ancestor. Each branch in itself was a joint family. In 1872, the Plaintiff's predecessor in title, Gossain Luchmi Narain Puri, was in possession of the entirety of 11 mouzahs appertaining to Kowakole, under a zurpeshgi lease dated in 1859, and executed by the manager and representative of each branch of the family. In November 1872, as alleged by the Plaintiff, Norender Singh, who was the manager and representative of the junior branch, and who was then entered in the Collector's books as the proprietor of 8 annas of Kowakole, granted to Luchmi Narain a zurpeshgi lease of his moiety of the 11 mouzahs, to take effect on the 27th of September 1874 at the ex-

piration of the lease of 1859. The consideration for the lease of 1872 was expressed to be the sum of Rs. 11,000, borrowed "from time to time" on the promise of such a lease for the benefit of Norender and his branch of the family. Norender, however, according to the Plaintiff's story, "did not give possession of the 8 annas" . . . to Luchmi Narain "from 1282 F. S.," that is from 1874. "On the contrary," the plaint goes on to say, "he himself entered into possession "and enjoyment of the profits, and remained so." Nor did Norender or his successors in title pay any part of the principal of the zurpeshgi money,—"not a cowri even,"—or any interest on account thereof. Under these circumstances, in May 1886, after nearly 12 years of silence and delay, the Appellant sued for a decree for payment of principal and interest and realization of the decree by sale, or in the alternative for possession of the mortgaged property. Thirty persons were made Defendants to the suit. Of these, 10 were members of Norender's branch of the family; the rest, according to the statement in the plaint, were persons who had "purchased "the mortgaged property at auction on account "of a debt contracted subsequent to the Plaintiff's "lien."

At the trial oral evidence was adduced by the Plaintiff to prove payment of the zurpeshgi money, the execution and delivery of the lease, and the execution and delivery of the kabulyat or counterpart. To these facts, if facts they be, several witnesses called by the Plaintiff deposed, all in the same terms and all repeating incidents in which they had no personal concern with the same admirable and suspicious exactness. The Defendants brought forward no witnesses. They contented themselves with putting in evidence a plaint filed in a former suit instituted in 1878 by Luchmi Narain, and

adopted by the Appellant in 1880 on Luchmi's death. The Judge of the Lower Court, passing over all the difficulties of the case, held that the claim was clearly proved by the oral testimony. He gave a decree in accordance with the prayer of the plaint against all the Defendants except some who had disclaimed. Those of the Defendants who were mortgagees and auction purchasers appealed to the High Court. On appeal the decree was reversed as against them, upon the ground that there was no satisfactory evidence to show that the transaction on which the claim was founded was a real transaction.

Notwithstanding the able and ingenious arguments of the learned Counsel for the Appellant, their Lordships think it impossible to dissent from the conclusion at which the High Court has arrived. It was incumbent on the Plaintiff in a contest with the present Respondents to give satisfactory proof of the truth and reality of the original transaction, and some reasonable explanation of the subsequent delay. This burthen, in their Lordships' opinion, has not been discharged.

The original lease of 1872 was not produced. It is supposed to have been lost. The account of its loss is certainly not very satisfactory. The lease was seen, it was said, several times, some years ago, in a bundle of papers in a chest belonging to the Appellant. When it was wanted it was not to be found, and somebody was dismissed because it was not forthcoming. No investigation seems to have been made into the matter. No reason has been suggested why the person punished for its loss should have made away with the instrument. For the purposes of the trial secondary evidence of its contents was given by means of an attested copy from the Registry Office. But, in a case of this sort, a copy, though it may be legal evidence, isno t quite the same thing as the original.

The original kabulyat was not produced. Notice to produce it was given to the person in whose possession it was said to be. But the notice was not followed up, and the Appellant did not put himself in a position to give secondary evidence of its contents.

The accounts showing the advances which made up the Rs. 11,000 are said to be in existence. But they, too, were not produced. The learned Counsel for the Appellant attempted to account for their non-production, or, at least, to minimise the effect of their absence, by observing that Indian accounts are not always trustworthy—an observation with which the learned Counsel for the Respondents would probably not desire to quarrel.

On the other hand, the oral evidence leaves nothing wanting. The witnesses saw everything there was to see. After the lapse of 15 years they remembered everything they saw as if it had occurred yesterday. The learned Judges of the High Court, not perhaps without reason, distrust eyes so observant and memories so retentive.

The strangest thing, however, after all, is the patient submission with which the Appellant and his predecessor in title bore the wrong done to them. Why men apparently not peculiarly averse to litigation should have hesitated so long to enforce a just claim passes comprehension. The Appellant has not vouchsafed any explanation on the subject. The excuse offered by his Counsel is plausible so far as it goes. There were disputes, it was said, and litigation which might have made the lease of 1872 waste paper; it was not worth while to put it forward. Still there was no reason for suppressing all mention of the lease, even while the litigation referred to lasted, and there was a considerable interval between the close of that litigation and the institution of the present suit.

There is great obscurity about Luchmi Narain's dealings with the proprietors of Kowakole. Some little light is thrown upon his conduct by the plaint in the suit of 1878, and a deposition made in that suit by one Nirput Lal who was his mokhtar, and who is a witness in the present suit. But the light, such as it is, does not in their Lordships' opinion tend to improve the Appellant's case.

It would appear that on the death of Norender's predecessor in title, which took place in the year 1864, disputes arose about mutation of names, and that for a time, and until after the date of the last but one of the alleged advances making up the Rs. 11,000, Tekait Het Nerain Singh, who was the manager and representative of the senior branch of the family, was the only person registered in the Collector's books in respect of Kowakole. Apparently Luchmi Narain thought it for his advantage to acknowledge Tekait as the proprietor of the whole property, and he took from Tekait alone an ikrarnama in confirmation and extension of a zurpeshgi lease of five other mouzahs appertaining to Kowakole, which had been originally granted by the managers and representatives of both branches of the family. Why in these circumstances Luchmi Narain should have advanced money to Norender to help him to oppose Tekait, and why he should have made those advances on the security of Norender's interest in the property while, at the very time, his case was that Norender had no interest at all, it is difficult to understand.

Then it appears from Nirput's deposition that on the expiration of the lease of 1859 Luchmi Narain, so far from being excluded by Norender, gave up possession of the entirety of the 11 mouzahs to Tekait. Afterwards disputes took place between Luchmi Narain and Tekait, and

there seem to have been judgments and auction sales of Tekait's interest in the 5 mouzahs and the 11 mouzahs. In these transactions and in the litigation which commenced in 1878 Luchmi Narain and the Appellant insisted that Tekait was the proprietor of the entire talook, and that Norender had nothing to do with the property. While this dispute lasted, it may be that there was an intelligible motive for keeping the lease of 1872 out of sight. But Norender's title to 8 annas was established in the suit of 1878 by a decree in 1881 and a judgment on appeal in 1883. There was then no longer any motive for concealment. But even then the Appellant did not assert his title under the zurpeshgi lease of 1872. He stood by until May 1886, when the plaint in this suit was filed, although he must have known that the property comprised in the alleged lease of 1872 was being dealt with by mortgages and auction sales.

In the result, their Lordships are compelled to hold that the Appellant has failed to establish the truth and reality of the transaction on which his claim is based. Under these circumstances it is unnecessary to consider the question whether, assuming the lease of 1872 to be good, the Appellant's conduct has been such as to disentitle him to priority over the Respondents, a question which is perhaps not open at this stage of the proceedings, there being no issue on the point, and no direct evidence on the part of the Respondents of absence of notice.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The Appellant will pay the costs of the appeal.