

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal and Cross-Appeal of Syed Asghar Reza Khan v. Syed Mahomed Mehdi Hossein Khan and others; and of Syed Mahomed Mehdi Hossein Khan and others v. Syed Asghar Reza Khan, from the High Court of Judicature at Fort William in Bengal; delivered the 4th March 1903.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD SHAND.

LORD LINDLEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Lord Lindley.*]

The question to be determined on these Appeals is the right of the Plaintiffs (Respondents in the first Appeal) to four properties in the possession of the Defendants. The Subordinate Judge decided in favour of the Plaintiffs. Two of the Defendants appealed to the High Court, which affirmed the decision as to three out of the four properties, but reversed it as to the fourth. One of the two Defendants who appealed to the High Court has appealed to His Majesty in Council from this decision so far as it is adverse to him; and the Plaintiffs have appealed from it so far as it is adverse to them.

As to three out of the four properties, both Courts were in favour of the Plaintiffs; but as

to the fourth the High Court considered that the title was *res judicata*, and on that ground and that only they differed from the Subordinate Judge.

Passing over this question for the present their Lordships are of opinion that the Plaintiffs have established their title to all four properties. The Defendants showed no prior title of their own. They relied on possession and lapse of time, and the first Appellant relied further on conveyances subsequent to those under which the Plaintiffs claim. Adverse possession for 12 years before the commencement of this action was not proved, and the conveyances relied upon by the first Appellant conveyed no title by reason of the prior conveyances to the Plaintiffs. This was the view taken by both Courts in India, and were it not for the Cross-Appeal and the defence of *res judicata* as to one of the four properties, their Lordships would not think it necessary to say more. They would simply dismiss the first Appeal.

The defence of *res judicata* and the Cross-Appeal render it necessary to go a little further into detail. The title of the Plaintiffs, who are the Respondents in the first Appeal, will be found accurately stated in their case. The following short statement is all that is necessary for the purpose of understanding the defence of *res judicata*.

The Zemindari of Surjapore geographically included all four properties in dispute and formerly belonged to Syed Haidar Reza and Syed Safdar Reza in equal shares. Syed Haidar Reza is the ancestor of the Defendants 3 to 11 who are not Appellants. The Defendant No. 1, who is the only Appellant in the first Appeal, is a step-brother of Syed Haidar Reza. In 1876 Syed Haidar Reza and Syed Safdar Reza mortgaged their shares in the Zemindari to Syed

Lutf Ali Khan. In 1883 Haidar's share and in 1892 Safdar's share was sold to him. The Plaintiffs claim through him. The four properties now in dispute are claimed by the Plaintiffs as parts of the Zemindari, and the main contest in this case turned on whether they were parts of it or whether, as the Defendants alleged, they had been severed from it and did not pass to Syed Lutf Ali Khan. Both Courts decided this point in favour of the Plaintiffs as to three properties, and their Lordships see no reason whatever for differing from them.

The fourth property in dispute called Kutubgunge was a bazar built many years ago. There was a dispute and litigation (in 1865 and lasting until 1869) about this bazar between the then owners of the Zemindari. The proceedings in this litigation are set out in the record and the history of the bazar appears to be as follows:— It appears that there were two bazars in this Zemindari both built many years ago. One was built by an ancestor of the then Defendant, and the profits of this were not divided between the Zemindars but were enjoyed by the Defendant and his ancestors. The other which was then (and is now) in dispute had been built by a female ancestor of the then Plaintiff Ahmed Reza and was claimed by him as part of his share of the Zemindari. It was apparently held under a lease or a succession of renewable leases in respect of which a ground rent was payable to the Zemindars. The question in dispute was who was entitled to the profit rental. Ahmed Reza claimed it all as his. The other Zemindar, *i.e.*, the then Defendant, claimed a share of it. The decision was in favour of Ahmed Reza. Neither party claimed the bazar as property severed from the Zemindari. Nor did the Court decide that the land on which the bazar was built was not part of the Zemindari estate within which it was

locally situate. All that was decided in this litigation was that Ahmed Reza as the successor of the person who had built the bazar was entitled to take for his own benefit the profit rental obtainable from it and was not bound to share that rental with the other Zemindar.

Under these circumstances the plea of *res judicata* might well be a defence to a hostile claim by persons asserting a title under Ahmed Reza's former opponent against those who claim under him. But their Lordships are at a loss to understand its applicability in a dispute between persons all of whom claim under Ahmed Reza himself, as the Plaintiffs and the Defendants in this case do. The claim under the Statute of Limitations being negatived, the present dispute must turn on the true construction of the conveyances under which the parties respectively claim.

The conveyances to the Plaintiffs' ancestor, Syed Lutf Ali Khan, were made in 1883 and 1894 and are set out in the record. The deed of 1883 contains no words of exception or reservation and is ample in point of language to pass all Syed Haidar Reza's interest in the Zemindari, including the land on which the bazar was situate. His interest in the houses on that land and in the profit rents derived from them would pass by the deed in the absence of words showing an intention to retain them.

It is true that in 1890 and 1891 Haidar Reza and his wife sold his share in the bazar to the first Appellant, but the prior conveyance to the Plaintiffs' ancestor left them no share in this bazar which they could convey to any other person.

The share of Safdar Reza was sold under the decree of the Court and the sale certificate of the 17th December 1894 shows that all his interest in the property mortgaged by him was sold to the Plaintiffs. The description in the certificate

is again quite sufficient to pass his interest in the bazar in the absence of any words showing an intention to exclude it.

The result, therefore, is that their Lordships will humbly advise His Majesty to dismiss the Appeal of the Defendant Syed Ashgar Reza, and to allow the Cross-Appeal of the Plaintiffs and to discharge the Decree of the High Court so far as it reversed the Decree of the Subordinate Judge, and to order the Appellant Syed Ashgar Reza to pay the costs of that Appeal. The other Appellant to the High Court is not before the Board and cannot, therefore, be ordered to pay these costs.

The Appellant Syed Ashgar Reza will pay the costs of his Appeal and of the Cross-Appeal.

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