Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals (Nos. 4 and 5 of 1870) of Runjeet Ram Panday v. Goburdhun Ram Panday and others from the High Court of Judicature at Fort William in Bengal; delivered 2nd April 1873.

Present:

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

THIS is an Appeal from decrees of the High Court of Calcutta affirming the Judgments of the Principal Sudder Ameen in two cross suits relating to some mouzahs in Zillah Gya in Behar. A Magistrate's order had been made prior to the suits, which dealt with four of the mouzahs referred to in them. The effect of that order was to declare that the Appellant was in possession of three mouzahs, Khyra, Hussra, and Moojooratro, and that the Respondents were in possession of a mouzah called Dalla Kullan. It appears that the immediate reason for requiring the intervention of the magistrate was some disputes with reference to Dalla Kullan. A man had been murdered in the course of an affray in that mouzah, and the evidence given before the magistrate appears to have related principally to it. There appears to have been little or no evidence given before him as to the other mouzahs; but undoubtedly his order is that the Appellant should remain in possession of Khyra, Hussra, and Moojooratro, and that the Respondents should remain in possession of Dalla Kullan.

The Magistrate's order led to the two suits which gave rise to the Judgments under appeal.

The Appellant, Runjeet Ram, brought the first of these suits to obtain possession of Dalla Kullan, and a confirmation or declaration of his title with regard to the three mouzahs, Khyra, Hussra, and Moojooratro; and he included in the latter part of the suit, that is, in the prayer for confirmation, three other mouzahs. One of those mouzahs, Rutnagh, was in the suit declared to belong to him, and no question arises in the Appeal respecting that mouzah, or with respect to the two other mouzahs, Dhajabun and Kantee, for which he sought a confirmation of title.

The second suit was brought by the present Respondents, and that suit was to obtain possession of the three mouzahs which the magistrate's order had declared to be in the possession of the Appellant. Therefore the questions which arise under the two suits in the present Appeal are the same with reference to the four mouzahs, Dalla Kullan, Khyra, Hussra, and Moojooratro; first, the question of title, whether they belong to the Appellants or the Respondents? and, next, the question arising on the Statute of Limitations.

The first question to be considered is the main one; namely, the title. The dispute between the parties arose in this way: the Appellant, Runjeet Ram, claimed to be entitled to a mokurruree lease of the mouzahs, which undoubtedly had been granted to him, and in his name only, as his own self-acquired property. The Respondents asserted that, though the mokurruree had been granted to him, the mouzahs contained in it were old ancestral property belonging to the family, and that the mokurruree was granted to Runjeet Ram on behalf of the family, and not on his own individual account. That dispute had been brought into a court of justice; but before the proceedings had gone far in the suit, the parties, it is said, agreed to refer the question to arbitration, and it is said that an award followed upon the agreement.

Now, on the part of the Appellant it is asserted that the documents which appear upon the record,—

which undoubtedly, if they are genuine, show that there was an agreement to refer, and an award, confirmed by an order of court,—that all those documents are spurious and fabricated. The main question is, whether that contention is established or not?

It may be observed in the outset that the Principal Sudder Ameen of Gya and the High Court have given concurrent judgments upon it. They have come to the conclusion that there was a submission to arbitration, and that the award set out in the record has been proved; and they are also of opinion that the order of the Civil Court confirming that award was proved.

The Respondents have given some evidence that before the submission to arbitration the property included in the mokurruree pottah granted to Runjeet Ram had been held by his father and his grandfather. And it does appear from the receipts given in evidence in the cause that this was so, which certainly negatives what is put broadly forward by Runjeet Ram, that he acquired this mokurruree for the first time by his own exertions. However, the evidence before the date of the submission to arbitration is not very strong.

The agreement to refer appears to have been made in January 1834. It is an agreement made by the then members of the family. It states that, "A suit arising from contention "about shares amongst us is pending in Court, "and is now entered on the special board for "trial;" and then it goes on to say, "We "have constituted" * * four persons, one of whom is Gunnesham Singh, * * "and undertake "in writing that we will, without demur, abide "by and be governed by the decision with regard "to the allotment of shares which these arbi- "trators may pronounce." If genuine, it is a perfectly good submission to the arbitration of these four persons.

Now, this agreement is proved to have been executed by the testimony of Gunnesham Singh,

one of the arbitrators, and it is authenticated by the signature of Mr. Smith, the commissioner of Patna, who also signed the mokurruree lease; and it may be observed that Runjeet Ram, who was examined before the magistrate, does not deny that such a submission was made, although he says that no award followed it. The evidence, therefore, of the ikrarnamah, or agreement to refer, seems to their Lordships to justify the findings of the Courts below that it is a genuine document.

It appears that two days after the date of the ikrarnamah a mokurruree pottah was granted by the Maharajah Domurnath Sahee, who is described as owner and mokurrureedar of pergunnah Beeloucha, of the mouzahs now in dispute, and of several other mouzahs to Runjeet Ram, to be held from generation to generation at an annual rent of sicca rupees 258. Runjeet Ram's claim arises from this pottah having been executed in his own name, and the pottah, no doubt, is consistent with his case that it was self-acquired. But it bears date two days only after the submission to arbitration, and the two documents appear, when regarded by the light of the subsequent award, to have been made contemporaneously, for the purpose of having the property placed in the name of one of the family as a convenient form for vesting the mouzahs in the family upon a clear mokurruree title.

The next document to which reference should be made is the disputed award itself. That, of course, is the most important document in the case, for it is the evidence of the title set up by the Respondents. The award is very full in its statement. It sets forth the substance of the claims advanced on both sides, and then declares the course which the arbitrators themselves took to arrive at a proper decision upon the question referred to them. It states: "As by inquiries "from the neighbours, and from the deposition "of the witnesses, such as the putwaree, jeth "ryot, and cultivators of the contested mouzahs

" and shareholders, also on a reference to some " papers of a suit in a court of justice, filed by " the opposite party, the fact of the aforesaid " mouzahs having been acquired by the ancestors " of the parties while together, and that they " remained in joint possession of the shares as " alleged by the opposite party, has been proved " and established." Therefore, if this be genuine, these four arbitrators decide that these mouzahs had been in the family, and had been acquired by the ancestors of the parties, and that they had remained in joint possession. Then the ordering part of the award is, "That the claim " of the first party," that is, Runjeet Ram, to the " entire 16 annas of the contested mouzah be " disallowed." It thus appears that he had put forward his claim, as he does now, and it was after this investigation disallowed. It goes on: " The first and opposite parties shall remain in " possession of the whole of the property in " dispute in equal moieties, as per detail sub- " joined to this award." Then the detail is given, and certain mouzahs are allotted to Runjeet Ram, including Mouzah Rutnagh; and certain other mouzahs are allotted to the predecessors in title of the Respondents, which include the four mouzahs which were the subject of the magistrate's order, and are those in question in the present appeal.

It is important to observe that the award refers to the mokurruree pottah, and provides for the mode in which the mokurruree rent shall be paid. The mode in which that is provided by the award is this:—the rent is divided, and it is assumed that one half of it, or 129 rupees, would be payable equitably according to the allotment by those whom the Respondents now represent; but for convenience it was provided that the whole rent should be paid by Runjeet Ram; and certain mouzahs, or the produce of certain mouzahs, were given to him in order to compensate him for the share of the rent which he was to pay for them. In consideration of having the pro-

duce of those mouzahs he was to pay the whole rent, and to indemnify the other branch of the family from the one half of it. That accounts for his continuing to pay the rent, which appears to be the same as the Government revenue, and accounts for all the receipts for the rent being in his own name, and for the fact that none appear in the names of the Respondents.

The authenticity of this award has been very strongly disputed. It was produced in the Courts below, where the judges were much better able to decide upon the view of it than their Lordships can be as to its genuineness; and those Courts, having seen the document, and having heard all the evidence, came to the conclusion that the document was genuine. It would be contrary to their Lordships' usual practice to find that an instrument of this description was spurious and fraudulent, against the concurrent findings of the Courts below. Undoubtedly there may be cases where the inference is so strong from the evidence that that might be done; but it is evident that such cases must be extremely rare. Their Lordships find no evidence which leads them to the conclusion that the Courts have come to a wrong finding upon the authenticity of this award. On the contrary, there are two circumstances, independently of the general history of the case, which appear to their Lordships to be very strong in its favour. The first is, that one of the arbitrators, the only surviving one, Gunnesham Singh, was examined as a witness, and distinctly stated that although he could not recollect the substance of the award, yet that an award was made. Therefore the assertion of Runjeet Ram that no award followed the submission is clearly disproved by one of the arbitrators themselves; and if any witness is to receive credit in India there can be none entitled to higher credit than those whom the parties have selected to settle their disputes, and to whose position and respectability they have therefore both borne practical testimony. But, again, if this was not the award, Runjeet Ram might have

proved that fact. He might have said, This award is not that which was made by the arbitrators, and have stated circumstances which would have enabled the Court to decide upon his assertion, if it really had been a true one. But he abstains altogether from going into the witness box to deny the authenticity of that which he asserts upon his pleading to be a spurious and fabricated document.

Their Lordships, therefore, are unable to come to any other conclusion than that it is their duty, so far as this instrument is concerned, to agree with the findings of the Courts below.

Another document appears upon the record, which undoubtedly is open to the strong observations which have been made upon it very ably by Mr. Doyne; that is, a proceeding in the Civil Court of the district of Behar, which professed to be a confirmation of the award in a suit brought for that purpose. It is dated the 15th April 1837. It, no doubt, on the face of it, is an order which recites that a suit was brought upon the award for the purpose of having it confirmed and enforced; and it concludes in this way:—" It is therefore ordered that without the arbi-" trators being cited, and without hearing their " depositions, the arbitration award in this case, " as the claim is admitted, be confirmed." Various objections to this order arose from improbabilities appearing on the face of it. They are set out in the Judgment of the High Court. The High Court, admitting that these improbabilities exist and are strange and irregular, still think that they may be accounted for upon the reason that at the time when the order was made in the year 1837 the proceedings of the Courts were characterized by some irregularities. Their Lordships think that if the case had depended on this document alone, it would have required very great consideration on their part before they could have acceded to the view taken by the High Court regarding it. But in the view they take of the case they do not think it neces-

sary to give any opinion of their own upon its genuineness; for, assuming it not to be a genuine document, still the award to which they think they are bound to give credit remains; and that award is sufficient to establish the proposition for which the Respondents contend, namely, that these mouzahs belonged to the family as joint property, and that the mokurruree pottah was granted to Runjeet Ram, not for himself only, but on behalf of the joint family, and therefore that at the time of this award he held the whole of the mouzahs contained in the pottah for the benefit of the family. No question of time arises under Regulation 6 of 1813; for this is not a proceeding to enforce the award in a summary way, but it is a regular suit founded upon the original joint title and the subsequent partition; and the award, and the proceedings which led to it, are used only as evidence in proof of that title, and to show that the mokurruree pottah was granted for the benefit of the family.

Their Lordships have therefore come to the conclusion already in effect stated, namely, that these mouzahs were joint property and were partitioned or were awarded to be partitioned by the award in the way in which that instrument declares them to be allotted.

With regard to limitation, an objection is made to the right of the Respondents to recover in the suit which they have brought for the recovery of the three mouzahs, Khyra, Hussra, and Moojooratro; and the same objection is made to their title to hold Dalla Kullan upon the ground that the possession since the award has been with Runjeet Ram, and not with them. The objection turns upon the Statute of Limitations, and must be dealt with as one under the statute. This question has occasioned some difficulty to their Lordships in consequence of the manner in which it has been dealt with by the Courts below. The award, which must now be assumed to be valid, directed that the mouzahs should be allotted, some to the Appellant and some to the

Respondents; and from the time of the award, undoubtedly the possession, to be in accordance with it, should have been the separate possession by the different parties of the several mouzahs allotted to them. The Principal Sudder Ameen and the High Court have held that the possession of Runjeet Ram would be the possession of the rest of the family, treating him as the holder of the mokurruree grant as a trustee for them. Neither Court appears to have considered the question of the possession in fact of these mouzahs, but they have rather assumed that if the possession was with Runjeet Ram it would still be, under the circumstances, the possession of the whole family, and not an adverse possession by him against them. Their Lordships are not prepared to agree with that view, because undoubtedly that is not the case which is set up by either of the parties, and it is not consistent with what might presumably be expected to have followed the award. Their Lordships therefore have been obliged to look at the evidence, unassisted by any findings of the Courts below upon the fact of possession. They have had to consider whether they were able to form a judgment upon the evidence as it stands for themselves, or whether it would be their duty to send the case down for further investigation and inquiry. The latter course is clearly undesirable, as it would necessarily involve a new inquiry at great expense, and at a distance of time when the evidence might have disappeared, and witnesses who might at an earlier stage have been called were gone. They have therefore felt that they would best administer justice between the parties by deciding this question for themselves.

Now first of all, with regard to Dalla Kullan, their Lordships have looked very carefully at the evidence, and they think that, with regard to that mouzah, the evidence is tolerably clear that the possession was with the Respondents before the Magistrate's order. The Magistrate has so found, and his attention was certainly called to

that mouzah from the circumstance already adverted to; and there is very strong evidence in the record that it was in the possession of the Respondents. It is also to be observed that Gunnesham Sing, the arbitrator, says that it was in their possession at an early time after the award.

Their Lordships therefore think that it is established that Dalla Kullan was in the possession of the Respondents within 12 years before the commencement of the suit; and if it was in their possession at any time within that period the statute cannot be set up as a bar against the title, which must now be assumed to be in them. Their Lordships cannot fail to observe that if they are right in the conclusion that Dalla Kullan has really been in the possession of the Respondents, that fact very strongly supports the contention that the award is a genuine instrument, —because, undoubtedly, that mouzah is included in the mokurruree pottuh, and no suggestion has been made as to how it came into the possession of the Respondents, unless under the award which gave them title to it, notwithstanding the apparent title of the Appellant by reason of its being included in the mokurruree grant.

With regard to the other three mouzahs, Khyra, Hussra, and Moojooratro, the evidence is more conflicting. There is evidence on both sides. There are several witnesses who say that those mouzahs were in the possession of the Appellant; but there are several others who speak very distinctly to the possession of the Respondents. The last-named witnesses speak to a possession for a considerable period of time. Some of them say they themselves cultivated the land in the mouzahs, and shared the produce with the Respondents. It is, of course, extremely difficult to come to a conclusion which is satisfactory to the mind upon evidence of this kind. The magistrate's order with regard to those mouzahs has certainly not the weight which it has with regard to Dalla Kullan. He does not

appear to have taken evidence with regard to them.

Mr. Doyne relied upon certain mortgages which had been made of one of the mouzahs, Moojooratro. It appears that in 1838 that mouzah was mortgaged to Gunput Sahoo. Various proceedings were taken, and time given; and ultimately in 1862 there was an acquittance, in which it appears that the mortgage debt was included with other sums, and discharged. It is to be observed that there is no evidence whatever that the mortgagee took possession of the property mortgaged to him, or that the mortgage itself was in any way brought to the knowledge of the Respondents.

In 1852 there was a mortgage of Dalla Rutnagh, which is said to have included Dalla Kullan, to Koonjbehary Lall, who was the heir of Gunput Sohoo, which does not appear to have been connected with the former mortgage. The mortgage itself does not appear to have been disclosed to the Respondents; but Mr. Doyne relies upon the circumstance that in 1862 there was an attachment preparatory to a sale, which, he says, must have given the Respondents notice of the mortgage, and that they did not then intervene; and he derives an argument from their abstention to do so. But it must be observed that the attachment was not followed by a sale; for, within a week after its date (the 10th July 1862), viz., on the 17th July, part of the money was paid off, and further time given, and all proceedings on the attachment were stayed. It appears, however, that three years later, in 1865, an order for sale was made; and that order for sale being made, and there being apparently an intention to act upon it, on the 20th September 1865 the Respondents intervened, and petitioned, stating their title to the mouzahs they now claim, precisely in the way they put it forward in this suit. They stated also that the Appellant had improperly included their mouzahs in this mortgage by the general term Dalla Rut-

nagh, which was the name of the mehal; that he had not separated his own mouzahs from theirs, but had mortgaged the whole by the general term Dalla Rutnagh. Upon the intervention of the Respondents effect was given to it, not apparently by a decision of the Court, but by the acquiescence of the creditors, who allowed these mouzahs to be excepted out of the order which was made for sale. It seems to their Lordships that the intervention by the Respondents at that time is strong evidence of an assertion of title, which could hardly have been made if they had really been out of possession from the time of the award.

In the midst, therefore, of this conflicting evidence their Lordships think it right to consider whether there is any presumption to be derived from the other parts of the case in favor of the one side or the other. Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here, on the part of the Respondents,—opposed by evidence, apparently strong also on the part of the Appellant,—their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded; and that, with the aid of it, there is a stronger probability that the Respondents' case is true than that of the Appellant.

It may also be observed that their Lordships are not disposed to give great credit to the evidence brought forward by the Appellant, inasmuch as his case, which rested upon the theory that he had acquired this property for himself, has been found to be wholly untrue.

In the result their Lordships will humbly advise Her Majesty to affirm the judgments of the Courts below, and to dismiss this Appeal, with costs.