

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Mussamut Wuzeer Doolhun v. Nawab  
Ashrufoodowlah Ahmed Hossein Khan, from  
the Court of the Judicial Commissioner of  
Oudh; delivered Wednesday 14h February  
1874.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

THIS appeal is part of a long and very unfortunate litigation concerning the succession to the estate of Nawab Ameenoodowlah, who died in the year 1856. He left a considerable estate, and his admitted family, at the time of his death, consisted of the Appellant, who was his widow, of his son, the Nawab Ashrufoodowlah, and a daughter named Wuzeroonissa. There was also a person of the name of Hyder Hossein, who claimed to be a legitimate son of the deceased Nawab by a mootah marriage. The property seems to have got into the hands of the curator of the Nawab Ashrufoodowlah, who was deaf and dumb. The widow, the present Appellant, brought a suit in order to have her right to one eighth of the estate declared, and also to clear up the question whether certain property was to be the subject of division as part of the deceased Nawab's estate or not. With that suit

we have little or nothing to do on the present occasion. But there was a more serious litigation with regard to the legitimacy of Hyder Hossein. Upon some summary proceeding he appears to have been declared to be a legitimate son of the Nawab, and the Nawab Ashrufoodowlah and his sister were put to a regular suit to establish his illegitimacy. The Civil Judge found that he was illegitimate. Mr. Campbell, who was then the Judicial Commissioner of Oudh, reversed that judgment, and found that he was legitimate. Against that decree an appeal was granted by special leave of this Board to Her Majesty in Council; and finally Mr. Campbell's judgment was reversed, and the illegitimacy of Hyder Hossein established.

Now, it is desirable to observe that the simple questions raised and decided in that suit, were whether or not this person was legitimate, and, consequently, whether the estate of the deceased Nawab, after providing for the admitted right of the widow to one eighth of that estate, was divisible in fifths; that is, two fifths to Ashrufoodowlah, two fifths to Hyder Hossein, and one fifth to the daughter; or divisible in thirds, two thirds going to Ashrufoodowlah and one third to Wuzeroonissah.

Pending the appeal the proceedings which have given rise to the present litigation took place. They may be very shortly stated. There appears to have been considerable uncertainty as to the principle upon which the rights of Hyder Hossein, assuming the decree of Mr. Campbell to stand, were to be enforced. For some time the Civil Judge of Lucknow seems to have been under an erroneous impression that that decree, which had simply affirmed that Hyder Hossein, being a legitimate son, was one of the residuary heirs of the deceased Nawab, was something in the nature of a money decree, capable of being enforced by

an execution sale of the shares of the co-heirs, the Plaintiffs in the suit, in the estate. Their Lordships deem it unnecessary to go into the proceedings which were taken upon that erroneous view. It appears to them that the commencement of the title of the present Appellant is to be found in the order of the 10th of March 1862 and in the earlier proceedings which lead up to that order. It appears at page 74 of the Record that in February 1862 there was an application by the manager of the estate to the Judge for leave to lease the bazaar, which is one of the subjects of the present appeal; that the Judge refused that leave on the ground that the Judicial Commissioner had ordered the whole estate to be divided amongst the sharers; that this ought to be done without delay; and therefore that it would be useless to lease out the collection of rent. And the Judge seems then to have contemplated a sale of that portion of the estate, for, he adds, I prefer the sale. Accordingly on the 10th of March 1862 he recorded an order, purporting to be made on conference with Darogah Wajid Ally, who was the manager of the estate, and also, it would appear, the curator of Ashrufoodowlah, and Synd Moostafa, the pleader, who appeared for Hyder Hossein, whereby he directed that the rights and interests of Ameenoodowlah, deceased, of and appertaining to the bazaar should be sold by public auction after 15 days clear notice. It is clear that the effect of this order was not to put up the right and interest of Ashrufoodowlah to be sold in satisfaction of anything in the nature of a judgment debt recovered by Hyder Hossein, but to put up for sale the whole interest of Ameenoodowlah in the bazaar, in order either to ascertain its value or to realize the amount of such value, for the purpose of dividing it among all the heirs. Ashrufoodowlah and his curator objected to that

order, and appealed against it to the then Judicial Commissioner, Mr. Campbell, who on the 5th of April came finally to the conclusion that "the Judge's order is probably the best for all parties, on the understanding that the sharers in the estate may bid without paying cash (provided their share of the whole estate is not exceeded), amount bid being placed against them to account of their share of the whole estate." It appears from the certificate of sale at page 25 and the statement at page 141 of the Record that a portion of this bazaar had been sold the day before the order of Mr. Campbell, but sold under the order of the 10th March; that is, as already mentioned, in order to a division of the proceeds among the co-sharers and to the general administration of the estate, and not with reference to any supposed execution of a money decree or anything like a money decree. A portion, however, of the bazaar was not sold until the 16th August 1862; and at an intermediate date, viz., the 13th of July 1862, the garden, called Ilmas bagh, which is the other parcel concerning which this appeal is preferred, was also sold, under similar orders and in the manner directed by Mr. Campbell. At these sales the present Appellant, the widow, became the purchaser of her own one eighth share, and also of the supposed two fifth shares of Ashrufoodolah in both properties, retaining the price of her own one eighth, but paying into Court the purchase money of the two fifths of Ashrufoodolah. Those moneys came into the hands of the curator, and were applied by him in carrying on the appeal to Her Majesty in Council or otherwise for the benefit of Ashrufoodolah, and his receipt must be taken, for the purposes of this suit, to have been a receipt on account of Ashrufoodolah. The widow was then let into possession or enjoyment of the shares which she

had so purchased, and continued to receive the rents and profits thereof up to the year 1867.

In 1867, the order of Her Majesty, overruling the decision of Mr. Campbell, came out to Lucknow, and thereupon an application was made by Ashrufoodowlah and his sister to the then Judge of Lucknow, a Mr. Smith, praying to be put into possession of the whole of the bazaar and the garden with the exception of the widow's one eighth share therein. Mr. Smith's final order is at page 118 of the Record, and contains the following passage: "the Privy Council has reversed the decision of the Judicial Commissioner. As a consequence, then, every proceeding based upon the Judicial Commissioner's order has become a nullity, and the parties revert back to their original status. The auction purchasers, amongst whom is Ubbasse Khanum," that is, the Appellant, "are therefore in illegal possession, and cannot be allowed to maintain possession of that which was illegally acquired, seeing that the order on which they acquired that right has been set aside." I therefore direct that, with the exception of one eighth of the property specified in the bill of plaint, and which is the legal share of Ubbasse Khanum, the remaining shares be put in possession of Ushrufood Dowlah and Wazeeroonissa, the Plaintiffs of that case, both as respects the real property and the Government notes." The effect of that order of Mr. Smith was to dispossess the Appellant of the two fifths share of the bazaar and garden which she had enjoyed up to that time, and which she had purchased under the orders I have mentioned; and ultimately the whole of these properties seems to have come into the hands of the curator, who was then a person of the name of Atnaram, on behalf of Ashrufoodowlah.

The effect of the order of Her Majesty in Council upon what was done under Mr. Campbell's decree was also considered in certain proceedings on the Record, which were had between Ashrufoodowlah and his sister on the one side, and Hyder Hossein and persons claiming through him on the other, touching the two fifth shares which had been supposed to belong to him. In one of these (see page 145 of the Record) Mr. Sparks, the then Judge of the Civil Court of Lucknow, seems to have taken a more correct view of this question than that of his predecessor, Mr. Smith. He says, "The property was not  
 " sold in execution of the decree, but was put up  
 " to sale among the heirs, and the proceeds  
 " divided. Such a sale would, it appears to me,  
 " have been just as desirable if the Judicial  
 " Commissioner had not decided in favour of  
 " Hyder Hossein; the only difference would  
 " have been that of the proceeds, Ashrufoodowlah  
 " and Wazeeroonissa would have received in the  
 " proportions of two thirds and one third instead  
 " of two fifths and one fifth. I should be dis-  
 " posed to give to Ashrufoodowlah two thirds of  
 " the two fifths given to Hyder Hossein, and  
 " the remaining one third of the two fifths to  
 " Wazeeroonissa, without interfering with the rest  
 " of the arrangements made in 1862. It would  
 " seem from the report that part of the immove-  
 " able property was given over to Hyder Hossein  
 " as his share and Rs. 490 were given in cash.  
 " Hyder Hossein or his heirs should be required  
 " to refund Rs. 490, and of that amount  
 " Wazeeroonissa would be entitled to Rs. 163. 5. 4.  
 " and Ashrufoodowlah to the balance. The im-  
 " moveable property made over to Hyder Hossein  
 " or his representatives should be similarly divided  
 " in the same proportions between Wazeeroonissa  
 " and Ashrufoodowlah, and any alienations that

“ may have been made by Hyder Hossein or his  
 “ representatives are void.”

Effect seems to have been given to the principle thus laid down by Mr. Sparks by his successor, Mr. Lincoln, in the subsequent proceeding of the 4th of August 1868 (see Record, page 164). And on an appeal against this last order to the Judicial Commissioner, Sir George Couper, he, on the 6th of April 1869, recorded the Minute at page 179 of the Record, in which, after stating that the Court of First Instance had gone wrong and had not confined itself strictly to the sole business which was before it, viz., the enforcement of the decree of Her Majesty's Privy Council; he goes on to say, “That portion of the estate, therefore, which was made  
 “ over to Hyder Hossein, the Defendant, in virtue  
 “ of Mr. Campbell's judgment, which was reversed  
 “ by the Privy Council, must be restored to the  
 “ position it was in before Mr. Campbell's judgment  
 “ was passed. If any portion of it has been sold  
 “ in satisfaction of decree against Hyder Hossein,  
 “ the purchasers or purchaser must make restoration, for they only purchased the rights and  
 “ interests of Hyder Hossein in the property, and  
 “ the Privy Council have declared that he possessed no rights and interests. Consequently  
 “ they purchased nothing. The Court of  
 “ First Instance will distinctly bear in mind  
 “ that it has at present nothing to do with  
 “ claims put forward by other parties to share in  
 “ the estate generally. It has simply to obey  
 “ the decree of the Lords of the Council, and that  
 “ can be done by putting the property in exactly  
 “ the same position as it was, as far as the  
 “ interests of Hyder Hossein are concerned. If  
 “ other members of the family object to the  
 “ arrangements which were come to in consequence of the ‘family auction’ directed by  
 “ Mr. Campbell, they have their remedy in a

“ fresh suit. But their rival claims cannot be taken into consideration in carrying out the execution of the Privy Council’s decree.” The effect, then, of these last-mentioned proceedings, and of the final order of the Judicial Commissioner, was to decide that neither Hyder Hossein nor those who claimed under him could hold the two fifth shares which had been put up for sale as belonging to him against Ashrufoodowlah and his sister. To that decision no objection is now raised by the Appellant, who by subsequent purchase had acquired an interest in those shares. But in the same proceedings, and particularly in the Minute of the Judicial Commissioner, it was expressly declared that the Privy Council’s decree did not in any degree affect the sales of Ashrufoodowlah’s two fifth shares; and that if there was any objection to the title under which those shares had been acquired, that must be the subject of a separate suit, with a view to set aside Mr. Campbell’s orders and what had been done under them.

In May 1869, the Appellant having been, as before stated, dispossessed by Mr. Smith’s order, brought the present suit. It is in form a claim treating Atnaram, the curator of Ashrufoodowlah’s estate as being in possession of the whole estate, and claiming to recover from him the back rents of those two fifth shares of Ashrufoodowlah in the bazaar and garden, which she had purchased under the former proceedings. The present litigation is confined to those particular shares and the Appellant’s title thereto. The issues originally settled in the suit were, 1st, whether the Plaintiff had purchased the share of Ashrufoodowlah in the estate of Ameenoodowlah for valuable consideration or not? 2nd, an issue as to what was the amount of the collections which she had a right to claim, with which it is not necessary to deal; 3rd, “Were these sales



“ also cancelled by the decision of the Privy  
 “ Council, under date 15th December 1865 ? ”  
 Afterwards the following additional issues were  
 framed :—“ 1st. Did Mr. Smith in his proceeding,  
 “ under date the 8th March 1866, cancel the  
 “ sale of Ashrufoodowlah’s share in Plaintiff’s  
 “ favour or not? 2nd. Can a Judge, in a mis-  
 “ cellaneous proceeding several years after the  
 “ confirmation of a sale, cancel a sale? 3rd. Does  
 “ the reversal of a decree by the Appellate Court  
 “ necessarily involve the cancelment of the sales  
 “ made in the execution of that decree? ”  
 Mr. Lincoln, the Civil Judge, found all those  
 issues in favour of the Plaintiff, referring the  
 second to an officer to calculate the amount of  
 the collections, and gave a decree for the sum  
 reported by him to be recoverable. This decree  
 was in the first instance against Atnaram alone,  
 but on Ashrufoodowlah’s petition and admission,  
 stated at page 41 of the Record, it was drawn up  
 against him also. He was the original, and his  
 representative is the present, Respondent to this  
 appeal. On appeal, the Judicial Commissioner,  
 Sir George Couper, reversed the decree, and dis-  
 missed the suit. His decision proceeds on the  
 ground that the sales under which the Appellant  
 purchased were altogether irregular and could not  
 be upheld. The Civil Judge had cited a pre-  
 cedent to show that a sale of immovable property  
 in execution of a decree may be binding, although  
 the decree is afterwards reversed on appeal. The  
 Judicial Commissioner correctly points out that  
 this authority was not in point, inasmuch as the  
 sales in question were not sales in execution of  
 a decree under the provisions of Act VIII. of  
 1859. And his final conclusion was that, “ the  
 “ proceedings were illegal from beginning to end,  
 “ in that an attempt made to find out the value  
 “ of certain property by putting it up to auction  
 “ among the persons immediately interested, was

“ regarded as a sale in satisfaction of a decree  
“ for money, such a decree, as a matter of fact,  
“ never having been passed.” Against this order  
dismissing the suit the present appeal is brought.

Their Lordships are of opinion that the issues which had been settled in the suit were correctly found by the Civil Judge in favour of the Appellant; that she purchased the two fifth shares of Ashrufoodowlah in the properties in question for valuable consideration, and that she paid that consideration. They are clearly of opinion that these sales were not cancelled by the decision of the Privy Council, which simply determined that Ashrufoodowlah was entitled to more than two fifths, viz., to two thirds of the residue of the estate. Nor do they differ from the learned Judge, who has found that Mr. Smith's order was altogether *ultra vires*, and that he had no authority, particularly upon an erroneous view of the effect of the decision of the Privy Council, to treat the sales as nullities. On the other hand, their Lordships cannot concur in the ruling of the Judicial Commissioner, which seems to be at variance with the principle which he had himself laid down, and, as their Lordships think, correctly laid down, in his minute of the 6th of April 1869. They do not think that any supposed irregularity in the proceedings taken under Mr. Campbell's order or want of jurisdiction in Mr. Campbell to make such an order, affords an answer to the Appellant's claim in this suit, or justifies its absolute dismissal. The sales, until set aside by the decree of a competent Court, in a suit properly framed for that purpose, must be taken to be valid. And it is obvious that if Ashrufoodowlah had brought a suit to impeach the sales on the ground of irregularity, he could only have obtained relief upon the terms of repaying the purchase money, of which he had the benefit, and upon such other terms and conditions as,

having regard to the expenditure upon the property, and all the circumstances of the case, the Court might have considered equitable and proper to be imposed. Upon the issues settled in this suit, no question as to the validity of the sales is really raised. Their Lordships would have been glad to recommend an order which would conclusively determine all possible questions between these parties, and put an end to a litigation in which there has been a lamentable amount of confusion. They feel, however, that they have not before them the materials upon which they can safely determine either the regularity of the proceedings under which the sales took place, or the question whether, if the sales were irregular, Ashrufoodowlah has not ratified them by his subsequent conduct, and still less the terms upon which, if at all, he is entitled to have those sales set aside.

The case, then, stands thus : Here is this lady, who, upon sales which have not been properly impeached, was put into possession of shares in certain properties. She was ousted by an order which was improperly made. She brings her suit to recover the profits which she would otherwise have received. Every issue settled in the suit has been found, and properly found, in her favour, and that decision has been reversed upon grounds not raised, and incapable of being tried in this suit.

Under these circumstances it seems to their Lordships that the decision of the Civil Judge was the correct decision ; that the order of the Judicial Commissioner which is under appeal was erroneous ; and therefore they must humbly advise Her Majesty to allow this Appeal, to reverse the order of the Judicial Commissioner, and to affirm the order of the Civil Judge, with the costs of this Appeal.

