Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Rampershad Tewaree v. *Sheochurn Doss, Sheochurn Doss* v. *Rampershad Tewaree, and Mussumat Thookra* v. *Rampershad Tewaree, from the late Sudder Dewanny Adawlut, North Western Provinces of Bengal; to be delivered 17th March*, 1866.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THE suit out of which these Appeals have arisen was brought by Rampershad Tewarry to enforce his claims against the other members of a joint and undivided Hindoo family. The common ancestor of the Plaintiff and the Defendants was one Sheodut Tewarry, who lived at Jhoosee, a village on the Ganges opposite to Allahabad, and exercised there the functions of a Purohit or Priest. He died in 1802, and is not shown to have left any property except the house, such as it was, in which he lived, and the Huqq Purohittai, or Priests' fees, the right to which seems to have been hereditary. He left five sons, Gungapershad, Moona Loll, Radakishen, Deenanath, and the Plaintiff Rampershad.

Radakishen died in 1840, leaving three sons, Buldeo Doss, Bhyronpershad, and Seetulpershad, all of whom were Defendants below; but Seetulpershad has since died, leaving three infant sons, who are represented on the record by their mother and guardian.

Gungapershad died in 1846, leaving three sons, Sheochurn Doss or Loll Tewarry, the principal Defendant below and Respondent here; Bheekum Singh, a Defendant below, who has since died without issue; and Bhugwan Doss.

Denanauth died in 1850 or 1851 without issue, but leaving a widow, Mussumat Thookra, one of the Respondents and a cross Appellant.

Moona Loll, who survived Deenanauth, is dead; but there is some confusion as to the date of his death. From the Partition Deed of the 23rd of February, 1852, which is afterwards referred to, we should infer that he was dead at that date. From other parts of the record, and particularly from page 133, it would appear that he was alive in April, 1857, and died between that month and June, 1858. Whenever he died, he left an only son, Sheopershad, a Defendant below, who has since died, leaving two sons, the Respondents Soorujpershad and Ramnath.

The evidence concerning the precise history of the family after the death of Sheodut is conflicting, and will be afterwards considered. It is, however, undisputed that for a considerable period between the years 1818 and 1848, the five brothers or their children carried on a flourishing banking business, on some terms of partnership or joint interest, under five different firms. Of these, one was established at Jhoosee, the ancestral seat of the family, under the style of "Moona Loll and Gungapershad;" another at Agra, under the style of "Radhakishen and Deenanauth;" a third at Benares, under the style of "Gungapershad and Rampershad;" a fourth at Ghazeepoor, under the style of "Rampershad and Sheochurn Doss;" and the fifth at Mirzapoor, also under the style of "Rampershad and Sheochurn Doss."

The Mirzapoor firm was under the management of the Plaintiff Rampershad; and it is alleged by the Defendants, though not admitted by the Plaintiff, that about the year 1848 he separated himself from the rest of the family, appropriating to himself the assets and property of that firm. That about that time he was on bad terms with the other members of the family, and ceased to render the accounts of the Mirzapoor to the Jhoosee firm according to the course of business theretofore subsisting, seems to be pretty certain; but there is no proof of a formal separation or dissolution of partnership at that date.

On the 23rd of February, 1852, the adult members of the family other than Rampershad, viz.

Sheopershad, as representing Moona Loll; Sheochurn, for himself and as guardian of his infant brothers, as representing Gungapershad; Buldeo Doss, for himself and as guardian of his infant brothers as representing Radakishen; and Mussumat Thookra, as representing her husband Deenanauth, executed a Deed of Partition, which stated that the five brothers had been associated in partnership in trade and banking since 1874 Sumbut (corresponding with A.D. 1818); that the five before mentioned banking firms had been established; that in 1904 Sumbut (1848) Rampershad, who was at Mirzapoor, having taken as his share Rs. 1,16,197 : 10 in cash and houses situated at Mirzapoor, had separated himself, and ceased rendering accounts and correspondence in regard to the property in his possession; and that similarly, he having no concern with the firms of Agra, Jhoosee, Ghazeepoor, and Benares, the undersigned, being the partners of those firms, with a view to obviate future disputes and contests, had examined the accounts of the firms and the property appertaining thereto, and found in cash Rs. 5,03,184 : 8, which they had amicably divided into four equal shares, each share amounting to Rs. 1,25,996 : 4, and had separated themselves. The deed then provided for the future division of some outstandings, which were to be held jointly until realization; and for the division of certain boats, and the warehouses and shops there mentioned, but stated that the houses situated at Jhoosee were to remain in the joint possession of the four parties. The effect of this instrument was to exclude Rampershad from any participation in the property which was the subject of the partition, and to give a fourth share to Mussumat Thookra as the widow and representative of Denanauth. This fourth share she afterwards, by an instrument dated the 7th of September, 1855, assigned to Sheochurn Doss.

The suit was commenced on the 4th of January, 1856, in the Court of the Principal Sudder Ameen, whence it was transferred to the Civil Court of Agra. The plaint claimed a one fourth share of the property therein specified, giving credit for Rs. 1,16,197 : 10, the assets of the firm of Mirzapoor, in Plaintiff's possession; and to set aside the Deed of Partition of the 23rd of February, 1852, and the Deed of Gift of the 7th of September, 1855.

It may be necessary to examine the pleadings more particularly hereafter, for the purpose of considering the weight of certain arguments which were addressed to their Lordships on the hearing of these Appeals. At present it is sufficient to say, that the material questions in the cause were, whether the property of which a share was claimed, and in particular the property of the banking firms, was the joint and undivided property of the family; and consequently, whether, by the Hindu law, as it obtains in the North Western Provinces, the Defendant Mussumat Thookra was incapable of taking a share of it; and further, whether, by his conduct in 1848, the Plaintiff had effectually separated himself from the rest of the family, and had conclusively bound himself to take the assets of the Mirzapoor firm in full satisfaction of his share and interest in the joint concerns.

The Civil Judge of Agra, by an Order of the 7th of March, 1857, referred these questions, as well as various questions of account, together with the partnership books, to two native Assessors or Commissioners; and upon their report of the 15th of March, as well as upon his own view of the evidence taken before him, he, by his Decree of the 28th of March, 1857, determined both the before mentioned questions in favour of the Plaintiff, and awarded to him, in full satisfaction of his claims up to the date of the Decree, the sum of Rupees 1,37,508 : 5, with subsequent interest to the date of realization, and costs. For this amount all the Defendants were made liable.

Against this Decree there were four Appeals to the Sudder Court. Two of them, viz. those of Mussumat Thookra and Sheochurn Doss, went to the merits of the suit. Of the other two, one was presented by Sheopershad as representing the interest of Moona Loll, and by the guardian of Bhugwan Doss, the infant son of Gungapershad; and the other was presented by the sons and representatives of Radakishen. Both of them were confined to the point that the Appellants were improperly made liable for any part of the sum decreed to the Plaintiff; since, upon his mode of taking the accounts, they would be entitled to more than they had received under the Partition Deed of the 23rd of February, 1852.

The Sudder Court dealt with the merits of the case upon the Appeal of Sheochurn Doss. Before doing this, however, and on reading the papers in all the Appeals, they made an order on the 9th of May, 1860, whereby they referred the case to two native Commissioners (being the same persons who had acted in that capacity in the Court below) for inquiry and report upon three new points. The first was, what were the profits of the Mirzapoor firm during the four years between 1904 Sumbut and 1908 Sumbut, *i. e.* between 1848 and 1852. The second involved certain disputed items in the accounts. The third was the amount of maintenance to be allowed to Mussumat Thookra, should it be ultimately determined that she was not entitled to a share of the property in dispute.

On the 21st of May, 1860, the Commissioners reported that the account of profits rendered by the Plaintiff under the first head of inquiry was incorrect, and begged that either the Plaintiff's pleaders should be required to furnish a proper account within a given time, or that they (the Commissioners) should be allowed to submit a Report on the two other points. On the 22nd of May the Court gave the Plaintiff one week within which he was to file correct accounts. On the 29th of May the Commissioners made their Report, which was to the effect that for want of proper accounts furnished by the Plaintiff they were unable to report on the profits realized by the Mirzapoor firm; reporting on the disputed items of account; and finding that rupees 125 per mensem was a proper sum to be allowed for the maintenance of Mussumat Thookra. On the 4th of June the Plaintiff presented a petition to the Court objecting to this Report. On the 5th of June the Court, after hearing the verbal assertions of the Commissioners and the pleaders of the parties, passed an order that the case should be adjourned, the Commissioners dismissed, and the petition of the Plaintiff objecting to the Report placed with the record.

By its Decree of the 9th of June, 1860, the Court disposed of the Appeal of Sheochurn Doss. They concurred with the Court below in holding that the property in dispute was joint and undivided; that Mussumat Thookra, as the widow of one of the co-sharers, was not entitled to take a

share in it; and that the Plaintiff had not forfeited his rights as a co-sharer by separating himself from the rest of the family in 1848. They held, however, that Mussumat Thookra was entitled to maintenance according to the scale proposed by the Commissioners, and that rupees 15,000 must be set aside out of the divisible assets to provide for it. They further reduced the divisible assets by the amount of certain bad and irrecoverable debts and other items pursuant to the finding of the Commissioners. And inasmuch as the Plaintiff had failed to account for the profits of the Mirzapoor firm between the years 1848 and 1852, they charged him with interest on the principal sum for which he was accountable at 12 per cent. The amount was rupees 55,280. The effect of this Decree was to reduce the sum presently payable to the Plaintiff to rupees 17,478 : 12 : 9, for which, having regard to the shares taken by him and by the other parties under the Deeds of 1852 and 1855, they held Sheochurn Doss to be solely liable.

Pro formâ orders giving effect to this Decree were passed on the same day upon the other three Appeals.

The Plaintiff has appealed against these Decrees to Her Majesty in Council. He submits that they should be affirmed in so far as they affirm the Decree of the Zillah Court, and ought to be set aside, reversed, or varied, in so far as they vary or differ from that Decree. The particular relief which he has claimed at the Bar will be more conveniently noticed hereafter.

Sheochurn Doss has presented a cross Appeal against the Decrees below. He insists that they are unjust and erroneous in so far as they affirm the Decree of the Zillah Court, and that the Plaintiff's suit ought to have been dismissed with costs. He further submits that if the Decree of the Sudder against him was substantially right in other respects, it was erroneous in making him solely responsible for the sum decreed to the Plaintiff.

Mussumat Thookra has also presented a cross Appeal. Her Appeal is not distinguishable from that of Sheochurn Doss, except that she does not quarrel with that part of the Decree which makes him solely responsible for the amount (if any) pay-

able to the Plaintiff; and on the other hand insists that if the Decree impeached was substantially right, positive directions should have been given and provision made for the payment of the maintenance to which she was found entitled.

In dealing with these Appeals we shall first consider whether both the Courts below were right in holding that the property in question was the joint and undivided property of the five brothers; and in deducing as a consequence from that finding that the Plaintiff, notwithstanding his acts and conduct in 1848, was in 1852, the date up to which the accounts have been taken, entitled to one fourth share of it.

The case of the Defendants and cross Appellants upon the first of the points is that the partnership property was in no degree acquired by the use of ancestral property; that Denanauth left his native village to seek his fortunes some years after his father's death with nothing but his brass lotah or drinking vessel; that he took service with one Peeroo Mull, a native banker at Agra; that whilst in that service he realized a small capital by means of some private adventures; that with the capital so acquired and its accretions he established first the Agra and afterwards the other firms; that he associated with himself from motives of family affection first Radhakishen and Moona Loll, and afterwards the other two brothers; employing them in the business rather as dependants than as partners on an equal footing with himself; and that the property of the different firms, if not wholly the separate and self acquired property of Denanauth, was nevertheless partnership property, to be dealt with according to the rules which regulate mercantile partnerships between strangers, and was not subject to the rule of Hindoo law which excludes a widow from the succession to her husband's share of the joint property of an undivided family. If this contention be well founded, the Plaintiff was entitled to at most a fifth share in the partnership assets, and when he brought his suit had received even more than his due in the assets of the Mirzapoor firm.

Before dealing with the evidence upon the question now under consideration, it may be well to notice the arguments of the Attorney-General to

the effect that the pleadings of the Plaintiff are in fact inconsistent with the case on which he now relies, and tend to confirm that of the Defendants. To show that the Plaintiff did not sue as one of the co-sharers of a joint and undivided family, but as an ordinary partner, he relied on the phrase "The claim is brought in virtue of right of co-partnership" at the commencement of the Plaint, and the use of the word "partnership" in other parts of the pleadings; and also on the circumstance that the Plaintiff claimed only one fourth part of Denanauth's share, whereas the Hindoo law of succession, which he was supposed to invoke, would have given him one half of that share; inasmuch as by that law nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer.

Assuming the latter proposition to be correct, which their Lordships consider it to be, it may show only that the Plaintiff has to some extent mistaken his rights, and claimed less than he might have claimed. The presumption arising from this misstatement of his rights as co-sharer in an undivided Hindoo estate, is by no means conclusive. It may be outweighed by the proof that the property was in part joint, which the conduct of the family, and the mode in which they kept their accounts, afford. And it may be observed that the claim made is also inconsistent with the hypothesis of a partnership governed by the rules which regulate the rights of mercantile partners as such *inter se*. Nor is it possible to read the whole Plaint without seeing that the ground on which the claim to any portion of Denanauth's share rests is the rule of law which excludes the widow from the succession to a share in a joint and undivided Hindoo estate, and limits her rights to maintenance. Upon the argument founded on the word "copartnership," their Lordships have to observe that the pleadings before them have been translated from those in the native language; that the word is ambiguous; that the phrase "is brought in virtue of right of copartnership" covers the whole claim, which includes the Huqq Purohittai, admitted to be ancestral property, and no part of the assets of the mercantile firms. Looking to the whole scope of the pleadings, their Lordships have no

doubt that the Plaintiff's claim was really based upon his alleged rights as a co-sharer in a joint and undivided Hindoo estate, and that, as such, it was sufficiently well pleaded.

Upon the facts it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family, and there was a nucleus of ancestral property. It may be further admitted that Denanauth laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate property, that which he acquired at Agra. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners, and that thenceforward they carried on business together, each contributing by his exertions to the increase of the common stock. The Partition Deed of the 23rd of February, 1852, itself negatives the hypothesis that he employed his brothers as servants or dependants, since under that instrument they share as partners and take an equal share with his widow and assumed representative. There is nothing *primâ facie* improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions would, according to the general principle of Hindoo law, be the joint property of the family whilst undivided, and be partible as such on a partition. There is no proof of any special contract (and the proof of such lay on the Defendants) which impressed the character of *partnership* as distinguished from *joint* or *separate* property, in the Hindoo sense of these terms, upon the property in question. In this state of things we have not only the judgments of the two Courts below in favour of the Plaintiff upon this question, but we have also the finding of the two native Assessors to whom it was expressly referred, founded on the pregnant evidence afforded by the books and accounts of the family. These persons are shown, by later proceedings in the cause, to have had no undue bias in favour of the Plaintiff,

and they brought to the examination of the matters referred to them that intimate knowledge of native usages to which a European rarely, if ever, attains. Their Lordships cannot adopt the construction which the Attorney-General would have them put on the Assessors' Report of the 15th of March, 1857. They believe the first finding in that Report to be that the property was joint in the Hindoo sense of the term. And they see no sufficient grounds for dissenting from that conclusion, or from that to which the Assessors and the Courts below also came, upon the question whether the Plaintiff had effectually separated himself from the rest of the family in 1848.

This being so, the remaining questions for determination, with the exception of one touching the provision for Mussumat Thookra's maintenance, are those which arise upon the Plaintiff's Appeal, and involve the consideration of the deductions made by the Sudder Court from the amount awarded to him by the Zillah Court.

That it was right to call upon the Plaintiff to bring into the account the profits made by the Mirzapoor firm between the years 1848 and 1852, appears to their Lordships to be too clear for argument. It is however insisted that the Court has improperly visited his failure to produce the accounts required, by charging him with interest on the principal sum for which he was accountable at the rate of 12 per cent.; that they ought to have given him further time to produce his accounts; and that the cause ought to be sent back to India, in order that the account of profits may be now taken. Their Lordships have to observe that the time to be allowed was a matter for the discretion of the Court; that the account was presumably one which the Plaintiff, as a merchant and banker, ought to have been able to produce at short notice; that the time actually allowed was not unreasonably short; that in the circumstances it was competent to the Court to charge the Plaintiff with interest in lieu of the profits for which he had failed to account; and that the rate of interest was only that which he himself claimed on the sums due to him. The Defendants are willing to accept the interest in lieu of the profit, and their Lordships can see no ground for sending the cause back upon this point at the

instance of the Plaintiff. The sum of Rupees 14,316:2:6, mentioned in the examination of the Commissioners of the 28th March, 1857, was obviously one item of profit appearing in the books; not the measure of the profits of the Mirzapoor firm for the whole of the four years in question. The other items of account which the Plaintiff disputes, and on which he asks to have the cause sent back for further trial, have all been investigated by the native assessors or commissioners. These were persons peculiarly conversant with native accounts; they appear to have been examined on their report in open Court on the 5th June, 1860; and the Judges of the Sudder Court expressly state that, after going over the several items with the Commissioners, they entirely concurred in their opinion. To remit a cause to India for the purpose of reopening accounts so taken is obviously a course which their Lordships would not be justified in adopting, unless they had a clear conviction that there had been a miscarriage of justice. They have no such conviction in the present case. It may be true that the Commissioners have not required evidence *dehors* the books; but the Plaintiff, as a member of the joint family and a partner in the several firms, was *primâ facie* bound by the entries in the books. If he impeached them, it lay on him to falsify them.

Their Lordships do not think that the amount of maintenance decreed to Mussumat Thookra is excessive. It is however objected by her that positive directions should have been given, and provision made for the payment of her maintenance. And the Plaintiff, on his side, complains that he is by the Decree deprived of his right to claim a share of the principal sum deducted to meet this claim of maintenance on the death of Mussumat Thookra.

A Court of Equity in this country, if administering the whole estate, would no doubt have carried over the sum set apart for this purpose to a separate account; would have directed that the annual income should be paid to Mussumat Thookra during her life; and that the parties who had a reversionary interest in the principal should be at liberty to apply concerning it on her death. The Country Courts in India have, however, no machinery which enables them to take any such course Nor was the suit one for the general administration

of the estate. It was, in form, a suit to obtain present payment of the balance which the Plaintiff alleged to be due to him on the proper division of the property and adjustment of the accounts. The course, therefore, which the Court took was to deduct from the gross amount of divisible assets the sum of Rs. 15,000, which at 10 per cent. would produce the annual sum of Rs. 1500, and to leave it as residue undivided in the hands of Sheochurn Doss, in which it was found, subject to the obligation of paying the maintenance. Sheochurn Doss and Mussumat Thookra being co-defendants, and there being no proof of the precise terms and conditions on which she had made over to him the share which she took under the deed of the 23rd of February, 1852, the Court was hardly in a condition to make more precise provision for the payment of her maintenance by him. Nor is it expedient that their Lordships should now make any order on that subject. Again, if the Sudder Court had simply deducted the Rs. 15,000 as so much undivided residue, without saying anything about the Plaintiff's future rights, their Lordships, considering the form of this suit, would have doubted whether he had any grounds for impeaching the Decree on this point. The Judgment however says, "We decide that the best mode of setttling her claim will be to deduct from the total divisible assets the sum of of Rs. 15,000, the proceeds of which shall be devoted to Thookra's maintenance, and in respect to which the Plaintiff is declared to possess no right." These last words are certainly calculated to embarrass the Plaintiff or his representatives in asserting the right, which they seem to possess, to claim a share of this sum when the purpose for which it has been deducted from the divisible assets, the maintenance of Mussumat Thookra, has been satisfied. Their Lordships therefore propose to add to the Decree a Declaration that it is to be without prejudice to the right of the Plaintiff or of his representatives to claim, on the death of Mussumat Thookra, such share as he or they may be entitled to in the sum of Rs. 15,000 retained to provide for her maintenance.

Their Lordships however do not think that this slight modification of the Decree ought to affect the costs of the Appeal. And the order which

they will humbly recommend Her Majesty to make is that the cross Appeals of Sheochurn Doss and Mussumat Thookra be both dismissed with costs; and that, on the Appeal of the Plaintiff, the Decree in No. 62 be varied by the addition of the Declaration above mentioned; that in other respects the Decrees appealed against be affirmed; and that the Appellant Rampershad do pay the costs of his Appeal.