

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Umrao Singh and another v. Thakur Lachman Singh and another, from the Court of the Judicial Commissioner of Oudh; delivered the 28th February 1911.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ROBSON.

SIR ARTHUR WILSON.

MR. AMEER ALI.

[DELIVERED BY LORD MACNAGHTEN.]

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This is an Appeal from a Decree of the Court of the Judicial Commissioner of Oudh reversing the decision of the Subordinate Judge of Sitapur.

The dispute between the parties relates to the right of succession to one-third of the estate of Ramkote, of which a Hindu gentleman named Kalka Bakhsh Singh was the last owner.

In the course of the discussion before this Board the controversy was reduced to two questions, and two questions only—

- (1.) Was a certain document executed by Kalka Bakhsh on the 23rd of May 1884 a testamentary or a non-testamentary instrument?
- (2.) Is that question now open having regard to the course of the proceedings in the Courts below?

After the confiscation of Oudh the second

Summary Settlement of the Ramkote estate was made with Kalka Bakhsh. He obtained a sanad from the Government. His name was entered in lists 1, 4, and 6, prepared under the provisions of Section 8 of Act I. of 1869. And he remained absolute owner of the property until his death.

Kalka Bakhsh died on the 14th of October 1893. He had three sons, Umrao Singh, Pirthipal Singh, and Baldeo Bakhsh. Pirthipal Singh died in his father's lifetime, leaving two sons, who were Defendants in the suit and are the Respondents to this Appeal.

On the 9th of January 1862 Kalka Bakhsh in compliance with the directions issued by the Government, declared that his wish was that after his death his estate should continue in his family undivided, in accordance with the custom of Rajgaddi, and that the younger brothers should be entitled to maintenance.

It is not disputed that this declaration was a valid testamentary disposition by Kalka Bakhsh of his estate in favour of his eldest son.

Kalka Bakhsh and his second son Pirthipal Singh were on bad terms, so much so, that Pirthipal Singh threatened personal violence to his father, and Kalka Bakhsh commenced criminal proceedings against his son. The quarrel, however, was for the time composed by the intervention of two friends of the family, Jote Singh of Bihat and Ratan Singh of Rojah. At their instance the following document was drawn up and signed by Kalka Bakhsh in their presence on the 23rd of May 1884 :—

“ This sanad is executed by me, Thakur Kalka Bakhsh, talukdar of Ramkote. For Pirthipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this, whatever I may give I will give equally to the three sons, except provisions, which they may take from my godown (kothar). He may take 6 annas in kharif (crop) and 10 annas in rabi (crop) out of my treasury (tahwil). The marriage and gauna

“ expenses of the sons and daughters shall be borne by me.  
 “ After me the three sons are to divide the property, move-  
 “ able and immoveable. This has been settled through the  
 “ mediation of Thakur Jote Singh of Bihat and Thakur  
 “ Ratan Singh of Rojah.”

Kalka Bakhsh, though he executed the document without demur, did not comply with its terms, if, indeed, he ever meant to do so. In February 1886 Pirthipal Singh, who apparently was then in destitution, brought a suit to recover arrears of maintenance and a sum of money equal to an amount alleged to have been given by Kalka Bakhsh to his youngest son Baldeo Bakhsh. The suit, which was founded on the instrument of May 1884, was dismissed by the Subordinate Judge, and the dismissal was affirmed on Appeal, except as regards arrears of maintenance then due, amounting to Rs. 412. 8.

In May 1892 Kalka Bakhsh brought a suit for cancellation of the instrument of May 1884. Pirthipal, however, died in November 1892, before the suit could be heard, and it was consequently withdrawn.

After Kalka Bakhsh's death there was the usual quarrel as to registration in the Revenue records. On the 14th of May 1894 the Deputy Commissioner of Sitapur, without pronouncing any opinion on the questions in dispute, made an order directing the entry of one-third of the estate in the name of Umrao Singh, one-third in the name of Baldeo Bakhsh, and the remaining third in the names of Pirthipal's two sons.

Umrao Singh then transferred his interest in the estate to his brother Baldeo Bakhsh, and they brought this suit as co-Plaintiffs to recover the one-third of the estate entered in the names of the sons of Pirthipal Singh. They relied mainly on a will alleged to have been executed on the 4th of October 1893, up to which date, as they contended the testamentary instrument of the 9th of January 1862 was in force. They asserted

too that the instrument of the 23rd of May 1884 was obtained from Kalka Bakhsh by undue influence, and was wholly inoperative.

The Subordinate Judge gave effect to the Plaintiffs' claim except so far as it was founded on the alleged will of October 1893. He decided against them on the issue as to the validity of that document, stating that the execution thereof "was not very clear to his mind." The Decree was made without costs.

On Appeal the Judicial Commissioners affirmed the findings of the Subordinate Judge in regard to the will of 1862 and the alleged will of 1893. But as regards the instrument of 1884 they held that its execution was not procured by undue influence, and that it operated as a valid devise to Pirthipal Singh, the benefit of which passed on his death to his two sons. In the result they reversed the Decree of the Subordinate Judge and dismissed the suit with costs.

Their Lordships agree with the Court of the Judicial Commissioner in thinking that the instrument of 1884 was not procured by undue influence. Indeed, there seems to be no ground whatever for such a suggestion. On the other hand, it seems clear that that document is a non-testamentary instrument. It was a family arrangement arrived at by the mediation or arbitration of two gentlemen, who were old friends of the family, and interested in maintaining its honour. It was plainly intended to be operative immediately, and to be final and irrevocable. It fails of effect simply because it was not registered, as required by the Registration Act III. of 1877, Section 17. It is therefore void as regards immoveable property.

As regards the second question their Lordships' must hold that they are not precluded by what took place in the Courts below from considering and determining the real question

in the case. In the Courts below neither party pursued a consistent course. As long as the question of the validity of the alleged will of the 4th of October 1893 was undetermined the Appellants contended that the instrument of May 1884 was testamentary, while the Defendants contended that it was a settlement and not a will. As soon as the alleged will of 1893 was successfully impeached, the Defendants maintained that the instrument of 1884 was a will and not a settlement, and the Appellants changed their attitude. Their Lordships think that, notwithstanding the conflicting views presented by the Appellants in the Courts below, they are bound to give effect to the real character of the instrument. At the same time they consider that the Appellants, though successful in the result, ought not to be allowed costs on this Appeal or any costs in the Courts below.

Their Lordships will therefore humbly advise His Majesty that the Appeal ought to be allowed and the Decree of the Subordinate Judge restored, and that any costs paid under the order of the Court of the Judicial Commissioner must be returned. There will be no costs of the Appeal.

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In the Privy Council.

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THAKUR UMRAO SINGH  
AND ANOTHER

v.

THAKUR LACHHMAN SINGH  
AND ANOTHER.

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