Privy Council Appeal No. 145 *of* 1919.
Oudh Appeals Nos. 17 *and* 18 *of* 1916.

Thakur Sitla Bakhsh Singh - - - - - - *Appellant*

v.

Thakur Sital Singh and others - - - - - *Respondents.*

Same - - - - - - - - - *Appellant*

v.

Thakur Sital Singh and others - - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1921.

Present at the Hearing :

LORD BUCKMASTER.
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

This appeal turns upon the construction of the Oudh Estates Act, No. 1, of 1869, an Act, the construction of which has been frequently before this Board. It arises in the following circumstances :—

One Sher Bahadur Singh was the holder of a taluqa entered in the 1st and 3rd lists enumerated in Section 8 of that Act. He died on the 10th June, 1899, having made a will dated the 1st December, 1895. The will contained a bequest of the taluqa in favour of his wife, who, however, died in his lifetime, then of his mother, Dilraj Kunwar, and then of his daughter.

There might be points of difficulty as to the construction and efficacy of the bequests, but their Lordships agree with the Courts

in India that in the events which actually happened, Dilraj Kunwar obtained an absolute estate under the terms of her son's will. She entered into possession and died on the 12th July, 1906. Thereupon the present disputes arose.

The appellant claimed to be the proper successor under the rule of lineal primogeniture, as sixth in descent from the common ancestor. His original opponent, Kirat Singh, asserted that the appellant was seventh in descent, while he was sixth, and also disputed the seniority of the appellant's line.

Both parties set forth their claims in suits against Sher Bahadur Singh's daughter, whom they treated as a trespasser. It was determined early in the proceedings that the daughter had no title, and that the dispute really was between the appellant and Kirat Singh; that Kirat Singh was wrong in his contention that the appellant was seventh in descent; that both parties were in the same degree; and that the appellant was in the senior line, and would be entitled if the rule of male lineal primogeniture applied.

During the course of the litigation, Kirat Singh died, and thereupon his brothers, Sital Singh and Debi Singh, appeared as respondents. The Subordinate Judge decided in favour of the appellant against Sital Singh and Debi Singh in their capacity of representatives of their dead brother.

Sital Singh and Debi Singh appealed to the Court of the Judicial Commissioner, and put forward a case in their own right, contending that the estate had by virtue of Section 15 of the Oudh Estates Act been taken out of the line of succession established by the Act, and that consequently the ordinary rule of inheritance according to the Mitakshara law applied, and that they as equal in degree with the appellant were entitled to share with him in the inheritance. The Court of the Judicial Commissioner allowed this amended claim to be preferred, and decided in favour of the two brothers of Kirat Singh that the estate passed according to the ordinary Mitakshara law, and that therefore the appellant was only entitled to half the property, the other half going to the two brothers. Debi Singh has sold his share to his brother, who is the contesting respondent in this appeal.

If therefore the rule of male lineal primogeniture applies, the appellant is entitled to the whole property. On the other hand, if the inheritance is to follow the rule of the Mitakshara, the contesting respondent in his own right and that of his brothers is, as the Court of the Judicial Commissioner decided, entitled to share with the appellant, each taking half.

The material provisions of the Oudh Estates Act are the following: Section 8 provides for the formation of six lists, of which the first three are important for the consideration of this case. They are as follows:—

First—A list of all persons who are to be considered taluqdars within the meaning of this Act.

Second.—A list of the taluqdars whose estates, according to the custom of the family of and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir.

Third.—A list of the taluqdars, not included in the second of such lists, to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture.

This taluqa comes into the first and third lists, while most of the decisions to which reference has been made in the argument have regard to taluqas coming into the first and second lists.

Section 22 provides for the succession to all intestate taluqdars whose names shall be inserted in the second or third lists. There are ten clauses providing for descent to named heirs, and then comes the eleventh clause, which is as follows :—

> " Or in default of any such descendant, then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee, heir or legatee are subject."

Every taluqdar is, however, competent to dispose of his property under certain conditions, either by deed or will ; and if any such deed or bequest breaks the line of succession the taluqa ceases to be regulated by the special provisions of the Act and becomes subject to the ordinary laws of inheritance. If, however, the transfer or bequest is to the next heir in succession, such transfer or bequest does not break the limitations. Under the amending Act, Act 3 of 1910, it is not necessary in order to save the limitations that the transfer or bequest should be to the immediate next heir ; but this Act having been passed since the succession in dispute opened, has no bearing upon the present case, notwithstanding that in certain respects it is made retrospective. The sections in the original Act which provide for the alternative contingency are in terms as follows :—

> " XIV. If . . . any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath the whole or any portion of his estate . . . to a person who would have succeeded according to the provisions of this Act to the estate or a portion thereof if the transferor or testator had died without having made the transfer or intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.
>
> " XV. If . . . any taluqdar or grantee, or his heir or legatee shall hereafter transfer or bequeath to any person not being a taluqdar or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate, or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee."

The appellant says that he is the successor to the whole taluqa, because the principle of male lineal primogeniture applies,

even though recourse is had, as it must be in this case, to Clause 11 of Section 22, and because, according to his contention, the bequest to Dilraj Kunwar was not one which falls under Section 15 and breaks the limitations, but a bequest to the next heir under Section 14.

The respondent has two grounds of defence. First, he says that when Clause 11 is reached special limitations disappear, and the succession under this clause is according to the ordinary law and no longer according to the law of primogeniture. Secondly, he says that if Clause 11 still provides special limitations, then Dilraj Kunwar was not next heir to her son, and the bequest to her was not a bequest to the next heir, but broke the line of succession, and therefore made the property thenceforward subject to the ordinary law of succession, that is according to the Mitakshara.

Their Lordships will proceed to consider together both grounds of defence adopted by the respondent. If Clause 11 should be treated as providing special limitations, then though the descent is to be according to the ordinary law of the religion and tribe, yet this ordinary law operates only so far as it is not inconsistent with the over-riding consideration that the succession is to be governed by the rule of primogeniture, which implies also impartibility.

The cases upon the construction of the Oudh Estates Act which have been brought to their Lordship's notice are the following :—

Brij Indar Bahadur Singh v. *Ranee Janki Koer*, 5 I.A., page 1, decided in 1877, is a case where the taluqa was entered in the second list, but where there had been a sanad of earlier date than the Act of 1869 granted to a widow lady, by which the estate was to descend to the nearest male heir according to the rule of primogeniture. Their Lordships held that the taluqa having been placed in List 2, which merely requires that the property should devolve upon a single heir, and the original grantee being a woman, the Act superseded the sanad, and the estate descended to her daughter as heir according to the Mitakshara law, no special custom being proved.

Similarly in *Achal Ram* v. *Udai Partab Addiya Dat Singh*, 11 I.A., page 51, decided in 1883, also a case of a taluqa in the second list, their Lordships held that the estate did not descend according to the rules of primogeniture, and that the plaintiff, who did not prove that he was nearer in degree than some other relations, had not made out his title.

Dewan Ran Bijai Bahadur Singh v. *Rae Jagatpal Singh*, 17 I.A., page 173, decided in 1890, is a third case of a taluqa in List 2, and one in which, nearer heirs having failed, the descent was regulated by Clause 11 of Section 22. The principle of impartibility gave the estate to the elder brother, unless he was excluded by the general Hindu law as being insane, which in the event, their Lordships found he was not.

In this case the decision that the estate remained impartible though the succession was under Clause 11 seems to show that

Clause 11 does provide special limitations, and does not simply remit the succession to the unqualified ordinary law of the religion and tribe.

Narindar Bahadur Singh v. *Achal Ram*, 20 I.A., page 77, decided in 1893, is a case relating to the same taluqa as that which came under consideration in 11 I.A. The purport of the decision now being cited is that when the case comes under List 2, there being no rule of primogeniture, degree prevails over line in the ascertainment of the heir, but where the degree is equal the line prevails. The case follows the previous decisions, but has been specially relied upon, because of certain observations made in the course of the judgment. They are as follows :—

> " Counsel has suggested that in a case of distribution ordered by the 11th Sub-section of the 22nd Section of the Act of 1869, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th Sub-section is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single heir must be pronounced to be Jubraj in preference to the plaintiff."

The expressions in this passage are not precisely the same as those used in other judgments of the Board. But the result and also the mode of reasoning are the same. The passage should not be taken by itself, but in conjunction with an earlier passage in the judgment : " the effect of that (being placed in List 2) is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture." When, therefore, their Lordships say that the law takes in the family custom, they mean that the law takes in the limitations provided in List 2. With this explanation there is no difficulty about the case. It falls into line with the others, and confirms the view that the limitations under Sub section or Clause 11 are still limitations under the Act, and not mere returns to the ordinary law.

Jagdish Bahadur v. *Sheo Partab Singh*, 28 I.A., page 100, decided in 1901, relates to the same taluqa as in 5 I.A. The Board decided that if the descent to a taluqa is to be traced under Clause 11 to a person entitled under the ordinary law of the religion and tribe, it is still subject to the provisions of the Act and descends as an impartible estate ; and after considering an alleged custom under which the later-born son of a senior wife was supposed to have a prior claim over an earlier son of a junior wife, and finding that as a custom this was not proved, the Board proceeded to enquire what was the ordinary Hindu law on the subject, and held that, according to the ordinary Hindu law, the elder born, without reference to the position of his mother, succeeded.

Thakurain Balraj Kunwar v. *Rae Jagatpal Singh*, 31 I.A., page 132, decided in 1904, again a case under List 2, is a decision upon the construction of Section 14. It was held in this case that it was not enough to keep the estate within the settlement

that the legatee was a possible heir in the line of succession, but he must be the person or one of the persons to whom the estate would have immediately descended in accordance with Section 22.

This decision is said to have led to the passing of the amending Act of 1910. The particular succession was regulated by Clause 6 of Section 22, and this being so, the case has no special bearing on the present one.

Incidentally, in this case it was decided that a legatee who succeeded before the passing of the Act was not a legatee within the meaning of that word in the Act of 1869.

The family was the same family as that concerned in the case in 5 I.A. ; but it was a separate taluqa, or rather a separate part of the taluqa, that came in question.

Thakur Sheo Singh v. *Rani Raghubans Kunwar*, 32 I.A., page 214, decided in 1905, came afterwards again before this Board on a further question as to the determination of what property formed part of the taluqa and what property of the predecessor from whom the succession was traced, was separate property (45 I.A., page 134). On the occasion reported in 32 I.A. it was held again that a legatee of a taluqa who succeeded before the passing of the Act of 1869 was not a legatee within its meaning, and that the succession to him was not covered by Section 22, but by the particular sanad ; and that this being the case, the sanad and not the Act was to govern, and the particular sanad in that case requiring that the estate should descend to the nearest male heir according to the rule of primogeniture, having in fact equivalent limitations to those expressed in List 3 of the Act, the brother of the last holder must be preferred to his widow. This seems to their Lordships a strong authority in favour of the respondents in the present case, the limitations being in fact the same, though by virture of a different instrument, in the one case the sanad, in the other the Act. The limitations to the nearest male heir, according to the rule of primogeniture, exclude the widow, and equally, if not *a fortiori*, would exclude the mother. It would follow that the bequest in the present case to Dilraj Kunwar was a bequest to a person out of the line of succession, and brought the case within Section 15 of the Act, rendering the estate in future descendable according to the ordinary Hindu law, unless a particular custom of the religion or tribe should be proved.

Debi Baksh Singh v. *Chandrabhan Singh*, 37 I.A., page 168, decided in 1910, was a case of taluqa which fell under List 5, which is as follows :—

> " A list of the grantees to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture."

It will be observed that the limitations are the same as those under List 3. The decision, therefore, should bear closely upon the

present case. The plaintiff was in the senior line, but of a degree more distant from the common ancestor than the defendant. As the succession was to a remote predecessor, it fell under Clause 11. The Board insisted upon the rule of impartibility. The contention of the appellant in support of his claim to succeed under the ordinary law as nearest in degree rested mainly upon a citation of a passage in the judgment in 5 I.A., in which it was supposed that their Lordships had rejected all reference to the sanad. But in that case there was an inconsistency between the sanad, which was granted before the Act, and which made the descent to the nearest male heir according to the rule of primogeniture and the provisions of the Act, which entered the particular estate in List 2, and made it merely descendable upon a single heir. In the case now under consideration, as in all the other cases, the limitations in the sanad and the limitations in the statute were the same. It matters not which is looked at. Accordingly their Lordships held that Clause 11 gives a rule of descent which is still within the statute, and therefore a descent in the particular case according to the rule of primogeniture, giving a preference to the line over the degree in the ordinary way.

Murtaza Husain Khan v. *Muhammad Yasin Ali Khan*, I.L.R. 38, Allahabad, page 552, decided in 1916, concerned a taluqa held by a Mohammedan family, all the other cases which have been cited having been Hindu taluqas. There was no contention as to the descent of the taluqa, which it was admitted between the parties devolved according to the rule of primogeniture. The question in dispute was as to the separate and private property of the last holder of the taluqa. According to ordinary Mohammedan law, this property would have been divisible between the two sons, but the elder son said that by the family custom it devolved upon him, because it followed the descent of the taluqa. Now it happened that the taluqa was entered in List 2, in which the descent is to a single heir, but there is no rule as to primogeniture. Still, if there is a descent to a single heir, as the taluqa is impartible, the elder will inherit as if there were the rule of primogeniture. It was suggested that the taluqa was entered in List 2 by mistake, and that it should have been entered in List 3 ; but their Lordships could not accept that contention. They held, however, that if it was in List 2 there was a presumption that it was in that list because there had been an earlier family custom which would apply to all property, whether belonging to the taluqa or separate from it. It is to be observed that if there was a custom that the property should descend to a single heir, it would have the same effect in the particular case as if there was a custom that it should descend according to the rule of primogeniture. This being so, their Lordships held that the entry in the list, whether List 2 or List 3, was good evidence that there was a family custom, which would make the property, in the particular case, devolve upon the elder son.

Their Lordships believe that they have now gone through all the decisions of the Board, which were cited in argument, and the

result is, that, while there are several decisions on cases coming under List 2 to the effect that it is enough to provide a single heir, and that when the succession is regulated by Section 11 this single heir is the nearest in the succession, and may be male or female ; there is no decision to this effect when the case comes under List 3, where the rule is that of primogeniture. But there are two decisions—that in 31 I.A., *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh*, where the succession was regulated by the sanad ; and that in 37 I.A., *Debi Baksh Singh* v. *Chandrabhan Singh*, which came under List 5—which show that the rule of male lineal primogeniture applies after the special successions provided by Clauses 1–10 are exhausted, and where Clause 11 is invoked.

Therefore, the second ground of defence adopted by the respondent succeeds. It would appear to follow from the cases cited, from 17, 28 and 37 I.A., and from the reasoning which has been adopted in this judgment that the first ground of defence would not have succeeded ; but it is enough that treating Clause 11 as regulating the succession, Dilraj Kunwar was not, as mother of the previous holder, the proper successor according to the Act ; and that the will bequeathing the property to her, took the property out of the limitations of the Act, and rendered it under Section 15 subject to the ordinary Hindu law, according to which the appellant and respondent as representing two lines of agnates would divide the property.

There was a further suggestion that as Dilraj Kunwar, if she succeeded by inheritance, would only have succeeded to a Hindu woman's estate, which is a limited one without power of bequest, and with only certain powers of transfer *inter vivos*, while the effect of the will had been to give her an absolute estate, the will would have broken the line even if she had been the next heir. But it is unnecessary to consider this point. Upon the whole, their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

In the Privy Council.

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