Privy Council Appeal No. 69 *of* 1920.

Oudh Appeal No. 7 *of* 1917.

Badri Narain Singh - - - - - - - *Appellant*

v.

Thakurain Harnam Kuar and others - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MAY, 1922.

Present at the Hearing:

VISCOUNT CAVE.
LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by which the plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

Lal Ajodia Bakhsh, the ancestor of the plaintiff, belonged to a family of Bisen Thakurs long settled in the district of Partabgarh, and was the owner of an estate called Kundrajit or Shamspur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of

Oudh in 1856, this estate, with the remainder of the soil of the province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th March, 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor-General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government. The sanad was in the form then commonly adopted and contained the following clause :—

> " It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above named (bracketed together), were entered as owners of Kundrajit in List 1 and List 4, as prepared under Section 8 of the Act. There appears to have been no reason why they should not have been entered in List 3 as owners of an estate regulated by the rule of primogeniture ; but they may have preferred not to be subject to the special rules of succession which, under Section 22 (Clauses 1 to 10) of the Act, apply to estates entered in that List. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in List 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible taluq on the terms of the sanad and of the Act of 1869.

Chhatarpal died on the 19th October, 1899, and was succeeded by his son Lal Ram Kinkar. On the death of the latter without issue on the 6th October, 1907, his widow, the first respondent, Thakurain Harnam Kuar, took possession of Tajpur and the lands then held with it. Thereupon, the appellant, Babu Badri Narain Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession ; and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam

Kuar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (*a*) under the terms of the sanad, (*b*) by an alleged family custom of succession by male lineal primogeniture, and (*c*) under a will executed by Chhatarpal on the 6th September, 1899. This will, having been executed less than 3 months before the death of Chhatarpal, is now admitted to have been inoperative (under Section 13 of the Act of 1869), to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to Section 23 of the Act of 1869, under which the succession on intestacy to a taluqdari estate entered in List 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the sanad but by the law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

On appeal the Judicial Commissioners differed on the question whether the sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the sanad of 1863 is to have effect, the appellant as the nearest male heir is entitled to the succession; and in the argument for the respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of Section 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the Mitakshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment:—

> "The meaning of the words 'ordinary law' has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate's tribe and religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows Re-marriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan Law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the 'ordinary law' in Section 23 is merely meant to imply the personal law uncontrolled by custom or acts of the Indian Legislature. As pointed out by Lord Hobhouse in a case of List 2 the effect

of the 11th sub-section of Section 22 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, and such ordinary law would include custom. (*Bhai Narendra Bahadur Singh* v. *Achal Ram*, I.L.R., 20 Cal. 649, at p. 654.) In *Parbati Kuar* v. *Chandrapal Kuar*, I.L.R., 31 All., 457, at p. 474, Lord Collins applied the same rule to a case of List 4, governed by Section 23. In other words, when the special rules of succession laid down in Section 22 are exhausted and Section 22, clause (11) is reached, or when Section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner; and indeed no other conclusion is consistent with the decisions of this Board in *Narendra Bahadur Singh* v. *Achal Ram* (L.R. 20, I.A. 77), *Debi Bakhsh Singh* v. *Chandrabhan Singh* (L.R. 37, I.A. 168) and *Sitla Baksh Singh* v. *Sital Singh and others* (L.R. 48, I.A. 228). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the statute and includes any sanad giving title to the property in dispute. It is true that these decisions were rendered with reference to Clause 11 of Section 22, and not with reference to Section 23 of the Act; but the terms of the latter section are precisely similar to those of Section 22 (11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir Barnes Peacock in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (L.R. 5, I.A. at p. 13), that in that case "the limitation in the sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of Section 22 of that Act," But it must be remembered that in that case (which arose under List 2) the contest was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the sanad; and this being so, the case is no authority for the view that the effect of Section 22 (11) or of Section 23 of the Act, was wholly to destroy the rules of succession laid down under sanads which had been so recently granted. Probably the dictum means no more than this, that the Act supersedes the sanad where the two are in conflict. Reliance was also placed on the case of *Musammat Parbati Kunwar* v. *Rani Chandarpal Kunwar and others* (L.R. 36, I.A. 125), which arose under List 4; but that case was argued (doubtless for good reasons) without any reference whatever to the sanad, and cannot, therefore, be taken as an authority on the question now under discussion.

In their Lordships' opinion, this argument fails.

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows; but all these instances with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad; and they cannot be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate is now held. The Crown Grants Act of 1895, Section 3, enacts that all provisions, &c., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Thakur Sheo Singh* v. *Rani Raghubans Kunwar and another* (L.R. 32, I.A. 203). The exception was in the case of the widow of Surajpal, one of the grantees under the sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another branch of the family. This argument, therefore, also fails, and the appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside; and that the appellant should be held entitled to possession of Mahal Tajpur with any accretions thereto and to an account and payment of mesne profits. The respondents will pay the costs of the appellant in both Courts and his costs of this appeal.

In the Privy Council.

BADRI NARAIN SINGH

v.

THAKURAIN HARNAM KUAR AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.