Privy Council Appeal No. 45 *of* 1932.
Allahabad Appeal No. 15 *of* 1930.

The Collector of Gorakhpur, as Manager, Court of Wards, Majhauli Estate - - - - - - - - - *Appellant*

v.

Ram Sundar Mal and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JUNE, 1934.

Present at the Hearing:
LORD BLANESBURGH.
LORD SALVESEN.
SIR JOHN WALLIS.
[*Delivered by* LORD BLANESBURGH.]

The main question for determination on this appeal is whether, on the death of Raja Kaushal Kishor Prasad Mal, which occurred on the 7th January, 1911, Indarjit Mal was entitled to succeed to the impartible Raj of Majhauli. On the death of the Raja, mutation of names had by order dated the 12th May, 1911, been effected in favour of his senior widow without objection or opposition from Indarjit Mal, and the appellant was appointed by the Court of Wards to be Manager of the Majhauli estate. The respondents are a syndicate now formed to exploit the title of Indarjit Mal. He died on the 13th August, 1921, and they on the 30th October, 1922, purchased from his son, Balbhadra Narain Mal, certain of the properties belonging to the Majhauli estate. The consideration was Rs. 24,000. The title of the vendor was clearly a doubtful one and the price had no relation to the value of the properties purchased. It was a sum suitable for the finance of the contemplated litigation, or for a substantial part of it.

On the 5th January, 1923, two suits were as a result filed in the Court of the Subordinate Judge of Gorakhpur against the present appellant, the plaintiff in the first suit being added as a

co-defendant to the second suit. The suits came to be known as the "Majhauli Raj cases." The first was brought by Balbhadra Narain Mal, claiming the Raj. That suit, after being consolidated with the other, has been compromised and need not be further referred to. The second suit, out of which the present appeal arises, was filed at the instance of the members of the syndicate, to recover possession of the properties conveyed by the sale deed in their favour. This was only two days before the expiry of the period of limitation. After subsequent transfer to the Court of the District Judge of Gorakhpur, the suit was by decree dated the 8th June, 1926, dismissed with costs. On appeal by the plaintiffs to the High Court of Judicature at Allahabad that decree was on the 25th February, 1930, reversed, and the suit allowed. From this decree of the High Court the defendant has now appealed to His Majesty in Council.

According to the pedigree produced in the suit the common ancestor of the deceased Raja (whose widow is represented by the appellant) and Balbhadra Narain Mal, from whom the respondents derive their title, was a certain Raja Bodh Mal. According to the same pedigree the deceased Raja, on whose death the senior line became extinct, was the seventh generation in descent from his ancestor Lakshmi Mal, a descendant of Bodh Mai, and Balbhadra Narain Mal, the eighth in descent from Ananda Mal, the younger brother of Lakshmi Mal.

In the suit many matters were discussed and adjudicated upon by the Courts in India, but of these only three remain for final decision by their Lordships. One is whether this pedigree of Balbhadra Narain Rai has been proved by the plaintiffs, the respondents. A second is whether the sale deed on which their title depends has been duly registered. Both of these questions were determined in favour of the respondents in both Courts, and to their consideration the Board must return. But not only because of its general importance but by reason also of the fact that the two Courts in India differed upon it, their Lordships will first deal with the remaining question still in issue, namely, whether, on the assumption that his pedigree has been proved, Indarjit Mal was entitled, on the death of the Raja, to succeed to the whole impartible Raj to the exclusion of his widow, on whose behalf the present appeal is presented. The contention of the respondents was that Indarjit Mal, as the nearest surviving male agnate of the deceased Raja and as a member of the junior branch of a joint Hindu family, was entitled, on the extinction of the senior branch by the Raja's death, to succeed in accordance with the customary rule of succession in the family in question. On this point the District Judge came to the conclusion that the two branches had been, for at least seventy years, separate, and were at the Raja's death no longer joint. This was the decision which was reversed on appeal, the Judges of the High Court holding that the appellant had failed to prove that the

junior branch had ever expressly or impliedly relinquished their right to succeed by survivorship, which was the true issue in the case.

The facts are long and complicated, and it is recognised that their real bearing on the final issue must largely depend upon the true statement of that issue, a question upon which the two Courts in India are in acute difference.

The facts, however, are set forth with the utmost particularity in the judgment of the learned District Judge, and his findings are commented upon by the High Court with care. It will therefore not be inconvenient if, in the first instance, their Lordships attempt a brief summary of them, indicating as they proceed the main points upon which the two Courts are not in agreement.

1. Upon the question of separation between the branches in residence and in food, the learned District Judge thought it to be a fair assumption from the evidence that occupying under a *babuai* grant made in 1726 of the village of Dharamner and other properties, Ananda Mal and his descendants had lived ever since in that village, which is situate about 10 miles from the residence of the Raja. He considered it to be proved by a *rubkar*, to which he made careful reference, that Ananda Mal's descendants were living there in 1833, and he was of opinion that from the time when Ananda Mal or his descendants established their residence at Dharamner the two families were separate in residence and in food. The High Court do not question this conclusion, but they do not accept the learned Judge's assumption that the families had been so separate since the date of the grant. The document dated in 1833, upon which he based his primary assumption, did not, they thought, show that the descendants of Ananda were living at Dharamner even at that time. The oral evidence again, they thought, did not establish separate residence prior to the Mutiny.

The High Court, however, have regard to the fact that the family of Indarjit are, and that Indarjit at his death was, living at Dharamner and not occupying any part of the residential quarters at Majhauli. Accordingly they find themselves justified in concluding that at least from about the time of the Mutiny or a little earlier there had been separate residence and consequently separate messing. Their Lordships in this matter are in sympathy with the conclusions of the High Court. But except as one of several circumstances the matter is not, as will be seen, of vital importance, it being the view even of the learned District Judge that separation in food and residence is ordinarily inconclusive of separation, and more particularly so in a case like this, where there was no evidence to show when the descendants of Ananda Mal " built up a separate house " at Dharamner.

2. But there was complete separation in worship. Both Courts are agreed that while there is nothing on record to show the position in this regard before the time of Indarjit Mal, there

is definite evidence to prove that he never visited Majhauli or took part in the family worship there. It is further established that the two families had a separate *guru* and a separate priest. To the learned District Judge the evidence established a complete separation in worship between Indarjit Bahadur Mal and the late Raja, a circumstance to which he attached great importance as affording a very strong indication of a general disruption of the family connection. The High Court do not question this finding, but in the view they take of its relevance to the real issue, as they see it, they do not attach to it any final or great importance.

3. The summary of the relations between the members of the two families over a very considerable stretch of time made by the learned District Judge may be accepted as representing the conclusions drawn by both Courts from the evidence :—

"(1) That the Babus of Dharamner never visited Majhauli and were never invited by the Raja on any occasion whatever.

(2) That various other Babus connected with the Majhauli Raj family in the same manner as the Babus of Dharamner paid visits to Majhauli and were invited on ceremonial occasions.

(3) That monetary assistance was given by the Raja to Bisen Chhattries in general, and to some of the other Babus also, but never to the Babus of Dharamner.

(4) That the Raja used to have several Bisen courtiers, but he never allowed any of the Babus of Dharamner to be one of them.

(5) That villages of the raj were often given out on lease to other Babus, but never to the Babus of Dharamner.

(6) That the Raja would not allow any Babus of Dharamner to be employed in his raj in any capacity.

(7) That there was a well-known tradition of old enmity between the Babus of Dharamner and the Majhauli Raj family."

It is recognised that this last proposition is no doubt responsible for those which precede it, indicating as they do the natural outcome of a long-continued and bitter feud between the two families, which arose, it is said, out of an attempt on the part of a member of the junior family to assassinate the then Raja. And perhaps the further fact may be added that in 1857 the Raja of Majhauli remained loyal to the British Government and was rewarded by a grant of additional land, while the grandfather of Indarjit Mal fought on the side of the rebels and was punished accordingly by confiscation of part of his estate.

4. There is no doubt that whether in consequence of this estrangement or for other reasons the financial condition of Indarjit Mal and his family was very poor. There are no less than 13 documents showing that between 1898 and 1907 Indarjit and his son transferred small parcels of their share in village Dharamner for quite inconsiderable sums. One sale deed for a price of Rs. 299.15 was made in order to pay two previous debts and to receive a balance of Rs. 110.13 to meet the expenses of a daughter's marriage. On this matter the District Judge remarks :—

"Anyone who is conversant with joint family life among Hindus knows that the marriage of a daughter is a sacred duty which is binding on

all the members of the family. It is impossible to conceive that Indarjit Mal was compelled to borrow the petty amount mentioned above for the marriage of a daughter though he was joint with the holder of the Majhauli Raj. Such an act would have brought opprobrium on the Raja himself."

5. It is perhaps convenient at this point to observe that these last matters, to which the learned District Judge attaches so much importance in support of his conclusion that the two branches of the family had become completely separate, may be regarded from another point of view. The impoverishment of the Dharamner branch may well have furnished an additional reason for a desire on the part of the Raja to have nothing to do with his poor kinsmen; while these, if they were able to arrange for the marriage of a daughter without assistance from the Raja, might well decide to do so in view of the terms on which the families stood to each other.

6. The conduct of Indarjit Mal is relied upon by the learned District Judge as showing that he did not consider himself a member of the joint family when the succession opened by the death of the Raja Kaushal. Indarjit lived until the 13th August, 1921—that was 10½ years after the death of the Raja. During his lifetime he made no attempt to assert his title to the estate. On 8th February, 1911, the widow applied for, and on the 12th May, 1911, obtained, mutation of the estate in her favour. Further, on 19th February, 1912, Balbhadra Narain Mal applied to the then Collector of Gorakhpur, that his eldest son, ought, on the footing that he had a chance of succeeding to the estate as a reversioner, to have a provision made by the Court of Wards for his education. This application and similar applications which were afterwards made show that neither Indarjit nor his son made any claim by survivorship to immediate possession of the *raj*.

These facts are accepted by the High Court. It will, however, be more convenient to deal later with their comment upon them.

There is one further matter to which attention may be directed, although it is not in terms alluded to either by the learned District Judge or by the High Court. It appears from a *rubkar* dated the 26th November, 1836, relating to the village of Dharamner, and already referred to, that that village was included in the estate of Raja Tej Mal: that after the death of the Raja under a *rubkar* dated the 24th April, 1833, the names of the Rani and the then Raja and his son were recorded; but that "now on enquiry it has been ascertained that this village was included in the estate of the Rani, but as a *babuai* property it remained in the possession and occupation of Babu Nand Kishor Mal and others who are the collaterals of the Raja." Nand Kishor Mal was a member of the junior branch of the family to which Indarjit belonged. The document then goes on to say that the agents of the Rani and the Raja attended and admitted that, although the

village had been included in the estate of the Raja, it was in the possession and occupation of Babu Nand Kishor Mal and that his clients had no claim for it in any way. Under these circumstances the village with the correct revenue was settled with Nand Kishor Mal and others, the amount, as shown by exhibit D. 23, being a uniform *jama* of Rs. 1,000 a year. It appears from subsequent sale deeds that various members of this junior branch thereafter dealt with parcels of this original *babuai* grant as absolute owners by dispositions thereof from time to time. It will be convenient to deal with the precise significance of all this at a later stage. As has been said, it has not influenced the judgment of either Court in India.

Now it is not to be denied that the cumulative effect of the above facts as found by the learned District Judge, even when qualified, to the extent to which their Lordships think they should be, by the findings of the High Court, go far to establish that for many years before the death of Indarjit Mal the condition of jointness in general status between these two branches of this ancient family had been lost, and it is not surprising that the learned Judge treating this, as being in point of law the true issue to which his mind had to be addressed, should have concluded after a powerful summary of its cumulative effect that Indarjit Bahadur Mal was not joint with Raja Kaushal Kishor, the last holder of the Raj.

But while so expressing himself the learned Judge makes it clear that this final conclusion of his was largely dependent upon the actual facts of which proof was by law required, and upon this question he states his own views with the utmost clearness, as the following amongst other passages in his judgment show.

Having asked what constitutes separation in a family like the Majauli holding impartible property only, the learned Judge proceeds to say :—

> " It is necessary to decide this question so that a proper standard may be laid down for the appreciation of the various facts which have been proved by the defendant in order to establish separation in the present case."

And then, after referring to the *Telwa* case, 42 I.A. 192, and the *Serampore* case, I.L.R. 2 Pat. 319, he enquires what was the conclusion which this Board had then reached upon the question of what constitutes separation in respect of an impartible estate. And his answer is :—

> " I think they have now definitely decided that there is no difference between partible and impartible property in that respect so that a separation can be brought about merely by the unequivocal expression of an intention to that effect by any member of the family. It is further clear to my mind that the member who thus brings about a separation may be the holder of the impartible property himself."

Later he adds :—

> " It must . . . be taken for granted that the *Telwa* case stands as a clear authority for the proposition that a separation is possible in a family

owning impartible property alone without any relinquishment by the junior member of his contingent right of succession, and we must proceed to consider the facts set out by the defendant in the present case in order to establish separation."

And the learned Judge's conclusion of the whole matter as above set forth follows an elaborate examination of the evidence on the basis of the law as stated by him. This is shown by the closing words of his judgment :—

"It is true that there is no evidence of a definite partition between the families or of a relinquishment of the right of succession by Indarjit Mal or by any one of his ancestors. But in view of my finding of the legal aspect of the question I think these elements not necessary to constitute separation of a family holding impartible property alone. I therefore find that Indarjit Bahadur Mai was not joint with Raja Kausha Kishor, the last holder of the estate."

The learned Judge, that is to say, leaves entirely open the question whether even on his finding of the facts the same result would have followed had his opinion on the legal aspect of the question been different; in other words, had his view of the law been that in order to constitute separation of a family holding impartible property only there must be either a definite partition between the families or a relinquishment of the right of succession by the junior branch.

Now when this suit was before the District Court the case of *Baijnath Prashad Singh* v. *Tej Bali Singh*, 48 I.A. 195, had been decided by this Board, but the full implications of the judgment there delivered by Lord Dunedin and later to be stated were not perhaps fully appreciated.

Again, the *Telwa* case (1915), 42 I.A. 192, upon which the learned Judge placed final reliance, while already questioned as a case of general application, had not then been described as it was by this Board in *Konammal* v. *Annadana* (1927), 55 I.A. 114, as a case laying down no general proposition of law, for the purpose of that case or, as may now be added, of this case.

It is therefore not surprising that in the then state of the authorities the learned Judge expressed the law as he did. But the High Court had before them the case just cited of *Konammal* v. *Annadana*, and their Lordships have now before them also the case of *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi* (1932), 59 I.A. 331, the effect of these decisions being finally to settle the law upon this vexed question. Somewhat tentatively phrased, the rule is thus expressed in 55 I.A. at p. 127 by Sir John Wallis delivering the judgment of the Board :—

"These authorities, in their Lordships' opinion, go far to support the inference deduced by Ramesam J. [in the Court below] from an examination of the cases, that in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate."

And quite definitely this same rule is thus enunciated in 59 I.A. at p. 345 in the following words of Sir Dinshah Mulla when delivering the judgment of their Lordships :—

> "In order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship."

In these circumstances the High Court were justified, relying only on 55 I.A. 127, and even more would they have been justified had 59 I.A. 395 then been decided, in saying in their judgment as they do that :—

> "It is quite clear that the learned District Judge has approached the case from a totally wrong standpoint inasmuch as he thought that it was wholly unnecessary to establish any relinquishment of the right of succession. We must therefore examine the facts found by him or disclosed by the evidence from this new angle of vision."

Now all the cases and reasons for the decisions of the Board in 55 I.A. and 59 I.A. are fully dealt with in the judgments there. It is unnecessary and it would be tedious to set them forth again. With reference to the general position thereby established their Lordships, before following the High Court into their examination of the facts would say only this :—

1. The decisions of the Board in the *Surtaj Kuari* case (1888), 15 I.A. 51, and the first *Pittapur* case (1899), 26 I.A. 83, appeared to be destructive of the doctrine that an impartible *zemindari* could be in any sense joint family property.

2. This view apparently implied in these cases was definitely negatived by Lord Dunedin when delivering the judgment of the Board in 1921, in 48 I.A. 195.

3. One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance the *Chellapelli* case, 27 I.A. 151, which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding *zemindari* lands for maintenance could still be considered as joint in estate with the *zemindar* in possession. Such was the position of the junior branch in this case under the *babuai* grant of Dharamner, to which reference has so often been made in the course of these proceedings.

4. It is the view of both Courts in India that there is no evidence here of a definite partition between the families. Now if in the case of an impartible *zemindari* like this there was to be a separation it would have to include all branches of the joint family. To prove, therefore, the separation of the junior branch it would be necessary to show *either* that the Raja had separated from all the junior members of the family, a conclusion negatived by the fact that members of more remote branches gave evidence for the defendant, or that the branch

represented by the plaintiffs separated themselves from the rest of the family, which is not to be supposed, seeing that their chance of succeeding to the *raj* as next branch was their greatest asset. And here, as the learned District Judge finds, there is no evidence of the relinquishment of the right of succession by Indarjit Mal or by any one of his ancestors.

4. The mere fact that the common ancestor lived so long as two hundred years before suit is not enough to raise a presumption of separation. Ramesam J. in his judgment in *Konammal* v. *Annadana* instances a pedigree showing a common ancestor as remote as or remoter than the common ancestor in the present case without any suggestion made that this remoteness raised any presumption of separation as to the impartible estate either in the High Court of Madras or in the judgment of the Board. See 13 M.I.A. 333. In the present case we find a member of this junior branch of the family asserting his position as a member of the family in a suit in 1806.

5. With reference to the *rubkar* of 1836, all that really appears from exhibits P. 7 and D. 23 is that the village of Dharamner—the subject of the *babuai* grant of 1726—was settled then with this branch, the agents of the Raja and Ranee not objecting and disclaiming any interest. The only result of this disclaimer was to make the revenue payable to the Government direct instead of to the Ranee. If this had been a permanently settled estate the Raja would have been entitled to the revenue and this subsequent arrangement would have been important. But in the then position the only question was whether the land revenue was to be collected from the *babus* in possession. The fact that the Raja had no objection to its being so collected has little, if any, weight as evidence of separation, and while it was right to mention the incident in order to show that it had not been overlooked, it is not remarkable that it had not been referred to in India nor was it included in the argument of counsel for the appellant before the Board until his attention was drawn to it by one of their Lordships.

6. The recent decisions of the Board constitute a further landmark in the judicial exposition of the question at issue here. While the power of the holder of an impartible *raj* to dispose of the same by deed (*Surtaj Kuari's* case (1888), 15 I.A. 51) or by will, the first *Pittapur* case (1899), 26 I.A. 83 : *Protap Chandra Deo* v. *Jagadish Chandra Deo,* 54 I.A. 289, remains definitely established, the right of the junior branch to succeed by survivorship to the *raj* on the extinction of the senior branch has also been definitely and emphatically re-affirmed. Nor must this right be whittled away. It cannot be regarded as merely visionary. As was pointed out in *Baijnath Prashad Singh's* case, when before the Allahabad High Court—38 All. 509—the junior members of a great *zemindari* enjoy a high degree of consideration, being known as *babus*, the different branches holding *babuana* grants out of the *zemindari*. Their enjoyment of these grants is attributable to their member-

ship of the joint family, and until the decisions above referred to beginning in 1888 supervened, they had no reason to believe that their rights of succession were being imperilled by their estrangement from the *zemindar* in possession. Great caution must therefore be exercised in attributing any special consequences to conduct only significant in the light of these decisions now explained.

Returning now to the examination of the evidence made by the High Court, the learned Judges embark upon it with the statement already foreshadowed that the question for decision is whether it is incumbent upon a claimant to an impartible estate to establish a jointness in general status between the two branches of the family in order to supersede the widow—as the learned District Judge thought—or whether, as they thought, it is only incumbent upon him to establish a notional jointness with the burden on the opposite party to show a definite renunciation of their right to succession.

And the learned Judges examined the evidence in order to ascertain whether the defendant had discharged the burden so laid upon him. And they found that he had not.

It is not necessary that their Lordships should in detail go through all the different qualifications which, approaching the facts from this totally different angle, the learned Judges of the High Court introduce into the findings of the learned District Judge. Some of these have already been referred to. On the question of the remoteness of the common ancestor they gave further instances justifying their assertion that in many of the cases relating to impartible property the pedigree as a rule has been a long one. Differing also from the learned Judge in the importance he attached to separation in worship they make it clear that however important this may be on a question of jointness in general status it does not imply any intention on the part of the junior members to give up their right of succession to the estate. Withdrawal by the Raja from social intercourse with a junior branch may be regarded in the same way; and with reference to the inferences sought to be drawn from Indarjit's actions after the Raja's death the learned Judges point out that it is at the death and not at some later period that the separation must be established.

Upon the whole case their Lordships are content to say that they concur with the learned Judges in their conclusion which is thus expressed :—

> "On an examination of the entire evidence as referred to by the learned District Judge and after weighing all the circumstances brought out by him we are unable to agree with his conclusion in the light of the recent pronouncement of their Lordships of the Privy Council. We think that the burden lay heavily on the defendant to establish that the estate was held as the separate property of the Raja Kaushal Kishore and that a separation had been brought about by an intention express or implied on the part of the junior branch to relinquish their right to succession to

> the impartible estate whenever a succession opened. We must therefore hold that it is not established that Raja Kaushal Kishor was separate from Indarjit Bahadur in the sense that the latter had lost all right to succession in case the former died without a child and without having disposed of his estate in his lifetime."

Their Lordships now proceed to the consideration of the two further issues in the appeal upon which both Courts in India were in agreement. The first relates to the pedigree propounded by the plaintiffs. Was it proved by sufficient evidence ?

This question was discussed with great elaboration in both Courts in India and it was argued in much detail at their Lordships' Bar. Their Lordships are satisfied that the objections taken to the sufficiency of proof of a pedigree which seems to have been notorious in the family for generations are purely technical and as they are in agreement with both Courts upon it they will deal briefly with the question.

There are produced certified copies of the decree in the suit of 1805 already referred to and of two pedigrees, P. 5 and P. 6, found with it, all of which are by statute to be deemed originals. The decree recites that pedigrees had been filed by both the parties, and sets out according to both pedigrees the descent of Daryao from Bodh Mal, the common ancestor. This is the only part of the second defendant's pedigree in dispute. If the decree is legal evidence that pedigrees were filed by both parties, we may presume that the two pedigrees P. 5 and P. 6 found with the decree were the two pedigrees filed in the suit. Both pedigrees should have been admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship under section 32 (5) of the Evidence Act. The statements in the decree that the pedigrees were filed is evidence either under section 35 as an entry in a public record, or under section 13 as evidence of the course of proceedings in a suit. In 18 Mad. 73 a statement amounting to an admission which was contained in a judgment was received in evidence under section 35 as an entry in a record made by a public servant in the course of his duty. There is much to be said for this view of section 35. In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room, the parties being supplied with certified copies only. The pedigrees themselves are the best evidence of their contents. P. 5, the pedigree filed by the Rani, should therefore have been received when tendered, and it might be necessary to have it filed in evidence, unless the circumstances bring it within section 65, clause (*c*) of the Act. It may be accepted that they do.

The question whether statements in judgments and decrees are admissible under section 13 read with section 43 is elaborately discussed by Sir John Woodroffe in his new edition of the Evidence Act (1931), p. 181 *et seq.* He would hold that they are not admissible at all under section 13; but this view is not in accordance

with the decisions of the Board in *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, 22 I.R. 60, and *Dinomoni* v. *Brojo Mohini*, 29 I.R. 24. At the bottom of page 194, however, the learned author treats judgments as evidence of admissions by ancestors. There are great difficulties about section 13, but *Dinomoni's* case is express authority for the proposition that " on general principles and under section 13 " orders made under the Criminal Procedure Code are admissible for the purposes mentioned in the passage quoted at p. 191 from the Board's judgment.

All really wanted here in order to prove that the pedigree filed by the Rani in 1805 is an admission of the second defendant's descent from Bodh Mal is to use the statement in the decree that the pedigrees produced were filed by the parties. If other entries made in records by public officers are admissible it would be absurd that such an entry as this in a decree should be inadmissible. In the result their Lordships are prepared to hold the pedigree admissible under section 35. In their judgment, moreover, the two decisions of the Board already referred to are sufficient authority for holding it admissible under section 13. The pedigree filed by the Rani in 1805 if admissible is clearly a relevant admission under section 21 against the present Rani as her representative in interest, and an admission within the definition in section 18 of the Evidence Act.

Upon this issue therefore their Lordships find themselves in agreement with both Courts below.

They now proceed to consider the third question raised by the appeal—whether the registration of the sale deed of the 30th October, 1922, was valid.

The deed is a registrable instrument under section 17 of the Indian Registration Act, 1908. Section 28 of that Act requires that every registrable document " shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate," and section 49 enacts that no registrable instrument shall affect any immovable property comprised therein unless it has been registered in accordance with the provisions of the Act. The sale deed was registered with the sub-registrar of Gorakhpur. The only justification for registration with him was that there is included in the deed, as a separate item of transfer, an undivided interest in a small sitting-room situated in Gorakhpur, later to be described. The question is whether in all the circumstances of the case the deed related to that property within the meaning of the statute. If it did not, the registration was inoperative.

The facts raising the question are clear enough. The inferences to be drawn from them are not so clear. The deed purports to transfer as one parcel four villages of the Majhauli estate, and, as a separate item of property, a one-third share in a sitting-room in a garden appertaining to the Majhauli Kothi in Mohalla

Dandpar, Gorakhpur. As compared with the value of the four villages this property is insignificant, almost derisory.

The villages yield a gross income of nearly Rs. 10,000 and the Government revenue is Rs. 8,213. In the claim the entire summer room is valued at Rs. 150. The purchase price fixed by the deed was, as has been seen, Rs. 24,000. The inclusion in the parcels of the fraction of the room referred to had, it has been found, no influence whatever upon that price, arrived at, as it will be recalled it was, irrespective of actual value. The room is described by the learned District Judge as " a pukka platform, circular in shape, having a diameter of 13½ feet and covered by a tiled roof." It is situate in the midst of a walled garden surrounding the Majhauli Kothi. No part of the garden is included in the sale. The purchaser is by the deed given no right of way or other access to the room.

It is accordingly true of it to say that as a subject of sale this item was of no real value, and that not only from the interest in it conveyed, but from its landlocked situation it was a subject incapable of enjoyment by the purchasers. It has been found, in the language of the learned District Judge, that this insignificant item of property was never contemplated as really forming a part of the consideration and was entered in the sale deed presumably with the only object of getting the deed registered at Gorakhpur.

The High Court is in agreement with this finding, which, being concurrent, their Lordships accept. They may say, however, as a result of their own examination of the evidence, that it is in their judgment, irresistible.

But there are some further facts to which reference must now be made. While both Courts in India find that the parties to the deed regarded this subject of sale as parcel of the Majhauli Raj and therefore comprised in the claim thereto made by Balbhadra Narain Mal it had, in point of fact never been incorporated with the Raj, and was an item of property to which Balbhadra had no right or title whatsoever. And there are two further facts which may be of assistance in reaching a true conclusion in this matter. The first is that in evidence an attempt was made on behalf of the plaintiffs to show that this room was what remained of a place of residence at Gorakhpur which the purchasers desired to acquire. And the next is, that according to this same witness he desired the whole Kothi to be included in the sale, but that Balbhadra objected and would consent to the inclusion therein of no more than the undivided third part of this inaccessible room. And it is also to be noted that each of the remaining two-thirds of the room was so to speak earmarked for inclusion in two further sale deeds which, as is shown by this sale deed, were contemplated as possible in the future for execution

by Balbhadra in favour of the respondents. The purpose of this sale deed was to enable the "Majaulhi Rai cases" to be financed to the extent of Rs. 24,000. It was apparently realized that this sum might not suffice for its purpose. Provision accordingly is made for the sale in the future by two further separate deeds each of two further villages outside of Gorakhpur each for Rs. 12,000, and in each case with a third of this sitting-room in Gorakhpur included as a separate parcel. It seems to their Lordships almost obvious that this inaccessible item of property valueless to the purchaser either in undivided shares or as an entirety was selected for service, even in advance, only in order that some colour for the registration of each deed in Gorakhpur might appear upon its face. And this conclusion is assisted by some evidence of Shiam Rathi, the scribe who prepared it. He asked his principal, Ram Ghulam, why a third share of the room was being entered in the deed, as it would be of no use whatever. The answer given in no way disputes that statement of Shiam Rathi's who was an ingenuous witness. He knew, he said, that if he agreed that the room was mentioned in the deed merely to enable its being registered at Gorakhpur the suit would fail on the ground of invalid registration. Yet both Courts held that the registration was valid.

Now the learned District Judge, so soon as he found that the sitting-room was an existing thing, so that its insertion as a subject of sale could not, as he thought, within the decision of this Board in *Harendra* v. *Hari Rasi Debi*, 41 I.A. 110, be regarded as "fictitious," decided that he was not at liberty to consider whether it was the intention of the parties that the sitting-room should be an effective subject of sale. They had kept within the letter of the law, he thought, and the registration must be upheld. It seems from some passages in his judgment that if he had felt himself at liberty to consider the intentions of the parties in this matter he might have reached the same conclusion as that at which their Lordships have arrived.

In the High Court the learned Judges were of opinion, and their Lordships think rightly so, that they were bound to go into this question of intention, and having done so they arrived at the conclusion that the entry of the sitting-room in the deed was not a fictitious entry within the meaning of the decision of the Board already cited, and although on the facts of the present case one could not help feeling that the parties to the sale-deed under consideration attempted to juggle with the registration law, still the question was whether they had overstepped the bounds laid down by the law, and the learned Judges felt that that question must be answered in the negative.

In reaching that conclusion, however, they failed to refer to or to take into account all the circumstances which their Lordships have detailed, and it becomes the duty of the Board to consider the question afresh in their light.

They have done so and, having regard specially, although not exclusively, to the facts that this undivided share in this sitting-room was agreed by one of the purchasers to be of no value, that both in respect of the interest taken in it and in respect of its complete inaccessibility, it was incapable either of being utilized or enjoyed by the purchaser ; that the vendor refused to include in the sale any subject in Gorakhpur to which these disadvantages did not attach, they think that one of two inferences alone is possible : either that it was never intended by either party that the sitting-room should for any purpose other than that of registration be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchasers. The word " fictitious " used in *Harendra* v. *Hari Rasi Debi*, *ubi cit.*, is not confined to non- existing properties. It is satisfied if the deed does not " relate " to a specified property for any effective purpose of enjoyment or use.

In their Lordships' opinion, all the facts of the case, if not stronger, are at least as strong as those in either *Harendra* v. *Hari Rasi Debi*, *ubi cit.*, or *Biswanath* v. *Chandra*, 48 I.A. 133, and, paraphrasing the words used in the latter case, the circumstances here leave in their minds no doubt that the parties never intended that this undivided share of this sitting-room should really be sold. The so-called sale was a mere device to evade the Registration Act.

On this last issue accordingly the appeal, in their Lordships' judgment, succeeds, and they will humbly advise His Majesty that it be allowed, that the decree of the High Court be discharged and that of the District Judge restored.

The appellant will have his costs of the appeal to the High Court and of this appeal.

In the Privy Council.

THE COLLECTOR OF GORAKHPUR, as Manager,
COURT OF WARDS, MAJHAULI ESTATE,

v.

RAM SUNDAR MAL AND OTHERS.

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