Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of—

Brij Indar Bahadur Singh (Plaintiff) *Appellant.*
v.
Ranee Janki Koer (Defendant) - - *Respondent.*

Lal Shunker Buksh (Plaintiff) - - *Appellant.*
v.
Ranee Janki Koer (Defendant) - - *Respondent.*

and

Lal Seetla Bux (Plaintiff) - - *Appellant.*
v.
Ranee Janki Koer (Defendant) - *Respondent.*

From Oude, delivered 20th November, 1877.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.

THESE three Appeals were argued together. In each of them the Appellant was Plaintiff in a separate suit instituted by him against the Respondent in the Court of the Deputy Commissioner of Pertabghur, to recover possession of Taluka Pawansi, in Pergunnah Dingwas, in the province of Oude. In each case the Plaintiff claimed to have become entitled to the taluka, by right of inheritance, upon the death of Thakurain Kablas Koer, the mother of the Defendant.

The property in dispute was formerly part of the estate of Rai Chein Singh, the great-grandfather of

Mypal Singh. Mypal Singh held it under the Native Government down to the time of his death, in 1260 Fuslee, corresponding with the year 1852-53.

Upon his death he left two widows; the first married was Mussamat Subhao Koer, and the second the above-mentioned Thakurain Kablas Koer. By his first wife, Subhao Koer, he had two daughters, of whom the elder, Jaganath Koer, was the mother of the Appellant, Brij Indar Bahadur Singh. The other died without issue. By his second wife, Thakurain Kablas Koer, he had one daughter, Ranee Janki Koer, who married Rai Bajai Bahadur Singh, and is the Defendant in the suits, and the Respondent in each of the three Appeals.

At the time of the annexation of Oude the estate was in the possession of the aforesaid Kablas Koer, to whom it had descended as the surviving widow of her deceased husband, Mypal Singh.

In 1858 the estate was confiscated by the British Government by virtue of Lord Canning's Proclamation of the 15th March in that year.

The summary settlement for 1858-59 was made with Kablas Koer. In the Kabulyat dated 20th April, 1858, executed on her behalf on that occasion, she was described as the widow of Lall Mypal Singh, and it appears from an administration paper put in evidence in Brij Indar's Case (Record, page 8), that Kablas Koer admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A Sunnud was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that as long as the obligations imposed by the grant should be observed by her and her heirs

in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this Sunnud is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major MacAndrew, the Deputy Commissioner, of the 4th February, 1861 (Record Seetla Bux's Case, page 4), for he there states that if Kablas would file a deed of will in the terms of the proposal therein contained, she would receive a Sunnud for the estate from Government. It must also have been after the date of her petition in answer, dated 15th March, 1861, in which she asks to have a Sunnud for life granted to her. It is exceedingly inconvenient, but it often happens in records sent up from the Courts in Oude, that documents are without dates. Their Lordships mention this that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel MacAndrew, to which reference has just been made, and the petition of Kablas in answer to it, were relied upon in the argument on the part of the Appellants, in order to show that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to Kablas and her heirs was not made through inadvertence, and that her heirs were intended.

In the letter Colonel MacAndrew says, "among the Thakoors of Dingwas there is no one next of kin to the husband of the Thakurain who may be declared as heir, and according to the Circular orders she has power, after the receipt of the Sunnud, to alienate her estate by will to anyone." He gives reasons why she should make a will in favour of Seetla, and concludes by saying "if you file a deed of will in terms of the above proposal, you will receive a Sunnud for the estate from the Government." (Record, p. 4). In her petition in answer, after pointing out her objection to execute a will in favour of Seetla Bux, she concludes, "I myself am at a look-out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your

Honour know. Meanwhile, it will be an act of grace on your part to confer a sunnud on me for life. On no account am I willing to adopt Seetla Bux and Shunker Bux. I therefore pray that, on receipt of the Report from Pertabghur District, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to Seetla Bux the succession to the estate upon the death of Kablas, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of Kablas as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the Sunnud, with a view to ascertain the intentions of Government, they would operate more against than in favour of the claims of Seetla and Shunker.

Upon the death of Kablas, in August 1872, the Appellant, Brij Indar, claimed to inherit as the son of Jaganath Koer, the daughter of Subhao, the first wife of Mypal, and the rival wife of Kablas.

Lal Shunker Bux and Lal Seetla Bux each claimed as a distant collateral relative of Mypal, the deceased husband of Kablas. Each was a son of Ragnath Singh, who was a great grandson in the male line of Rai Chein Singh, who was the great-grandfather of Mypal Singh.

Seetla was the son of the first wife of Ragnath, and Shunker, who was born before Seetla, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy Commissioner dismissed the suit of Brij Indar, and also that of Shunker Bux, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judicial Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the Judgment of the Commissioner. In the case of Seetla Bux the Deputy Commissioner decreed for the Plaintiff. The Commissioner, upon appeal, reversed that Decree, and decreed the taluka to the Defendant, Janki Koer, and upon appeal to the Judicial Commissioner he affirmed the Decree of the Commissioner. The Appeal of Seetla

Bux to Her Majesty in Council is, therefore, from the Decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several Appellants.

The first question to be considered is whether the estate, in the event of the intestacy of Kablas, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt.

They consider that the Sunnud conferred, and was intended to confer, a full proprietary and transferable right in the estate upon Kablas and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life, with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which Kablas, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the Sunnud, the Government granted to Kablas and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the Sunnud, for in 1869, Act No. 1 of that year was passed to prevent, as appears from the preamble, doubts as to the nature of the rights of certain talukdars and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By section 2 the word "Talukdar" was defined, and it was declared to mean "any person whose

name is entered in the first of the lists mentioned in section 8.

The name of Thakurain Kablas Koer was entered in the first of such lists. It was also entered in the second of the lists mentioned in section 8 as one whose estate, according to the custom of the family on and before the 13th February, 1856, ordinarily descended to a single heir.

By section 10 of the Act, list No. 1 is conclusive evidence that Kablas was a talukdar within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of section 3, Kablas Koer must be deemed to have acquired by the Sunnud a permanent heritable and transferable right in the estate in dispute.

It was contended by Counsel that a trust was created, and that Kablas took the estate upon trust for those who would have been entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the Sunnud or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the Sunnud was wholly superseded by Act 1 of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act. By that section it was enacted that if any talukdar whose name should be inserted in the second, third, or fifth of the lists mentioned in section 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described.

Their Lordships do not consider that the positive limitations in that section are in any way controlled by the provision in the 3rd section of the Act, that the right acquired by virtue of the Taluqdari Sunnud should be subject to all the conditions affecting the Talookdar contained in the Sanad under which the estate is held. They understand the conditions

referred to in clause 4 of that section to be the conditions of loyalty and good service mentioned in the letter of the 19th October, 1859, republished in the first schedule of the Act, and to the other conditions of a similar nature, such as those of surrendering arms, destroying forts, &c., contained in the Sanad.

It was contended in the Lower Court, on the part of Brij Indar, that he being the son of a daughter of a rival wife, and having been treated by Kablas in all respects as her own son, came within the meaning of clause 4 of section 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of Kablas Koer, the talukdar, within the meaning of the clause.

It having been decided that Brij Indar did not come under clause 4 of section 22, neither of the Plaintiffs is within the description contained in clauses 1 to 10, both inclusive.

The case is therefore to be governed by clause 11, which is as follows:—

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

In the absence of any special custom applicable to the particular tribe or family to which Kablas belonged (as to which advertance will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the Mitácshará.

Chapter 2, section 11, treats of the separate property of a woman, and of the distribution of it. In par. 1 of that section it is said "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated in the course of the argument by the learned Counsel for Shunker Bux, that in the original of par. 1, cap. 2, sec. 11 of the Mitácshará, and of par. 12, cap. 4, sec. 1, of the Daya-Bagha, the words translated as "separate

acquisition," are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned Counsel may be correct. But the words "and the like" or "in such like" would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At par. 4, cap. 2, sec. 11 of the Mitácshará, it is said "The enumeration of six sorts of woman's property by Menu, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman' (Menu, 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The Daya-Bagha is to the same effect. Par. 18, cap. 4, sec. 1, is as follows:—

"Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by Menu and others is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the Mitácshará, par. 2, chap. 2, sec. 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest "woman's property."

Again, par. 3, "The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptation is improper."

There is a note to par. 2, above quoted, with reference to property obtained by inheritance, and their Lordship's attention was called to it by the learned Counsel for Shunker Bux; but as the estate in dispute did not come to Kablas by inheritance, it is unnecessary to determine whether immovable property acquired by a woman by inheritance is

"woman's property." It has been decided that a woman cannot, even according to the Mitácshará, alienate immovable property inherited from her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs —Mussumal Thakoor Deghee *v.* Rai Baluk Ram, 11 Moore's Indian Appeals, 175.

The question does not arise in this case whether if the grant had been made to Kablas in her husband's lifetime the property would have been her peculiar property, over which her husband would have had no dominion or control (see Daya-Bagha, chap. 4, sec. 1, pars. 20 and 23); for the property was granted to Kablas after her husband's death. The Talooka must, in their Lordships' opinion, be considered to have been the property of Kablas at the time of her death.

A woman's property having been described in the first eight paragraphs of the section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it is only in the event of her dying without issue that her kinsmen succeed.

Par. 9 goes on: "If a woman die 'without issue' —that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described."

Par. 10. "The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated Brahma, or in any of the four unblamed modes of marriage, goes to her husband; but if she leave progeny it will go to her daughter's daughters. In other forms of marriage, as the Asura, &c., it goes to her father and mother on failure of her own issue."

The words "daughter's daughter" are made clear by par. 15: "On failure of all daughters, the granddaughters in the female line take the succession, under the text, 'if she leave progeny it goes to her daughter's daughter. And, again, by par. 12, "In

all forms of marriage, if the woman leaves progeny, that is, if she have issue, her property devolves on her daughters. In this place, by daughters, grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: 'The daughters share the residue of their mother's property after payment of her debts.'"

Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance."

Par. 16 deals with the case of a multitude of grand-daughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect that the property of a Bissein could be inherited only by a Bissein, and that it descended to collateral male heirs in preference to a daughter.

The Commissioner in his Judgment said that the custom among Chattris that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of Bissein Chattris. The Judicial Commissioner, however, was of opinion that the Plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession (Record in Seetla Bux's Case 100).

Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman. Their Lordships are, therefore, of opinion that, under clause 11, sec. 22, the estate descended to the Defendant (Respondent) as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if Kablas had died without issue, either of the Plaintiffs would have been entitled to succeed to the estate.

The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow.—Record, p. 100.

In this view of the case their Lordships, for the reasons above stated, cannot concur. The Decree of the Judicial Commissioner was notwithstanding

correct; for he, holding that the Defendant was heir to her father, Mypal, dismissed the Appeal against the Decree in her favour.

Their Lordships hold that that Appeal was properly dismissed upon the ground that the Talook descended to her as heir to her mother, who, at the time of her death, was the Talookdar, and had a permanent heritable right in the estate.

Their Lordships will therefore humbly recommend Her Majesty to affirm the Decrees of the Commissioner in the respective cases of Brij Indar and of Shunker Bux, and to affirm the Decree of the Judicial Commissioner in the case of Seetla Bux.

The Appellants in each of the Appeals must pay the Respondent's costs in that Appeal.

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