Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bajrangi Singh (since deceased, and now represented by Drighpal Singh and Gulab Singh) and another v. Manokarnika Bakhsh Singh, from the Court of the Judicial Commissioner of Oudh; delivered the 31*st October* 1907.

Present at the Hearing:

LORD MACNAGHTEN.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

Sitla Bakhsh Singh, a Hindoo of the tribe of Bhale Sultan Chhattris, resident in Sultanpur, died some time before the annexation of Oudh, leaving him surviving a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his widow and, at her death, would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on the 6th of August 1892, having previously sold the whole of the estate to her son-in-law Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the Revenue Registers was effected in his favour. After the death of Maheshar, which occurred on the 3rd of April 1893, the name of his son, Manokarnika Bakhsh Singh, the present Respondent, was entered in the Government Records as proprietor of the estate;

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and the present Appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under Appeal, claiming that, by reason of the custom of the Bhale Sultan Chhattris, they were the next heirs in reversion to the estate of Sitla Bakhsh.

In the Courts below, and before their Lordships two main questions were raised. First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the Appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death. In the Courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the Courts in India upon the question of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned Judges below, and by the learned Counsel who argued the Appeal. They will briefly state the grounds on which they consider the judgment of the Judicial Commissioner on this point must prevail.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several villages in which they constitute the bulk of the population. In the language of the

Indian Evidence Act, 1872, (Section 48) they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the Appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the Respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a *wajib-ul-arz* in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village administration papers (*wajib-ul-arz*) were produced, of which seven were admitted by both Courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not *alal-umum* (that is, as a general rule) obtain the share. One of them is attested by 44 Zemindars and Lambardars of the village, another by 49, others by 8 or 10. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani

Kunwar. In 1876, Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer to her claim, the Vakil for the Defendants put forward the plea that "among Bhale Sultans a daughter "never succeeded to the inheritance of her father." The Court came to no decision on the point, but disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shows that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Singh, the father of the present Respondent. During the period from 21st October 1872 to 24th July 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity"; and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the Appellants Jagdamba Singh and Bajrangi Singh, brought a suit in the Court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner

on the 6th May 1874. Janga Kunwar's suit, already referred to, was dismissed on the 25th August 1876. Having thus succeeded, for the time being, in the Courts, Daryao Kunwar entered into negotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents, called deeds of relinquishment, one dated the 4th May 1877 and the other dated the 29th January 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's lifetime, and the fifth, Baijnath Singh, is the father of the Plaintiff Mahpal Singh, who died while this suit was pending in the Court of the District Judge, and who is now represented by the Appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of the present Appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents, which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say :—

" We all have given our full consent to all those sale-deeds " which the Thakurain has executed in favour of the Babu, " and will ever remain so satisfied. And after the death of " the Thakurain we shall bring no claim against the Babu " on account of the moveable and immoveable property " owned by her; hence we have executed this deed of " agreement so that it may serve as an authority, and be of " use in time of need."

"It was not disputed," says the Judicial Commissioner in his Judgment, "that the " executants of these deeds received con- " sideration for ratifying the transfers and " agreeing not to dispute their validity. Indeed " it was said that they were paid to execute the " deeds." Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid, and dismissed the appeal.

The restrictions imposed by the Hindu law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

"For religious or charitable purposes, or those which are "supposed to conduce to the spiritual welfare of her husband, "she has a larger power of disposition than that which she "possesses for purely worldly purposes. To support an "alienation for the last she must show necessity. On the "other hand it may be taken as established that an alienation "by her which would not otherwise be legitimate may "become so if made with the consent of her husband's "kindred." (*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 Moo. I. A. 529, at p. 551.)

"The kindred in such case," their Lordships observe in a later case, "must generally be understood to be all those "who are likely to be interested in disputing the transaction. "At all events, there should be such a concurrence of the "members of the family as suffices to raise a presumption that "the transaction was a fair one, and one justified by Hindu "law." (*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*, 13 Moo. I. A. 209, at p. 228.)

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai* v. *Tula Kuari* (I.L.R. 6 All. 116) considered that:—

1883.

"The plain principle deducible from these rulings of the "Privy Council is that in order to validate an alienation by a "Hindu widow of her deceased husband's estate for purposes "other than those sanctioned by the Hindu law, it must have "the consent of all those among his kindred who can "reasonably be regarded as having an interest in questioning "the transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger. "We think," say the learned Judges,

"that the spirit of the Hindu law is to keep the right of "succession to the deceased husband's estate open until the "widow's death, free of any control by her, except in such

"cases as she has a power to adopt; and that no reversioner
"possesses such a present vested interest as enables him to
"combine with her in defeating his co-reversioners. In other
"words, her right and theirs have one common basis, that
"of survivorship to the widow, and it is incapable of
"anticipation."

The High Court of Calcutta has taken a different view, based upon a long current of authority in that Court, albeit two of the learned Judges—Garth, C.J., and Pigot, J.—considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (I.L.R. 10 Cal. 1102) a Full Bench held that under the Hindu law current in Bengal—

1884.

"A transfer or conveyance by a widow upon the ostensible
"ground of legal necessity, such transfer or conveyance being
"assented to by the person who at the time is the next
"reversioner, will conclude another person not a party
"thereto, who is the actual reversioner upon the death of
"the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth, C.J.:—

"If it is once established as a matter of law that a widow
"may relinquish her estate in favour of her husband's heir
"for the time being, it seems impossible to prevent any
"alienation which the widow and the next heir may agree to
"make."

And more fully by Mitter, J.:—

"Whatever conflict there may be upon the question whether
"a Hindu widow may sell the whole inheritance without any
"legal necessity, merely with the consent of the next male
"heir, there is no conflict in the decisions, since the case of
"*Jadamoney* was decided in the late Supreme Court of
"Calcutta, upon the question whether the relinquishment by a
"Hindu widow of her estate to the next male heir of her
"husband is valid or not. Such relinquishment by the widow
"has been held for a long series of years to be valid. . . .
"But if the widow is competent to relinquish her estate to
"the next male heir of her husband, it follows as a logical
"consequence, that she can alienate it merely with his
"consent without any legal necessity."

In a subsequent case (*Radha Shyam* v. *Joy Ram Senapati*, I.L.R. 17 Cal. 896) the same High Court held that the consent must be of the

whole body of persons constituting the next reversion.

The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marudamuthu Nadan* v. *Srinivasa Pillai* (I.L.R. 21 Mad. 128), decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar, J., says:—

"I think it unnecessary to go into the question whether "the Hindu law, according to the texts or the commentaries, "lends support to the doctrine that a female holding a qualified "estate can validly surrender such an estate so as to entitle "the then immediate reversioner to enter upon the inheritance "and to hold it absolutely as if the succession had opened by "the natural or civil death of the qualified owner. Though "there has been no course of decisions on the point in this "Presidency as in Bengal, yet instances have occurred which "show that parties have acted upon the view that such "surrenders are valid in these parts as well. This appears "even from some of the cases which have come before the "Court. Since there is nothing in the doctrine itself which "makes it less suited to the community in this Presidency "than to the community in Bengal, it is not surprising that "the Calcutta rulings have in practice been followed in this "Presidency also. In such circumstances the rule, as stated "by the Judicial Committee in *Behari Lal* v. *Madho Lal* "(L.R. 19 I.A. 30), should, I think, be taken to be a rule "applicable to this Presidency too, subject, no doubt, to the "restriction pointed out by their Lordships, viz., that the "surrender should be absolute and complete, and that the "whole limited estate should be withdrawn, a restriction that "would guard against the injurious results which would "follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak* v. *Govind* (I.L.R. 25 Bom. 129). In the course of his judgment Jenkins, C.J., says (at p. 133):—

"There can be no question that, apart from legal "necessity, a widow can validly alienate land that has "devolved upon her from her husband with the consent of "the reversioner. The basis on which this rests is a "matter of controversy. The High Court of Calcutta on "the whole appears to favour the view that the consent "derives its effect from the power supposed to reside in a "widow of accelerating, by the surrender of her own

"interest, the interests of the reversioners. It is impossible
"not to feel some difficulty as to this doctrine. . . . .
"The other view is that the consent of the persons interested
"to oppose the transaction evidences its propriety, if not
"its actual necessity. This has a parallel in the law relating
"to a widow's adoption under certain circumstances, and it
"finds support in the texts. . . . This view has too, in
"a measure, the sanction of the Privy Council."

And he quotes the cases in 8 Moo. I.A. and 13 Moo. I.A. which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have "accepted this view rather than that which "finds favour in Calcutta." In the same case Ranade, J., observes (at p. 139) :—

"The Bengal theory that the widow's interest was a life
"interest, and that her surrender or release of that interest to
"the next reversioner accelerates his obtaining the full title
"has never met with much acceptance on this side of India.
"Our leading case—(*Varjivan Rangji* v. *Ghelji Gokaldas*,
"I.L.R., 5 Bom., 563)—lays down that the consent must be
"of all the kindred, but that does not mean that every single
"member who is a kindred must actually join in the con-
"veyance."

And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than from legal necessity,

"The consent of the reversioners must be of such kindred
"the absence of whose opposition raises a presumption that
"the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond

its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta (*Radha Shyam* v. *Joy Ram*, I.L.R. 17 Cal. 896) that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who "executed the deeds, Hanuman Singh and Sheo "Dayal Singh were four degrees removed, and "Sheo Bakhsh Singh, Sheo Narain Singh, "Baijnath Singh, and Matadin Singh were five "degrees removed from Jai Singh, the common "ancestor of themselves and Sitla Bakhsh "Singh. There do not appear to have been any "other reversionary heirs alive at the time of "the transfers superior in degree to Hanuman "Singh and Sheo Dayal Singh, or equal in degree "to Sheo Bakhsh Singh, Sheo Narain Singh, "Baijnath Singh, and Matadin Singh, or indeed "any other reversionary heirs at all in the line "of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. The Appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed and the decree of the Judicial Commissioner dated the 6th March 1900 confirmed. The Appellants must pay the costs of the Appeal.