Privy Council Appeal No. 104 *of* 1922.

Oudh Appeal No. 26 *of* 1919.

Lal Ram Singh and others - - - - - *Appellants*

v.

The Deputy Commissioner of Partabgarh - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

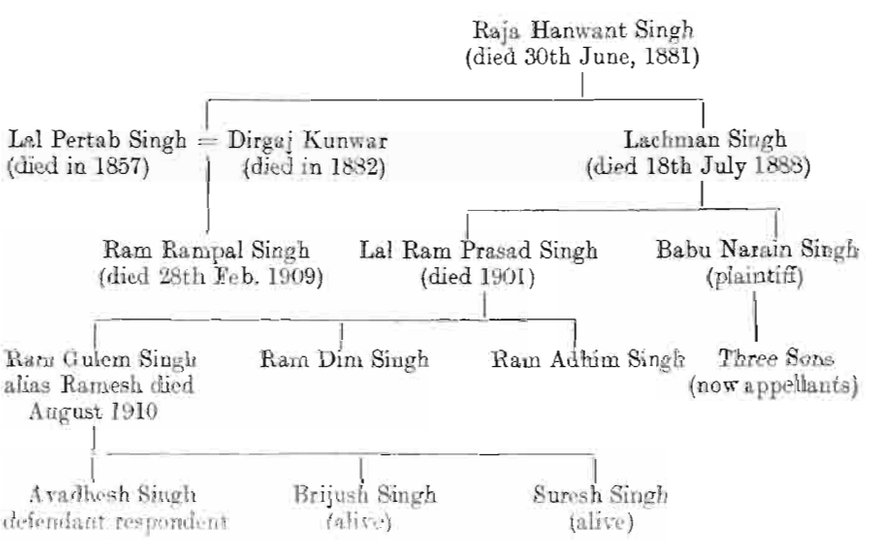
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1923.

Present at the Hearing :

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

The dispute in this case concerns the succession to a taluqdari estate in Oudh, which at the time of the confiscation was held by one, Raja Hanwant Singh, the ancestor of all the parties. Their position would best be explained by a short pedigree.



Narain Singh, the original plaintiff, is dead, and his three sons take his place as the present appellants. The defendant-respondent being a minor, is represented by the deputy-commissioner as manager of the Court of Wards.

The occasion for the dispute arose upon the death of Ram Rampal Singh in 1909, on which occasion Ram Gulem Singh claimed the estate and procured mutation of names in his favour. He did not live long and was succeeded by the minor, whose interest is represented by the Manager of the Court of Wards. In 1913, the plaintiff, Narain Singh brought the present suit to dispossess him.

The estate is one of those governed by the Oudh Estates Act, 1869 and is in list 2, defined by the Act as " A List of the Taluqdars whose estates according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

Hanwant Singh before he received his sanad had executed a deed of gift in favour of his grandson, Rampal Singh, of all his properties, except six villages. Disputes having arisen as to the nature and operative effect of the gift, the Raja, on the 16th May, 1871, filed a suit against Rampal Singh in the Court of the Deputy Commissioner of Sultanpur, praying for a declaration of his absolute proprietary right, notwithstanding the execution of the deed of gift.

The grandson appeared and defended the suit ; and thereupon a compromise was arrived at, which was embodied in an agreement between the parties, which again was confirmed by a decree of the Court. In compliance with that agreement Hanwant Singh executed an instrument which may not inappropriately be called a settlement. This document provided that Hanwant Singh should for his life be the proprietor in possession of one of the taluqdari estates. He was to have no power to make a will, sale or transfer affecting the estate beyond his life time. Rampal Singh was to have another estate similarly for his life only. On the death of Hanwant, Rampal was to have the whole of the taluqdari estates, but again for his life only, except that he had power to make a certain provision for his widow or widows, sons and daughters.

If Rampal Singh predeceased Hanwant Singh, Dirgaj Kuar, mother of Rampal Singh, was to have Rampal's estate for her life. If both she and Rampal Singh died in the life of Hanwant Singh, Hanwant was to have the absolute proprietory right with the power of making a will, sale or transfer in accordance with the authority given by the Act of 1869. If, on the other hand, the order of deaths was that Hanwant Singh died first, and then Rampal Singh, in that event the mother was to be owner of the whole taluqdari estate for her life with similar restrictions. Then came the last limitations which are the important ones in this case. The actual settlement was drawn up and executed

in Urdu, and the official translation of this paragraph is as follows :—

> 7. That on the death of the last three persons, *i.e.*, Raja Hanwant Singh, Raja Rampal Singh and Dirgaj Kuar, the mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs and representatives, shall succeed to the entire Rampur Kaithaula estate, as provided by Section 22 of Act I of 1869. But the said Babu Lachman Singh shall not interfere in any way with the said *ilaqa*, beside the six villages which he has received under Section 8, during the lifetime of Raja Rampal Singh and his mother, Dirgaj Kuar.

As the pedigree shows, Hanwant Singh died first, then the mother, then Lachman Singh, and lastly Rampal Singh, upon whose death it became necessary to determine who succeeded to the reversion. Rampal Singh seems to have died without leaving a son, but if he had left sons, they would have been excluded.

Now Section 15 of the Act of 1869 provides as follows :—

> "If any Taluqdar or Grantee shall heretofore have transferred or bequeathed or if any Taluqdar or Grantee or his heir or legatee shall hereafter transfer or bequeath to any person not being a Taluqdar or Grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a Taluqdar or Grantee."

This transaction took place before the amending Act of 1910 ; so that a transfer to a person who is not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of descent. The principle has been finally established by the case of *Ghulam Abbas Khan* v. *Amatal Fatima* (48 I.A. p. 135).

In these circumstances the original plaintiff Narain Singh, the father of the present appellants, claimed to succeed to the whole estate under the Mitakshara law of the Benares School, or alternatively under a will executed by Lachman Singh ; and the original defendant Gulem Singh *alias* Ramesh set up as defences that the deed of settlement was invalid, that the plaintiff was estopped under the principle of *res judicata*, that the estate was impartible, that he was the heir according to the custom of the tribe or family, which he said was the custom of lineal primogeniture, that the alleged will of Lachman Singh was fictitious, and that in any event, Lachman Singh had no power to dispose of the taluqdari estate by will. Fortunately, for him, though he did not rely upon it at the time as a defence, he introduced among the documents which he filed, a will of Lachman Singh in his favour. In the event, he got a decision from the Subordinate Judge in his favour on the points of *res judicata*, and the family custom of lineal primogeniture—the Subordinate Judge further holding that the plaintiff had not proved that will of Lachman Singh on which he relied.

The case then came on appeal to the Court of the Judicial Commissioner. Here the learned Judges agreed with the Subordinate Judge that the will upon which the plaintiff relied had not been proved. But they disagreed with him in his decision as to *res judicata* and the family custom, which latter they held not to be proved. Nevertheless, they decided in the defendant's favour because they held, contrary to his original submission, that Lachman Singh could validly dispose of his property by will, he having according to their views, an absolute estate in reversion and not a life estate only. Having thus allowed the defendant to reverse his original position to so large an extent, they, as it seems to their Lordships, very properly gave him a decision without costs.

On appeal to this Board the heirs of the original plaintiff, while not abandoning their father's position that he was entitled as next heir either to Hanwant Singh or to Lachman Singh to the whole property, have also put forward a claim that the two sons of Lachman Singh were both of them heirs, and that they, as representing one of these sons, should have half the property.

Now, for this purpose they had to abandon the original case, which was that Lachman Singh could dispose of the property by will and had disposed of it in their father's favour. On the contrary they now say that he had only a life estate and could not, in any event, pass the property by will.

In this tangle of claims and defences, it appears to their Lordships that the points which now remain to be decided are these :—

1. What estate or interest did Lachman Singh take under the settlement ? If he took only a life estate, then the reversion descended to the heir or heirs of Hanwant Singh. If he took an absolute estate, then—
2. Had he the power to dispose of it by will ? and this question raises a new point which was not discussed in the Courts below. If he could not dispose of it by will, then—
3. Who are his heirs ? In connection with this point, it would have to be decided whether the estate in Lachman's hands was partible or impartible.

Now as to the first point, it was strongly contended on behalf of the appellant, that the right way to read clause 7 was to read it as an endeavour to fix the course of succession in the line prescribed by Section 22 of the Act of 1869, though the effect by virtue of Section 15 would be to take the estate out of the Act ; and that, therefore, this was an attempt to create an order of succession unknown to the common law and unwarranted by the Act, which has been decided to be impossible by the judgment in the *Tagore* case (*Jatindra Mohan Tagore Ganendra Mohan Tagore*, 9 B.L.R (P.C), p. 377), and by various subsequent decisions.

It followed (so the argument proceeded) that the limitations were good so far as they gave Lachman a life estate, but that

everything after this must be rejected as contrary to law, and that therefore the reversion to the estate after the death of Lachman remained undisposed of.

It was also submitted that the point might be put in this way ; the grant of a life estate to Lachman would not—supposing him to be out of the line of succession—necessarily operate under section 15 as a destruction of the special taluqdari entail, and the settlement would anyhow be effective so far as it granted that life estate, but the transfer of the absolute ownership would operate under section 15, to break the taluqdari entail, and would therefore subject the property to the ordinary Hindu law of inheritance to which the taluqdari entail would be repugnant, and that therefore the further limitation by reference to section 22 of the Act would be invalid and inoperative. Another suggestion was that the clause should be read as giving a life estate to Lachman and then the reversion to his heirs, who being unborn persons, could not take under Hindu law.

The words in clause 7 are undoubtedly difficult of construction ; but their Lordships, in dealing with an instrument of this kind carrying out a decision of the Court, ought to take for their guidance the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat*.

On the whole, their Lordships are disposed to accept the construction which the Subordinate Judge and the Court of Appeal put upon this clause of the settlement. In the first place, they think that to borrow a phrase from the English law of real property, the words " heirs and representatives " are to be treated as words of limitation and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachman received an absolute estate in reversion.

The next point for consideration is whether Lachman could dispose by will of the estate which was vested in him. This depends upon the question whether it was to be deemed ancestral property or self-acquired property. On this point their Lordships have little assistance from the Courts below. It could not have been considered by the Subordinate Judge, because the respondent was not then relying on Lachman's will. It probably was not argued before the Court of Appeal because counsel for the appellant had so little opportunity of addressing himself to this new point. But the Court of Appeal, though without giving any reasons for it, did incidentally state its opinion that the property was self-acquired property.

It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal* v. *Ram Buksh* (6 Sutherland W.R., p. 71), when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu* v. *Abaninath Adhurjya* (17 Calcutta Weekly Notes, p. 280, decided in 1912). In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed, shall be ancestral or self-acquired, on the principle of *cujus est dare ejus est disponere*, but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. See *Tarachand* v. *Reebram*, 3 Madras High Court Reports (1866) p. 50, and compare it with *Nagalingam* v. *Ramachandra*, I.L.R. 24 Madras (1901), p. 429, and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmohandas* v. *Sir Mangaldas Nathubhoy*, I.L.R., 10 Bombay, p. 528 (1886), and *Nanabai* v. *Achratbai*, I.L.R. 12 Bombay, p. 122 (1886). At Allahabad the decision was that such property is self-acquired. See *Parsotom* v. *Janki Bai*, I.L.R. 29 All., p. 354 (decided in 1907). Finally, in Oudh in the case of *Rameshar* v. *Musammat Rukmin* (14 Oudh Cases, p. 244, decided in 1909), after a review of all the cases, it was held that :

> Where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death.

If the criterion were to be the intention of the father when he makes the gift, there is nothing to indicate that Hanwant Singh desired to make the estate ancestral property in the hands of Lachman. His expression of opinion or desire, whichever it may be, that the property should still be governed by the Act of 1869 would indicate the contrary view ; because under the Act each holder of the estate has a power to give it or will it away. If, on the other hand, Hanwant should be treated as having intended the legal consequences of his acts, he had brought the estate under section 15 ; and then the argument urged by Counsel for the respondent founded on the words at the end of that section by which property is to be regulated by the rules which would govern succession to it, if the transferee or legatee had bought it, would have to be considered.

But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts,

and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case.

The principle upon which it is contended that such property should be deemed ancestral property, is that the son is only getting by his father's will that which but for the will, he would have received by descent according to the Mitakshara law. Now before Hanwant Singh made the settlement, the property was subject to the Act of 1869 and would have descended to a single heir in accordance with that Act, and would not have descended according to Mitakshara law or to those whom that law would designate as heirs. The principles, therefore, of Mitakshara law—if that law be as the High Court of Calcutta has thought and the appellant contends—would not apply to regulate the descent. Lachman, therefore, took the property as self-acquired property and could dispose of it by will.

It becomes, therefore, unnecessary to consider who would be the heir or heirs of Lachman if he had died intestate.

In result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

LAL RAM SINGH AND OTHERS

v.

THE DEPUTY COMMISSIONER OF PARTABGARH.

DELIVERED BY LORD PHILLIMORE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.