Privy Council Appeal No. 23 *of* 1924.

Oudh Appeal No. 14 *of* 1922.

Thakur Nirman Singh and others - - - - - *Appellants*

v.

Thakur Lal Rudra Partab Narain Singh and others - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 1ST JULY, 1926.

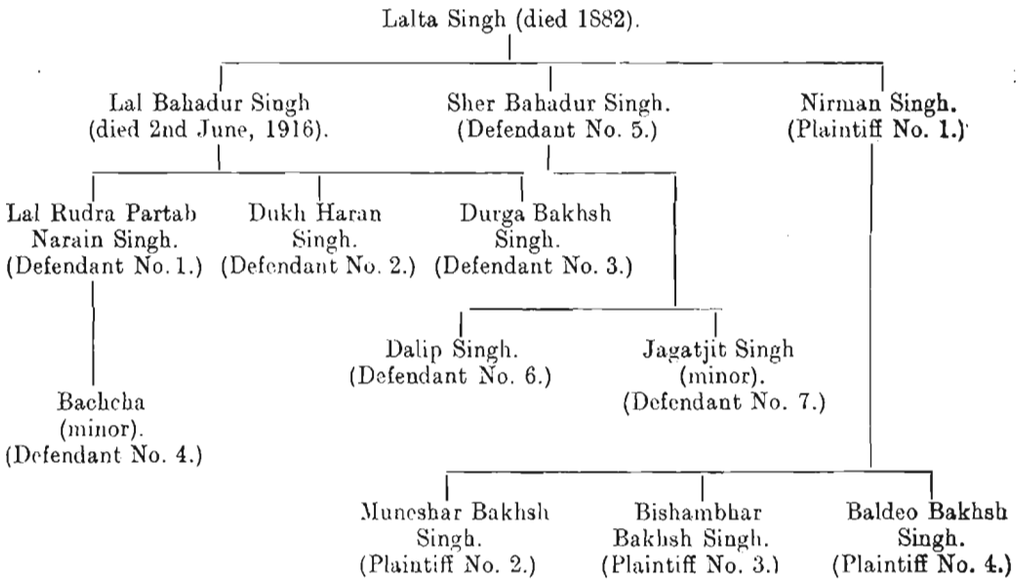
Present at the Hearing:

VISCOUNT DUNEDIN.
LORD ATKINSON.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree dated the 18th September, 1922, of the Court of the Judicial Commissioner of Oudh which reversed a judgment and decree dated the 6th July, 1920, of the Subordinate Judge of Bahraich. The main question for determination on this appeal is whether the plaintiffs' suit is barred by limitation. The Subordinate Judge held that it is not barred, and the Appellate Court took the opposite view, holding that it was barred. The pedigree of the parties showing their descent from Lalta Singh, who died in the year 1882, the relation between them, and the position they have respectively taken up in the litigation out of which this appeal has arisen, are indicated with sufficient fullness and accuracy in the pedigree as set out in the appellants' case.

It runs as follows :—



The pedigree of the ancestors of Lalta Singh is fully printed at page 29 of the Record.

The plaintiffs, Nirman Singh, Muneshar Bakhsh Singh, Bishambhar Bakhsh Singh and Baldeo Bakhsh Singh, commenced an action against the three sons of Lal Bahadur Singh, since deceased, who died on the 2nd June, 1916, and Bachcha, then 10 years of age, then a minor under the guardianship of his own father, Sher Bahadur Singh, and Dalip Singh. A paragraph of the plaint filed by the plaintiffs sets forth that the parties to the suit are members of a joint Hindu family, governed by Mitakshara law, and that no partition of any kind has ever been effected between the parties to the suit, or between the ancestors mentioned in their pedigree. In paragraph 3 it stated that Lalta Singh's own brothers died childless; that Lalta Singh thereupon became head of the joint Hindu family and entered into possession of the entire joint property; that at the time of the death of Lalta Singh, Nirman Singh, plaintiff No. 1, and his brother, Sher Bahadur Singh, were minors and lived with their elder brother, Lal Bahadur Singh, that all the villages held in proprietary possession remained joint property, that mutation of names being effected in favour of Lal Bahadur Singh as the head of this joint Hindu family, during whose life all the members of the family remained as owners in respect of the joint family property; Lal Bahadur Singh died on the 2nd June, 1916. It was then stated that defendants from 1 to 4 then raised all sorts of disputes and filed objections against the mutation of names, rendering it impossible to live in joint enjoyment of the family property; that, for this reason, plaintiffs then desired this property should be partitioned amongst the members of the family, but on the 27th November, 1916, defendant No. 1 finally refused to consent to this being done. The share of the plaintiffs in the entire property would, on partition, be one-third, that of defendants Nos. 1 to 4 (also one-third) and that of the defendants 5 to 7 also one-third.

Defendant No. 5 and his two sons, defendants Nos. 6 and 7 are impleaded as defendants, but in their written statement they admit the validity of the plaintiffs' claim. The principal defendant is Lal Rudra Partab Narain Singh, defendant No. 1. He filed a written statement on the 3rd November, 1917, about 18 months after the death of his father. In his statement he denied that the parties to the suit were ever members of a joint Hindu family, and in paragraphs 15 and 16 of this statement averred that the custom of single ownership had been existing for centuries in the family of Lal Rudra Partab Narain Singh, defendant No. 1, and that the Bahraich estate since its acquisition had for generation after generation been held by a single owner, that under this custom the property was impartible and owned by a single owner. That the estate was never partitioned in view of the fact that it was impartible, and further that the custom of primogeniture has obtained in the family of defendant No. 1 and that for generation after generation the Bahraich estate had been held and enjoyed by the eldest son in accordance with this custom, while the other children continued to get only maintenance allowance due by way of guzara in accordance with the custom. He further averred that Bahadur Lal Singh, his father, had been in exclusive possession of the estate in dispute from May, 1882, and that even if the plaintiffs had any right to partition, limitation commenced from the date of mutation in 1822, and their claim was barred by time. Defendants 3 and 4 adopted as their own the pleas raised by defendant No. 1.

On these pleadings, the Subordinate Judge framed 20 issues (see page 376 of the record, numbered from 1 to 20 both inclusive). He has most conveniently divided them into three groups according to the subjects with which they respectively deal.

The first group consists of the following first two issues :—

" (1) Whether Lal Bahadur Singh and the parties to the suit constitute members of a joint Hindu family ?

" (2) Whether the property in suit is joint family property ? "

The Subordinate Judge, after having most carefully examining all the evidence, found in the affirmative on each of these issues, and the Appellate Court affirmed his findings.

The second group has comprised the two following issues, Nos. 3 and 4 :—

3. Does a custom of impartibility and of succession by lineal primogeniture exist in the family, as alleged ?

4. Is the property in the suit also otherwise impartible, as alleged ?

The Subordinate Judge found these issues against the defendants, and expressed himself thus :—

" Now all the points to be determined in connection with issue No. 3 have been wholly or partly decided in the negative upon a review of all the authorities cited for the parties and the documentary and oral evidence

in the case. I am therefore of opinion that the custom of impartibility and lineal primogeniture pleaded by the contesting defendant is not established, and I find issues Nos. 3 and 4 in the negative."

The Appellate Court concurred with the finding of the Subordinate Judge that the defendants had failed to prove the custom pleaded by them, saying, " Our finding is that the custom is not proved."

The third group consist of the issues Nos. 10, 11 and 12, relating to the raising the plea of limitation. These run as follows :—

" (10) Have the plaintiffs been in possession of the property in suit within limitation ?

" (11) Have Lal Bahadur Singh and defendant No. 1 been in adverse possession of the property in suit for more than twelve years before suit ?

" (12) If the property in suit be found to be joint family property, then have the plaintiffs been excluded within their knowledge from the enjoyment of it more than twelve years before suit ? "

The lower Courts are agreed in holding that the determination of the question of limitation depends upon the true meaning and application of Article 127 of the 1st Schedule to the Indian Limitation Act (IX. of 1908), which is as follows :—

Description of Suit.	Period of Limitation.	Time from which period begins to run.
127. Suit by a person excluded from joint family property, to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff.

The Subordinate Judge tried issues Nos. 10, 11 and 12 together, and, on considering them, he directed his mind to the following considerations :—

" In order to see whether the suit is or is not barred under Article 127, we have to see whether or not the plaintiffs were excluded from the joint family property more than twelve years before the suit to their own knowledge. The onus of proving not only that they were excluded, but also that they knew that they were excluded more than twelve years before the suit, *i.e.*, before the 6th July, 1905, lay upon the contesting defendants."

The facts relating to the plea of limitation may be summarised thus :—

As already stated, the head of the joint family, Lalta Singh, died in 1882, leaving him surviving three sons, namely, (1) the eldest, Lal Bahadur Singh ; (2) the second, Sher Bahadur Singh (defendant No. 5), who was sixteen years old ; and (3) the plaintiff, Nirman Singh, who was a minor, fifteen years of age.

On the 23rd May, 1882, the said Lal Bahadur Singh filed an application under the provisions of Sections 61 and 62 of the Oudh Land Revenue Act (XVII. of 1876), praying that, as he had performed the funeral rites of his deceased father, mutation of names in respect of his father's estate might be made in his favour.

The Extra Assistant Commissioner of Bahraich made the following rather peculiar order on this application :—

" Ordered

that in place of the name of Lalta Singh, deceased, the name of his eldest son, Lal Bahadur, shall be written in the column of Lambardar and the names of (the deceased's) younger sons, Sher Bahadur Singh and Nirman Singh, shall be written in place of the deceased as co-sharers. Let the Tahsildar be informed so that he gives effect to this and collects the usual fee. Let the Registrar Qanungo, the Suddar Qanungo, the *vasilbaqi navis* of the Suddar be informed. If this eldest son, Lal Bahadur, has any objection to the recording of the names of his brothers as co-sharers, and considers them to be entitled to maintenance, he can have his remedy from a competent Court, as according to Hindu law and custom all the sons of a deceased person are his lawful representatives.

(Sd.) " Pandit Janki Prasad,
" Extra Assistant Commissioner of Bahraich.

" Dated 1st June, 1882."

Lal Bahadur was dissatisfied with this order and appealed to the Deputy Commissioner of Bahraich, who made an order equally peculiar. It runs thus :—

" Order.

" Such being the facts of the case I accept the appeal from the order of Extra Assistant Commissioner and cancel so much of his order as not register (*sic*) Sher Bahadur and Nirman Singh in the Tahsil Books as proprietors in possession. This order will not, of course, debar them from claiming, should at any time such a course appear to either of them advisable, their share in the estate.

" To-day present applicant and the two minors. Their mother and guardian is not present. Sher Bahadur and Nirman Singh, aged 16 and 15, appear with an application from their mother excusing her appearance at such a distance (35 m.) in this weather, she being a pardahnashin. She says in it that the estate has never been divided, and that she has no objection to *dakhil-kharij* in the eldest boy's name, Lal Bahadur's.

" Sher Bahadur, aged 16, declares that the signature to this is his mother's, and was written by her in his presence.

(Sd.) " M. L. Ferrar,
" Deputy Commissioner."

Both the lower Courts have found that the plaintiff, Nirman Singh, and his brother, Sher Bahadur Singh, have, since their father's death in the year 1882, lived jointly with their eldest brother Lal Bahadur Singh in the ordinary way, and continued so to do up to the year 1911, or thereabouts. Thereafter they resided separately, but received considerable sums of money for their expenses from Lal Bahadur Singh, the head of the joint family. The defendants themselves assert that plaintiffs are in receipt of cash maintenance, and that they are in possession of some land in lieu of the same. In view of these facts, the Subordinate Judge held that the plaintiffs' suit was not barred by limitation, and concluded a sound and able judgment in the following words :—

" The last-mentioned case of *Raghunath Bali* v. *Maharaj Bali*, Indian Law Reports, 11 Calcutta Series, p. 777 (Privy Council), makes it clear

that even where the person actually holding the property of a joint family believes that it is impartible property, and another member of the family sharing that belief accepts maintenance, it does not amount to the exclusion of the latter, and upholds the authority of the Privy Council in 20 Madras, 256, that where the junior member under a mistake accepts the provision of maintenance they are not to be deemed excluded as coparceners. The mere fact that the parties believed that the estate was impartible and the junior coparceners having a right to share accepted maintenance in lieu, does not put the head of the family in a position adverse to the other members, so as to force them to realise, so to speak, their right of partition or be barred. The cause of action would not arise unless the coparceners were absolutely excluded, and is not absolutely excluded if he is in receipt of maintenance from the family property. Here it is asserted by the contesting defendants themselves that the plaintiffs are in receipt of cash maintenance, and that they are in possession of some lands in lieu of the same. (*Vide* Exhibit A142 to A160, A177 and A178.)

" The decision of the Madras High Court in I.L.R., 11 Madras, 380, confirmed by the Privy Council in I.L.R., 14 Madras, 237, laid down that if the plaintiff in a suit under Article 127 has lived on the property with other joint owners, and has been supported by the proceeds of the joint family property, this is sufficient to negative his exclusion and to save limitation.

. . . . . .

" Exclusion to bar a suit under Article 127 must be a total exclusion. (*Vide* I.L.R., 20 Madras, 256; 24 Madras, 562; and 52 Indian Cases, 470.)

" In view of these authorities and the facts of the case, I am of opinion that the plaintiffs have not been excluded within their knowledge from the enjoyment of the property in suit for more than twelve years before the suit and that it is within time. I therefore find the issues accordingly against the contesting defendants."

The perusal by their Lordships of the judgment the Court of the Judicial Commissioner of Oudh, at page 482 of the Record, leads their Lordships to think that its Judgment is to great degree based on the mischievous but persistent error that the proceedings for the mutation of names is a judicial proceeding, in which the title to and the proprietary rights in immoveable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

It is little less than a travesty of judicial proceeding to regard the two orders of the Extra Commissioner of Bahraich and Mr. M. L. Ferrar, Deputy Commissioner, as judicial determinations expelling *proprio vigore* any individual from any proprietary right or interest he claims in immovable property. Yet of these very orders the Court of Appeal at p. 484 of the Record said the Deputy Commissioner decided that Lal Bahadur Singh was alone entitled on the evidence to have

his name entered, though he added that his order could not debar the brothers from bringing a suit to establish their claim at any time.

It appears to us that these proceedings afford clear evidence that Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership, and not on behalf of the younger brothers. There can be no doubt he had sole physical possession in the sense that he was able to deal with the proceeds, and to exclude all others, and there can be no doubt that he showed a determination to exercise that physical power on his own behalf. He had therefore sole legal possession—yes, in the sense that any person who on an application for mutation of names is put upon the registry as sole occupier will have sole legal possession, whether he be the head of a joint Hindu family, or not head of any family, or an absolute owner. If, however, the Court of Appeal meant by the language they have used that these orders were evidence that Lal Bahadur Singh was in possession as sole legal owner in a proprietary sense, to the exclusion of all claims of the other members of the family as co-owners or for maintenance or otherwise, they, in their Lordships' view, were entirely mistaken. The same evidence finds expression in this passage of the judgment of the Court of Appeal as is manifested in the passage at the top of page 485. After referring to what Lord Macnaghten, in the case of *Corea* v. *Appuhamy* [1912] A.C. 230, said to the effect that " possession is never considered adverse if it can be referred to a lawful title," they held that there was nothing in that case to show any intention on the part of the deceased owner's heir to enter as a plunderer, and said " That case is to be distinguished from the present case by the fact that Lal Bahadur Singh did at the time of entry set up an adverse title in clear terms before the revenue authorities, and *they accepted his claim.* If that means that Lal Bahadur Singh set up a claim to be sole proprietary owner of this estate entitled to an interest in which his brothers had no claim, then these revenue authorities had no jurisdiction to pronounce upon the validity of such a claim, and from these orders it would appear they did not attempt to do so. It is, in their Lordships' view, perfectly clear that the orders already referred to did not effect and were not intended or designed to effect *proprio vigore* an exclusion of the plaintiffs from all interest in the property of the joint family of which they were members. At page 487 the Court of Appeal deals with the point of exclusion. They say it was strenuously argued that the fact that Lal Bahadur Singh's brothers got maintenance and actually held some lands is conclusive proof that they were not, in point of fact, excluded from the estates of Lal Bahadur. A long and rather obscure discussion follows as to the exclusion being intentional or the contrary. It is generally understood in law that a man must be presumed to intend the natural consequence of his own act. The following passage on

page 487, between lines 20 and 30, is the strongest practical comment upon this principle. It runs thus :—

> " It must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. Here the facts are these. Lal Bahadur Singh was, as we have found, a co-sharer in point of law. But he was holding under an express assertion of his title to hold as sole proprietor. He gave money and lands to his brothers in the way a sole proprietor would do. Such gifts do not save his brothers from exclusion. The cases cited to us appear to us no authority for the contrary."

On the whole their Lordships are quite unable to concur with the Court of Appeal in the views that Court has taken on all or most of the important points in this case. They think those views are erroneous. The judgment of the Subordinate Judge they, on the contrary, think sound and helpful, and are therefore of opinion that the decision of the Court of Appeal should be set aside, that the judgment and decree of the Subordinate Judge should be affirmed, and this appeal should be allowed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THAKUR NIRMAN SINGH AND OTHERS

v.

THAKUR LAL RUDRA PARTAB NARAIN SINGH AND OTHERS.

DELIVERED BY LORD ATKINSON.

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