Privy Council Appeals Nos. 102, 103 *and* 104 *of* 1929.
Oudh Appeals Nos. 38 *of* 1927 *and* 2 *and* 9 *of* 1928.

Dulahin Jadunath Kuar - - - - - - *Appellant*

v.

Raja Bisheshar Bakhsh Singh, since deceased - - - *Respondent*

Raja Bisheshar Bakhsh Singh, since deceased (now represented by Raja Bajrang Bahadur Singh and another) - - - *Appellant*

v.

Dulahin Jadunath Kuar - - - - - - *Respondent*

Lal Harihar Pratap Bakhsh Singh - - - - - *Appellant*

v.

Raja Bisheshar Bakhsh Singh, since deceased, and others - - *Respondents*

(*Consolidated Appeals*)

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD SALVESEN.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* LORD THANKERTON.]

In accordance with the view expressed in the judgment of this Board dated the 4th December, 1930, the issue raised in the third appeal has been re-heard before a fuller Board. By that

judgment it was decided that the succession to the *Taluka* Gangwal is governed by the Oudh Estates Act, and in particular by section 22 (10), which, as amended in 1910, is as follows :—

> " (10) Or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid."

The last *Talukdar* was Raja Suraj Prakash Singh, and the plaintiff's pedigree shows Bhaya Partap Singh as their common ancestor, and in accordance with the previous judgment the plaintiff must be held to have established that, in blood relationship, he is the nearest male blood relation according to the rule of lineal primogeniture of Raja Suraj, the last male holder of the *Taluka*. It is clear from the context that this finding relates to physical blood relationship and does not exclude the possibility —raised by the issue in the third appeal—of the legal right of succession, so far as expressed as blood relationship, having been lost, *e.g.*, by adoption.

The sole question in the third appeal is whether the plaintiff has proved that he is an " agnate " of the propositus within the meaning of section 22 (10) ; if so, he is admitted to be the nearest male agnate according to the rule of lineal primogeniture.

In the first place, their Lordships are clearly of opinion that the meaning of " male agnate " for the purposes of the section cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute—in this case the Hindu law of succession according to the rules of the Mitakshara. The term " agnate " is not a term of art in the English legal system ; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males. In their Lordships' opinion, it is a word expressive of relationship, similar to " son " or " brother," to which the rule of construction laid down in *Raghuraj Chandra* v. *Subhadra Kunwar* (1928), 55 Ind. App. 139, falls to be applied. The only express prescriptions of the Act relative to " male agnate " are that it denotes only legitimate relatives (section 2), and that it applies only to *najib-ul-tarfain*, *i.e.*, those of noble birth on both sides (section 21). Subject to these qualifications, the meaning of " male agnate " falls to be ascertained by the personal law of the individual, to whom the succession is to be established.

Turning to the law of the Mitakshara, their Lordships have no doubt that " male agnate " denote a *gotraja-sapinda*, as to which an authoritative exposition is to be found in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1870), 13 Moore Ind. App. 373. Sir Robert Phillimore, in delivering the judgment of this Board, says (p. 390) :—

> " The *Mitácshará*, in the 5th and 6th sections of the second chapter, recognises two successive classes of heirs : first, ' Gentiles ' ; next, *Bandhoos ;* after them it places certain special persons, and after these last the State, the *ultimus hæres*. Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the

deceased is still enjoined. The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindoo Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the *Mitácshará* is in the strictest conformity to these principles. The Gentiles, or *Gotraja* (from the *Gotra*) are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the *Gotra*. These conditions are all that are stated as necessary to the constitution of the class of Gentiles. As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as *Sapindas* and *Samanodacas*; the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs, then, in this case show a common ancestor, a *Gotra*, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text."

From this it is clear that, in order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, viz.: (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

It is now settled that *sapinda*-ship under the Mitakshara law arises from the community of corporal particles, and is not dependent on the right to participate in the offering of funeral oblations; the latter may be of importance in settling the order of preference of heirs in the same class, but is not relevant in a question of exclusion from a class of heirs. *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 Ind. App. 212; *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 Ind. App. 290. It may further be noted that the *bandhus*, or cognates, have a technical meaning in the system of the Mitakshara and signify the *bhinna-gotra sapindas*, that is, those not belonging to the same *gotra* or family (*Ramchandra, supra cit.*).

The pedigree of the plaintiff in the present suit shows his community of corporal particles with the propositus through a common ancestor, Bhaya Partab Singh, traced through males, and, to that extent, the pedigree has been held proved, as already stated. He has, therefore, satisfied one of the two requisite conditions, *i.e.*, that he is a *sapinda* of the propositus; but the main issue in the third appeal is whether the plaintiff has proved that he satisfies the other condition, namely, that he is of the same patriarchal stock or *gotra*. In the absence of challenge on this

point, it might well be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged by defendant No. 2 on this point, it is for the plaintiff to satisfy the Court that he complies with this condition also, before he can succeed in his claim to the succession.

Defendant No. 2 maintains in this appeal that it is established on the evidence that the *gotra* of the propositus was Vaiyaghra, and the plaintiff's *gotra* being admittedly Atri, they cannot be related as agnates (*gotraja sapinda*) under the Mitakshara law, and that, in any event, the plaintiff has failed to prove that the propositus, like himself, belonged to the Atri *gotra*. The plaintiff maintains that the evidence sufficiently establishes that he was of the same *gotra* as the propositus, but that, if this conclusion is not justified, the case should be remitted for further enquiry on this point, as the issue was not fairly or fully raised in its present form at the trial or in the Courts below.

It was ultimately agreed by both parties (*a*) that, if in fact the propositus was of the Vaiyaghra *gotra* and the plaintiff was of the Atri *gotra*, this difference of *gotra* necessarily led to the conclusion that the plaintiff is not an agnate, *i.e.*, *gotraja sapinda*, of the propositus, and (*b*) that such difference of *gotra* could only be accounted for by adoption into a different *gotra*, of the plaintiff or one of his paternal ancestors since the common ancestor, Bhaya Partab Singh.

In the previous judgment their Lordships expressed the view that this issue had not been clearly or adequately placed before either of the lower Courts, and, after reconsideration before a fuller Board, their Lordships are confirmed in this view.

The question of *gotra* was not raised in the pleadings, written or oral. Defendant No. 2 put the plaintiff to the proof of his pedigree, and his only express contention was that Jugraj Singh, the younger son of Partab Singh, died childless. The only issue that could be held to cover this point was No. 7, which is as follows: " Is the plaintiff the nearest heir under the Act by the rule of lineal primogeniture to Suraj Prakash Singh, or under the custom applicable to the family ? "

At the trial, *gotra* was first mentioned during the cross-examination of the plaintiff, when he stated " My *gotra* is Atra *gotra* " ; he was not further examined on this point by either side. It is next referred to in cross-examination, for defendant No. 2, of two witnesses for defendants 1 and 3 (D.W. 15 and D.W. 18), and is dealt with by a series of witnesses for defendant No. 2. About halfway through this latter body of witnesses a statement by plaintiff's counsel is recorded to the effect that the plaintiff did not admit that the *gotra* of the Gangwal family was Vaiyaghra, but that the Gangwal family belonged to Atri *gotra*.

It seems reasonably clear from the judgment of the trial Judge that difference of *gotra* was only used before him as affecting the question whether Jugraj Singh had died childless, in other

words, as involving a break in the blood relationship of the plaintiff with Jugraj Singh. There appears no trace of an argument that, granted the blood relationship, the difference of *gotra* would still negative the plaintiff's claim to be the nearest agnate.

The learned trial Judge held it proved by the defendants' witnesses that the Gangwal *talukdars* were of the Vaiyaghra *gotra*, though he thought that this conclusion was weakened by the fact that that point was not put to the plaintiff or his witnesses in cross-examination; he also thought it possible that the plaintiff might have stated his *gotra* incorrectly or his ancestors might have forgotten to what *gotra* they belonged and then taken whatever *gotra* was suggested by their *prohits* or priests. On consideration of Sastri's Treatise on Hindu Law and Dr. Gour's Hindu Code, he came, apparently reluctantly, to the conclusion that it is possible that persons descended in the male line from a common ancestor can belong to two different *gotras*, and stated "whatever the explanation of the difference of *gotras* may be, I am not prepared to accept this difference as conclusive proof that the plaintiff and his family are not agnatic relations of the *talukdars* of Gangwal in the manner claimed. Counsel for defendant 2 should have put his case to the plaintiff in cross-examination. Probably he feared that if he did so the plaintiff might be able to explain the apparent difficulty. I think it is impossible to explain away the admissions made by Raja Sitla Bakhsh Singh and his *Mukhtar* to which I have referred above." The admission referred to was made in a suit in 1868 by Sheo Nath, the plaintiff's father, against Raja Sitla, the first *talukdar* of Gangwal, claiming that certain villages had been given as *bhayai* to the plaintiff's ancestors: in his answer the Raja stated "The plaintiffs do belong to the defendant's family, but these villages were not given to them as a *bhayai*, *i.e.*, portion. Defendant's ancestors gave Gularia to plaintiff's ancestor in 1244 as *jagir*." The learned Judge also referred to the conduct of Rani Itraj Kuar in 1900, when Sheo Nath Singh made an application to have the estate taken under the Court of Wards on the ground of mismanagement by Rani Itraj Kuar and the detriment to himself as next reversioner, and the omission of the Rani to suggest that Sheo Nath Singh was in no way related to the *Talukdar's* family and therefore had no *locus standi* to present the application. The learned trial Judge concludes:—

> "In my opinion, therefore, the plaintiff has satisfactorily established his agnatic relationship to Raja Suraj Prakash Singh in the manner set forth in his pedigree."

Their Lordships are satisfied that the admissions of Raja Sitla and conduct of Rani Itraj Kuar do not involve any admission as to identity of *gotra* between the two families.

The Chief Court, in their judgment, say:—

> "On the question of the plaintiff's relationship with Raja Sitla Bakhsh Singh" [? Raja Suraj Prakash Singh] "the case put forward and argued before us on behalf of Lal Harihar Partab Bakhsh Singh, the defendant-

appellant in Appeal No. 19, is that Jugraj Singh, the second son of Partap Singh, died issueless, or at least that the plaintiff has failed to prove that he is the descendant of Jugraj Singh. It was not disputed that Jugraj Singh was one of the two sons of Partap Singh. We agree with the trial Court that the plaintiff has succeeded in establishing the fact that he is the descendant of Jugraj Singh according to the line of descent indicated in the pedigree above set forth. The evidence seems to be overwhelming and there is no evidence worth the name in rebuttal."

After dealing with the evidence, including the admissions of Raja Sitla about 1868, the learned Judges state :—

" In agreement with the trial Court, we therefore hold that the plaintiff has succeeded in establishing the fact that he is an agnate of the late Suraj Prakash Singh."

It is obvious that the word " agnate " is loosely used in that finding, for after disposing of a question as to the seniority of the plaintiff's line, which was not in dispute before this Board, the judgment proceeds :—

" Against the broader question of relationship, which we have decided in agreement with the trial Court in favour of the plaintiff, the only argument advanced on behalf of the defendants and particularly Lal Harihar Pratap Bakhsh Singh, defendant No. 2, is that the plaintiff and Raja Suraj Prakash Singh could not be held to be related to each other, in spite of all the evidence to the contrary, on the ground that the two belonged to different *gotras*. On the face of it the argument is highly technical and its pursuit has landed us into the region of Hindu tradition."

After quoting the first part of the passage cited above from the judgment of this Board in *Bhyah Ram Singh's* case (13 Moore Ind. App. at p. 391), the learned Judges state :—

" Technically and *prima facie*, therefore, if the plaintiff and the *talukdar* of Gangwal are descended from a common ancestor, they should have one and the same *gotra*."

Differing from the Trial Judge's view of the evidence as to the *gotra* of the *talukdar* of Gangwal, the learned Judges considered that the matter was not free from doubt, and suggested that there were two meanings of *gotra*, one technical and the other popular. They seek to attribute to the plaintiff's use of the term *gotra* a so-called popular meaning as referring to his being a Sombansi, and they conclude as follows : " On these grounds we are unable to give effect to this argument as sufficient to outweigh the direct and positive evidence as to the relationship of the two families."

As already indicated, their Lordships are of opinion that *gotra* has only one meaning, and they find it difficult to believe that, if the question now raised had been clearly in issue *ab initio*, there would have been any difficulty in producing evidence to identify beyond judicial doubt or speculation the *gotras* of the plaintiff and of Raja Suraj Prakash Singh. Their *gotras* must be well known to relatives who attended the *S'raddh* ceremonies, at which the *gotra* of the three paternal ancestors is recited, and such evidence is conspicuous by its absence. There should be no need to resort to the " region of Hindu tradition."

Their Lordships are therefore of opinion that the case should be remitted to the Chief Court in order that the plaintiff may have the opportunity of establishing the identity of his *gotra* with that of Raja Suraj Prakash Singh ; upon this issue his success or failure in his claim to the *taluka* will now depend.

In accordance with the previous judgment of this Board, dated the 4th December, 1930, and this judgment, their Lordships will humbly advise His Majesty as follows :—That the decree of the trial Judge dated the 4th January, 1927, be recalled except in so far as it dismisses the plaintiff's claim in respect of the property mentioned in Schedules B, C, E and F appended thereto, that the decrees of the Chief Court in Civil Appeals Nos. 19 and 24 of 1927 be recalled ; that the first appeal (No. 102 of 1929) be dismissed, the appellant (defendant No. 1) to pay the plaintiff's costs of the appeal and of Civil Appeal No. 24 of 1927 ; that the second appeal (No. 103 of 1929) be allowed, the appellant's costs to be paid by defendant No. 1 ; that the third appeal (No. 104 of 1929) be allowed without costs, and the case be remitted to the Chief Court as above proposed, the costs of all parties in the trial Court, of the parties in Civil Appeal No. 19 of 1927, and of further procedure to be adjudged by the Chief Court.

In the Privy Council.

DULAHIN JADUNATH KUAR

v.

RAJA BISHESHAR BAKHSH SINGH, SINCE DECEASED.

RAJA BISHESHAR BAKHSH SINGH, SINCE DECEASED (NOW REPRESENTED BY RAJA BAJRANG BAHADUR SINGH AND ANOTHER)

v.

DULAHIN JADUNATH KUAR.

LAL HARIHAR PRATAP BAKHSH SINGH

v.

RAJA BISHESHAR BAKHSH SINGH, SINCE DECEASED, AND OTHERS.

(*Consolidated Appeals*)

DELIVERED BY LORD THANKERTON.

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