Judgment of the Lords of the Judicial Committee of the Privy Council on the two consolidated Appeals of Kunwar Brijraj Singh and another v. *Kunwar Sheodan Singh and others, from the High Court of Judicature for the North-Western Provinces, Allahabad (P.C. Appeals Nos.* 86 *and* 87 *of* 1912; *Allahabad Appeals Nos.* 38 *and* 39 *of* 1910); *delivered the* 5*th May* 1913.

PRESENT AT THE HEARING:

LORD SHAW.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[DELIVERED BY LORD MOULTON.]

This is a suit brought by two brothers, Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as Plaintiffs their respective sons Kunwar Shibraj Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the lifetime of the father of the Plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties

of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The Defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made.

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the Court of First Instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th November 1895, he drew up and executed a document (which he calls a will) setting out a division of the family property among the members of the family, reserving nothing for himself. This is the family arrangement set up by the Defendants.

Their Lordships incline to the view that the term "will," as applied to this document, was a complete misnomer. It is manifest that it differed from a will in the crucial characteristic that it was intended to speak from the date at which it was written, and not from a future date, viz., the death of the writer. It was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows:— "All the three sons were put in separate " possession of the estate in the beginning of " the year 1303 Fasli" (September 1895). "I " have no other heir having a right besides " those mentioned in this will. I have there- " fore executed this will in order that it may " serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the Plaintiffs Rao Karan Singh and Kunwar Sheodan Singh to this family arrangement. If they accepted it their acceptance would bind not only them but also their sons, who are the remaining Plaintiffs as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and before setting out the specific shares which each was to receive, the document reads thus :—

"My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present while in a sound state of body and mind and of my own free will and accord divided the property among my sons, heirs as follows."

There follows a specific division of the villages by name among the three sons. It then gives certain sir lands and other property to his wife for life, and proceeds to provide that at her death the sir lands (with the exception of that in the village of Badri) shall go to the wife of the eldest son according to the custom of the family. The sir land in the village of Badri is to go to the wife of the Plaintiff Kunwar Sheodan Singh, "because the share of Kunwar Sheodan "Singh is less than that of Kunwar Karan "Singh," the other Plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grandsons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on 26th November 1895. Early in 1896 the Plaintiffs and their brother Rao Sultan Singh severally apply for mutation of names in respect of the villages

allotted to them by their father in the document. It will suffice to refer to one of these applications, all of which *mutatis mutandis* are substantially identical. For this purpose the application of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated 25th February 1896, and reads as follows :—

"Application for mutation of names in respect of 20 biswas of the zamindari property of the village of Nagla Tula Ram.

"The applicant begs to state as follows :—The applicant's father Rao Balwant Singh partitioned his property among his heirs under a registered will dated 26th November 1895 and in accordance with the partition the 20 biswas of the villages of Bajripur and Nagla Tula Ram and 20 biswas of Khumanpur a hamlet of Jirauli Mahal Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the khewat. Separate applications have been filed in respect of the remaining villages. The applicant's elder brother Rao Sultan Singh has filed the original will in a case relating to the village of Sahaoli. It is also a proof in this case."

It will be well to follow up the proceeding thus initiated. On March 19th, 1896, we have the Tahsildar's record of the hearing of the application and the order made thereon. It reads as follows :—

"Application for mutation of names in respect of 20 biswas of the village of Nagla Tula Ram, pargana Akrabad, according to partition of the property.

"Kunwar Karan Singh, applicant, *v.* Rao Balwant Singh.

"Under a will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a raïs of Sahaoli, divided his zamindari property among his sons. The 20 biswa property of the village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of anyone else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may

be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The patwari of the village says that Kunwar Karan Singh made collections and assessments for *Kharif* of 1303 Fasli. As a transfer in possession has taken place, and no objection has been raised, the name of Rao Balwant Singh be expunged in respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the pargara officer for approval. A fee of Rs. 7 is deposited and the Treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the patwari of the village testifies to the applicant having made collections in 1303 Fasli (September 1895), thus confirming the truth of the statement in the so-called will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the Defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

There is another set of transactions of a different date, which add strong confirmation to the Defendants' case. Rao Sultan Singh died on March 30th, 1901, and his father, Rao Balwant Singh, died a few days later on April 7th, 1901. Thereupon there ensued a situation such that the conduct of the parties must evidence

almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao Balwant Singh held his portion separately. The importance of the situation is emphasised by the fact that the main grievance of the Plaintiffs is that the share of the eldest brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the Defendants' contention. We find that application was made in July 1901 by the widow of Rao Sultan Singh on behalf of her son Rao Brijraj Singh for mutation of names with regard to the property held by her late husband. The following is the record :—

" Amendment of khewat,

" Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar,

" In the matter of the death of Rao Sultan Singh.

" Village of Sumera alias Bijaigarh, pargana Akrabad. 17th July 1901."

" Today this Case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as Holding No. 2 measuring 280 bighas stands recorded in papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a Will. Rao Sultan Singh is dead and his heir is Rao Brijraj Singh, whose name be entered. The patwari bears testimony to possession and other sharers have taken no objection. It is

Ordered :

That the name of Rao Balwant Singh be expunged in respect of Holding No. 2 and the name of Rao Brijraj Singh be entered in papers and that the Sadar Munsarim do comply with the order."

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows :—

" Present : Haji Mohammad Makhdum Husain, Settlement Deputy Collector at Aligarh.

" 17th July, 1901.

" Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

" Village of Kumera (?) alias Pijaigarh.

" Statement of Kunwar Karan Singh.

" My father's name is Rao Balwant Singh : age, thirty-three years : occupation, zamindari : residence Sahaoli, pargana Akrabad.

" Statement.

" Two hundred and eighty bighas entered as Holding No. 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a will, fallen to the share of my brother Rao Sultan Singh. Rao Sultan Singh is dead, and now his son Brijraj Singh is the Owner. His name should be recorded and I have nothing to do with it.

" Signature of Kunwar Karan Singh."

And on the same day the statement of the other Plaintiff, Kunwar Sheodan Singh :—

" Rao Brijraj Singh, minor, under the guardianship of Musammat Rani Piari Kunwar.

" In the matter of the death of Rao Sultan Singh, Village of Sumera alias Bijaigarh, pagana Akrabad.

" Statement of Kunwar Sheodan Singh, a raïs of Sahaoli.

" Statement.

" My statement is the same as has been made by my brother Kunwar Karan Singh.

" (Sd.) Kunwar Sheodan Singh."

It is not necessary to go into the datails of the mutation of names with respect to the sir lands. They support the contention of the Defendants in substantially the same way as that which has been already given with respect to the village property.

It is now necessary to examine the evidence put forward by the Plaintiffs in answer to the case of the Defendants, based, as it is, on the unbroken evidence of ten years' conduct of all parties. In the first place the Plaintiff Kunwar Karan Singh does not give evidence at all, so that his acts as shown by the records remain undenied and unexplained. The Plaintiff

Kunwar Sheodan Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to, nor does he give any explanation why he took no action until the year 1905, *i.e.*, four after the death of his father and brother and ten years after he had taken possession of his apportioned share. It is not too much to say that he did not attempt to show that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and lets it be seen that it was the pleaders whom he consulted that suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the Defendants' case entirely unshaken.

The testimony mainly relied upon for the Plaintiffs is that of Chiranji Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1303 Fasli (September 1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence for the Plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the Plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the Defendants, and he admitted that they were in his own handwriting, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a statement in his own handwriting that Brijraj Singh is the proprietor and similarly the items of expenditure relate to him alone. These books demonstrate the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books at all. The learned Judge of First Instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

The claim of the Plaintiffs in this action evidently arose from the suggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that

such a partition could not have been made by Balwant Singh by will strictly so-called. But, as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Everyone treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the Plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in presenti* by reference to a provision to be found in this document. It reads as follows :—

"If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this Will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating *in presenti*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at

all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of First Instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The Plaintiffs are therefore entitled to their share of these movables as inherited property.

It will be seen therefore that their Lordships are of opinion that the judgment of the learned Judge of First Instance was right on all points. Both Plaintiffs and Defendants appealed from his decision to the High Court. That Court allowed the Plaintiffs' appeal and dismissed that of the Defendants. The Defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both Appeals. They will accordingly humbly advise His Majesty that the Order of the High Court allowing the Plaintiffs' Appeal should be discharged with costs, and the Decree of the Subordinate Judge restored and that the Order of the High Court dismissing the Defendants' Appeal should be affirmed. The Plaintiffs must pay the costs of the Defendants' Appeal to His Majesty in Council, and the Defendants must pay the costs of their unsuccessful Appeal.

In the Privy Council.

KUNWAR BRIJRAJ SINGH AND ANOTHER

v.

KUNWAR SHEODAN SINGH AND OTHERS.

DELIVERED BY LORD MOULTON.

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