Privy Council Appeal No. 3 *of* 1943
Oudh Appeal No. 11 *of* 1940

Musammat Inder Kuer – – – – – – *Appellant*

v.

Musammat Pirthipal Kuer and another – – – *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1945

Present at the Hearing:

LORD THANKERTON
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

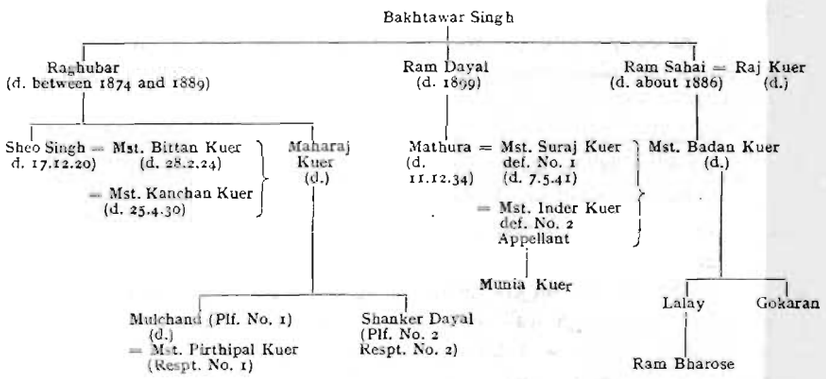
[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from the decree of the Chief Court of Oudh dated 27th February, 1940, which reversed the decree of the Civil Judge, Sitapur, dated 30th September, 1936, and decreed the plaintiffs' suit.

The appellant before the Board was the second defendant in the suit, the surviving widow of one Mathura Singh, deceased. The first and the only other defendant, her co-widow, did not join the appellant in filing this appeal. She was therefore made the third respondent. During the pendency of the appeal she died and her name was removed; and the appellant was made her heir and legal representative by the order of the Chief Court.

The deceased husband of respondent No. 1, and respondent No. 2, were the original plaintiffs in the suit. They will be referred to as the respondents.

The relationship of the parties to the suit is shown in the following genealogical table:—



One Bakhtawar Singh, a Hindu, had three sons, Raghubar, Ram Dayal, and Ram Sahai. Of these Raghubar and Ram Dayal had each one son called respectively, Sheo Singh and Mathura Singh; and Raghubar had a daughter as well, whose sons were the plaintiffs in the suit. Sheo Singh died on 17th December, 1920, without issue, leaving two widows, Musammat Bittan Kuer, who died on 28th February, 1924, and Musammat Kanchan Kuer, who died on 25th April, 1930.

Mathura Singh, the cousin of Sheo Singh, died on 11th December, 1934, leaving two widows—the defendants in the suit—of whom the surviving widow, the second defendant is, as was stated before, the appellant.

The appeal arises out of a suit instituted by the respondents for possession of the immoveable properties mentioned in lists A and B of the plaint, under claim of being the heirs of Sheo Singh, the last full owner. They claimed the properties as Sheo Singh's separate estate, to which they as his sister's sons were entitled to succeed by virtue of section 2 of the Hindu Law of Inheritance (Amendment) Act II of 1929 (hereinafter referred to as "the Act"). The Act applies to persons otherwise subject to the Law of the Mitakshara. Section 2 of the Act says that

> "A son's daughter, daughter's daughter, sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother".

It will be observed that Mathura Singh, as the son of Sheo Singh's father's brother and ranking as such in the Mitakshara order of succession would, under the section, be postponed to the plaintiffs as sister's sons of Sheo Singh. The case of the respondents is that after the death of Sheo Singh, his widows Bittan Kuer and Kanchan Kuer, entered into joint possession of Sheo Singh's property, that on Bittan Kuer's death, Kanchan Kuer came into possession of the entire property, that on her death Mathura Singh took wrongful possession of the same, and that on his death his widows obtained wrongful possession against them.

The appellant and her co-widow resisted the claim of the respondents on the alternative contentions, viz., (1) that the properties in suit were joint family properties which on Sheo Singh's death in 1920 passed by survivorship to their husband, and on his death in 1934, to themselves for a limited estate, and the appellant claims that on her co-widow's death they vested in herself alone; and (2) that even if the properties were the separate properties of Sheo Singh, under the custom applicable to the family, Mathura Singh took as heir, the operation of section 2 of the Act being excluded by section 3 thereof. Section 3 is as follows:—

> "Nothing in this Act shall (*a*) affect any special family or local custom having the force of law".

The custom relied on by the appellant and her co-widow is thus stated in para. 21 of their joint written statement: "It has been the custom in the family of Bakhtawar Singh and his descendants that in the presence of collaterals, daughters, their sons, or sisters and their sons, are excluded from inheritance. If there be no collateral then daughters, their issue, and after that sisters and their descendants become heirs".

On the above contentions two questions arose for decision in the Courts in India, and the same questions arise for decision also before the Board. These questions are: (1) Whether Sheo Singh and Mathura Singh were members of a joint Hindu family, or whether Sheo Singh died while separate from Mathura Singh, and (2) whether there is any custom in the family of Sheo Singh excluding sisters and their issue if collaterals are in existence.

In support of their respective contentions both parties gave evidence, both oral and documentary, on a consideration of which the learned Civil Judge answered both questions in favour of the appellant; the learned Judges of the High Court set aside his decision on both points.

As is usual in cases of this kind, the oral evidence is much interested and indefinite, and the documents by themselves are inconclusive. The case has to be decided on the evidence read as a whole. The burden of proving that Sheo Singh was separate in estate from Mathura Singh is on the respondents. It is well known that the state of every Hindu family is presumed to be joint, joint in food, worship and estate; but the strength of the presumption necessarily varies in each case. It has been laid down that the presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker. The evidence in the case has to be reviewed in the light of this presumption. Sheo Singh and Mathura Singh, being cousins, the presumption of jointness may not be so strong as it would be had they been brothers.

The respondents have not been able to assign any definite date as regards the partition in the family of their uncle. They are only nephews of Sheo Singh who ordinarily may not be expected to know the details of his family affairs, though according to the evidence they had lived long in their uncle's family. Their Counsel stated (see page 13 of the records): " Raghubar Singh, Ram Sahai, and Ram Dayal were separate. My client cannot give the date when separation took place, but it took place when the sons of Bakhtawar Singh were alive. The separation took place some time between the first regular settlement and the death of Ram Sahai. Raghubar was separate from before ". The settlement referred to is 1873, and Ram Sahai died in or about 1886. There is some evidence, not direct, bearing on the point, but it is not sufficient by itself to establish the truth of the Counsel's statement. Their Lordships will refer to it later. In this connection it is necessary to observe that though the respondents may not be able to prove the exact case of separation set up by them in their Counsel's statement, they will be entitled to succeed in their case if they are able to prove to the satisfaction of the Court that Sheo Singh and Mathura Singh must have been separate in estate and that Sheo Singh died while separate from Mathura Singh, which is what they have really attempted to do, relying on the evidence read as a whole to support that conclusion inferentially.

Their Lordships will first deal with the question whether Sheo Singh died while separate from Mathura Singh. After holding that separate devolution of shares in the properties, specification separately of the shares of Sheo Singh and Mathura Singh in the Khewats, the fact that they held *Sir, Khudkasht* lands separately, that they held groves separately, that they had separate residences, that they executed separate powers of attorney and had separate servants and other factors, relied on by the respondents to show that Sheo Singh and Mathura Singh were separate in estate, were not necessarily inconsistent with the existence of a joint Hindu family, the learned Civil Judge concluded that the family was joint chiefly by reason of (1) the evidence of Mussammet Suraj Kuer, defendant No. 1, taken on commission, (2) the evidence afforded by certain books of accounts, exhibits A37 to A40, and (3) the evidence that the income of the entire estate was collected by Sheo Singh alone in his life time. In support of the conclusion that the family was joint and was not divided Mr. Pringle, the learned Counsel for the appellant, has taken their Lordships through most of the evidence in the case. Their Lordships will refer only to those salient features in the evidence which they think are sufficient to decide the point under consideration and will deal with the relevant objections thereto as they proceed.

In their Lordships' opinion evidence relating to devolution of properties in separate shares where such devolution happened, and the holding and management of properties in separate shares, are the most important evidence in this case on the question of separation. When Ram Sahai, one of the three sons of Bakhtawar, died in or about the year 1886, evidence shows that in two villages, his share was mutated in the name of his widow Raj Kuer to the exclusion of his brothers (see exhibits 22 and 23). Exhibit 22 shows that she was also the Lambardar of the village of Bodhwa. It is said that these shares came back to the family but it is not shown in what circumstances. However, to the extent they go these documents would suggest that there may well have been a separation of shares before the death of Ram Sahai. It is not known whether Raj Kuer obtained the shares of her husband in the other three villages in which also he had shares. The learned Judges of the High Court say that all his property was mutated in the name of his widow but the evidence on record refers only to the above-mentioned two villages. Their Lordships agree that this evidence by itself is not enough to establish the case of separation set up, but it requires explanation, and Mr. Pringle explains it by saying that the shares in question were given to her by way of consolation to the widow on the death of her husband. The learned Judges of the High Court say with reference to this plea that " it is well established that there is no presumption that mutation in the name of a Hindu widow is by way of consolation. Consequently whoever raises the plea of mutation being for

consolation must prove it but in the present case there is no evidence worth the name in support of the defendants' allegation on this point ". This view has not been shown to be wrong. The learned Judges say further, that " the fact that Ram Sahai's and Sheo Singh's widows were Lambardars in some of the villages knocks the bottom out of the plea of consolation ". The next instance of mutation to be noticed is the one that followed on the death of Sheo Singh, who died in 1920. The following extract is from the learned Civil Judge's judgment: " The shares of the property of Sheo Singh and Mathura Singh were separately recorded in the Khewats, and after the death of Sheo Singh his property was separately recorded in the names of his widows as appears from the Khewats and Khetonis (Exts. 27 to 34 and 37 to 39). The widows of Sheo Singh were also made Lambardars of their share of the property (*vide* D.W. 10, page 57) ". This instance of mutation strongly supports the view that Sheo Singh before his death must have become separate in estate from Mathura Singh for, if they were joint, mutation would in the normal course be in the name of Mathura Singh and not in the name of the widows. In this connection the High Court observes that " the order of mutation having been passed by the Tashildar shows that Mathura Singh did not even contest the widows' right to succeed to their husband." Exhibit 17 shows that on Bittan Kuer's death the property standing in her name in village Tambour was mutated in favour of the surviving widow Kanchan Kuer, as stated by the Tashildar " on the basis of inheritance ". The mutation made in favour of the widows in the case of Sheo Singh's death also, is said to have been made by way of consolation without any proof that it had been so made. If that had been so made originally, on Bittan Kuer's death, why should her portion be mutated again in favour of Kanchan Kuer who had been given her specific portion already? An order made in mutation proceedings is, no doubt, not a judicial determination of the title of the parties, but that it has evidentiary value cannot be disputed. It appears to their Lordships that the true explanation of what happened is this, that when their husband died the two widows succeeded to his estate as they would ordinarily do under the Hindu law, and when one of them died, the other succeeded to the ordinary widow's estate in the whole of it, from which it would follow in the absence of a reasonable explanation that their husband died while separate from Mathura Singh. This is the real evidentiary value of the mutation proceedings in this case, and the learned Counsel who has gone through the evidence with great care has not been able to give any satisfactory explanation of them except that the properties were given by way of consolation to the widows which is true neither in law nor in fact. The instances of succession which their Lordships have noticed are clearly inconsistent with the family being joint. Further, in several villages the widows were Lambardars. They had separate servants for collection of rents and they filed suits for arrears of rents even in a village of which Mathura Singh was the Lambardar. These facts are full of significance and support the view that Sheo Singh was separate from Mathura Singh before he died.

The above evidence does not stand alone. Another kind of evidence relates to the holding of the lands. There is evidence not only that the shares of Sheo Singh and Mathura Singh were specified in several Khewats but also they held *Sir, Khudkasht* lands and groves separately. It is true that there is no evidence in this case of actual partition of the joint estate by metes and bounds, but physical division of property is not necessary. " Once the shares are defined there is a severance of joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforward the parties hold as tenants in common ". (See the decision of the Board in *Harkishan Sing* v. *Partap Singh*, (1938) A.I.R., p. 189.)

The other relevant evidence indicative of separation such as, having separate residence, separate business, separate servants, separate cattle sheds, and others of a like nature which are important, have all been fully considered in the judgment of the High Court and need not be referred to again. It is well established that separation of family can be proved

by the conduct of the family and the attendant circumstances; and their Lordships are of opinion that in this case there are strong circumstances proving the separation of the family.

The cumulative effect of the evidence examined above is sought to be negatived mainly by referring to entries in the account books, A37 to A40, for the years 1914-15, 1915-17, 1918-20, and 1920-23, respectively, to show that the family remained joint. Their Lordships are not satisfied after an examination of the various entries brought to their notice that the account books represent accounts of the joint family; on the other hand they agree with the High Court that the evidence gives strength to the respondents' case that the accounts are the separate accounts of Sheo Singh. They may add that there is nothing in the evidence to show from what source the monies dealt with in the accounts came. The other documents brought to their Lordships' notice, such as A2, A42, A43, A45, are not for the reasons mentioned by the learned Judges necessarily inconsistent with the respondents' case. The evidence of the 1st defendant, the co-widow, taken on commission, distinctly supports the case of the plaintiff, that Sheo Singh and Mathura Singh were separate. Their Lordships do not attach much importance to the evidence that Sheo Singh collected the rent and paid the revenue on behalf of the co-sharers as he was the Lambardar of many of the villages.

In their Lordships' opinion the evidence surveyed as a whole including the oral evidence leads to the conclusion that the separation of estate in this family began from about the time of Ram Dayal's death and went on progressively till it culminated in effective separation between Sheo Singh and Mathura Singh before the death of Sheo Singh, and that Sheo Singh died while separate from Mathura Singh. It is difficult to ascertain definitely the date when the separation took place but that is not a defect as their Lordships are satisfied from the evidence that it did take place before the death of Sheo Singh. The learned Counsel for the respondents state that the separation took place at or about the year 1900, judging from the entry in column 3, headed period of cultivation, " 20 years from 1309 Fasli " noted against Thakur Sheo Singh, " proprietor ", an exhibit 27, an extract from the Khetauni of village Tambur, but it is difficult having regard to the nature of the evidence to assign any exact date, nor is it necessary to do so in the circumstances of this case.

In view of the finding that Sheo Singh died while separate from Mathura Singh, the appellant cannot succeed unless the alleged custom of exclusion of sisters and their children by collaterals is established, which is the next question for consideration. In support of this custom the appellant and her co-widow relied in the Courts below mainly on the " wajibularz " of Isapur village—exhibit 41, dated 1873. Para. 4 of the wajibularz runs as follows:—

> " The custom obtaining in the family of the Zamindars of this village is that on the death of any co-sharer, if there be any male issue and widow, the male issue get the heritage in equal shares and the widow, food and raiment. . . . If there be no male issue, the real brothers shall be the heirs, generation after generation, and shall support the widow. If even real brothers be not in existence, then the widow shall remain the heir for life. If there be two or more widows, they shall be the owners in equal shares. In the event of the widow becoming immoral, she shall be deprived of the share. If there be no widow even, then the nearest among the collateral relations of the widow's husband shall get the share and if even he be not forthcoming, then the daughter and her issue and sister and sister's issue shall be the heirs. . . . "

The wajibularz has been attested by Ram Sahai, Raghubar Singh, Ram Dayal and other co-sharers of the village. The learned Judges held that the above paragraph of the wajibularz can hardly be taken as a custom for the reasons that, (1) on Ram Sahai's death his property devolved on Raj Kuer, and not on his brother Ram Dayal, (2) wajibularzes are often untrustworthy as they record not custom but the wishes of those who dictate them, (3) in the present case there is no satisfactory evidence that the clause records a custom, (4) none of the witnesses examined could cite a

single instance of the application of the custom, and (5) it is difficult to see how there could have been a custom of exclusion of sisters when sisters were no heirs at all prior to the passing of Act II of 1929. The learned Judges had before them another wajibularz—exhibit A2—" which contained no such provision relating to the succession of sisters as is contained in the wajibularz of Isapur ". They therefore held that the custom set up was not proved.

The printed records show that exhibit A2 is a translation of an extract from the wajibularz of the village Ismailganj, in which also, the predecessors of the parties were co-sharers, containing only paras. 1, 3, 13 of the wajibularz. The extract is a certified copy issued by the copying department of the Sitapur Collectorate. It does not contain para. 4 of the wajibularz or any reference to the alleged custom.

A translation of the original wajibularz of Ismailganj containing all the paragraphs has now been brought to their Lordships' notice by the respondents, included in the " supplementary record ". It contains para. 4 of the wajibularz styled " relating to right of inheritance ". Normally their Lordships will not at this stage take this document into consideration, without having the question of its admission considered by the High Court, but the appellants' learned Counsel, though he objected to the manner in which it has been brought to their notice without the usual formal application for admission of the document, has agreed that he has no objection to their Lordships treating it as admitted. Their Lordships are surprised that the learned Judges of the High Court were led to think that there was no reference to the right of inheritance in the wajibularz of Ismailganj. The Trial Court does not in this connection refer to this exhibit. Paragraph 4, " relating to inheritance " of this wajibularz runs as follows:—

> " A daughter " and her issue are not entitled to inheritance and a childless widow whose husband's share was separate and whose husband used to get rendition of accounts only, is entitled to inheritance and possesses powers of transfer also. In case the share is divided but no rendition of account is made she (the widow) holds the share without power of transfer and after her that share devolves on the lawful heir. In case there are male " issue from several wives, then division of share takes place on the number of wives. A woman who is not lawfully wedded and her issue have no right whatsoever. She gets maintenance (food and raiment) as long as she remains alive." (The rest of the paragraph omitted refers to the custom of adoption; and of the rights of an adopted son and the son born after adoption.)

The above paragraph does not contain any reference to inheritance by sisters and their sons at all, and in that respect is not in conformity with the custom contained in paragraph 4 of the wajibularz of Isapur, which excludes sisters and their children in the presence of collaterals. As already stated the predecessors of the parties to the suit were co-sharers in both the villages. In an appropriate case like the present what is the rule of inheritance to be applied according to the custom of the family? In view of the inconsistent statements contained in these two documents as regards the right of inheritance their Lordships hold without any further consideration of the question which seems to them to be unnecessary in the circumstances, that the alleged custom set up by the appellant and her co-widow has not been established. In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council

MUSAMMAT INDER KUER

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MUSAMMAT PIRTHIPAL KUER AND ANOTHER

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