Privy Council Appeal No. 11 *of* 1944
Allahabad Appeals Nos. 42 *of* 1939
and 1 *of* 1940

Kuar Shyam Pratap Singh - - - - - - *Appellant*

v.

The Collector of Etawah, representing Rani Rathorni Narain Kunwar, and others - - - *Respondents*

Kunwar Kalka Singh - - - - - - - - *Appellant*

v.

Thakur Shyam Pratap Singh and others - - - *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 194

Present at the Hearing:

LORD MACMILLAN
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

These are consolidated appeals from a decree of the High Court of Judicature at Allahabad, dated 1st November, 1939, which affirmed a decree of the Court of the Subordinate Judge of Mainpuri, dated 26th January, 1933, though on grounds different from those on which the decision of the learned Subordinate Judge was based.

The subject-matter in dispute is an impartible estate in the district of Etawah, known as the Partabner Raj. It is not disputed by the parties to this appeal that the Partabner Raj is an ancient Raj, and that down to the death of Raja Hukum hereinafter mentioned it was an impartible estate governed by the rule of lineal primogeniture. The estate was owned at the time of his death, which occurred on the 17th May, 1925, by Raja Hukum Tej Pratap Singh (hereinafter called " Raja Hukum ") who died leaving a widow, and a mother, Rani Baisni Madho Kunwar (hereinafter called " Rani Baisni "), but no natural descendants. Shortly before his death, Raja Hukum had adopted a son, Raja Maha Vindeshri Pratap Singh (hereinafter called " Raja Maha "), the minor son of Madho Singh, who was a member of the family of Raja Hukum. Soon after the death of Raja Hukum a suit was filed by his widow and there were mutation proceedings, the question at issue in such suit and proceedings being as to the validity of the adoption of Raja Maha. These proceedings resulted in the adoption being accepted by the interested parties, and as a result, the Revenue Court sanctioned mutation in favour of Raja Maha by an Order dated 29th April, 1927.

By a notification issued under section 15 of the United Provinces Court of Wards Act, 1912, the Court of Wards assumed the management of the Partabner Raj on behalf of Raja Maha as from the 14th December, 1926.

On the 18th February, 1931, Raja Maha was murdered by his natural father, Madho Singh. He died a minor and unmarried.

The suit in which these appeals arise, namely, suit No. 19 of 1931, was brought by Sheorakhan Singh, who claimed to be the senior male member of the senior branch of the family of Raja Hukum, and accordingly entitled to the estate under the rule of lineal primogeniture. He died during the pendency of the suit and his son, Shyam Pratap Singh, the appellant in one of these consolidated appeals, was substituted as plaintiff and is hereinafter referred to as " the plaintiff ". In the suit Sheorakhan claimed that the properties mentioned in lists " A ", " B ", " C " and " D " annexed to the Plaint had descended to him as the senior member of the senior branch of the family. The effective defendant was Kunwar Kalka Singh, who was defendant No. 4 and is the appellant in the second of these appeals. He is hereinafter referred to as " the defendant ". His case was that he was the senior member of the senior branch of the family.

At the trial the learned Subordinate Judge held that of the properties specified in lists " A " to " D " annexed to the plaint, the properties in lists " A " and " C " were part of the said impartible Raj subject to the rule of lineal primogeniture, that according to this rule the person entitled to succeed to the Raj was not the plaintiff, but the defendant, whose claim as the senior member of the senior branch of the family had been satisfactorily proved, and that the properties in lists " B " and " D " were not part of the impartible Raj but were governed by the ordinary Hindu Law of succession and devolved on Rani Baisni as the mother of the adoptive father of the last holder of the Partabner Raj. Accordingly, the learned Subordinate Judge dismissed the suit with costs.

There had been consolidated with the said suit another suit, No. 26 of 1932, which had been instituted by Rani Baisni, in which she claimed that no part of the estate was impartible, or subject to the rule of lineal primogeniture, and that she was entitled to succeed to the whole property under the ordinary law of Hindu succession. As already mentioned, her claim succeeded to the extent of the properties in lists " B " and " D ".

Against the said decision of the Subordinate Judge three appeals were preferred to the High Court of Judicature at Allahabad. First, Appeal No. 82 of 1933 by the plaintiff challenging the decree against him in suit No. 19 of 1931, secondly, Appeal No. 109 of 1933 by Rani Baisni challenging that portion of the decree in suit No. 26 of 1932, by which a part of the Partabner Raj estate was held to be impartible and subject to the rule of lineal primogeniture, and thirdly, Appeal No. 381 of 1933 by the defendant against that portion of the decree in suit No. 26 of 1932 by which the properties in lists " B " and " D " were held not to be impartible. Rani Baisni died on the 12th June, 1938, and, by Order of the Court dated 1st November, 1939, Appeal No. 109 of 1933 was held to have abated.

On the other two appeals preferred respectively by the plaintiff and the defendant the High Court held that the plaintiff had proved his title to succeed to the Partabner Raj and the properties in lists " A " and " C " as the senior male member of the senior branch of the family, if the rule of lineal primogeniture still applied, but that the properties in lists " B " and " D " did not form part of the Partabner Raj. The Court, however, also held that Raja Hukum had by his will dated 16th May, 1925, given the Partabner Raj and the properties constituting the same to Raja Maha, that such gift had the effect of making the property the self-acquired property of Raja Maha, and that on his death it passed under the ordinary law of Hindu succession to his adoptive grandmother Rani Baisni, though whether she took an absolute estate or the ordinary limited estate of a Hindu widow was not discussed. The Court declined to decide who became entitled to the estate on the death of Rani Baisni, and merely dismissed the appeal and confirmed the decree of the Subordinate Judge.

The plaintiff and defendant have both appealed to His Majesty in Council against the decree of the High Court, but the finding of the lower Courts that the properties in lists " B " and " D " do not form part of the Partabner Raj has not been challenged. The other appellants and respondents have not advanced any independent claims.

The first question which arises for decision on these consolidated appeals is whether the view taken by the High Court as to the construction and effect of the alleged will of Raja Hukum is correct. Upon this question the plaintiff and defendant have joined forces in attacking the decision of the High Court, and no argument has been advanced before the Board in support of the decision, since Rani Baisni is not represented. Their Lordships can only decide the question as between the parties to this appeal.

The will is in these terms:—

> " I, Raja Hukum Tej Pratap Singh, am the Raja of Partabner. I have been ill for a long time, and in spite of treatment I am not getting better. Since this morning I have, on the other hand, become much worse. Life is uncertain. Maha Vindeshri Pratap Singh is the son of Kunwar Madho Singh—one of my kinsmen—resident of Padampura, district Etawah. To-day (Kunwar Madho Singh) has given him (Maha Vindeshri Pratap Singh) to me in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the ' gaddi-nashin ' and the owner of my entire movable and immovable property. After my death he shall, like myself, have all the powers. Lal Maha Vindeshri Pratap Singh is yet a minor, therefore during his minority, my mother, Rani Besni Madho Kunwar, who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son Lal Maha Vindeshri Pratap Singh and shall manage the entire estate. I have, therefore, executed this will while in a sound state of body and mind and after full deliberation.
>
> Dated 16th May, 1925. Written by the pen of Sheo Narain."

The learned Subordinate Judge held that this document was not a will within the definition in the Indian Succession Act. He thought that the only operative part of the document was the appointment of a guardian and that all the rest was narrative. On the other hand, the High Court thought that the direction that the adopted son should be the gaddi-nashin and the owner of the entire movable and immovable property of the testator constituted a good residuary gift. Their Lordships do not doubt that these words, taken out of their context, would operate as an effective gift of the whole of the testator's property, but taking the document as a whole, their Lordships prefer the view of the Subordinate Judge. It will be observed that there are no direct words of gift in the will, and that there was no object in giving to the adopted son property which he would inherit under the law, whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift. In their Lordships' view the effect of the document is that Raja Hukum states that he is very ill, that he has taken Maha Vindeshri in adoption, that the latter will, therefore, after the testator's death, be the gaddi-nashin and the owner of the whole of his property, that Maha Vindeshri is a minor and, during his minority, the testator appoints his mother to be the guardian of Maha Vindeshri and the manager of the estate.

But, even if the construction adopted by the High Court be correct and the will contains a gift to Raja Maha, their Lordships are unable to adopt the view of the High Court as to the effect of such gift on the character of the estate. The learned Judges referred to several cases, and relied particularly on a recent decision of their Lordships' Board—*Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*—(1939) L.R. 66 I.A. 134. In that case the owner of an ancestral impartible estate in the Madras Presidency governed by the Mitakshara Law, wishing to exclude his eldest son from the succession, executed a deed settling the estate after his own death on his second son. The Board held that the settlement was within the power of the settlor, and that the second son took the property as his self-

acquired property and that it passed on his death under the ordinary Hindu law of succession. In that case, the settlor had deliberately broken the line of succession and settled the estate on somebody outside that line, and that is the *ratio decidendi*. But in the present case, Raja Hukum did not break the line of succession, on the contrary he gave the property to the person who would succeed under the rule of lineal primogeniture, and moreover expressly directed that he should be the gaddi-nashin and have all the powers which the testator had possessed. The various Wajib-ul-arz on record in the Mauza Partabner and other Mauzas show that the sole heir inheriting under the rule of primogeniture is always called the gaddi-nashin. In their Lordships' view it is impossible to hold that this will, even if it operated to give the property to Raja Maha, had the effect of changing its character from that of an impartible Raj governed by the rule of lineal primogeniture. So to hold would plainly defeat the intention of the testator as disclosed in the document.

The question which then arises for decision is that on which the courts in India differed, namely, whether the plaintiff or the defendant is the senior male in the senior branch of the family and entitled to succeed under the rule of lineal primogeniture. No question arises as to the plaintiff and the defendant respectively being the senior male in his branch of the family; the question is which is the senior branch. The plaintiff and the defendant both claim under one Raja Sambhar Singh, who had 5 sons:—Raja Narain, Hindu, Mohan, Anand and Ratan. The plaintiff's branch of the family is descended from Anand, and the defendant's branch from Hindu, and the question at issue is whether Hindu or Anand was the second son, the other being admittedly the fourth son. As Raja Sambhar Singh was 6 degrees removed from the defendant, and 7 degrees from the plaintiff, it is obvious that no one living can have any personal knowledge as to the respective ages of his sons. At the trial, witnesses were called on both sides who spoke to statements made on the subject by Raja Hukum, Madho Singh, and others, and the Subordinate Judge thought the oral evidence called for the defendant seemed the stronger. But neither of the courts in India attached much importance to the oral evidence, realising that statements can very easily be put into the mouth of a dead man, and, further, that witnesses may easily have misunderstood such statements, or forgotten their exact import. Their Lordships therefore do not rely on the oral evidence, and think that the question must be decided on the documentary evidence which is somewhat scanty. The High Court considered six documents to be relevant, three supporting each of the parties. On behalf of the plaintiff there was a Jagas bard pedigree book Ex. II (12), a pedigree prepared by one Muhammad Naeem, Ex. XXXVII, and a letter Ex. II (14), enclosing a pedigree of the family Ex. III (2), alleged to have been writen by Madho Singh the natural father of Raja Maha and brother of the defendant. Of these three documents, the High Court considered only the last Ex. II (14) and Ex. III (2) to be of any serious value, and their Lordships agree with this view. On the side of the defendant reliance was placed on a letter of Madho Singh written to the Board of Revenue and dated 7th October, 1930, Ex. N, a pedigree Ex. " W," and a pedigree in the estate notebook produced by the Court of Wards Ex. V. With regard to exhibit " W " both the courts in India considered that the exhibit assisted the defendant, and the High Court said that it went to the length of proving his case if it was genuine, but the Court held that the exhibit was not genuine. The only portion of the exhibit which has been brought on record in these appeals contains no reference whatever to the matter in dispute and is nugatory. It may be that the relevant part of the document, by some mistake, has not been included in the record but, however that may be, their Lordships can only deal with the record as they find it, and this exhibit does not help either side. The letter, exhibit " N ", is relied on mainly as detracting from the weight of the pedigree produced by Madho Singh, and the contest has really resolved itself into a question whether the letter and pedigree emanating from Madho Singh Ex. II (14) and Ex. III (2), or the pedigree produced from the Court of Wards Ex. V is the more cogent piece of evidence.

Exhibit II (14) is a letter from Madho Singh to the plaintiff's father, Sheorakhan, by a familiar name, and is undated, but the High Court considered that it was written in 1925 shortly before the death of Raja Hukum, and their Lordships accept this view. The object of the letter seems to have been to enlist the sympathy of Sheorakhan as a prominent member of the family in relation to an ejectment suit brought against the writer by the Partabner Raj, and complains that the members of the family have become disunited and the writer encloses a genealogical table which is Exhibit III (2). This is the document mainly relied on by the High Court in support of the plaintiff's case. Their Lordships have not seen the original; the print on record shows the name of Anand Singh with a figure " 2 " after it, but the names of his brothers are stated to be torn off. There is also a separate pedigree of Baeram Singh the adopted son of Anand Singh, which is headed:—" Branch of Anand Singh of Dhakpura the second son of Raja Sambhar Singh." It is this statement which is the really relevant part of the document. There are three considerations which seem to their Lordships to weigh against accepting this document as at all conclusive. In the first place, it is most unfortunate that the initial part of the pedigree has been torn off and that the only reference to Anand Singh as the second son is the statement to that effect quoted above, a statement which could have been interpolated without much physical difficulty. In the second place there is nothing to show how Madho Singh acquired the information which is included in the pedigree; and in the third place there is the letter Exhibit " N " which is one of the defendant's documents. This letter was written on the 7th October, 1930, to a member of the Board of Revenue, Lucknow, and it contains this sentence:—" Had I not been engaged in these narrow circumstances and my son had not been adopted by the late Raja Bahadur I would have been the Raja after his death which can be found out by the genealogy of my family now in possession of the Court of Wards." It has been argued on behalf of the plaintiff that no weight should be attached to this letter since the writer was plainly trying to make himself out as important a person as possible. The letter may not by itself be entitled to any great weight, but it does show that Madho Singh was prepared to make entirely contradictory statements as to which was the senior branch of the family as suited his purpose. It makes it difficult to rely with confidence on his statements. The High Court thought that Exhibit " N " was not admissible in evidence because it was made after the question in dispute was raised and would therefore not be admissible under section 32 sub-section 5 of the Evidence Act. The High Court relied on the fact that the question of succession had arisen in the mutation proceedings taken shortly after the death of Raja Hukum and some years before this letter was written, but that question turned on the validity of the adoption of Raja Maha. If the adoption was valid the question in dispute in this suit, namely, which is the senior branch of the family, was irrelevant. That question only led to a dispute on the death of Raja Maha in February, 1931. In their Lordships' opinion Exhibit N is admissible in evidence.

Exhibit V, which is the document mainly relied on by the defendant, is a pedigree produced in court by an officer from the Court of Wards. The High Court noticed in its Judgment that section 332 of the Court of Wards Manual prepared under the United Provinces Court of Wards Act provides:—" An estate notebook for each estate under the Court of Wards shall be maintained in triplicate in forms 74 to 87, one copy being kept in the District Office, one in the Divisional Office and one in the office of the Court of Wards. The object of the notebook is to provide a separate and succinct history of every estate under the management of the Court of Wards." This document therefore is an official document prepared by a public authority in pursuance of a statutory duty, and it is not disputed that it is evidence, though not conclusive evidence, of the facts stated therein. The pedigree portion of the document starts with Raj Sambhar Singh and states his five sons showing Hindu as the second son and Anod (presumably meaning Anand) as the fourth son. The criticism directed against this document is that it does not show the sources

on which the Court of Wards based its findings, and that " the assumption of charge file " on which the pedigree purports to be founded was not produced. But this is not criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of the accuracy of which it was satisfied. No cross-examination of the two witnesses from the Court of Wards who were called was directed to ascertain the sources on which the pedigree was founded. In their Lordships' view, this is much the most important document on either side and, in the absence of any reason for supposing the document to be incorrect, their Lordships think that it must be accepted as accurate. The learned Judges of the High Court thought that the document was not entitled to much weight because it had been brought into existence after the controversy had arisen, but their Lordships are unable to accept that view. As already pointed out, the controversy in this suit had not arisen before February, 1931, but, apart from that, the Court of Wards is an entirely impartial body. It has remained in control of the estate since the death of Raja Maha because nobody has succeeded in establishing a title, and there is no reason for supposing that the Court of Wards is interested in the question which branch of the family succeeds.

For these reasons their Lordships think that the defendant has succeeded in proving that he is the representative of the senior branch of the family and entitled to succeed to the Partabner Raj and the properties in lists " A " and " C " annexed to the plaint. The defendant, however, has not preferred any substantive claim and their Lordships can only follow the course adopted by the Subordinate Judge and affirm the dismissal of the plaintiff's suit. In the High Court Rani Rathorni Narain, the step mother of Raja Hukum, who is represented in these appeals by the Collector of Etawah, was given her costs in both Courts on the ground that it was on the plea of her counsel that the Court held that the Raj had become self-acquired property of Raja Maha. As this plea has now failed there is no reason for giving Rani Rathorni Narain her costs. The High Court after dismissing the appeal directed that the other parties to the suit should bear their own costs. Whether this direction was intended to alter the order of the Trial Court as to costs is not clear. As the defendant failed on some of his contentions in the High Court their Lordships think that each party should bear his own costs in the appeal to the High Court but the order of the Trial Judge as to the costs in the Trial Court will stand. In these appeals both plaintiff and defendant have succeeded on the issue as to the will, and the defendant, although advancing no substantive claim, has gained some advantage from the plaintiff's suit. Their Lordships think that the plaintiff ought not to be left to bear the whole costs of these appeals.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court dated the 1st November, 1939, be varied by striking out the direction (1) that the parties to the suit other than Rani Rathorni Narain Kuar shall bear their own costs and (2) that the appellant pay the respondent No. 1 the sum of Rs. 1553-8-0, the amount of costs incurred by the latter in the High Court and in the Court below, and that it be ordered that the parties to the appeal to the High Court should bear their own costs. The appellant Kuar Shyam Pratap Singh, in the first consolidated appeal, will pay two-thirds of the costs of the appellant Kunwar Kalka Singh in the second consolidated appeal to His Majesty in Council. Subject as above these appeals will be dismissed.

(48823) Wt. 8013—5 170 4/46 D.L. G. 33

In the Privy Council

KUAR SHYAM PRATAP SINGH

v.

THE COLLECTOR OF ETAWAH REPRESENTING RANI RATHORNI NARAIN KUNWAR AND OTHERS

KUNWAR KALKA SINGH

v.

THAKUR SHYAM PRATAP SINGH AND OTHERS

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