PRIVY COUNCIL.

P. C.*
1913
April 15, 16;
June 10.

JANKI PRASAD SINGH (DEFENDANT) *v.* DWARKA PRASAD SINGH (PLAINTIFF).

APPEAL AND CROSS APPEAL CONSOLIDATED.

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Act No. I of 1869 (*Oudh Estates Act*), *sections* 2, 3, 8, 10 *and* 22—*Summary and regular settlements of Oudh—Villages settled on grantee whose name was entered as owner in Lists* 1 *and* 2 *of those prepared under section* 8—"*Taluqdar*"—"*Estate*" *under section* 2—*Impartible property*—Kabuliat *executed by grantee after the time limit specified in section* 3—*Suit for partition—After-acquired properties held to be partible, there being no intention shown to incorporate them with the impartible property.*]

At the summary settlement of Oudh an order was made on the 5th of October, 1859, for the settlement of certain villages with the ancestor of the parties to these appeals, who, however, did not execute his *kabuliat* until the 13th of October, 1859, and so not within the time limit specified in section 3 of the Oudh Estates Act (I of 1869), namely "between the 1st of April, 1858, and the 10th of October, 1859." At the regular settlement, shortly afterwards, the grantee recovered decrees for possession of other villages; and subsequently acquired other properties by purchase. In respect of all the settled villages his name was entered in Lists 1 and 2 prepared under the statutory provisions of section 8 of the Act. In a suit for partition to which the defence was that all the property was impartible,

Held (affirming the decisions of the Courts in India) that the grantee (the defendant) was, on the construction of the provisions of Act I of 1869 relating thereto, a "taluqdar," and the villages so settled with him formed, within the meaning of the Act, an "estate" which was impartible and descendible to a single heir.

On a question whether the delay in executing the *kabuliat* deprived the taluqa of the character of an "estate" defined in section 2 of the Act, the Judges of the Judicial Commissioner's Court differed in opinion.

Held, in the absence of an express declaration that non-execution within the time specified would be fatal to the right given to the grantee by section 3, that no such construction could be put on that section; but the execution of the *kabuliat* related back to the date of the settlement, namely the 5th of October, 1859.

As to the after-acquired properties the defendant contended that by the custom of the family they became part of the original estate and were therefore not subject to the ordinary Hindu law of inheritance.

Held (affirming the decisions of both courts below) that the evidence was insufficient to establish that custom; that no intention of the talnqdar was shown to incorporate the subsequently acquired properties with the taluqa, as

* *Present:*—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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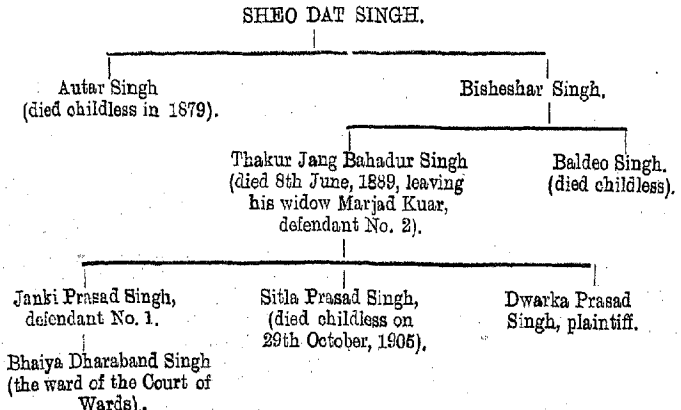
was necessary on the authority of the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1); and that the plaintiff was therefore entitled to a decree for his share (one half) of such properties as being partible.

APPEAL (116 of 1911) and cross appeal (117 of 1911) consolidated, from a judgement and decree (8th September, 1909) of the Court of the Judicial Commissioner of Oudh, which affirmed with slight variation the decree (15th September, 1908) of the Court of the Subordinate Judge of Bara Banki.

The suit which gave rise to these appeals was instituted by Dwarka Prasad Singh for partition of certain properties in the possession of his brother the first defendant Janki Prasad Singh, claiming that such properties constituted ancestral estate of the family partible between them. The defence of Janki Prasad Singh was that the "properties in suit were impartible, and that no partition can be or ever has been made in this family in accordance with the prevailing custom" which obtained from ancient times. The first defendant had died and was now represented by Dharaband Singh his minor son, who appeared by his guardian the Deputy Commissioner of Bara Banki as representing the Court of Wards. The second defendant Marjad Kuar (the mother of the plaintiff and of the first defendant) was also dead, and no question now remained as to her interest in the properties in suit.

The following extract from the family pedigree shows the relationship of the parties, and explains the history of the litigation which is stated in their Lordships' judgement, together with the relevant sections of the Oudh Estates Act (I of 1869).



(1) (1902) I. L. R., 29 Calc., 433 (453): L. R., 29 I. A., 82 (98).

The main questions for determination in these appeals were whether the properties in suit were impartible, and whether, they devolved on a single heir under the provisions of the Oudh Estates Act (I of 1869).

The history of the family showed that certain of the villages of which the properties in suit consisted had been settled upon Autar Singh, an ancestor of the parties, at the Summary Settlement in 1859, and at the Regular Settlement shortly afterwards; and that other properties had been subsequently acquired by him. As to the properties which had been settled, the Subordinate Judge held that they constituted an "estate" within the meaning of section 2 of Act I of 1869, and were consequently impartible and devolved by family custom on a single heir; but as to the after-acquired properties he held that they were joint and partible; and he gave the plaintiff a decree for partition, and delivery of possession of a one-third share in them, dismissing the suit as to the settled portion of the properties.

From that decision both parties appealed to the Court of the Judicial Commissioner, the plaintiff asking for a half-share, as the second defendant had died.

The Appellate Court consisted of Pandit SUNDAR LAL (1st Additional Judicial Commissioner) and Mr. PIGGOTT (2nd Additional Judicial Commissioner), who affirmed the decree of the Subordinate Judge, except that they gave the plaintiff a half share instead of a one-third share in the after-acquired properties. On the question whether the settled properties did or did not form a taluqdari estate within the meaning of Act I of 1869, the Judges differed in opinion, Pandit SUNDAR LAL holding that the Summary Settlement of the villages in 1859 not having been concluded before the 10th of October (certain formalities being only carried out on the 13th of October, 1859), those villages did not form part of an "estate" as defined in section 2 of Act I of 1869, and that the succession to them was consequently not governed by the provisions of that Act: and Mr. PIGGOTT holding that the settlement ought to be presumed to have been made on the 5th of October, 1859, when the Commissioner had made an order that the villages should be "settled."

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Both appeals were dismissed with costs by the Court of the Judicial Commissioner: and both parties appealed to His Majesty in Council, the defendant's appeal being 116 of 1911 and the plaintiff's 117 of 1911.

On these appeals—

Sir H. Erle Richards, K. C., and *Kenworthy Brown* for the defendant contended that the villages originally settled at the summary and regular settlements formed an estate within the meaning of the Oudh Estates Act (I of 1869), and did not lose the character of an "estate" under that Act, by reason of the execution of the *kabuliat* not having been made by Autar Singh within the period mentioned in section 3, and reference was made to sections 2, 3, 8 and 10 of that Act, and Sykes' Taluqdari Law, pages 378, 389 and 392 with regard to the Lists of Taluqdars whose estates descended according to the custom of impartibility. That custom, it was contended, had been established by the evidence and governed the succession of all the property in dispute; Act XVII of 1876 (Oudh Land Revenue Act), section 17, was referred to. If a custom of impartibility was shown to govern the originally settled property, as, it was submitted, had been done, the *onus* rested on those who alleged it to show with regard to the after-acquired property that it was partible, and not impartible like the original property. When such a custom has been established as to certain family land, anyone who alleges that others of the family lands are not impartible must prove his allegation. The authorities, it was submitted, showed that. Reference was made to *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1), *Jagdish Bahadur* v. *Sheo Partab Singh* (2), *Ibrahim Ali Khan* v. *Muhammad Ahsan-ullah Khan* (3) and *Rajendra Bahadur Singh* v. *Raghubans Kuar* (4).

The Courts in India had erred in allowing the plaintiff to set up a new case not originally pleaded, namely, that all the properties in suit were not governed by the same law, and in giving him a decree for some of them on the footing that they were partible; and by reason of the fact that that case was not set up in the plaint, the defendant had no opportunity of showing that

(1) (1884) I. L. R., 10 Calc., 792 (807): L. R., 11 I. A., 135 (139, 140).
(2) (1901) I. L. R., 23 All., 369: L. R., 28 I. A., 100.
(3) (1912) I. L. R., 39 Calc., 711: L. R., 39 I. A., 85.
(4) (1908) 11 Oudh Cases, 256 (258, 260).

the intention of the taluqdar was that the lands subsequently acquired should form part of the originally settled lands, and be governed by the same custom of impartibility. The plaintiff, it was submitted, was not entitled to any of the property as being partible, but his suit should have been wholly dismissed.

De Gruyther, K. C. and *B. Dube* for the plaintiff contended that the summary settlement in 1859 had not been made before the 13th of October, 1859, when Autar Singh signed the *kabuliat*, which was not within the time limited by section 3 of Act I of 1869; and that the provisions of that Act were therefore not applicable. The property then settled was consequently not an "estate" under that Act, but was governed by the ordinary Hindu law of the Mitakshara, and was therefore partible. With respect to the after-acquired property, the Courts in India had found that it was not to be treated as being governed by the custom of impartibility set up by the defendant; and there was no condition in the grant which prohibited the partition of that property. There was moreover no intention by the taluqdar shown to incorporate the acquired property with that originally settled. [Lord SHAW referred a passage from the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1) from page 453 of I. L. R., 29 Calc., lines 32 to 36]. Both Courts below had concurrently held to that effect. Reference was made to Act I of 1869, sections 2, 3, 8, 10, 22 and schedule I: Sykes' Taluqdari Law, pages 13, 28, and 285: Mayne's Hindu Law, 7th ed., page 61, para. 54, and page 633, para. 469. Judgements in fact ought not to be disturbed unless shown to be substantially wrong; *Hyder Hossain* v. *Mahomed Hossain* (2): and as to proof of custom *Bhau Nanaji Utput* v. *Sundrabai* (3): also Parliamentary Papers relating to Oudh, Chief Commissioner's letter of the 28th of January, 1859.

Sir H. Erle Richards, K. C., replied.

1913 June 13th:—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

These are two consolidated appeals from a judgement and decree of the Court of the Judicial Commissioner of Oudh, dated the 8th of September, 1909, and arise out of a suit brought by the plaintiff

(1) (1902) I. L. R., 29 Calc., 433: L. R., 29 I. A., 82.

(2) (1872) 14 Moo. I. A., 401 (407).

(3) (1874) 11 Bom. H. C., 249 (269).

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Dwarka Prasad in the Court of the Subordinate Judge of Bara Banki, for partition of certain properties known as taluqa Ranimau, in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara Law.

The two defendants to this action were the plaintiff's elder brother Janki Prasad and their mother Marjad Kuar, and as the mother, under the Mitakshara Law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the plaint.

The defendant Janki Prasad alone contested the suit, the ground of his defence being that the taluqa sued for was, under the provisions of Act I of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu law of inheritance did not apply. The parties thus went to trial on two distinct issues, viz., whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to such properties, or whether they formed in whole or in part, under Act I of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the taluqa in dispute is said to have been formed by one Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856, when the British first occupied the kingdom of Oudh, the taluqa included 21 villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grand father of Suk Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous Proclamation issued in March, 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July, 1859, Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on the 5th of October, 1859, an order was passed

on his application, sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The *Kabuliat*, however, was not signed by him until the 13th of that month.

In the course of the Regular Settlement which followed shortly after, Autar recovered decrees for possession of six more villages. He was thus in possession of some 15 villages when Act I of 1869 was passed into law. Later on he acquired by purchase several other properties.

Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadur, the eldest son of his brother Bisheshur. Jang Bahadur died in 1889, leaving him surviving two sons, viz., the plaintiff and the defendant, Janki Prasad, the latter being the eldest. On Jang Bahadur's death, Janki Prasad came into the possession of the entire property.

The Subordinate Judge has held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the regular settlement, form an "estate" within the meaning of Act I of 1869 and are descendible to a single heir and are consequently impartible. But as regards the several properties Autar Singh acquired by purchase subsequent to the regular settlement the Trial Judge was of opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquisitions with the "estate," they must be held to be governed by the ordinary Hindu law of inheritance. He accordingly decreed the plaintiff's claim in respect of a one-third share in what he calls the "acquired" properties and dismissed the suit as regards the rest.

Both parties appealed to the Court of the Judicial Commissioner of Oudh which affirmed the decree of the Subordinate Judge with a modification in respect of the parties' shares necessitated by the death of their mother Marjad Kuar, which became one-half each instead of one-third.

The plaintiff and the defendant have both appealed to His Majesty in Council against the judgement and decree of the appellate court. The plaintiff contends that the lower courts are wrong in holding that the properties in respect of which his suit has been dismissed, form an "estate" within the meaning of

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the Act, and are, consequently, impartible; whilst the defendant urges that the properties, a half share of which has been decreed to the plaintiff, being accretions to the "estate" or taluqa are equally impartible.

As regards the contention of the plaintiff, the first point to determine is the meaning which the Legislature has attached to the word "estate" with reference to properties coming within the purview of Act I of 1869, and that meaning must be gathered so far as possible from the enactment itself.

The term "estate" is defined in section 2 to mean "the taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in section 3, section 4 or section 5, or the immovable property conferred by a special grant of the British Government upon a grantee." And "taluqdar" is declared to mean a person whose name is entered in the first of the lists mentioned in section 8.

Section 3 declares that:—

"Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April, 1858, and the tenth day of October, 1859, or to whom, before the passing of this Act and subsequently to the first day of April, 1858, a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliyat* executed by such taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Section 8 provides that:—

"Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely:—

"*First.*—A list of all persons who are to be considered taluqdars within the meaning of this Act.

"*Second.*—A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Section 22 lays down the rules relating to intestate succession to the estates of taluqdars whose names have been entered in the second, third or fifth of the lists mentioned in section 8. In the first instance it declares that if any taluqdar whose name is so entered were to die intestate as to his estate, such estate shall

descend "to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April, 1858, and the 10th day of October, 1859." Their Lordships are not omitting from consideration the fact that the *kabuliat* was not executed until the 13th of October. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first regular settlement of the Province, and that his name was entered in the Lists prepared under the statutory provisions of section 8. It is clear, therefore, that Autar was not only a taluqdar, but that his taluqa acquired by virtue of the above-recited proceedings, was an "estate" within the meaning of the Act.

One of the learned Judges in the Court below has considered that the execution of the *kabuliat* after the time-limit mentioned in section 3, deprived Autar Singh's taluqa of the character of an estate defined in the Statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible property. His view may shortly be summarized as follows: as the principal villages included in the taluqa were not acquired either under a grant or a summary settlement made between the two dates mentioned in section 3, the property did not constitute an "estate" defined in section 2; but as it appeared in the evidence that the taluqa had ordinarily devolved upon a single heir on and before the 13th of February, 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in section 22.

The other learned Judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before the 10th of October, 1859.

In their Lordships' judgement the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the

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time-limit, and yet the formal documents connected therewith might not, owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Section 3, which declares the right a taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby," (that is by the summary settlement), "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliat* executed by such taluqdar when such settlement was made." The right the taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed, on the 5th of October, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by section 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the *kabuliat* affected Autar Singh's rights in the properties settled with him in 1859, or differentiated him from the other taluqdars; and although the settlement had been made with him as *malguzar*, he was, in fact, included as a taluqdar in the general lists prepared under the section, and the property of Ranimau was entered against his name as the estate in his possession. Section 10 of the Act provides that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees."

Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "estate" within the meaning of the Act, and are consequently impartible.

The defendant's appeal relates to that portion of the lower court's decree which, affirming the order of the Subordinate

Judge, awarded to the plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Prasad has died since the institution of this appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance.

Both the courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the taluqa. As has been pointed out by this Board in the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession," depends on his intention to incorporate the acquisitions with the original estate.

The courts in India have concurrently found against the defendant on this point, and their Lordships see no reason to differ from their conclusion. Both courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the regular settlement proceedings. The decree of the lower court must, therefore, be varied by the elimination of Kamrauli.

Subject to this variation both appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for Janki Prasad Singh:—*The Solicitor, India office.*

Solicitors for Dwarka Prasad Singh:—*Barrow, Rogers & Nevill.*

J. V. W.

(1) (1912) I. L. R., 29 Calc., 433; L. R., 29 I. A., 32.