BADRI NARAIN SINGH (PLAINTIFF) v. HARNAM KUNWAR AND OTHERS (DEFENDANTS).

P.C.* 1922 Ma .12

[On Appeal from the Court of the Judicial Commissioner of Oudh].

Oudh Estates Act (I of 1869), section 23—Succession—"Ordinary Law"—List 4—Male primogeniture sanad—Custom—Succession of widows—Evidence—Instances prior to sanad—Crown Grants Act (XV of 1895), section 3.

An Oudh taluqdari estate was held under a male primogeniture sanad granted in 1863, and had been entered in list 4 prepared under section 8 of the Oudh Estates Act, 1869, that list comprising those taluqdars to whom section 23 was applicable. By section 23 intestate succession, "except in the cases provided for by section 22," is to be "regulated by the ordinary law to which members of the intestate's tribe and religion are subject". Upon the death of the holder in 1907, intestate, his widow took possession; the appellant, who was the heir if the rule of succession the sanad applied, sued her and other members of the family to establish his title

Held (1) that the words "the ordinary law" in section 23, like the similar words in section 22, clause 11, include the rule of succession laid down in the sanad by which the estate had been granted, (2) that evidence of instances of widows having succeeded prior to the sanad could not be used to set up an existing rule of succession directly contrary to the terms of the sanad, having regard to section 3 of the Crown Grants Act, 1895; further, that a single instance later than the sanad was wholly insufficient to establish a custom in a branch of the family different from that in which the instance had occurred, and (3) that consequently the appellant succeeded.

Dictum in *Brij Indar Bahadur Singh* v. *Janki Koer* (1) and *Parbati Kunwar* v. *Chandarpal Kunwar* (2) explained.

Judgment of the Court of the Judicial Commissioner reversed.

APPEAL (No. 69 of 1920) from a judgment and decree of the Court of the Judicial Commissioner (2nd January, 1917), affirming a decree of the Subordinate Judge of Partabgarh (25th February, 1915).

The suit related to the succession to an Oudh estate of large value called Mahal Tajpur upon the death intestate of the holder in 1907. The estate had been granted in 1863 by a sanad by which on an intestacy it was to descend to the nearest male heir, according to the rule of primogeniture. The grantees had been entered in lists 1 and 4 prepared under section 8 of the Oudh Estates Act (I of 1869); list 4 being "a list of the taluqdars to whom the provisions of section 23 are

* *Present*:—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1877) L. R., 5 I. A., 1, 13.
(2) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.

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applicable." Section 23 provides:—"Except in the cases provided for by section 22 the succession to all property left by taluqdars and grantees and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject."

The suit was instituted by the appellant who was entitled if the rule of succession laid down in the sanad applied. The first defendant (now the first respondent) was the widow of the deceased taluqdar and was in possession. She pleaded, *inter alia*, that the succession provided in the sanad was nullified by Act I of 1869, and that she was the rightful heir under section 23 of that Act. The remaining defendants (respondents), who were other members of the family, also denied the claim of the plaintiff (appellant).

The facts of the case appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit. He held that the estate being in list 4. "the ordinary law" referred to in section 23 did not include the provisions of the sanad. He found that the custom of male lineal primogeniture alleged by the plaintiff was not made out; he therefore found it unnecessary to record any finding whether the estate was impartible or not.

On appeal the decision was affirmed. The first Judicial Commissioner held that "the ordinary law" in section 23 included the sanad. His reasoning appears substantially from the passage cited in the judgment of the Judicial Committee; he pointed out also that if a custom of impartibility can be established in respect of an estate in list 4 a rule of primogeniture imposed by a sanad could not be excluded; he referred further to the Crown Grants Act, 1895, section 3. He found, however, that by the custom of the family widows succeeded before the sanad, and that though the sanad gave a new title to the grantees, the custom was preserved by the family and maintained. He said that in the absence of evidence to show that the custom of the family was one of pure lineal primogeniture (as the plaintiff alleged) and that a widow was excluded, the plaintiff was not entitled to succeed. The second Judicial Commissioner held that the succession was not controlled by the sanad but was governed by

the "ordinary law" as defined by the Oudh Laws Act (XVIII of 1876), namely custom and Hindu law. He found, upon an elaborate consideration of the evidence, that if the plaintiff had established that the estate was impartible, he had failed to prove that widows were excluded, and he said that to his mind the defendant had proved the contrary.

1922, March, 17, 20, 21. *Dunne, K. C.*, and *Kenworthy Brown* for the appellant.—

The appellant was the nearest male heir according to the rule of primogeniture; he was accordingly entitled to succeed under the sanad. The words "ordinary law" in section 22, clause 11, of the Oudh Estates Act, 1869, include the rule of succession laid down in a primogeniture sanad granting the estate: *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1); see also *Sitla Bakhsh Singh* v. *Sital Singh* (2). The similar words in section 23 have the same effect. *Brij Indar Bahadur Singh* v. *Janki Koer* (3), in which the Board referred to the sanad being superseded by the Act, related to an estate on list 2, and was distinguished on that ground in the case first mentioned above. *Parbati Kunwar* v. *Chandarpal Kunwar* (4) arose under list 4, but was decided on a finding as to that custom; the record shows that there was a sanad, but neither side relied on it because, being females, they both would have been excluded by its terms. The fact that the grantees in the present case were not included in list 3 does not indicate that the limitations in the sanad do not govern the succession; they may well have desired that intestate succession to the estate should be governed under section 23 by the sanad, unaffected by the special limitations in section 22, which apply to list 3. The effect of section 3 of the Crown Grants Act, 1895, was to make the sanad control the succession: *Sheo Singh* v. *Raghubans Kunwar* (5). The custom alleged would restore one of the incidents of the Hindu law of succession which was expressly inapplicable by the terms of the sanad. Further, if the estate was impartible, the succession was by survivorship, therefore the

(1) (1910) I. L. R., 32 All., 599: L. R., 37 I. A., 168.

(2) (1921) I. L. R., 43 All., 245: L. R., 48 I. A., 228.

(3) (1877) L. R., 5 I. A., 1, 13.

(4) (1909) I. L. R., 31 All., 457; L. R., 36 I. A., 125.

(5) (1905) I. L. R., 27 All., 634; L. R., 32 I. A., 203.

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appellant as the senior in line was entitled: *Baijnath Prasad Singh* v. *Tej Bali Singh* (1).

De Gruyther, K. C., and *Dube* for the respondents.—

The last contention for the appellant clearly fails, because, having regard to the general confiscation in Oudh, the estate was self-acquired property; further, the case has proceeded on the basis that the family was divided. The sanad does not apply; the words of section 23 are clear, and preclude reference to the sanad in list 4 cases. The title does not rest upon the sanad, but upon the summary settlement; see letter of the 10th of October, 1859, paragraph No. 2 (schedule No. 1 to Act I of 1869). Lists Nos. 2 and 3 are exhaustive of the estates which by custom or the sanad are governed by primogeniture. Inclusion in list 4 shows that the succession was not to be by primogeniture; under section 9 the grantees could have transferred the estate to list 2. The pronouncement in *Brij Indar's case* (2) that the sanad was superseded by the Act should be given effect to in the present case. *Debi Bakhsh's case* (3) arose under list 5, not under list 4, and was therefore one in which under the Act itself primogeniture was to be the rule. The respondents are substantially supported by the decision in *Parbati Kunwar's case* (4), since that arose under list 4 and section 23, but was decided on custom without reference to the sasad. (Reference was also made to the further cases mentioned in the judgment in *Sitla Bakhsh Singh* v. *Sital Singh* (5), and to Sykes' Taluqdari Law.)

Dunne, K. C., replied.

May, 12.—The judgment of the Judicial Committee was delivered by Viscount CAVE:—

This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by which the plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

(1) (1921) I. L. R., 43 All., 228: L. R., 48 I. A., 195.

(2) (1877) L. R., 5 I. A., 1, 13.

(3) (1910) I. L. R., 32 All., 599: L. R., 37 I. A., 168.

(4) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.

(5) (1921) I.L.R., 43 All., 245: L. R., 48 I. A., 228.

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Lal Ajodhia Bakhsh, the ancestor of the plaintiff, belonged to a family of Bisen Thakurs long settled in the district of Partabgarh, and was the owner of an estate called Kundrajit or Shamspur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of Oudh in 1856, this estate, with the remainder of the soil of the province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th of March, 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government.

The sanad was in the form then commonly adopted and contained the following clause:—"It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above-named (bracketed together) were entered as owners of Kundrajit in list 1 and list 4, as prepared under section 8 of the Act. There appears to have been no reason why they should not have been entered in list 3 as owners of an

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estate regulated by the rule of primogeniture; but they may have preferred not to be subject to the special rules of succession which, under section 22 (clauses 1 to 10) of the Act, apply to estates entered in that list. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in list 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible taluq on the terms of the sanad and of the Act of 1869.

Chhatarpal died on the 19th of October, 1899, and was succeeded by his son Lal Ram Kinkar. On the death of the latter without issue on the 6th of October, 1907, his widow, the first respondent, Thakurain Harnam Kunwar, took possession of Tajpur and the lands then held with it. Thereupon, the appellant, Babu Badri Narain Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession; and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam Kunwar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (*a*) under the terms of the sanad, (*b*) by an alleged family custom of succession by male lineal primogeniture, and (*c*) under a will executed by Chhatarpal on the 6th of September, 1899. This will, having been executed less than three months before the death of Chhatarpal, is now admitted to have been inoperative (under section 13 of the Act of 1869) to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to section 23 of the Act of 1869, under which the succession on intestacy to a taluqdari estate entered in list 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the sanad but by the law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

On appeal the Judicial Commissioners differed on the question whether the sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the sanad of 1863 is to have effect, the appellant as the nearest male heir is entitled to the succession; and in the argument for the respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of section 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the Mitakshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment:—"The meaning of the words 'ordinary law' has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate's tribe and religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows' Re-marriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the 'ordinary law' in section 23 is merely meant to imply the personal law uncontrolled by custom or Acts of the Indian Legislature. As pointed out by Lord HOBHOUSE in a case of list 2 the effect of the 11th sub-section of section 22 is simply to refer the parties

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to the law which would govern the descent of the property when the special provisions of the Act are exhausted, and such ordinary law would include custom: *Bhai Narendar Bahadur Singh* v. *Achal Ram* (1). In *Parbati Kunwar* v. *Chandarpal Kunwar* (2) Lord COLLINS applied the same rule to a case of list 4, governed by section 23. In other words, when the special rules of succession laid down in section 22 are exhausted and section 22, clause (11), is reached, or when section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner; and indeed no other conclusion is consistent with the decisions of this Board in *Bhai Narendar Bahadur Singh* v. *Achal Ram* (1), *Debi Bakhsh Singh* v. *Chandrabhan Singh* (3) and *Sitla Bakhsh Singh* v. *Sital Singh* (4). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the Statute and includes any sanad giving title to the property in dispute. It is true that these decisions were rendered with reference to clause 11 of section 22, and not with reference to section 23 of the Act; but the terms of the latter section are precisely similar to those of section 22(11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir BARNES PEACOCK in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (5), that in that case "the limitation in the sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act." But it must be remembered that in that case (which arose under list 2) the contest

(1) (1893) I. L. R., 20 Calc., 649: L. R., 20 I. A., 77.

(2) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.

(3) (1910) I. L. R., 32 All., 599; L. R., 37 I. A., 168.

(4) (1921) I. L. R., 43 All., 246

(5) (1877) L. R., 5 I. A., 1, 13.

was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the sanad; and this being so, the case is no authority for the view that the effect of section 22 (11), or of section 23 of the Act, was wholly to destroy the rules of succession laid down under sanads which had been so recently granted Probably the dictum means no more than this, that the Act supersedes the sanad where the two are in conflict. Reliance was also placed on the case of *Parbati Kunwar* v. *Rani Chandarpal Kunwar* (1) which arose under list 4; but that case was argued (doubtless for good reasons) without any reference whatever to the sanad, and cannot, therefore, be taken as an authority on the question now under discussion.

In their Lordships' opinion, this argument fails

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows; but all these instances, with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad; and they cannot be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate is now held. The Crown Grants Act of 1895, section 3, enacts that all provisions, etc., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Sheo Singh* v. *Raghubans Kunwar* (2). The exception was in the case of the widow of Surajpal, one of the grantees under the sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another branch of the family. This argument, therefore, also fails, and the appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree

(1) (1909) I. L. R , 31 All., 457 : L. R., 36 I. A., 125.

(2) (1905) I.L R., 27 All., 634; L. R., 32 I. A., 203.

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of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside; and that the appellant should be held entitled to possession of Mahal Tajpur with any accretions thereto and to an account and payment of mesne profits. The respondents will pay the costs of the appellant in both courts and his costs of this appeal.

Appeal allowed.

Solicitor for appellant:—*Douglas Grant.*

Solicitors for respondent:—*T. L. Wilson & Co.*

APPELLATE CIVIL.

1921 November, 22.

Before Mr. Justice Piggott and Mr. Justice Walsh.

LACHMI PRASAD (APPLICANT) *v.* BALDEO DUBE AND OTHERS (OPPOSITE PARTIES).*

Act No. VIII of 1890 (*Guardians and Wards Act*), *sections* 29, 30, 47 *and* 48—*Appeal.*

No appeal lies from an order passed under section 30 of the Guardians and Wards Act, 1890.

THE facts of this case were briefly these:—

One Gopi Dube died possessed of some landed property, including some *sir* land. He left behind him certain minor heirs, who inherited the property subject to certain incumbrances. Their names were entered in the revenue papers, and their father, Mahabir Misir, was appointed guardian of their persons and property by the District Judge.

On the 26th of August, 1919, Mahabir Misir applied to the District Judge for permission under section 29 of Act VIII of 1890 to sell the property for Rs. 2,400 in order to clear off the debts due from the estate. On the 1st of November, 1919, while this application was still pending, one Baldeo Dube, one of the creditors, appeared before the District Judge and offered to pay Rs. 2,500 as sale consideration for the property.

On the 10th of December, 1919, the District Judge passed an order in favour of Baldeo Dube that the property be sold to him for Rs. 2,500.

Subsequently, Mahabir Misir, in contravention of the court's order of the 10th of December, 1919, gave a perpetual lease of the

* First Appeal No. 79 of 1921, from an order of Baijnath Das, District Judge of Ghazipur, dated the 14th of January, 1921.