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1938
July, 22

PRIVY COUNCIL

RANI HUZUR ARA BEGAM AND ANOTHER (APPELLANTS) *v.* THE DEPUTY COMMISSIONER, GONDA, IN CHARGE OF THE UTRAULA ESTATE AND OTHERS (RESPONDENTS)*

[On Appeal from the Chief Court of Oudh]

Oudh Estates Act (I of 1869)—Estate in List II—Succession to non-taluqdari movable property

Where taluqdars are entered in List II under section 8 of the Oudh Estates Act, there is a presumption that succession to their non-taluqdari property, both movable and immovable, is governed by the rule which governs succession to the taluqdari property.

Murtaza Husain Khan v. *Mahomed Yasin Ali Khan* (1), and *Thakur Ishri Singh* v. *Baldeo Singh* (2), referred to.

Consolidated Appeal (no. 61 of 1937) from four orders of the Chief Court in its Civil Appellate Jurisdiction (21st April, 1936) which reversed two orders of the same Court in its Original Civil Jurisdiction (27th February, 1935).

Raja Mohammad Mumtaz Ali Khan, taluqdar of Utraula, whose name was entered in List II under section 8 of the Oudh Estates Act obtained two decrees on 22nd April, 1930 against Raja Syed Mohammad Saadat Ali Khan of Nanpara (the 2nd respondent herein) in two suits of 1928. The decrees gave effect to an award of the Commissioner of Oudh, dated 8th April, 1930 which, after finding certain sums due to the taluqdar of Utraula, concluded as follows:

"Lastly, the payment of the annuity to the Raja of Utraula will cease on his death. But should his death occur before the liquidation of the arrears amounting to Rs.2,09,919, payment of these arrears will be completed to his heirs."

Only a small portion of the decretal amount was paid before the death of the Raja of Utraula on 4th

*Present: Lord ROMER, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1916) L.R., 43 I.A., 269, S.C., (2) (1884) L.R., 11 I. A., 135, 148. 19 O.C., 290.

March, 1934, leaving him surviving as his heirs under Mohammadan Law his widow, a minor daughter and two minor sons.

By a notification, dated 29th March, 1934, the Court of Wards assumed superintendence of the estate on behalf of the minor sons. By another notification, dated 22nd January, 1935, the Court of Wards stated it had assumed the superintendence of the person and property of Raja Mohammad Mustafa Ali Khan (the elder son) and by a notification of the same date stated it had assumed the superintendence of the person and estate of Iqbal Ali Khan (the younger son). The Deputy Commissioner of Gonda was placed in charge of the two estates.

In the meanwhile, namely, on 18th September, 1934, Rani Ara Begam, the widow of the late Raja, applied for execution of the decrees obtained by the late Raja.

Her applications purported to have been made by herself in her personal capacity as an heir of the late Raja and as guardian of her minor daughter and for the benefit of her minor sons.

Objections were filed by Raja Saadat Ali Khan, the Judgment-debtor, and by the Deputy Commissioner of Gonda on behalf of the minor sons. They contended that the late Raja, having been entered in List II, succession to all his property movable and immovable was governed by the rule of single heir succession and devolved on the elder son and that the widow was not an heir and had no interest in the decrees and was not entitled to make the applications.

The trial Judge (NANAVUTTY, J.) allowed the applications, holding that no custom of single heir succession could be made applicable to movables.

Both the judgment-debtor and the Deputy Commissioner of Gonda as representing the elder son appealed. In these appeals, the Deputy Commissioner as representing the younger son was made a respondent.

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The Appellate Court (KING, C. J. and MOHAMMAD ZIA-UL-HASAN, J.) held that there was a presumption that the custom of single heir succession which was applicable to the estate was also applicable to the property in dispute and remitted the following issue for a finding by the trial Judge:

"Has Rani Huzur Ara Begam rebutted the presumption that the family custom of single heir succession, which is applicable to the estate, is also applicable to the property in suit?"

The trial Judge found on this issue that the Rani had failed to rebut the presumption and the Appellate Court accepted that finding and dismissed the applications.

From the orders dismissing her applications, Rani Huzur Ara Begam, for herself and as guardian of her minor daughter, brought the present appeals impleading the Deputy Commissioner of Gonda in charge of the estate of the elder son, Raja Mohammad Saadat Ali Khan and the Deputy Commissioner of Gonda in charge of the estate of the younger son as respondents.

23th, 24th and 27th June, 1938. *Eddy, K. C., Rashid and M. P. Srivastava*, for the appellants: The case depends on the interpretation and application of *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*,(1). In *Rani Jagadamba Kumari* v. *Wazir Narain Singh*(2), it was pointed out that Murtaza's case dealt with immovable property and it was distinguished. It is submitted that the Appellate Judges in the High Court misunderstood Murtaza's case. The Oudh Estates Act, sections 1 to 5 and 7 were referred to. "Estate" under the definition in section 2 is limited to immovable property. Section 7 is important. If it does include money, then a certain procedure must be followed to make the money devolve with the estate. If it does not include money, then there is no provision in the Act in regard to money

(1) (1916) L.R., 43 I.A., 269, S.C., 19 O.C., 290.

(2) (1922) L.R. 50 I.A., 1 p. 9 S.C., I.L.R , 2 Pat., 319.

Sections 8, 10, 22, 23 and 32 and Chail Behari Lal's Oudh Estates Act, pages 91, 100 and 103 were referred to. It is said that because the name is in List II, there is a presumption that movables devolve in the same way as the estate. Section 7 is inconsistent with such a presumption. The Act, so far as the taluqdari estate is concerned, abrogates the ordinary law. The ordinary law here would be the Mohammadan Law, unless it is proved to have been altered by custom and there is no proof of a custom altering the law here. In the absence of express language Parliament does not intend to abrogate ordinary law (Halsbury, Vol. 27, p. 148, para. 278.) If the legislature intended that movable should follow the special rule of descent prescribed for the estate as defined in the Act, it would have said so.

The following cases were referred to *Maharaja Pertab Narain Singh* v. *Maharanee Subhao Koer* (1), *Murtaza Husain Khan* v *Mahomed Yasin Ali Khan* (2), *Rani Jagadamba Kumari* v. *Wazir Narain Singh* (3), *Shib Prasad Singh* v. *Rani Prayag Kumari Debi* (4), *Mohammad Sadiq Ali Khan* v. *Fakhr Jahan Begam* (5), *Zarifun Nisa* v. *Shafiq-uz Zaman Khan* (6).

Rashid, followed: Because by Mohammadan Law there is no distinction between ancestral and acquired property, it does not follow that that cannot be modified by custom. The custom taken cognizance of by the Act is the custom attached to the taluqdari estate. Unless a declaration is made under section 32, non-taluqdari property does not accrete to the estate and succession is not governed by it.

Ratcliffe, Wallach and Russell for the 1st respondent: The case is concluded by *Murtaza's* case (*supra*). The judgment of the High Court in that case which is reported in 16 O. C. 209 shows the dispute was to all the non-taluqdari property. There was no limitation to any

(1) (1877) L.R., 4 I.A., 228—246, S.C., I.L.R., 3 Cal., 626.
(2) (1916) L.R., 43 I.A., 269 S.C., 19 O.C., 290.
(3) (1922) L.R. 50 I.A., 1 p. 9 S.C., I.L.R., 2 Pat., 319.
(4) (1932) L.R., 59 I.A., 331 S.C., I.L.R., 59 Cal., 1399.
(5) (1931) L.R., 59 I.A.I., S.C., I.L.R., 6 Luck., 556
(6) (1928) L.R., 55 I.A., 303 S.C., I.L.R., 3 Luck., 372.

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particular property or distinction between movable and immovable property. In two subsequent cases it was said that the decision in *Murtaza's* case applied to immovable property, but we now know as a matter of fact by reference to the records that movables were included in the claim in that case.

Shiba Prasad Singh's case has nothing to do with custom. It says a man may by his own act incorporate other immovable property with his impartible estate. The question was whether he had done so. A claim that movables were incorporated failed. No custion was alleged or proved. What the custom is, is always a question of evidence. The entry in List II, is evidence of custom. The presumption arises from that. The Act comes in only as a piece of evidence and the evidence is conclusive under section 10 that, as regards taluqdari property there is a custom. *Raja Mohun* v. *Nisar Ahmed Khan* (1).

Section 7 gives a power to regulate devolution of certain property. It has nothing to do with what is the custom. It makes the property so dealt with inalienable. It does not deal with all movable property.

Pugh, K. C., Hyam and Siraj Husain, for the 2nd respondent: *Murtaza's* case (*supra*) is not the only one on the point raised here. In *Thakur Ishri Singh* v. *Baldeo Singh* (2), it was held that it was rightly presumed that other property devolved in the same way as the taluqa.

It is important to see in these cases whether the estate is a taluqdari estate or not and whether the taluqdar is a Hindu or a Mohammadan. Decisions on Hindu impartible estates are not applicable. Once the rule of single-heir succession is established in a taluqdari, it applies to all the property. *Nawab Ibrahim Ali Khan* v. *Nawab Muhammad Ashan Ullah Khan* (3), was referred to.

(1) (1933) L.R., 60 I.A., 103, 115, S.C., I.L.R., 8 Luck., 65.
(2) (1884) L.R., 11 I.A., 135, 148, S.C., I.L.R., 10 Cal., 792.
(3) (1911) L.R., 39 I.A., 85, S.C., I.L.R., 39 Cal., 711.

Ordinary law is custom *Narindar Bahadur Singh* v. *Achal Ram* (1). — —

Sidney Smith, for the 3rd respondent: The Mohammadan Law of succession is based on the precepts of the *Koran*. *Hakim Khan* v. *Gool Khan* (2), *Ameer Ali's* Mohammadan Law (4th ed.), Vol. II, p. 42.

It is important that this should be borne in mind in considering evidence of custom modifying the general rule. Custom may be limited to the principal estate. *Zarif-un-Nisa's* case (*supra*), p. 316.

It has been found to have been so limited in the case of Hindus *Janki Pershad Singh* v. *Dwarka Pershad Singh* (3) and *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* (4).

In Hindu as in Mohammadan Law, ordinarily, there is no single-heir succession. Words used in the cases relating to Hindus should not be interpreted differently when used in those relating to Mohammadans. Reference was made to the observations in *Maharaja Pertab Narain Singh's* case (*supra*).

Eddy, K. C., replied: There is a distinction in the case of movables. Wilson's Mohammadan Law (6th ed.) p. 450. Section 8 of the Act deals with the taluqdari estate. It does not go further. The facts here are different from the facts in *Murtaza's* case (*supra*). That case can be distinguished and it is not necessary for me to say it is wrong. In that case the defendant was in possession till he died in 1909, that is before the amending Act.

Reference was made to *Shah Mukhun Lall* v. *Kishen Singh* (5).

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

Raja Mohammad Mumtaz Ali Khan, Taluqdar of the Utraula Estate in the district of Gonda of the Oudh Province, obtained, on the 22nd April, 1930, against Raja

(1) (1893) L.R., 20 I.A., 77 S.C., I.L.R., 20 Cal., 649.
(2) (1882) I.L.R., 8 Cal., 826.
(3) (1913) L.R., 40 I.A., 170 S.C., I.L.R., 35 All., 391.
(4) (1918) L.R., 45 I.A., 134 S.C., I.L.R., 40 All., 470.
(5) (1868) 12 M.I.A., 157—178.

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Saadat Ali Khan, taluqdar of the Nanpara Estate, two decrees for the recovery of certain sums of money. These decrees were based upon an award made by the Commissioner of Lucknow Division on the 8th April, 1930. The award, after finding the amounts of money due to the taluqdar of Utraula concluded as follows:

> "The payment of the annuity to the Raja of Utraula will cease on his death. But should his death occur before the liquidation of the arrears amounting to Rs.2,09,919, payment of these arrears will be completed to his heirs."

Raja Mohammad Mumtaz Ali Khan died on the 4th March, 1934, leaving him surviving four persons who were his heirs under the Mohammadan law; namely, his widow Rani Huzur Ara Begam, his minor daughter Rajkumari Fatma Begam, and two minor sons Raja Mohammad Mustafa Ali Khan and Iqbal Ali Khan.

On the 18th September, 1934, the widow Rani Huzur Ara Begam, on behalf of herself and as guardian of her daughter, filed in the Chief Court of Oudh two applications for execution of the two decrees. The total amount for which execution was sought, was Rs.1,85,925-2-8 with reference to one decree and Rs.11,43,227-5-4 with reference to the other decree. The applications expressly stated that they were made by the widow in her personal capacity and as guardian of her minor daughter, and also for the benefit of the two minor sons.

The judgment debtor challenged the right of the widow to execute the decrees obtained by her husband. Her right was disputed also by the Deputy Commissioner of Gonda who, as the representative of the Court of Wards, was in charge of the persons and properties of the two minor sons. He asserted that under the law and the family custom of single heir succession, the estate of Raja Mohammad Mumtaz Ali Khan, including his rights under the decrees, devolved on his elder son Raja Mohammad Mustafa Ali Khan alone; and that neither the widow nor his other children were entitled to succeed to any portion of his estate. He accordingly denied the right of the applicant to execute the decrees.

Now, the taluqdar of the Utraula Estate is named in list 2 of the taluqdars prepared under section 8 of the Oudh Estates Act, I of 1869, whose estate, according to the custom of the family on or before the 13th day of February, 1856, ordinarily devolved upon a single heir. Section 10 of the statute provides that the Court shall take judicial notice of the said list and regard as conclusive the fact that the person named therein is such taluqdar. In other words, there was a pre-existing custom attaching to the estate on which its inclusion in list 2 was based. There is, therefore, an irrebuttable presumption in favour of the existence of the custom of the family by which the estate devolves on a single heir, but the provision as to the conclusiveness of the custom is confined to the estate coming within the ambit of the statute. It does not apply to any property which is not comprised in the estate or taluqa. What is the rule which governs succession to non-taluqdari property? If immovable property forming part of the taluqa is governed by the custom of single heir succession, there is no *prima facie* reason why immovable property, which is not comprised in the taluqa, should follow a different rule.

Indeed, it has been decided by this Board that there is a presumption that the rule as to succession to a taluqa governs also the succession to non-taluqdari immovable property; *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (1). It must, therefore, be taken as a settled rule that, whereas the entry of a taluqdar in list 2 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. The only difference is that, while in the case of taluqdari estate there is an irrebuttable presumption in favour of the rule of devolution on a single heir, the presumption in the case of non-taluqdari immovable property may be rebutted by evidence proving a different rule.

(1) (1916) L.R., 43 I.A., 269.

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The question than arises whether there is any other rule in the matter of succession to the non-taluqdari movable property left by the taluqdar. As observed in *Thakur Ishri Singh* v. *Baldeo Singh.* (1).

> " their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluka to the law relating to all other family property, and says there is a presumption from the actual decisions relating to the taluka that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to show that the other family property followed a line of devolution different from that of the taluka."

Their Lordships' attention has been invited to section 7 of the Act which provides that if a taluqdar or grantee desires that any elephants, jewels, arms or other articles of movable property belonging to him should devolve along with his estate, he should make an inventory thereof and deposit it in the office of the Deputy Commissioner of the district wherein his estate is situated. Thereupon the articles mentioned in the inventory shall be enjoyed and used by the person who under, or by virtue of, the Act may be in actual possession of the said estate.

It is argued that the necessity for making this special provision for the devolution of heirlooms mentioned in the inventory arose because the legislature contemplated that movable property of a taluqdar would devolve, not on a single heir along with the estate, but upon the persons who might be his heirs under the ordinary law. Their Lordships think that the object of the section was to enable the taluqdar to ensure that the heirlooms mentioned in the inventory should pass along with the estate in all circumstances, but it does not warrant the inference that the legislature intended that the descent of movable property, for which no inventory was made, should be governed by the ordinary law.

The result is that the non-taluqdari property, immovable as well as movable, is governed by the custom

(1) (1884) L.R., 11 I.A., 135(148).

applicable to the taluqa, as there is no evidence to prove a custom to the contrary. The judgment of the Court of Appeal, dissenting from that of the Single Judge, of the Chief Court of Oudh, must, therefore, be affirmed. Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs to be paid to the respondent the Deputy Commissioner as representing the elder son, Raja Mustapha Ali Khan, the owner of the Utraula estate.

Solicitors for the appellants: *Nehra & Co.*

Solicitor for the Deputy Commissioner (1st respondent): *The Solicitor, India Office.*

Solicitor for the Deputy Commissioner (3rd respondent): *Hy. S. L. Polak & Co.*

Solicitor for the 2nd respondent—*Barrow, Rogers and Nevill.*

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APPELATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge, and Mr. Justice G. H. Thomas

1937
October, 8

BANSIDHAR AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* MUSAMMAT NAWAB JAHAN BEGAM AND OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 53—"Transfer which defeats or delays creditor", meaning of—Preference of one creditor to another, whether means a fraudulent transfer —Debtor executing deed of gift in favour of his wife for her dower debt—Gift, whether offends against provisions of section 53, Transfer of Property Act—Oudh Laws Act (XVIII of 1876), section 5—Mahomedan wife with respect to her dower debt, whether a creditor.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid. Where

*Second Civil Appeal No. 338 of 1935, against the decree of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 8th of July, 1935, upholding the decree of Pandit Brij Kishan Topa, Civil Judge of Malihabad at Lucknow, dated the 22nd of December, 1933.