

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Ishri Singh v. Baldeo Singh, from the Court of the Judicial Commissioner of Oudh; delivered February 12th, 1884.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS case has been argued so recently that the introductory facts need not be recapitulated. It will be sufficient to bear in mind that the suit concerns property of two classes, that comprised in list A and that comprised in list B, to which quite different considerations apply.

With respect to the property in list A, the whole controversy turns upon the validity and the character of the instrument which is marked as exhibit C in the cause, being an instrument executed on the 28th of June 1871, by Maharaj Singh, for the purpose of effecting a transfer of the property contained in it to Baldeo Singh the Respondent. It will be convenient first to consider the character of the instrument, because certain arguments were advanced against its validity depending entirely on the hypothesis that it is a transfer operating *inter vivos*, and their Lordships have come to the opposite conclusion, namely, that it must be considered as a will.

The reasons for considering it to be a will are these: It answers the definition of a will which is contained in section 2 of Act I. of

1869. It was registered as a will; and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of Maharaj Singh. It provides for contingencies which are not ascertainable, or may not be ascertained, until the death of the testator; for instance, the contingency of his having a child, which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to anybody any possessory or present interest until the death of Maharaj the donor. And it makes a gift to the children of Maharaj, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction?

As regards judicial opinion, it may be observed that the question of will or deed was in issue between Baldeo and Ishri after the death of Maharaj, before the Deputy Commissioner of Sitapur, upon the application for mutation of names; and he held it to be clearly a will. The Judicial Commissioner in the present case gives no opinion upon the point. The District Judge thinks it is a deed, though he says it is not very material whether it is held to be one or the other. His reasons for thinking it to be a deed are that the donor Maharaj uses the word tamlik ("assign") and calls his deed a tamliknamah, and he has it stamped as if it were a deed. It appears that the stamp is not exactly that which the instrument would bear if it were a deed of assignment, but the District Judge says it is not so far distant from it but that it carries to his mind a conviction that the stamp,

coupled with the use of the name, shows that Maharaj intended something different from a will. Then he says that it cannot be a will, because it affects the property in the lifetime of Maharaj; but that seems to their Lordships to be an assumption of the question. Of course if it affects the property in the lifetime of Maharaj it cannot have a testamentary character, but the very question is whether it does affect the property in the lifetime of Maharaj. The District Judge does not assign any additional reasons for thinking it does affect the property in that way.

Mr. Woodroffe in his argument relied very strongly upon the use of the word "assign," and upon the reservation of a life interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. Woodroffe wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument; but the instrument was prepared by Lal Sundar, and we must not construe with too great nicety, or assign too much weight to, the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect to this class of property. So with respect to the reservation of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to

operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole therefore, looking at what are the substantial characteristics of the document which have been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have a decided preponderance over those which would lead them to hold it to be a deed.

It remains to consider the objections to the validity of the instrument considered as a will. First it was said that the disposition made by it was beyond the power of Maharaj Singh, because the property was governed by a previous will or declaration, whichever it may be, of Beni Singh, dated the 8th March 1860, which fixed a character upon the property that no subsequent possessor could depart from. The answer to that is that Act I. of 1869, section 11, gives not only to the original Talukdar, but to every heir and legatee of a Talukdar, power to transfer or to bequeath the estate which is granted to him. It was suggested that section 11 is controlled by section 19, in which there is a proviso "that nothing herein contained shall affect wills made before the passing of this Act." But section 19 is for the purpose of applying to wills made under Act I. of 1869 a number of sections contained in the Indian Succession Act; and their Lordships are of opinion that the proviso only applies to the sections or provisions contained in section 19, and not to those contained in the whole of Act I. of 1869.

Then it is said that there was undue influence used to coerce Maharaj Singh into executing the instrument. On that point there is the finding of both the Courts below against the Appellant, and the subject-matter is one on which this

Board would be exceedingly reluctant to disturb concurrent findings of the Court below. But it is said that they ought to be disturbed, because evidence of undue influence was tendered and rejected. It becomes important then to see whether there was any evidence tendered for the purpose of showing any undue influence. It is not shown that any such evidence was tendered, excepting what is called a revocation, or an attempt to revoke, by Maharaj, long after the date of the instrument in question. Now of course it might happen that a revocation or an attempt to revoke should be accompanied by circumstances showing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question. But no such circumstances are suggested. In the argument of Counsel on page 104 of the record nothing is spoken of but the bare fact of what is called the revocation, which it is said is a relevant fact corroborative of another relevant fact, viz., the undue influence. On the passage which shows how the Court dealt with the matter at page 114 the same remark occurs. And the reasons given for appealing to the High Court seem to make it quite conclusive that no other evidence was tendered. There are two separate reasons at page 149 of the record, one relating to undue influence and the other relating to the revocation. The one relating to undue influence uses this language:—"From the time when and the
" manner in which document C was executed,
" and the circumstances under which such an
" unnatural and unusual disposition of a valuable
" property was unnecessarily made by Maharaj
" Singh, the presumptions and probabilities are
" very strong in support of the oral evidence
" adduced by the Plaintiff in proof of the docu-
" ment having been obtained by means of fraud,
" misrepresentation, coercion, and undue in-
" fluence." That raises the whole question as

to what occurred at the time when the document was executed; and no evidence was excluded on that point. Then the 18th reason for appeal is: "The Lower Court is wrong in having excluded oral evidence of the cancellation of the document C by Maharaj Singh"; and it goes on to argue that oral evidence of that fact was admissible. So that it is quite clear that the fact alone was to be proved by the rejected evidence, and it is impossible to suggest that the fact standing alone would have any bearing on undue influence used on the execution of the instrument.

All the other arguments against its validity, as to its return into Maharaj's hands, its cancellation, the non-delivery of possession, and so on, turn upon the hypothesis that the instrument was a transfer and not a will; and therefore it is not necessary to make any further observations upon them. The consequence is that all the objections to exhibit C fail; and as to list A, the suit must be decided against the Appellant.

Now their Lordships come to list B, which comprises things not affected by exhibit C. With respect to that property there was an alteration in the issue settled by the First Court, and a great deal of argument was used to show that there ought to have been no such alteration; but it is quite clear that the Appellant is not damnified by it, whether it was right or wrong. If he could claim the whole of the property and when that was decided against him could fall back and claim half, he might possibly be injured by the alteration of the issue; but he cannot do that, because the impartibility of the property is and always has been common ground between him and the Respondent. Treating the property as impartible, the case can be argued in favour of the Appellant just as well under the issue as it stands as it could be argued under the issue as it was originally framed.

As the issue stands the argument is presented

in this way : Mr. Woodroffe says that as between Beni and his three sons the latter take by way of unobstructed inheritance ; that if the property had been subject to the ordinary law of the Mitakshara, on Beni's death the three sons would have taken ; but it is an impartible property, and therefore the eldest son Maharaj took the whole ; on the death of Maharaj the question comes, who is the heir to Beni ; and again, the estate being impartible, the eldest must take the whole. And a passage was read from Mr. Mayne's "Hindoo Law," referring to authorities, and saying that in general such estates—that is, impartible estates—descend by the law of primogeniture.

Now however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the law of Primogeniture, it is impossible to say that there is no such guide in this case. As to the Taluk, there is a great deal of evidence to the effect that the law of Primogeniture has not prevailed. On the 20th February 1860, Beni Singh, the then Talukdar, being called upon to state what the law of devolution of the estate is, says:—
 " The usage established by prescription in
 " petitioner's family is still in force ; namely, that
 " out of several sons an able one had up to
 " this time been selected and nominated as
 " Talukdar, without reference to seniority " ; and then he prays that the Government will select an able one. That is to say, according to him, the law which is familiar to us under the name of Tanistry, or something very like it, prevailed in his family.

On the 8th March 1860 Beni Singh executed an instrument by which he states his desire that after his death his estate shall be maintained in his family entire and undivided according to the custom of Raj-gaddi, the younger brothers

receiving maintenance from the Gaddi-nashin, the successor to the estate for the time being. That document is not without ambiguity, but it does not assert the law of Primogeniture with clearness.

The next document is a parwana, issued by the Deputy Commissioner of Sitapur to Beni Singh on the 19th of August 1861; and it seems to have been issued because the Government had not been told with exactitude what the rule of succession was or was to be. The parwana runs thus:—"You are instructed that if the rule of Primogeniture or the custom of Masnad Nashin be not in force in your family, it is essentially necessary that you should execute a will naming your successor therein." Now Beni Singh does not reply to that, that the rule of Primogeniture was in force in his family, and therefore he did not wish to execute a will; but he answers, "In compliance with your order conveyed in the foregoing letter, I will execute my will in favour of an heir." It does not appear that Beni Singh did execute any will, but he promised to make a will on the footing that the rule of Primogeniture was not in force in his family.

The next act is the formation of the lists of Talukdaris; and in that important operation we find the Taluk entered, not in list 3 which contains the Primogeniture estates, but in list 2 which contains the estates which go to a single heir.

Now in all these proceedings it is the Taluk or the property comprised in list A which is the main object, though statements are made in general terms as to the custom of the family. But in 1872 a suit was instituted by Ishri, the present Appellant, to recover from Maharaj Singh the Taluk, and also moveable property valued at Rs. 84,000. Baldeo Singh was also made a defendant to the suit, so that whatever was decided in that suit was decided between

the parties to this Appeal. The Rs. 84,000 would seem to come under the same considerations as the moveables in list B in the present suit. It is observable that in the present suit list A contains no moveables at all. All the moveables are in list B; and though it is not so clear as might be wished, the probability is that the moveables which were the subject of the suit of 1872 were governed by the general custom of the family.

In that suit Ishri filed a written statement in which he says, "On the 20th February 1860 Plaintiff's father, by a will of the same date."—meaning the statement made to the Government,—"stated the family usage regarding succession, which Plaintiff's father desired to be followed after his death." Then he is examined; and in his examination he says, "In my family the eldest brother has never succeeded to the Taluka;" and he gives one or two instances to show that such is the fact. In giving judgement the Deputy Commissioner of Sitapur observes that all he has to consider is the Plaintiff's title to the Taluka Kanhmow. He takes a distinction between the considerations that apply to the Taluka Kanhmow and the considerations that apply to Nimchaina,—something which was the subject of a subsequent grant; but he takes no distinction between the considerations that apply to Taluka Kanhmow and those which apply to the moveables on which he is deciding.

The case set up by Ishri principally consisted of a document which was held to be forged, and it is remarkable that in that document he continues to put into Beni's mouth the assertion of the principle that the ablest person is to succeed—and after extolling the intelligence and gravity of temper and other good qualities of Ishri Beni is made to say in the forged instrument that he desires Ishri to succeed him in preference to

Maharaj or Baldeo. But the Deputy Commissioner of Sitapur dismissed the suit on the ground that, though there was evidence that it was the custom of the family for the most able to succeed, there was no evidence that Ishri had been selected as such. Towards the end of his judgement he says, "There is no doubt that this was the custom in most Talukas in this district, and was probably the custom of the smaller Talukas in the greater part of Oudh. Wills however at that time were unknown."

That seems very like a decision with regard to property other than the Taluk, that Tanistry rather than Primogeniture was the governing rule of the family. Even if the decision concerns the Taluk alone, their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the Taluk to the law relating to all the other family property, and says there is a presumption from the actual decisions relating to the Taluk 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 Taluk.

Whether the evidence would prove the case as regards list B in favour of the Respondent if he were the party claiming and the Appellant were in possession, is not now the question. The question is, whether the Appellant, having the *onus probandi* on him to show that Primogeniture is the law of the family, has proved his case; and he certainly is very far indeed from proving his case, the evidence so far as it goes being the other way.

The Appellant therefore fails on all his points; and their Lordships will humbly advise Her Majesty that the Appeal be dismissed with costs.