*Reasons for the Report of the Lords of the Judicial Committee on the Appeal of Bahadur Singh and Others* v. *Mohar Singh and Others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 30*th November* 1901.

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Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

The suit out of which this Appeal has arisen was one for recovery of some jungle land called Guljawari. This land was formerly the property of one Mohar Singh who died before the year 1847 and probably as early as 1835. The Plaintiffs and present Appellants claim to be the next of kin *ex parte paterna* and heirs of Mohar Singh. The Defendants and Respondents claim under a title derived from his widow Pritu who had been recognised as proprietor of the land at the Settlement of 1847. Pritu died in 1892 and thereupon the Appellants claimed to succeed on the footing of her having had only a Hindu widow's estate and they allege that the alienation made by Pritu under which the Respondents claim is invalid.

Issues were stated by the Subordinate Judge for the purposes of deciding the various questions which arise on the pleadings, the first issue being, "Are the Plaintiffs entitled to bring this suit?"

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All the issues were decided by the Subordinate Judge of Dehra Dun in favour of the Plaintiffs and by his decree dated the 31st January 1896 he ordered that the Plaintiff's claim be decreed with costs. The decree was reversed in the High Court of the North-Western Provinces. The learned Judges of that Court held that the Plaintiffs had failed to make out their title as heirs of Mohar Singh and therefore allowed the Appeal and dismissed the suit without considering the other issues in the case. The first question therefore is whether the Plaintiffs have proved their title.

The Appellants have adduced both documentary and oral evidence in support of their title. But before considering the evidence it will be convenient to state the outlines of the pedigree put forward by the Appellants. They are the sons and grandsons of three brothers named Bishun Sandal and Zorawar. These three brothers were the sons of one Narpat who was a direct descendant in the fourth degree of Hukmat the alleged common ancestor. Mohar (it is said) was also descended in the fourth degree from Hukmat. His grandfather was called Chaini in the proceedings of 1847 but is referred to as Partab in the pedigree now put forward.

The documentary evidence consists of the Settlement Proceedings in 1847 and 1866. It is a little difficult to follow the proceedings before the Settlement Officer in 1847. Zorawar and Bishun both filed petitions claiming possession of the Zemindari of Dain Adhoiwala which includes the lands in suit. The story told by the claimants was that the property had been jointly purchased by Chaini the grandfather of Mohar and Ratan the grandfather of the claimants and that on a division Chaini acquired Adhoiwala. Bishun said that Chaini and Ratan were own brothers Zorawar described them as

cousins. It is however apparent throughout these proceedings that the term "brothers," is used in a loose sense. What is meant by both deponents is that they were members of one family. Zorawar in his deposition says "now my right is this that Mohar Singh died "leaving only his wife" and the ground on which they sought immediate possession was that Pritu had forfeited her estate by misconduct. There is not a trace on these documents of the effective assertion of any title by Pritu otherwise than as widow of Mohar and indeed the deposition of her Mukhtar Sahab Singh shows what her title was. Their Lordships think it plain that the three brothers were then claiming as the heirs of Mohar and in no other character.

Mr. Ross, Superintendent of the Settlement Department, in his record of the proceeding before him stated that after perusing the papers and hearing the statement of the parties it appeared that both the parties, *i.e.*, the husband of the person now in possession (Pritu) and the claimant were the descendants of a common ancestor and that Pritu was a widow having no heir or child. He further stated that Pritu being asked to state who would be the owner of her estate after her death replied, "If Zorawar, Bishun and Sandal, "the claimants undertake to pay the debt which "is due by me on account of the revenue of this "Dain or which may hereafter be due by me "and if they are obedient to me and I am "thoroughly satisfied with them they will be "owners of my estate after my death but so long "as I am alive I have every sort of power in "respect of my estate." Mr. Ross seems to have advised or put pressure on the claimants to act according to the conditions alleged by Pritu and made an order accordingly.

The Record of Rights showing the shares in Dain Adhoiwala as prepared under Regulation IX. of 1833 at the time of Settlement in

1848 is as follows: "As to the appointment of "Lambardar—after my death Zorawar Sandal "and Bishun who are own brothers will become "the owners of this estate in equal shares pro- "vided they pay the present and future debts "and remain obedient to me and one of "them whom the Collector will think fit for "lambardarship will be appointed lambardar."

These proceedings at least show that the claim of kinship now put forward is not a recent invention but was made nearly fifty years before the commencement of the present suit and was not then seriously controverted if it was not in terms admitted. The learned Judges in the High Court decline to regard the statement of Pritu as an admission of relationship or recognition of the Appellant's ancestors as her successors. The whole proceeding however is unintelligible on any other footing. Pritu could not designate her successors or bind the reversion after her death. On the other hand unless the brothers were assumed to be the then heirs of Mohar they had no interest in the matter. Whatever was said or done is not of course conclusive upon the Respondents or perhaps standing alone very strong evidence in favour of the Appellants but their Lordships think it was a recognition on her part both that her husband's heirs (which is the character in which the three brothers claimed) were entitled to succeed her and also that she at any rate was not prepared to contest their claim to be such heirs. The rather unintelligible conditions which the three brothers were induced by Mr. Ross to acquiesce in as the price of a recognition of their title to succeed Pritu do not seriously detract from the general effect of the proceedings in 1847–48.

The learned Judges seem to find some contradiction to the entry made at the settlement of 1847–48 in the statement made by Pritu in the record of rights and village administration paper of 1866–67.

" I have no heir to succeed me after my death. " Therefore I cannot propose anything in regard " to the office of lambardar."

This of course is strictly accurate if Pritu had only a widow's estate. Bishun Sandal and Zorowar had claimed and the Appellants now claim as heirs of Mohar and not as heirs of Pritu. This can hardly have been overlooked by the learned Judges.

The only oral evidence which need be noticed is that of two of the Plaintiffs and Appellants Hira and Bahadur. Hira is a son of Bishun and he states the descent of his father and mother from the common ancestor in the same way as was stated in 1847 except that he calls Mohar's grandfather Partab instead of Chaini. He says he learnt the particulars of his family from his elders. He also says that he found an old genealogical tree in the house but for some reason it was not produced and the Respondents do not appear to have pressed for its production. If it had been produced it would of course have been treated with suspicion. The learned Judge comments on his evidence because he does not know whether the father of Mohar Singh had any other son (it is not suggested that he had) or what was the name of the husband of Dando the paternal aunt of Mohar which seems a little hypercritical and also on the non-production of his genealogical tree.

Bahadur is the grandson of Zorawar from whom he says he obtained information about his family pedigree. He also speaks of the names of ancestors being called out on the occasion of marriages and says that in performing the ceremonies of sradh and tarpan the names of the father grandfather and of all the ancestors he can remember are repeated. He adds a detail in the descent of Mohar from Hakumat Singh viz. that Nupa who was Mohar's great grandfather had three sons Chaini Partab and Chaila.

This may account for the differences in the name of Mohar's grandfather in the pedigree of 1847 and that in the present suit. One brother may have been mistaken for the other. The variation is not a mark of untrustworthiness, but rather points to a more careful investigation.

There is also evidence that Pritu in her lifetime was on good terms with the Appellant's family and that Hira performed her funeral rights.

Both Hira and Bahadur were cross-examined at great length but there is no suggestion throughout the cross-examination of any other person as a possible heir nor is there any attempt to attack any particular link in the chain.

It is of course for the Plaintiffs to make out their title and they can only succeed on the strength of their own title. But their Lordships think that the Appellants have given admissible evidence which in the absence of any counter evidence and in the circumstances sufficiently supports their title.

Mr. Cowell suggested that all statements made to the witnesses Hira and Bahadur since the year 1847 were inadmissible under Section 22 (5) of the Indian Evidence Act as being made *post litem*. It does not however appear that the heirship of the then claimants was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case.

This Appeal was originally heard *ex parte* and the only question on which their Lordships were called upon to pronounce an opinion was whether the Appellants had sufficiently proved their kinship. Subsequently the Respondent obtained leave to appear and put in a case and their Lordships having heard the Respondent are now in a position to dispose of the whole case.

The only additional point argued by Mr. Cowell on the Respondent's behalf was that the

Appellants are estopped by what took place in 1847–8 from disputing Pritu's right to alienate the property. This argument fails both in fact and in law. There is no evidence of any representation on which to found an estoppel and even assuming that the arrangement made by Mr. Ross amounted to a contract between the then claimants and Pritu such a contract is not binding on the Appellants. According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The Appellants claim in their own right as heirs of Mohar when the succession opened and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent.

Their Lordships have already intimated that they will humbly advise His Majesty that the order appealed from be reversed and that the decree of the Subordinate Judge should be restored.

The Respondents will pay the costs of this appeal including those of the first hearing.