

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakurain Balraj Kunwar and Another v. Rae Jagatpal Singh, from the Court of the Judicial Commissioner of Oudh; delivered the 14th May 1904.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ARTHUR WILSON.

*[Delivered by Lord Macnaghten.]*

This Appeal raises a question under the Oudh Estates Act, 1869, as to the succession to property which formerly belonged to Rae Pirthipal Singh, who died in June 1866, and whose name was entered, after his death, in List I. and List II. of the lists mentioned in Section 8 of the Act. List I. is a list of all persons who were to be considered Taluqdárs within the meaning of the Act. List II. is a "list of the Taluqdárs 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 property in question was made over by Pirthipal Singh by will (as both the Courts below have held) or by transfer under a family arrangement (as the Appellants contend) to his younger son Bisheshar Bakhsh. Bisheshar died in August 1890 intestate, leaving two widows but no male issue.

The rival claimants to the property are (1) the son of Bisheshar's elder brother, the eldest male lineal descendant of Pirthipal Singh, who was

Plaintiff in the suit and is Respondent to this Appeal, and (2) the two widows of Bisheshar who are Appellants. They were Defendants in the suit, and succeeded in the Court of the Subordinate Judge.

The Sections of the Act which have the most direct bearing on the question in dispute are the following:—

“ 13. No taluqdár or grantee, and no heir or legatee of  
 “ a taluqdár or grantee, shall have power to give or  
 “ bequeath his estate, or any portion thereof, or any interest  
 “ therein, to any person not being either—

“ (1) A person who, under the provisions of this Act,  
 “ or under the ordinary law to which persons  
 “ of the donor's or testator's tribe and religion  
 “ are subject, would have succeeded to such  
 “ estate or to a portion thereof, or to an inte-  
 “ rest therein, if such taluqdár or grantee,  
 “ heir or legatee, had died intestate; or

“ (2) A younger son of the taluqdár or grantee, heir  
 “ or legatee, in case the name of such taluqdár  
 “ or grantee appears in the third or the fifth  
 “ of the lists mentioned in section eight,

“ except by an instrument of gift or a will executed and  
 “ attested, not less than three months before the death  
 “ of the donor or testator, in manner herein provided in  
 “ the case of a gift or will, as the case may be, and  
 “ registered within one month from the date of its  
 “ execution.

“ V.—*Transfers and Bequests.*

“ 14. If any taluqdár or grantee shall heretofore have  
 “ transferred or bequeathed, or if any taluqdár or  
 “ grantee, or his heir or legatee, shall hereafter transfer  
 “ or bequeath, the whole or any portion of his estate to  
 “ another taluqdár or grantee or to such younger son as  
 “ is referred to in section thirteen, clause two, or to a  
 “ person who would have succeeded, according to the  
 “ provisions of this Act, to the estate or to a portion  
 “ thereof if the transferor or testator had died without  
 “ having made the transfer and intestate, the transferee or  
 “ legatee and his heirs and legatees shall have the same  
 “ rights and powers in regard to the property to which he  
 “ or they may have become entitled under or by virtue of  
 “ such transfer or bequest, and shall hold the same subject  
 “ to the same conditions and to the same rules of suc-  
 “ cession as the transferor or testator.

“ 15. If any taluqdár or grantee shall heretofore have  
 “ transferred or bequeathed, or if any taluqdár or grantee

“ or his heir or legatee shall hereafter transfer or bequeath  
 “ to any person not being a taluqdár or grantee the  
 “ whole or any portion of his estate, and such person  
 “ would not have succeeded, according to the provisions of  
 “ this Act, to the estate or to a portion thereof if the  
 “ transferor or testator had died without having made the  
 “ transfer and intestate, the transfer of and succession to  
 “ the property so transferred or bequeathed shall be regu-  
 “ lated by the rules which would have governed the  
 “ transfer of and succession to such property if the  
 “ transferee or legatee had bought the same from a person  
 “ not being a taluqdár or grantee.”

Besides these Sections it is necessary to refer to Section 22, which provides for intestate succession in the case of the death of any taluqdár or grantee whose name is inserted in List II., List III., or List V., or the heir or legatee of such taluqdár or grantee. A number of cases are dealt with separately and in order, beginning with the case where the deceased leaves an eldest son. In that case, Clause (1), the estate is to descend “ to the eldest son . . . . and his  
 “ male lineal descendants subject to the same  
 “ conditions and in the same manner as the  
 “ estate was held by the deceased.” Then after dealing in separate clauses with other cases, including the case of an adopted son, the Section provides, in Clause (6), that in default of such adopted son the estate is to descend “ to the  
 “ eldest and every other brother of such taluqdár  
 “ or grantee, heir or legatee, successively accord-  
 “ ing to their respective seniorities and their  
 “ respective male lineal descendants subject as  
 “ aforesaid.”

Now the contention on the part of the Respondent is that on Bishesar's death, intestate, he came in to the property under Clause 6 of Section 22. The Appellants, on the other hand, maintain that Bishesar was not legatee of Pirthipal Singh within the meaning of that word in the Act of 1869, and that, whether he was or was not a legatee in the ordinary sense of the

word, the case is governed by Section 15, and that accordingly, on the death of Bisheshar intestate, the property devolved as it would have devolved if Bisheshar had bought it from a person not being a taluqdár or grantee.

The learned Counsel for the Respondent argued quite correctly that Section 15 must be read in connection with Sections 13 and 14. His contention was that Bisheshar was a person who would have succeeded, within the meaning of Section 14, if Pirthipal had died without having made a transfer of the property, and intestate.

The real question is what is the meaning of the words "would have succeeded" in Sections 13 and 14. Of course if Bisheshar's case falls within Section 14, Section 15 can have no application to it.

Their Lordships think that the learned Judges in the Court of the Judicial Commissioner have gone too far in holding as they did "that any person mentioned in Section 22 as a possible heir may be said to be 'a person who would have succeeded according to the provisions of the Act to the estate if the testator had died intestate' within the meaning of Section 14." They think that the expression "would have succeeded" must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or, in the case of a gift by will, at the time when the succession opened. In short, they think that the expression "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of Section 22 applicable to the particular case." Their Lordships do not agree

with the view of the learned Counsel for the Respondent that Clause 2 of Section 13 was introduced by mistake and may be disregarded altogether. On the contrary they think that that clause throws a good deal of light on the words in dispute. A younger son of a taluqdár named in List III. or List V. is no doubt among the possible heirs of his father, but he is not within the prescribed line of succession if the father leaves an eldest son or a male lineal descendant of an eldest son.

The construction which commends itself to their Lordships gives a meaning to every part of the Sections under consideration. If a transfer or bequest is made to a person in the prescribed line of succession, there is reason for placing the transferee or legatee in the same position with regard to succession to the estate as the transferor or testator, but if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the estate.

There are some minor points which were discussed in the judgment of the Judicial Commissioners, or argued before their Lordships, which ought perhaps to be noticed.

Their Lordships have no doubt that Pirthipal's eldest son, though born of a different mother, was a brother of Bisheshar within the meaning of the word "brother" in Clause 6 of Section 22.

It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament.

In their Lordships' opinion it is immaterial to enquire whether Bishesar took under a will or by transfer. Both the lower Courts have held that the title is derived under a will. The question seems to be one of some difficulty. It is not necessary to decide it. It is enough for their Lordships to say that they are not satisfied that the Courts below are wrong.

Their Lordships agree with the Judicial Commissioners in thinking that Bishesar was not a "legatee" within the definition of that term in the Act of 1869. The bequest in his favour, if it took effect, came into operation before the Act was passed. He cannot, therefore, be considered a person to whom property was bequeathed under the special provisions of the Act.

Their Lordships will humbly advise His Majesty that the Decree appealed from should be reversed, with costs, and the Decree of the Subordinate Judge restored.

The Respondent will pay the costs of the Appeal.

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