Kunwar Man Singh And Anr. vs Lal Dharam Moorat Singh And Anr. on 13 October, 1954

Equivalent citations: AIR1955ALL261, AIR 1955 ALLAHABAD 261

JUDGMENT

Kidwai, J.

1. Raja Chetpal Singh was the owner of the Noorpur estate (commonly called the Chetpalgarh estate). His name was entered in respect of the said estate at Nos. 274 and 88 respectively of lists I and III prepared under Section 8, Oudh Estates Act 1 of 1869). On 5-6-1891, Chetpal Singh made a gift of, certain items of property to Rani Dilraj Kuer. Raja Ghetpal Singh had an only son Inder-pal Singh who died issueless on 23-12-1894. Thereafter on 24-6-1895, Chetpal Singh executed a will bequesting his property, movable and immovable to his wife, Rani Dilraj Kuer. This will Ex. A-4, provided for the eventuality of there being an after-born son or of the testator adopting a son and it made due provision also for the testator's mother and his widowed daughter-in-law.

2. On 6-2-1901 Raja Chetpal Singh died and Rani Dilraj Kuer applied for mutation of names to be effected in her favour. Her application was opposed by Raghunandan Singh, on behalf of his son Bhagwati Prasad Singh who, he claimed, had been adopted by Raja Chetpal Singh and he set up a deed purporting to be a deed of adoption dated 1-2-1901 and registered on 4th February. The Deputy Commissioner of Partapgarh granted the application of Rani Dilraj Kuer and, by his order dated 6-4-1901, he ordered mutation of names to be effected in favour of Rani Dilraj Kuer.

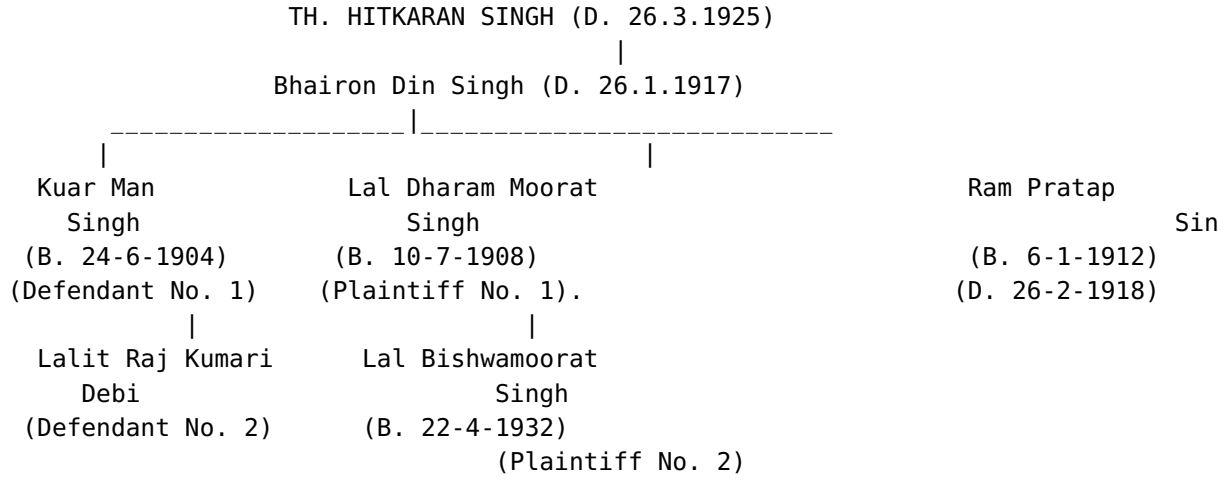
3. In September 1901, for some reasons, Rani Dilraj Kuer instituted a suit against Bhagwati Prasad Uingh, under the guardianship of Raghunandan Singh, for a declaration that Bhagwati Prasad Singh was not the adopted son of Raja Chetpal Singh and that the alleged deed of adoption was invalid. The Subordinate Judge dismissed the suit on 27-5-1903, and Rani Dilraj Kuer appealed but her appeal was also dismissed by a Bench of the Court of the Judicial Commissioner of Oudh by its judgment dated 14-10-1904. Thereafter on 17-12-1904 the Judicial Commissioners granted Rani Dilraj Kuer leave to appeal to the Privy Council.

4. In the meanwhile Bhagwati Prasad Singh had, through his next friend, instituted a suit against Rani Dilraj Kuer for possession of all the property left by Chetpal Singh. This suit was stayed pending the decision of the Privy Council appeal. On 12-2-1907, the parties to the litigation referred all their disputes to arbitration and appointed the Advocates for the parties. Bahua Ishwari Dayal and Ram Chandra arbitrators, undertaking to abide by the unanimous decision of the arbitrators whatever it was (vide Ex. A-9).

5. The arbitrators gave their award on 14-3-1907. By this award the Chetpalgarh estate was divided between the two claimants and Rani Dilraj Kuer obtained the villages mentioned in list A attached to the plaint of the present suit, six other villages being given to Bhagwati Prasad Singh. Both parties to the reference accepted the award. The rights created by it and the manner in which it is to be construed will be considered hereafter.

6. An application was made to the Subordinate Judge in whose court Bhagwati Prasad's suit was pending to decide the suit in terms of the award. He refused to accede to this prayer on the ground that the reference had been made without the intervention of the court. Thereupon an application in revision was filed in the court of the Judicial Commissioner of Oudh. On 30-5-1907 the Judicial Commissioner held that the reference to arbitration and the award amounted to an adjustment of the suit and directed that effect be given to it. It was accordingly incorporated in the Judicial Commissioner's decree allowing the revision.

7. A fresh chapter now begins, and in order to elucidate the facts of the -case it is necessary to give a short pedigree.



8. On 28-7-1907 Rani Dilraj Kuer gifted the entire property in suit to Bhairo Din Singh mentioned in the above pedigree. On the death of Bhairo Din in 1917. all his sons were minors and mutation was effected on 19-4-1917 in favour of the eldest of them, Kr. Man Singh only. A suit was brought against Man Singh and his grandfather by Bhagwati Prasad Singh claiming possession of the property on the ground that the compromise (evidenced by the reference to arbitration and the award) was against the interests of the minor, was legally defective and was not binding on the" minor. This suit was dismissed on 28-10-1919 and on 4-9-1920 the Court of Wards assumed charge of the estate purporting to do so (c)n behalf of Man Singh who was declared a ward.

9. The estate was released by the Court of Wards on 25-11-1929. Proceedings were initiated on 8-1-1931 by Man Singh to have the property in list A of the plaint brought under the Oudh Settled

Estates Act. After the necessary preliminaries had been gone through, Kr. Man Singh, on 5-11-1931, executed a deed declaring that the villages owned by him mentioned in the deed were to be subject therefor ward to the provisions of the Oudh Settled Estates Act. This declaration was registered and published in the Gazette.

10. On 24-6-1938 the Government permitted Kr. Man Singh to revoke the declaration with regard to tillage Mandhata and thereafter on 20-10-1944 Man Singh made a gift of this village to his daughter Lalit Raj Kumari Debi, defendant No. 2, and delivered possession to her.

11. On 5-7-1946 the suit out of which this appeal arises, was instituted by Lal Dharam Moorat Singh and his son Lal Bishwamoorat Singh, for a declaration to the effect that the plaintiffs were the owners of a half share in the property specified in lists A and B attached to the plaint.

12. The case made in the plaint was a very simple one. It was asserted that Dilraj Kuer was the absolute owner of the property under an award: that she gifted the property in list A to Bhairon Din Singh and the property in list B to Hitkaran Singh who thereby became absolute owners that on the death of Bhairon Din Singh and Hitkaran Singh, plaintiff No. 1 and defendant No. 1 became entitled to the properties in lists A and B as members of a joint Hindu family: that the name of Man Singh was entered in the Government papers as head and karta of the joint family: that it was only when Man Singh made a gift of village Mandtiata to his daughter that the plaintiffs realised that he was asserting his exclusive title: and that Man Singh was asked to get the plaintiffs' names also entered in the revenue papers but he refused to get this done. Hence the declaratory suit was filed.

13. The two defendants filed similar written statements. They gave the history of the property and set up a pedigree connecting Bhairon Din Singh with Chetpal Singh as a male agnate. They admitted that the property in list B attached to the plaint was non-Taluqdari property and that the plaintiffs had a share in it but they asserted that the property in list A was Taluqdari property and that on the death of Bhairon Din Singh it descended solely to Man Singh as the eldest son. They further claimed that if there, was any defect in the title of defendant No. 1 it had been cured by adverse possession for over 12 years and because the plaintiffs were estopped from claiming any portion of the estate after a declaration under the Oudh Settled Estates Act had been made to the knowledge of plaintiff No. 1 and without any objections having been filed within the time permitted by law. In any event a 'jethansi' right according to which the eldest son got double the share of each of the younger sons was set up and It was alleged that the plaintiff was not in possession of any portion of the property in list A and so a suit for a mere declaration in respect of that property did not lie.

14. In their replication the plaintiffs reasserted their original pleas: denied the pedigree set up by the defendants: denied that Raja Chetpal Singh got a primogeniture or that any portion of the property was Taluqdari and asserted that, in any case, the property in the hands of Bhairon Din Singh was non-Taluqdari. In paragraph 47 it was stated:

> "Even supposing for any reason it be held that the property in suit or any portion thereof was subject to Act I of 1869, still on account of the fact that the assets of Raja Chetpal Singh had been divided in two shares by means of award and Rani Dilraj

Kuer got all rights of ownership with right of transfer and subsequently the said Rani Dilraj Kuer by means of deed of gift and will relied upon by the defendant No. l transferred it in favour of Th. Hitkaran Singh and Kr. Bhairon Din Singh, the property in suit did not remain subject to the Act 1 of 1869 but be.came subject to Mitakshara Law of the Hindus for all purposes such as inheritance etc."

15. It was also asserted that there had been no ouster and that the proceedings under the Oudh Settled Estates Act were invalid and did not affect the plaintiffs' rights.

16. Upon the pleadings of the parties the trial Court raised the following 13 issues:

1. Whether or not the property in suit is "estate" under the Oudh Estates Act.

2. Does there exist a custom of 'jethansi' in the family of the parties as alleged?

3. Is there a tribal custom of 'jethansi' amongst the Sombansi Thakurs?

4. Was the property in suit not validly settled under U. P. Act & of 1917 (the Oudh Settled Estates Act)?

5. Is the property in suit the joint property of plaintiffs and defendant No. 1?

6. What is the effect of the deed of will of 1895, the deed of gift of 1899 and the award of 1907?

7. Is the gift deed dated 20-10-1944 operative and binding on the plaintiffs?

8. (a) Is the pedigree filed by defendant No. 1 correct?

(b) If so, its effect? or

(c) Was Kuer Bhairon Din Singh a blood relation of Raja Chetpal Singh even if the pedigree by defendant No. 1 be not held strictly proved?

9. Does Section 42, Specific Relief Act, bar this suit?

10. Are the plaintiffs estopped from suing as alleged in paras 32 and 37 of defendant No. 1's written statement?

11. Has defendant No. 1 completed his title to the property by adverse possession?

12. Is the plaintiffs' suit time-barred?

13. To what relief are the plaintiffs entitled?"

17. The learned Civil Judge found:

(1) That no summary settlement of the Government Revenue was made with Raja Chetpal Singh of any villages between the 1-4-1858, and 10-10-1859.

(2) That as a matter of fact no sanad of any kind was granted to Raja Chetpal Singh.

(3) That the villages mentioned in list A attach- ' ed to the plaint were settled at the first regular settlement with Chetpal Singh.

(4) That it must be presumed by reason for Sections 3 and 10 of Act 1 of 1869 that Raja Chetpal Singh was granted a primogenitures and in respect of the Nurpur estate and that all the 10 villages included in list A are a part of that estate.

(5) That the will executed by Raja Chetpal Singh in favour of Rani Dilraj Kuer was revoked by the deed of adoption dated 1-2-1901 and did not confer any title upon the Rani.

(6) That even if Rani Dilraj Kuer had any title under the will, it ceased to exist after the award.

(7) That the only 'title which Rani Dilraj Kuer had to the property in list A was the award of the arbitrator and this could not be deemed to be a transfer to her from a Taluqdar and so the property in her hands was not governed by Act 1 of 1869.

(8) That the pedigree set up by the defendants is proved.

(9) That since the property in the hands of Rani Dilraj Kuer was not governed by Act 1 of 1869, it was not governed by that Act in the hands of Bhairon Din Singh.

(10) That the plaintiffs and defendant No. 1 Were members of a joint Hindu family and cosharers in the entire property in suit.

(11) That the transfer of village Mandhata in favour of defendant No. 2 is valid only to the extent of the share of defendant No. 1.

(12) That under a family and a tribal custom applicable to the parties, the eldest son inherits twice as much as each of the other sons.

(13) That the properties in suit were not validly settled under the Oudh Settled Estates Act.

(14) That there is no estoppel.

(15) That defendant No. 1 did not perfect his title by adverse possession and (16) That the suit is not barred by the. Specific Relief Act since the plaintiffs are in possession as cosharers.

18. On these findings the trial Court decreed the suit and granted a declaration that the plaintiffs are owners of a 6/16 share in the entire property in lists A and B except the house in the southern portion of the last item of- properties in list B.

19. The defendants have appealed and their learned Advocate, relying upon the findings so far as they are in his favour has contended:

(1) That as between the parties to the award the award may be conclusive as to title but in order to determine the nature of the property in a contest between persons both of whom claim under the same party title prior to the award must be considered:

(2) That the property in the hands of Rani Dilraj Kuer continued to be governed by the Oudh Estates Act since her title must be deemed to be a title as legattee of Raja Chet-pal Singh.

(3) That since the property in the hands of Dilraj Kuer continued to be Taluqdari & the pedigree set up by the defendants is proved the property in the hands of Bhairon" Din Singh was also Taluqdari and consequently, on his death, his eldest son alone succeeded: and (4) That in any case there had been an ouster of the plaintiffs by the defendant No. 1 and so their title such, as it was, came to an end.

20. On the other hand the learned counsel for the plaintiffs-respondents contended:

(1) That the villages, entered in list A, except Noorpur, were not governed by the Oudh Estates Act even in the hands of Raja Chet-pal Singh, since they did not fall within the definition of "estate" given in that Act.

(2) That, at any rate, Rani Dilraj Kuer was not a legatee governed by Section 14 of the Act and so the property in her hands ceased to be governed by Act 1 of 1869.

(3) That the will in favour of Rani Dilraj Kuer has been revoked by the deed of adoption dated" 1-2-1901 and consequently it created no title in her:

(4) That, in any case, the gift by Rani Dilraj Kuer to Bhairon Din Singh took the estate out of the Act:

(5) That there was neither ouster nor adverse possession by defendant No, 1.

21. The first question that has to be determined is whether the property in list A when it was in the hands of Chetpal Singh was governed by the Oudh Estates Act. This depends upon the interpretation to be placed upon Sections 3, 8 and 10 of the Act. Section 3 is as follows:

> "3. Every taluqdar with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858 and the 10th day of October, 1859, or to whom before the passing of this Act and subsequently to the 1st day of April, 1858, a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court or an officer engaged in making the first regular settlement of the Province of Oudh, such decree not having been appealed from within the time limited for appealing against' it, or, if appealed from, having been affirmed."

22. In order to bring property held by a Taluqdar within the scope of this section it must be established either (a) that the summary settlement of the property had been made within the prescribed dates with the Taluqdar, or (b) that a sanad has been granted to him 'before' the passing of the Act. It is only if either of these conditions is fulfilled that full proprietary rights will accrue in (a) the property entered in the Qabuliat executed at the time of the summary settlement: and (b) in the property which may be decreed to him by a court engaged in effecting the first regular settlement. This is also the view taken in --'Janki Prasad Singh v. Dwarka Prasad Singh', 9 Ind Gas 83 (Oudh) (A).

23. It has, therefore, first of all to be ascertained whether any summary settlement was made in respect of any village with Chetpal Singh. For this purpose it is necessary to enquire into the history of the property and the only evidence that there exists from which the history may be traced is the report of the settlement Commissioner Ext. A3. It appears from Ext. A2 that the villages entered in list A of the plaint and the other villages in the possession of Chetpal Singh originally formed part of Taluq Tirwal and had been at one time separated from that Taluqa. On the crucial question as to whether they were settled at the summary settlement with Chetpal Singh, however, it throws no light. Taluqa Tirwal itself, having been confiscated from Gulab Singh, greatuncle of Chetpal Singh, was granted to Ajit Singh, a cadet of the family, and he is stated to have held 20 villages, which were held as muafi from the King, on behalf of Chetpal Singh who was then only 11 years old.

24. Later a dispute arose as to whether they were settled as a part of Taluqa Tirwal with Ajit Singh or kept separate. The Commissioner stated the rival claims and reported that they were-not part of Taluqa Tirwal. There is, however, nothing in this report to show that they were settled either with Chetpal Singh or with any one else on his behalf. No copy of summary settlement qabuliat either of these villages or of Taluqa Tir-

wal has been filed'nor had any copies of the wajibul-arzes of these villages been produced by either party. This evidence is quite inconclusive and does not prove that the relevant summary settlement was made with Chetpal or that it was made with some one else.

25. As to the grant of the Sanad there is definite evidence on the record to show that no Sanad had been granted to Chetpal Singh before Act 1 of 1869 was passed and became law. Ext. 5 is a Rubkar of the Deputy Commissioner of Pratap-garh dated 16-3-1869 at the time when the lists required under. Section 8 of the Act 1 of 1869 to be prepared were in the course of preparation. It appears from this document that till the 16-3-1869 i. e., till after the enactment of Act 1 of 1869 no Sanad of any kind had been granted to Chetpal Singh.

26. An examination of the evidence, therefore, discloses that there is no material upon which it could be found as a fact that either of the two essential conditions stated in Section 3 of Act 1 of 1869 have been fulfilled. This does not, however, conclude the matter since we have still to consider the question of the effect of the presumption arising under Section 10 by reason of the entry of Chetpal Singh in the lists prepared under Section 8.

27. Section 8 directs the preparation of six lists of Taluqdars. The first of these is "a list of all persons who are to be considered Taluqdars within the meaning, of the Act." The third is thus described.

> "Third. A list of the taluqdars, not included in the second of such lists to whom sanads have been or may be given or made by the British Government up to the date fixed for the closing of such lists declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture;"

28. Section 10 is as follows:

> "10. No persons shall be considered taluqdars or grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees".

29. Thus by reason of the entry in the lists prepared under Section 8 there is a conclusive presumption that the persons named therein are "such Taluqdars". In the present case it must accordingly be presumed that Chetpal Singh was Taluqdar of the 'estate' of Noorpur in respect of which he had obtained a sanad declaring that the succession to that estate was thereafter to be regulated by the rule of primogeniture.

30. The effect of the presumption was thus stated in -- L. Harihar Pratap Baksh Singh v. Bisheshar, Bakhsh Singh', AIR 1928 Oudh 307 at p. 312 (B) of the report:

> "According to Section 10 of the Act the entry is conclusive evidence not only of the fact that Sitla Baksh Singh was a taluqdar within the meaning of the Act but also of the fact that he was a taluqdar possessed of the estate of Gang-wal in the district of Bahraich. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of Section 10. This word connotes all the legal

> characteristics of a taluqdar whose name finds place in list 1 of the lists prepared under the Act. "Estate" is defined in the Act as "the Taluqa or immoveable property acquired or held by a taluqdar ..... in the manner -
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> mentioned in section 3" of the Act. It follows that the estate of Gangwal possessed by Raja Sitla Bikhsh Singh was held by him in the manner mentioned in Section 3 of the Act. It was so held by their Lordships of the Judicial.
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> Committee in the case of -- 'Brij Indar Baha dur v. Janki koer', 5 Ind App 1 (PC) (C) (pe nultimate paragraph at p. 12). - "

If the above reasoning is correct, the only matter which requires to be proved is as to what, immoveable property constitutes the estate of Gangwal".

When the case went up in appeal, this view was not challenged before the Judicial Committee in -- 'Jadunath Kuer v. Bisheshar. Baksh', AIR 1931 PC 24 (D).

31. In the same way, in the present case what has to be ascertained is what villages constitute the estate of Noorpur. In that case the wajib-ul-arz provided the evidence in the present case it is provided by the Khewats and Qabuliats executed at the first Regular Settlement -- Exts. A73 to A89 (which relate to the villages in list A attached to the plaint). Out of these documents the Khewats Exts. A-72, A-74, A-76, A-78, A-82, A-84, A-86 and A-88, refer to the villages to which they relate as forming part of "Ilaqua Noorpur".

32. It must accordingly be held that all the villages entered in list A attached to the plaint formed part of the "estate" of Noorpur which, in.

the hands of Chetpal Singh, was governed by Act .

1 of 1869.

33. It has next to be ascertained whether it continued to be so governed even in the hands of Rani Dilraj Kuer. In order to determine this it has to be ascertained whether the Rani was a 'legatee' of Chetpal Singh to whom the provisions of Section 14 of Act 1 of 1869 applied or whether she took under a title which made Section 15 of the Act applicable and thus removed the estate from-the operation of the Act.

34. The learned Civil Judge has taken the view that the property in the hands of Rani Dilraj Kuer was not governed by the Act for two reasons: (a) that the will in her favour was revoked by the will in favour of Bhagwati Prasad Singh; and (b) that her title was title under the award and the effect of this was to create a new title without regard to any pre-existing title. Since the award was not a transfer and; in any case not a transfer from a taluqdar, the provisions of Section 14 of Act 1 of 1869 did not apply to it.

35. The learned counsel for the respondent has urged one more ground for holding that the property in the hands of Dilraj Kuar ceased to be governed by Act 1 of .1869 and that depends upon a construction of the words "to a person who would have succeeded according to the provisions of this Act to the estate or a portion thereof if the transferor or testator had died without having made the transfer and intestate"

> used in Section 14 of the Act. We shall consider the meaning of those words in due course.

36. The first objection to the decision of the learned Civil Judge in respect of the will in favour of Dilraj Kuar is that there was no plea that that will had been revoked in spite of a specific assertion by the defendants that Rani Dilraj Kuar held the property under the will of her husband. The only plea that was taken by the plaintiffs in this connection was that set out in paragraph 47 of their replication which has already been quoted (vide paragraph 14 above). It was, therefore, not open to the learned Civil Judge to go into the question of the revocation of the will of Rani Dilraj Kuar.

37. The document upon which the learned Civil Judge relies as revoking the will in favour of Rani Dilraj Kuar is the document said to have been executed by Chetapal Singh five days before his death and registered only two days earlier. The original document has not been produced but only a certified copy is forthcoming and this is Ex. 61 on the record. Though the learned Civil Judge could not raise a presumption as to the genuineness of the document when only a copy had been produced, he could rely, as he did, on the earlier litigation and hold the document to be proved to have been executed by Chetapal Singh.

Having regard to the date on which the document was. executed, strong proof was, however, required to show that its executant possessed a sound disposing mind. The learned Civil Judge did not direct himself to this aspect of the matter. No doubt for proof of this also he relied upon the judgment of the earlier case. Since both the parties to the present litigation, claim title under the same party to the earlier litigation the judgments do not operate as res judicata. They can only be relied upon as occasions on which the document had been accepted as valid but much of the evidentiary value of this fact is lost because a Privy Council appeal was still pending and it was during the pendency of that appeal that the parties referred their dispute to arbitration and the award was given.

38. The learned counsel for the respondents met the objections raised to the course adopted by the learned Civil Judge by urging that a person who relies upon a will must prove that it is the last will of the testator and that consequently he has to displace or disprove any document 'which is later in date and has testamentary effect. The mere production of a subsequent document without setting it up as a will or deed of revocation does not cast upon the propounder of a will the burden of proving the negative. When no one even asserts that the document was the conscious act of a testator possessed of a sound disposing mind the propounder of the earlier document cannot be called upon to establish that the executant, when he executed the document, did not possess a sound disposing mind.

39. In the present case while the will in favour of Dilraj Kuar makes due provision for all the persons who had, or might eventually have, claims against the testator, the deed of adoption, although it mentions the testator's two wives; makes no provision either for them or his. widowed daughter-in-law. It provides that if the testator had a son by natural generation, the adopted son would not get the estate. It makes no provision for him in that eventuality. The alleged adopted son was only twenty months old and yet no directions are given for his upbringing. The alleged \ legatee under the deed of adoption was the son of the testator's 'general agent' and the earlier will is not mentioned at all. In these circumstances a considerable doubt attaches to the subsequent deed and it cannot be said that the will in favour of Rani Dilraj Kuar is proved to have been revoked.

40. It may also be pointed out that the last stage in the earlier litigation between Dilraj Kuar and Bhagwati Prasad was the award of Babus Ishwari Prasad and Ram Chandra. This award did not negative -the will in favour of Dilraj Kuar. It stated in paragraph 1:

> "After this decision..... .the decision of the ques-
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> tions of law and fact as to whether Bhagwati Prasad Singh is the adopted son of Raj a Chetpal Singh under Hindu law or Act I of 1869 or whether the will dated the 24th June, 1895, and the deed of gift dated the 5th June, 1899, executed by Raja Chetpal Singh in favour of the Rani have been cancelled or not seems immaterial and we are not adjudicating upon those points because the rights of the parties so far as they relate to the disputed property left by Raja Chetpal Singh have been finally and once for all decided by us. For the purpose of ownership and inheritance respecting the shares which have been given to the parties in the property in suit under this award it will be considered as if Bhagwati Prasad had no " relationship whatever with Raja Chetpal Singh'."

41. At other places in paragraph 1 it was clearly stated that Bhagwati Prasad was in all respects to be treated as continuing to belong to his natural family: the members of Raja' Chetpal Singh's family would have no right of succession in the property awarded to Bhagwati Prasad nor would Bhagwati Prasad have any right to any inheritance in the family of Chetpal Singh. Further in para. 6 of the award the arbitrators endeavoured to wipe out altogether the effect of the adverse decision given against Rani Dilraj Kuar in the declaratory suit filed by her. In view of this award the learned Civil Judge clearly erred in holding the deed of adoption to be proved as a deed revoking the will in favour of Dilraj Kuar solely on the basis of the judgments which preceded the award and were in a large measure nullified by it.

42. In the view which we take of the award, however, a decision of this question is immaterial. The award followed a reference to arbitration without the intervention of any Court, although two litigations were then pending. After it had been given it was accepted by the parties and was signed on their behalf in token of their acceptance. It was accepted by the Judicial Commissioners as an adjustment of the suit that was then pending. It was not seriously contested that awards, and more specially this award, do not stand on a footing different to compromises. This award must also be approached as if it was a compromise.

43. The approach of the learned Civil Judge is not a proper approach. He has held that the award terminated all earlier title and he has relied upon certain decisions in support of his view. He has, however, not studied those decisions with care. All that those decisions lay down is that as between parties to a compromise or an award or persons claiming under rival parties the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. The proposition cannot be disputed and is obvious. If persons bind themselves by any valid contract supported by consideration they cannot resile from that contract. This is also true of an adjustment of rival claims to property, whether the adjustment is by way of compromise or through the intervention of arbitrators.

44. This does not, however, mean that when the nature of the title of a person whose possession is being enquired into as between persons claiming under him, title prior to the compromise must be ignored as non-existent. If such a view were accepted then in every case of disputed succession where the parties instead of proceeding through Courts of law arrive at an adjustment their original title will cease and they will have a new title arising out of the adjustment only. This proposition has only to be stated to be rejected.

45. If an award is treated on the same footing as a decree of a Court in the present case it was incorporated in a decree the position is no different since it is well recognized that a decree does not create but only recognizes a pre-existing title and gives relief on its basis.

46. There are many decisions of the Courts in India and of the Privy Council which provide a guide in determining how an award is to be approached when the title of a party in possession of property under it is being enquired into and they are all consistent. It is only necessary to go into a few.

47. In -- 'Lala Khunni Lal v. Gobind Krishna Narain 38 Ind App 87 (PC) (E) their Lordships say at p. 102:

> "The real nature of the compromise is well expressed in a judgment of the High Court of the North West Provinces in 1868 in the suit of Mewa Kunwar against her sister Chhatar Kunwar's husband. The learned Judges say as follows: The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others 'as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, than the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement' (--'Lalla Oudh Beharee Lall v. Mewa Koonwar', 3 Agra HCR 82 at p. 84 (F))."

48. In -- 'Ameer Mirza Beg v. Udit Fershad', AIR 1925 Oudh 709 (G) the learned Judges say at page 711:

"That a settlement of controversy between two persons may amount to a transfer from one to the other may be conceded but the settlement of the 12th July 1909 is clearly not of that nature. We think that the view taken by the learned Judges of the High Court of the N. W. P. who decided the case of 3 Agra HCR 82 (F) is peculiarly applicable to the settlement with which we are concerned. It is as follows:

The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than falling to his share, and recognizing the right of the others as they had previously asserted it to the portion all otted to them respectively; it was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement.

In delivering the judgment of their Lordships of the Privy Council in the case of -- 'Rani Mewa Kuwar v. Rani Hulas Kuwar', 1 Ind App 157 (PC) (H), the Right Honourable Sir Montague E. Smith said 'The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is'."

49. In the Shish Mahal case, -- 'Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam', AIR 1929 Oudh 97 (I) a similar contention was raised since there had been a compromise between the heirs of a deceased taluqdar by which their rights were determined. The learned Judges' repelled the contention and at p. 103 of the report, they say that the effect of the compromise only was that the heir had succeeded and obtained possession: that his relatives disputed his title and on receipt of consideration had withdrawn their opposition thus leaving the original title of the heir-at-law as successor under Section 22 of Act l of 1869 unaffected. On appeal their Lordships of the Privy Council upheld the view in -- 'Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam', AIR 1932 PC 13 (J). At p. 16 of the report they said that "it is impossible to regard the compromises as being in any way the root of Baqar Ali's title....."

50. The same reasoning was adopted in 'the Gangwal's case' in AIR 1928 Oudh 307 (B) upheld by the Judicial Committee in AIR 1931 PC 24 . (D).

51. The last two were cases arising under the Oudh Estates Act and it was held that, in spite of the fact that on the death of the taluqdar there were disputes which were settled by compromise between the rival claimants the property in the hands of the person in possession under the Compromise was still governed by Act 1 of 1869.

52.. As against these cases Mr. Hyder Husain relied upon the decision of the Judicial Commissioner's Court and the Privy Council in the Bilwal case -- vide -- 'Zarif-un-Nisa v. Shaflq uz-Zaman', AIR 1923 Oudh 185 ,(K) and -- 'Zarif-un-Nisa v. Shafiq-uz-Zaman', AIR 1928 PC 202 (L) respectively. In that case the widow of the last taluqdar set up title under a will. On the other hand

the brother of the taluqdar claimed title tooth under the will and by succession under Section 22 of Act 1 of 1869. The dispute was referred to arbitration and before the arbitrator the parties accepted the will and requested the arbitrator to interpret it. The arbitrator gave his award which, though challenged was upheld by the Privy Council. Parties entered into possession of the properties allotted to them by this award.

After the death of the widow, the brother's son and grandson challenged the title of the widow's legatees. It was held that one party to an award could not challenge the title not only of the other party but also of the successors of the other party. Further it was held that the property in the hands of the widow was not governed by the Act but this was so held because under Section 22 the brother was a preferential heir to the widow. Consequently in view of the decision in -- 'Thakurain Balraj Kunwar v. Rae Jagatpal Singh', 31 Ind App 132 (PC) (M), the widow was not "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"

> and Section 14 did not apply to keep the property in her possession within the Act. Since many rights had been acquired before 1910 when the amending Act 3 of 1910 was passed retrospective effect could not be given to amended Section 14 of the Act and the property remained out of the Act.

53. It is clear from the proceedings which, led Up to the award which have been detailed in an earlier part of the judgment that Rani Dilraj Kuar always claimed title under the will of her husband. In accordance with the principle approved by their Lordships of the Judicial Committee in 38 Ind App 87 at p. 102 (PC) (E) her title will be considered to be the title as a legatee of her husband. The question as to whether she is a legatee within the meaning of Section 14 has now to be considered.

54. Mr. Hyder Husain's contention was that a widow does not succeed under Section 22 of the Act to an estate or to a portion thereof but only to an interest therein and that consequently a bequest to her did not fall within the scope of the words of Section 14 of the Act quoted earlier (vide para. 35). However interesting this argument might be we are not called upon to decide it because Section 14 of Act 1 of 1869 as amended by Act 3 of 1910 undoubtedly covers the case of a bequest to a widow.

55. Amended Section 14 (b) provides that if the legatee is one of the persons mentioned in Section 13A, Clause (1) and (2) the estate will continue to be governed by the Act. Section 13A, Clause 1 (a) relates to bequests to "a person who would have succeed- . ed to such estate, portion or interest under the provisions of this Act applicable to such estate." Rani Dilraj Kuar would at least have succeeded to an interest in the Chatpalgarh estate if her husband had died intestate. She is, therefore, a person who comes within the operation of amended Section 14.

56. Section 21 of Act 3 of 1910 gives retrospective operation to the provisions of Sections 7 and 8 of that Act. Section 14 of Act 1 of 1869 was amended by Section 7 of Act 3 of 1910 and consequently it has retrospective operation. The only limitation on its retrospective operation is that:

> "Nothing contained in the said sections.....

> shall be deemed to vest in or confer upon any . person any. right or title to any estate or portion thereof, or any interest therein which at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed."

57. At the time when the amending Act came into operation the property was vested in Bhairon Din Singh. Giving the amendment retrospective operation would not deprive him of any right. Consequently the case would not fall under the exception to Section 21 of Act 3.

58. It was contended that the effect of giving retrospective operation to amended Section 14 would be to alter the line of succession. The chance of an heir apparent succeeding is not a vested right but merely an expectancy. By changing the line of succession no vested rights are divested. Moreover the whole object of the amending Act was to alter the line of succession so as to restore succession under Act 1 of 1869 for the personal law in many cases in which the Act had ceased to be operative. Thus this contention also fails and the estate in the hands I of Dilraj Kuar must be held to have been govern ed by Act 1 of 1869.

59. The last step in this contention is to determine whether the property in the hands of Bhairon Din Singh was still governed by Act 1 of 1869. The pedigree set up by 'the defendants has been held established. It has not been challenged in appeal. It shows that Bhairon Din Singh was a male agnate of Raja Chetpal Singh. He might, therefore, in the absence of other nearer heirs have succeeded to the estate of Nurpur. He was accordingly covered by Clause (2) of Section 13A. and amended Section 14(b) of the Act will keep the property within the Act in his hands. Thus the villages entered in list A attached to the plaint being still governed by Act 1 of 1869 in the hands of Bhairon Din Singh descended, on his death to his eldest son, Kuar Man Singh alone succeeded.

60. The above decision is sufficient to dispose, of the appeal. One more contention has, however, been raised upon which we think it proper to give our finding briefly and this is the plea of ouster. Since the suit fails on the question of title no question of ouster arises. If, however, it had been found that Lal Dharam Moorat Singh was also a cosharer, the fact that mutation was made in the name of Man Singh alone on the death of his father or that the Court of Wards took possession of the estate m the name of Man Singh alone would not indicate any ouster. Dharam. Moorat Singh was a minor and in spite of mutation being in the name of his elder brother and the Court of Wards being in possession on his behalf, he was also deriving benefit from the estate and was being maintained by it. Further Kuar Man Singh himself admits as D. W. 9 that the income of the taluqdari and non-taluqdari property was kept in one and cut of it money was paid to the defendants for their daily expenses.

61. The position after the declaration of the property as settled estate was different and it is immaterial whether the declaration that the property would thenceforward be held under the provisions of the Oudh Settled Estates Act is. valid or not. Only such property can be declared to be subject to the Act as is held in absolute right toy the declarant without any cosharer. Thus when Man Singh applied in January for permission to settle the villages included in list A attached to the plaint, he clearly indicated that he was" the sole and exclusive owner of them and that no one else was a

cosharer in them or had any right in them. Thereafter, permission having been granted, Man Singh executed a declaration as required by the Act to the effect that his property would thereafter be held subject to the provisions of the Act.

Plaintiff No. 1 admits that he was aware of these proceedings but he thought that they did not affect his rights. Exhibit A/1 also shows that he accepted an account which showed expenditure of money in this connection. The explanation that he gives for having formed this idea is absurd and incredible. The fact that he still had to be maintained by his brother even after this is immaterial because, according to Indian ways of life, customs and traditions, it was the duty of the elder brother to maintain out of his own property his penniless younger brother. This would not create or keep alive any right. in the younger brother when a clear assertion had been made and a solemn declaration had been executed to his knowledge that the elder brother claimed the property exclusively as his. The present suit was not instituted till 5-7-1946, i.e., about fifteen years later. All title which plaintiff No. 1 might have possessed accordingly came to an end.

62. In 1937 two sale deeds were- executed on the 12th-April and 9th December (Exs A/60 and A/61) respectively which also indicate that at that time plaintiff No. 1 accepted the position that his elder brother was the sole owner and he was merely a guzaredar, that is to say that he was aware that there had been an ouster and he took no steps to assert his rights within twelve years of the ouster. On this ground also the plaintiff's suit with regard to the property in list A is liable to be dismissed.

63. The result Is that this appeal is allowed and the decree of the lower Court is modified tc this extent that the suit is dismissed with regard to the property in list A but the decree in respect of the property in list B is maintained in the for in which it has been given. Since the appellant always admitted the right of the plaintiffs in the property in list B, they will get their full costs of both the Courts from the plaintiffs. C. M. Appln.

No. 217 of 1954 is dismissed.