(1930) 02 AHC CK 0012

Allahabad High Court

Case No: None

Ram Sundar Mal and Others		APPELLANT
	Vs	
Collector of Gorakhpur and Another		RESPONDENT

Date of Decision: Feb. 25, 1930

Hon'ble Judges: Sulaiman, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Sulaiman, J.

This is a plaintiffs'' appeal arising out of a suit for recovery of possession of four villages together with a sitting room called nashistagah. The suit relates to a part of the estate known as Majhauli Raj. The plaintiffs in the suit are transferees from Balbhaddar, who claimed through his deceased father Indarjit to have succeeded to this estate. Two suits had been filed, viz., suit No. 20 and suit No. 21 of 1923, the first one by the claimant Balbhaddar himself and the second by his transferees. The main suit which related to the bulk of the estate was compromised. The present appeal arises out of the second suit No. 21.

2. In the plaint it was stated that Majhauli estate is a very ancient impartible estate, which was founded by Raja Bishwa Sen a long time ago. A long genealogical table was attached to the plaint which shows that the claimant is more than 100 generations from the founder, whose time might very well go back 2,000 years. The last male holder was Raja Kaushal Kishor, who died on 7th January 1911, leaving two widows, Rani Shyam Sunder and Rani Janki Kunwari surviving him. He left no child. Rani Janki Kunwari died in 1917 and the estate is in the possession of the Court of Wards, who hold charge of its on behalf of Rani Shyam Sunder. The plaintiffs alleged that according to the genealogical table sat up by them the succession opened to Indarjit, the father of Balbhaddar, on the death of Raja Kaushal Kishor. The plaintiffs'' case was that Balbhadar''s branch of the family was joint in status so as to

become entitled to the estate in preference to the widows. The plaintiffs had acquired the property in dispute in this appeal under a sale-deed, dated 30th October 1922.

3. On behalf of the defendant the fact that Majhauli estate was an ancient impartible raj and was founded by Bishwa Sen was admitted, and it was also admitted that only one person owned the raj at a time and that the other members of his family cannot get their share by partition. The pedigree get up by the plaintiffs was denied, and it was also not admitted that Balbhaddar''s branch had remained joint with the main line. It was further alleged that there was a custom in this family under which a widow was entitled to succeed for her lifetime, but no general tribal custom was put forward. A further custom of non-alienability was also pleaded. The validity of the sale-deed in favour of the plaintiffs was also challenged on the ground of a fraudulent registration on account of the inclusion of an item of property not intended to be sold.

4. The learned District Judge, who has taken great pains over the case and has written an able judgment, framed five Issues relating to: (1) the pedigree; (2) the jointness of the plaintiffs'' branch with Raja Kaushal Kishor; (3) the special custom of succession of widows; (4) not-transferability and; (5) the fraud on registration.

5. The learned District Judge has found the issues relating to the pedigree, the customs and the validity of the plaintiff''s sale-deed in favour of the plaintiffs, but has dismissed the suit on the main ground that the two branches were not joint.

6. The learned advocate for the appellants challenges the finding of the Court below which is against him, and the learned counsel for the respondents has also triad to support the decree by challenging the findings relating to the pedigree and the registration and half-heartedly the finding relating to the custom of succession by widows.

7. The legal question of the right to succeed to an impartible estate that is or has been the property of a joint Hindu family has been discussed at considerable length by the learned District Judge, who has examined a large number of cases on the point. He was however at a considerable disadvantage inasmuch as the latest and the most authoritative pronouncement of their Lordships of the Privy Council which has set at rest some of the doubts which prevailed previously, was not available to him. This case is Konammal v. Annadana AIR 1928 P.C. 68. The main point which the learned Judge had to consider and which it is our duty to decide is whether it is incumbent upon a claimant to an impartible estate to establish a jointness in general status between the two branches of the family in order to supersede a widow, or only a notional jointness with the burden on the opposite party to show a definite renunciation of their right to succession. Mr. Piare Lal Banerji who has argued the case with great ability, has placed before us almost all the previous cases that are relevant to this question.

8. The previous case law was summarized by their Lordships of the Privy Council in the leading case of Baij Nath Prasad Singh v. Tej Bali Singh AIR 1921 P.C. 62 which is known as Aghori Barhar case. It is therefore wholly unnecessary to refer at length to the previous cases. Their Lordships pointed out that the earliest case known as the Shivagunga case, Katama Natchiar v. The Raja of Sivagunga [1863] 9 M.I.A. 539 was one where the property was the self-acquired and separate property of the last holder and that the Tipperah case Raja Suraneni Venkata Gopala Narasimha Row v. Raja Suraneni Lakshma Venkama Row [1869] 13 M.I.A. 113 was under the Dayabhag Law and not the Mitakshra. Their Lordships also remarked that Sartaj Kuari v. Deoraj Kuari [1888] 10 All. 272 had stood too long to be now touched, but it merely affirmed the general proposition laid down in the Tipperah, case [1869] 13 M.I.A. 113

that when a custom is found to exist it supercedes the general law which however still regulates all beyond the custom.

9. In conclusion their Lordships laid down that

the zamindari being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara law, and that the respondent, being the person who in a joint family would, being the eldest of the senior branch, be the head of the family, is the person designated in this impartible raj to occupy the gaddi.

10. This leading case did therefore re-affirm the law laid down in some of the earlier cases and explained the ratio decidendi in Sartaj Kuari''s case [1888] 10 All. 272 and in the Tipperah case [1869] 13 M.I.A. 113. It is however to be noted that Tara Kumari v. Chaturbhuj Narayan Singh AIR 1915 P.C. 30 known as the Telwa case had been distinguished by the learned Judges of the Allahabad High Court, who thought that it was decided on its special facts without laying down any general proposition of law in Baij Nath Prasad Singh v. Tej Bali Singh [1916] 38 All. 590. That case however was not referred to by their Lordships in their judgment in appeal.

11. There can be no doubt that the impression created in India by the Telwa case AIR 1915 P.C. 30 was that in order to succeed to an impartible estate on the ground of jointness of the family it was necessary to show jointness in the general status of the two branches. In the Telwa case AIR 1915 P.C. 30 Sir John Edge put the issue to be '"whether the two brothers had separated" (p. 1192 of 42 Cal). Reference was made to the fact that one brother had built a pucca house to the westward of the family house, established a tulshi pinda there and removed his family to his pucca house and lived there separately from his brother, building a wall in between; their expenses were also found to be separate, and the evidence proved a complete separation "in worship, in food and in estate." On this finding the claimant was unsuccessful as against the widow. That this is how the Telwa case AIR 1915 P.C. 30 was understood by some High Courts is clear from the following remark of Wallis,

C.J., in Gurusami Pandyan v. S.P. Chinna Thambiar AIR 1921 Mad. 340 (at p. 8 of 44 Mad.):

The Telwa case AIR 1915 P.C. 30 lays down, that in determining which line of succession to follow the test is whether the last owner who left no male issue was or was not separated from the other members of the family, and expressly negatives the contention that, to lot in the rule of succession as to separate estates, there must have been something in the nature of a partition of the impartible estate, or of an abandonment express or implied of the right to succeed to it as joint family property.

12. The question came up again for consideration before the Madras High Court in Annandana Jadaya Gounder v. Konammal AIR 1923 Madras p. 402 before Krishnan and Ramesam, JJ., who dealt with the subject exhaustively, reviewing almost the whole of the previous case law. But in view of the Telwa case AIR 1915 P.C. 30, they felt it incumbent upon themselves to go into the question of facts relating to the jointness or separation. At p. 406 Krishnan, J. remarked:

To show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned.

13. Similarly Ramesam, J., at p. 415, after stating that an impartible zamindari may be the self-acquired property of a particular member, or might be renounced by a member of the family, or might be allotted to a member in a family partition, dealing with it, remarked that he did not claim to exhaust the modes in which it had become the separate property of a member.

14. This last mentioned case went up in appeal before their Lordships of the Privy Council, and the judgment was affirmed: Konammal v. Annndana AIR 1928 P.C. 68. As this judgment is instructive we must refer to it at some length, because in our opinion it definitely settles the law. The suit was brought by Konammal, the mother of the last holder Narayanappa, who according to the pedigree given on p. 121 (of 55 I.A.) was the great-great grandson of the common ancestor Lakshmanappa; and the defendant in possession of the estate was Annadana, who was great-great-great-grandson of the same ancestor. Their Lordships started with the presumption of jointness and held (p. 123 of 55 I.A.) that the onus of proving that the estate had become the separate property of the junior branch was on the plaintiff who had based her claim on the ground that her son''s branch had held the property as their separate and absolute property. Their Lordships pointed out that prior to the decision in Baij Nath Prasad Singh v. Tej Bali Singh AIR 1921 P.C. 62 the authority of some of the earlier cases which had proceeded on the footing that the estate though impartible must still be regarded as joint family property for the purpose of succession, had been somewhat shaken by the decisions in Sartaj Kuari v. Deoraj Kuari [1888] 10 All. 272, Venkata Surya Rao v. Court of Wards [1899] 22

Mad. 383 and Gangadar Rama Rao v. Raja of Pittapur AIR 1918 P.C. 81 and the two later decisions in Tara Kumari v. Chaturbhuj Narayan Singh AIR 1915 P.C. 30 and the Bettiah Raj case Bishun Prakash Narayan Singh v. Janki Koer AIR 1920 P.C. 34. As to the Telwa case AIR 1915 P.C. 30 their Lordships definitely remarked that

this case cannot now, in their Lordships'' opinion, be treated as laying down any proposition of law for the purpose of the present case, as it does not deal with the question whether an impartible estate is to be treated for purposes of succession as joint family property or with the legal consequences that follow if it is.

15. The Bettiah Raj case AIR 1920 P.C. 34 contained some observations going much further, but they were explained by Lord Dunedin in Baij Nath Prasad Singh v. Tej Bali Singh AIR 1921 P.C. 62. Reviewing the cases their Lordships re-affirmed the early decisions of the Board, which had applied the test whether the facts showed a clear intention to renounce or to surrender all interest in the impartible estate. In particular reference was made to Chowdhry Chintamun Singh v. Mt. Nowlukho Konwari [1875] 1 Cal. 153 where there had to some extent been a separation in the family, but it was held that the question was, whether the plaintiff''s father and his branch had waived their right of succession and had impressed upon the taluka the character of separate property. Having examined some of the other cases also their Lordships concluded:

Those authorities "in their Lordships" opinion, go far to support the inference deduced by Ramesam, J., from an examination of the cases, that in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate: p, 127.

16. Their Lordships next proceeded to deal with the grounds of separation, and thought that the fact that the defendant''s ancestor had been set aside by usurpation in favour of the younger brother was not of itself sufficient to show that the other line had thereby lost their rights as members of the joint family to succeed to the estate on failure of his line. Their Lordships held that the fact that the members of the joint family had exercised their right of partition over their partible property, would not divest them of their interest in the impartible estate over which they had no right of partition, for it certainly could not be put upon the ground of surrender or renunciation, there being nothing in the fact of these partitions of their partible property to suggest any intention of renouncing their rights of succession to the impartible estate, nor the receipt of any consideration for such renunciation. As regards the evidence relating to separation in food, worship and estate, their Lordships attached very little importance to separation in food and very little weight to the absence of joint worship, and found that the alleged separation of the defendant''s branch inter se was not conclusive.

17. This case therefore is the clearest authority for the proposition that a mere separation in food, mess or worship, that is to say, in the general status of the family, or even a partition of the partible property inter se, would not destroy that notional jointness which entitles a member of the junior branch to succeed to the impartible estate, and that the presumption of jointness can be rebutted only by showing that there was

an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate.

18. In the case of partible property where separation involves a division and separate possession of shares by each separated member, every fact, which shows that the members are not living as one unit and are either separate in residence, mess, worship, business or cultivation, would be some evidence of disunion. But in the case of impartible property where the estate cannot be divided and a separated junior member cannot get any share on a partition, ordinary facts, which would be some evidence of separation with regard to partible property, would not be sufficient. Separation of the general status of the family does not necessarily imply a clear intention to renounce or surrender the right to succeed in case succession opens. There must be such evidence, direct or circumstantial, as would show an intention expressed or implied to give up the right to succession. We do not agree with the learned advocate for the appellants that in the absence of direct and positive evidence showing a clear abandonment or renunciation of the right to succeed, mere circumstantial evidence and inferences deducible from conduct would be wholly insufficient to prove an expression of an intention to give up such right. No hard and fast rule can be laid down as to the quantum of evidence required for such proof. The passage quoted from their Lordships'' judgment itself states that the intention may be expressed or implied. Such intention therefore can be implied both from circumstantial evidence and from the conduct of the parties. But the conclusion must be irresistible and the circumstances must point not to mere separation in general status but separation relating to the impartible property itself, that is to say, an abandonment of the right to succeed to it.

19. Many of the passages quoted by Lord Dunedin in Baij Nath Prasad Singh v. Tej Bali Singh AIR 1921 P.C. 62, from previous judgment of their Lordships go clearly to establish that the separation to be proved is one relating to the impartible estate itself. In view however of the latest clear pronouncement, it is not necessary to elaborate this point any further.

20. The learned District Judge has discussed this question at considerable length in connexion with his finding on Issue 2 (pp. 120 to 129). He has devoted considerable thought to the consideration of the question whether the Telwa case (6) was an authority in support of the defendant''s contention. He concluded, to quote his own words:

The Telwa case (6), does, by necessary implication, repeal the contention that there can be no separation without relinquishment by the junior member of his contingent right of succession" (p. 127, line 26.)

21. He further thought that

there is no difference between partible and impartible property in this respect so that a separation can be brought about merely by the unequivocal expression of an intention to that effect by any member of the family. It is however clear to my mind that a member who thus brings about a separation may be the holder of the impartible property himself (p. 128, line 12).... The Telwa case AIR 1915 P.C. 30 is an instance of a holder of an impartible estate determining the contingent right of the junior member by giving expression to a clear intention on his part to separate (p. 128, line 22).

22. Finally he remarked:

It must therefore be taken for granted that the Telwa case AIR 1915 P.C. 30 stands as a clear authority for the proposition Chat a separation is possible in a family owning impartible property alone without any relinquishment by the junior member of his contingent right of succession (p. 129, line 20).

23. It may here be pointed out that their Lordships in the case of Chintamun Singh v. Nawlukho Konwari [1875] 1 Cal. 153 had remarked:

The plaintiff''s father and his branch had waived their rights of succession, or by their joint action impressed upon the taluka the character of separate property

and not to the individual volition of the holder of the estate for the time being. In view of the pronouncement in the latest case it is quite clear that the learned District Judge has approached the case from a totally wrong standpoint inasmuch as he thought that it was wholly unnecessary to establish any relinquishment of the right of succession. We must therefore examine the facts found by him or disclosed by the evidence from this new angle of vision. Eight circumstances were relied upon by the defendant to establish separation between the two branches. They are enumerated at pp. 129 to 130 and have been discussed at pp. 130 to 143. We shall take them in the order in which they stand.

24. Point 1.-The first point is that the claimant is too distantly related to the alleged common ancestor, and that accordingly the presumption of jointness, becoming weaker after each generation, has altogether disappeared. A shorter pedigree is given by the learned Judge at p. 96, which shows the descendants of the common ancestor Raja Bodh Mal, according to the plaintiffs, which, as we shall show later, has been satisfactorily established. The last male holder was the seventh in descent from the common ancestor. Indarjit, the deceased father of Balbhaddar, who was alive when Raja Kaushal Kishor died, was eighth in descent from him. No doubt in the case of a partible estate such a distant relationship would indeed leave but a

very weak presumption of jointness. But if in the case of an impartible estate no occasion for such succession has so far arisen, the presumption of law cannot disappear. The burden still is on the party who alleges that the estate was the separate property of the last male holder. The relationship of the claimant was equally distant in Ram Nandan Singh v. Janki Koer [1902] 29 Cal. 828, but no argument was addressed to nor was it suggested before their Lordships that the distance of relationship was in itself sufficient to destroy the presumption. As a matter of fact in many of the cases relating to impartible property the pedigree as a rule has been a long one. In particular we may refer to the pedigrees in Naragunty Lutchmeedavamah v. Vengama Naidoo [1862] 9 M.I.A. 66 as given in Naraganty Achmmagaru v. Venkatachala ati Nayanivaru [1882] 4 Mad. 250 and Sree Raiah Venkayamah v. Sree Rajah Yanumula Boochia Vankondora [1871] 13 M.I.A. 333 as given in Sree Rajah Yanumula Gavuridevamma Garu v. Sree Rajah Ramandora Garu 6 M.H.C.R. 93. They are both set forth in the judgment of Ramesam, J., which was affirmed by their Lordships of the Privy Council. In Annadana''s case AIR 1928 P.C. 68 itself the relationship was also fairly remote. The learned Judge has not held this circumstance to be fatal, but has merely considered it to weaken the presumption.

25. Point 2-Separation in residence, mess and worship for a long period is next relied upon. There is no doubt that there is evidence which the learned Judge has accepted showing that on the death of Raja Bodh Mal his eldest son Bhawani Mal became the Raja and made a babuai grant to his youngest brother Anand Mal, who is alleged to be the ancestor of Indarjit. This happened some 200 years ago, and a share in one of the villages so granted, viz., Dharamner, is still in the possession of Balbhaddar. The learned Judge has thought that Ex. P-7 (p. 183) shows that

the descendants of Anand Mal were living in village Dharamner ever since 1833.

26. He has then thought that:

it is fair to presume that ever since the grant Anand Mal''s descendants have been living in this village.

27. The learned Judge is wrong in both of his conclusions. All that Ex. P-7 indicates is that the village, though included in the raj, was a babuai property in the possession of the collaterals, and that it was settled by Government directly with them. There is nothing in this rubkar to suggest that these grantees had even built any house at Dharamner and were residing in that village at that time. As a matter of fact, Dharamner is only ten miles from Majhauli, and it is not impossible for the younger members of the family to live at Majhauli and manage their estate in Dharamner. Much less is there any justification for presuming that the descendants of Anand Mal have been living separately ever since the making of the babuana grant, which took place some 200 years ago. The oral evidence of the defendant cannot satisfactorily establish such separate residence for a period prior to the Mutiny, as the witnesses cannot speak of it according to their personal knowledge. There is,

however, the undoubted fact that Indarjit and his family are living at Dharamner and not occupying any part of the residential quarters at Majhauli. It may therefore be taken that at least from about the time of the Mutiny or a little earlier there has been separate residence and consequently separate messing. The finding of the learned Judge (p. 131, line 3) that the descendants of Anand Mal have been separated in food and residence from the holder of the estate for more than 200 years cannot be accepted. He has however conceded that mere separation in food and residence is ordinarily inconclusive (line 8), particularly as he found that

there is no evidence to show that the descendants of Anand Mal built up a separate house (line 28).

28. The same remarks apply to the separation in worship. The learned Judge has conceded (p. 131, line 33) that

there is no evidence on the record to show the state of affairs before the time of Indarjit Mal.

29. But there can be no doubt that during the lifetime of Indarjit and since his death there has been no joint worship and no attendance on the occasion of religious festivals for the performance of periodic worship; and that the two families have separate priests or gurus. As regards the oral evidence relating to a Tulsi Chaura (a platform with a Tulsi plant on it), the learned Judge has thought that the evidence was utterly unreliable, and had been produced in order to introduce a feature which had been referred to in the Telwa case AIR 1915 P.C. 30. His ultimate finding was that the total separation in worship afforded a very strong indication of a general disruption of the family connexion.

30. We have already referred to Konammal''s case AIR 1928 P.C. 68 in which their Lordships of the Privy Council remarked that the circumstance that the defendant''s branch had not any part assigned to them in the annual festival of the local temple in which the jagirdar took a prominent part, has no bearing on the present question. In our opinion when there was separate residence, it is not at all surprising that there should be regular attendance for purposes of worship at different temples. There is no suggestion that the members of the junior branch changed their religion. A mere separation of the place of worship does not in our opinion imply any intention on the part of the junior members to give up their right of succession to the estate.

31. Point 3.-Reliance was next placed on want of social intercourse. Indeed the oral evidence led on behalf of the defendant was to the effect that there was actually enmity or hostility between the two branches, and that invitations were not issued to the members of Indarjit''s family on festive occasions and marriages and other ceremonies. It seems to us that the evidence on this point is somewhat exaggerated, but assuming that this was so, the mere existence of strained relations would not be tantamount to an abandonment by the junior branch of their rights of

succession. On the other hand they might very well entertain the hope of ultimate succession, and look forward to the day when the last holder who had no male children died, leaving a widow whom they could supersede. We think that the learned District Judge has attached too great a weight to the supposed estrangement between the two branches as showing a complete separation.

32. Point 4.-It is in evidence that Indarjit Bahadur Mal as well as Balbhaddar Mal had been mortgaging and selling little parcels of their share in village Dharamner without reference to the Raja, The learned Judge has not attached any value to this fact, but has considered that it may contribute its quota to the cumulative effect produced by the other circumstances. We have already referred to Konammal''s case AIR 1928 P.C. 68 where their Lordships remarked that the separation or partition inter se among the members of the junior branch of their partible property was no evidence of the abandonment of their right of succession. The junior members are entitled to deal with their partible property in any way they like, and their action cannot imply any intention on their part to give up their chance of succession to the impartible estate itself.

33. Point 5.-The learned Judge has relied strongly on the fact that no financial help was given to Indarjit''s branch by the holder of the estate and has considered that this circumstance fortifies the conclusion as to the complete severance. The evidence on this point leads us only to a period of the last 30 years, and it may be assumed that during Indarjit''s time no financial help has been received by his family. At least there is no reliable evidence on behalf of the plaintiffs to prove that it was. This branch had been given some villages as a grant, and it is not strange that they did not expect any further help from the estate. Such a circumstance would be strong evidence in the case of an ordinary joint Hindu family qua their partible estate, but is not of the same importance in the case of a succession to an impartible estate.

34. Point 6.-The strongest reliance has been placed on behalf of the defendant on certain admissions of separation by statement and conduct of Indarjit and Balbhaddar. Raja Kaushal Kishor died on 7th January 1911 and on his death the name of his senior widow Mt. Rani Shyam Sunder was entered in the revenue papers in respect of the villages forming part of the estate, and admittedly no claim was put forward by Indarjit in the revenue Courts. In para. 26 of the plaint there was a suggestion that Indarjit and Balbhaddar tried to take possession of the raj but were unsuccessful. This in our opinion is not a true statement. As a matter of fact, three successive Collectors. Mr. (now Sir) J.H. Simpson, Mr. Silberrad and Mr. Collet have all stated that no claim to the estate was put forward on behalf of Indarjit or Balbhaddar. We accept that statement as perfectly correct, It may therefore be taken for granted that no attempt was made by Indarjit or Balbhaddar soon after the death of Raja Kaushal Kishor to assert their right of immediate possession, but mere omission or silence is not necessarily an admission of want of title.

35. It is also clear that the suit was instituted after considerable delay and in fact within two days of the expiry of the period of limitation, and not till certain speculators had come on the scene and acquired a portion of the estate by way of speculation. The defendant further relies on certain positive acts which it is suggested, amounted to a clear admission on the part of Indarjit. So far as the three District Collectors referred to above are concerned, they all admit that they had no personal talk with Indarjit himself, and their interviews were with Balbhaddar alone: Mr. Simpson (p. 591, line 26); Mr. Silberrad (p. 593 line 11); Mr. Collet (p. 82). So far as the oral conversations go, although one may suspect that Balbhaddar might have been speaking both on behalf of himself and his father, it is legally impossible to bind Indarjit by what Balbhaddar might have said, particularly when there is no evidence on the record to show that Balbhaddar had authority to speak on behalf of Indarjit. It does however appear that when Mr. Simpson was approached by Balbhaddar for the grant of some scholarship for the education of Balbhaddar''s son, because he would be the next heir to the estate, an objection was raised by Kedar Narain Mal, who asserted that he himself was in the senior line. An enquiry was ordered by the Collector through Mr. Ganga Ram, a Deputy Collector. The report of the Sub-Divisional Officer is printed on p. 377, and shows that he took down the statements of a number of people and ultimately came to the conclusion that Indarjit''s branch represented the senior line. In that proceeding Indarjit was admittedly represented by a vakil and he filed a genealogical table of Dharamner Babus and also filed a copy of judgment of 1867, if not also other evidence, and also examined no less than 22 witnesses. Thus Indarjit was fully aware that the enquiry was going on and was taking an active part in the proceedings. The enquiry was based on two assumptions. One was that Daryao Mal was in the senior branch, the dispute being confined to the question whether Indarjit or Kedar Narain represented the senior line of Daryao Mal''s branch, and the second was the assumption that succession had not opened out at that stage. No doubt by implication it may be said that Indarjit by his conduct was accepting the position that the death of the Raja had not opened out the succession to him. On the other hand, it may well be urged on behalf of the plaintiffs that Indarjit was merely trying to lay the foundation for his claim by removing the first obstacle placed in his way by Kedar Narain. If he succeeded in procuring all the available evidence and establishing that he represented the senior branch, there would be time enough for him to claim the estate later. In this connexion it may also be pointed out that the report shows that the Rani''s servants were taking an interest in this enquiry, presumably on the side of Kedar Narain.

36. But the strongest answer to the defendant''s contention is that the state of jointness or separation has to be considered at the time when the succession opened, viz. 7th January 1911, and not subsequently, though the subsequent conduct of the parties may be some evidence of such separation. If in January 1917 Indarjit was entitled to succeed, he did succeed automatically by inheritance, and

unless there has subsequently been a surrender or relinquishment of his estate by him, any admission of his would not destroy his right. We cannot take these proceedings in any way to indicate that Indarjit, knowing that he had succeeded to the estate, definitely abandoned his claim and relinquished his rights, surrendering them in favour of the Rani. At best the proceedings show that Indarjit was not fully cognizant of his legal rights, and this is not to be wondered at in view of the impression which had prevailed in India in consequence of the Telwa case. But there is also a possibility that Indarjit was trying to establish that he represented the senior line as a first step towards the acquisition of the estate.

37. It may further be pointed out that the case of the defendant was that there was a custom in the family under which a widow could succeed. It is therefore also possible to attribute the conduct of Indarjit to a belief in his mind that such a custom existed, though this hypothesis is not a very probable one.

38. A few other facts in this connexion have been referred to by the learned District Judge. Although Balbhaddar Narain did not succeed in getting the scholarship for his son from the Collector, the junior Rani granted a scholarship of Rs. 8 per month to his son from her private purse and later, after the death of the junior Rani, it was continued and then enhanced to a sum of Rs. 50 per month distributed among the four sons of Balbhaddar Narain. The receipt of these scholarships by Balbhaddar has not been pleaded as amounting to any estoppel against him, and would not in our opinion amount to such estoppel. The scholarship was granted by way of a gratuity as an act of grace and favour and not as consideration for any relinquishment of Balbhadar''s right. There can therefore be no estoppel against him on this ground. We think that these circumstances are not sufficient to show that as a matter of fact there had been a complete separation and an abandonment of all right to succession and a renunciation of the inheritance before 7th January 1911 when Raja Kaushal Kishor died.

39. Point 7.-The next circumstance relied upon by the learned counsel for the respondent is the succession of women to the estate. The learned Judge has not accepted this contention and has found under his Point 7, that there is no instance in the family of a widow succeeding to the estate in the presence of joint collaterals. Three instances were relied upon on behalf of the defendant, and those instances have been discussed by the learned Judge in his finding on Issue 3 relating to the custom set up by the defendant. The plea of custom of the admission of a widow to succession to an impartible estate has not been pressed before us, but the three instances have been relied Upon as showing a separation. It cannot be denied that if the defendant were to establish as a fact that at any time since the death of Bodh Mal a widow succeeded to the estate as Rani and held it to the exclusion of the next heir representing Indarjit''s branch, so as to destroy their right, the necessary conclusion would be that there was a complete separation in the family and the right to succeed would not be revived after the succession has opened once again.

The succession of a widow to the exclusion of an ancestor of Indarjit would in any case be very strong evidence to prove the separation in the two branches. But in our opinion none of the three instances satisfactorily establish the case put forward by the defendant.

40. Reliance is first placed on the succession of Bakht Kunwari when her husband Raja Bhim Mal died childless. The only evidence on which this plea is based is a decree, dated 30th May 1908, a copy of which was found on a record kept in the record room of the District Judge of Gorakhpur which was sent for by the plaintiffs.

41. As this is the first time that we have referred to this decree, it is necessary to point out that its genuineness was very strongly challenged on behalf of the defendant. The learned Judge considered this point at considerable length at pp. 100 and 101, and came to the conclusion that this is a genuine copy, and so is also a pedigree found on the same record. These documents are printed on pp. 3 and 1 of the Supplemental Record No. 2. We tested the genuineness of this copy in various ways. We satisfied ourselves that prior to Regn. 13 of 1808 which came into force in December 1808 the Zila Judge or the District Court had jurisdiction to try all suits of a civil nature, no matter how high its valuation might be: vide, Regn. 2 of 1803, Section 3, and that his jurisdiction was only subsequently restricted. We also found that the seal of the Zilla Court had to be 1½ inches in diameter (Regn. 2 of 1803, Section 14) and that the seal of the Provincial Court of appeal had to be two inches in diameter and did contain the words "the Seal of the Provincial Court of appeal." (Regn. 4 of 1803, Section 5). Ex. P-4 bears impressions of seals which are not decipherable, but another copy of it which is not marked as an exhibit and which was also on the same file and is before us shows that there are seals on it. There are impressions two inches in diameter in which the words "Baadalat Appeal Ilaqa Benares" can be read and so also the year 1212 Fasli. The paper and the writing on these appear to be old, and the learned District Judge, in spite of matters alleged to be suspicious which were brought to his notice, came to the conclusion that they were genuine copies.

42. Fortunately for the plaintiffs their learned advocate has discovered the report of that very case when the matter came up in appeal before the Sadar Diwani Adalat. That case is reported in S.D.A. (N.W.P.), Vol. 2, p. 169, and reproduces the same pedigree. It is interesting to note that Mr. Machnaghten in his Principles and Precedents of Hindu Law, Vol. 2, p. 192, has quoted this very pedigree in order to illustrate a rule of Hindu law relating to adoption. In the judgment of the Sadar Diwani Adalat the full pedigree down to Daryao Mal is given. We do not rely upon these reports as any evidence in the case at all, but merely to confirm our view that the copy of the decree filed in the Court below which was admitted as evidence by the learned District Judge is a genuine copy. The decree merely shows that Shamsher the eldest son of Daryao Mal came to Court on the allegation that Rani Bakht Kunwari had given away the raj to his father Partab Mal and made him the

representative. This fact was denied by the defendant Rani Dilraj Kunwari, whose name was brought on the record after the death of her husband Raja Ajit Mal, and it was also asserted on her behalf that Bakht Kunwari had no such authority. It was found as a fact that although Bakht Kunwari had attempted to give the raj to Partab Mal, the chaukidars of the district and the other Rajas had assembled and given the raj to Sheo Mal, and that Raja Sheo Mal and after him Raja Ajit Mal were the persons entitled to the raj and not Partab. We fail to see how this circumstance can establish that Bakht Kunwari actually succeeded as Rani to the exclusion of the next heir so as to bring about a complete separation. The judgment does not say that the Rani herself succeeded to the estate, but that she attempted to give it away to Partab when her husband was killed. This, therefore, furnishes no instance of any importance.

43. The second instance relied upon on behalf of the defendant is the succession of Rani Dilraj Kunwari. The decree referred to above shows that on the death of Ajit Mal his widow Rani Dilraj Kunwari was brought on the record and the suit was continued as against her, but in the body of the judgment it also appears that she not only pleaded but led considerable evidence to show that when Tej Mal the son of Sarabjit Mal was born, Raja Ajit Mal went there on the 12th day after the birth, and having invited all the people of the village, and the hawan ceremony and worship performed, and Raja Ajit Mal and Rani Dilraj Kunwari took Ajit Mal as their son (Supplemental Record, p. 7, line 22). The finding at p. 8, line 20 was:

When Tej Mal, son of Babu Sarabjit Mal was bom Raja Ajit Mal and Rani Dilraj Kunwar defendant took him as their son, but since the death of Raja Ajit Mal, Rani Dilraj Kunwar defendant his widow is in possession.

44. It is, therefore, clear that in the presence of an adopted son Rani Dilraj Kunwar could not by any means succeed to the estate, and she took over possession merely because the adopted son was a minor boy. This is by no means an instance of the exclusion of the junior branch which destroyed their jointness. The result of the adoption in fact was that the two branches of Lakshmi Mal were absorbed into one and represented the senior line.

45. In this connexion we may also refer to a book called Viswan Vansa Vatika and printed and published in 1887 which gives a history of this family presumably in accordance with the traditions handed down in the family. No serious objection to the admissibility of this book appears to have been raised in the Court below, nor has it been seriously objected to before us. Presumably it has been admitted in evidence on the supposition that it contains either the statement made by a person possessed of special means of knowledge (8. 32, Evidence Act) or contains a record of the custom in the family. Extracts from this book have been printed from pp. 155 to 165. The list of the Rajas omits the name of Bakht Kunwari, but mentions Rani Dilraj Kunwar (p. 157). But on p. 159 it is pointed out that when Raja Tej Mal was born, Maharaja Ajit Mal went to his place of birth and taking off his turban from his

head put the same on the head of his nephew, and that on the death of the Maharaja the same boy had a right to sit on the gaddi but that the widow took the management of the raj in her own hands. Later when Tej Mal was 16 years old he sat on the gaddi in 1815. Part of the extract which is not printed and which ought to be a continuation of the 21st line on p. 164 shows that she gave the raj to Tej Mal before she actually died. The learned counsel for the respondent relied on this passage, which says that she reigned for 12 years as Rani and wanted to give the raj to her daughter. But apparently this was so because her adopted son was a minor boy still under age.

46. In this connexion reliance is also strongly placed on the Kaifiat Mahtawi printed on pp. 177, 179 and 181, which go to show that on the death of Raja Ajit Mal the zamindari tenure was settled from 1216 to 1222 fasli with the attorney of Rani Dilraj Kunwari, and that the settlement was continued till 1224 fasli when Tej Mal''s name was entered on the death of the Rani. The entry in the revenue papers merely indicates possession and is not any conclusive evidence of title. We may also point out that the judgment dated 30th May 1808 between Rameshwar Bahadur who belonged to Indarjit''s family and Rani Dilraj Kunwari would outweigh entries in settlement papers made 30 years afterwards, based presumably on oral information received. The case of Rani Dilraj Kunwari is therefore not an instance of a succession to the exclusion of the junior branch.

47. The third instance relied upon is that of the defendant Rani Shyam Sunder Kunwar. The learned District Judge has summarily rejected this, and we fully agree with his view. Barring the fact that there has been delay in the institution of suits which may be explained away on various suppositions and the circumstance of the request for the small scholarship for Balbhaddar''s boy, there is nothing else to show that Rani Shyam Sunder Kunwari''s succession was accepted by Indarjit and is an instance in point. The suit is brought within 12 years and before her right to retain the property has matured by prescription, and the question which we have to decide is the state of the family before she took over possession, viz. when her husband died.

48. Point 8.-The last point relied upon by the respondent is the extent of the babuai grant to Anand Mal. The learned District Judge has himself not thought much of this point. On behalf of the defendant it was suggested that the babuai grant might have consisted of 133 villages which was nearly one-third of the entire estate. In the first place the babuana grant itself was denied by the defendant, and the argument is based merely on an alternative ground. In the next place it is not at all clear that the villages so granted amounted to anything like one-third of the entire estate. The learned Judge has discussed this matter on p. 142 and has pointed out that the area covered by the talukas now in the possession of the Rani would have comprised about 1,454 villages. Even if the area granted to the junior branch would now be represented by 133 villages it does not follow that 200 years ago this area would

have been of a very great value, for aught one knows it may all then have been jungle land and small in comparison with the bulk of the estate. We agree with the Court below that the defendant has failed to make out this point.

49. This disposes of all the points which were relied upon on behalf of the defendant in order to prove a complete separation of the two branches, so as to destroy the right of succession. As remarked above the learned District Judge was labouring under a wrong idea that a different principle had been laid down by the Telwa case, which was binding upon him. For instance at p. 120, line 8, he remarked that there was never any renunciation by Lakshmi Mal and Anand Mal and their descendants of their contingent right to succeed to the estate. At p. 123, line 44, he thought that for the purposes of succession to an impartible estate the general status of the family had to be taken into consideration. Finally at p. 143, line 5 he remarked:

It is true that there is no evidence of a definite partition between the families or of a relinquishment of the right of succession by Indarjit Mal or by any one of his ancestors. But in view of my finding on the legal aspect of the question I think these elements are not necessary to constitute separation in a family holding impartible property alone.

50. On an examination of the entire evidence referred to by the learned District Judge, and after weighing all the circumstances brought out by him, we are unable to agree with his conclusion, in the light of the recent pronouncement of their Lordships of the Privy Council. We think that the burden lay heavily on the defendant to establish that the estate was held as his separate property by Raja Kaushal Kishor and that a separation had been brought about by an intention expressed or implied on the part of the junior branch to relinquish their right to succession to the impartible estate whenever a succession opened. We are of opinion that the evidence led in the present case falls short of making out of such a case. We must therefore hold that it is not established that Raja Kaushal Kishore was separate from Indarjit Bahadur in the sense that the latter had lost all right to succession in case the former died without a child and without having disposed of his estate in his lifetime.

51. We now come to the question of the pedigree which has been found by the Court below in favour of the plaintiffs and which finding is challenged on behalf of the defendants. The book referred to above only indicates the senior line consisting of the successive Rajas. Although it supplies a few links it does not make out the whole pedigree for the plaintiffs. Similarly the oral evidence adduced on their behalf cannot take us back to any period earlier than Daryao Mal. But up to Daryao Mal the pedigree is established by overwhelming evidence. Not only have we the fact that on an enquiry ordered by the Court of Wards which was holding charge of the estate on behalf of Rani Shyam Sunder Kumari it was ascertained on enquiry that Indarjit represented the senior branch of Daryao Mal, but that part of the pedigree is further established by other evidence in the case including the decree dated 5th

September 1850, the judgment dated 24th December 1851, the judgment dated 30th November 1867 as well as entries in the khewats which are all printed in Supplemental Record No. 2 and the genuineness of which cannot be challenged. This portion of the pedigree has not been seriously challenged on behalf of the respondent. The attack has been directed against the upper portion of it between Bodh Mal and Daryao Mal. It must be conceded that if the pedigree, Ex.p. 6, and the decree Ex.p. 4 be entirely excluded from consideration, the rest of the evidence, oral or documentary, is totally insufficient to complete these links. The genuineness of these documents, particularly of the decree, has already been considered by us and we have accepted it in concurrence with the view of the District Judge. So far as the pedigree (Ex.p. 6) is concerned there is a note on it showing that it had been dictated by Sham Sher Mal himself and is therefore in that way brought home to his personal knowledge and fulfilled the requirement laid down in Jagatpal Singh v. Jageshar Bakhsh Singh [1903] 25 All. 143. This point is discussed by the District Judge at pp. 102 and 103 of his judgment. He has excluded from consideration the other pedigree filed by Rani Dilraj Kunwar on the ground that it had not been brought home to her. The whole of the pedigree is incorporated in the decree itself. Under Regn. 4 of 1803, Section 13, true copies of the original decree preserved by the trial Court were to be deemed to be the original and admissible in evidence. Under the regulations then in force the decree had to contain a correct copy of the pleadings, and the recital of the facts in the decree may then be taken to be secondary evidence of the admission of the parties. The pedigree was admitted by both the parties and is fully incorporated in the decree at p. 5, and brings it down from Bodh Mal to Daryao Mal in its entirety. The copy of the pedigree (p. 6) in the same way gives us a complete pedigree. We consider it unnecessary to refer to any other evidence in this case which has been discussed by the learned District Judge, for we accept his finding on this question of fact, that the full pedigree set up by the plaintiffs has been made out and that Indrajit Mal was the next member of the family representing the senior most branch in the event of Raja Kaushal Kishor''s line becoming extinct.

52. The only other point which now remains for consideration is an alleged fraud on the registration. This is the subject of Issue 5 which has been found in favour of the plaintiffs by the learned District Judge. His findings are on pp. 149 to 151.

53. The sale deed by Balbhaddar in favour of the plaintiffs is dated 30th October 1922 and is printed on p. 583. The properties transferred are described on pp. 585 and 586 and in addition to the four villages sold a 1/3rd share in a sitting room in the garden appertaining to the Majhauli kothi in muhalla Daudpur, Gorakhpur, was also sold. It is clearly established that this sitting room is a circular tiled shed about 13½ feet in diameter situated in a corner of this garden. As compared with the value of the four villages this property was insignificant. The villages were situated in Tahsil Deoria which has a separate registration office; and in the ordinary course the deed ought to have been presented for registration before the Sub-Registrar of

Deoria, but for some reason best known to the parties it was thought either more advisable or more convenient to have this deed registered at the headquarters viz. at Gorakhpur. In order to effect this registration, the 1/3rd share in the sitting room or neshisrga was included in the deed. The Sub-Registrar, when he found that there was some property within his jurisdiction, was perfectly justified in accepting the deed, as it prima facie fulfilled the requirements of Section 28, Registration Act.

54. The defendants however urge that the sitting room was not a part of the impartible estate, but was the self-acquired property of Raja Kaushal Kishor and that in any event it would not have devolved upon Balhaddar and that therefore no title could pass to the vendees. It has further been urged that the whole object of the inclusion of this property was to bring about the registration to Gorakhpur, and that there was no intention to transfer this item at all.

55. It appears that this kothi was purchased at auction in the name of Dulhin Chandrika Kunwari at an auction purchase in 1893 (p. 293). Later on she made a gift of it to Raja Kaushal Kishor on 29th October 1896 (p. 297). In view of Section 66, Civil P.C., it is not open to the plaintiffs to urge that the auction purchase was a benami one, and that the real purchaser was the owner of the Majhauli estate. Curiously enough the Dulhin is described as such owner in the sale certificate (p. 293). It must therefore be assumed that Raja Kaushal Kishor acquired it in 1896 as his separate property. The question whether by incorporation during a period extending over 12 years the Raja could have converted the character of this kothi into one of impartibility is a moot point and has not been gone into by the learned District Judge. On behalf of the plaintiffs reliance is placed on the case of Gurusami Pandiyan v. Chinnathambiar [1920] 53 I.C. 14. We however think that in the absence of any such plea or direct evidence we must assume that this kothi remained the separate property of Raja Kaushal Kishor and did not descend on Indrajit as a part of the impartible estate. It does not however follow that either the vendor Balbhaddar or his vendees, the present plaintiffs were aware of this auction purchase and the gift. The office of the Court of Wards is located in this kothi, and as shown from the description in the sale deed, the kothi goes by the name of Majhauli kothi which would be understood by the general public as a property belonging to the Raj, Ram Ghulam Mal, one of the plaintiffs, has sworn that he was assured by Balbhaddar that there was a kothi and a garden belonging to the estate situated in Gorakhpur (p. 41, line 10). The evidence of Sham Rathi (p. 44) also corroborates his statement. There is no evidence to show that Balbhaddar or his vendees had any knowledge of the auction purchase or the gift of 1896. The learned District Judge has found that Balbhaddar Narain Mal bona fide believed that this property was also a part of the estate (p. 151, line 6). There can be no doubt that the vendees also laboured under the same belief, and that they all had an honest belief that Balbhaddar had the right to transfer and the vendees to take the transfer of this property. But in view of the facts now discovered we must hold that Balbhaddar had in reality no title to it. The position then is that the vendor has no transferable

interest in this item of the property which is of almost an insignificant value but that both the vendor and the vendees honestly believed that such an interest existed. This is the view expressed by the District Judge which we accept.

56. The learned Judge has thought that it follows from these two statements of fact that the registration is valid. He has thought that the question of an intention to transfer can only arise when the property is not owned by the person transferring it and is not believed by the parties to be owned by him, and that all that is necessary to validate the registration is that some portion of the property within the jurisdiction of the Sub-Registrar should be included.

57. It cannot be disputed that the object of the parties to get registration effected at any particular place cannot per se amount to a fraud on the Registration Department. They are the best judges of their own convenience. The inclusion of a bit of a property howsoever small does not necessarily imply any fraud on registration. So long as the parties satisfy the requirements of Section 28, Registration Act, they are acting well within their powers. In the present case there cannot be the least doubt that the main and principal object of the inclusion of this item was to get the deed registered at Gorakhpur. If that were not the primary consideration in their minds, it is possible that this one-third share in the sitting room might not have been transferred at all. But if in order to enable themselves to present the deed for registration at Gorakhpur they did honestly mean to transfer this small bit of property and bona fide believed that the property could be transferred by Balbhaddar, we do not see any fraud against the registration law. We do not agree with the view which the District Judge was inclined to take, that no question of intention can arise. In Harendra Lal v. Haridasi Debi AIR 1914 P.C. 67 their Lordships at p. 989 remarked:

This parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security.

58. Similarly in Biswanath Prasad v. Chandra Narayan AIR 1921 P.C. 8 at p. 516 (of 48 Cal.) their Lordships observed:

In coming to the conclusion that this appeal must be dismissed, their Lordships'' judgment rests on the view that none of the parties over intended that the one kauri share in mauza Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee.

59. No doubt those cases were distinguished in the case of Durga Prasad v. Tameshwar Prasad AIR 1924 All. 897 which, unlike the case before their Lordships of the Privy Council, was not a case of an instrument executed by the parties.

60. The cases before their Lordships of the Privy Council were cases of a non-existing property and property which was known to both the parties not to

belong to the vendor, and there could of course be no intention to transfer it. The present ease is not such a one. Here the property existed and the parties believed that it could be transferred. It seems to us that Section 92, Evidence Act, which excludes evidence of any oral agreement modifying the written contract applies only as between the parties to the instrument and their representatives-in-interest. But even under the first proviso to that section any fact may be proved which would invalidate the document. The section would therefore not exclude evidence to show that a document was a mere paper transaction never intended to be given effect to or acted upon. In the present case Section 92 cannot operate as a bar against the defendant, as Rani Shyam Sunder, whom the Court of Wards represents, was no party to the sale deed of 1922. We think that it is open to her to show by direct or indirect evidence that the parties had no intention of conveying a one-third share in the sitting room, and that Balbhaddar had no intention of selling and the plaintiffs had never any intention of purchasing the one-third share in this shed which was merely included in the sale deed in order that its name may be used for the purpose of getting the registration effected at Gorakhpur. We think that extraneous evidence of this kind is admissible where the person challenging the transfer is not a party to the instrument, We may in this connexion refer to the case of Mukat Nath and Others Vs. Shyam Sundar Lal and Others, , which finds support from the case of Gokarakonda Narsimha Rao v. Goharakonda Papunna [1920] 43 Mad. 436.

61. The learned advocate for the appellants has relied on the case of Vishvanathbhat Annabhat Pujari Vs. Mallappa Ningappa, but in that case the oral contract sought to be proved was one for reconveyance to the vendor. The judgment does not show on what ground the learned Judges thought that they could not allow evidence to be led to show the intention of the parties unless it be the fact that they thought that the case was covered by Section 92, Civil P.C., because the transfer had been made by the guardian of the minor plaintiff. The other case relied upon by Mr. Peare Lal Banerji does not in any way help him. This is Ram Sumran Prasad Vs. Govind Das, That was a suit brought by a reversioner to challenge an alienation by a Hindu widow under an instrument to which he was not a party. The learned Judges found as a fact that there was a bona fide intention on the part of the widow to make a gift and that she had intended to part with it though the transferee afterwards changed his mind and did not take over possession.

62. Accordingly we cannot hold that the mere fact that the vendor and the vendees honestly believed thai Balbhaddar owned the property is sufficient to validate the registration, even though neither party might ever have intended that this should be transferred.

63. But the burden of proving the fraud on registration undoubtedly lies upon the defendants. Prima facie the validity of the registration must be presumed and the defendants must place sufficient materials before the Court to exclude the case of an absence of fraud.

64. The circumstances relied upon on behalf of the respondent are that the property was insignificant, that the obvious object of its inclusion was to effect the registration at Gorakhpur, that being an undivided share it was not capable of immediate and exclusive possession, that the evidence of Ram Ghulam indicates that no serious enquiry was made by him to find out the title to it or to inspect the property thoroughly, that this property could not have been taken into account in calculating the consideration, and that it could not be made use of without a claim to a subsequent suit for partition. All these no doubt are suspicious circumstances. The oral evidence of Ram Ghulam and his pairokar Sham Rathi is direct and is to the effect that a transfer of this item was actually intended by the parties, though the object was to enable the registration to be effected at Gorakhpur. The existence of this motive cannot be doubted but is it a necessary conclusion that, with the object to get the deed registered at Gorakhpur in their mind, they did not also intend to transfer a small bit of the property? We think that in the circumstances which are undoubtedly established in the case there can be two possibilities. The parties might either have not intended that this small bit of property should pass from Balbhaddar to the plaintiffs or they might have intended that it should pass, the object in both the events being the same, viz. to enable the registration being effected at Gorakhpur. When the circumstances are capable of two explanations, and there is direct and positive oral evidence on the side of the plaintiffs and there is no direct and positive oral evidence on the side of the defendant to contradict it, and the learned District Judge who tried the original suit came finally to the conclusion that no fraud had been established, we feel very loth to take a contrary view in appeal. The burden of proving fraud lay on the defendant, and in the circumstances we must hold that burden has not been discharged and the alleged fraud not established. As there was a big estate at stake, it is most likely that the parties took legal advice in the matter. Indeed, it was suggested in the course of the oral evidence that there were people belonging to the legal profession at Gorakhpur who were interested in this affair and were present at the time of the registration. There is no reason to suppose that they would have allowed the whole deed to fall through for want of a proper registration on account of an absence of an intention on the part of both the parties to transfer this small item. The probabilities are that in order to effect the registration as desired they deliberately included this item in the contract of sale and did intend that it should pass. We accordingly hold that no fraud on registration was committed in this case.

65. That in such an event the registration is valid finds support from the view expressed in an earlier case by the same Bench which decided Durga Prasad Sahu''s case referred to above. This is the case of Muhammad Abdul Hasan Vs. Fida Husain and Others, The learned Judges in that case remark:

The property, a grove situated within the jurisdiction of the Sub-Registrar of Budaun, did exist and mortgagor and mortgagee had reason to believe that it belonged to one of the mortgagors, Baqar Husain. There was no collusion between

the mortgagor and the mortgagee, and a fictitious property was not entered with a view to obtain registration in a registration office where it would not otherwise have been possible.

66. As in Pahladi Lal v. Mt. Laraiti [1919] 41 All. 22:

the facts there are that the parties intended to deal with the property that is the grove situated in Ujhani; so the condition of the mortgagor''s real title does not affect the question of registration.

67. We agree with this view and decide the issue in favour of the plaintiffs.

68. The last point relates to the alleged custom of admission of widows. With the exception of the three instances of Rani Bakht Kunwari, Rani Dilraj Kunwari and the present defendant Rani Shyam Sunder, which we have discussed at considerable length and shown that they do not amount to any real instance of such succession, there is no other instance cited in the direct line of the holders of the Raj.

69. But the defendant has led oral evidence to show that among descendants of ancestors three or four degrees higher than Raja Bodh Mal, who himself flourished about 200 years ago, there have been such instances. Not a single piece of documentary evidence has been produced in support of this case. Instances in order to be relevant ought to relate to succession to impartible estates and not to partible properties. As impartible estates are generally big estates, one would expect that documentary evidence in the form of khewats, if not of proceedings in Court, would be easily available to prove the succession of widows. No such documentary evidence is forthcoming. Oral evidence which is easy to procure has been led and an attempt has been made to show a number of such instances. These instances are all said to come, not from the Province of Agra, but from the Province of Oudh. Even though it may not be possible to exclude such alleged instances as being irrelevant, it is quite clear that their weight cannot be very great when we have to consider the custom prevailing in the Majhauli Raj. In this connexion it must be pointed out that in para. 30 of the written statement the custom pleaded was the family custom of Majhauli and not any tribal custom. Apart from that a period of 200 or 300 years may in itself be sufficient for the growth of a new custom in some other families of which instances have been sought to be given.

70. The learned District Judge has held that the alleged custom has not been established. We think that many of these instances quoted by the defendant''s witnesses have really not been proved, and the evidence taken as a whole is altogether insufficient for proving such a custom of succession of a Hindu widow to the exclusion of a member of the junior branch when the joint status of the family has not been broken. The learned District Judge has discussed the oral evidence on pp. 146 to 148, and as we are in agreement with his conclusion, we do not think that we need discuss that evidence over again when the point is not very seriously pressed before us.

71. The result, therefore, is that this appeal is allowed and the decree of the Court below is set aside, and the plaintiff''s claim is decreed with costs in both Courts.