Privy Council Appeal No. 37 *of* 1915.

Oudh Appeal No. 16 *of* 1913.

Murtaza Husain Khan - - - - - *Appellant,*

v.

Mohammad Yasin Ali Khan - - - - *Respondent,*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1916.

Present at the Hearing:

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

The facts of this case are fully set out in the judgments of the Judicial Commissioners of Oudh, from whose decree dismissing the plaintiff's claim this appeal is preferred; their Lordships are thus relieved of the necessity of referring to them at any length.

The suit was brought in the Court of the Subordinate Judge of Sultanpur to recover from the defendant, the Talukdar of Deogaon, in the district of Fyzabad, a half-share of certain non-Talukdari property to which the plaintiff claims to be entitled by right of inheritance under the Mahommedan law.

At the time of the annexation of Oudh the Taluka of Deogaon was found to be in the possession of one Babu Jamshed Ali Khan under a firman of the deposed King, bearing date the 23rd Shaban, 1271, corresponding with the 11th May, 1855. On the 19th December, 1858, a summary settlement of this property was made with him by the British Government. The *Kabuliat*, or engagement for the payment of revenue, executed by Jamshed Ali Khan, bears date the 22nd January, 1859. On the 17th October, 1861, he received a *Sanad* conferring on him "the full proprietary right, title, and possession" of the estate of Deogaon and of Almasgunj,

consisting of the villages in the list attached to his *Kabuliat*. This *Sanad*, among other conditions, declared as follows:—

"It is another condition of this grant that in the event of your "dying intestate or of any of your successors dying intestate, the "estate shall descend to the nearest male heir, *i.e.*, sons, nephews, &c., "according to the rule of primogeniture, but you and all your suc- "cessors shall have full power to alienate the estate, either in whole or "in part by sale, mortgage, gift, bequest, or adoption, to whomsoever "you please."

Jamshed Ali Khan died in 1865; his name, however, is found entered as Talukdar in the lists 1 and 2 mentioned in Act I of 1869 (the Oudh Estates Act).

He was succeeded by his son Raja Azam Ali Khan, who appears to have acquired between 1868 and the time of his death, considerable property, movable and immovable, which, not coming within the meaning of the word "estate," defined in Act I of 1869, is usually called the non-Talukdari property. The plaintiff's claim relates to a half share of this property on the ground that it is not subject to the rule of devolution applicable to the estate or Taluka.

Rajah Azam Ali Khan died in October 1899, leaving two sons, Mustafa Ali Khan and the present plaintiff; and the former as the elder succeeded to the estate by the rule of primogeniture in accordance with the provisions of the *Sanad* and the rule laid down in section 22 of the Act. He also obtained possession without dispute, so far as appears on the record, of all the non-Talukdari property, and held the same until his death in July 1909, when he was succeeded by his son, the minor defendant, Yasin Ali Khan.

The plaintiff brought his suit on the 12th April, 1910, and the main basis of his claim is that the property in dispute is not subject to the rule of succession by primogeniture, which regulates the descent of the Taluka, but is governed by the ordinary Mussulman law of inheritance, and that accordingly Mustafa Ali Khan and he became entitled on the death of their father to equal shares in the same.

The defendant in his answer pleaded that the property in dispute was an accretion to the ancestral estate, and was, therefore, subject to the same rule of descent as the Taluka, and that even if it were not so regarded, his father, and, on the death of his father, he himself became under the old family custom solely entitled to the said property. These contentions took a concrete shape in the statements of the respective pleaders recorded by the Subordinate Judge on the 14th June, 1910. The plaintiff's pleader appears to have stated that the present claim was exclusively confined to properties that had been acquired by Rajah Azam Ali Khan, and did not relate to the Taluka; and he contended that Act I of 1869 applied neither to the Taluka nor to the villages in dispute, though the Taluka descended to a single individual by the rule of primogeniture under the *Sanad*. He further denied the existence of any family custom.

The defendant's pleader, on the other hand, urged that the Act applied to both classes of property, and that, apart from the Act, family custom governed the descent of such property as was not included in the estate under the Act.

The sixth issue framed by the Subordinate Judge relates to the question of custom, and is in these terms :—

" 6. Whether there exists any custom in the family of the parties " relating to the acquired property, under which a single member " becomes the owner, and according to which the father of the defen- " dant and the defendant alone became entitled ? "

The onus of establishing the family custom was placed on the defendant; and although his pleader appears to have objected that this burden was wrongly thrown on him, he produced a considerable body of evidence, oral and documentary, in support of his allegation regarding the course of descent relating to the family property. The plaintiff in rebuttal, as it is called, of the case made by the defendant, gave his own evidence and examined his sister, a lady of the name of Kaniz Batul, widow of the late Nawab of Hasanpur. He also produced some *Wajib-ul-Arz*, or village administration papers for several years ranging from 1864 to 1873. To these their Lordships will refer, very shortly, later on.

On the question whether Act I of 1869 applied to the estate of Deogaon, the Subordinate Judge held in substance that as Jamshed Ali Khan had died before it came into force, his name was wrongly entered in the lists prepared under the Act; and that consequently, the statute not being applicable, no presumption with regard to custom could arise thereunder.

This view as to the non-applicability of the Act to the Taluka itself, which was not attempted to be supported before this Board, was rightly overruled by the learned Judges on appeal, and their Lordships will not refer to it further. Having held that no presumption could arise from the inclusion of the Taluka in List 2 as the Statute did not apply to it, the Subordinate Judge proceeded to consider the evidence. Among this were two important documents, one a petition of Rajah Azam Ali Khan bearing date the 27th May, 1873, presented to the revenue authorities, and the other a written statement filed in Court on the 15th February, 1868. In both there were clear and explicit statements of the deceased Rajah regarding the custom which governed the devolution of property in his family. Both these statements the Subordinate Judge ruled out of consideration as he thought they referred only to the Taluka, and had, therefore, no bearing on the question of succession to the non-Talukdari property.

Dealing with the oral evidence, thus detached from any support from the documents, the trial Judge characterises the defendant's witnesses, many of whom appear to be men of substance, and some of standing and position, as " tutored," and

their testimony as wholly untrustworthy; and, relying on the *Wajib-ul-Arz* papers, and in some measure on the statements of the plaintiff's sister, he came to the conclusion that the defendant had failed to prove the custom alleged by him. He accordingly decreed the plaintiff's claim. This decision has been reversed on appeal by the Judicial Commissioners, who have dismissed the suit with costs in both Courts. Shortly stated, they have held that the estate of Deogaon is within the statute, and by virtue of the provisions of the Act there was a presumption in favour of a pre-existing custom attaching to the Taluka which threw on the plaintiff in this case the onus of showing that the non-Talukdari property was subject to a different rule of devolution. They also considered the oral testimony adduced by the defendant as reliable, and referred to Rajah Azam Ali's statements with regard to the custom of the family as showing that he made no distinction between ancestral and acquired property.

The judgment of the Judicial Commissioners has been assailed in this appeal chiefly on two grounds: *firstly*, it is contended that the presumption on which the learned Judges have mainly rested their decision, has been wrongly raised and wrongly applied; and, *secondly*, that the onus has been wrongly thrown on the plaintiff, inasmuch as it lay on the defendant, as established in *Janki Pershad Singh's case*,* known locally as the *Ranimau Case*, to prove affirmatively the custom alleged by him. The two points are so closely inter-related that their Lordships do not propose to discuss or consider them separately.

The contentions of the parties on the question of presumption rest on the provisions of sections 8 and 10 of the Act; and although these sections have formed the subject of discussion in several previous decisions of this Board, it becomes necessary again for the purposes of this judgment to refer to them shortly. Section 8 provides that "within six months after the passing of the Act the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India, shall cause to be prepared six lists, namely, *first*, a list of all persons who are to be considered Talukdars within the meaning of the Act." As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on the 22nd January, 1859, a Talukdari *Sanad* was granted to him on the 17th October, 1861, and his name was entered as a Talukdar in the first of the lists. He had acquired, as declared by section 3, "a permanent, heritable, and transferable right" in his estate, and was unquestionably a Talukdar within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to "cause to be prepared" were obviously in course of preparation long before the passing

* L.R. 40, I.A. 170.

of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such Talukdars.

List 1 is a general list of all Talukdars, without distinction as to the course of descent in their families in respect of the Taluka. The classification of Talukdars on the basis of the devolution of the estate begins with list 2, which is "a list of Talukdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir." The use of the word "ordinarily" clearly implies that an occasional variation would not affect the "custom" of devolution.

The third is "a list of the Talukdars, not included in the second of such lists, to whom *Sanads* or grants 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."

On behalf of the appellant, it is contended that although the name of Jamshed Ali Khan is included in list 2, the fact that the succession is declared in the *Sanad* to go by primogeniture shows that the estate really came under list 3 and not under list 2, and that, consequently, no presumption as to a custom relating to the descent of the estate can arise. In support of this contention, reference is made to the Chief Commissioner's circular, dated the 18th day of January, 1860, by which the Talukdars were invited "to file a written declaration," expressing their desire that their estates should not be subdivided at their death "or in any future generation." A similar expression of wish was invited from such Talukdars as had received *Sanads*, "and in whose families the law of primogeniture does not prevail."

It appears that in response to this invitation, Jamshed Ali Khan submitted, on the 6th day of February, 1860, the following representation:—

"Sir,

"The British Government has been pleased to confer upon me "the proprietary rights of the Deogaon estate, Pargana Jagdispur, "District Fyzabad. I, therefore, wish and pray that after my death "my estate may be allowed to continue in my family, generation after "generation, in its entirety, without partition, according to the custom "of *raj-gaddi*, and the younger brother may get the maintenance "from the *gaddi-nashin*."

It is urged that these two documents, taken together, show that family custom or usage did not form the basis of the declaration as to the rule of descent by primogeniture, which does not come under list 2 but comes only under list 3. This proposition is attempted to be supported by reference to certain dicta, or rather expressions, of this Board in the case of *Achal Ram* v. *Udai Partab*, 11 I.A. 51, and in

that of *Thakur Ishri Singh* v. *Baldeo Singh*, 11 I.A. 135. The appellant's contention receives some colour from the words of Sir Barnes Peacock, who delivered the judgment of the Board in *Achal Ram's case*, "that when a Talookdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture." But it must be observed that that case proceeded on its own special facts; the Talukdar Pirthi Pal Singh, whose name had been entered in list 2, had died before the Act came into force; there was no dispute, however, that the succession to his estate was governed by the Act. He left no heir coming within the first five sub-sections of section 22, and the property had accordingly "descended" to the widow, who held it for her lifetime; and after her death it was held by her daughter. On the death of the daughter, Achal Ram, her husband, took possession of the estate. The suit by Udai Partab was brought to recover possession of the estate from Achal Ram, on the ground that he, Udai Partab, was entitled as the nearest male agnate of the deceased Talukdar. The case really fell within sub-section 11 of section 22, and the issue relating to descent by right of lineal primogeniture did not directly arise in it.

Their Lordships think that the views expressed by Sir Barnes Peacock must be read in conjunction with the facts of the case and ought not to be extended so as to exclude the rule of descent by primogeniture from the scope of list 2. In fact, in *Thakur Ishri Singh's case* decided shortly after, where also the deceased Talukdar's name was inserted in lists 1 and 2, Sir Arthur Hobhouse (afterwards Lord Hobhouse) delivering the judgment of the Board used the following language: "Now, however true it may be that if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the rule of primogeniture, it is impossible to say there is no such guide in this case." It was found in *Thakur Ishri Singh's* case that the deceased Talukdar Bani Singh had in his lifetime, on the 20th February, 1860, in answer to the Chief Commissioner's circular letter already referred to, stated the usage in his family to be the selection of "an able one" out of several sons "without reference to seniority" to succeed to the estate; "that is to say, according to him," adds Sir Arthur Hobhouse, "that law which is familiar to us under the name of tanistry, or something very like it, prevailed in his family." The conclusion is thus expressed:—

> "The question is, whether the appellant, having the *onus probandi* "on him to show that primogeniture is the law of the family, has "proved his case; and he certainly is very far indeed from proving "his case, the evidence, so far as it goes, being the other way."

This decision certainly does not exclude descent by rule of primogeniture, from the scope of list 2; whilst section 22

expressly declares that succession *ab intestato* to the estates of Talukdars whose names are inserted in list 2 equally with those entered in lists 3 and 5 shall be by lineal primogeniture. It provides in the first three sub-sections as follows :—

"If any Talukdar or Grantee whose name shall be inserted in the "second, third, or fifth of the lists mentioned in section 8, or his heir "or legatee, shall die intestate as to his estate, such estate shall descend "as follows, viz. :—

"(1.) To the eldest son of such Talukdar or Grantee, heir or "legatee, and his male lineal descendants, subject to the "same conditions and in the same manner as the estate was "held by the deceased ;

"(2.) Or if such eldest son of such Talukdar or Grantee, heir or "legatee, shall have died in his father's life-time, leaving "male lineal descendants, then to the eldest and every "other son of such eldest son successively, according to "their respective seniorities, and their respective male "lineal descendants, subject as aforesaid ;

"(3.) Or if such eldest son of such Talukdar or Grantee, heir or "legatee, shall have died in his father's life-time without "leaving male lineal descendants, then to the second and "every other son of the said Talukdar or Grantee, heir or "legatee, successively, according to their respective "seniorities, and their respective male lineal descendants, "subject as aforesaid."

The amendments made by the Oudh Estates (Amendment) Act of 1910 do not affect the matter.

Their Lordships are, accordingly, of opinion that there is no substance in the contention of the appellant based on the difference in the phraseology of section 8 relative to lists 2 and 3 that descent by primogeniture is confined to cases coming under list 3. Section 10 of the Act after declaring that "no persons shall be considered Talukdars or grantees within the meaning of the Act, other than the persons named in such original or supplementary lists as aforesaid" (s. 9), provides that "the Courts shall take judicial notice of the said lists and shall regard them as a conclusive evidence that the persons named therein are such Talukdars or grantees," that is, "within the meaning of the Act."

This does not mean they shall be conclusive merely as to the fact that the persons entered therein are Talukdars as defined in section 2 ; in their Lordships' opinion, the provision of section 10 goes much further ; it means that the Courts shall regard the insertion of the names in those lists "as a conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. For example, in list 2 such Talukdars alone are included, whose estates, according to the custom of the family "on and before the 13th February, 1856" (the date of the first Annexation of Oudh), "ordinarily descended upon a single heir." Their title to have their names inserted in that list is based on the specific family custom set out in the section. Under section 10 the

Courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based.

In the present case Jamshed Ali Khan's name was included in list 2; it could only have been done by virtue of a pre-existing custom governing the devolution of the estate to a single heir. Section 10 makes the entry of his name in list 2 conclusive evidence of that fact. There is no dispute that in this case the estate descends by lineal primogeniture; the only question for determination is whether the custom which has thus received statutory affirmation with respect to the estate attaches also to the non-Talukdari property, and governs its devolution.

The provision as to the conclusiveness contained in section 10 is confined to estates within the meaning of the Act; it does not apply to non-Talukdari property. The existence, however, of the pre-existing custom gives rise to a presumption. It is urged on behalf of the appellant that this presumption is not enough; and that the defendant must establish affirmatively the course of descent alleged by him. The contention that the onus lies primarily on the defendant is supported by a reference to the decision of their Lordships in the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh.** The plaintiff in that case had obtained a decree in the Courts in India for a half-share of the after-acquired properties of the Talukdar, on the ground that the defendant had failed to establish that by the custom of the family these acquisitions became part of the original estate, and were, therefore, not subject to the ordinary rules of inheritance; and this decree was upheld by this Board. That case had arisen in a family subject to the law of the Mitakshara, which recognises two courses of devolution in the case of what is called "obstructed inheritance": the ancestral property descending in one channel, the self-acquired property in another. Even where the estate is impartible, this distinction in the course of descent is recognised. This is exemplified in *Maharajah Pertab Narain Singh* v. *Maharance Subhao Koer*† (a case under the Oudh Estates Act), where, in making the decree, their Lordships added the following limitation:—

> "The declaration, however, must, their Lordships think, be limited "to the Talook and what passes with it. If the Maharajah had personal "or other property not properly parcel of the Talookdari estate, that "would seem to be descendible according to the ordinary law of "succession."

Similar differentiation was made in another Mitakshara case, which, however, did not arise in Oudh, but which equally exemplifies the rule.‡

Unless there be a custom by which self-acquired properties in a Mitakshara family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended

* L.R. 40, I.A., 170. † L.R. 4, I.A. 228, see p. 246.

‡ *Rani Kumari Dobi* v. *Jagadis Chunder Dhabal*, L.R. 29, I.A. 98.

to incorporate such acquisitions with the estate, they descend by the ordinary law of inheritance. For example, where the owner of an ancestral, impartible estate, possessed also of self-acquired properties, dies leaving lineal male descendants, as the inheritance is "unobstructed," both classes of property go to them; supposing, however, he were to die leaving no male progeny in the direct line, but a widow and a divided agnatic relation, in the absence of a custom the self-acquired property would go to the widow, whilst the estate would devolve on the agnatic heir. The onus of establishing a custom *dehors* the ordinary rule in such a case would lie on the person asserting it. This was the principle on which their Lordships proceeded in *Janki Pershad Singh's case.*

The Mahommedan Law makes no distinction between ancestral and self-acquired property, and recognises no principle of differentiation in the matter of lineal and collateral succession, as is the case under the *Mitakshara* which divides inheritance into "unobstructed and obstructed heritage." All classes of property, whether ancestral or self-acquired, follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the Taluka to establish it.

Their Lordships are of opinion that the Judicial Commissioners in the present case were right in holding that the Subordinate Judge had wrongly placed the onus on the defendant. As already observed, a pre-existing custom relating to the descent of the ancestral estate to a single heir received statutory affirmation in 1869. The presumption is, the family being Mahommedan, that prior to 1856 the same rule of devolution applied to the self-acquired property of the previous owners, and applies to the acquisitions of Rajah Azam Ali Khan. That presumption the plaintiff has sought to rebut by statements and recitals contained in a number of *Wajib-ul-Arz* papers. A *Wajib-ul-Arz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition.

The following facts connected with Jamshed Ali Khan's family will make this absolutely clear. It may be taken as a historical fact that some four centuries ago a Rajput adventurer of the name of Barawand Singh or Raja Barar, of the Rae Bareilly district, raided into the Fyzabad district, and after ousting the Bhar inhabitants from their ancient possessions, established himself there with his clan, apparently since then called the *Bhale Sultan* clan, on account of their prowess

with the pike or lance. Barar's descendants appear to have multiplied immensely; some have remained Hindus, others have adopted the Moslem religion. Tradition ascribes the adoption of Islam to one of his early descendants, named Palandeo, who lived in the time of the Afghan Emperor Sher Shah, from whom he is said to have received the title of Malikpal. This Malikpal is claimed as the progenitor of the Mussulman section of the Bhale Sultan clan. The fourth in descent from Malikpal was Pahar Khan, with whom, according to the defendant's case, began the origin of the Daogaon estate. The Pahar Khani section of the Mussulman Bhale Sultans, to which the Talukdar of Daogaon belongs, trace their descent to him, whilst the Mubarak Khanis derive their origin from Mubarak Khan, his brother. The Talukdars of Mahona and of Uchgaon are Mubarak Khanis. The son of the Talukdar of of Mahona (in the absence of his father in Mecca) has given evidence in this case on the side of the defendant on the question of the custom; so has the Talukdar of Uchgaon. Jamshed Ali Khan was the eighth in descent from Pahar Khan.

The *Wajib-ul-Arz* papers, on which the plaintiff relies, contain the statements of a number of Bhale Sultans, both Hindu and Mussulman, regarding the origin of their respective title to the lands they hold in the several villages to which these papers relate. The history of their title is based purely on family tradition. They describe how after Barar and his clan settled in this district his descendants continued to split up, until several of them formed stocks of their own. In no case, however, they appear to bring down the tradition of division beyond Pahar Khan. The plaintiff admits in his deposition that there has been no partition of the family property since the time of Alahdad Khan, the third in descent from Pahar. His own statement lends strong corroboration to the large volume of concurrent testimony regarding the rule or custom governing the descent of the entire family property, whilst the *Wajib-ul-Arz* papers, on which the first Court relied, do not support the case put forward for him.

In their Lordships' opinion, the plaintiff has failed to establish that the devolution of the non-Talukdari property is subject to a rule different from that governing the estate, and that his claim was rightly dismissed in the Judicial Commissioners' Court. Their Lordships will, therefore, humbly advise His Majesty that the decree of the Appellate Court should be affirmed, and this appeal should be dismissed with costs.

Privy Council.

MURTAZA HUSAIN KHAN

v.

MOHAMMAD YASIN ALI KHAN.

DELIVERED BY MR. AMEER ALI.

PRINTED AT THE FOREIGN OFFICE BY C. R HARRISON.

1916.