Privy Council Appeals Nos. 79, 80 *and* 81 *of* 1936
Allahabad Appeals Nos. 16, 17 *and* 28 *of* 1933

Raja Ajai Verma - - - - - - *Appellant*

v.

Musammat Vijai Kumari *alias* Bitta Rani, minor, (by Thakur Randhir Singh) and another - - - *Respondents*

Same - - - - - - - *Appellant*

v.

Same - - - - - - - *Respondents*

Same - - - - - - - *Appellant*

v.

Same - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1938

Present at the Hearing:
LORD MACMILLAN
SIR GEORGE LOWNDES
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE LOWNDES]

These consolidated appeals arise out of a suit filed by Kunwar Vijai Verma to make good his claim to a moiety of the Pawayan Estate in the Shahjahanpur District of the United Provinces. The litigation has been protracted and in some ways singularly unfortunate, and the appeals as they come before this Board have little resemblance to the case originally tried. Only one of the issues originally raised is now in dispute and upon it their Lordships have not deemed it necessary to hear argument.

It has been found by the Indian Courts, and is now admitted, that the Pawayan Estate was, in the hands of Raja Fateh Singh, the father of Vijai Verma, an impartible Raj descending by the custom of male primogeniture, under which, on the Raja's death in December, 1921, it would, in the absence of any testamentary disposition by him, have passed intact to his eldest son, Raja Indra Bikram Singh, the original defendant in the suit. His younger brother however, claimed that the Estate was joint family property subject to the ordinary Mitakshara law, and alternatively that by the duly executed will of his father, half the Estate was devised to him. The Trial Court held that the Estate was as to some portions impartible, but as to others partible, and gave the

plaintiff a decree for his share of the latter with mesne profits. It held the will not to be proved. The High Court on appeal found the whole Estate to be impartible, but upheld the will, so that the plaintiff, if he had then been alive, would have succeeded in his suit. Unfortunately however, he died before the decision of the Appellate Court was given, leaving an only daughter who was, under protest from the other side, substituted for him on the record. This brought an entirely new issue into the field of dispute as the daughter's right of inheritance to her father was denied on the ground of family custom. It necessitated a remand to the lower Court to try the validity of the custom on which evidence was recorded at great length. The Trial Judge found the custom proved, the result of which would have been to deprive the daughter of all the fruits of her dead father's success, but on his finding being returned to the High Court, the learned Judges there disagreed with his conclusion, and held that the custom was not established, that the daughter inherited under the Mitakshara law and was, therefore, entitled to half the Estate with a large sum for mesne profits. The matter now comes before the Board with two questions in dispute, viz., whether the validity of the will was established and whether the custom excluding the daughter from inheritance was proved. With the consent of the parties their Lordships took up first the question of custom, and having come, somewhat reluctantly, to the conclusion that the custom is proved, they have not found it necessary to go into the question of the will.

It is desirable in the first place to set out in more detail the course which the litigation took in the Indian Courts.

Raja Fateh Singh died on the 28th December, 1921, leaving two sons, Indra Bikram Singh, the elder, who succeeded to the hereditary title of Raja, and Vijai Verma. The latter, on the 7th March, 1922, instituted his suit in the Court of the Subordinate Judge of Shahjahanpur, making his brother defendant. After recording a mass of evidence, both oral and documentary, the Subordinate Judge delivered his judgment on the 16th September, 1926. He held (as already stated) that the will of Rajah Fateh Singh was not proved, that certain of the Pawayan villages were impartible and passed to the defendant, but that others were in the nature of ordinary joint family property in which the plaintiff was entitled to share equally with the defendant. He passed a decree to this effect and directed an enquiry on the usual lines as to mesne profits, in respect of which a sum of about $2\frac{1}{2}$ lakhs of rupees was eventually decreed on the 17th January, 1928.

In the meantime both parties appealed to the High Court at Allahabad and a third appeal against the mesne profits decree was lodged by the defendant in April, 1928. Before, however, any of these appeals came on for hearing, both plaintiff and defendant died, the defendant on the 25th May, 1928, and the plaintiff on the 12th September, 1929. The defendant left two sons, the elder of whom, Ajai Verma, succeeded to the Raj and was brought on the record of the appeals in the place of his father. He is now the appellant before the Board. His younger brother was added as a

pro forma party and is the second respondent. He takes no part in the present proceedings. The plaintiff, Vijai Verma, left, as already stated, an only daughter, Vijai Kumari, then and still a minor, who under the guardianship of her maternal uncle is the first and contesting respondent before the Board.

The course of the proceedings in the High Court has already been referred to. The issue remanded for trial in the lower Court was in the following terms:—

> "Whether there is any custom in the family by which a daughter is excluded from inheritance and whether therefore Vijai Kumari is excluded and cannot maintain her father's appeal or resist the appeal of Indra Bikram Singh."

The Additional Subordinate Judge by whom this issue was tried recorded a mass of evidence tendered by Raja Ajai Verma (hereinafter referred to as the appellant) upon whom the burden of proving the custom lay. It consisted in the main of *wajib-ul-arzes* of villages held by other branches of the family, statements by deceased members of the family recorded by settlement officers, family tradition, and instances in which daughters had actually been excluded from inheritance. No oral evidence was offered on behalf of the present respondent, whose counsel was content with a not very effective cross-examination of the witnesses called by his opponent. The significance of this is considerable: see per Sir Montague Smith in *Rani Lekraj Kuar* v. *Baboo Mahpal Singh,* 7 I.A. 63 at 72.

The learned Subordinate Judge delivered an exhaustive judgment to which he appended a laboriously compiled genealogical table of the family which has materially lightened the labours of counsel and also of their Lordships at the hearing of these appeals. He came to the conclusion that the custom was proved, that Vijai Kumari did not inherit to her father, and in effect that she had no *locus standi* in the appeals before the High Court.

He gives an interesting history of the family, derived mainly from the local Gazetteers, and a history sheet of the family prepared under the directions of the Collector in 1865. It is, no doubt, in part legendary, but its only materiality is to connect the various branches of the family appearing in his genealogical table with a common ancestry, and for this purpose their Lordships think that it may fairly be accepted. No argument has been addressed to them, nor indeed was any cross-examination before the Subordinate Judge directed to show that such family connections did not exist.

The generally accepted family tradition is undoubtedly of a common descent from Raja Chandra Sen who is said to have ruled over a considerable tract of country in what is now the Sitapur District of Oudh and the neighbouring territory in the 16th century. His descendants are all spoken of as Brahm Gaur* Thakurs and they seem to have spread over Sitapur during the break-up of the Mogul Empire, acquiring extensive estates chiefly by force of arms. One of

* Gaurs were one of the recognised clans of Kshattriyas who are said to have migrated from Gaur the ancient capital of central Bengal.

them, Udai Singh, the direct ancestor of Raja Fateh Singh, carved out for himself the estate of Pawayan in or about 1746. It was apparently part of the Rohilla country or at all events, of the debatable ground between Rohilkhand and Oudh, and was ceded to the British in 1801, and it thenceforward formed part of the Shahjahanpur District of the Bareilly Division; Sitapur, in which most of the branches of the family were settled, and in which the Pawayan branch subsequently acquired certain villages, remained a part of Oudh and passed into British hands by the annexation of 1856.

It is not now disputed that Pawayan has since the time of Udai Singh been held as an impartible estate descending by male primogeniture with the hereditary title of Raja recognised by the British Government. It follows almost necessarily from this that so long as there was no partible property in the Pawayan branch the question of a daughter's inheritance could never arise. But if the custom of the daughter's exclusion prevailed throughout the family before the impartible estate came into existence, it may well have remained (so to speak) latent, and ready to come into operation in respect of any partible property that might be acquired at any time by a member of that branch.

Assuming, as their Lordships do in this judgment, that a moiety of the estate passed by the will of Raja Fateh Singh to Vijai Verma, it is admitted that it would be partible property in his hands, and would descend as such on his death. If therefore, the custom was there, the daughter would be excluded. This is the contention of the appellant and was in effect the judgment of the Subordinate Judge.

In the High Court, when the case came back for final decision, it was held that the family custom was not proved. The learned Judges there thought that the *wajib-ul-arzes* were unreliable as recording rather what the members of the family wished to be the rule of inheritance for future generations, than what was in fact an already established rule. They also relied on the fact that though the existence of the custom was recorded in the numerous *wajib-ul-arzes* of Sitapur villages, owned by different branches of the family, there was no similar record in the case of any such village in Shahjahanpur. They thought therefore that even if the custom prevailed in Sitapur (which, however, they held not to be established) there was no reason to assume that it prevailed in the neighbouring district. There was also, they said, "absolutely no evidence" to prove that the custom was prevalent in the family in 1746 when Udai Singh migrated to Pawayan. They do not, however, suggest what evidence of this could have been produced.

The Subordinate Judge had held that some 25 instances of the actual exclusion of daughters had been proved before him. The learned Judges of the High Court held that all these cases were based on doubtful evidence and that some of them were manufactured. Their Lordships are not greatly impressed by the reasoning of this part of the High Court judgment. The grounds on which they rejected most of

these instances do not seem to have been suggested in cross-examination before the Subordinate Judge, and would appear to have been largely conjectural. For instance, in many cases the witnesses had affirmed that the property in question was the separate property of the deceased person which but for the custom would have been taken by his daughters but from which they were excluded. The learned Judges, however, thought it sufficient to say that after all the property might have been joint family property in which the daughters would have no interest.

It is, however, in their Lordships' view, unnecessary to examine these instances in detail. They are nearly all of more or less recent occurrence, and have no bearing on the question which their Lordships take to be the crux of the case, viz.: whether the custom existed prior to 1746. The reason for their elaboration before the Subordinate Judge seems to have been due to the fact that (as he says in his judgment) before him the chief plea of the present respondent was that the custom had been abandoned. This is not now contended, and it is well established that proof of actual instances of such a custom taking effect is not necessary (see *Ahmad Khan* v. *Channi Bibi*, 52 I.A. 379 at 383 and other cases). At the same time their Lordships have little doubt that the Subordinate Judge was justified on the evidence given before him in holding that, at all events, many of the instances deposed to were genuine, and there remains the outstanding fact that in all the ramifications of the family, only one instance could be adduced in which the claim of a daughter to inherit had been made and succeeded, and that, under circumstances which rather support the existence of the custom than otherwise. It may be well to refer to it at once as it has been relied on by both sides, and is, in their Lordships' opinion, of considerable import.

Raja Jangli Bux Singh of Sakhran Behar in Sitapur, a close connection by marriage of the original parties to this litigation, died intestate in 1862 leaving an only daughter, who was in possession of the estate. The male relatives of her father then brought a suit in the Settlement Court to establish their right under the custom. The Settlement Officer, Mr. Boys, delivered a written judgment dated the 18th April, 1868, holding the custom to be proved. The daughter's pleader, he said, had been unable to mention a single instance " nor can the Court find or remember one, in which a daughter had been allowed to hold an estate in her own right; on the other hand the Court can remember cases quoted in the body of these proceedings in which the rights of the daughter have been ignored." He therefore decreed the claim of the plaintiffs.

The case went up in appeal to the Commissioner who upheld the daughter's right. He was evidently satisfied that the custom excluding daughters from inheritance had been established, for he says in his judgment—" I entered into the question of custom very fully in my memo of the 3rd July and expressed my concurrence with Mr. Boys that the evidence regarding custom was against the claim of the daughter." He was however of opinion that the custom was

one that should not be countenanced in British Courts. He referred to the prevalence of female infanticide in the family, and continued, " No custom in my opinion which is opposed to Hindu Law and which has been caused by the dislike of Rajput Chieftains of their own daughters should be countenanced by our Courts." The memo to which the learned Commissioner refers is unfortunately not forthcoming; it might have thrown valuable light on the question now before their Lordships. But they agree with the Subordinate Judge in thinking that the record of this case goes far to establish the prevalence of the custom in the Sitapur District at all events in the early sixties. It seems to their Lordships to be unfortunate that consideration of this case should be dismissed by the learned Judges of the High Court with a mere statement that the ultimate decision was in favour of the daughter.

Their Lordships regret that they are unable to agree with the High Court as to the custom in the Sitapur villages: they think it is abundantly established. It is recorded in the *wajib-ul-arzes* of (in effect) every village owned by a member of the family, and they are very numerous. It is also deposed to by over 70 witnesses, many of them of standing and evident respectability, and was, as their Lordships think, judicially established in the Sakhran case above referred to.

Against this formidable array of positive evidence there is almost nothing on the other side; not a single member of this numerous family is prepared to deny or even to question the existence of the custom.

The probative value of these village records has been recognised over and over again by this Board: It will be sufficient to refer to the judgment of the High Court of Allahabad in *Parbati Kunwar* v. *Chandarpal Kunwar* (see 31 All. 457) which was affirmed by the Board, and the remarks of Sir John Edge in *Balgobind* v. *Badri Prasad*, 50 I.A. 196 at 201, where a *wajib-ul-arz* was of itself held to be sufficient to establish a custom similar to that now in question.

The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of family tradition, are clearly admissible (see *Garurudhwaja* v. *Saparandhwaja*, 27 I.A. 238 at 251) and their unanimity in the present case is remarkable. Their Lordships can see no adequate reason why such testimony should be disregarded, and they have no doubt that the Subordinate Judge came to the right conclusion on this part of the case.

It is contended for the respondent that the prevalence in these Rajput families of female infanticide makes the custom unlikely, but their Lordships are not prepared to attach much weight to this suggestion. Though many infants may have met with an untimely fate, it is not disputed that a certain proportion—put by some authorities as low as 10 per cent.—survived, and the custom ensured that the survivors should at any rate be no danger to the worldly possessions of the branch in which they were born. It is also material to

remember that the object of this inhuman practice was to relieve the father of the often almost impossible task of finding husbands for his daughters, a duty which was laid upon him by his religion, while the exclusion from inheritance was for the benefit of the other members of the family after the father's death.

The question, however, whether the custom so established in respect of the Sitapur villages can be held to attach to the Pawayan Estate, is a more difficult one, but their Lordships think that if it can be assumed that it was a custom prevalent in the family before the acquisition by Udai Singh of the Pawayan Raj, i.e., in or about 1746, their judgment should be in favour of the appellant.

Though Pawayan is now in a different province of British India from the Sitapur villages, there was at the time of its acquisition little if any territorial difference between them; they are separated by a distance of only a comparatively few miles, and it is difficult to conceive any reason why a custom of inheritance should have varied among members of the same family according to whether the individual owned property on one or other side of an indeterminate border. The Courts of Oudh have found the exclusion of daughters from inheritance so well established among the Rajputs that (to quote the High Court in the present case) it is "almost a territorial rule of law." The reasons for its maintenance would be the same in each case —mainly no doubt the unwillingness of the Thakurs to allow any part of their hard-won possessions to pass by a daughter's marriage into the family of a neighbouring chieftain, and the necessity of the strong arm to maintain what they had won. There is certainly no reason to think that these considerations were less applicable in 1746 to Pawayan than to any other part of the Rohilla country.

Their Lordships do not forget that there is no record of the custom in the *wajib-ul-arzes* of any of the family villages in Shahjahanpur. These were mostly villages of the Pawayan Estate which were governed by the primogeniture rule which necessarily excluded females. But there were also three villages on that side of the border which were held by descendants of Harjurnal, one of the four brothers of Udai Singh, in which some reference to the custom might have been expected. But the only record in the *wajib-ul-arzes* of these villages is that particulars as to customs regarding adoption, second marriage, succession and right of pre-emption shall be settled with reference to *Qanum Warasat*. The vernacular words mean literally "Rule of heirship" and the High Court take them to import the strict Mitakshara law, under which the daughters would inherit. The Subordinate Judge deals with this question at some length and comes to the conclusion, for reasons that appear to their Lordships to be well founded, that the words mean no more than the rule generally prevailing in the district regarding these matters, including any established customs, and that they do not therefore negative the existence of a custom excluding daughters from inheritance. It is also noticeable that the same vernacular words are used with

regard to the Pawayan villages where the admitted rule of male primogeniture necessarily implied a variation by custom from the Mitakshara.

The Shahjahanpur records were not prepared under the same regime, and (as appears from those before the Board) not with the same regard for details as those in Oudh, and their Lordships think that the absence of any reference to the custom in the case of these three villages, cannot outweigh the other evidence of its very wide recognition in the family. Harjurnal was the owner of Budnapur where the custom undoubtedly held good, and it would almost automatically apply to any subsequent acquisitions by his branch. If it did not, their Lordships think that some evidence of the fact must have been available.

There remains the question whether this custom, which their Lordships hold to have been established in 1864, when the village records were made, can be presumed to have been in existence in 1746, for almost necessarily, there could be no positive proof that it was. Having regard to the history of this part of India, it could hardly be expected that any provable record of its existence prior to the British administration would be found.

If it was an ancient custom in 1864 it must obviously have grown out of a practice in the family originating at a much earlier date. It has, their Lordships think, every appearance of being a primitive one, and its almost universal acceptance by Rajput families in Oudh of itself suggests its antiquity. It may well have been an almost necessary ingredient of the Rajput acquisitions in that turbulent district. They came from other parts of the country, the Gaurs according to tradition from Bengal, and they generally came with swords in their hands and evidently with little love of daughters in their hearts. The Rajput migration from Gaur must have dated at all events from the end of the 16th century when that magnificent capital was abandoned and fell into ruins. This would correspond with the traditional date of Raja Chundra Sen's conquests, from whom the family is said to have been descended.

The custom has been carried back by oral evidence as far as existing memory can carry it, and there is nothing to suggest that it might be a comparatively modern development. Certainly this was not suggested in the Subordinate Judge's Court where the case made was that it was now obsolete.

In these circumstances, their Lordships think that, in the absence of anything to suggest the contrary, it may be safely presumed that the custom, or, at all events, a common practice in the family of excluding daughters from inheritance, was prevalent as early as 1746, and that it was inherent in Udai Singh's branch when he settled in Pawayan.

One other matter only need be referred to. It was suggested for the respondent that even if the custom should be held to deprive her of the inheritance of her father's estate, she would be entitled to the mesne profits accumulated during his lifetime. Their Lordships can find no trace of any such contention in the Indian courts. The issue upon

custom was in the most general terms—was she or was she not precluded by it from claiming as heir to her father?—and the finding of the Subordinate Judge was equally general. No such point was taken in the objections filed by the respondent to the report of the Subordinate Judge: nor does the contention appear as a ground of her claim in the printed case of the respondent. The question in any case could not be decided without going into the validity of the will of Raja Fateh Singh, but their Lordships are satisfied that it is not now open to the respondent.

For the reasons given above their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed: that the three decrees of the High Court against which they are brought should be set aside: and that the suit originally filed by Vijai Verma should be dismissed.

The question of costs in this heavy litigation presents some difficulties. If Vijai Verma had survived and the finding of the High Court as to the validity of his father's will had stood, he would have succeeded in his suit, and have been entitled to his costs throughout. But the question of the will is still open, and his daughter's claim to stand in his shoes has failed. In the circumstances their Lordships think that justice will be met by leaving each party to pay their own costs in the Indian Courts, and awarding the costs of this appeal to the successful appellant, these costs to be paid by the respondent Musammat Vijai Kumari.

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In the Privy Council

RAJA AJAI VERMA

v.

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SAME

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Consolidated Appeals

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