

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Thakur Durriao Sing v. Thakur Davi Sing,
from the Court of the Financial Commis-
sioner of Oudh; delivered November 14th,
1873.*

Present :

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEELE.

THEIR Lordships are of opinion that this Appeal must be allowed. It is an appeal against a decision of the Financial Commissioner, who, upon special appeal, overruled the finding of the two Lower Courts, to the effect that the succession and enjoyment of the estate in question, and the rights of the Appellant and Respondent as members of a joint and undivided Hindoo family, were to be regulated by the ordinary rules of the Hindoo law. That the family was joint and undivided was indisputable; and it therefore lay on the Respondent, if he could displace the operation of the ordinary Hindoo law, to do so by clear proof of some family or other custom which varied the law. Both the Lower Courts have found that no such custom was established; but that, on the contrary, there was evidence, satisfactory to them, that the estate, though engaged for in the name of one brother, was, in point of fact, held and enjoyed by the two brothers as co-sharers. There was also evidence that although there had been no partition of this

estate for six or seven generations, the property of the family had in former times been the subject of partitions. The case went before the Financial Commissioner upon special appeal, and he appears to have considered that it was governed by a former decision of his predecessor Mr. Davis, by reason of which he was bound to reverse the judgments of the Courts below. The only appeal is against that reversal on special appeal.

It appears to their Lordships that the decision of Mr. Davis has not the effect which the Financial Commissioner, Colonel Barrow, attributes to it; and that it is not an authority which governs the present case. In the case before Mr. Davis the Lower Courts had found that during six or seven generations the estate then in question not only had remained undivided in fact, but had descended as an impartible estate to a single heir. That being so, Mr. Davis appears to have ruled that this proof was sufficient to raise a presumption of an unbroken family custom, which could not be rebutted by some evidence that had been tendered to show earlier partitions in the family, whereby a larger estate had been broken up into several smaller portions, one of which was the estate in dispute.

In the present case, there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindoo law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded.

If then the decision of Mr. Davis fails to support that which is under appeal, is there any other ground upon which the Financial Commissioner was justified in overruling on special

appeal, the judgments of the Lower Courts? Their Lordships can find none. It certainly cannot be said that there was no evidence to support the material findings of these Courts; for they had before them the admission of the Respondent by his agent on the occasion of applying for the settlement of 1859, and his former admission on the occasion of applying for the settlement in 1856.

Their Lordships in the course of the argument intimated that it was not open to them upon such an appeal as this, as it was not open to the Financial Commissioner on special appeal, to disturb the findings of fact by the Lower Courts. They may, however, state that if they could have violated the rule which they have laid down as to not giving special leave to re-open the whole case when the application is made to them for the first time at the bar, they do not think that upon the evidence on this record Mr. Leith could have succeeded in inducing them to come to a different conclusion from that arrived at by the Courts below.

Their Lordships will therefore humbly advise Her Majesty to allow this Appeal, to reverse the decision of the Financial Commissioner, and to affirm the decrees of the Lower Courts.

The Appellant must have the costs of this Appeal.

