Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Court of Wards on behalf of Mussumat Sheo Soondooree v. *Pirthee Singh and others, from the High Court of Judicature at Fort William, in Bengal; delivered 19th November*, 1872.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS appeal was heard some months ago. Whilst it stood for judgment their Lordships were asked to suspend their decision, in the hope that a proposed compromise would be effected. They have since been informed that the negotiations for a compromise have failed, and that the parties desire to have their Lordship's judgment; which I now proceed to deliver:—

The question in the cause was the right of succession to an estate called Talook Sunkra, forming part of Tuppa Belputta in zillah Bhaugulpore. The estate was unquestionably held by Soomaer Singh, the common ancestor of the Appellant and Respondent, and, having been resumed by Government with the rest of Tuppa Belputta, was temporarily settled with him in 1840. Soomaer Singh died in March, 1851.

The case of the Respondent (the Plaintiff in the cause) as stated in the Plaint is that Soomaer Singh left two sons, viz., Manick Singh, and the Respon-

dent, the latter being a minor at the date of his father's death, and continuing to be so until March, 1865; that Manick Singh took possession of the property, but, at least in law, held it on behalf of himself and his infant brother as members of a joint and undivided Hindoo family; that on Manick's death his son Durbejoy took his place as managing member of the joint family; that on the death of Durbejoy, leaving only a daughter, the Respondent became entitled, under the law of the Mitakshara, which is the law of zillah Bhaugulpore, to the whole estate, the daughter (the Appellant) being entitled only to maintenance; but that, nevertheless, he had been dispossessed by the Court of Wards, acting on her behalf, which had since procured a permanent settlement of the property to be made in her favour.

The case made by the Court of Wards on behalf of the Appellant is that Soomaer Singh left only one legitimate son, viz., Manick (the Respondent being illegitimate); and, accordingly, that the estate descended from Soomaer to Manick, from Manick to Durbejoy, and from the latter to the Appellant. The answer set up also an alternative defence, viz., that according to the custom and usage of the family of Soomaer Singh, and the Zemindars in the neighbourhood, the right of inheritance has generally been vested in the line of the family of the eldest son in succession. The only issues settled in the cause (p. 72) were—

1. Whether the Respondent is the legitimate or illegitimate son of Soomaer Singh.

2. Whether the law of primogeniture obtains in the family of Soomoer Singh or not.

A further question, which does not appear on the pleadings, was raised in the course of the suit, viz., whether the district in which the estate is situate (Tuppa Belputta), having been transferred as late as 1795 from Zillah Beerbhoom, of which it was theretofore part, to Zillah Bhaugulpore, the general law of succession to be applied to the case was that of the Dayabhaga, or that of the Mitakshara.

The Respondent being out of possession, the burthen of maintaining the first issue, of course, lay upon him. And if he has not done so, his suit must stand dismissed. But if it be assumed that, as the High Court has found, he has succeeded in

establishing his legitimacy, it becomes material to consider what in such a case would be the remaining questions between the parties.

The property is admitted to be ancestral; and the family, if not admitted, must be presumed to be joint. Hence, in the absence of a special law of descent, founded on family or other custom, the estate at Soomaer's death would descend to his two sons as Hindoo coparceners; and on Manick's death, Durbejoy would succeed only to his father's moiety. The Respondent, therefore, would unquestionably be entitled to at least a moiety of the estate.

Whether he would be entitled to more depends on the question, what is the general law of succession to be applied? Under the law of the Mitakshara he would succeed to Durbejoy's share, subject to his daughter's right to maintenance; under the law of the Dayabhaga she would succeed to her father's share, in preference to her uncle.

To establish, therefore, the Appellant's title to the whole estate, she must prove a special and customary rule of succession; to establish her title to even a moiety, she must show that the succession is to be regulated by the law of the Dayabhaga.

Again, the second issue, as settled, does not comprehend the whole of what is essential to the Appellant's title to the whole estate. For, let it be granted that the rule of primogeniture did obtain in Soomaer Singh's family, that circumstance would, no doubt, support the title, first of Manick, and afterwards of Durbejoy to the estate as impartible. But on the death of Durbejoy the next male member of the joint family would, under the law of the Mitakshara, be entitled to succeed to the ancestral estate, though impartible, in preference to the daughter of the last holder. This was admitted in the Sivagunga case, although, on the ground that the impartible estate in question was the separate acquisition of the last holder, it was there ruled that it ought to descend, according to the rule of succession to separate estate, to his widow. Hence, to make out the Appellant's title to the whole estate, it must be shown both that by custom it was impartible, and descended according to the law of primogeniture; and also that either by special family custom, or by the operation of the law of the Dayabhaga, as the law which should

govern the case, she, on the death of her father, was entitled to succeed to it, in preference to her great uncle.

It is next to be considered what are the proper findings on the settled issues.

The Principal Sudder Ameen altogether omitted to decide the first. The High Court, on a careful review of the evidence, came to the conclusion that the Plaintiff (the present Respondent), had established his legitimacy; and, at the close of the argument at the bar, their Lordship's were clearly of opinion that no case had been made for disturbing that finding.

Upon the question of the alleged family custom, the decisions of the two lower Courts were in conflict; the Principal Sudder Ameen holding that the evidence showed that the estate was impartible, and that the Appellant was entitled to succeed to it. It is not, however, very clear whether he rested the Appellant's right of succession on family custom, or on the law of the Dayabhaga, treating that as the law which was to govern the case. The High Court held that there was no proof of any custom which varied the ordinary law of inheritance; that the law to be applied was that of the Mitakshara; and, consequently, that the Respondent was entitled to recover the whole estate.

The point to be first considered on this part of the case is, whether the first of these propositions of the High Court is correct.

The fresh evidence adduced by the Appellant in support of the alleged custom is very slight. Of the five witnesses called by her, two only speak to the custom. One of these does not put it higher than a custom by which the eldest son takes the whole estate; and, in answer to the Plaintiff's pleader, admits (thereby recognizing the applicability of the Mitakshara), that on the death of the eldest son, after he has taken possession of the property, leaving only a daughter, the brother would take before the daughter. (See p. 72, line 39.)

The documentary evidence does not carry the case much further. Mr. Sutherland's Report does not show more than that in the year 1819 there was great confusion and uncertainty as to the nature of the sub-tenures in Tuppa Belputta; that Soomaer Singh was then claiming many villages to

which he was not entitled; that the documents of title produced by him were untrustworthy; and that if the villages specified in List No. 1, p. 35 (of which only two are identified as villages now in dispute), were originally held on a Ghatwallee tenure, the Ghatwals in that district (see p. 29, line 50), had virtually ceased to be such, and had become mere under-farmers. It does not appear what was done on this report; but it is certain that many years after its date, *i.e.*, in 1840, the Talook in dispute was resumed by Government, and settled as ordinary Malgoozary land with Soomaer Singh.

The other documentary evidence of the Appellant proves little or nothing. But it is remarkable that the proceedings for the mutation of names on the deaths of Soomaer and Manick, which form part of it, contain the usual inquiry whether there were other heirs of the deceased; and that in neither instance was the claim expressly asserted as one founded on the right of primogeniture.

On the other hand, it is singular that the strongest evidence in favour of the position that the estate had been treated as in the nature of a Raj is to be found in the oral testimony given on the part of the Respondent. (See in particular witness No. 5, p. 28.) But this evidence would at most prove that the property, though held as a Raj, belonged to a joint family, of which, not invariably the eldest son of the last holder, but the most competent male member, was entitled to succeed as Rajah; and, further, that the original possessions of the family, viz., those held by Jye Singh, had been the subject of partition.

On the whole, whatever may have been the earlier history of the estate, which was, at most, only a subtenure of some kind under the Raja of Beerbhoom, there seems to their Lordships to be no sufficient ground for disturbing the conclusion of the High Court, that since the resumption it is to be treated as subject to the general law of succession.

The result of this is that, if there are no legitimate descendants of Soomaer Singh other than the Respondent and the Appellant, the Respondent is entitled in any case to recover half the estate; and, if the general law of succession is that of the Mitakshara, to recover the whole.

What, then, is the general law of inheritance by which the case is to be governed?

The High Court applied the law of the Mitakshara as that which undoubtedly rules in Zillah Bhagulpore; and refused to listen to the plea founded on the transfer of Tuppa Belputta from Beerbhoom to Bhaugulpore in 1795, treating it as "started at the eleventh hour on appeal." This last position is not, in their Lordships' view, correct; because the point is expressly taken by the Principal Sudder Ameen in his Judgment, and seems to have been one ground of his decision. (See page 77, line 40.)

The applicability of the Dayabhaga to the case may depend upon either of two circumstances. It may be that the whole of the transferred district has continued to be governed by its old law, in which case the law would be an exceptional local law; or the particular family, though now domiciled in a zillah governed by the Mitakshara law, may have continued to retain the law of the Bengal school as an exceptional family law. If the first state of things exists, the fact must be notorious to those who administer justice in that part of the country. The second state of things would require to be shown by evidence, and the record contains no evidence on this point. Nor, the pleadings and issues being what they are, could it be expected to do so?

The two lower Courts being, in fact, in conflict as to the law applicable to the case, and the question having been insufficiently tried, it seems to their Lordships desirable to remand the cause for further inquiry on this point.

The case has hitherto been dealt with as if there could be no dispute as to the property, except between the Appellant and Respondent. The High Court has almost assumed this to be so, remarking, incidentally (page 82, line 55), that of the four sons of Soomaer, other than Manick, Pirthee was the only survivor. On the argument of the Appellant, however, it was shown, that on the face of the oral evidence given for the Respondent, it was stated, that of these sons, Teeluck at least was legitimate, and had left issue (see pp. 24 and 25). This fact (if true), would affect the original shares of the Respondent and Durbejoy in Soomaer's estate;

though, unless Teeluck outlived Durbejoy, it would not affect the Respondent's right to succeed to that person's share, whatever it may have been.

The Respondent having to recover by force of his own title, is bound to show that the whole inheritance of Soomaer is, according to the law of the Mitakshara, now vested in him; and his own evidence leaves so much doubt on this point, that a remand upon it also seems to be necessary.

The learned Counsel for the Appellant sought also to set up a *jus tertii*, as regards some of the earlier generations of this family, appearing in the Genealogical Table at page 80. It seems to be clear that there was a partition of some kind amongst the sons of the original ancestor Jye Singh; but it is not so clear that the share of Tribhoobun, one of these sons, was ever divided amongst Soomaer and his other sons.

Their Lordships, however, are not disposed to invite litigation, by extending the inquiry beyond the descendants of Soomaer. Both parties have come into Court representing him to have been the sole owner of the estate; and if there were co-sharers with him, and there are now descendants of such co-sharers, it will be open to them, whatever may be the result of this suit, to assert their title in another and independent suit.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree under appeal in so far as it declares that the Respondent was the legitimate son of Soomaer Singh; to reverse the rest of the said decree; and to remand the cause to the High Court, with directions to determine the appeal from the decree of the Principal Sudder Ameen, pursuant to the provisions of section 354 of Act VIII of 1859, after causing the following issues to be tried, viz.:—

1st. Whether Soomaer Singh left any and what legitimate sons, other than Manick Singh, in the pleadings mentioned, and the Respondent; and, if so, whether they are living or dead; and, if any of them are dead, when they respectively died, and whether they have left any and what male descendants.

2ndly. Whether the estate of Soomaer Singh, which was formerly within the limits of Zillah Beerbhoom, having been transferred to Zillah

Bhaugulpore, the succession thereby becomes liable to be regulated by the law of the Mitakshara; or whether, by reason of any local or family custom, such succession, notwithstanding the transfer, continues to be governed by the law of the Dayabhaga.

Their Lordships will also recommend that the costs of this appeal, on both sides be taxed; and that the amount of such taxed costs be certified to the High Court, and be dealt with by that Court as part of the costs in the cause.

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