Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nitrpal Singh v. *Jai Singh Pal, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 27th June* 1896.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD JAMES OF HEREFORD.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The question in this appeal is whether the ancestral property of a Rajpoot family long settled in the Agra district devolves according to ordinary Mitakshara law, or is subject to the custom of primogeniture. The Courts below have differed in opinion upon the evidence; the Subordinate Judge thinking that the custom is established, and the High Court that it is not, so that it becomes the duty of this Board to say whether the evidence is such as to make it right to restore the original decision.

The family is one of Rajpoots belonging to a clan, apparently numerous, called Jadon Thakurs. Their estate and place of residence is the talook or riasat of Umargarh. One of the witnesses named Bhairon states that he is the Jaga (something apparently corresponding to a bard or herald or genealogist) of this family and of all other Jadon Thakurs; and that he kept books compiled by himself his father and his elders,

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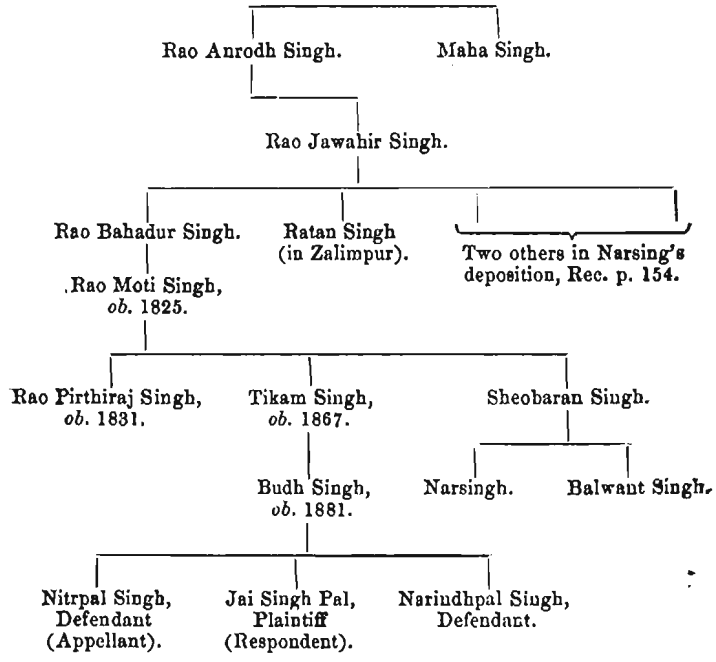
containing pedigrees of those families. He produced the book relating to Umargarh which professes to show the heads of the family and some of the younger sons for 27 generations. Some parts of the evidence will be better understood if so much of it as relates to the last six generations is set out here.



The Plaintiff is a younger son of Budh, claiming to have the estate divided. The eldest son, who resists that claim, is the principal Defendant. Another son who did not join in the Plaintiff's claim was made a defendant, and now takes no active part in the proceedings. Both the younger sons are minors.

The Subordinate Judge of Agra decided in favour of the custom, and dismissed the suit. Omitting some minor points, the main grounds of his decision may be stated under the following heads :—(*a*) The pedigree made out by Bhairon, coinciding as it does with a large amount of tradition among the Umargarh family and their kinsfolk the Jadon Thakurs, shows that the family is ancient and noble, and has been in possession of

the talook of Umargarh and of various villages appertaining thereto for many generations. (*b*) The family property has never been the subject of partition. (*c*) The heads of it ascertained by primogeniture have been installed on the gaddi with public ceremonies. (*d*) The first claim for partition by a younger son, made in 1831, was resisted and finally defeated in 1845. (*e*) The property in suit has since been enjoyed by the head of the family as sole owner. (*f*) The members of the family, with the exception of the actual claimants for partition, have declared their belief in the custom of primogeniture. (*g*) There is substantial evidence to the same effect among their kinsfolk the Jadon Thakurs. (*h*) The evidence adduced by the Defendant stands unrefuted by any substantial evidence for the Plaintiff. Their Lordships will proceed to show the objections taken by the High Court to these positions, and to examine the evidence bearing on them.

Head (*a*).—The High Court point out the inconclusive nature of Bhairon's pedigree. No doubt a document of this kind compiled from papers handed down from Jaga to Jaga and probably supplemented by tradition, must be taken with much reserve; and its obscurity is increased in this case by the fact that it is written in a peculiar dialect or character known only to the Jaga, and by the further circumstance that it is difficult to understand from the record what is represented as the precise language of the book, and what is the language of Bhairon himself. Their Lordships hesitate to attach importance to such expressions as "succeeded "to the Gaddi," or to the appearance of the dignified title "Rao" which is prefixed to the head of each generation. Still there is no suggestion that Bhairon is untruthful; and the contradictions between his pedigree and other parts of the evidence, which are dwelt on by

the High Court are quite insignificant. They cannot doubt that the Jaga books represent with fidelity the traditions and belief in the Umargarh family, or that the family is a noble one of very long standing in the country. Indeed, as the Subordinate Judge points out, the Plaintiff has made no suggestion to the contrary. The Jadon Thakurs who give evidence for him all believe in a common ancestor many generations ago. And the High Court, though unable to attach any value to the pedigree, are satisfied that the Umargarh family is an old one, and socially of considerable importance, (p. 274.)

Head (*b*).—But then they say that the pedigree affords no evidence of impartibility. Certainly it affords no explicit evidence, nor does it profess to do so. The High Court however think that the absence of partition for many generations is as consistent with partibility as with primogeniture, unless it is shown that partition was claimed and refused (p. 274). Of course if that was shown it would be very cogent evidence in favour of primogeniture. And it is possible that a divisible estate may remain undivided for a long time. But their Lordships do not think it probable that any great number of generations would pass without any operation of the motives under which Sheobaran acted 50 years ago and the Plaintiff is acting now. Anrodh had a younger brother, and nothing is known of partition. Bahadur had a younger brother (three if Narsingh is correct) and we hear nothing of partition. The High Court indeed, finding that Ratan is stated to be "in Zalimpur," suggest (p. 276) that he may have been there by partition. But we find from the Talook papers (p. 134) that in 1855 Zalimpur was vested in Tikam. The probability is rather that it was given to Ratan for maintenance, and on his death fell in to the

Talook. Prior to Sheobaran there is no tradition or rumour of a partition suggested on the Plaintiff's part. To put it at the lowest, that lays a ground for the favourable reception of evidence in favour of primogeniture; or, to put it higher, makes it probable that primogeniture is the real custom of the family.

Head (*c*).—The High Court are prepared to believe that some ceremonial of gaddinashini did take place in the cases of the Defendant and his father Budh. In fact, such ceremonies are proved by numerous eye-witnesses, invited for the occasion, wholly unshaken in cross-examination, and not contradicted except by other neighbours who were not invited and did not see what took place. And as to the Defendant the evidence is corroborated by Budh's petition in the Collector's Office, which prays for a mutation of names, and which was allowed by an order of 15th February 1877, in spite of an objection made by somebody, by whom is not clear (p. 226).

The High Court attenuate the significance of installation by two remarks. First they say that no witness professes to have seen any similar ceremonials in respect of Tikam, Pirthi, or any other member of the family. Now Pirthi acceded in the year 1825, 61 years before the evidence was taken, and Tikam six years later. None of the witnesses examined is old enough to have seen them installed. But as to Tikam there is evidence that Narsingh (p. 155) saw him occupying the gaddi, and that Balmakand, a Jadon Thakur, heard from his father that Tikam was placed on the gaddi and remained in its possession (p. 165). His widow Bijai speaks to the same effect (p. 47). Aman Singh, another Jadon Thakur, heard about the installation of Pirthi and his father Moti from the Jagas (p. 162). Of course as the time becomes more remote the evidence becomes fainter; but there is evidence

of family tradition as far back as Anrodh, in accordance with Bhairon's pedigree (pp. 160, 170, 188). Their Lordships cannot concur with the opinion of the High Court that the gaddi ceremonies were invented to make evidence after the dispute with Sheobaran, nor is it easy to see the motive for making evidence at that time.

The other remark is a suggestion that there is no necessary connection between gaddinashini and primogeniture (p. 282). That may be so, but it is impossible to read the evidence without seeing that the witnesses on both sides treat the two as identical, or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied gaddinashini for the purpose of disconnecting it from primogeniture. Not only so, but the Plaintiff's uncle Sukhram, being expressly questioned on the point, says that if the gaddi custom is proved the Plaintiff will not get a share (p. 92). And Raja Shunker Singh, who gives much information about family customs in the Agra district, speaks of gaddinashini and primogeniture as generally coincident (p. 51). It is clear that the Subordinate Judge had no suspicion that the evidence applying to gaddinashini could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny gaddinashini they mean to affirm or deny primogeniture; and their constant identification of the two things shows how closely they are connected in the minds of the families of that part of the country. The custom of gaddinashini has clearly an important bearing upon that of primogeniture, though the connection between them may not be a necessary one.

Head (*d*).—This brings us to the stage of the family history in which actual controversies

on this question have sprung up, and they require some careful attention. On the death of Moti in the year 1825, the eldest of his three sons, Pirthi, became head of the family. Whether he was formally placed on the gaddi has been discussed above; he certainly represented the estate on the Collector's books, and during his life no question as to the ownership was raised. He died in 1831, when his brother Tikam became head. It seems that immediately afterwards the widow of Moti raised a claim on behalf of the youngest son, then a minor, to have the estate divided. An agreement was made deferring the question till Sheobaran's attainment of full age, and then another agreement was made appointing Mr. Bell to be arbitrator. Mr. Bell was a proprietor of indigo works in Umargarh, and he held a mortgage created by Moti on the estate.

The precise tenor of the questions referred is one of the many things which are left in obscurity on this Record. In his award which is dated 16th January 1843 Mr. Bell states them as being the difference existing between the brothers connected with the pretensions of Sheobaran to a joint interest in the estate. After referring to two agreements, and a decree of Court, none of which are produced, and to the testimony of neighbouring zemindars and younger branches of the family, he states that custom has determined the descent of the estate in one individual. Then he refers to "the "avowed inclination of Thakur Tikam Singh "that his younger brother should receive such "allowance as may enable him to support "himself in a manner consistent with the "respectability of his descent;" and proceeds to award that Sheobaran should have six villages and a plot of land in full proprietorship, and should have no further claim upon the talook (p. 202).

Sheobaran was not content with this award, but immediately afterwards sued for his full share in the estate. Tikam insisted on his right as eldest brother, and also pleaded the award. Nawab Kuar the widow of Pirthi, who was a Defendant, supported Tikam. She alleged that she was entitled to one third of the estate, only "by reason of the family usage, and of "Tikam Singh being seated on the gaddi, she "has refrained from making any claim" (p. 206). The Sudder Amin gave Sheobaran a decree on the ground that primogeniture could not prevail except in the families of Rajas and Ravats; whereas the Umargarh family did not bear either of those titles. As for the award, he held it to be invalid on grounds which have nothing to do with the present question. They were overruled by the Sudder Court, who, on the ground that Mr. Bell had decided the case in favour of Tikam, reversed the decree below, and dismissed the suit (p. 209). Their decree is dated 1st December 1845.

From this litigation in the Civil Court we get no additional light thrown upon the family custom, unless it be the declaration of Pirthi's widow. The Sudder Amin did not discuss it, but thought that the question of primogeniture turned on the use or non-use of certain appellations. The Sudder Court had not to express any opinion about it, and did not.

As to the bearing of the award the High Court take a view which their Lordships cannot understand. They say,—(p. 278.)

"Practically, the transaction was one of partition, dividing "the family property, and giving the allottees exclusive control "over their shares.

"Mr. Bell, in making the award, may have considered that "the practice, which is not unusual in some places, of giving "one portion to the eldest brother—a larger share—was one "which he might follow.

"However this may be, we are satisfied that the award "operated to transfer to Sheobaran Singh the absolute right in "the awarded villages in a manner absolutely inconsistent with "there being the custom alleged."

This is in direct contravention of the language of Mr. Bell, who states that his award is not by way of partition, which is prohibited by the family custom, but by way of voluntary allowance for Sheobaran's support in a manner consistent with his position. Mr. Bell may have made his award on insufficient grounds, or without due inquiry, but his opinion is clear. And the opinion of a resident in Umargarh, who had dealings with the estate, was a friend of the family, and was so trusted by them that they called him in to settle the question of primogeniture between them, must have weight in a controversy on that subject. The suggestion that Mr. Bell did not act in good faith, but lent himself to the manufacture of evidence, has no basis of fact that their Lordships can find.

Head (*e*).—After all the award was not acted on. On 18th May 1848 (p. 210) Tikam, declaring that he was full proprietor of mauza Bechupura, one of the Umargarh villages not awarded to Sheobaran, made it over absolutely to Sheobaran by way of provision and maintenance. On the 3rd July 1854 (p. 131) a wajib-ul-arz for taluka Umargarh was framed on the declarations of the mukhtars of Tikam and Sheobaran. By it Sheobaran is shown to be owner in possession of Bechupura and pattidar of the talook of Umargarh, and Tikam appears as the owner of several villages among which are five of the six awarded to Sheobaran. It is calculated that the awarded villages were about one-third in value of the whole talook, and that the property ultimately taken by Sheobaran was much less, possibly only one third of the amount awarded. The subsequent enjoyment has been in accordance with the recorded titles.

This change of arrangement remains totally unexplained, and the High Court appear on that account to throw blame on the Defendant and

suspicion on his case (p. 280). If the Defendant could have produced the proceedings which led up to the award they might have been material. But we are not discussing the validity or legal effect of the award, but the amount of light which it throws on the alleged custom; and it is difficult to suppose that arrangements superseding the award to the disadvantage of the younger brother would disclose circumstances to weaken the title of the elder. Of course the Plaintiff might have compelled an investigation of those matters in the First Court; but it does not seem to have occurred to anybody that it was useful to do so, and probably it was not.

The wajib-ul-arz of 1854 does not contain any statement of the family custom of inheritance. In wajib-ul-arzes of separate mouzas made in 1876 there are statements importing that primogeniture is the custom; but as some of them are shown to have been dictated by Budh, and perhaps all were, they do not add to the weight of his opinion shown in other ways. The point for which the wajib-ul-arz of 1854 was used is that it contains a statement relating to lumbardars. It says that on the death of a lumbardar his eldest son becomes lumbardar according to the custom of the family.

The High Court treat this as totally immaterial, because they say the choice of lumbardar has nothing to do with the succession to the estate, and that partible estates may have the custom of hereditary lumbardars. This they prove by referring to Kasba Jalesar (pp. 255–258). It is difficult to see how Jalesar is an instance. As with so many other matters in this record, the evidence is obscure. There are two extracts from a wajib-ul-arz. No date is affixed to them. By their contents they would seem to have been framed in the lifetime of Pirthi. Seoti Ram, to whom the High Court refer as showing Budh's

dictation of the wajib-ul-arzes of 1876, knows nothing about Jalesar (p. 185). Supposing these extracts to be Budh's work, their only effect is that the lumbardarship is hereditary and will go to the eldest son of the musnadnashin; and the estate also will go to his eldest son. But there are three castes in the Kasba which have different customs, and one of those castes (viz. the Sayad caste which their Lordships presume to be Mahomedan) conforms to the Mahomedan law. That is quite consistent with the descent by primogeniture of the property of the riasat whose chiefs are hereditary lumbardars, and does not detract from the bearing, whatever it may be, of the devolution of lumbardarship upon the devolution of property in the same family.

A lumbardar represents the estate in all transactions with the Government. It is of importance that he should be of capacity for business, and it is usual in a joint family to appoint one of the elder members of the family. When it is found that the office devolves by primogeniture in a family (and there is no suggestion that the wajib-ul-arz speaks falsely), it seems to their Lordships a material circumstance to aid the conclusion that the estate devolves in the same way in the same family.

Heads (*f*) (*g*) *and* (*h*) may be taken together. Bijai Kuar is the widow of Tikam, and learned about the family customs from Moti's widow, and presumably from her husband. Besides speaking of primogeniture in general terms, she says that after Moti's death Pirthi obtained the gaddi, and that Tikam and Sheobaran got maintenance (p. 45). The statement of Pirthi's widow against the interest she claimed as hers in the suit of 1843, has been before mentioned. On the death of Budh some enquiry was held apparently with reference to the entry of the estate in the Collector's books. One of his widows, Rathorji also called Bijai, deposed to

the mutation of names in Budh's time, and to his intention that the Defendant should succeed according to the family custom. Another of his widows, Solankhi the mother of Narindhpal, also deposes to the custom on the same occasion (pp. 235, 236). Neither of those two widows have been examined in the present suit, but their depositions have been put in and treated as evidence. Narsingh, the son of Sheobaran, speaks to the succession from Anrodh's time, according with Bhairon's pedigree except that he ascribes to Jawahir three younger sons instead of one. He says that he heard from his father. He is open to the observation that he gives an impossible date to one communication from his father, that his father died when he was about 11 years old, and that he is indebted to the Defendant, to what amount does not appear. Unless it be for the debt, he does not seem to have any interest to support traditions in which he does not believe.

Seven Jadon Thakurs and another neighbouring Thakur of a different caste affirm the custom in general terms, and also establish the installation of the Defendant and his father by direct evidence, and affirm other installations by tradition and hearsay. Their evidence varies in detail and is not given by vote. It is quite unshaken by cross-examination.

All this evidence is subject to the observations that it is given after the dispute with Sheobaran, that the ladies are pendanashinis, that the witnesses speak to what they have heard when very young, and so forth. These observations would have much greater weight if there had been any dispute before Sheobaran's time, or if there were evidence conflicting with that given for the Defendant. But within the family itself there is no conflict of opinion The Plaintiff has produced no evidence but that of several Thakurs, Jadon and others, who deny

the custom in general terms and in identical language. But the value of their denial, small in itself, is reduced to nothing by the fact that they also deny the installation of Budh and the Defendant, which are proved by conclusive evidence. One of them indeed, Hari Ram, says that 20 or 22 years ago the riasat was partitioned in his presence. But he only adduces as proof some remarks which Tikam made to him quite at variance with the known facts. And he does not even know that Sheobaran ever sued for a partition (p. 98).

The High Court (p. 283) say that the Plaintiff's witnesses must have known of the custom if it had existed, and ought to be believed. But people who knew nothing of the gaddi custom or of actual installations are not likely to have known or cared anything about the custom of inheritance. There need be no imputation on their veracity, for with the exception of Hari Ram they only speak to negatives, and are guilty of nothing worse than the common error of assuming the non-existence of that which is not known to them.

Their Lordships conclude that there is no contradiction of the Defendant's case; and that the propositions of the Subordinate Judge are established by sufficient proof. All the lines of evidence here examined converge upon the same point. Perhaps no one of them would, if standing alone, be conclusive in favour of the Defendant's case; but taken as a whole they are conclusive. The High Court should have dismissed the Plaintiff's appeal, and it is now right to discharge their order and to restore that of the Subordinate Judge and to direct that the Respondent shall pay the costs of his appeal to the High Court. Their Lordships will humbly advise Her Majesty to this effect. The Respondent must pay the costs of this Appeal.