Privy Council Appeal No. 80 *of* 1912 ; *Bengal Appeal No.* 19 *of* 1909.

Ekradeshwar Singh - - - *Appellant,*

v.

Musammat Janeshwari Bahuasin - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1914.

Present at the Hearing :

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

[*Delivered by* SIR JOHN EDGE.]

The suit in which this appeal to His Majesty in Council has arisen was brought on the 20th December 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh, who is the appellant here, against Musammat Janeshwari Bahuasin, who is the widow of the plaintiff's younger brother Babu Janeshwar Singh. The plaintiff and his brother were sons of Netreshwar Singh, who was a younger son of Maharaja Rudar Singh of Durbhanga.

The plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the plaintiff's brother had obtained on a partition between them of immovable pro-

perty which had been granted by a Babuana grant to their father, of immovable property which had been granted by a Sohag grant to their mother, of immovable property alleged to be accretions to the Babuana property, and of accumulations. The plaintiff's claim was based on an alleged custom in the family of the Durbhanga Raj by which widows and other females were excluded from all rights to the possession of lands held under Babuana grants or Sohag grants. It was alleged by the plaintiff that the properties which had been purchased by his father and by his brother had been purchased with profits which had been derived from the Babuana property and were to be treated as accretions to that property. The defendant, who was in possession, denied the existence of any such custom and by her written statement put the plaintiff to proof of his title to possession.

The Durbhanga Raj is an ancient and impartible Raj, and by the Kulachar, or family custom, the right of succession to the guddi and to the properties of the Raj Reasat descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled Babus, and by the Kulachar each younger son is entitled by way of a Babuana grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a Sohag grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages, granted, continues to form part of the Raj Reasat, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted

reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. Babuana grants and Sohag grants differ essentially in their nature from absolute grants, and are subject to the Kulachar under which they are authorised and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and, except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu law, which, so far as it applies to this case, may be taken as following the Mitakshara of the Benares School.

Maharaja Rudar Singh of Durbhanga, by a Babuana grant granted to his son Babu Netreshwar Singh by way of maintenance as Babuana, the dehat milkiat appertaining to pergunnah Nisankhpur Kusha, together with dasturat malikana. That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a sanad, dated 7th Phagun Badi 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That sanad was registered in the registry of Mozuffarpur on the 13th February 1850. The sanad shows that Babuana grants had also been made by Maharaja Rudar Singh to two other of his younger sons, and contains the following directions :—

"The said Maharaj Kumar Babus shall continue in "possession of the said pergunnahs, and the government "revenue, which shall be due on account thereof, will "be paid by them to you, and you will pay the same to "the government along with the government revenue of the "Raj. The said Babus shall live in a style befitting "the position of Babus, and you shall treat them according "to your sense of propriety as a Raja, and in a manner "befitting their position as Babus."

On the death of Maharaja Rudar Singh his eldest son Maheshwar Singh succeeded to the guddi and the Raj Reasat, and became Maharaja

of Durbhanga. Maharaja Maheshwar Singh by a sanad, dated 6th Aghan Sudi 1259 Fasli (A.D. 1852), granted to Bahuasin Sohagin Mouzah Madhapur as a Sohag gift. As translated in this record the sanad contains the following clause :— "You and your sons and grandsons, &c., shall "cultivate or get cultivated the mouzah aforesaid, "and enjoy the usufruct thereof yourself." Bahuasin Sohagin was the wife of Babu Nitreshwar Singh and the mother of the plaintiff, and of his late brother. She is referred to in the record as Musammat Netrobati Bahuasin.

The plaintiff's mother died in 1879. His father died in 1883, when the plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the effect of which will later be considered, the plaintiff and his brother were coparceners in the Babuana property, which, according to Hindu law, was in their joint possession ancestral property, subject, however, to such family custom as applied to it. Similarly, the Sohag property was ancestral property in which, at the time of the separation and partition, the plaintiff and his brother were coparceners. The plaintiff came of age in 1888, and was put in possession of the Babuana property and the Sohag property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were coparceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers.

The younger brother died without issue on the 18th April 1906, leaving surviving him his wife, who is the defendant to this suit. On her husband's death she took possession of the pro-

perty which he held at the time of his death. Her right to the possession of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money maintenance, was excluded from any right to the possession of that property.

The Kulachar or family custom under which the plaintiff claimed is thus described by him in his plaint:—

"1. That the family, to which the plaintiff and the "defendant's husband belong, has held from time immemorial "the properties known as Raj Reasat of Durbhanga, and "constituting an impartible Raj, and is governed by the "Kulachar or family custom in the matter of succession and "inheritance as hereinafter mentioned.

"2. That by such Kulachar and family custom, females, "either widows or daughters and heirs in the female line, "are altogether excluded from succession.

"3. That so far as the said Raj Reasat is concerned, the "same descends according to the rule of lineal primogeniture "on the eldest son of the last holder, the other sons obtaining "portions of the Raj for maintenance and support by way "of Babuana grants.

"4. That in the event of the last holder of the said Raj "dying without male issue, natural or adopted, his younger "brother, or, in the absence of brother, his nearest agnate, "according to the rule of lineal primogeniture, succeeds "to the said Raj to the exclusion of widows and other "females.

"5. That the incidents of the said Babuana properties "are, that the name of the Maharaja Bahadur of Durbhanga "for the time being stands recorded in the Government "Register as the proprietor of the mouzahs comprised in "the said properties, and it remains a part and parcel of "the said Raj, and the Babus holding the said properties "pay the Government revenue and other public demands "payable in respect of the said mouzahs to the said Maharaja "who pays the same to Government; and that the said "Babus and their male heirs in the male line remain in "possession and enjoyment of the said mouzahs; and that "on the extinction of the heirs male of the grantees in the "male line, the said mouzahs together with all acquisitions, "movable and immovable, made from the income thereof, "revert to the said Raj.

"6. That by virtue of the Kulachar aforesaid and the "incidents of the said Babuana grants, on the death of any

" male descendant in the male line of any Babu or younger " scion of the said Raj family to whom a Babuana grant as " aforesaid has been made, without male issue, natural or " adopted, his nearest agnate among the other male " descendants in the male line of the said grantee succeeds " to his share in the said Babuana grant together with all " accretions thereto as aforesaid.

" 7. That in accordance with the custom of the family " of Raj Durbhanga usufructs of some village or villages out " of the Raj properties are granted to females of the family " on the occasion of their marriages or other ceremonies. " The rule of succession and other incidents connected there- " with are the same as that of Babuana ; the villages granted " to them descend to males of their body in unbroken male " line ; and on the extinction of male issue the said village " or villages revert to the Raj."

The plaintiff put forward the following as an explanation of the separation and partition between him and his brother :—

" 16. That after the husband of the defendant attained " majority, and in consequence of disagreement between " him and the plaintiff, they separated and divided amongst " themselves the major portion of the aforesaid properties " and *Sohag* property merely for the sake of convenience " and undisturbed enjoyment of usufruct without prejudice " to their co-parcenary rights as junior members of the Raj " Durbhanga family ; but they being of junior branch of " the Durbhanga Raj family, their status as co-parceners in " the Durbhanga Raj family did not come to an end, nor " did such partition in any way affect or alter the nature " and incident of their tenure of the said grant.

" 17. That the husband of the defendant died on the " 18th April 1906 without any issue, and leaving plaintiff " his full brother, and the defendant his widow.

" 18. That according to the Kulachar or family custom " referred to above obtaining in the Durbhanga Raj family, " including the junior branches thereof, the defendant has " no right or title to the estate left by her husband ; and " the plaintiff as the surviving male heir in the family of " the grantee Maharajkumar Babu Nitreshwar Singh and " also as a co-parcener in the Durbhanga Raj family, is " entitled to succeed to and to the possession of the estate " left by the husband of the defendant, representing his " share of the said grant and accretions thereto ; and that " the defendant is only entitled to suitable maintenance out " of the same ; and that she is not entitled to succeed to

"and possess the said estates, properties and effects as is "falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their coparcenary rights in the property is unknown to the law. As the plaintiff was a party to the suits in which the decrees under which the partition was effected were made he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between coparceners, and that the custom of the Durbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship, and estate, and consequently that at the time of the death of the younger brother in 1906 the plaintiff had no coparcenary interest in any of the property in suit. The correctness of that finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Durbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit Babuana properties, and that the succession and inheritance in the case of Sohag grants are governed by the custom which governs the succession and inheritance in the case of Babuana grants, and he held that notwithstanding that there had been complete separation between the brothers the custom applied. He gave the plaintiff a decree for

possession of some of the immovable properties which the plaintiff claimed, for certain movable property and for mesne profits. From that decree the defendant, the respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of Babuana and Sohag grants would on the failure of male heirs in the male line of the grantee revert to the Maharaja of Durbhanga for the time being, the plaintiff had failed to prove any custom by which the widow of a childless and separated Babu was not entitled during the continuance of Babuana or Sohag grant to hold for a Hindu widow's interest the property which her separated husband had held under a Babuana or Sohag grant, and, consequently, applying the rules of the ordinary Hindu law, those learned Judges decided that the plaintiff had failed to prove as against the defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council has been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in were not admissible as evidence in in this suit. It seems to have been overlooked at one period of the suit that evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Durbhanga Raj which applied to Babuana grants and Sohag grants and to accretions to Babuana immovable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of Sohag property is the same as the custom governing the succession to and the inheritance of Babuana property. In the High Court Mr. Justice Richardson held that Sohag property is similar in its nature and incidents to Babuana property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except that a Babuana grant is made to a male while a Sohag grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a Babuana grant and its incidents and a Sohag grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being. The general evidence as to custom upon which their Lordships have found that widows are excluded from the succession to Babuana and Sohag properties, includes and is strongly supported by instances in this family of Durbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the Babuana sanads which are in evidence in this suit the words which have been regarded in the Court below as words of

limitation are in the vernacular *auras putra poutradik*. As to those sanads Mr. Justice Sharfuddin in his judgment in this case said :—

" From the copies of sanads (Exhibits 20 A, 20 B, 20 C, " 20 D, and 20 E) it is clear that female children and " daughters' sons were excluded from the inheritance of the " Babuana properties. The expressions used in the sanads " are *auras putra poutradik*, which means sons born of the " loins. I take it to mean that so long as there is one " descendant of this description, the properties granted are " not to revert to the Raj."

That construction is consistent with the evidence as to those Babuana grants to which their Lordships attach importance, and their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of their Lordships has been drawn to the judgment of this Board in *Ram Lal Mookerjee* v. *The Secretary of State for India in Council and others* (8 Indian Appeals 46), in which it was held that in Bengal in a gift to a man the vernacular words *putra poutradi krame* would be read as words of general inheritance, and would include female as well as male heirs where by law the estate would descend to such heirs. Babuana grants could not be made under the ordinary Hindu law, but they are authorised by the custom which excludes females from the succession. Their Lordships must regard the words *auras putra poutradik* as used in these sanads as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to Babuana property or to Sohag property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint, can, without evidence that it has been applied where the members of a

branch have separated in food, worship, and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the Babuana and Sohag properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated the Babuana and Sohag properties were held by them, subject to the terms of the grants and the custom, as joint ancestral property in which their rights were those of coparceners.

The right under the Mitakshara of coparceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of Babuana or of Sohag property in this family of Durbhanga, and that to allow that Babuana and Sohag property could be partitioned would be to frustrate the very object with which Babuana grants and Sohag grants have been made and the very object with which the custom in the family of the Durbhanga Raj authorised the making of such grants by the Maharaja for the time being of Durbhanga, that object being to provide by a grant of lands suitable maintenance, having regard to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Durbhanga from the possibility of having from time to time to provide for such descendants maintenance by gifts of money.

In support of the contention that there can be no partition of Babuana property reference has been made to the judgment of this Board in *Durgadut Singh and others* v. *Maharaja Sir Ramashwar Singh Bahadur* 36, Indian Appeals

176. That case related to a Babuana grant in this family of Durbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of Babuana property "cannot have it divided "amongst them by proceedings in the nature of "partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by counsel in that case was that lands which had been granted to Kirkat Singh by a Babuana grant descended to the eldest male heir of the grantee to be held, or managed, by the person to whom they descended for the maintenance of the family. The evidence in this suit proves that Babuana and Sohag lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as coparceners.

Apart from the general evidence that females are excluded from the succession to Babuana and Sohag properties there is little evidence, and that apparently merely evidence of opinion, that the rule as to the exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Durbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to Babuana or Sohag property could have arisen. It is doubtful that with the exception of the present case and the case of Musammat Ghanlata, who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Durbhanga family had a wife who survived him.

Musammat Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Durbhanga descended through Maharaja Rudar Singh who made the Babuana grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh had a Babuana grant; he had six sons, one of whom was Dharamput. Dharampur had by his wife Dharamlata a son Ghansham Singh, who had by his wife Musammat Ghanlata two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the Babuana property of that branch. On Ghansham Singh's death his widow Musammat Ghanlata entered into possession of his one-sixth share of the Babuana property as hers by right of inheritance, and in the presence and with the knowledge of the agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died Musammat Ghanlata executed an ekrarnama in which she stated that by custom she had no title to the share, and alleged that she had been permitted to hold possession of it merely by way of maintenance. It is obvious that she executed the ekrarnama as a compromise to secure, if possible, 400 bighas of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why Musammat Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their

Lordships are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Darbhanga Raj by which females are excluded from the succession to Babuana property and to Sohag property applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and consequently that on the death of his brother the plaintiff became entitled to the possession and enjoyment of the Babuana property and of the Sohag property which his brother held at the time of his death. Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immovable properties which were acquired from the income and profits of the Babuana properties are to be considered as accretions to the Babuana properties, and they hold that the plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immovable properties. Their Lordships are not satisfied that the plaintiff proved a title to the possession of any of the movable property or accumulations which he claimed. The defendant was and is entitled to money maintenance, and as no substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside; that the appellant should have a decree for the possession of the immovable properties in suit excepting Nos. 15, 19, and 21 of Schedule 3, and No. 10 of Schedule 4 (A), and that in other respects the decree of the Subordinate

Judge should be varied by dismissing the suit; that it be declared that the respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Durbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immovable properties which the appellant will recover by the order in this appeal; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the appellant and his brother had not effected a partition this litigation might have been avoided. No costs of this appeal will be allowed to either side.

In the Privy Council.

EKRADESHWAR SINGH

v.

MUSAMMAT JANESHWARI BAHUASIN.

DELIVERED BY SIR JOHN EDGE.

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