Privy Council Appeal No. 46 of 1918.

Rao Kishore Singh - - - - - - - *Appellant*

v.

Musammat Gahenabai and another - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1919.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

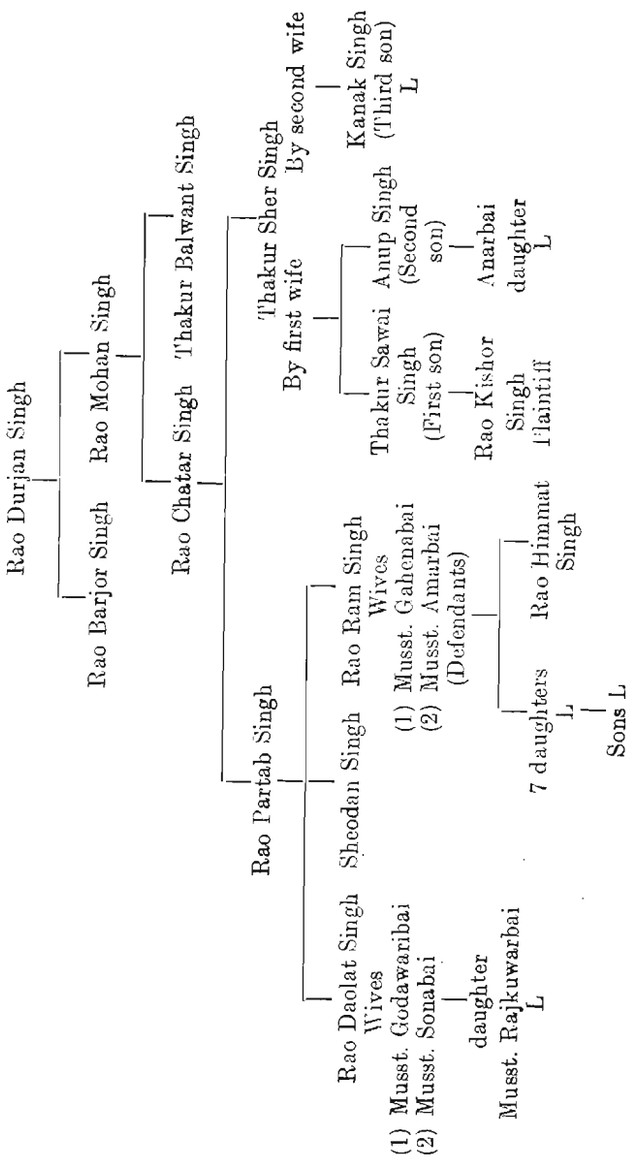
[*Delivered by* LORD ATKINSON.]

This is an appeal from the decision of the Judicial Commissioner of the Central Provinces on appeal from the District Court of Nimar reversing a judgment of the latter Court in an action in which the present appellant was plaintiff and the present respondents were defendants. The fact that the respondents have not appeared on the hearing of the appeal before this Board, requires that the evidence, and the points raised in the case should be examined by their Lordships in more detail than would have been necessary, had counsel for both the appellant and the respondents appeared and presented their respective contentions to them.

The action out of which the appeal has arisen was brought by the appellant, Rao Kishore Singh, to have it declared that he, as sole heir of his second cousin, Rao Himmat Singh, who died on the 16th October, 1906, was entitled to a certain estate, particulars of which are set out in detail in the schedules attached to the plaint, of which his said cousin was owner in possession at the date of his death, and also to recover possession of the same.

The appellant claims this heirship by virtue of a special family custom upon which he relies, according to which, as he avers (1) females are wholly excluded from inheritance ; (2) on the death of a proprietor the whole estate passes to a single person, subject to the liability to maintain the other members of the proprietor's family ; (3) on the death of a proprietor the male relative who is in the eldest line of male descent from him succeeds, and in default, the male relative in the eldest line of male descent, from his father, and next from his grandfather succeeds and so on. No restraint on alienation is imposed in other respects by this custom.

The respondents are the mother and stepmother of Himmat Singh, widows of his late father, Rao Ram Singh, claiming to be entitled as the latter's heirs to the aforesaid estate under the ordinary Hindu Law. They admittedly would be so if the alleged custom did not govern the descent of the estate. The genealogical table of the appellant's family for the last six generations, which is set out in the plaint, is admitted to be correct, and runs thus :—



The letter " L " appears under the names of those persons still alive who are not parties to these proceedings.

It is in the plaint averred amongst other things and subsequently found by the District Judge that certain properties of

which the appellant was then in actual possession were by a certain instrument in writing dated the 21st January, 1841, obtained by his grandfather, Shere Singh, from Rao Partab Singh, the then head of the family, in lieu of the yearly sum of Rs. 210, formerly received by him for maintenance. This document is Exhibit P. 42. From the extraordinary and, as it appears to their Lordships, misleading use made of it by the Appellate Court, it becomes necessary to examine its terms in detail. It is further averred that, with certain trifling exceptions, named by the District Judge, the whole family estate in the schedule to the plaint described descended from Rao Durjan Singh to Rao Barjor Singh, from him to Rao Mohan Singh, thence to Rao Chatar Singh, and from him to Rao Partab Singh, and thence to Rao Daolat Singh, all of whom are named in the above-mentioned genealogical table.

It is also averred and not disputed that Rao Daolat Singh died on the 23rd August, 1880, possessed of the whole of the said family estates, leaving him surviving his two widows, Mussamat Godawaribai and Mussamat Sonabai, and one daughter, Musammat Rajkuwarbai, who is still alive.

It is further averred that Rao Ram Singh, who was a younger brother of Rao Daolat Singh, lived separate from the latter, receiving certain sums of money for his maintenance; that on the death of Rao Daolat Singh, in the events which had happened, the family estates passed by inheritance to Rao Ram Singh, who gave by registered deed to the widows of his brother, Daolat Singh, for their maintenance one village, some lands, a house and a cash allowance; and that after the death of these widows the property so given reverted to Rao Ram Singh, Musammat Rajkuwarbai receiving nothing; and that Rao Ram Singh died on the 30th May, 1905, leaving him surviving two widows, the defendants in the case, one son, Himmat Singh, who died childless on the 31st May, 1905, and seven daughters. In the written statement of the respondents filed the 13th November, 1908, they, in addition to putting the appellant upon strict proof of the family custom relied upon, and denying that any rule of primogeniture existed in the caste and family to which the parties litigant belong, pleaded that even if the Court should find in favour of the existence of some kind of rule of primogeniture binding the family, it would be of no avail to the appellant, inasmuch as before the first Settlement in 1864 there was a partition of the family estates between the senior and junior branches of this family, by reason of which the junior branch enjoyed exclusively the property then in their possession; that Shere Singh, paternal uncle of Rao Daolat Singh, made a representation of this fact to the officer in charge of the Zemindari Settlement during its progress between the years 1858 to 1864, and that on the faith of this representation separate *jageer* and pensions were allowed him to the detriment of the interest of Rao Daolat Singh, who, on the faith of the representation, did not claim a larger pension, nor the grant of the *jageer* with respect to property assigned to Shere Singh; that Shere Singh

as one among numerous junior members of several Zemindari families, well knew that he would have, in future, no claim to the succession to the senior branch, but that on the extinction of heirs the property would lapse to the Government; and that the appellant was, by reason of the above representation, estopped from claiming any right to succeed to the property in suit, the above-mentioned partition having destroyed the right of the junior branch, if they had any, to succeed to it.

The respondents further plead in reference to the matters set forth in the third paragraph of the plaint that they have no personal knowledge of the grant of Rs. 210 per annum for maintenance, nor of the execution of the Ekranama therein mentioned, but alleged that even if the Court were to find in favour of the existence of the agreement, it would be of no avail by reason of the aforesaid partition, and estoppel.

The appellant in a written statement in reply traversed all the material averments contained in the written statement of the defendants; and as to the sum of Rs. 210, said that it was at the Zemindari Settlement commuted by the Government into a hereditary annual pension of Rs. 150, and Mouza Malgaon on *jageer*.

The following ten issues were settled by the learned District Judge, C. S. Finlay :—

" ISSUES.

" I. Under what circumstances are the appellations of ' Thakur ' and ' Kuwar ' applied to members of the Bhamgarh family ?

" II. Does Government confer the title of Rao on the person succeeding to the Bhamgarh property and in particular was it conferred on plaintiff by Government on 29th January, 1908 ?

" III. Does a law or custom of primogeniture prevail in the Bhamgarh family, and if so, what are its details and incidents ?

" IV. Was there a partition between the senior and junior branches of the Bhamgarh family of the nature indicated in paragraph (2) (*c*) of defendants' written statement, dated 13th November, 1908 ? If so, what is the effect of such partition on plaintiff's claim ? Is plaintiff estopped from claiming a right to succeed to the property in suit ?

" V. Did plaintiff's grandfather, Shersingh, receive a yearly grant of Rs. 210 as maintenance allowance under an ' Ikrarnamah ' dated Magh Vadi 14 Sambat 1897, executed between Shersingh and Partab Singh ? What is the effect of the partition and estoppel, if any, described in the last issue on this ' Ikrarnamah ' and the arrangement made thereunder ?

" VI. Has the British Government since its advent paid a definite sum to Shersingh in lieu of his Zamindari rights ?

" VII. Is any of the property ancestral ? Was all of it enjoyed by the several ancestors mentioned in paragraph (3) of the plaint ? In particular are properties Nos. (30), (31), (46) and (53) in the possession of the defendants ? What is the nature of property No. (53) ?

" VIII. Is plaintiff the heir of Rao Himmat Singh ?

" IX. Are plaintiff's claims for a declaration and for possession redundant ?

" X. To what relief is plaintiff entitled ? "

The learned District Judge who tried the case, C. Sestra Rao, in a lengthy and elaborate judgment, delivered on the 19th

November, 1910, analyzed in minute detail all the evidence given in the case, oral and documentary. He dealt at length with the early occupation of Nimar by Rajput Chiefs as described in the settlement reports of Captain Forsyth and the Zemindari Settlement Reports of Captain Mackenzie, Commissioner for the Nerbudda Division, and also with those portions of the latter report relating to the history of the Zemindar property, the subject of this suit, and he found amongst other things :—

(1) That in the Bhamgar family to which the parties litigant belong the brothers of a sonless Gaddawale are styled Kuar, and should the Gaddawale have a son that son is styled Kuar, and the child's paternal uncles are styled Thakur.

(2) That in this same family the Gaddawale gets the title of Rao, and that the Indian Government, on the 29th January, 1908, conferred that title on the appellant on his succession to Rao Himmat Singh, deceased.

He then summarizes in the following words the historical conclusions which the above-mentioned reports of Captains Forsyth and Mackenzie appeared to him to establish :—

(1) That the Bhibala, the family to which the litigants belong, sprung originally from the intermarriage of one of the invading Rajput chieftains with a member or members of a local clan inhabiting the hills bordering on Nerbudda, and are now true Rajputs.

(2) That the ancestors of the plaintiff came from the north and occupied the Central Nimar about 20 generations ago.

(3) That they subdued the Bhils three or four centuries prior to the Mahomedan conquest of Nimar and were chiefs. (Paragraph 40 of Captain Forsyth's Settlement Report.)

(4) That they brought with them the institutions of their race, one of which is *Gaddi*. The succession to the *Gaddi* being by primogeniture and the other members being provided with maintenance.

(5) That in the time of the Mahomedan rule the chiefs were constituted hereditary Zemindars or fiscal officers of their tracts with "*hucs*," and were allowed to retain the villages actually in their possession.

(6) That in later times of the Mahomedan rule the Rajput Zemindars were deprived of all fiscal functions, though they were allowed to retain the title of Zemindar and the *hucs* and lands attaching to their offices. (Paragraphs 120 and 121 of the Settlement Report.)

(7) The Zemindars had property in the lands which were considered their private property.

(8) The Rajput Zemindars rendered nominal service to the State till the advent of the British Government and the Zemindari settlement.

These *hucs*, which took the shape of percentages of revenue collections, were of considerable value.

The learned District Judge, having thus dealt with the historical aspect of the case, proceeds to dispose of the different issues raised on the pleading, especially the third and most important issue, namely, " Does a law or custom of primogeniture prevail in the Bhamgar family, and if so what are its details and incidents ? " The burden of proving this issue he rightly held lay on the appellant. The examination of the evidence bearing upon this issue covers 17½ printed pages of the Record, from p. 301 to p. 318. He ultimately finds that the custom of primogeniture prevails in the family of the parties litigant ; that under it women were excluded from inheritance, and that the male relative who is in the eldest line of male descent from the last holder or his father or grandfather succeeds. It will be observed that the learned Judge uses the present, not the past tense, " prevails," and that he does not state that the custom involves any restraint on alienation.

It is in their Lordships' view clear that there was abundant evidence before the learned Judge to justify him as a reasonable man in finding as he has found on this issue, and they do not find in the evidence anything to lead them to think that his conclusion was erroneous. Well, if he be right in this, this custom became the law of the family regulating the succession to the family estate. The ordinary Hindu law did not apply to it save so far as it was not inconsistent with the custom. It is in their Lordships' view clear that such a custom may, if observed and acted upon, survive the primitive condition of things out of which it originally, from the very necessity of the case, sprung; and it is, they think, perfectly clear that the head of the family for the time being, could not, by accepting from the Government of India a sanad containing clauses inconsistent with the custom, destroy it or render it inoperative.

The learned District Judge then proceeds to deal with issues 4, 5 and 6. In reviewing the evidence bearing upon issues 4 and 5, he deals specifically with Exhibit P. 42, the agreement of the 21st January, 1841, and the two sanads dated the 18th December, 1865, identical in all respects save as to the property dealt with, given to Rao Daolat Singh and Shere Singh respectively, and he finds that the evidence as a whole shows that there was no partition between Partab Singh and Shere Singh ; that there was an agreement in January, 1841, by which Shere Singh received Rs. 210 a year, a jirat, and some trees as his maintenance allowance. On issue 6 he finds that the British Government realized the *hucs*, and that out of the *huc* due to Daolat Singh Rs. 210 were paid to Shere Singh, and the balance direct to him, and that Exhibit P. 42 lends support to the finding that Shere Singh received Rs. 210 direct from the Government. Ultimately the learned District Judge finds that the appellant is entitled to possession of the properties in suit except items 30, 31, 46, and 53.

Before dealing with the judgment of the Court of Appeal it would be well to examine this document, P. 42, considering the use which has been made of it by that tribunal. It is found at p. 140 of the Record. It takes the form of a letter written by Shere Singh to Partab Singh. It runs thus :—

> " I shall get Rs. 210 annually for my food and other expenses. You should therefore cause it to be paid to me directly from the sarkar. (1) Chhote land of the village Rangaon. (2) Old Mango Grove at Bhampar. (3) Mowha Grove of Rampur. (4) The house situate on the road in which I live. I shall be receiving as above and I will serve the Raj and will go wherever ordered. My descendants and I will enjoy it. In case there shall be no descendant from me it will lapse to the Raj. I will not give it to anyone. I will not act against your pleasure."

It would be difficult to select words to indicate more complete loyalty and subservience to the Raj than do these words. It is simply an agreement by the head of the family to devote certain portions of the family property to the maintenance of a junior member, that is, an alienation *pro tanto* of an impartible estate which every head of such a family not restrained from alienation by a family custom is entitled to make though the estate be impartible. (*Rani Sartaj Kuari* v. *Rani Deoraj Kuari* 15 I. A., 51), *Raja Rama Rao* v. *Raja of Pittapur* (45 I. A., 148). To treat it as it is treated by the Appellate Court at p. 347 of the Record as an example of the semi-hostile assertion by the younger members of a family of a right to a provision out of the family as a permanent settlement, in the shape of a portion of the estate, is quite inaccurate.

The Appellate Court does not seem to have been of opinion that the evidence did not establish that the custom found by the District Judge to be an existing operative custom was not at some time or other before the Settlement of 1865 existing as an operative binding custom. So far they seem to concur with the learned District Court Judge. Where they differ from him apparently is that they hold that the custom, though once existing and operative, has ceased to be so, either because the primitive conditions out of which it sprung had ceased to exist, and therefore *cessat ratio cessat lex*, or because owing to the improvement in education and the spread of socialistic opinions consequent thereon, the custom has been so gradually but steadily and persistently encroached upon that it has, as it were, been eaten away, and has ceased to be observed or applied, or because it has been destroyed by the grant and acceptance of the sanads above mentioned, since they contain provisions inconsistent with it. Indeed they regard these latter documents as decisive of the case.

The judgment of the Appellate Court contains many very lengthy quotations from the before-mentioned reports of Captains Forsyth and Mackenzie. The Court appears to have accepted as accurate the statements contained in these reports, though they involve, in some cases, as in the case of the agreement of the 21st January, 1841, made with Shere Singh, the construction of a written document. At pages 346 and 347 of the Record, speaking of the report of Captain Forsyth, they say that it

contains a reliable record of the antecedents of such families as that to which the parties litigant belong, and proceed to give a historical sketch of the conditions out of which quality of impartability of the estates of such families arose, as well as the circumstances under which it ceased to attach to them.

The outline of that history, they say, is " that certain families of Rajputs came into Nimar centuries ago, and settled here probably as rulers of petty domains there, then chiefly peopled by aboriginal tribes. . . . In days when the crude state of internal communications made decentralization of sovereign power indispensable, it is easy to understand that the Rajput clans, so established, even where nominally subject or in vassalage to some distant ruler, were practically independent chiefs in their own territories. Therefore we find them with the royal title of Rao applied to the head of each clan, accompanied by such ensignia as a throne, a treasury and other attributes of sovereignty. Later, when the Mahomedan Dynasty asserted itself, and its own viceroys appeared on the scene, stripping the clans of their independence, the established Rajputs were still a power to be reckoned with, and they were reconciled and their loyalty secured by their appointment of each headman as the fiscal officer in charge of his estate. In this capacity . . . . the headman exercised considerable power. But as his unfitness for purely revenue work became more apparent, he was deprived of his powers by the substitution of a stipendiary establishment. Nevertheless for obvious political reasons his complacency was secured by a maintenance of his status and dignity. His title, his nominal authority over his tract, his property in land and the grant of perquisites, were continued, but it now ceased to be necessary that the clan should be represented by one acknowledged head. It is easy to understand that while each family possessed sovereign or quasi-sovereign rights over any tract of country, it was indispensable that succession to the throne should be governed by a rule of primogeniture, and no doubt at that time and under those circumstances the family property as an undivided whole was under the governance of the family head, and remained attached to the *Gaddi* like any impartible Zemindari at the present day. Again, when the head of the family became the holder of a hereditary fiscal office it was still necessary to apply the rule of primogeniture for succession to the office."

No doubt one of the ways in which impartible estates may originate is by independent chiefs or feudatories, exercising almost autocratic powers, being gradually in the course of time reduced by a paramount power to the position of ordinary Zemindars ; but these impartible estates may also owe their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only, without any power of interference with the management.

It is difficult to see why a family should not similarly agree

expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times, after that condition had completely altered. Their Lordships, therefore, are of opinion that the principle embodied in the expression *cessat ratio cessat lex* does not apply where the custom outlives the condition of things which gave it birth.

The Appellate Court do not appear to have attached sufficient weight to the vast mass of evidence given on behalf of the appellant to the effect that the custom relied upon, whatever its origin, has been acted on and applied down to quite recent times.

This Court proceed next to show how a custom arising out of ancient conditions affecting the succession to the estates of a family such as that to which the litigants belong was superseded, and the succession to and enjoyment of those estates became subject to the ordinary Hindu Law. At pages 340 and 341 of the Record the Court set out the orders of the Indian Government prescribing the mode in which the recommendation of Captain Mackenzie should be carried out. The orders run as follows :—

> "That the full value of the Zemindar's land and cash perquisites should be ascertained, and that, after deducting the amount of expenditure which would fall on Government, in lieu of their services, they should receive the balance in rent-free estates, and thereby revert to the position of Inamdars.
>
> "That in giving effect to this measure lands whether plots ('*ziraut*') or whole estates ('jageer') already held rent-free by the Zemindars should remain undisturbed, and new grants of rent-free estates should be made only in commutation for that portion of the cash perquisites which might remain after making the prescribed deductions.
>
> "That the future status of the Zemindars as Inamdars should be regulated by the principles of the Madras Enam Rules, each case to be considered and decided on its own merits."

The plain object of these orders is to change the tenure by which the owners of estates such as that of the family of the litigants held their estates, and the rights and obligations attaching to that ownership of them. The Appellate Court, at page 341, state :—

> "that in carrying out the object so aimed at it was discovered that besides actual heads of families there had sprung up a certain number of junior sharers who for several generations had enjoyed property and allowances independently of the heads of the families to which they respectively belonged. These were carefully distinguished from those cadets, or junior members, who received allowances from or were maintained otherwise by the head of each family. Captain Mackenzie found that the inclusion of these junior sharers raise the number of individuals requiring treatment to 78, whereof no less than 44 were junior shareholders."

That statement is based entirely upon Captain Mackenzie's report. It may or may not be an accurate description of the general condition of affairs in this district. Their Lordships have not the means of determining, nor are they called upon to determine that question, but it would appear to be clear that it is not an accurate description as applied to the estate of the litigants' family, for this reason that where the Appellate Court, at page

347, line 20, apparently attempt to give instances of the three junior sharers existing for generations on the estate in suit, they are obliged to select Shere Singh claiming under P. 42 the maintenance agreement of 1841, and (Exhibit 51) an agreement made on the 24th January, 1865, in contemplation of the intended Government settlement, whereby certain provisions were made by Rao Daolat Singh for the maintenance of his brothers Sheodan Singh and Ram Singh. It is not too much to assume that if other instances of shares having been enjoyed for generations by junior sharers were available, those of cadets, whose titles began in 1841 and 1865 repectively, would not have been selected.

At page 347 the Appellate Court continue to deal with the same point. They say :—

> " Again when the head of the family became the holder of a hereditary fiscal office, it was still necessary to apply a rule of primogeniture for succession to the office. But now the once *ruler* of the family had become merely the *representative* of the family for the management of such property, and the receipt of such perquisites as attached to the hereditary office. Thereupon the ordinary Hindu law began to be reinstated, and junior members asserted themselves as shareholders. Still, while the ruling power recognised only the office holder, the ' younger sons ' were still to some extent under his sway, and their shares at his disposal. But the recurring demand for shares, and the advance of socialism in the family, due to education and the evanescence of all real authority in the head, made permanent partitions of estate necessary. The subsistence which the younger brother once received as a favour from the lord of the manor now became a share claimed by him as a right, ever increasing in *quantum* towards that equality which is favoured by the ordinary Hindu law from which only the particular circumstances had for a time diverted enjoyment of the family property."

It is unnecessary for their Lordships to determine whether this reasoning would be sound as applied to any case. It is sufficient to say the facts which it assumes and upon which it is based do not exist in the present case. The Appellate Court have not been able to refer to a single instance other than those two already mentioned where the junior members asserted themselves as shareholders in the manner described.

It only remains to deal with the sanads. They run as follows :—

> " SIR,
>
> " Whereas you formerly held the office of Zemindar as a Pergunna Officer in the District of Nimar, and enjoyed certain allowances by way of ziraut, jagheer, and cash percentages on public revenues, and *whereas* the services you rendered in that office will not in future be required by the Government, and *whereas* it has seemed fit to arrange for your proper maintenance in future in consideration of your previous services and present status : Therefore the Governor-General in Council has been pleased to order that your ziraut and jagheer, as noted at foot hereof, continue in your possession in freehold Enam, with the full power of alienation by gift, sale, adoption or otherwise, subject to good behaviour and the annual payment into the Government Treasury by half-yearly instalments of Rupees one hundred and fifteen as quit-rent.
>
> " 2. In token whereof this sunnad is granted to you this Eighteenth day of December, 1865.
>
> " (Sd.) W. MUIR,
>
> " Secretary to the Government of India."

Such a document as this is quite inapplicable to Shere Singh's case. He never held the office of Zemindar as a Pergunna or any other officer. He never enjoyed by virtue of such an office any percentages on public revenues. His maintenance is to be arranged in consideration of services he never was empowered to perform and never did perform. The reason why its use was resorted to is not far to seek.

At page 347 of the Record, line 29, the Appellate Court state that :—

> "Captain Mackenzie found Shere Singh to be an independent sharer holding a distinct hereditable share independent of Rao Daolat Singh. It is reasonable to presume that Shere Singh himself led the Commissioner to that conclusion as a result of which he got an independent status as Zemindar and was given a separate sanad in exactly the same terms as Rao Daolat Singh."

If Shere Singh did this he, it appears to their Lordships, grossly misrepresents his true position under the agreement of the 21st January, 1841 (and he had no other title), but Captain Mackenzie, in the 38th paragraph of his report, states that :—

> "38. '. . . . In very few cases is it known with any degree of certainty when the holdings enjoyed by these Zemindars were first acquired by them or in what they originated. It is, no doubt, probable that they were conferred in the first instance on some condition of service; and so it has been most convenient to assume as a general principle that they are service tenures. . . . So the service theory was maintained. It was the only theory upon which the tenures could be readily understood, written about, and generally dealt with. . . .'"

And accordingly Shere Singh's true position was misdescribed in the sanad in order to fit the theory. As indeed was Daolat Singh's also to some extent. It occurs to their Lordships there may have been another reason for inserting clauses expressly relieving those grantees from the further performance of their imaginary services.

The first case to be found deciding that the discontinuing of a service attached to an impartible estate did not alter the nature of that estate and render it partible, is *Ramrao Trimbak* v. *Yeshvantrao Madhavrao*, 10 Bom. 327, heard and decided in 1885, twenty years after the Zemindari settlement; and it may possibly have been thought in 1865 that, as the law then was supposed to stand, the release from these fictitious services would render the estate partible. But whether that be so or not, their Lordships are clearly of opinion that if this family custom relied upon and found applied to and bound the estate the subject matter of this suit, the head of the family for the time being could not destroy that custom or release his estate from it by becoming grantee from the Crown under such a document as these sanads. For these reasons they think the Appellate Court dealt with the case on mistaken principles, that their decision was wrong and should be reversed, that the decision of the District Judge was right and should be restored, and this appeal be allowed with costs in the Appellate Court and before this Board, and they will humbly advise His Majesty accordingly.

In the Privy Council.

RAO KISHORE SINGH

v.

MUSAMMAT GAHENABAI AND ANOTHER.

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