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transmission of it to his descendants in perpetuity, trammelled only with some pious and charitable trust. If this was not his object, it is difficult to understand why he did not specify the objects of the dedication in the waqf-namah, instead of in an instrument drawn up and executed simultaneously with the waqf-namah.

For these reasons I am of opinion that the waqf-namah was an imperfect dedication of the property according to the Shia law, and that the will does not cure the defect inherent in it, and so no valid waqf has been created.

It is unnecessary for me to deal with any other aspect of the case; but I may observe that if the waqf-namah and the will can be read together, as my brother Burkitt considers that they can, I should have difficulty in coming to any other conclusion than that at which he has arrived, namely, that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. The appeal will therefore be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C. 1901 *November* 14, 15. 1902 *February* 22.

CHANDIKA BAKHSH (DEFENDANT) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH) AND OTHERS (PLAINTIFFS) AND DRIGBIJAI SINGH (DEFENDANT) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH) AND OTHERS (PLAINTIFFS).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu Law—Custom—Mitakshara and Mayukha Schools of Hindu law—Proof of family custom at variance with Hindu Law—Governing law of migrating families.

A family custom alleged to exist amongst the Ahban Thakurs of Oudh, in derogation of the ordinary Mitakshara law in force there, that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date, which their Lordships found to be the only portions of the evidence adduced which supported it.

APPEALS from judgments and decrees (9th and 30th August 1898) of the Judicial Commissioners of Oudh reversing two decrees (15th June 1896) of the Subordinate Judge of Sitapur.

* *Present:*—LORD MACNAGHTEN, LORD ROBERTSON, and LORD LINDLEY.

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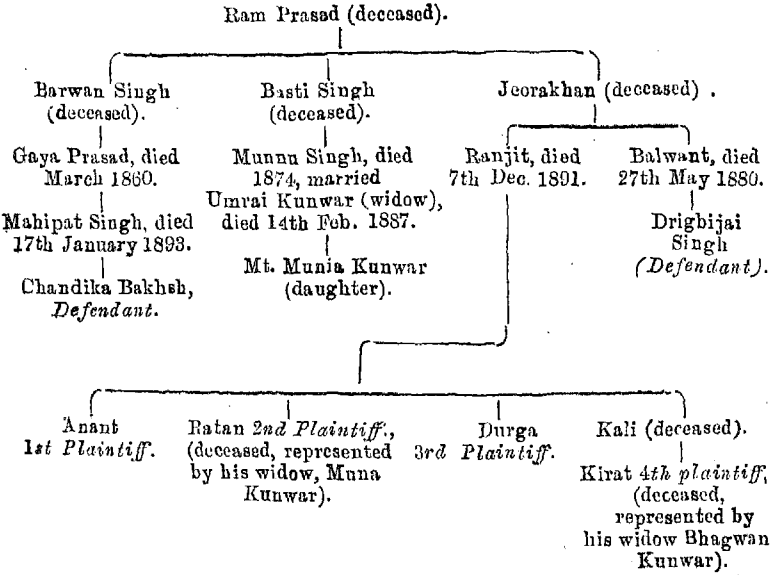
The parties to these appeals were Ahban Thakurs, a tribe which, coming originally from Gujrat, had settled in Oudh many centuries ago. The suits out of which the appeals arose were brought by the respondents as next heirs of one Munnu Singh, a divided member of the family, to recover his property on the death of his widow, Umrai Kunwar. The property in suit consisted of shares in eleven villages which had been held by Munnu Singh as his separate estate until his death on 21st January 1874, and afterwards by his widow until she died on 14th February 1887.

The relationship of the parties in the litigation is shown by the following pedigree:—



It was undisputed that daughters did not succeed, so that on the death of Umrai Kunwar, the nearest heir under the Mitakshara law prevailing in Oudh was Ranjit Singh, the father of the plaintiffs. A custom, however, was set up by the defendants that among the Ahban Thakurs, on the death of one of several brothers without direct heirs, the descendants of the other brothers took equally without reference to their nearness to the common ancestor. In accordance with this custom Mahipat Singh and Drigbijai Singh would succeed simultaneously with Ranjit Singh, and the property would be divided *per stirpes*.

On the death of Umrai Kunwar it appeared that disputes arose between the claimants to the estate, which resulted in the attachment of the property now in suit under section 146 of the Criminal Procedure Code (Act No. X of 1882). Subsequently the tahsildar was directed to effect a compromise, if possible, and eventually an arrangement was come to that Ranjit Singh should take a four-anna share, Drigbijai Singh a four-anna share, and Mahipat Singh an eight-anna share in Munnu Singh's property. An order to this effect was made by the Deputy Commissioner on 11th November, 1887, and the property released from attachment, the shares of Ranjit and Drigjibai being placed in charge of the Court of Wards under whose management their estates already were.

Ranjit Singh died on 7th December, 1891, and was succeeded by his sons Anant, Ratan and Durga and by his grandson Kirat, whose father Kali had predeceased Ranjit Singh. Mahipat died on 17th January, 1893, and was succeeded by his son Chandika Bakhsh. In March, 1893, Ranjit Singh's estate was released from the Court of Wards, and on the 27th April, 1895, the plaintiffs, the sons and grandson of Ranjit, brought the suits out of which the present appeals arose to recover from Chandika Bakhsh and Drigbijai Singh the shares they had taken of Munnu Singh's estate, to which the plaintiffs claimed that Ranjit Singh was under the Mitakshara law alone entitled to succeed on the death of Umrai Kunwar.

The main defence in both suits was that the succession was governed by the special custom already mentioned, and not by the ordinary law of the Mitakshara. Other grounds of defence were raised, but they were all decided against the defendants by both the Lower Courts and were not raised in the present appeals.

The Subordinate Judge held that the custom set up by the defendants was proved, but that the succession under it was *per capita* and not *per stirpes*. In the suit against Chandika Bakhsh for an eight-anna share of the property the Subordinate Judge gave the plaintiffs a decree for a two-anna eight pie share, that being the excess held by Chandika over the one-third share to which he was entitled. The suit brought against Drigbijai for a four-anna share of the property was dismissed with costs.

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On appeals preferred to the Court of the Judicial Commissioner, that Court held that the custom set up by the defendants had not been proved, and therefore reversed the decrees of the Subordinate Judge and decreed the plaintiffs' claim in each case in full.

The material portion of the judgment of the Judicial Commissioners in the case against Chandika Bakhsh as to the custom set up was as follows :—

"I pass on to consider the question whether the Hindu Law of the *Mitakshara* regarding inheritance has been superseded or modified by a custom binding upon the parties. The rule of succession which is alleged by the defendant to be binding upon Ahban Thakurs is that sons of a deceased brother, cousin, uncle or nephew of the propositus are entitled to stand in the shoes of their father and inherit along with their father's brother. The learned Subordinate Judge relied upon the *wajib-ul-arzes* of Shahpur, Kunwa Danda, and Bidhipur, and upon the judgment of the Subordinate Judge in Bhagwant Singh and Drigpal *v.* Raj Rani, dated July 22nd, 1881, in support of his finding that the custom had been established. The material portion of the *wajib-ul-arz* of Shahpur is as follows:—'*bad marne aurat mazkur shauhar mutawaffi ke bhai bhatije aur dar surat na hone bhai bhatijon ke jo waris karib ek jaddi shauhar ka ho hissa pawega.*' The *wajib-ul-arz* of Bidhipur is almost the same word for word. This passage literally translated is as follows:—'After the death of the said woman (or widow) the brothers and nephews of her deceased husband and on failure of brothers and nephews, the nearest heir of the same stock will get the share (of the deceased).' It is conceded that the word 'and' must be inserted between 'brothers' and 'nephews' although in the original there is no conjunction between the words.

"The defendant's learned counsel contends that the meaning is that brothers and nephews should succeed together. This is to my mind a forced construction. Such a sentence as the above is often found in *wajib-ul-arzes* and is the language usually employed to denote that brothers and in default of brothers, nephews may succeed, and I think that that is the meaning here. But even if this contention be admitted as sound these documents will not avail the defendant. The word '*bhai*' is no doubt frequently used to denote both brothers and cousins, but it cannot be so understood here else it would be unnecessary to make further provision for the succession of the nearest heir of the same stock. Mahipat Singh, therefore, was not a brother of Munnu Singh within the meaning of this *wajib-ul-arz*. The *wajib-ul-arz* of Kunwa Danda contains nothing that can be tortured into a record of the alleged custom.

"The judgments in *Bhagwant Singh* and *Drigpal* v. *Raj Rani* do not help the defendant's case. Mandhata, Mahipat, Suphal and Bhagwant were brothers. Drigpal was the son of Mandhata. It appears that at the regular settlement Mahipat was found to be in possession of Suphal's *sir*. Bhagwant and Drigpal brought a suit against Mahipat, which resulted in an arbitration award and a

decree, dated January 1866, by which it was declared that Mahipat and his wife who were childless should retain possession for their lives. Many years later Raj Rani after Mahipat's death executed a mortgage of the property, whereupon Bhagwant and Drigpal sued her and her mortgagee for a declaration that the mortgage would be ineffectual against them after her death. She pleaded that uncle and nephew could not join as plaintiffs. The Subordinate Judge disposed of this plea with the remark that Bhagwant and Drigpal were entitled to sue together both under the decree of 1866 and by custom; in proof of the custom he referred to the decree of the Settlement Court and to the evidence of a solitary witness. He added that Bhagwant at all events had a right of suit. On appeal the District Judge did not deal with the question of custom at all. The judgment of the Subordinate Judge cannot be relied upon as a pronouncement in favour of the existence of such a custom as that pleaded by the defendant. The decree of the Settlement Court is not in evidence, and there is nothing to show that the award of the arbitrators was based upon the custom alleged by the present defendant. It is remarkable that the *wajib-ul-arzes* of the villages in suit do not mention the custom; the parties who attested them seem to have induced the Settlement Officer to record what suited their purpose.

"This exhausts the documentary evidence which is supposed to tell in favour of the custom.

"Before discussing the oral evidence I must notice a circumstance which is relied upon by the defendant as rendering it probable that such a custom would be observed by Ahban Thakurs. It appears that the Ahban Thakurs now found in Oudh are the descendants of families which migrated to Oudh several centuries ago from Gujrat. According to the Vyavahara Mayukha, which is of paramount authority in Gujrat, the sons of a brother who is dead are allowed to share along with surviving brothers. This is supposed to explain the origin of the custom set up in this case. Babu Sri Ram pointed out that the Maynkha was the work of Nilakantha, who lived about 1600 A.D., *id est*, long after the migration of the Ahban Thakurs to Oudh. This may not be a sufficient answer, for the law in force in Gujrat at the time of migration may have been the same as that laid down in the Mayukha some centuries later. If the custom set up in this case owes its origin to the law in force in Gujrat so many centuries ago and has been observed ever since one would expect to find some mention of it in the *wajib-ul-arzes*.

"Moreover the rule of the Mayukha that sons of a deceased brother succeed along with surviving brothers does not appear to enable sons of deceased cousins, uncles or nephews to succeed along with surviving cousins, uncles or nephews. I am therefore of opinion that the rule laid down in the Mayukha cannot be held to establish an antecedent probability in favour of the much more comprehensive rule pleaded by the defendant."

The Court then discussed the oral evidence and went in detail through the 18 instances put forward by the defendant in proof of the custom, and in conclusion said:—

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"In the result, then, I am of opinion that instances 9, 14, 15 and 17 have not been established, that Nos. 6 and 13 may be taken as proved, that Nos. 3 and 18 may be, but are not necessarily, true examples of the custom, and that Nos. 1, 2, 4, 5, 7, 8, 10, 11, 12 and 16 must, for various reasons, be regarded as doubtful. It is noticeable that instances 1 to 11 and 14 are said to have occurred in Kunwa Danda, Shahpur and Bidhipur, though, as already explained, the *wajib-ul-arzes* of those villages contain no record of the alleged custom. If the conclusions at which I have arrived are correct it is obvious that there is not on the record of this case sufficient evidence that the alleged customary rule of inheritance is binding upon the parties. Even if it be assumed that all the 18 instances have been established, I consider that the evidence must on the authorities be held insufficient. It has been established by a long series of authorities that in order to establish a tribal or family custom at variance with the ordinary law of inheritance it is necessary to show that the usage is ancient and has been invariable, and it must be established by clear and unambiguous evidence."

IN the case against Drigbijai Singh the judgment of the Subordinate Judge was reversed on the same grounds.

Chandika Bakhsh and Drigbijai brought separate appeals to His Majesty in Council.

In the first appeal—

Mr. *Leslie DeGruyther*, for the appellant Chandika Bakhsh.

Mr. *J. D. Mayne*, for the respondents.

In the second appeal—

Mr. *G. E. A. Ross*, for the appellant Drigbijai Singh.

Mr. *C. W. Arathoon*, for the respondents.

In the first appeal—

Mr. *DeGruyther*, for the appellant contended that the succession in this case was governed by the special custom set up and not by the ordinary law of the Mitakshara. The parties, Ahban Thakurs from Gujrat, where the Mayukha law is in force, must be presumed to have brought that law with them when they migrated and settled in Oudh. The custom now contended for is founded upon the Mayukha. The rule in the Mayukha is to the effect that "sons of a deceased brother succeed along with the surviving brothers" (see Stoke's Hindu Law, ch. iv., section 8, verse 17). "Brothers" is not confined to brothers proper, but extends to cousins, the rule of the Mayukha having been naturally extended to include more remote relationships than actual brothers (West and Buhler's Hindu Law, 3rd Ed. Book I, p. 108). In this case the appellant contends that cousins and cousins' sons

succeed together, and it is submitted that the evidence supports that contention. There are 18 instances in which the custom has been observed. As to proof of a custom *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad* (1) was referred to. The Subordinate Judge was in error in holding that the rule of succession is *per capita*, and not *per stirpes*; but even if the division were made *per capita*, the respondents are not entitled to so much as has been allotted to them. As to the effect in evidence of the *wajib-ul-arzes*, or administration papers, *Uman Parshad* v. *Gandharp Singh* (2) and *Lekraj Kuar* v. *Mahpal Singh* (3) were referred to.

Mr. *J. D. Mayne* for the respondents contended that the special custom set up had not been established: the evidence in support of it was unsatisfactory and insufficient to prove such a custom, which was one in derogation of the ordinary law. The alleged custom had only been followed in three out of the eighteen instances adduced in support of it, and those are of comparatively modern date and are insufficient to establish it, one of the essential requisites of a custom being that it is ancient. All the remaining instances merely follow the rule of succession laid down in the Maynkha. The extension of that rule contended for by the appellant is not in accordance with the principles of the Hindu law and should not be allowed. The following cases and authorities were cited:—Stoke's Hindu law, ch. IV., section 8, verse 17; Stoke's Hindu Law, pp. 443, 445, verse 8; Mitakshara, ch. II., section 4, verse 1; West and Bühler's Hindu Law, 3rd Ed., Book I., pp. 107, 108; *Jamiyatram* v. *Bai Jamna* (4); *Lakshmi Bai* v. *Ganpat Moroba* (5) and *Sant Kumar* v. *Deo Saran* (6).

Mr. *DeGruyther* replied—

1902: 22nd February: The Judgment of their Lordships was delivered by LORD MACNAGHTEN:—

The question involved in these appeals may be disposed of in a few words. In the first case the Subordinate Judge of Sitapur found in favour of the appellant (the principal defendant

(1) (1900) I. L. R., 23 All., 37: L. R., 27 I. A., 238.
(2) (1887) I. L. R., 15 Calc., 20 (28): L. R., 14 I. A., 127 (134).
(3) (1879) I. L. R., 5 Calc., 744: L. R., 7 I. A., 68.
(4) (1864) 2 Bom., H. C. R., 11.
(5) (1868) 5 Bom., H. C. R., O. C. 128 (139).
(6) (1886) I. L. R., 8 All., 365 (369).

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in the suit) on the ground of an alleged family custom that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor. The Judicial Commissioners reversed this decision and adjudged the estate in dispute to the respondents, who were plaintiffs in the suit, holding that the alleged custom had not been made out.

The parties to this litigation are Ahban Thakurs. It seems that the tribe known in Oudh as Ahban Thakurs came originally from Gujrat and settled in Oudh many centuries ago. In Gujrat the Mayukha is recognised as authority of paramount importance when it differs from the Mitakshara. According to the Mayukha sons of a brother who is dead share along with surviving brothers. The rule, however, as found in the Mayukha does not go beyond brothers and brothers' children. Although the migration of the Ahban Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom.

The argument of the learned counsel on behalf of the appellant was to this effect:—It is to be assumed (he said) that the tribe known as the Ahban Thakurs brought with them from Gujrat the law of the Mayukha: it is quite true that the Mayukha deals only with the case of a deceased brother; but it is a legitimate, and under the circumstances a natural, extension of the doctrine to apply it to cases of more distant relationship. It is a development of the law which might be expected to grow up among a tribe settled in a foreign land and there living apart. In support of the appellant's claim there was in evidence a judgment which was not much to the point, some oral testimony which was anything but satisfactory, certain *wajib-ul-arzes* which on examination are found to prove nothing, and 18 instances of succession which were put forward as demonstrating the existence of the alleged custom. The Judge of first instance considered these instances conclusive. The Judicial Commissioner who delivered the judgment of the Court examined them in detail. He found that four had not been established, that ten must be

regarded as doubtful, that two were not necessarily true examples of the alleged custom, and that the remaining two might be taken as proved. But his opinion was that if all the 18 instances had been established, the evidence must on the authorities still be held insufficient.

Mr. Mayne for the respondents contended that the suggested extension of the Mayukha rule would be abhorrent to the fundamental principles of Hindu law. He was willing to concede for the purposes of this case that the Ahban Thakurs settled in Oudh were governed by the Mayukha; but if that position was accepted, it was, he said, destructive of the appellant's case. He discussed the 18 instances and showed that all but three were true examples of the Mayukha rule and nothing more. This result was not really contested by the learned counsel for the appellant in his reply. He could do no more than add one of the other cases as an instance of the alleged custom, contending on the evidence that it was not simply an example of the Mayukha rule.

The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence.

It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation.

The appeal of Drigbijai Singh fails on precisely the same ground.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed. In each case the costs will be borne by the appellant.

Appeals dismissed.

Solicitors for the appellant, Chandika Bakhsh—Messrs. *Watkins* and *Lempriere*.

Solicitors for the appellant, Drigbijai Singh—Messrs. *Barrow Rogers* and *Nevill*.

Solicitors for the respondents in both appeals—Messrs. *T. L. Wilson & Co.*

J. V. W.