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whether the accused have been prejudiced by the action of the Deputy Magistrate. The Deputy Magistrate says:—"I carefully went through the diaries under section 172, and found nothing favourable to the accused in these diaries." We have been referred to several matters in the statements of witnesses recorded in what are called the special diaries, and we find that there are many statements which would unquestionably be of great assistance to the accused. We think, therefore, that the accused have been prejudiced by the action of the Deputy Magistrate. In our opinion, the conviction and sentence must be set aside, and we accordingly set them aside. In the circumstances of the case, we think it desirable that it should not be re-tried by Baboo Rakhal Mohan Banerjee. We direct that it be re-tried by any first class Magistrate there may be at Manbhum. At this re-trial, the accused will be at liberty to use, in accordance with the provisions of the law, the statements of the witnesses recorded by the police.

Rule made absolute and new trial directed.

H. T. H.

PRIVY COUNCIL.

BHAI NARINDAR BAHADUR SINGH AND ANOTHER (PLAINTIFFS) *v.* ACHAL RAM (DEFENDANT).

*P.C.** 1893 *February* 2, *and* 3.

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

The Oudh Estates Act (I of 1869)—Taluk descending to a single heir—Ascertainment of that single heir distinguished from the rule of primogeniture.

An estate belonging to a talukdar whose name is entered in the second and not in the third of the lists of talukdars in six specified classes prepared under the Oudh Estates Act (I of 1869), sections 8—10, is one which according to the custom of the family descends to a single heir, but not necessarily by the rule of primogeniture.

If, as happened in the present case, where the estate descended to a single heir, the heir according to lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals, coming

* *Present:* LORDS WATSON, HOBHOUSE, and MORRIS, and SIR R. COUCH.

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within the line of heirship, then, according to the classification in the Oudh Estates Act, nearness in degree prevails over directness of line. But, if two collaterals, or other persons in the line of heirship, are equal in degree, then the person rightly entitled is indicated by the seniority of the line to which he belongs. Section 22, sub-section 11 of the Act, referring to the law which would govern descent in default of any heirs who would come under the special provisions of the Act, includes in that law family custom when established.

In an attempt to prove a family custom to the effect that females should not inherit, no proof was afforded by the production of certain *wajib-ul-araiz*, as to which there was nothing to show that the villages of which they were recorded were the villages in suit, or belonging to the family which was disputing the succession.

APPEAL from a decree (24th April 1884) of the Judicial Commissioner, affirming a decree (26th June 1886) of the District Judge of Faizabad, and dismissing the appellant's suit with costs.

The estate in dispute was the taluk Birwa Mahnaon in the Gonda district, conferred upon Pirthi Pal Singh, who died in November 1859. His name as talukdar was, however, entered in the lists I and II prepared by the order of the Chief Commissioner, under the provisions of the Oudh Estates Act (I of 1869); list I comprising all talukdars, and list II comprising "talukdars whose estates, on and before the 13th February 1856, ordinarily devolved upon a single heir."

Pirthi Pal's widow, Thakurain Sarfraz Kuar, succeeded her husband, and died on the 20th February 1870. Her daughter Brij Raj Kuar next inherited; and died on the 3rd February 1879, when her husband Achal Ram entered upon possession of the taluk. In *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1) the rule of succession as stated in the above Act, in regard to estates in list II, was affirmed as applicable to Birwa Mahnaon; and it was held not to be necessary that when a talukdar's name was entered in the second, but not in the third of the lists, the estate, though descending to a single heir, should descend by the rule of primogeniture.

The plaint, filed on the 8th January 1886, alleged that, on the death of Sarfraz in 1870, the plaintiff's father Harbhagat, deceased in 1874, became entitled as the nearest collateral heir to Pirthi

(1) I. L. R., 10 Calc., 511; L. R., 11 I. A., 51.

Pal to inherit the taluk, to the exclusion of Brij Raj Kuar, daughter of Sarfraz and Pirthi Pal. The possession which Brij Raj obtained on the death of her mother was said to be wrongful. But, according to the plaint, the cause of action against Achal Singh, the present defendant, did not arise on the death of Sarfraz, but arose at the time when, in a suit against Achal Singh, the succession to Pirthi Pal's taluk was claimed by Udai Partab Singh, talukdar of Bhinga, and a final order was made for Achal's possession on the 1st April 1885, by the Judicial Commissioner. More explicitly stated, the origin of the right of Narindar to sue Achal Ram was put in this way. Brij Raj represented by the Court of Wards retained possession till her death in 1879; and her husband Achal Ram, on his succeeding her, was sued by the Raja of Bhinga, who on the 21st February 1881 obtained a decree. To that suit Narindar, the present claimant, was not a party. On the 12th December 1883 that decree was reversed by order of Her Majesty in Council; the result being that the right of possession was restored to Achal Ram. This, in the course of events, involved the opposition of the latter to the claim set up by Narindar, who claimed as against Achal Ram to be put into possession of the taluk, dating his dispossession to have taken place on the 2nd February 1884, and alleging title to possession in virtue of his being the nearest heir of the late Pirthi Pal Singh.

The defendant denied that the plaintiff was the nearest male relation of Pirthi Pal Singh, deceased, and claimed the right to taluk Birwa on a title through his marriage with Brij Raj Kuar: he alleged also that the latter was entitled under a will, made by Sarfraz, as well as by the rules of inheritance.

The Courts below concurred on the following points:—that Pirthi Pal died intestate; that Brij Raj Kuar, on the death of her mother Sarfraz Kuar, succeeded as heiress to her father in preference to collaterals; that the descendants of Azmut Singh, in the third generation, who had been adopted into another family, must be left out of consideration.

But they differed on the question of limitation. The District Judge, on the understanding that the succession opened to collaterals on Brij Raj Kuar's death in 1879, was of opinion that the

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plaintiff might have made title through his father Harbhagat; but holding the suit barred by the twelve years' limitation, he dismissed it. The Judicial Commissioner held that the suit was not barred by limitation; but he dismissed the suit on the merits. The Judicial Commissioner found that, at the death of Brij Raj Kuar, the plaintiff, Narindar, was not the nearest collateral heir, in the presence of Jubraj, who, like the plaintiff, survived Brij Raj Kuar. This Jubraj he found to be equal in degree with Narindar, but nearer than he was in line, being great-grandson of Sardawan, an elder brother of Sangram Singh, of whom the plaintiff was great-grandson.

The suit was accordingly dismissed.

On this appeal,

Sir *H. Davey*, *Q.C.*, and Mr. *C. W. Arathoon* for the appellant, argued that it had not been proved that Jubraj Singh stood before the plaintiff as nearer in degree to Pirthi Pal. In reference to the evidence afforded by the *wajib-ul-araiz* of certain villages, *Lekraj Kuar* v. *Mahpal Singh* (1) was cited. The plaintiff had shown the better title and should have had a decree in his favour.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *H. Cowell* for the respondent, were not called upon.

Their Lordships' judgment was given by

LORD HOBHOUSE.—The question in this case has come to a very simple point indeed after all this litigation. The estate is in Oudh, and was granted by the Crown to one Pirthi Pal after the confiscation, and it is placed in class 2 of Act I of 1869, and not in class 3. The effect of that is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then as the property can only go to

(1) I. L. R., 5 Calc., 744; L. R., 7 I. A., 63.

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one, recourse must be had to the seniority of line to find out which that one is.

Pirthi Pal died in the year 1859. He left a widow and a daughter, but no son. There was no question as to the right of his widow to succeed; the Act of 1869 provides for that. She succeeded, and held during her life, and died in the year 1870, and the first question is whether on the death of the widow the daughter succeeded. If she did not, the succession opened to collaterals of Pirthi Pal at the death of his widow; and there is no doubt therefore upon the pedigree, that one Harbhagat would then be the nearest collateral to take, and the plaintiff Bhai Narindar is his heir. Therefore it is the plantiff's interest to show that the succession to collaterals did open at the death of the widow in 1870: and for that purpose he attempts to prove a family custom to the effect that females shall not succeed. The only proof of such a custom is the production of certain *wajib-ul-arziz*. But it is not shown that the villages of which they were recorded are villages now in suit, and it is not shown that they belong to the same family as the family which is now disputing the question of succession. There is therefore no proof of the custom before their Lordships. Besides this there are concurrent findings in the Courts below in favour of the succession of Pirthi Pal's daughter which, though they do not in terms negative the custom alleged, are absolutely inconsistent with it, and must be taken as concurrent findings against the custom. Therefore the succession opened at the death of the daughter without issue, which happened in the year 1879. By that time Harbhagat was dead, and the two nearest collaterals were the son of Harbhagat, who is the plaintiff, and his cousin Jubraj; those two being both sixth in descent from the common ancestor of themselves and Pirthi Pal. But Jubraj comes of a branch senior to the branch of the plaintiff; and therefore if the estate can only go to one, it will go to that one who represents the senior branch.

Sir Horace Davey has suggested rather than argued on behalf of the appellant that in a case of distribution ordered by the 11th sub-section of the 22nd section of the Act of 1869, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th sub-section is simply to refer

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the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single heir must be pronounced to be Jubraj in preference to the plaintiff.

Their Lordships have not got Jubraj before them, and do not know whether there are other claimants; but the plaintiff's own evidence shows that Jubraj comes in before him, and therefore the plaintiff cannot maintain this suit.

The result is, that their Lordships will humbly advise Her Majesty that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

C. B.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

1893 *February* 6.

QUEEN-EMPRESS *v.* MUKUNDA CHUNDER CHATTERJEE (ACCUSED).*

Bengal Municipal Act (Bengal Act III of 1884), *ss.* 337, 338, 339, *and* 344—*License for a provision market—Market—Order prohibiting use of unlicensed market—Powers of Municipal Commissioners to grant or withhold licenses.*

It is entirely within the discretion of the Municipal Commissioners, under the provisions of section 339 of the Bengal Municipal Act (Bengal Act III of 1884), to grant or refuse a license for a market, and the Courts have no longer any jurisdiction to control such power, however arbitrarily exercised.

Moran v. *The Chairman of the Motihari Municipality* (1) approved.

* Criminal Reference No. 346 of 1892, made by J. Posford, Esq., Sessions Judge of Faridpur, dated 31st December 1892, against the order passed by Baboo R. M. Chuckerbutty, Deputy Magistrate of Madaripur, dated the 19th September 1892.

(1) I. L. R., 17 Calc., 329.