PRIVY COUNCIL.

P.C.*
1908
Oct. 27, 28;
1909
March 11.

RAMAKANTA DAS MOHAPATRA
v.
SHAMANAND DAS MOHAPATRA.

[On appeal from the High Court at Fort William in Bengal.

Hindu law—Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—"Paharaj"—"Chowdhuri"—Hereditary Office, land attached to—Regulation XI of 1793—Regulation XII of 1805, s. 36—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872) ss. 21 and 32, clause (5)—Proof of Custom.

The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which, from a period prior to British rule, the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance and not to any share of the land. The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient, date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom :—

Held, by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only ; that the office was revocable at the pleasure of the sovereign, and though generally heritable, it might be conferred by him not merely on the eldest son, but upon any member of the family, or indeed upon anybody. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous.

With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compro-

* *Present :* LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

mise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity.

APPEAL from a judgment and decree (21st March 1904) of the High Court at Calcutta which reversed a judgment and decree (27th September 1899) of the Subordinate Judge of Cuttack.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was whether the succession to the property in suit was governed by the rules of lineal primogeniture, or by the ordinary Hindu law.

The history and facts of the case besides being fully set out in the judgment of their Lordships of the Judicial Committee, are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 32 Calc. 6.

The High Court (PRATT and GEIDT JJ.) upheld the custom of primogeniture which was set up by the present respondent, the defendant in the suit.

ON this appeal,

De Gruyther K.C. and *E. U. Eddis*, for the appellants, contended that the evidence on the record was not sufficient to establish a custom of lineal primogeniture. All it showed was that during the period of native rule in Cuttack, namely, up to 1803, the eldest son took the title of Paharaj, and that the office of Chowdhuri had been held by members of the family in succession; but that office was nothing more than a Revenue office, "a remnant of the old Hindu fiscal organisation," of an hereditary character to which any grant of land that was made was attached to the holder of the office as part of his remuneration, no right or custom of succession being shown to such land. Nor was there any proof that the land was impartible or in the nature of a Raj. Statements, it was contended, by various members of the family to the effect that the estate was impartible which had been relied upon by the High Court as being evidence, had been made after the controversy as to the existence of the custom arose, and were

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therefore inadmissible. The eldest son took a title which the younger sons did not take, but did not succeed as such to any land. The meaning of Paharaj was a unit over which the Chowdhuri exercised jurisdiction. Reference was made to Toynbee's History of Orissa, Ed. 1873 (printed at Bengal Secretariat Press), page 24; Account, Geographical, Statistical and Historical, of Orissa and Cuttack, by A. Stirling (reprint in Calcutta in 1904 of Ed. of 1822), page 2, paragraphs 6 and 7, and pages 65, 73 and 79; and Sir W. Hunter's Statistical Account of Bengal, Vol. 18, pages 129, 301. During the period of native rule, it was submitted on these authorities and on the evidence that no such custom, as was contended for by the respondent, had been shown to exist.

Since the commencement of British rule in Cuttack Regulations XI of 1793 and XII of 1805 precluded such a custom except in cases in which succession had devolved according to established usage to a single heir before and up to 1805, which came under Regulation X of 1800; and by section 36 of Regulation XII of 1805 the succession to estates was to be governed by the local law of the country which in this case was the ordinary Hindu law. It was pointed out that in all the cases in which the succession to the property in suit had been in dispute, the litigation had been settled by the younger sons obtaining, not the maintenance they would have been entitled to if the rule of primogeniture had existed and been adhered to, but shares of the estate much in excess of such maintenance, and these, it was submitted, were really shares of a joint estate under the Hindu law.

As to the proof required of such a custom *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1) was referred to which laid down that a special usage modifying the ordinary Hindu law must be ancient and invariable, and established by clear and unambiguous evidence. Judged by these principles no such custom as was contended for had been proved, and the decree of the Subordinate Judge, which had been reversed by the High Court, should be restored.

(1) (1872) 14 Moo. I. A. 570, 585; (1866) 3 Mad. H. C. 75, 77.

Sir R. Finlay K.C. and *Kenworthy Brown*, for the respondents, contended that the custom of primogeniture was sufficiently established by the evidence. The land in dispute had for a long term of years been shown to have been attached to the office of Chowdhuri, and that office had been only held by one member of a family, namely, the eldest son. Reference was made to the answers given to certain questions addressed in 1814 to the Rajahs and Chiefs of the Regulation Provinces and Tributary Mahals as establishing the practice as to the succession to their estates (a book printed at the Military Orphan Asylum Press in Calcutta in 1861). The judgment of the High Court was supported for the reasons therein given, which, shortly stated, showed that in the only instance under native rule of which there was evidence regarding the succession, the descent was from father to eldest son, and that since the British occupation the claim of the eldest son to succeed had been invariably upheld in spite of the opposition of the younger sons; and that the law prescribed in the Regulations expressly allowed the rule of primogeniture to prevail in Cuttack in cases in which by established usage succession to an estate could be shown to have devolved to a single heir before 1805 (which it was submitted was the case here) and had not since been departed from. The right to partition had never been recognised.

As to the admissibility of the statements which the appellants argued were inadmissible: *Butler* v. *Mountgarrett* (1), *Monckton* v. *Attorney General* (2), and *In re the Berkeley Peerage* (3).

The contention that the family were not really proprietors of the land attached to the office of Chowdhuri, but that it was only remuneration to the holder of the office for the performance of the duties of Chowdhuri was a new one which had not been raised at any previous stage of the suit, and to which evidence had not been directed, and it should not be allowed to be taken for the first time on this appeal. The

(1) (1859) 7 H. L. C. 632. (2) (1831) 2 Russ. & M. 147, 161.
(3) (1811) 4 Camp. 401.

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passages cited from Stirling's Account of Orissa and Cuttack were not, it was submitted, applicable under the circumstances in evidence in the present case. Reference was made to the Cuttack Proclamation of 15th September 1804 (set out *in extenso* in Regulation XII of 1805), and the settlement registration made under it, and to *Freeman* v. *Fairlie* (1) and *Collector of Trichinopoly* v. *Lekkamani* (2).

As to proof of custom, *Mohesh Chunder Dhal* v. *Satrughan Dhal* (3) and *Nitr Pal Singh* v. *Jai Pal Singh* (4) were referred to.

De Gruyther K.C., in reply, referred to *Rajkishen Singh* v. *Ramjoy Surma Mazoomdar* (5) as to the probability of the succession to the estate in suit being regulated by the ordinary Hindu law; and to *Miller* v. *Madho Das* (6), and the Evidence Act (I of 1872), sections 21 and 32 clause (5) as to the admissibility of evidence. [*Sir R. Finlay K.C.*, on the latter point, referred to *Shahzadi Begam* v. *Secretary of State for India in Council* (7).]

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The question for determination in this appeal is whether the succession to the estate to which it relates is governed by a family custom of succession by lineal primogeniture, or by the ordinary Hindu Law. The estate is considerable, the major portion of it being comprised in two mahals, named Killa Talmunda and Taluk Aranga, situated in the district of Balasore, in the Province of Orissa. The parties to the suit are members of the same family, the appellants representing a junior, and the respondent the senior, branch of it. The appellants were plaintiffs in the suit, in which they alleged that the family was an undivided family,

(1) (1828) 1 Moo. I. A. 305, 342, 343.
(2) (1874) L. R. 1 I. A., 282, 313.
(3) (1902) I. L. R. 29 Calc. 343; L. R. 29 I. A. 62.
(4) (1896) I. L. R. 19 All. 1, 14, 15; L. R. 23 I. A. 147, 156.
(5) (1872) I. L. R. 1 Calc. 186, 188.
(6) (1896) I. L. R. 19 All. 76, 92; L. R. 23 I. A. 106, 116.
(7) (1907) I. L. R. 34 Calc. 1059, 1073; L. R. 34 I. A. 194, 199.

governed by the Mitakshara School of Hindu law, and claimed partition of the family property under that law. The respondent, in his written statement, asserted that "according to the custom obtaining in our family from a very remote period, the eldest son of the eldest branch of the family becomes the *malik* of all properties, and his younger brothers are entitled to maintenance only without having any share in them." Upon the issue thus raised, the Subordinate Judge of Cuttack found in favour of the plaintiffs, but his decision was reversed on appeal by the High Court at Calcutta.

The family is a Brahmin family long established in Cuttack, members of which are proved to have held the office of Chowdhuri, under both the Mogul and the Mahratta rule. A great deal of information as to this office is to be found in an official Minute by Mr. Stirling (Secretary to the Commissioner) on Tenures in Orissa, dated 10th October 1821, to which their Lordships have been referred by counsel on both sides, and which appears to be a very carefully-drawn and reliable document. According to this Minute, under the government of the Gajpati native sovereigns, the country was divided for fiscal purposes into districts called Bissee and Khund, over each of which were placed two officers, one called Bissoee, or Khund-adipati (terms signifying chief of a division) and the other an accountant, called the Bhoee Mool. On the introduction of Todur Mull's revenue settlement, under the Mogul government, somewhere about A.D. 1580, Mr. Stirling says :—

"The titles of Khund-adipati and Bissoee became lost entirely in the more familiar designation of Chowdhuri (Chief) a word introduced from Bengal and Upper India, though, probably, not unknown before in the province, and the Bhoee Mool received the appellation of the canoongoe willaity (country or provincial canoongoe). The portion of the pergunnah under the more immediate charge of each was called talooka and the managers generally talookdars."

There does not appear to have been any change in the position of these officers under the Mahratta government, and Mr. Stirling came to the conclusion that there exists

"Ample ground for asserting the Mogul and the Mahratta talookdars, who formerly managed and collected the revenues of so considerable a

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proportion of the district with the designation of chowdhuris and canoongoes, were the hereditary revenue and police officers of the old Hindu government under another name."

The remuneration of these officers appears to have been an assignment of rent-free land called "nankar," and the right to certain perquisites or "russooms." As regards the ownership of land, Mr. Stirling observes :—

"The chowdhuri has been generally off-hand assumed to have been a proprietor of land, though the word is obviously only a title given to the head officers (or talookdars) of a pergunnah, and which in modern times has been adopted by the headman of nearly every hereditary art, profession, and bazar . . . . Nobody, I believe, ever supposed for a moment that the person called canoongoe by the Moguls was other than a mere servant of Government, though succeeding by regular inheritance to his office. . . . . There is obviously no more reason to assume that the chowdhuri or chief of pergunnahs were the proprietors of the land comprised in them than that the canoongoe talookdars were—a conclusion from which most minds would probably revolt, however predisposed to see an absolute European landlord in every superior revenue manager connected hereditarily with the soil."

But as regards the offices held by both chowdhuris and canoongoes, Mr. Stirling goes on to say :—

"Their tenures were certainly generally heritable, though cases of removal were of frequent occurrence, and all the larger holders found it convenient to obtain a sunnud of appointment, or, say of confirmation, on succeeding to their inheritance. The very unscrupulous manner in which the right of ouster was exercised by the native rulers, as is obvious from the frequent occurrence of the word *tughueyyoor* (or change) in the sunnuds, might lead to a conclusion unfavourable to their acknowledged title to transmit hereditarily and furnishes, at all events, a strong ground of presumption that they were regarded as officers of trust, liable to be called to account for their conduct."

But, he concludes,

"It is my decided opinion that, from the hereditary character pervading so remarkably all the institutions of the Hindus, they at all times possessed an imperfect title of property in their offices, which was distinctly admitted and recognized by the practice of the Mogul government."

In the light of these general considerations, their Lordships have carefully examined the evidence produced by the respondent in support of his claim. It consists mainly of two ancient documents, as their Lordships are unable to attach much importance to admissions made in recent years by members of the family. The first of these documents is called an "Appeal of Gopinath Paharaj Chowdhuri to the Public for Testimony." The date is wanting, but it must have been written at some-

time between A.D. 1729 and 1745. It is addressed to all officials, ryots and cultivators of Sarkar Biro—which is presumably the talooka of the applicant—and recites that :—

"A Sanad of former ages of the time of the Emperor Jahangir bearing the seal of Rashid Beg Khan granting for salary 155 batis of land as nankar, subject to service as Chowdhuri of the aforesaid Sarkar, has become very old and owing to the paper being worm-eaten and worn out it was not capable of being preserved for future time; therefore, in 1137 Amli (A.D. 1729) it was shown to every gentleman, to men of respectability and all residents and amlas and functionaries of the said Sarkar."

It was therefore requested that "those acquainted with the facts" will

"prove the document as well as the fact that the forefathers of this applicant from past ages discharged the duties of Chowdhuri of the said Sarkar in consideration of the nankar zamindari and that this applicant also keeps in attendance in the office of Thanadars and Amins and gets the revenue paid."

It does not appear whether anybody complied with the request that he should "record his evidence on this paper"; but on the back is an endorsement: "155 batis of land under former Sanads assigned as nankar has been confirmed and granted to Chowdhuri Paharaj," and particulars of the land are given.

The second document is a Sanad dated in A.D. 1745 and granted to the eldest son of the Gopinath just mentioned. It is addressed to the Mutsuddis and other functionaries of the mahals described in the Schedule and recites that :—

"The office of Chowdhuri under Sanads of former officials was for ages vested in (the ancestors of) Raghunath Paharaj. Now he has appeared before his Honour, and has made a representation, and his loyalty, truthfulness and his services have become disclosed. Therefore he is appointed as before to the office of Chowdhuri of the said mahals. It is required that you all will conduct all business of the said pergunnahs as before in consultation with him and by his advice . . . and you will leave to him all that is customary for the Chowdhuri and in respect of the nankar as was the practice before. The said Chowdhuri is required that he will not in the slightest degree omit to fulfil his duties loyally, and for the benefit of the Sarkar and for the welfare of ryots. He will appropriate the profits of the dastur and nankar lands as before and he will pay the proper rent of the jaghirdars under him year by year according to ancient usage, and he will make such endeavours as will make manifest his great loyalty and services daily, even more than before, then he will get his reward."

On the back of the Sanad is an endorsement "Chowdhuri's office confirmed in favour of Raghunath Paharaj Chowdhuri,"

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together with particulars of fifteen mahals, which do not correspond with those mentioned in Gopinath's documents, or those in dispute in this suit.

These documents have been recited at length because, as already observed, they form the only reliable evidence of the status of the family under successive native governments. In the opinion of their Lordships, they fall far short of establishing the claim of the respondent. They show, indeed, that the office of Chowdhuri was held, for many generations, by a member of the family, and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might be conferred, not merely on the eldest son, but upon any member of the family, or, indeed, on any body. In the nature of things, the office could only be held by one person at a time, and, as Mr. Stirling points out, such offices were "generally heritable"; but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose, the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed.

So far, therefore, as relates to the period of native rule in Cuttack, the case of the respondents fails. It remains to enquire whether, after the British conquest, there was any recognition of the existence of such a custom, either by the family or by the Government.

The conquest of Cuttack took place in 1803, and by a Proclamation dated the 15th September 1804, the British Government declared its intention to adopt "such a plan for the settlement of the land revenue of the Province. . . . . as may be most conducive to the prosperity of the country and to the happiness of the inhabitants." With this view, it was ordered that a settlement of the land revenue should be "concluded in all practicable cases with the zamindars, or

other actual proprietors of the soil (unless when disqualified by notoriously bad character or other good and sufficient cause) for the period of one year," on the expiration of which further settlements would be made " with the same persons (if willing to engage, and they shall have conducted themselves to the satisfaction of Government)" for further periods of three, four, and three years respectively at gradually enhanced rates. At the end of these eleven years, in 1822, a permanent settlement would be " concluded with the same persons (if willing to engage, and they have conducted themselves to the satisfaction of Government, and if no others who have a better claim shall come forward) for such lands as may be in a sufficiently improved state of cultivation to warrant the measure on such terms as Government shall deem fair and equitable."

In the following year, Regulation XII of 1805 was passed, confirming and explaining this Proclamation, from sections 2 and 4 of which it appears that the first settlement was made with the persons in possession of the lands, and that the settlement extended to " the Mogulbundy territory of the Zillah of Cuttack," in which the lands now in suit are situated ; and by s. 36 it was provided that " nothing herein contained shall be construed to authorize the division of the lands comprised in any estates in the Zillah of Cuttack, in which the succession to the entire estates devolves, according to established usage, to a single heir," in which cases Regulation X of 1800 was to apply, and the Courts were directed to give effect to " the local custom of the country." Generally, however, these newly-formed estates were declared to be descendible like other descriptions of property to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, as the case might be, and to be liable to partition when devoling on two or more heirs. Regulation XI of 1816, which exempts certain tributary estates in Cuttack from partition, does not appear to apply to the estate in question in this suit.

It will have been noticed that, in the Proclamation, the settlement is to be made " with the zemindars or other actual

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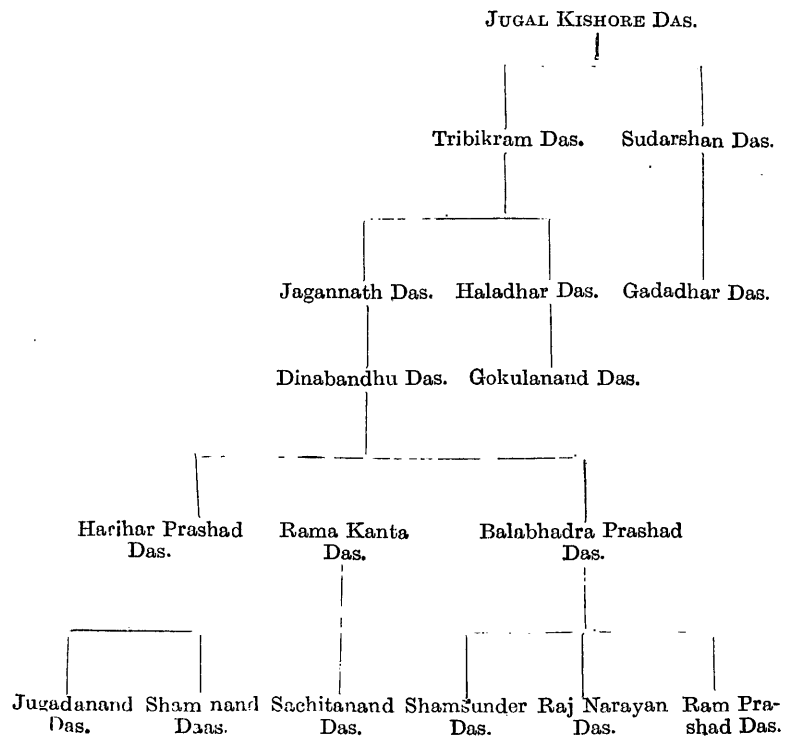
proprietors of the soil." In Mr. Toynbee's Sketch of the History of Orissa from 1803 to 1808 (p. 26) an explanation is given as to the persons included in the designation of zamindars :—

"During the confusion which ensued between 1801 and the British acquisition of the Province in 1803, it seems most probable that the *chowdhuris canoongoes*, *mokadams*, and other persons entrusted with collections in estates held *khas*, or who had given agreements to the *amils* to pay the lump sums due from other lands, assumed the title of *zamindar*, and claimed to hold the land itself in virtue of hereditary right, valid or invalid, as the case may be, to collect its rents. Broadly speaking, therefore, the *zamindars* of Orissa were, at the time of the British acquisition, either principal *mokadams* with a hereditary right of collection, but without any right, title, or interest in the land itself; or Government officers, chiefly *chowdhuris* and *canoongoes*, in charge of collection."

It now becomes necessary to trace the history of the family and their estate after the advent of the British Government, and this history will be more easily understood by reference to the subjoined pedigree :—



From their pedigree it appears that Jugal Kishore left two sons, Tribikram and Sudarshan, the elder of whom, Tribikram, entered into successive engagements with the British Government from 1805 to 1818, when he died. The second of these engagements, for three years from 1805 to 1808, is printed in the Record, and is dated 29th July 1805. It is addressed to the ryots, cultivators, mokadams, and sarbarakars of Killa Talmunda, and recites that Bir Bikram Paharaj, according to usual custom, and in consideration of good services rendered by him in 1804, and also in consideration of the fact that he had "signed the settlement decision for 1213 to 1215 Amli for an annual jumma of Rs. 1,154. 13. 5 . . . . and duly submitted the kabuliyat and kistbundi in this Court, is confirmed." No inference can be drawn from this document, which is in common form, and is limited, as might be expected, to the grantee's liability for the revenue demand.

Tribikram died in 1818, and by an order of the Collector of the District, dated 11th March 1818, "the zamindari was recorded in the name of Chowdhuri Jagannath Das, son of the deceased, and the revenue was realized from him by the Government." Thereupon, Tribikram's younger brother, Sudarshan, filed a suit claiming "a half share of the zamindaris belonging to the estate" of his grandfather and father, and a half share of the cash and value of movable properties belonging to the estate of his father. This suit was compromised upon terms which secured to the claimant far more than the maintenance allowance to which he would have been entitled had the succession to the estate been governed by the rule of lineal primogeniture, and which further bound his nephew and his heirs neither to sell nor in any way to hypothecate the zamindaris without the consent of the younger branch of the family. This condition, however, soon seems to have been broken, for it appears from Government records that in 1837, one Gobardhan Das purchased a half share in the zamindari at an auction sale; and that subsequently Haladhar Das, the younger brother of Jagannath Das, brought a civil suit in respect of the other half share and obtained a decree, "and thereafter

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he, the said (Haladhar) Das, of his own accord, gave out of the same a four annas share to Chowdhuri Jagannath Das, and made a petition for the remaining four annas share being recorded in his own name." This was accordingly done, and the zamindari was entered in the Government records as the zamindari of Chowdhuri Jagannath Das Paharaj and Haladhar Das and Gobardhan Das by an order dated 27th July 1842. It should be noted here that Haladar, as a matter of fact, brought two suits, one for a half share of Killa Talmunda and the other for a half share of Taluk Aranga, and obtained *ex parte* decrees in both suits, in the absence of his brother from the district; but a final agreement was made, on his brother's return, in which it is admitted that "there is no practice in the family about partition on account of a brother's share" and Haladhar, as the result of the litigation, merely obtained a four annas share in the Zamindari of Killa Talmunda "on account of his maintenance allowance," and relinquished his claim to any share in Taluk Aranga, and all other movable and immovable properties possessed by the defendant, and to the costs of the suit.

Jagannath died in 1862, leaving an only son Dinabandhu, so that in this instance no question of primogeniture could arise. Dinabandhu died in 1871, leaving three sons, one by his first wife, named Harihar, and two by his second wife, named Rama Kanta and Balabhadra, the present appellants, both of whom were minors at the time of their father's death. Harihar's name was entered on the Revenue Registers without objection; and on his death in 1885, his widow Saraswati Debi applied for registration of her name as mother and next friend of her infant son Jugadanand. The present appellants objected on the ground of their being joint owners of ancestral property, in answer to which the applicant asserted that the law of primogeniture applied to the family. The Revenue Court declined to go into the question and decided the case upon a technical ground, referring the parties to the Civil Court for the determination of the question of custom. This suit was thereupon brought. The Subordinate Judge found that the

custom was not proved. The High Court held it established that "the rule of primogeniture has uninterruptedly governed the devolution of property in the family for a long period of time both before and after the British occupation."

Their Lordships have already stated their reasons for holding that no family custom, properly so-called, existed during the period of native rule. As regards the subsequent period it is clear that, whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts, and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence entirely fails, in their Lordships' opinion, to give to the alleged custom the character of certainty which is essential to its validity; and this being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise His Majesty to reverse that decision and in lieu thereof to direct that the decree of the Subordinate Judge be confirmed and the appeal to the High Court dismissed with costs.

The appellants must also have their costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Sanderson & Co.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.