

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Umritath
Chowdry and Goureenath Chowdry and others,
from the High Court of Judicature at Fort Wil-
liam, in Bengal; delivered December 7th, 1870.*

Present:—

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THIS case, which has occupied the greater part of two days, appears to their Lordships, when reduced to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the Plaintiffs below—the Respondents here—is, that a certain estate, a zemindary with accretions which, beyond all reasonable question, had been made by the investment of the profits of that estate, was an ancestral estate which descended to them and the Appellant, who was a cousin, in coparceny. It is admitted that by the common law of Hindostan the descent is in coparceny where no other custom or right is proved. The case of the Plaintiffs was, that this property was ancestral property, which had belonged to their grandfather, one Hurjee, and descended from Hurjee upon the two sons, Bacharam and Sheebloll, the fathers of the respective parties.

The case mainly relied upon in the Court in India on the other side was, that there was no foundation whatever for this assertion, that the property was not ancestral property—that the

grandfather never had any property at all, but that it was an acquisition by Bacharam himself, under a grant made to him individually—or as we should say in English law, an acquisition by him by purchase, so that he became a new root of descent, and so that the common title alleged to be derived from the grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships,—indeed was hardly disputed at last in the arguments at the bar,—that this property was originally a zemindary, of which Hurjee, the grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that Bacharam in the first settlement, then in the decennial settlement, and then in the perpetual settlement, claimed to have it made with him by reason of his hereditary right to the zemindary as hereditary zemindar. That being proved, that it was Hurjee's property, and that Bacharam was entitled by descent, of course the next proposition would equally follow, unless there is something to exclude it; that is, that he would not be entitled to it himself, but that he and his brother would succeed to it as coparceners.

Well, has anything occurred to divest that right which in a case of ordinary property was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact that the settlement was made in the name of the elder son, whether, originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong, or very conclusive evidence. The mere fact that one of the two brothers was registered so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight, any more than it did to the Court below, and in respect to the actual enjoyment of the property there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived together,

they messed together, and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder brother to a mere dependant who had no right whatever to the property.

It appears to their Lordships therefore that the case as principally alleged in the Court below has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the bar here, as they were at a late part of the case in the Court below. It is alleged that, admitting it to have been Hurjee's property, admitting it to have been ancestral property in that sense, it was property which descended to Bacharam as the eldest male heir, by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first as a custom of a district so as to bring it within the regulation of 1800; that is to say, it is the custom of a district supposed to be a jungle mehal, in Zillah Bhangulpore. Now of the existence in any known district whatever of anything which can be predicated as a jungle mehal in which this Zemindary is situated, there is neither pleading nor evidence. There is nothing at all to shew any custom, except a Collector's letter with respect to a custom extending to all the Zemindaries throughout the whole Zillah of Bhangulpore; and certainly it would be very strong indeed to hold, merely upon that evidence, that there was a custom proved extending to the whole of the Zillah of Bhangulpore, or to the whole of any undefined district within that Zillah, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that district. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom, a custom of this particular family, under which custom it is alleged that Bacharam succeeded at such a time,—that is, before the year 1794, in such a way as to exclude the title of his younger brother. Of that family custom there really is no sufficient alle-

gation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that, in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the Defendant in the Court below; that is to say, of the new acquisition made by him under the grant or pottah from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collector's letter of a sort of general custom extending through the whole of Bhangulpore, all the Zemindaries being held by that kind of title, but the genealogical tree, which is the only thing otherwise which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the Defendant, have failed, and that brings it back to the case which the Plaintiffs below had to prove; that is the simple fact, that this was ancestral property of their common grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made, the decree of the Court below seems to their Lordships to be right, and they will therefore recommend Her Majesty that the decree be affirmed and the Appeal dismissed.