Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chowdhry Chintamun Singh v. *Mussamut Nowlukho Konwari, from the High Court of Judicature at Fort William in Bengal; delivered 1st July* 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE only question raised by this Appeal is whether the Appellant, the Plaintiff in the courts below, or the Respondent, was entitled to succeed to the property called talooka Gungore, the Appellant claiming as the nearest collateral male heir of the last possessor, and the Respondent claiming as the widow of the last possessor.

It was admitted on the opening of the case, and seems to have been admitted throughout the proceedings below, that the enjoyment of this talooka has long been by a single member of the family, and that it has passed from father to son according to the rule of primogeniture for several generations. The existence of this family custom has moreover been litigated at various times from a very early period, and has been affirmed by repeated decisions.

By that of the 17th May 1809 it was held that the talooka was one which by custom descended according to the law of primogeniture; that it was one of those estates which were in the contemplation of the legislature when it passed Regulation II. of 1793; and that the

rights of all parties under the custom were saved to them by the fifth section of that Regulation. It seems to their Lordships too late to question what is affirmed by many reported cases, that a custom of descent according to the law of primogeniture may exist by Kolachar or family custom, although the estate may not be what is technically known either as a raj in the north of India or as a polliam in the south of India.

That being so, it is necessary next to consider what are the limits of the custom as established, and what would have been the course of descent of this property had the family remained wholly undivided.

There is some evidence in the Tuksimnamas of 1832 of what the family understood to be the custom. To that reference will afterwards be made. It is to be observed however, that if the evidence were wholly silent as to that point, the general law as laid down in decided cases seems to be that where the family to which ancestral property, held in this peculiar manner, belongs, is governed by the law of the Mitacshara, that law, in the event of a holder dying without male issue, would, if the family be undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor.

The cases upon this point are collected and reviewed in the judgment of Chief Justice Couch in the 9th volume of the Bengal Law Reports. In the last of them, which was decided here as late as the 2nd February 1870, viz., the case of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*, and is reported in the 13th Moore's Indian Appeals, page 333, the point which has been taken in the present case by the learned counsel for the Respondent appears to have been taken by Sir Roundell Palmer and Mr. Leith, who argued

for the Appellants in that case. The judgment however says :—" Accordingly the strength " of the argument of the learned counsel for the " Appellant has been directed to show that this " case should be governed by *Katama Natchiar* " v. *The Rajah of Shivagunga*, in the 9th " volume of Moore's Indian Appeal Cases, " p. 539, which is generally known as the " '*Shivagunga* case.' They have gone so far as " to argue that the estate in question in this " case being impartible, must, from its very " nature, be taken to be separate estate, and " consequently, that according to the decision in " the '*Shivagunga*' case, the succession to it is " determinable by the law which regulates the " succession to a separate estate, whether the " family be divided or undivided. The authority " invoked, however, affords no ground for this " argument. The decision in the '*Shivagunga*' " case will be found to proceed solely and " expressly on the finding of the Court that the " zemindary in question was proved to be " the self-acquired and separate property of " Gowary Vallaba Taver. It assumes that if " this had not been so, the decision would have " been the other way." In that case the estate was held to pass to a very remote collateral male heir in preference of the widow of the last possessor.

This authority seems to dispose of the arguments of the learned counsel for the Respondent, which went to show that even while the family remained a joint and undivided family in the full sense of the term, this property would have been treated as separate property and therefore governed by the law of the Mitacshara as to separate succession.

It is however found as a fact and cannot be denied, that there has been to some extent a separation of this family, and the question, there-

fore, is whether this particular property after that separation lost the character which it before possessed, and became subject to a different rule of succession. According to the rule laid down by Sir William Macnaghten (Principles of Hindoo Law, title Partitions, vol. 1, page 53), "If at a general partition any part of the pro- "perty is left joint, the widow of a deceased "brother will not participate, notwithstanding the "separation, but such undivided residue will go "exclusively to the brother." That authority was in fact one of those upon which this board in the Shivagunga case decided the converse of the proposition, viz., that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession. The question, therefore, really seems to be whether by reason of the acts of the parties on the several occasions of the partial partition in 1832, and of the compromise of the suit of 1852, the Plaintiff's father waived his rights of succession, or whether the parties by their joint action have impressed upon this talooka the character of separate property which must now pass according to the laws of separate succession.

As to the transaction of 1832, it appears to their Lordships that the partition then made was clearly intended to be confined to the property which was then admitted to be partible; that although the talooka of Gungore is mentioned in the Tuksimnamahs, it is mentioned only for the purpose of declaring that it is impartible, and that the clear intention of the parties was to leave that particular property in the condition in which they found it, and to set it aside out

of the mass of the family estate. Being impartible in its nature it could not be the subject of partition, and the object of the transaction is declared at the foot of the deed, where it is said, "These few words in the way of a deed of par- "tition of a four anna share of Mouzah "Purmeswurpore have, therefore, been written "that they may be of use when needed." There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or transfer any right or contingent right of property which they might have; they only admitted that they had no claim to share in talooka Gungore as coparceners. This their Lordships think is made more clear from the special manner in which the nature of the family custom is referred to. The deed of Ramdyal and of Soman says, "Talooka "Gunpore, Pergunnah Pharkya, comprising five "mouzahs, both usli and dakhili, an ancestral "estate, has been, in accordance with family "custom from time immemorial, held by one "person, the eldest son and the registered pro- "prietor, from generation to generation, and in "case the registered proprietor dies without "issue, the younger brother of the deceased or "his eldest son becomes the rightful proprietor "of talooka Gungore." If it had been intended to make this property, which had been joint, separate property, it would not have been necessary to enter into so detailed an account of the family custom, or of the manner in which it had previously passed. The statement of the family custom their Lordships are disposed to construe very much as it was construed by the subordinate judge, who decided this cause in the first instance. In a document between Hindoos, and indeed in the Mitacshara itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is

intended to comprehend the whole class. And their Lordships think that in the above statement of the family customs, it was not intended to confine the passing over of the whole, in the event of the proprietor dying without issue, to a younger brother of the deceased or his eldest son, and further, that the words "without issue" are to be taken to import "issue in the male line." Accordingly, the real effect of that definition of the family custom was that the property was ancestral property; that though ancestral property, it was held by special custom by one person at the time, according to the rule of primogeniture, with a provision that where the direct male line failed it should then go over to the collateral lines. It has already been shown that this course of devolution was consistent with the general law. Their Lordships conceive that the partition which took place in 1852 of the other property cannot be held to have affected the character or the mode of descent of this property as thus defined.

It however appears that in the year 1852 Ramdyal was so ill advised, and it may be said so dishonest, as to seek to re-open the question of this family custom, and to bring a suit by which he claimed possession of the moiety of the talooka and certain other property. The mother and guardian of Tilukdaree Singh, the elder brother of Runjeet Singh, who was then the person next in succession to Gurdyal Singh, filed her answer, setting up, amongst other things, that Gurdyal Singh was "proprietor of "the entire ancestral estate, in consequence "of his being the eldest son in accordance "with family custom; and that the Plaintiff "was not entitled to receive a share." She either included in that defence the whole of the property claimed in the suit, or the proceedings set out in the record fail to show what specific

defence she made in respect of the property other than Gungore which was claimed. The result of the suit was a compromise between the parties, which resulted in a decree that "The " Plaintiff do obtain possession of the three " annas twelve gundahs and a fraction above " four cowries of Mouzah Purmeswurpore, Pur- " gunnah Chye, including his former share,"— meaning the share specifically given him on the partition,—" and 100 beegahs of kamut land " long held by him in mouzahs Gungore, " Oolapore, and Jehangira, and seven bighas of " land, together with the orchard situate in " Ismaelpore, talooka Gungore, in accordance " with the petitions of the parties; and that " after Runjeet Singh attains his majority, he " shall have his name enrolled in respect of the " share of Purmeswurpore." The decree, therefore, is upon the face of it merely one made to give effect to a compromise whereby the Plaintiff receded from his claim to any share as coparcener with a present right of possession in talooka Gungore. No doubt the words of the petition of compromise, if taken by themselves, are considerably stronger, and are capable of being read as if he were giving up all rights whatever in talooka Gungore. But looking to the position of the parties, and to what was done upon the petition, and to the absence of any evidence to show that there was any negociation for a compromise, or any terms of compromise arranged between the parties whereby the character of this estate and the mode in which it was to descend was to be changed, or that Ramdyal undertook to transfer any contingent rights of succession, which he possessed, their Lordships cannot but think that this transaction really amounted to no more than an agreement to waive the claim to a share in, and to the consequent right to a partition of, the

talooka Gungore. They think that this construction is confirmed by the reference which the petition itself contains to the partition and arrangement of 1832. At page 103, line 37, it says: "The said Runjeet Singh will continue " in possession under the said guardian, and " on his attaining his majority he and his heirs " will remain in possession according to the deeds " of partition dated the 31st January 1832, one " executed by me Ramdyal Sing, and the other " executed by Gurdyal Singh, in accordance " with which the name of Gurdyal Singh was " enrolled in the Government records, in respect " of the entire 16 annas of talooka Gungore."

If this be so, their Lordships are further of opinion that the written statement of Chintamun Singh, which was filed in the suit afterwards brought in 1863 by Rowshur Singh, can be taken only to be a disclaimer of any interest in the talooka as claimed by Rowshur Singh in that suit, which of course, if Rowshur Singh had succeeded in establishing his claim, would have brought in Chintamun Singh as a coparcener entitled to a partition. It cannot carry the case further than the act of his father, and it seems only to be an admission that he was content to abide by whatever his father had agreed to in the earlier suit of 1852.

This being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the subordinate Judge be confirmed, and that the appeal to the High Court be dismissed, with costs. The Appellant must also have his costs of this Appeal.