Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Garurudhwaja Parshad v. Saparandhwaja Parshad Singh, from Allahabad, North-Western Provinces; delivered 27th June 1900.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.
SIR HENRY DE VILLIERS.
SIR FORD NORTH.

[*Delivered by Lord Davey.*]

The question on this Appeal relates to the devolution of the ancestral estate of Thakur Girparshad Singh who died in the year 1880. The Defendant in the suit and present Appellant is the eldest son of Girparshad and contends that there is a custom of primogeniture in the family and that consequently he is alone entitled to succeed to the estate. The Plaintiff in the suit is his younger brother. He denies the existence of the alleged custom and claims to share in the estate in accordance with the ordinary Hindoo law of inheritance. The Subordinate Judge decided in favour of the alleged custom and dismissed the suit with costs, but his decision was reversed by the High Court of Allahabad and the Appeal is from the judgment and decree of the latter Court. It is unfortunate that the Plaintiff and present Respondent has not appeared on this Appeal. There are questions of the

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admissibility as well as the effect of evidence on which their Lordships would have been glad of the assistance of Counsel for the Respondent.

The parties belong to a family known as the Beswan family. This family and two other families in the same district called the Mursan and Hathras families are Jat families of the Tenwa Clan and are descended from a common ancestor named Nandram Faujdar who is said to have died in the year 1695. The Mursan family is said to have been founded by Khushal son of Zulkaran one of the fourteen sons of Nandram. The Beswan and Hathras families alike have their descent from Jai Singh another son of Nandram. The Hathras branch was divided from the Beswan branch in the person of Dyaram Singh in the fourth generation from Nandram who died in the year 1823. The circumstances under which this separation took place are in controversy and will be more fully considered hereafter. In the year 1817 Dyaram was deprived of the greater part of his possessions in consequence of his resistance to the British military forces and his family do not now reside at Hathras.

It appears from the evidence and was accepted as a fact by both Courts that the custom of primogeniture prevails in both the Mursan and the Hathras families. Their Lordships attach importance to this admitted fact. It points to a custom derived from a common ancestor and lends strong antecedent probability to the Appellant's case. The present Raja of Mursan was called as a witness by the Appellant but he was supporting the Respondent with a loan of money to be used for the purpose of the litigation. He could not therefore be expected to be very friendly to the Appellant. But he does not venture to deny the existence of the custom in

the Beswan family and singularly enough had made no inquiry on the subject. He says: "In "my family the custom of guddinashini prevails. "When a guddanashini dies leaving several sons "one of them becomes guddanashini and inherits "all the property and the others only get main- "tenance. I have heard that that custom of "guddanashini prevails in the Hathras Raj "family. I do not know whether the custom "of guddanashini prevails in the Beswan family "or not. I have no personal knowledge about "it and I did not make any inquiry on the point." Raja Harnarain Singh the present representative of the Hathras family is a son adopted by the widow of the preceding Raja and was only 22 years of age at the time of the trial. He also is said to be unfriendly to the Appellant on account of some previous litigation with Girpershad in which the latter claimed his estates. Raja Harnarain does not profess to know anything about the question in issue.

There are no records of any kind prior to the British Conquest in 1803. The most important documentary evidence since that date is the record of a proceeding of the Court of the Collector of Aligarh district dated 22nd November 1809. From the pedigree which is set out in the judgment of the Subordinate Judge and was accepted in the High Court it appears that Bhuri Singh the third in descent from Nandram died in the year 1775 leaving two sons Nawal and Dyaram who as already mentioned was the founder of the Hathras family. Nawal Singh is stated to have died before 1800 leaving two legitimate sons Harkishan (the eldest) and Jiwaram and three illegitimate sons. Harkishan succeeded to Beswan in exclusion of Jiwaram his younger brother and died in 1808. He had two legitimate sons (who are stated to have been uterine brothers) Jey Kishore and Jogul Kishore. It is

disputed whether Jogul Kishore survived his father but for reasons to be presently stated their Lordships think with the Subordinate Judge that the weight of evidence is in favour of his having done so and of his having died without issue shortly afterwards. Harkishan also left three illegitimate sons. By his order of the 22nd November 1809 Mr. Elliot the Collector of Aligarh directed that a parwana be issued to Dyaram and Raja Bhagwant Singh (the then representative of the Mursan family) asking them to give information whether there is any son of Harkishan other than Jey Kishore and whether according to the custom of Hindus the property of Harkishan devolves upon Jey Kishore and whether the sanads of jagir and istimrar should be granted to Jey Kishore.

The reply of Dyaram to this request was in the following terms :—

"After paying my compliments and expressing my wish to "pay my respects to you, I beg to state that I received your "kind note enquiring whether Jey Kishore was the rightful "person owing to the death of Thakur Harkishen, and granting "the sanad of jagir and istimrar to Barkhurdar* Jey Kishore "on condition of its being ascertained that he was entitled to "it under the custom of the Hindus. It is known to you that "Thakur Harkishen and others, and now Jey Kishore are "among my farzands† (sons). Formerly Thakur Harkishen, "who was senior in age to his other four brothers, was dis-"tinguished from, and surpassed them all, by his qualities as a "sirdar and head, and also during his lifetime his four other "brothers were of one mind with him and obedient to his "orders and carried on the affairs zealously. In the time of "Thakur Harkishen Barkhurdar, Jey Kishore, who is also "senior in age to his other four brothers and is distinguished "from, and surpasses them all, used to be called the heir-"apparent and successor. At present after the death of the "said Thakur he has the control of all the affairs, small and "great, of his father and it is Jey Kishore who is entitled to "the favours of the British Company. In accordance with "their usual practice the turban of *sirdari* was tied round the "head of Jey Kishore. It is hoped that the sanads of jagir "and istimrar will be kindly granted to the said Barkhurdar.

"Submitted for information. Further respects.

"(Sd.) THAKUR DAYARAM SINGH, of Hathras, son of Shipuri (?)."

* Literally may you eat the fruit of life.

† Literally means children.

The reply of the Raja of Mursan was in almost the same words and they were evidently written in concert.

Upon these reports a further order dated the 18th December 1809 was made by the Collector in the following terms :—

"On the 14th petition was made by Thakur "Dyaram stating that after the death of Thakur "Harkishen his estate devolves upon Thakur "Jey Kishore his eldest son and to-day a "petition was made by Raja Bhagwant Singh "stating that Thakur Jey Kishore was the eldest "son of Thakur Jey Harkishen deceased and that "the estate of the deceased Thakur devolved "upon him and consequently all the brethren "deeming Thakur Jey to be the rightful person "and eldest son tied the turban of the Sirdari." The petitions were then ordered to be forwarded to the Board.

The terms of this order clearly show the sense in which the Collector understood the reports of Dyaram and the Raja of Mursan. Accordingly two Sanads dated the 19th January 1810 were granted by the Government to Jey Kishore. By the first of these documents after noticing that under the orders of the Governor-General Taluka Beswan had been settled with and granted to Harkishan for his lifetime and his death before the issue of the perpetual sanad of the taluka it was stated that his Excellency therefore thought it advisable and proper that instead of the said deceased the taluka should be maintained in the name of his eldest son Thakur Jey Kishore for his lifetime at the jama therein mentioned. The second sanad contained the grant of a village called Jhanga by way of jagir in similar terms.

From the two letters of Dyaram and the Raja of Mursan it appears that Jey Kishore had then four brothers living. The inference is that Jogul Kishore his uterine brother was then living. It

is true that in two documents dated the 16th March 1845 it is stated by Tikam then Raja of Mursan and by a tehsildar named Sayed Hardar Ali that Harkishan had four sons only Jey Kishore and three illegitimate sons. It is more probable that (Jogul Kishore having died young and childless) his existence was forgotten or overlooked after a lapse of nearly forty years than that Dyaram and the Raja Bhagwant were mistaken and their Lordships agree with the Subordinate Judge that the balance of evidence is in favour of Jogul Kishore having survived his father. The witness Dharag Singh whose evidence is vouched by Mr. Justice Blair says indeed that Jogul Kishore died in his father's lifetime but in an earlier part of his examination he had said that he "did not know whether Jogul Kishore "died in his father's lifetime or after his death." This witness was born some years after Jogul Kishore's death and was speaking from hearsay only and there are many witnesses of the same kind some of whom say that Jogul Kishore died in his father's lifetime and others of whom say he survived him. The oral evidence (even if admissible) is quite inconclusive.

Jiwaram might have claimed to share the taluka with his brother Harkishan and he as well as Jogul Kishore (if living) might have claimed to share it with Jey Kishore if the succession was regulated by the ordinary Hindoo law. From the record of a proceeding before the Deputy Collector and Settlement Officer of the District of Aligarh on the 30th April 1846 it appears that on the death of Jey Kishore which took place in 1844 or 1845 Ram Pershad and others sons of Jiwaram who was also then dead claimed to be entitled to one half of the estate of Beswan and to have a settlement thereof made in their names. This claim was dismissed by the Collector. The document contains a history of the case gathered from a

perusal of "the papers in the records of the "Collectorate and those received from the Com- "missioner's Office as well as those filed in the "Settlement Department together with the "records of the Khazi's office civil side relating "to Jiwaram and Jey Kishore deceased minor "and fixing a monthly allowance for Jiwaram." Shortly told the story is that Jiwaram was appointed manager of the estate during Jey Kishore's minority but in consequence of some irregular proceedings on his part which were thought to manifest an intention to dispossess his nephew litigation ensued with the result that Jiwaram was deprived of the management of the estate and subsequently an allowance of Rs. 400 a month was made to him which he continued to receive during his lifetime. On his death Jey Kishore stopped the payment but the Commissioner by a rubkar of the 12th August 1836 directed that until an order should be made to the contrary or till the institution of a civil suit to establish right by the heirs of Jiwaram it should be continued as theretofore and the heirs of Jiwaram received the monthly allowance during the life of Jey Kishore. There is other evidence that Jiwaram enjoyed an allowance of Rs. 400 per mensem for maintenance and there is no evidence whatever that he brought any suit in the Civil Court to dispute his brothers' or his nephew's possession of the family estate. Nor did the sons of Jiwaram ever bring any suit to contest the possession of Girdhar the eldest son and successor of Jey Kishore. The Collector by a subsequent proceeding held the allowance of Rs. 400 per mensem to be a pension only and he reduced the allowance to Rs. 120 per mensem divisible between the sons of Jiwaram. They thereupon commenced a suit to establish their right to the Rs. 400 as a malikana allowance and

applied for leave to sue *in formâ pauperis* but the claim was rejected by the judgment of the District Judge of the 25th June 1856.

It thus appears that Harkishan succeeded his father Nawal in exclusion of his younger brother Jiwaram and on his death in 1808 Jey Kishore succeeded in exclusion not only of his younger brother Jogul Kishore but also of his uncle Jiwaram and on Jey Kishore's death in 1844 or 1845 Girdhar his eldest son succeeded to his estate. Jiwaram and his sons though challenged to assert their claim to share in the estate by a civil suit abstained from doing so and contented themselves with an allowance for maintenance. Girdhar died about eighteen months after his father and was succeeded by his only brother Gir Parshad. But as the latter was a minor throughout his elder brother's tenure of the estate no strong inference can be drawn from his not claiming to share in the estate. Gir Parshad died early in 1880. It results that for a period of nearly 80 years from the time of the British occupation the enjoyment has been consistent with the alleged custom and for the earlier and greater part of that term has been inconsistent with any other legal basis.

The High Court minimise the inference to be drawn from these successive descents of the estate to an eldest son in three generations and the circumstances accompanying them. (1) They say that the inquiry made by order of the Collector of Dyaram and Rajah Bhagwant Singh in 1809 was directed to the custom of Hindus and not to the custom peculiar to this family and they suggest that the reports made in pursuance of that inquiry related only to management and control of the estate not to property. (2) It is suggested that Jiwaram was awarded his allowance of Rs. 400 a month as compensation for

being dispossessed of the zemindari and being content with his position did not care to claim a share in the estate.

Their Lordships observe on the first point that the customs of Hindus would include any custom regulating the succession in a particular family and that the inquiry was whether the property "devolves on Thakur Jey Kishore." They have already observed that the Collector evidently understood the replies of Dyaram and the Raja of Mursan as directed to the question who was entitled to the property. The sanads were grants of the property to Jey Kishore described as eldest son and in short the transaction was not merely a settlement of the estate in his name for the purpose of revenue as suggested in the High Court. On the second point it is extremely unlikely that Jiwaram would have rested content with an allowance if he had a claim to one half the estate which he could prosecute with any prospect of success. Jiwaran (apparently) and his sons certainly asserted a claim to be sharers in the estate though they never ventured to bring their claims to the test of a legal decision. The records of the Collectorate so far as concerns the relations between Jiwaram and his sons on the one hand and Jey Kishore and afterwards Girdhar on the other do not disclose a picture of a perfectly united and contented family.

But the learned Judge in the High Court thought that the acquiesence of the descendants of Nawal Singh in the usurpation of Dyaram was far more impressive than the acquiescence of Jiwaram and his descendants. Their Lordships must therefore examine what is known of the relations between Nawal Singh and Dyaram and their respective descendants. Nawal Singh and Dyaram were sons and so far as appears the only sons of Bhuri Singh who is said to have

died in the year 1775. The Subordinate Judge says that Dyaram forcibly wrested the bulk of his father's property including taluka Hathras from his elder brother on their father's death and being a man of great energy he managed to dispossess the other descendants of Nandram from their estates and annex their estates to his extensive possessions. His authorities for this statement are apparently the settlement reports of Aligarh made by Mr. Thornton in 1834 and by Mr. Smith in 1874 and Atkinson's Gazeteer published in 1875. These works are not before their Lordships and they cannot say whether they bear out the learned Judge's statement which however seems to go further than the oral evidence of tradition warrants. It may be that the reports and gazeteer in question are not strictly evidence of the truth of all the statements contained in them. And it may be that if examined they would not bear out the conclusions drawn from them by the Subordinate Judge. They were however used apparently without objection and probably no objection would be taken to their being read for what they are worth in a similar case in this country. But if you exclude evidence of tradition what evidence is there that Hathras ever was part of the ancestral property of Bhuri Singh? In the last century when the Mogul Empire was breaking up and when (to quote Mr. Justice Blair) "law was in abeyance" it was not uncommon for an able and energetic man to carve out a large property for himself by the sword at the expense either of his own relatives or of strangers. If you look to tradition as disclosed by the oral evidence the statements as to Hathras are conflicting. Indeed Keheri Singh says that Dyaram acquired the Hathras estate from the Poreh Thakurs. In the opinion of their Lord-

ships it is impossible to presume a partition between the brothers or to say with any approach to certainty whether any or what portion of Dyaram's possessions was or was not ancestral property or from whom or by what means they were acquired. All that can be said is that tradition points to his having acquired them by force and not by right. Dyaram was at first confirmed in possession of his estates by the British Government but in 1817 was deprived of the bulk of them for rebellion. It appears from documents in evidence that 20 of Dyaram's villages under the appellation of taluka Shahzodpur were conferred on Jey Kishore and 31 were conferred on Jiwaram. It is probable that these villages were only a comparatively small part of the estates confiscated by the Government. The learned Judges in the High Court ask why the heirs of Nawal Singh did not then ask for reinstatement in the fiefs which had been seized by Dyaram as had been alleged in violation of Nawal Singh's right of primogeniture. And it is this acquiescence to which they attach so much importance. Their Lordships cannot agree for the simple reason that they do not know enough of the facts or circumstances or of the motives or policy of the British Government to form any reliable opinion on the subject.

Their Lordships now turn to the oral evidence in the case. No less than fifty-six witnesses were called and examined on behalf of the Appellants Their evidence mainly divides itself into two branches. (1) Evidence of the existence of the custom of gaddanashin in the Beswan taluka and of the successive holders of the taluka within living memory having sat on the gaddi and received the customary offerings. (2) Evidence of tradition relating to the family learnt by the witnesses from their deceased relatives and others.

In commenting on the evidence of the custom of gaddinashini the High Court say: "In order "to constitute that a valid argument it ought to "have been shown not only that gaddinashini "and the presentation of nazars was the ordinary "concomitant of the possession of an impar-"tible Raj but also that it was an exclusive "attribute of families in whom the custom of "primogeniture prevails." The judgment of the High Court was delivered on the 7th February 1893. Subsequently to that date a case of *Thakur Nitspal Singh* v. *Thakur Jai Singh Pal* (which in many of its circumstances is strikingly like the present one) was before this Board. The case related to the succession to the ancestral property of a Rajpoot family long settled in the Agra district. In delivering the judgment of their Lordships Lord Hobhouse observes:—

"The other remark is a suggestion that there "is no necessary connection between gaddi-"nashini and primogeniture. That may be so: "but it is impossible to read the evidence "without seeing that the witnesses on both "sides treat the two as identical or the former "as proving the latter. Not a single question "is put to any witness who has affirmed or "denied gaddinashini for the purpose of "disconnecting it from primogeniture. . . . "It is clear that the Subordinate Judge had no "suspicion that the evidence applying to "gaddinashini could be taken as not applying "to primogeniture. The first suggestion of such a "distinction comes from the High Court. Their "Lordships think that when the witnesses "affirm or deny gaddinashini they mean to "affirm or deny primogeniture: and their "constant identification of the two things shows "how closely they are connected in the minds "of the families of that part of the country. "The custom of gaddinashini has clearly an

" important bearing on that of primogeniture
" though the connection between them may
" not be a necessary one."

Their Lordships think that these observations are directly applicable to the case before them. The language in which the Raja of Mursan spoke of the custom of gaddinashini has already been referred to. The Respondent himself in denying that the custom prevailed in his family says " By gaddinashini or masnadnashini I mean
" the practice of one person or the eldest son
" succeeding to the whole estate and the other
" sons only getting maintenance." Kharag (a son of Jiwaram) says " By gaddinashini I mean
" that he (gaddi nashin) used to sit on a gaddi
" and receive nazar and one son inherited
" the property while the other sons received
" maintenance." Kashi Ram the jaga (bard or genealogist) of the Beswan family (whose father and grandfather were jagas before him) after deposing to the custom says " I call
" that gaddinashini that is that the eldest son
" sits on the gaddi and younger sons receive
" maintenance." And expressions of this kind showing the identification in the minds of the witnesses of the right of sitting on the gaddi with succession to the estate constantly occur in the course of the evidence. There are five witnesses who say they saw Jey Kishore sit on the gaddi and receive nazar. There are seven witnesses who say they saw Girdhar do so and there are numerous witnesses who saw Girpershad.

Their Lordships agree with the High Court that a good deal of the evidence of statements made by deceased persons is of doubtful admissibility. By the 32nd Section (5) of the Evidence Act such statements are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means

of knowledge and when the statement was made before the question in dispute was raised. For this purpose and to this extent statements of deceased relatives and servants and dependents of the family are admissible. By Section 49 when the Court has to form an opinion on (*inter alia*) the usages of any family the opinions of persons having special means of knowledge thereon are also relevant. But by Section 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. In this way some of the evidence of such witnesses as Kharag a son of Jiwaram of Pershad a nephew of Lala Lachminarain who was dewan at Beswan for about 25 years of Keheri Singh a descendant of Sakat who made out a genealogical tree of Nandram's family from the information of his grandfather of Ganga Ballabh and others of the same class would perhaps be admissible evidence of the custom and when corroborated by the proved facts as to the descent of the estate during the last eighty years is not without value. But their Lordships would not be disposed to place much reliance upon it standing alone.

Another class of evidence consists of the wajib-ul-arzes of various villages comprised in the taluka. The Plaintiff put in evidence ten of these documents compiled in the years 1862 and 1863. They do not support the Appellant's

case and they afford negative evidence against it because they contain a provision for the appointment of lambardar in certain events according to the will of the co-sharers, and in one of them relating to the village Bhawan it is said that if there be no son then one of the heirs shall be the lambardar with the consent of the other heirs. On the other hand the Appellant also put in evidence the wajib-ul-arzes of ten villages compiled in the year 1873. They contain a declaration by Gir Pershad himself of the custom. "After my death my eldest son if he is fit and "well-behaved shall according to the custom and "usage of my family succeed me to the gaddi "and the other sons if they are fit shall receive "Rs. 200 a month and if they are unfit "Rs. 50 a month." Their Lordships do not place much reliance on these later documents which are only an expression of the opinion or aspiration of Gir Pershad himself. The documents of 1862 and 1863 are no doubt evidence in favour of the Respondent but their Lordships do not think that they are sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate and other evidence in favour of the Appellant to which they have already adverted.

Their Lordships are fully sensible of the importance of requiring that a special family custom involving a departure from the ordinary Hindu law should be properly proved but they think that in this case the Appellant has satisfied the burden of proof. They will therefore humbly advise Her Majesty that the decree of the High Court be reversed and instead thereof the Respondent's appeal to that Court be dismissed with costs. The Respondent will also pay the costs of of this Appeal.