(1928) 12 CAL CK 0028

Calcutta High Court

Case No: None

Narendra Narayan Chowdhury		APPELLANT
	Vs	
Nogendra Narayan Chowdhury and Others		RESPONDENT

Date of Decision: Dec. 21, 1928

Citation: 118 Ind. Cas. 342

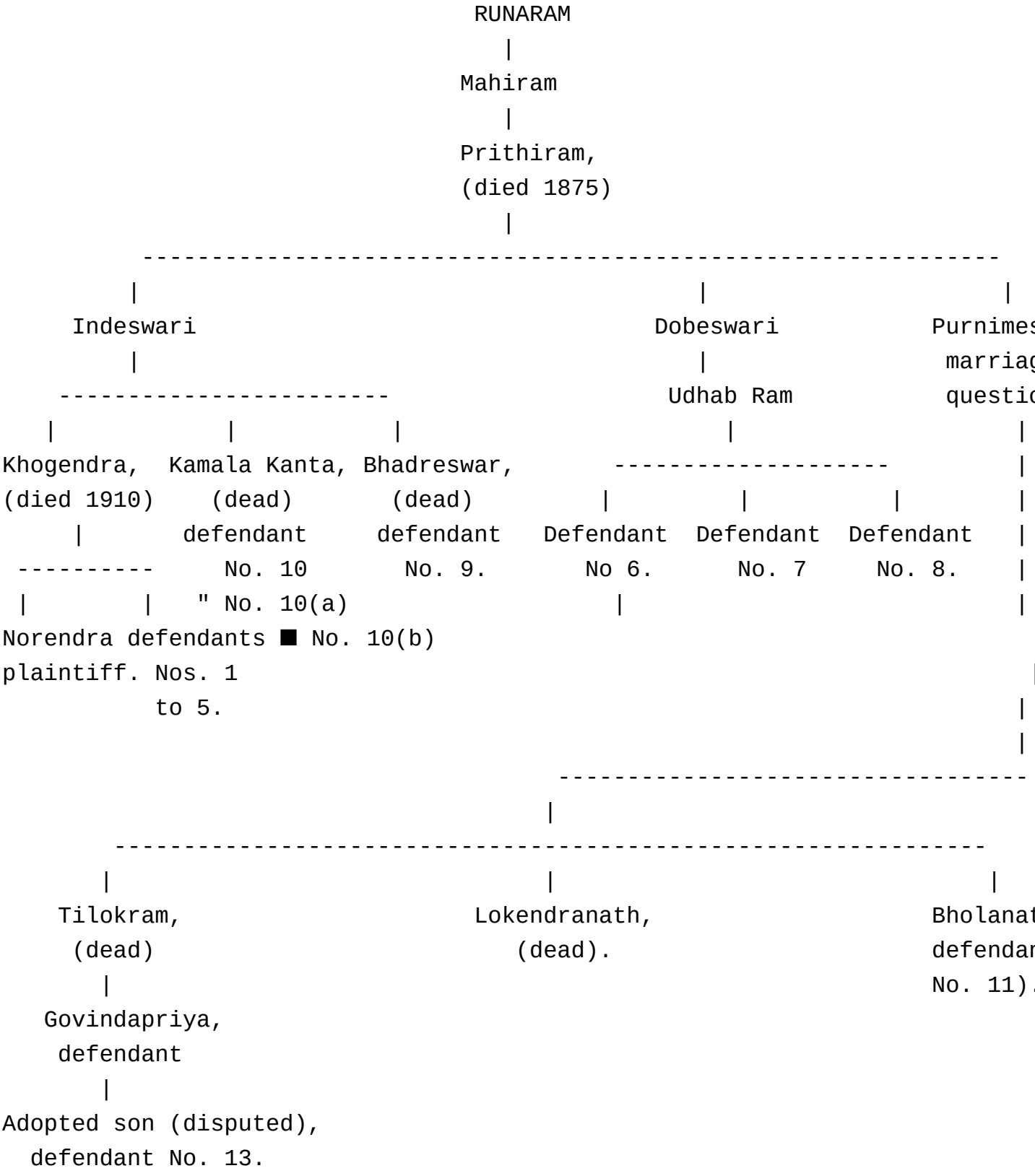
Hon'ble Judges: Panton, J; B.B. Ghose, J

Bench: Division Bench

Judgement

B.B. Ghose, J.

This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, Assam Valley Districts, dismissing the plaintiff''s suit for recovery of possession of an estate, which has been described as the Mechpara estate. Plaintiff''s suit is based upon the allegation made in the first paragraph of his plaint that the Mechpara zemindari belongs to a well-known Rajbansi caste and the Mechpara estate has been impartible and inalienable since time immemorial by virtue of the kulachar or custom governing the same family. Plaintiff then goes on to state that his grandfather Prithiram, was married to three wives and he had some children begotten of a maid servant by the name of Purnimeswari. His grandfather died in 1875 and disputes broke out among the sons of Prithiram and in order to purchase peace his father Khogendra, the other legitimate sons of Prithiram, and the sons born of the lady who was called the maid servant entered into a compromise, evidenced by a solenama, dated the 14th. December, 1875, by which they had divided the estate into different shares. Khogendra died in February, 1910, and the plaintiff has been since then in possession of one anna odd share of the estate. He now brings this suit for recovery of possession of 14 annas odd share of the estate as against his own brothers, who are defendants Nos. 1 to 5 and the other descendants of Prithiram. He asks for a declaration that he is entitled to the property as the eldest representative of the eldest line of Prithiram''s descendants. A short genealogy would be useful in understanding the claims of the parties.



2. The plaintiff describes Purnimeswari as a maid servant who was the mistress of Prithiram. His story is that the sons born of Purnimeswari, Tilokram, Lokenath and Bholanath were all illegitimate. Tilokram is dead and is now represented by his widow Gobinda Priya, defendant No. 12 and an adopted son defendant No. 13, Lokenath is dead. He died without leaving any descendants. Bholanath is alive and he is defendant No. 11 in this suit. Of the sons born of Prithiram''s wife, Indeswari, Khogendra was the father of the plaintiff and his brothers, defendants Nos. 1 to 5. The second son is Kamal Kanta who is dead and is represented by his son,

defendant No. 10 and defendants Nos. 10(a) and 10 (b). The third eon was Bhadeswar who is dead and is represented by his son, defendant No. 9. Prithiram had only one son born of his wife Debeswari named Udhab Ram, who is dead and is represented by his sons defendants Nos. 67 and 8. Defendants Nos. 1 to 5 do not contest the plaintiff''s suit. They are as I have already stated the brothers of the plaintiff. Barring them all the other defendants contest the plaintiff''s claim. Defendant No. 14 is a manager of the estate under the management of the Court of Wards.

3. The defendants who contested the suit in the Court below and who also appear as respondents in this Court deny the allegations of the plaintiff as regards the kulachar or family custom of primogeniture or impartibility. Some of the defendants also contest the allegation of the plaintiff that Purnimeswari was not the married wife of Prithiram. On the allegations of the parties, several issues were framed in the Court below, but the only issues of importance which have been discussed before us are these. Those are issues Nos. 7, 8 and 10 which are in the following terms.

Issue, No. 7. "Is there any custom of kulachar governing the Mechpara family as alleged and if so, is the Mechpara Estate impartible and inalienable by reason of such custom and kulachar?"

Issue No. 8. "Is the succession to the Mechpara Estate governed by rule of a primogeniture as alleged or by the ordinary rules of succession according to the Dayabhaga School of Hindu Law"?

Issue No. 10. "Were Tilokram, Lokenath and Bholanath illegitimate sons of the late Prithiram Chaudhury and as such excluded from inheritance?

4. The Subordinate Judge decided the issue No. 10 in favour of the plaintiff and he decided the other two issues Nos. 7 and 8 against him. In the result, as already stated, the entire suit was dismissed. It should be stated at the commencement that Tilokram and Lokenath were elder than Khogendra. If they were the legitimate sons of Prithiram then Khogendra would have no title to the estate, assuming that the rule of primogeniture prevailed in the family and the estate was impartible.

5. Mr. Langford James, the learned Counsel for the plaintiff, contended before us that the Subordinate Judge is wrong in his view that the estate was not impartible or inalienable and that this family is governed by the Hindu Law of Succession. His contentions were (1) Impartibility may be due, to the origin of the estate or it may be by custom created by agreement among the founders of the family. Inalienability in the same way may be an incident of the tenure and it may be also by custom and (2) Where the family is not Hindu by origin, any person alleging that the succession to the estate of that family is governed by the Hindu Law, has to prove that it has adopted the Hindu Law of Succession. His contention with regard to the second point, is that this family is Rajbansi and, therefore, non-Hindu by origin, and the

Subordinate Judge has not approached the decision of the questions involved in this case from that point of view.

6. I will take up the second point first as to the applicability of the Hindu Law of Succession to this family, whether the members of the family are Hindus and whether they are governed by the ordinary rules of Dayabhaga as found by the learned Subordinate Judge.

7. In my opinion, the question whether the family is governed by the Hindu Law of the Succession or not is a matter of secondary importance with regard to the question of the plaintiff''s right to the whole of the estate, but as this question has been elaborately argued before us by both sides, I think it is proper to record an opinion on the question. It is argued by Mr. James that as the family is Rajbansi it is non-Hindu in origin and the defendants, who allege that it is governed by the Hindu Law, must prove that they have adopted the Hindu Law of Succession. Reliance is placed upon the case of Fanindra Deb Raiket v. Rajeswar Das 12 I.A. 72 : 11 C. 463 : 4 Sar. P.C.J. 610 : 9 Ind. Jur. 277 in support of this contention. The question is really one of the fact whether these people, assuming that their origin is aboriginal, have adopted the Hindu Law as a whole in matters of succession. The evidence in this case, however, leaves no room for doubt that whatever might be the origin of the family, they adopted Hinduism in its entirety and it will be idle to say that they are not governed by the Hindu Law. They are in all essential purposes Bengal Hindus. First, it is only necessary to see what names they bear and it would appear that their names can hardly be distinguished from the usual Bengali names. It is undisputed that they have priests and their priests are Bengal Brahmins. The evidence of both sides shows that their last priest was Hara Prosad Chakravarty and it is also stated that they have got a priest at present, but his name does not appear in the evidence. Exhibit XX which is the budget estimate for the year 1320 of this family, shows the religious ceremonies of the family for which money was spent. These religious ceremonies included Jagannath Puja, Satyanarayan Puja, Mansa Puja, Janmastami Puja, Durga Puja, Punya, Bastu Puja and Saraswati Puja and then Dol Jatra Kamdeb Puja, Ras Jatra, monthly Kali Puja and so forth. All these Pujas are performed in well-to-do Bangali families. The pedigree which the plaintiff produced and which was alleged to have been obtained from their deceased family priest, Hara Prosad Chakravarty begins by stating their Gotra as Kasyap Gotra and there is mention in there Sapindas in that list. The aborigines have not been proved to care for Sapindas nor have they any Gotras so far as I am aware. This is peculiar to Hindus. Then whenever the plaintiff and the other members of the family describe themselves, they described themselves as belonging to the caste of Rajbansies. There is a large number of documents on the record executed by Khogendra and his brothers and the other members of family in which they describe themselves as belonging to that caste. It is only the Hindus who speak of caste. Then coming to the oral evidence it will appear that these people observe mourning on the death of any member of their family and that mourning is observed of 30 days. During the period of

mourning they do not take meat or fish, or milk or produce of the milk of buffaloes. That is the practice in orthodox Bengali Hindu families. Then they have the performance of the sradh after the expiry of the period of mourning. The evidence of both sides shows that on the death of a member of the family, before the funeral pyre is lighted, there is the mukhangi ceremony which, I believe, is peculiar to Bengali Hindus and it consists of putting lighted reads to the face of the corpse before the funeral pyre is set on fire. This is generally performed by the eldest son if he is present at the time of the cremation. There is also direct evidence on behalf of the plaintiff as to the family being Hindu. Santoran Burman (witness for the plaintiff) says in answer to question No. 16. The owners of the Mechpara Estate are Hindus by creed. Raja Abhoy Narayan Dev, a witness examined on behalf of the plaintiff and son-in-law of Kogendra Narayan Chaudhury, states in answer to question No. 16 "I know the owners of the Mechpara Estate to be Hindus by creed", and he speaks of himself "I am myself a Hindu." "I know the owners of Mechpara estate to be Rajbansies. My marriage was duly celebrated by calling priests and others. In my marriage my father-in-law gave away the bride." Kamini Mohan Guha another witness on behalf of the plaintiff, says in answer to question No. 11, "I think that the zemindars that are at present in Mechpara are governed by the Dayabhaga". It is unnecessary to pile up for their evidence. There cannot be the least shadow of doubt that whatever the parties may state in order to serve their own purposes, upon the evidence on the record, the family is governed by the Hindu Law and being residents of Bengal, they must be governed by the Dayabhaga School of Hindu Law.

8. This finding, however, as I have already stated, does not put an end to the plaintiff''s case, because assuming that the family is governed by the Dayabhaga School of Hindu Law, the plaintiff is still entitled to prove that the custom of primogeniture prevails in the family and the estate is impartible and inalienable by custom. That there are impartible estates in Bengal in the possession of Hindus cannot be and is not denied. That such estates exist was recognised by Regulation X of 1800, which enacted that the provisions of Regulation XI of 1793 as regards the rule of succession did not supersede the custom of primogeniture. We have, therefore, to see whether the plaintiff has been able to prove the existence of the custom as alleged. In the plaint as I have already stated the plaintiff based his claim upon the kulachar or family custom, but during the argument in the Court below it seems that the plaintiff''s Pleader also claimed that primogeniture may be established by the fact that this Mechpara zemindari was originally a military tenure and, therefore, by the nature of the tenure, the estate is impartible and succession would be by the rule of primogeniture. In support of the contention that the state was a military tenure, reference has been made to certain publications mentioned in the judgment of the Subordinate Judge. The question is whether it is still a military tenure. In addition to those historical tenures referred to by the learned Subordinate Judge, the learned Counsel for the plaintiff also refers to the Permanent Settlement kistibandi, which describes the Mahar Mechpara as "Mahar Topkhana"

and from these it is contended that it is still a military tenure. There cannot, however, be any doubt that the estate is not held under a service tenure. There are well known estates known as the Kharagpur Ghatwali Estates, which are impartible and inalienable by the very nature of them. Is this Mechpara like one of those? There is nothing to show that it is so. It is really an ordinary zemindari and succession to it must follow the ordinary law unless a special family custom is proved. I need hardly discuss the incidents of a military tenure and how such incidents may be lost even if its origin was a military tenure by taking a different sort of grant from the Government. In the case of Raj Kishen Singh v. Ram Joy Surma Mazoomdar 1 C. 186 : 19 W.R. 8 : 3 Sar. P.C.J. 174 : 8 M.L.J. 151 : 2 Suth. P.C.J. 744 their Lordships made the following observations (at page 191) " In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagir, requiring the render of services, if any such ever existed, were, as conditions of tenure, impliedly at an end, and that the zemindari so far as relates to tenure, was thenceforth held under the Government as an ordinary zemindari free from any such conditions. The settlement would not, however, of itself, have operated to destroy a family usage regulating the manner of descent". The argument, therefore, that is advanced on behalf of the appellant that on account of the nature of the tenure it should be held that it is impartible and succession is according to the rule of primogeniture, cannot be maintained. It is quite true as was observed in the case of Rai Kishore Singh v. Gahenabai 53 Ind. Cas. 630 : 24 C.W.N. 601 : 15 N.L.R. 176 : 37 M.L.J. 562 : 17 A.L.J. 1077 : 26 M.L.T. 494 : 1 U.P.L.R. 94 : (1920) M.W.N. 82 : 22 Bom. L.R. 507 : 12 L.W. 730 that where a custom was originated in a family for certain reasons, it cannot be said that those reasons being non-existent, the custom itself should cease to exist, In such a case, as their Lordships observe, the principle embodied in the expression cessat ratio cessat lex does not apply. But it is quite different where the claim is made on the basis of the nature of the tenure. When the nature of the tenure is altered then as their Lordships observed in the case of Raj Kishen Singh v. Ram Joy Surma Mazoomdar 1 C. 186 : 19 W.R. 8 : 3 Sar. P.C.J. 174 : 8 M.L.J. 151 : 2 Suth. P.C.J. 744 the rule of succession is altered. The plaintiff must, therefore, in order to succeed, rest his case upon a family custom as he had actually pleaded in his plaint and we have, therefore, to see whether the plaintiff has succeeded in establishing a family custom of primogeniture and inalienability. The learned Counsel for the appellant relied upon certain documentary evidence in support of the contention that the plaintiff has been able to establish the custom pleaded. He refers first to Ex. 2 dated 5th April, 1790, in which the Board of Revenue asks the Collector to furnish them with a statement of the family of Runneeram who had died before that. The next document is Ex. 4 dated the 17th June, 1700, the report of a local official called Roy Royan, which runs thus "His eldest son Mahira is his successor in the zemindari. Respecting any other heirs the deceased zemindar may have left, I am not prepared to report correctly". Subsequently the Commissioners make this report which found at the top of the

paper, "List of the family of the deceased Runneeram, zemindar of the Mechpara, Sobun the defunct''s mother, two wives Mahiram, a legitimate son aged 9 years. Gumburam a legitimate son aged 8 years, a legitimate son whose name is unknown aged one and a half years. Rupramran illegitimate son aged 15 years and an illegitimate son whose name is unknown aged 12 years. N. B. The defunct has not left any other relations. Upon this report the Board of Revenue made this direction, "we direct that Mahiram the eldest legitimate son of the late Ranneeram be allowed to succeed his father in the zemindari of Mechpara after the usual publication has been made in the District and at the Khalsa." This is dated the 21st July, 1790. The next document is Ex. 6 which confirms this report: "The Governor-General having directed that the eldest son Mahiram should be allowed to succeed his father in the zemindari of Mechpara after the usual publications, I am directed to desire that you will make the same at the Khalsa and report the result." This is signed by the Secretary of the Board. This is followed by the report of the Commissioner, Ex. 7, that proclamation was made respecting the succession of Mahiram the eldest son of the late Ranneeram and the next document is Ex. 8, a letter from the member of the Board of Revenue to the Commissioner of Cooch Behar to the effect that no objections having been made to the succession of Mahiram, the Commissioner would allow him to succeed his father in the zemindari of Mechpara agreeably to the orders of the Gevernor-General in Council. Upon these documents it is contended that it was recognised by the Government at the time that the succession to the estate was only to the eldest son of the deceased proprietor and that the rule of primogeniture prevailed in the family. I do not think that any such inference can at all be drawn from these proceedings. If one looks at the preamble of Regulation XI of 1793, it shows that the custom had grown under the previous administration of the country before the coming of the British, that upon the death of a proprietor of an estate, it devolved entirely to the eldest son to the exclusion of all other sons. This practice was on account of the inconvenience felt about the division of the estate and apportionment of the Revenue Regulation XI of 1793 enacted that henceforth the succession to the estate would be in accordance with the Muhammadan or Hindu Law to which the practices were subject. The fact, therefore, that before the passing of Regulation XI of 1793, the eldest son was recognised as succeeding to the estate of Runneeram, does not establish the custom of primogeniture in the family as this practice was followed by the Government in the case of every estate. The next matter, however, is directly against the contention of the plaintiff. Mahiram died in 1828 leaving a legitimate son Prithiram and an illegitimate son Madhoram. It appears from Ex. E. dated the 22nd January, 1832, a report of the Collector of Rangpur on Mechpara Pargana that "Mahiram died leaving a son born of his wife, named Prithiram and another son Madhoram born of Runga, a julchittona, or left handed wife." It goes on to say that "an enquiry was set on foot to establish the right of Madhoram which was proved and agreeably to a bewastha (the opinion) obtained from the Pundits of Assam, two-thirds of the father''s property was allowed to Prithiram and the remaining one-third of Madhoram. To

this no objection has been made by either party. I, therefore, assume this point as settled." This shows beyond any doubt that the estate was not considered descendible according to the rule of primogeniture, nor was it impartible. The illegitimate son was allowed one-third share of the property left by Madhoram. It is contended on behalf of the appellant that at that time Prithiram was an infant and, therefore, no objection could have been taken on his behalf. The estate was taken, charge of by the Court of Wards on behalf of both the minors and their mothers were appointed their guardians. It is quite true that Prithiram himself could not object to this division of the estate, he being a minor. But if the custom of primogeniture in the family was so well-established as the plaintiff would ask us to believe, is it conceivable that the Collector who had made enquiries about the right of the illegitimate son and went into the trouble of taking into the bewastha of the Pundits of Assam as regards his rights, could not have been cognizant of the well-established custom of the family of primogeniture, and can it be believed that if there was such a custom, he would not have reported/that by the custom of the family Prithiram would be the sole owner, even if he had a brother born of a lawful wife of his father? It is next argued on behalf of the appellant that the fact that one-third of the property was allowed the Madhoram, the illegitimate son of Mahiram, is of no consequence, because Madhoram died in 1834 and after that Prithiram claimed the entire estate to the exclusion of the mother of Madhoram, who would have been his heir. The learned Subordinate Judge in dealing with this argument has observed that probably the lady was living in the family and did not care to assert her own rights. That may be one explanation. But assuming that the lady was put aside, it would not prove primogeniture. The utmost that the plaintiff could urge was that widows did not succeed to the estate. This one fact that Madhoram got a share goes strongly against the claim of the plaintiff. Reliance is next placed upon the oral evidence on behalf of the plaintiff. This oral evidence consists of the statements made by three persons, the first of them being Santoram Burman. He gives his age as 90 or 9i years. His position is that he was menial servant of Prithiram on a pay of Rs. 3 per month and speaks about the rules of primogeniture in a zemindari estate of a considerable value. Under what circumstances this man came to know of the custom, which could never have been a topic of conversation during his time, it is difficult to say. Apart from the social position of this man, he is an absolutely ignorant person, He does not know anything what a year is, what a date means, what a month is. He was in service under Prithiram for only about four years. How this man could have possibly known about the rule of succession is difficult to understand. The next witness on whose evidence the plaintiff relies is Kamini Mohan Guha. This man is of a better position in society. He was at first a tutor of the plaintiff under Khogendra Narayan Chowdhury. Then gradually he served the estate in other capacities. He gives evidence to the effect that the custom is that the lawful eldest son of the Mechpara zemindari would inherit the property, the estate is impartible and inalienable. Then when he was asked from whom he had heard it, he said "from Khogendra Narayan Chowdhury,"

that is the father of the plaintiff and from such other persons who would naturally know of the existence of the custom in the family. As regards Khogendra Narayan''s knowledge the Subordinate Judge truly observes that his knowledge is of no account, because that man himself had entered into a partition deed with his brother. His oral evidence, therefore, can be dismissed without much comment. The last witness on whom the plaintiff relies is another person named Krishna Mohan, who says "I simply hear that the succession goes to the eldest son". Apart from that, there is the oral evidence of the plaintiff who of course, does not know anything about the custom, but he says that he heard of it from his father. In order to establish a custom varying the rule of ordinary descent better evidence should have been put forward. A custom of primogeniture might be proved by the fact that there were cadets of the family who had no share in the estate, or that on any previous occasion a right to partition was asserted and successfully resisted. Nothing like such evidence is available in this case. There was an illegitimate son of Mahiram along with a legitimate son and the illegitimate was allotted a share. The next event which disproves this claim of primogeniture is Ex. A, the partition deed entered into by all sons of Prithiram dated the 16th December, 1875. In that document it is stated that Prithiram Chaudhuri Rai Bahadur, zemindar died leaving the seven brothers as his heirs. Then it speaks of dissensions having broken out among them and so forth. By that deed in para. 1 it was stipulated that Khogendra Kamala Kanto, Bhadreswar and Udhob would be jointly entitled in equal shares to an eleven annas share and Tilokram, Lokenath and Bholanath would be equally entitled to a five annasshare in the property. This was followed by application for mutation of names in the Collectorate. Exhibit 1 is the petition of Khogendra and others dated 16th December 1875, where the same expression is repeated that Prithiram died leaving seven sons as his heirs surviving. Exhibit J is the petition by Tilokram of the same date. Exhibit K, dated 17th July, 1876 is a petition by Khogendra for opening separate accounts and in it is stated that Khogendra had inherited moveable and Immovable properties of the shares stated in the petition as heir to the properties left by Prithiram. After that suits were brought by Khogendra and all the other descendants of Prithiram for rent against tenants and these documents range from the years 1880 to 1907 which have been filed as exhibits in this case. In 1885 Bhadeswar presented a petition for registration of his name after attainment of majority. That is Ex. YYY. Then Ex. DDD, dated the 13th May, 1892, shows that the widows of some of the heirs, some of the descendants of Prithiram collected rents and Khogendra entered into an ekrarnama with two of the widows for collecting rents on their behalf. In May, 1907, Khogendra mortgaged one anna share of the property, stating that he was entitled to 2 annas 15 gandas share in the property and he subsequently executed another mortgage. All these transactions show that Khogendra not only entered into a partition with the branch born of Purnimeswari but stated throughout that all the seven sons of Prithiram were his heirs and he asserted title to only his fraction of 2 annas 15 gandas, which was a fourth share of the 11 annas which were allotted to him and his other co-sharers. After the death of Khogendra, Norendra the plaintiff in the case

applied for mutation of his name for one-twenty-fourth share in the 11 annas of the property (Ex. 11). There is a note at the end that Norendra claims 16 annas interest but he was actually in possession of one-twenty fourth share of the 11 annas and he stated later on in a petition dated the 13th November, 1911, that he reserved the right to apply for his name being registered with regard to the remaining 13 and odd, annas share. This, however, was rejected. Subsequently he mortgaged his share to others.

9. The matter, therefore, came to this, that assuming that the estate was military tenure at the commencement as soon as the zemindar took the Permanent Settlement, the nature of the tenure was altered and he became an ordinary zemindar subject to the general law of succession. This would be a complete answer to the argument based on the fact that primogeniture and impartibility must be assumed from the nature of the tenure. If there was a family custom of primogeniture, that custom certainly could not have been wiped out by the fact that the zemindar took a new settlement from the Government.

10. The authority for that proposition will be found in the case of Rao Kishore Singh v. Gahenabai 53 Ind. Cas. 630 : 24 C.W.N. 601 : 15 N.L.R. 176 : 37 M.L.J. 562 : 17 A.L.J. 1077 : 26 M.L.T. 494 : 1 U.P.L.R. 94 : (1920) M.W.N. 82 : 22 Bom. L.R. 507 : 12 L.W. 730 already referred to. But if the case is that the rule of primogeniture was according to the custom of the family, then the question is what would be the result of the acts of Khogendra supposing that the custom has been proved. I have already shown that the custom has not been proved by the evidence which has been adduced. But if there was such a custom, then by the acts of Khogendra that custom was given up. The authority for the proposition will be found in the case of Raj Kishen Singh v. Ram Joy Surma Mazoomdar 1 C. 186 : 19 W.R. 8 : 3 Sar. P.C.J. 174 : 8 M.L.J. 151 : 2 Suth. P.C.J. 744 which has already been referred to. Sir Binode Mitter who appeared on behalf of some of the defendants laid stress upon the observations of their Lordships at page 195 of the report which run thus: "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the lex loci binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be lees when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon".

11. It is contended on behalf of the appellant that the arrangement entered into by Khogendra was due to compulsion. On the death of Prithiram there were disputes among the brothers and on that account the Deputy Commissioner intervened and they were compelled to enter into this arrangement. Now, it is not a case of arrangement having been entered into by coercion or undue influence. Khogendra also, as I have already shown, after having entered into that arrangement, continued to act upon it for merely 40 years and the documents which have been produced in this case stated distinctly that he came into possession as one of the heirs of Prithiram.

12. It is true that Norendra the plaintiff, after the death of Prithiram stated that he asserted a claim to the whole of the property. Assuming that that assertion of the claim reserved his right to bring the suit about three days before the period of limitation had expired, had he any subsisting right, if the custom had been discontinued by his father and had been acted upon for such a long period of time, no other member of the family of the succeeding generation could assert that the family custom still subsists. The explanation of Norendra the plaintiff, is that he kept quiet for about 12 years, and dealt with his share of the property as haying been derived under the deed of partition for want of funds. Whatever that may be he cannot now reasonably be heard to say that he is entitled to the entire property according to the rule of primogeniture which is the subsisting custom of the family. In my judgment, therefore, the Subordinate Judge is quite right in holding that the plaintiff is not entitled to succeed in his claim. This finding finished the appeal of the plaintiff. But defendants Nos. 11, 12 and 13 who have appeared separately contend that the Subordinate Judge is wrong in his finding that Purnimeswari was not the married wife of Prithiram and they seek to support the decree of the Subordinate Judge on another ground that assuming that the plaintiff''s story is true that succession to the estate was according to the rule of primogeniture, the plaintiff would have no right as his father was really a junior member of the family, Tilokram, Lokenath and Bholanath being elder than Khogendra the father of the plaintiff, Bholanath is the only direct descendant of Prithiram now alive. The learned Advocate General who appears for him contends that the Subordinate Judge ought to have held upon his own findings that Purnimeswari was the married wife of Prithiram. The learned Subordinate Judge has stated that there is no evidence worth the name that Purnimeswari had been a maid servant. In my opinion, the name Purnimeswari itself would show that she could not have been a maid servant. The name is too aristocratic for a maid servant. However, the learned Subordinate Judge has found that if Prithiram married her at all, he must have married beneath his rank. That is quite possible. This marriage again, as the learned Subordinate Judge finds, if it had taken place, must have taken place hundred years ago. Bholanath, the last surviving son, is 71 and it is very difficult to find any person alive after this long lapse of time, who could possibly depose to the fact of the marriage, if it had actually taken place. The evidence is, therefore, mainly on the point as to how she

was treated and how her sons were treated during Prithiram''s lifetime and also subsequent to his death. There is uncontradicted evidence that the sons born of Purnimeswari were treated in the same way as the sons born of the other two wives of Prithiram. They were married to girls of respectable families. The learned Subordinate Judge has found even after Prithiram''s death the lady was regarded as the mistress of the house. After her death all the sons of Prithiram observed mourning (asouch), as can only be observed in the case of persons belonging to the same gotra. If she was a maid servant and was never married to Prithiram, the other members of the family, the legitimate descendants of Prithiram, however they might have regard for their father''s mistress would have no occasion to observe asouch or mourning according to the Hindu custom after her death. It is unnecessary to re-state the instances given by the Subordinate Judge when Bholanath was treated with the respect due to a legitimate son of Prithiram. The Subordinate Judge, however, states, that if Prithiram chose to take Purnimeswari as his wife without a formal marriage, no one within the limits of Mechpara would dare to show her disrespect during his lifetime. That may be true, but it may also be stated that nobody would show her the respect which is due to a married wife of Prithiram. Then it appears that one of the defendants who has been examined and who Bays that Purnimeswari was not the married wife of Prithiram had to admit that he had married into the family of the Raja of Jalpaiguri and the Raja of Jalpaiguri himself has married a daughter of Bholanath. It would be impossible to suppose that the Raja of Jalpaiguri, holding such a respectable position among his community would marry the daughter of a person who has such a blot in his pedigree. An attempt has been made to show that the Raja of Jalpaiguri has discarded the daughter of Bholanath as his wife, but the witness Jatindra who gave evidence, as regards this marriage, could not venture to make such an allegation. Then there is the evidence of Tilokram having performed the mukhangi ceremony of Prithiram, which he would naturally do as a legitimate son, being the eldest when Prithiram''s dead body was cremated. Kamini Kumar Guha, the witness of the plaintiff, on whom much reliance was placed by the appellant, says that on the death of Khogendra Babu all the zemindars of Mechpara along with Bholanath sat together and dined. There is no question and not a tittle of evidence that Bholanath was at any time looked down upon as a man born out of wedlock.

13. The defendant''s witness, Rebati Kanta Chakravarty, who is the manager of a different estate, was in the service in the Mechpara estate from the years 1287 to 1319. He gives evidence as to the position which Purnimeswari occupied during her lifetime. He says that Khogendra used to call Purnimeswari "mother", and the witness lived with Khogendra for a long time. Then there is the evidence of this very witness that alter the death of Tilokram, all the members of the family observed asouch which would not be the case if Tilokram was not a legitimate son of Prithiram. There is also the evidence of Kamini, plaintiff''s witness, who says that Bholanath Babu and Khogendra Babu have the same guru (spiritual guide) and

purohit. This also would not be the case if Bholanath had not been legitimate son of his father. Taking all these things into consideration it seems to me absolutely wrong to say, after this lapse of time, that Bholanath and his brothers were the illegitimate sons of Prithiram. It is not stated that Purnimeswari belonged to a different caste. The only assertion made is that she came as a maid servant. Now even if that be so, as these people belong to the lower caste of the Hindu community, no elaborate formal ceremony is necessary for a legitimate marriage and I do not see that there was any difficulty in having the marriage performed between Prithiram and Purnimeswari. At any rate, she was never treated as a mistress of Prithiram, nor were her sons treated as illegitimate. The Subordinate Judge after stating the facts came to the opposite conclusion merely upon the ground that by the partition, Tilokram and his brothers took a little more than the share of illegitimate sons and a little less than the legitimate sons. In settling the dispute some one must make concessions and it is stated that at the time Tilokram was ill and he was asked by certain Pleaders as the eldest member of the family to make some sacrifice in order to purchase peace. That might have been a reason for his giving up a small share. It is not improbable that the dispute was with regard to ornaments in the hands of Purnimeswari. She was the last surviving wife of Prithiram and it is not improbable that after the death of two wives of Prithiram, she got all the ornaments belonging to those ladies and after the death of Prithiram, Khogendra and others would naturally ask for a share of those ornaments. That might have been the cause of the dispute and if she had those ornaments, Tilokram might very well have given up a small share in the property instead of giving up those ornaments. However that may be, there may be many other reasons why this reduced share was taken and I do not think that the inference of the Subordinate Judge that this concession was made because Tilokram and his brothers were illegitimate, can be the only inference as to why this concession was made. I do not think that this inference is. legitimate. Having regard to these circumstances, in my opinion, the plaintiff has failed to establish that Purnimeswari was not the married wife of Prithiram and Bholanath and his brothers were his illegitimate sons. That being so, the plaintiff''s claim should also fail on the ground that Tilokram was the eldest surviving son of Prithiram at his death. This appeal must, therefore, stand dismissed with costs. There will be two sets of hearing fee. The defendants Nos. 7,8 and 10 represented by Sir Binode Mitter, will get one set of costs, defendants Nos. 9 and 11 represented by the learned Advocate-Ganeral, and defendants Nos. 12 and 13 represented by Mr. Roy Chowdhury, will get another set of costs, to be divided equally among them. The minors'' costs have already been paid.

Panton, J.

14. I agree.