
(1872) 02 CAL CK 0007

Calcutta High Court

Case No: Appeal No. 3 of 1871

Maharani Hiranath Kohr

APPELLANT

Vs

Baboo Ram Narayan
Sing

RESPONDENT

Date of Decision: Feb. 22, 1872

Final Decision: Dismissed

Judgement

1. Mr. Money, for the appellant, took a preliminary objection, viz., that the suit had abated by reason of the plaintiff's death. His eldest son, who had been made a party in his place was not necessarily, on the death of his father, the heir to the original Raja; the suit did not survive to him;--see Act VIII of 1859, s. 100. [COUCH, C.J.--The objection had better be taken at the close of the argument.] The onus is on the plaintiff to prove the custom he alleges; but the only evidence he gave as to the exclusion of females from succession was that the widows of Lachiminath and Shambunath did not succeed. The defendant, and not the plaintiff, is the heir according to the ordinary Mitakshara law. Jackson, J., and the Court of first instance erred in taking into consideration the customs of the old Ramghur family. Those customs cannot affect Tej Sing, who was a new man put in the place of Makund King, and no sanad was ever given to him under which the customs of the old family were continued. If, however, this view be incorrect, still as the plaintiff seeks to set up a kulachar, or family custom, in opposition to the ordinary laws of inheritance, he must show that the custom has obtained in the family during a long succession of ancestors--Sumrun Singh v. Khedun Singh Sel. Rep., 116. It must be ancient) invariable, and established by clear and unambiguous evidence--Doe d. Jugomohun Roy v. Sreemutty Neemoe Dosses ⁷; Tara Chand v. Reeb Ram 3 Mad. H.C. Rep., 50 Raja Koernarain Roy v. Dhorinidhur Roy S.D.D. for 1858, p.1132, Baboo Gunesh, Dutt Sing v. Maharaja Moheshur Sing ⁸; The evidence does not show that such a custom has prevailed in the Ramghur family. The learned counsel also referred to the following cases as to custom: Musst. Mahamaya Dibeh v. Goureekaunt Chowdhry 1 Sel. Rep., 236., Russia Lal Bhunj v. Puresh Munnee S.D.D. for 1847, p.205 Ramgunga Deo v. Doorgamunes Jobraj 1 Sel. Rep., 270, Kalerpershaud Roy v. Degumber Roy 2 Sel. Rep.,

237, *Ranee Soomitra v. Ramgunga Manik* 3 Sel. Rep., 40, the *Tipperah case*--*Neelkista Deb Burmono v. Beer Chunder Thakoor* 1 W.R., 177: affirmed by the Privy Council on appeal; 3 B.L.R., P.C., 13; S.C., 12 Moo. I.A., 523., the *Pachete case*--*Maharaja Gurunarain Deo v. Unund Lal Sing* 6 Sel Rep., 282., the *Chota Nagpore case*--*Thakooras Chutturdharee Singh v. Thakoorai Telukdharee Singh* 6 Sel, Rep., 260. Custom must relate to a particular class of property, not to all kinds of property in a district or division. The settlement paper of chota Nagpore consists of six divisions, of which Ramghur is one, Markby, J., finds that it is a modern political division, and an appendix to the Fifth Report to Parliament shows that the ancient divisions were different 6 Sel, Rep., 260. Custom can only apply within certain limits, or to a certain area, [Mr. Woodroffe.--The plaint gives as its local and geographical limit, that it was the custom of the family and of the highland country. MACPHERSON J. The appendix to the Fifth Report ⁹, states that Ramghur forms part of the highland district. Is not that sufficient ?] Mr. Blochman proves that formerly these lands were a portion of the old Kokra country ¹⁰; at the present day some of them lie in zilla Bhagulpur, and others in zilla Monghyr. In the case of the *Chakaye Mehal*, which is situated in zilla Monghyr, a woman succeeded her son--*Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* ¹¹. There is a material difference between a raj and a mere zamindari ¹². Ramghur is a zamindari and not an ancient raj; the title of raja was first conferred on the owners by the British Government. They must be regarded simply as zamindars. [Mr. Woodroffe.--Both the Judges below are agreed that this is a raj, and, therefore, it is not open to Mr. Money to argue that it is a zamindari--*Roy Nandipat Mahata v. Urquhart* (1), and *Shahzadi Hajra Begum v. Khaja Hossein Ali Khan* (2). COUCH, C.J.--I agree with the decision in the latter case, viz., that no point can be argued on appeal which was not argued before the Division Bench; but in *Roy Nandipat Mahata v. Urquhart* 4 B.L.R., A.C., 191, Norman, J., appears to have misunderstood the ruling in *Shahzadi Hajra Begum v. Khaja Hossein Ali Khan* ¹³. when he held that, where two Judges comprising a Division Bench agree in their finding, the High Court has no power in an appeal under cl. 15 of the letters Patent to question that finding. Mr. Money must show that the quotation was raised in the Court below.] (It appeared that the question had been raised, and Mr. Money continued);--There is nothing in the nature of a zamindar's duties incompatible with female succession. A female may hold a ghatwali tenure--*Musst. Kustoores Koomaree v. Monehur Deo* ¹⁴, which was a case from this particular district. Harrington speaks of primogeniture and impartibility ¹⁵; but he never mentions female exclusion.

2. Mr. Ghose on the same side.--The petition of Ramnath contains no allusion to any local custom. The family usage of affixing the tilak on the forehead of the raja-elect is alone referred to, and this usage is also mentioned in certain proceedings of the Collector, dated 1812, 1836 and 1842. In the form sent to Shambunath to be filled up, he was merely asked to give the names of the sons, who, under the then circumstances, were entitled to succeed. He could not insert the name of his wife, and at that time he had no son. The kulachar was not set up in the case of *Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* until the present case had been decided by the Deputy Commissioner.

Nor was any evidence of local or family custom given in *Ranes Hingun Koonwaree v. Nundlal Singh S.D.D.* for 1857, p.155., in which case the widow succeeded. The plaintiff cannot be said to have proved his case until he has shown that there had been an instance in which a woman entitled to succeed was passed over: mere proof that no female ever has succeeded is not sufficient--*Raja Nugender Narain v. Rughoonath Narain Dey W.R.* from Jan'y to July 1864 P.20. and *The Government v. Monohur Deo*. There is no reliable evidence of custom: most of the witnesses either know nothing, or only speak from hearsay. The plaintiff has not shown that the usage prevails in the other six zamindaris in this district. The performance of the pujas mentioned by the witnesses is not an essential duty of the ruler; the plaintiff can sit under an umbrella in her own apartments. The idea of a female ruler is by no means new to the Hindu mind; there are many such instances in Sanskrit literature.

3. Mr. Woodroffe for the respondent.--There were two issues, the one relating to the devolution of the raj and estates at Ramghur, and the other to Gaddi Khurkhur. No reference has been made by either of the learned counsel for the appellant to the latter, and I am, therefore, not called upon to say anything with respect to it. [COUCH, C.J.--Although the Judges of the Division Bench have not touched upon that point, yet, if I see, on the whole case that part of the judgment is wrong, I shall not allow it to stand merely because counsel have not argued it.] According to the Full Bench Ruling in *Roy Nandipat Mahata v. Urquhart* 4 B.L.R., A.C., 181., I ought to have been relieved of the necessity of showing that Ramghur is a raj, since the Judges below did not differ on the point. [COUCH, C.J.--That case, like the present one, was before three Judges it was not a Full Bench decision, and we are not bound by it as we should be by a Full Bench ruling on a reference by a Division Bench.] Where by the Charter an appeal is given to the High Court when two Judges differ, the judgment on appeal is a judgment of the High Court, whether three, four or five Judges sit, [COUCH. C.J.--It is a judgment of the High Court, and as such is binding on the parties, not on any other Court.] We ought to take it that Ramghur is a raj; it has been treated as such throughout. The succession to the dignity of a raj is exceptional, by reason of the impartibility of the dignity--*Koonwur Bodh Singh v. Seonath Singh* 2 Sel. Rep., 92., *The Secretary of State in Council of India v. Kamachee Boys Sahaba* 7 Moo. I.A., 476., and *Baboo Gunesh Dutt Singh v. Maharaj Moheshur Singh* 6 Moo. I.A., 164; see p.187. The title of raja is not absolutely essential to the tenure of a raj--*Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* 12 Moo. I.A., 1.. The estate of a raja is not necessarily impartible--*The Court of Wards v. Rajkumar Dio Nandan Sing* ¹⁶. but if the estate be impartible, it must be appurtenant to a raj. with the consent of the heirs; It may, perhaps, be divided but the family usage cannot be broken without such consent--*Ranee Hurrosoondree Dibbea v. Rajah Bishennath Singh S.D.D.* for 1847, p.139; S.C., 2 W.R., 81. The defendant admits that the rule of primogeniture obtained in this family: but primogeniture means the primogeniture of males; the case of *The Widow of Raja Zorawar Singh v. Koonwur (sic) Singh* 4 Sel. Rep., 57 and *Mussamut Maharanee v. Benee Pershad Rai* ¹⁴. are instances of the exclusion of females as a result of: the right. So in the case of the Polliam tenure of Southern India, the Privy Council held

that a Polliam is an ancestral estate of the nature of a raj; and although it may belong to an undivided family, yet it is not subject to partition. It can, be held by only one member of the family, who is styled the Polligar. The other members of the family are entitled to maintenance. The succession is to the male cousin of the Polligar last seized in preference to his widow--*Naragunty Lutchmeedavam v. Vengama Naidoo* 9 Moo, I.A., 66.. The defendant must prove that, by family custom, a female can succeed to the raj. Now indivisibility is a consequence of primogeniture; but if the mother succeeds, the daughter must succeed, and if there are several daughters either all will take as co-parceners, in which case the indivisibility is lost, or the custom must be that the eldest alone shall take; but no such custom has been proved. The succession of females is exceptional, and depends upon particular texts--*Kalidas Dos v. Krishan Chandra Das* 2 B.L.R., F.B. 103; see. p.111 and *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* 9 W.R., (sic); sec p.508. Where a woman succeeds, she does not take as heir: the heir is traced from the husband when a widow succeeds, and from the son when the mother succeeds. In like manner, when a widow or mother takes on partition, the next heir is traced from the male after whom she took. The *Mitakshara*, Chapter II, s. 1, cl. 25, says:--", The text of *Narada* which declares the dependence of women, "a woman has no right to independence," is not incompatible with their acceptance a property: even admitting their thralldom." *Menu*, Chapter V, vv. 147 to 151 mentions her dependence on males in various orders. The woman remains in a state of thralldom to the next male heir, which is incompatible with the position of a ruler. *Markby, J.*, was in error in saying that *Ramjiwan*, the zamindar of *Rajshahye*, was succeeded by his widow *Rani Bhowani*. *Ramjiwan* was succeeded by his grandson *Ramkunt*, whom he had adopted; *Rani Bhowani* was the widow of *Ramkunt*, and not of *Ramjiwan*, and on *Ramkunt*'s death, *Rani Bhowani* did not succeed; she entered into possession of the estate, upon the death of her son *Ramkishen*, as guardian of his son; see 3 *Harrington's Analysis*, 311; *Ranee Kishomones Debea v. Kashes Soondee Debea* S.D.D. for 1857, p.1136, and the same case under the name of *Maharanee Kishen Mones Debia v. Kashi Soonduree Debia* ¹⁷. *Mr. Money* said that *Ramghur* is only a zamindari, but that will not affect the impartibility. None of the cases make any difference between a sovereign raj and a dependent raj, and the succession in large zamindaris or in estates like *Folliams* may be governed by the same rules as regulate the succession to a raj--2 *Colebrooke's Digest* p.119; 1 *Strange*, Ch. 9, p.198; *Vyavashta Darpana*, p.12, *Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* 12 Moo. I.A., 1 Then it is said that no sanad was given to *Tej Singh* when the ancient estate of *Ramghur* was granted to him; but in the case last cited the Privy Council held that, in the case of a grant of an ancient estate by the vis major of the ruling power, the grant carries with it the incidents of the old family tenure, unless there is evidence of a contrary intention on the part of the grantors; see also *Khajah Assanoollah v. Obhoy Chunder Roy* 13 Moo. I.A., 317. The successive pottas to *Tej Sing* and his descendants describe them as "rajas." But apart from any rights arising from the impartibility of the estate, I contend that this, being an ancient raj, is not inheritable by females. In the *Shivagunga* case--*Katama Natchier v. The Raja of Shivagunga* ¹⁸. their Lord" ships say the appellant may recover the zamindari, but with out prejudice to the

rights of the appellant and her sisters inter se. This may seem to militate against my view, but it is explained in the case of *Jowala Buksh v. Dharum Singh* 10 Moo. I.A., 511, at p.534, where their Lordships state that it was admitted that this would not have been the course of descent according to the Mitakshara if the property had been ancestral; and proceed to say that the reason why they preferred the title of the daughter to that of the nephew of the last possessor was that the Shivagunga raj was the separate acquisition of the deceased, and, therefore, passed according to the canon which regulates the descent of separate property, and not according to that which determines the succession to the joint or ancestral property of an undivided family. The same reason for the decision in the Shivagunga case is given in *Raja Suraneni Venkata Gopala Narasimha Row Bahadoor v. Raja Suraneni Lakshma Venkama Row* (2). Mr. Ghose mentioned two cases, in which a female succeeded, but in the first, *Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* 13 Moo. I.A., 113, at p.140., the Judges declined to go into the question whether, upon the evidence as it stood, there was any proof of the existence of the alleged custom; and in the second case, *Ranee Heengun Koonwari v. Nundlal Singh S.D.D.*, 1857, p.155, one of two brothers died leaving a widow; the other brother claimed under a deed of renunciation: the deed was disbelieved, and no family custom was proved. The third ground is, that this property, and the persons claiming it, are subject to the Mitakshara law, and that the defendant, therefore, cannot inherit. In *Bhya Bam Sing v. Agar Sing* 5 B.L.R., 293, the Privy Council deals with the question of the preference of males under the Mitakshara law: the principle there followed is the same as in *Thakur Jibnath Sing v. The Court of Wards* ¹⁹. A family continues joint until it has expressed a wish to be separated. The law of succession follows the nature of the property and of the interest in *Natchier v. The Raja of Shivagunga* 9 Moo. I.A., 539; see p.610. In *Tej Sing*'s time the Ramghur estate was indivisible, and it has not since then been made divisible. On the death of *Tej Sing* all his sons took as interest by the Mitakshara law of descent, but by custom the eldest alone took the raj. The plaintiff's witnesses not only say that they never heard of a woman succeeding, but they positively state that the custom is for the eldest son to succeed. [COUCH, C.J.--The weak point in your evidence appears to be that from *Tej Singh*'s time to the present day, there has been no case in which a woman was entitled to succeed, but was passed over. The evidence of tradition in the family is very vague; the witnesses were not properly examined]. The natural inference from the fact that no woman ever has set upon the guddi is that no woman could do so. It is not necessary to enquire at the present day what the duties of a zamindar formally were; where a grant with emoluments is made to a person, for service to be performed, the grant does not cease to exist when those services are no longer needed--*Forbes v. Mir Mahomed Taki* 5 B.L.R., 529.. The case of *Musst. Kustoors Kowaris v. Monehur Deo*. ²⁰, therefore, proves nothing. It is not the peculiar nature of the ghatwali (sic), but the custom of primogeniture in the Balaghat district which precludes females from inheriting such tenures in Balaghat; see. the decisions of 1845 and 1852 mentioned in Colonel Dalton's Report.

4. The plaintiff sued the Court of Wards, who are in possession. The Maharani's claim is somewhat in the nature of an interpleader suit; the onus, therefore, is not more on the plaintiff than on the Maharani. [COUCH. C.J.--The plaintiff sues to establish his right to the raj; he must prove his case.] I submit that the evidence given by him has sufficiently proved his case.

5. If the preliminary objection taken by Mr. Money be good, his appeal must be dismissed. Ram Narayan was alive at the time of the decree and also of the appeal from which this appeal arisen.

6. Mr. Money, in reply.--Ramghur was an ancient zamindari, and as such it was impartible; it was not an ancient raj. It does not follow from the impartibility that females are exclude, any more than the exclusion of females is a necessary consequence of the impartibility of a borough-English tenure. Nor does the rule of primogeniture necessarily exclude females,--the word simply means seniority of birth. The present case is on all fours with the Shivagunga case--Katama Natchier v. The raja of Shivagunga 9 Moo. I.A., 539. The estate of Tej Sing was a new self-acquired estate. The purchaser of an estate does not take it subject to the usages prevailing in the family of its former proprietor--Gopal Dass Sindh v. Norotum Singh 1 Sel. Rep., 72. [COUCH, C.J.--To make this like the Shivaganga case, the estate should have been acquired by Ramnath.] It makes no difference whether the husband or the ancestors of the husband acquired it. The mother's propinquity to the son is greater than the father's she therefore, makes the property. The plaintiff lived separate and apart from the defendant's husband, and on this ground his claim must fail--Radkishor Rai v. Widow of Santoodas ²¹.

Couch, C.J.

7. (His Lordship, after briefly stating the facts, continued):--The question at once arises what was the nature of the estate granted to Tej Sing, whether it was a fresh grant of the family raj with its customary rule of descent, or a grant of the lands formerly included in that raj. to be held as an ordinary zamindari. To this the judgment in the Privy Council in Baboo Bear Pertab Sahee v. Maharaja Rajender Pertab Sahee 12 Moo. I.A., 1 is closely applicable. There, at page 34 of the report, it is said:--"There was not in this, as in the Shivagunga case 9 Moo. I.A., 539, a new sanad. "We have no evidence of the intention of the grantors except that which is to be collected from the proceedings and correspondence already referred to; nor have we any record of the proceedings before the Govener-General, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee Sahee. Again, it cannot be denied, that in these proceedings the term " raj" is never used, or that in some of them the subject of the grant is spoken of as "the land in Hunsapore which belonged to raj Futteh Sahee." On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the company, had never been broken up. The policy of the decennial settlement was to form a body of landholders, by ascertaining in whom

the zamindari interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue, so as to give them greater fixity of tenure. Lord Coruwallis's Government determined to set up Chutterdharee Sahee as the zamindar with whom the settlement in respect of this property should be made. But the estate of a zamindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependant talukdars, or other under-tenants, ryots of various classes, and others; and the decennial settlement, as a reference to the rules re-enacted by Regulation VIII of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed that the settlement was made precisely as it would have been made had the estate continued in the line of Raja Futteh Sahee; and, therefore, that the subject conferred on Chutterdharee Sahee was the old zamindari with all its incidents, excepting at most its descendible quality. It seems to follow, that the intention to alter that quality, if it existed, would have been expressed. Again the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favor of the hypothesis that the intention of Government was to restore the zamindari as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Baja Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a vis major." The present case is stronger in favor of this view of the grant, as the ten years' settlement was made by the Government with the eldest son of Paresnath Sing, there being other sons living, which would not have been right if it had been an ordinary zamindar the property of the undivided family. But this not all. [His Lordship here stated the effect of the decision in *Keonwur Bodh Sing v. Seonath Singh* 2 Sel. Rep., 92 as given above, and proceeded.] We have no evidence in the case of the custom or usage of the family before the grant to Tej Sing; but the want of it is supplied by this decision, which declared the estate to be impartible, the decision being pronounced in a suit between persons who are in privity with the plaintiff and defendant in this suit.

8. Having arrived at the fact that this is an impartible estate, we have to consider whether the defendant, & female, can succeed to it to the exclusion of the plaintiff, who is the nearest male heir. Where a family is governed, as this family was by the law of the Mitakshara, by which, in an undivided family, females do not inherit as long as there are any male members of the family, it is improbable that a custom that females should inherit to the exclusion of males would grow up with, and form part of, a custom that the eldest male member of the family should inherit. The object of the latter custom would be fully attained without the other, and there is no necessary connection between them. Before considering the evidence in this case, it will be convenient to refer to the decisions which are applicable to it.

9. In *The Widows of Raja Zorawar, Singh v. Koonwur (sic) Singh* 4 Set. Rep., 57, the widows of Zorawar Singh sued his brother to recover possession of an estate in the Jungle Mehals, alleging that by the custom of the family, of the Pergunna Jurria, and of the other jungle estates, the eldest son of the late incumbent took the whole estate, the other sons receiving lands for their support; and that, in the event of the zamindar leaving no son, his widow took the estate to the exclusion of his brothers. A deed of gift by Zorawar Singh to the plaintiffs, who were his second and third wives, was also set up. The Provincial Court of (sic) in which the suit was brought, put a question to the pandit of the Court, with directions to give an answer according to the shastra as current in the Western Provinces; and the answer was that the gift, if made, was not valid, and the right of inheritance in the estate (sic) on the death of the donor in his two brothers. The Provincial Court of Calcutta having dismissed the claim of the plaintiffs, they appealed to the Sudder Dewanny Adawlt, One of the Judges there, upon considering the whole case, held that the decision of the Provincial Court should be reversed; but the other two held it to be proved that the estate had always gone to the chief male heir, and confirmed the decision of the Provincial Court. In this case, the estate was ancestral, and the family undivided, and the impartibility of the estate only interferes with the ordinary law so far as to make it pass to the chief of the male heirs. In (sic) *v. Vengama Naidoo* 9 Moo. I.A., (sic), the estate which was the subject of the suit, was a Polliam, a tenure known in Madras. It was an ancestral estate of the nature of a raj not subject to partition, and could be held by only one member of the family who was styled the Polligar; and it was held that, being an ancestral estate, the succession vested in the nearest undivided male cousin of the Polligar last seized, who died without issue male, in preference to his widow. It appears in the judgment, page 86 of the report, that this was the opinion of the pandits who were consulted by the Sudder Court; and that it was adopted by the Court, and no objection was urged to it on the appeal, the ground taken being that it was not an ancestral estate, nor were the parties in the suit members of an undivided Hindu family. The answer of the pandits, page 74, shows that the ground of their opinion was that all the members of an undivided family have a joint right in their ancestral property, although only one of them, being capable, continues in possession thereof. The case of *The Collector of Madura v. Verracamoo* (sic) 9 Moo. I.A., (sic) is clearly distinguishable from this, and was decided upon its own peculiar facts. Markby, J., referred to *Katama (sic) v. The Rajah of Shivagunga* (1) as an instance of a woman succeeding to a raj, and near the end of his judgment said, that between impartibility and the exclusion of females, there is no connexion whatever. That need not be dispute. It is not upon the impartibility of the estate, but upon the family being undivided, and the law of succession to ancestral undivided property, that the exclusion of females rests. This appears clearly in the *Shivagunga* (1) and subsequent cases. The zamindari of Shivagunga (1) was created in 1730 by the Nabab of the Carnatic; and by a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the zamindari, which it appeared was treated as an escheat for want of lineal heirs, to Gowery Vallabha Taver, who was collaterally descended from the progenitors of the first zamindar. By a sanad, dated the 22nd of April 1803, the zamindari was confirmed to him in. perpetuity, with power to transfer it by sale

or gift, on payment to the Government of a permanent annual jumma. By the decree appealed from the son of Oya Taver, the elder brother of Gowery Vallabha Taver was held entitled to the zamindari in preference to his surviving widow, on the ground that they were undivided brothers. In the judgment of the Judicial Committee, page 605 of the report, it is said that the substantial contest was whether the zamindari ought to have descended in the male and collateral line, and the determination of that issue depended on the answers to be given to one or more of the questions:--First, were the brothers undivided in estate, or had a partition taken place between them ? Second, if they were undivided, was the zamindari the self-acquired and separate property of the younger ? And if so, third, what is the course of succession, according to the Hindu, law of the South of India, of such an acquisition, where the family is in other respects an undivided family ? From these questions, it is clear that the Shivagunga case, 9 Moo. I.A., 529 was different from the present; and the decision in it is not applicable. But the law applicable to it is stated in the judgment at page 589 of the report, where it is said that "if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the zamindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." We have thought it right to refer to this case at some length on account of the reference to it in Markby, J.'s judgment. Another authority for the exclusion of females, where the property is ancestral and the family undivided, is in the judgment of the Privy Council in Jowala Buksh v. Dharum Singh 10 Moo I.A., 511, at p.533, where it is said that Lal Sing, a nephew, whose legitimacy was disputed, if the legitimate male heir of the great ancestor, would have taken the raj on the death of his uncle to the exclusion of the widow, the property being assumed to be ancestral and the family undivided; that in the case of Katama Naichier v. The Rajah of Shivagunga (2), it was admitted that this would have been the course of descent according to the Mitakshara if the property had been ancestral; and that the reason of that decision was that the Shivagunga raj was the separate acquisition of the deceased. And in the judgment of the Privy Council in a latter case, Rajah Suraneni Venkata Gopala Narasimah Row Bahadoor v. Rajah Surhneni Lakshma Venkama Row 13 Moo. I.A. 113, at p.140, it is again said that, in the Shivagunga case 9 Id., 539, the impartible zamindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute, and the ruling of the Court was, that in that case the zamindari should follow the course of succession as to separate property, although the family was undivided, but that if that zamindari had been shown to have been an ancestral zamindari, the judgment of the Board would, no doubt, have been the other way. There is, however a judgment of the Privy Council, which is referred to by Markby, J., as the Tippera case, in which a different view is taken, and which we are unable to reconcile with the previous decisions. In Neelkristo Deb Burmono v. Beer Chunder Thakoer 12 Id. 523; S.C., 3 B.L.R., P. C., 3; see p.13, their Lordships say at page 540 of the report:--"Still when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law by judicial construction a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common

incidents of coparcener ship. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, were it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir." But in a later case, we find their Lordships adhering to the law laid down in the earlier cases. In the judgment in *Stree Raja Yanumula Venkyamah v. Stree Rajah Yanumula Boochia Vankondora* 13 Moo. I.A., 333, after stating that the question upon which the parties in the suit joined issue and went to trial was, whether the family of which the plaintiff and the appellant's husband were members was an undivided or a divided Hindu family, and that the Courts below had properly decided that issue in favor of the plaintiff,--they say: "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 that in the ninth volume of Moore's Indian Appeals, which is generally known as the Shivagunga case 9 Moo. I.A., 539. 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 9 Moo. I.A., 539, 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 9 Moo. I.A., 539 will be found to proceed solely and expressly on the finding of the Court that the zamindari in question was proved to be the self acquired and separate property of Gowery Vallabha Tavar." And after quoting from the judgment, they say: "It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that, if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India." And in observing on the evidence as to the estate being the separate property of the appellant's husband, they say:--"These grants, by way of maintenance, are, in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate, in favor of the junior members of the family, who, but for the impartibility of the estate, would be co-parceners with him." This judgment is closely applicable to the present case. There is here an ancestral impartible estate and an undivided family; for there is no proof that the family of Tej Sing had become divided, and no issue was raised as to that. If there had been no evidence of custom in the case, we should have held, upon the authority of the decisions we have referred to, that the plaintiff is entitled to succeed to the estate.

10. The evidence, oral and documentary, is fully stated in the judgments in the Division Court, and it is not necessary to re-state it. It shows that, on the only occasions since the grant of the estate of Tej Sing, when a female might have inherited, she was excluded. It is true that, in both cases, a brother succeeded in preference to the widow of the

deceased, but this could only be justified by the family being an undivided one; and the undivided family was not that of Sidnath Sing, the father of the brothers, but of Tej Sing, of which family the plaintiff is a member. And that this succession was not allowed, as was argued by the appellant's counsel, because a brother was to succeed, is, we think shown by the return made by Shambunath Sing on the 25th June 1846, in which he acknowledged the plaintiff as heir next in succession to his surviving brother Ram Nath. The plaintiff's claim is, therefore, supported by such evidence as there is of a custom in the family. It does not, in our opinion, depend upon a local custom, and probably the instances, which appear to be evidence of a local custom may all be explained by the rule of law which, we think, is established by the authorities we have quoted. The judgment of Markby, J., for the defendant appears to be founded on the assumption that the succession was governed generally by the rule of inheritance of separate property according to the Mitakshara, treating separate as if it were self-acquired, and this is supported by the judgment in the Tippera case--Neelkristo Deb Burmono v. Beerchunder Thakoor 12 Moo, I.A., 523; S.C., 3 B.L.R., P.C., 13.; but all the other authorities appears to show that this is not correct. Where the property is ancestral and the family undivided, a custom modifying; the law must be a custom to admit females, not a custom to exclude them. In our opinion, the plaintiff is entitled to succeed to the estate.

11. Nothing is said in the judgments in the Division Court about the Khurkhur property, and the judgment of the lower Court as to that was confirmed apparently without any difference of opinion between the learned Judges. It has not been argued before us that this part of the decree is erroneous. The lower Court found that the defendant had not proved her right to this property; and assuming that this question is before us in the present appeal, which we think it is, having been raised by the grounds of appeal to the High Court, and by the grounds of the present appeal, we cannot consider the evidence of the mohurir of the defendant as sufficient. On a question of fact, we think we ought to be guided by the rule of the Privy Council, where there have been the decisions of two Courts to the same effect. We think the appeal should be dismissed with costs. The decree of the lower Court will thus be allowed to stand;

¹. Koonwur Bodh Singh v. Sevanth Singh, 2 Sel. Rep., 92 In the report of this case the names are as follows:--Jusri Sing is called Jye Sree Singh, Maninath is called (sic), and Sidnath is called Seonath.

². Bhai or Cousin-brother.

³. Vyavastha Darpan by Shama Charan Sirkar, p.19, foot-note, 2nd edit.

⁴. Cousin-brother.

⁵. 1 Harrington's Analysis, pp. 194--297.

6. Ib. 311, the passage is as follows:--Ramjiwan, who long had the management of the zamindari, died about the year 1733; having provisionally adopted his grandson, Ramkunt, who succeeded immediately on Ramjiwan's death, and was afterwards confirmed by stand in. 1733. The Rani Bhowani, his widow, is the present incumbent.

7. Clarke's Notes of Cases during 1831 and 1832, p.101.

8. 6 Moo. I.A., 164. See also the decision of the Privy Council in Ramalakshmi Ammal Sivananantha Peru mal Sethurayer, 7 Mad. Jun., 254.

9. The Fifth Report by the Select Committee on the affairs of the East India Company, p.417.

10. Asiatic Society's Proceedings, Part I, No. 2, p.111

11. Before Mr. Justice Norman and Mr. Justice E. Jackson.

TIKAIT DURGA PRASAD SING AND OTHER (DEFENDANTS) v. MUSSAMAT DURGA KUNWARI (PLAINTIFF).*

The 5th January, 1870.

Baboos Anukul Chandra Mookerjee and Chandra Madhab Ghose for the appellants.

Baboo Annada Prasad Banerjee for the respondent.

NORMAN, J.--This was a suit by the plaintiff, Mussamat Durga Kanwari for possession of two-thirds, and a declaration of title to the other one-third of a zamindari mehal called Chakaye in zilla Monghyr. Her title is a very plain one.

Tikait Futtess Narayan Sing died on the 14th of Chaitra 1270, leaving three widows, Lallit Kunwari, Narayan Kunwari, and Durga Kunwari. Durga Kunwari, the plaintiff, was pregnant at the time of her husband's death, and in the month of Sranba 1270, gave birth to a son, Gurda Narayan, who lived till Chaitra 1272. On the death of Gurda Narayan, who, of course, on his birth, succeeded to the property in the entire mehal Chakaye as heir of his father, the plaintiff, as his mother and heiress, became entitled to the entirety of the mehal. She has been kept, or been put out of possession of two-thirds, by the other two widows of her husband, with one of whom at least, Lallit Kunwari, the appellants, Durga Prasad Sing, who is the third defendant in this case, appears to have colluded.

Durga Prasad Sing stands to the late proprietor Gurda Narayan, in the relation of great grandfather's brother's great grandson, and it may be that after the death of the plaintiff, he will be entitled as next heir to the property; to which, according to ordinary Hindu law, the plaintiff is entitled as mother and heiress of Gurda Narayan during her lifetime.

By his written statement, this appellant, Durga Prasad Sing, first of all (sic) up that the plaintiff was not in possession even of the one-third share which she does not claim. He goes on to say that the plaintiff was not entitled to the estate which had belonged to her on, because the widows and minor son lived in (sic) and as a joint family with him; that the entire property was ancestral; and that under the Mitakahara at her death of the plaintiff's husband and of her son, he, Durga Prasad, was entitled to the ancestral estate. Next he sets up a title that he, Durga Prasad, with, the consent of the three wives of Futteh Narayan, being rightfully entitled, was installed as rightful heir by being marked with the (sic) in 1274. Further, he says that the plaintiff had gone away from her husband's house with one Ahlad Panday, and was living an unchaste life.

We proceed to consider the four defences which he sets up. He does not attempt to show that the plaintiff was not in possession of one-third of the pro-

As to the second, the Sub-Judge finds that the parties were not in possession of the estate as a joint family estate. In fact, it is clearly proved that this ghatwali estate descended from the father to the eldest son, and was not held jointly, the younger sons having allowances made to them. Therefore, the second ground utterly fails.

As to the third ground, Durga Prasad Sing attempted to give evidence that there is a family custom or kulachar, by which in this family females were excluded from inheritances. He did not make any averment to that effect in his written statement, and therefore did not, perhaps would not, pledge himself to on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such cases. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or kulachar, the existence of which he now suggests. He does not even ever in his written grounds of appeal that such a custom is proved. We think that it would be a great injustice to the plaintiff to raise that issue now, and to allow the defendant to come in upon an allegation as to the truth of which he has never pledged himself, and which the plaintiff has had no opportunity or meeting. We therefore decline to go into the question whether, upon the evidence as it stands there is any proof of the existence of any such custom as that now alleged by the vakeel of the defendant Durga Prasad. It is said that the plaintiff's witnesses admit the existence of a custom to exclude females. The only statement to which the learned vakeel for the defendant can point as in any degree substantiating that contention, is the statement of Alam Chand, one of the "plaintiff's" witnesses, who says:--"I know of no case in which women have succeeded to any guddi in Chakaye." Very likely, but ignorance is not proof.

The charge that the plaintiff has been living an unchaste life has been abandoned and as has been shown by the Sub-Judge, has been contradicted by the widow Narayan Kunwari, whose evidence shows that there is no foundation for such a charge.

We think that the suit has been very properly decreed. We think it is evident that the defence set up is a mere fraudulent contrivance and a reckless attempt on the part of Durga Prasad Sing, a possible further heir, to defend the rights of the plaintiff, whose title as heiress of her son is clear.

* Regular Appeal, No. 133 of 1869, from a decree of the Subordinate Judge of Bhangulpore, date the 23rd March, 1869.

12. 3 Harrington's Analysis p.329.

13. Id., 86.

14. W.B., from Jany. to July (sic) p.39

15. Harington's Analysis, p.194.

16. Before Mr. Justice L.S. Jackson and Justice Macpherson.

THE COURT OF WARDS ON BEHALF OF RAJKUMAR SHIORAJ NANDAN SING (ONE OF THE DEFENDANTS) V. RAJKUMAR DIO NANDAN SING (PLAINTIFF) AND OTHERS (DEFENDANTS).^{**}

The 11th July 1871.

The Advocate-General for the appellant.

Mr. Cowie for the respondent.

MACPHERSON, J.--The main question in this appeal is as to the position of the Raja of Seohur in Tirhoot.

The contention for the plaintiff (who appears as respondent before us) is that, on the death of a raja of Seohur, the estate passes to his heirs according to

the ordinary law of inheritance prevailing among Hindus in the Tirhoot district. The contention for the defendant (the appellant) is that the estate is impartible, and passes with the raj from raja to raja, the other members of the family being entitled to maintenance only. The Court of Wards defends the suit, and now appeals to this Court, on behalf of Raja Shioraj Nandan, whom the plaintiff admits to be the present raja Shioraj Nandan is the plaintiff's nephew, being the elder son of the late Raja Shio Nandan, who was the plaintiff's elder brother. Shio Nandan and the plaintiff were the two sons of Jadu Nandan, the younger brother of Raja Raghu Nandan, on whose death the raj passed to his-nephew Shio Nandan. Tho plaintiff by his case in fact admits that he himself and his father Jadu Nandan were only "babooos," i.e., persons not entitled a decree of the

Subordinate Judge of to the raj, although standing in such a relation to a deceased raja that they rank among his immediate heirs, according to the ordinary rules of the Hindu law of succession and inheritance. While the plaintiff states in his plaint that the ordinary rules of Hindu law determine the line of successions and inheritance, so far as property is concerned in this family, he does not actually claim the full eight annas share, to which, if that law be applicable, he would be entitled. He asks for a six-annas share only, having relinquished, he says, a two-annas share in consideration of the position of his elder brother, the Raja Shio Nandan. The case for the appellant is that the property belongs to the raj, and goes with it, and is not susceptible of partition, and that there has obtained in this particular family, from time immemorial, a custom or kulachar, according to which the raja for the time being appoints one competent member of the family to be hit successor to the guddi who, on the death of the person appointing him, becomes the gaddi-nishin raja, and taken the whole estate, the other members of the family being entitled merely to maintenance.

The lower Court decided in favor of the plaintiff, holding that it lay upon the defendant to prove the custom or kulachar alleged, and that that kulachar had not been proved. The Subordinate Judge has written a very careful, and, in most material respects, excellent judgment. Concurring, as I do, in nearly all of the conclusions arrived at by the Subordinate Judge, who baa gone as all of the into the case, it is unnecessary that I should now go through the evidence in detail.

The Subordinate Judge shown, quite conclusively, in my opinion, that the kulachar set up for the defence is not proved. There is certainly evidence to show that subsequent to the time of the permanent settlement, the estate has not usually been dealt with according to the ordinary rules of inheritance and succession among Hindus; but it is clear to my mind that it has not been uniformly (if ever) dealt with according to the principle relied on by the defendant.

The custom or kulachar pleaded may be treated as consisting of two distinct parts:-

1. A custom according to which the raja for the time being appoints one competent member of the family to succeed him on the gaddi as raja; and
2. A custom according to which the entire property passes with the raj from raja to raja, the other members of the family being entitled merely, to maintenance.

It is as to this latter branch of the kulachar that the chief contest is in this suit; but the plaintiff also denies that the rule of succession to the raj is as alleged. The plaintiff practically admits that as a matter of fact, the principal member for the time being of the family has, for generations, enjoyed the title of raja. In his plaint he states that he and "Raja" Shio Nandan were the two sons of " Baboo" Jadu Nandan deceased and nephews of "Raja " Raghu Nandan, and grandsons of "Raja" Dushtada man; and that, although he and his brother inherited the property, under the ordinary law, in equal shares, he (the

plaintiff) had relinquished a two-annas share, and contented himself with six annas only, on account of his brother Raja Shio Nandan's position. And when Shio Nandan died, the plaintiff himself wrote immediately to the authorities giving notice of the fact, and adding that, before his death, he had conferred the tilak and raj-riasat on his son Raja Shioraj Nandan (the defendant in this suit). On the evidence generally too, there is no doubt that the principal member of the family has, for many generations, enjoyed the title of raja. It was not until the year 1859 that the title was formally and expressly granted by the British Government. In that year Lord Canning formally conferred the titles of raja and behadur on Shio Nandan, who in (sic) is addressed as "Raja" Shio Nandan, nephew of "Raja" Raghu Nandan, deceased. But while admitting that the principal member of the family, for the time being, enjoyed the title of raja, the plaintiff does not admit that the kulachar as to the succession to the gaddi was such as is represented by the appellant. The kulachar pleaded is simply that the existing Raja, of gaddi-nishin, nominates a competent member of the family, and that the person nominated succeeds. The evidence on the record, however, does not prove that this is the kulachar. Under the circumstances, it is not necessary that I should determine in what precise manner the succession to the raj, as independent of and separate from the property, has been regulated. If I had to determine it, I should probably declare that, whether competence ever properly entered into the question or not, the general rule was that the gaddi-nishin, (or whoever also had the power of appointing) nominated, and was bound to nominate, the eldest or other son, and, failing son, the eldest or other nearest nephew. More competence clearly had little (if properly anything) to do with it. The Raja of Banaras, who is a relative of the Seohur family, and who has been as times more or less mixed up in its affairs, was examined as a witness for the defence, and his evidence is much relied on by the appellant. But he speaks to a kulachar not such as is pleaded, but one simply by which, the property would keep in the direct male line, the eldest son succeeding first; failing sons, the eldest nephew, and so on. Moreover, we find that both the plaintiff and the defendant Shioraj Nandan are obliged to make title through Raja Dushtadamin, who neither was the direct male heir of the last preceding Raja, nor was nominated by him. Raja Dushtadamin was nominated by the widow of Raja Srikrishna some considerable time after the death of the latter. Srikrishna died leaving Ganga Prasad, his elder son, and Dushtadamin, his second son. On Srikrishna's death, Ganga Prasad succeeded to the raj, and died shortly afterward leaving two sons, Din Dayal and Gauri Nath, Ganga Prasad apparently made no nomination of a successor. At any rate, when he died his sons were both of them passed over, and their made Dushtadaman took up the raj. This he did under a letter of appointment from the widow of Srikrishna. In this letter the widow recites that, on Srikrishna's death she had given the tilak to his son Ganga Prasad to be raja. She says:--"Ganga Prasad has since died, and his son has little sense, and is unqualified. Therefore, agreeably to the decision of my relations, pandits panch, and neighbours, old faithful servants, and other persons. I have given the tilak of the rajji to "Raja" Dushtadama, ko." This Dushtadaman it was who nominated and was succeeded by Shio Nandan, who nominated and was succeeded by the defendant, Shioraj Nandan. Ganga Prasad died about 1810, Dushtadaman about 1819, Raghu Nandan about 1851, and

Shio Nandan in May 1867. These facts as to the appointment of Dushtadaman to succeed to the raj show that the succession did not go always, as alleged by the defendant, necessarily by nomination by the gaddi-nishin, also that it did not invariably go in the manner indicated by the Raja of Banaras Altogether on the evidence, the greatest uncertainty exists as to any kulachar regulating the succession of the raj. There being this uncertainty as to so, much of the alleged kulachar as relation to the right to succeed to the raj, the case seems to me to be even more unfavourable to the appellant on the second branch of the alleged kulachar, as to the impartibility of the estate. In my opinion it is proved distinctly that the estate is not importable, but thus on the contrary, it has been frequently divided. It is not disputed that a century ago, the retain, as held by Raj Sing (through whom both parties claim,) comprised the for (sic) and (sic) Sing had six sons, of whom (as the where died without issue) I need name only Dalip, Parthi, and Satrajit. His eldest son Dalip succeeded to the raj, and Dalip was succeeded by his son Dhurup. Dhurup had no son, but had a great grandsons named Bir Kishor (the son of a daughter of Dhurap). Raj Srikrishna, whom I have already mentioned, was son of (sic) (the second son of Gaj Sing), and therefore was a first (sic) of Dhurup, by whom he was appointed raja by a deed of gift dated apparently in 1199 F. (1782). In this deed of gift, I perhaps ought to mention, Dhurup describes Srikrishna as "my first cousin, who whole be entitled on my (sic) be succeed to the raj and property under rightful title." Satrajit, the third son of Gaj Sing, had (amongst others) a son named Abdhut. The family standing thus, and the four (sic) Majwa, Samarson, (sic) and Babra, having originally belonged to Gaj Sing, we find that at the time of the permanent settlement the two (sic) of Majwa and Samarson were settled with Bir Kishor, the great grandson of Dhurup, whose heirs are now known as the Bettiah Rajas, and still hold these two perguannas, which were thus settled with Bir Kishor. At the same time the remaining two perguannas (sic) and (sic), were settled with Raja Srikrishna (son of Parthi) and Abdhut (son of Satrajit) in shares of eight annas each.

Nothing can show more conclusively then this, that, at the time of the permanent settlement, the property was not treated as impartible. And the constant litigation which has gone on, I may any from that time to this--carried on by various members of the family, claiming shares in the estate, and claiming them successfully,--shows that it never was accepted or acknowledged by the family as a body, although it may have been asserted that the property was impartible and belonged to the raja alone. In addition to this, we here the fact, not denied by the appellant (and at any rate well proved), that the plaintiff acted jointly with his brother, the late Raja Shio Nandan, in the management of the affairs of the estate, his name appearing in leases, bonds, to., exactly as if he were that which he says he was, a co-sharer with the raja.

It was contended that, if it was proved that there had been a raj of Seohur for generations, it necessarily must be held that the property was impartible. But the mere fact that the principal member for the time being of the family has enjoyed the title of raja, does not necessarily lead to the conclusion that, as a matter of law, the property held by the raja is impartible, and descent's otherwise than according to the ordinary rules of

Hindu law. There is no authority for saying that it does. In every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or kulachar must be proved. There is no one rule that I know of which applies to all Hindu rajas and their estates. The evidence, given by the numerous witnesses examined was gone into very fully by the Advocate General. But, looking at the whole case, I have no doubt whatever, that the Subordinate Judge was right in holding that the plaintiff was entitled to a six-annas share of the estate held by him and Shio Nandan, and that it was not proved that the estate was impartible. The letters and petitions written by the plaintiff immediately after the death of his brother Shio Nandan have been pressed upon us as showing that, at that time, it had not occurred to the plaintiff to set up any claim, and as showing that he considered that the whole property passed with the raj. In my opinion, the acts of the plaintiff show no more than this, that he wished his nephew Shioraj Nandan to be acknowledged as raja in succession to his father, and that he wished himself to be acknowledged as his guardian during minority under an alleged appointment by Shio Nandan. I do not see anything whatever in his letters or conduct at that time to show that he deemed himself to have no share in these estates. It is true he does not claim any share expressly; and it is quite possible that, if he had been recognized as guardian, so that things could have gone on pretty much as before, with the mere substitution, of the name of Shioraj Nandan for that of Shio Nandan, no express claim and no dispute would ever have been heard of. Then it is said that the suit should, in fact at any rate, have been dismissed, because the plaintiff merely asks a declaration of titles, alleging himself to be in possession. But there is nothing in this objection, as the Subordinate Judge has shown. This is no ordinary case of a purely declaratory suit. The Collector, acting on behalf of the minor, denies the plaintiff's title, and has contested it, in every possible manner, in Court and out of it, and prevented him from collecting rent. Finally, he, in August 1858, wrote to him and bid him bring a suit to establish his right, if he had any. Under such circumstances, it (sic) lies in the mouth of the Collector to ask us to dismiss the suit as premature, and unnecessary, and informal.

The decree of the lower Court must, no doubt, be amended so far as it declares the value of the moveable property, without having any evidence before it on the subject. If necessary, there ought to be a further inquiry as to the value (in detail) of the moveable property, to a six-anna share of which the plaintiff is entitled. I understood Mr. Cowie, however, to say that the plaintiff was content to have a mere declaration of his right to a six-anna share, and did not insist on any specific declaration of value, or on a partition for the present. Unless the parties insist upon it, we shall not order any further inquiry, but shall merely amend the decree by limiting it to a declaration of the plaintiff's right to a six-anna share of the moveable property i.e., of the (sic) admitted or specified in the decree, and of such other moveable property (if any) (sic) may be. The decree will not be altered as regards the immoveable property.

I see no reason why this amendment of the decree should affect the question of costs. The appeal really has been on the question of title--the one important issue--and the

respondent is entitled to his full costs.

I observe that Rudraj Nandan, the younger brother of Shioraj Nandan, was a defendant in this suit, and appeared by his guardian. The guardian has chosen to put in a written statement, supporting the defendant's case and alleging that "baboo" have no interest in the estate beyond their right to maintenance. As Rudraj Nandan is himself only a "baboo," it is clearly against the minor's interest that his guardian should file such a statement on his behalf. The guardian who filed such a statement in fact committed a breach of duty towards her ward. If she did not choose to join actively with the-plaintiff, she was at the least (sic) to have left the case in the hands of the Court, and was not justified in adopting a line manifestly opposed to the interests which she was placed upon the record to defend. That the guardian of Rudraj happens also to be the mother of Shioraj does not justify her, or affect the question other duties as guardian of the younger son. In a suit in which it is not necessary for a minor defendant to take an active part, no guardian is ever justified in taking any step prejudicial to his ward. If he can do nothing positively for the minor's benefit. he ought simply to leave the matter to the Court.

JACKSON, J.--I concur in this judgment. I think it clear that the status of the family had none of the characteristics of a raj, and that the head of it became a raja in fact and truth for the first time whom the title was conferred by Lord Canning; and I think the proof of the alleged kulachar quite failed.

I concur also in the observation made as to the proceedings of the guardian to the minor brother of the present, Raja.

^{**} Regular Appeal, No. 91 of 1870, from Tirhoot, dated the 21st December 1869.

17. W.R.F.B.R., from July 1862 to July 1864, p.107.

18. Ante, p.306.

19. Id., 442.

20. W.B., from Jany. to July 1864, p.39.

21. Id, 13.