

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Baboo Beerpertab Sahee v. Maharajah Rajenderpertab Sahee. and Cross-Appeal from the High Court of Judicature at Fort William, in Bengal; delivered March 4th, 1868.*

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Present :

LORD CAIRNS.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD T. KINDERSLEY.

THE subject of this Appeal is the right of succession to the very considerable estate of the late Maharajah Chutterdharee Sahee, who died at Hutwah in Zillah Sarun on the 16th of March, 1858. He was the owner of a large Zemindary called Hunsapore, which had been in the family of which he was a member for many generations before the East India Company, under the grant of the Dewanny in 1765, became the virtual rulers of Bengal, Behar and Orissa. Like some other extensive Zemindaries in Behar, it was during that period an impartible Raj, and by family custom descended on the death of each successive Rajah to his eldest male heir according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called Babooana. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this Appeal. The Rajah in possession of the property when the East India Company assumed the govern-

ment of the province was one Futteh Sahee. In consequence of his refusal to acknowledge the sovereign or quasi sovereign rights of the Company, or to pay revenue to them, a contest ensued; and about the end of 1767, he had been driven from Hunsapore by the Company's troops into the jungles dividing their territories from Goruckpore, which then formed part of the dominions of the Nawab Vizier of Oudh.

The East India Company thereupon attached the estate of Hunsapore, and let it out to farmers. Futteh Sahee, however, from his retreat in the jungles, or in the dominions of the Nawab Vizier, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed Govindram, one of the farmers under the Company. Soon after that occurrence there was a sort of Treaty of Peace between him and the Company's Government; he was permitted to return to Hunsapore, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the province, and renewed his predatory life on its borders. And in May 1775 he attacked and murdered his own cousin, Bissunt Sahee, the grandfather of Chutterdharee Sahee, who was then the renter or farmer of Hunsapore under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its officers during their possession of the estate. For the present, it is sufficient to state that the Company retained possession of it from the date of the first expulsion of Futteh Sahee until 1790, either making the collections by their own officers or letting it out to farmers; but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the decennial settlement was in contemplation or in the course of being made, the Government of Lord Cornwallis granted the property to Chutterdharee Sahee, then a minor, under circumstances which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837 the title of Maharajah was, on his application, conferred upon him by Government

for the first time. He had not previously been distinguished by any title from other Zemindars.

The pedigree at p. 2 of the Appellant's case (the correctness of which is not disputed) shows that the late Maharajah had two sons who pre-deceased him. The elder of them (Ram Sahee) left two sons, viz., Oogurpertaub and Deoraj, and the other (Pritipal Sahee) also left two sons, viz., Tillukdharee and Beerpertaub (the Appellant). These four grandsons were living at the time of the Maharajah's death, and were his co-heirs according to the ordinary Hindoo law of inheritance. Oogurpertaub is the father of the Respondent, the Maharajah Rajinder Pertaub Sahee. Upon the death of the Maharajah Chutterdharee, a contest arose as to the succession to his estate; Deoraj, Tillukharee, and the Appellant, insisting that it descended as *ab intestato* to his four grandsons in equal shares, according to the ordinary course of the Hindoo law; the Respondent setting up the exclusive title which will be next stated, and Oogurpertaub favouring the pretensions of his son, and relinquishing his own rights in his favour.

The title set up by the Respondent is shortly as follows:—

The late Maharajah had for several years before his death expressed his desire that his estate should descend, as the Raj of Hunsapore had up to the time of Futteh Sahee descended, to a single heir; and that the Respondent, in whose favour his father had waived whatever rights he, as the eldest male descendant of the Maharajah, might possess, should be that heir. Accordingly, on the 15th of March, being the day before his death, the Maharajah made, in the presence of some members of his family, including the Appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (*tusleem*) of the Raj to the Respondent. On the same day, he caused his servants to write out four *Urzees*, for the purpose of notifying this fact to the principal authorities in the district, viz., the Magistrate, the Judge, the Collector, and the Commissioner. These are the documents at pp. 361, 364, 365, and 367 of the Record. All these were directed to be forwarded to Chuprah, the Sudder or principal station of Zillah Sarun. Early the next morning,

the Maharajah directed his servants to prepare a similar Urzee for transmission to the Deputy Magistrate, Mr. Lynch, who lived at Sewan, a place much nearer than Chuprah to the Maharajah's residence at Hutwah. Before this was done, Mr. Lynch accompanied by Dr. MacDonnell, the Sub-Deputy Opium Agent of the district, called to pay a visit at Hutwah. They had an interview with the Maharajah, who presented the Respondent to them as his heir; recommended him to Mr. Lynch's protection; and told him that an Urzee to his address was in course of preparation and would be forwarded. That Urzee which accordingly varies in form from the others by introducing the circumstance of this visit, is at p. 363 of the Record. Later in the day, the Maharajah gave what is called "Tilluck" to the Respondent; and afterwards caused his servants to prepare the testamentary paper which is set out at p. 167 of the Record, which he executed. He died somewhat suddenly about 4 P.M. of the same day.

In these circumstances the Respondent rests his title to succeed to the whole estate of his great grandfather, first, upon the several before-mentioned acts of the Maharajah, relying on the latest instrument as a will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative will in his favour. He contends, however, further that the Raj being impartible, and descendible by custom, according to the rule of primogeniture, he, by reason of his father's abdication in his favour, is entitled to it to the exclusion of the other members of the family, independently of any act of the late Maharajah. But he admits that in either case they are entitled to have Baboona allowances of a proper amount as signed to them.

The contest between the parties was commenced very shortly after the death of the late Maharajah by those summary proceedings, touching the fact or the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title. The Respondent, on the 26th of March, instituted a proceeding, before the Collector, for the Mutation of Names, and this was opposed by the Appellant, and also by Tilluckdharee and Deoraj. The Respondent also instituted a summary suit in the Judges' Court for a

certificate, under Act XX, as to the whole estate of the late Maharajah, which was met by cross suits of the same nature by the Appellant, Tilluckdharee, and Deoraj, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act XIX of 1841, for the appointment of a Curator. All these suits were decided in the Respondent's favour by the Judge on the 22nd of May, and his Judgments were confirmed on Appeal by the Sudder Court in the month of August 1858. (Appendix, pp. 370 to 374.) And on the 14th of June, 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the mutation of names for which the Respondent had applied. (Appendix, p. 374.) That order was confirmed by the Collector on the 5th of August, and again by the Commissioner on the 8th October, 1858. (Appendix, p. 277.) The effect of these preliminary proceedings was to put the Respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the Respondent for his Babooana allowance. The Appellant, however, and his brother Tilluckdharee, commenced the suit out of which this Appeal has arisen, on the 31st of December, 1858; but the latter, after the Decrees in the Respondent's favour had been made in it, also came to an arrangement touching his allowance, and abandoned the Appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the Appellant alone and the Respondent.

The Appellant insists on his title as one of the co-heirs of the late Maharajah, according to the ordinary Hindoo Law. He impeaches, as fraudulent fabrications in support of the Respondent's title, the will, and the several Urzees or Petitions alleged to have been sent by the Maharajah's desire, and under his seal, to the different Civil authorities of the district; and he denies that the alleged consignment or installation of the Respondent took place. These are all questions of fact.

But he further denies, as matter of law, the power of the Maharajah to make a will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the Raj of Hunsapore, according to family custom or otherwise, up to the time of Futteh Sahee, the law or custom determining that course of descent ceased on his expulsion; and that the grant to Chutterdharee was not one of an indivisible Raj, descendible according to a special custom, but one of a mere Zemindary, governed by the ordinary law. In his case he further contended that even had the grant been one of a Raj, or had the Raj continued in the line of Futteh Sahee, the special rule of succession would have been abrogated by the provisions of Regulation XI of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit, which are at p. 155 of the Record.

The Judgment of the Zillah Judge, Mr. Wilkins, which was given on the 24th of April, 1860 (Appendix, p. 158), found that the family custom, according to which the estate was impartible, and descended to the eldest male heir, subsisted at and up to the time of Futteh Sahee; that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to Chutterdharee; and that the estate was in his hands an impartible Raj, descendible to his next male heir alone, and, therefore on the renunciation of Oogurpertaub to the Respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and on the above ground decreed in favour of the Respondent. He held, however, that the alleged consignment or transfer of the 15th of March, and the will, were not well proven. And he decreed an allowance of 2,000 rupees per mensem to each of the Plaintiffs, viz., the Appellant and his brother.

The Judgment of the High Court on appeal from this Decree is at page 17 of the second Record, and is dated the 24th of April, 1863. That Court also held that the Raj was originally impartible, and descendible by custom to the eldest

male heir alone; and that it did not lose this character on its restoration to Chutterdharee. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice Levinge's separate note at page 26, this point is more fully argued. But the High Court differing therein from the Zillah Judge affirmed the validity of the will. It also reduced the allowance to each of the Plaintiffs to 1,000 rupees per mensem.

At the close of the argument for the Appellant their Lordships intimated that in their opinion the Judgment of the High Court, touching the *factum* of the will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion.

That the disposition was in accordance with the Maharajah's general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of Mr. Dampier (Appendix, page 392), Dr. Fleming (page 393), Mr. L. MacDonald and Mr. John Macleod (page 394), Mr. W. F. McDonnell (page 395), Mr. Tayler and Mr. R. Macleod (page 396), and Mr. Richardson (page 397), being all of them European gentlemen in the public service or otherwise of respectable station, is to the effect that from 1851 up to the time of his death the Maharajah continuously entertained and constantly expressed the desire to keep his property together as a Raj, and his intention to make the Respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. Lynch and Dr. McDonnell (pages 393, 394, and 397). The general intention of the alleged testator in favour of the Respondent, and his testable capacity, are therefore established. It is true that in the interview with Mr. Lynch and Dr. McDonnell the Maharajah did not express his intention to make a will. It is also true that to the *factum* of the will there is no testimony but that of his native servants and dependents. It is, however, most improbable that the Maharajah should have relied on what passed between him and the two

European gentlemen when none of his family except the Respondent, and but few of his dependents, were present. And though he might also have relied on the Tusleem or consignation of the preceding day as the public expression of his wishes, and the formal installation of the Respondent as the new Rajah (supposing that ceremony to have taken place), yet it must be recollected that the question whether the estate was impartible and descendible as a Raj was a doubtful one, and that he himself, as Mr. Dampier proves, had long known it to be so. There is therefore nothing improbable in the hypothesis that pressed by this doubt, as well as urged by his strong desire to secure the succession to the Respondent, he may, even after his interview with Mr. Lynch and Dr. McDonnell, have conceived and executed the intention of making a will, in order to supply by the force of that instrument any defects which his preceding acts may have left in the Respondent's title. And if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the Maharajah, are utterly discredited by the evidence of Mr. Lynch and Dr. McDonnell; and it is not contradicted (as it might have been contradicted) by the oath of the Appellant, whom the witnesses deposing to the Tusleem and to the execution of the will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing fortunately in number, of men who disregard this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the Appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains that there is no contradiction of the Respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are



in favour of the truth of their story. Their Lordships must therefore hold that the execution of the will has been proved; a conclusion which, though opposed to that of Mr. Wilkins, was also that of the Judge of First Instance and of the Sudder Court when dealing with the same question in the summary suits under Act XX of 1841, as well as that of the High Court in this suit. This being so, we have in the will executed by the Rajah (Appendix, p. 167) a corroboration of the positive testimony as to the facts of the Tusleem or consignment, and of the execution and despatch of the Urzees, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached Chuprah. Nor do their Lordships see anything in the objection that the Tusleem and the execution of the will are inconsistent acts; that if the former took place, the Rajah had nothing to dispose of, and the will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the will was the crowning one, all being designed by the Maharajah to effectuate, so far as his acts legally could, his intention to leave his estate as a Raj, and to make the Respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favour of the Respondent by nuncupative will. They will only remark that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The Respondent seems at one time to have relied on the Tusleem; at another on what passed between the Maharajah and Mr. Lynch as a nuncupative will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined the principal issues of fact on this Appeal, their Lordships have now to consider whether the Maharajah had, by law, the

power to make the will which he did make ; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the Raj of Hunsapore, is to be regulated if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which Chutterdharee acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of Futteh Sahee.

It has already been stated that after that event the property was for nearly twenty-three years held by the East India Company, who, whether they let it to farmers, or kept it under their own management, applied the whole of the surplus revenues to their own use. During great part of that period, Futteh Sahee continued to wage war with them from his retreat in the jungles, or in the territories of the Nawab Vizier, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of Bishunt Sahee took place, as before stated, in 1775. In 1778 the Revenue Council of Patna, on the application of Mohesh Dutt, the son of the murdered man, and the father of Chutterdharee Sahee, proposed that Futteh Sahee should be declared to have forfeited his zemindary, and that it should be bestowed on Mohesh Dutt, but the Government of Mr. Warren Hastings declined to comply with that proposal, or to do more at that time than hold out vague hopes of reward to Mohesh for his fidelity (Appendix, p. 334).

In 1784 the claims of Mohesh Dutt were again under the consideration of Mr. Hastings' Government. The proceedings are set out in the Appendix (pages 328 to 331). They clearly show that it was then considered that any grant to him, though he founded his claim on being the next heir to the Zemindary after the extinction of Futteh Sahee's line, was matter not of right but of favour; and that it was actually proposed to insert in the Sunnud by which any such grant should be made, a condition for avoiding it in case the

grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of Futteh Sahee within one year. Ultimately nothing was done on this application; Mohesh afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord Cornwallis in consequence of the steps which were then being taken in order to effect the Decennial Settlement. On the 16th of June in that year (page 237) the Collector, Mr. Montgomerie, having received instructions for the disposal of all lands "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his district which answered that description, unless they were this Zemindary and another somewhat similarly circumstanced. On the 21st of July the Board of Revenue submitted this letter to Government, with a recommendation that such part of Hunsapore as was the property of Futteh Sahee should be declared confiscated and sold, subject to the interests of the existing farmers. But on the 28th of July the Government, in answer to this communication, directed "that such part of Hunsapore as was stated by the Collector to have been the real property of the rebel Futteh Sahee, should be conferred on the infant son of the late Mohesh Dutt after the usual publication had been made." That letter also provided that upon the lands being finally confirmed to the son of Mohesh Dutt, he should receive the allowance fixed for disqualified landholders.

The Collector having on the 18th of November, 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to Chutterdharee Sahee," the Board of Revenue on the 17th of January, 1791, recommended that Chutterdharee Sahee, the infant son of Mohesh Dutt, should be "declared proprietor of the land in Hunsapore, which belonged to Futteh Sahee," and the Government on the 21st of January ordered accordingly.

These proceedings are at pages 237, 233, and 239 of the Appendix. A subsequent letter of the Board of the 29th of April, 1791 (at page 324),

fixes the Malikana allowance for the infant at 1,027 sicca rupees 7 annas 4 pies per mensem, and makes it payable from the 11th of October, 1790.

In October 1802, Chutterdharee having come of age, entered into a formal engagement for the payment of the Government Revenue; and the revenue officers who had managed the estate during his minority relinquished it to him and issued a Proclamation directing the ryots and tenants to pay the collections to him. These documents, called respectively the Dowl and the Amuldustuck, are at pages 296 and 297, but they do not throw much light upon any of the questions raised in the suit.

It is material to observe that during all these proceedings Futteh Sahee and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a Fukeer, having given up even his Gorruckpore property to his family (see page 321). In 1790, his wife and one of his sons appealed to Government for an allowance, but their application was rejected on the 25th of June in that year (page 324). In April 1792, one of the sons, and in April 1808 four of the sons, of Futteh Sahee made applications for the restoration of the estate and for allowances out of it. On the 29th of April, 1808, the latter application was rejected by Government in a letter which stated that "the estate of Futteh Sahee had been forfeited to Government" (see pages 320 to 323). Aree-murdhun Sahee, one (and apparently the eldest) of the four, made similar claims by petition in 1816 (page 327), and again in 1821 (page 325). In both these petitions he stated that his younger brother had come forward before Mr. Montgomerie in 1790 claiming, on behalf of Futteh Sahee's line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The Order indorsed on the Petition of 1821 is to the effect that "whereas the property of Futteh Sahee was confiscated on account of rebellion," no further proceedings on the Petition are necessary. In June 1829 the great grandson of Futteh Sahee (page 306) brought a regular suit against Chutterdharee and the Government for

the recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Statute of Limitations. And the same persons seem to have appeared on the proceedings before the Collector of the 14th of June, 1848, which is above referred to, alleging that the grant to Chutterdharee was for life only, and again setting up his own title as the descendent and representative of Futteh Sahee.

On these facts, it is at least clear that there was a virtual confiscation of the interest of Futteh Sahee and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of Futteh Sahee as forfeited, and refused to recognize any claim on the part of his descendants; it has for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of Mohesh Dutt, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favour it finally conferred it on Chutterdharee.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice Lvinge, have founded upon the supposed obligation of the East India Company to govern the provinces which they held under the Mogul Emperor by virtue of the grant of the Dewanny according to Mohammedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the great grandson of Futteh Sahee brought against Chutterdharee and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under Chutterdharee; and as between them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and therefore the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of Chutterdharee. The fact that he was the member of the family which had so long held the estate, next in succession to the line of Futteh Sahee, and the son and grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the Shevagunga case (9 Moore I. A., 606).

The question remains what was the nature of the estate granted, 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 Zemindary.

There was not in this, as in the Shevagunga case, a new Sunnud. 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 in the Council-room, 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. 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 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 Zemindary 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 Cornwallis' Government determined to set up Chutterdharee as the

Zemindar with whom the settlement in respect of this property should be made. But the estate of a Zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent Talookdars, 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 Futteh Sahee; and therefore that the subject conferred on Chutterdharee was the old Zemindary 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 favour of the hypothesis that the intention of Government was to restore the Zemindary as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of 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 circumstance that the grant was in the first instance of the Zemindary without the title of Rajah has been urged as a strong argument in favour of the Appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a Raj is shown by the Tirhoot case, 6 Moore's I. A., p. 191; and in 1837 the title was conferred on Chutterdharee upon his application founded on the fact that it had been enjoyed by his predecessors, and annexed to the Zemindary (Appendix, p. 308). This act of the Government in 1837 could not alter the legal

effect of what was actually done in 1790 ; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which Chutterdharee then put upon the acts of their predecessors in 1790.

Another argument for the Appellant is founded on Regulation XI of 1793. Mr. Field does not contend, in the face of the authorities cited by Mr. Leith, that if the estate granted to Chutterdharee in 1790 were a Raj, descendible by family custom, according to the rule of primogeniture, it lost that character on the passing of the Regulation in question. But he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord Cornwallis's Government was, presumably, to make the property restored to Chutterdharee subject to the ordinary law of succession.

Their Lordships, however, are of opinion that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large Zemindaries held as Raj, or subject to kooloochar, or family custom.

Upon the whole, then, their Lordships have come to the conclusion that the Courts below were right in holding that the estate granted to Chutterdharee in 1790 was the Raj of Hunsapore, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late Maharajah, which it is nevertheless necessary to consider, since the title of the Respondent to at least part of Chutterdharee's estate may depend on the will.

It is too late to contend that because the ancient Hindoo Treatises make no mention of wills, a Hindoo cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes



to alienation, by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitacshára, a Hindoo without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindoo in those provinces who has sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the Mitacshára his sons in both cases take, on their birth, an interest in the property, which their father without their consent cannot displace.

For the Respondent it is contended, that this question is concluded by the Bithoor Case, 9 Moore I. A., p. 96. It cannot be denied that in that case the testator being a Mahratta, domiciled at Cawnpore, and having real as well as personal estate, made by will an unequal distribution of both amongst his sons; and that his legal power to do so was affirmed by this Committee, and by both the Courts below. The Appellant, however, insists that this decision is opposed to the law of the School of Benares, and relies on the texts of the Mitacshára, which show that a father cannot alienate his self-acquired lands, or make an unequal distribution of them by partition, without the consent of his sons; and also upon passages in "Strange's Hindoo Law" and other authorities. Mr. Leith, on the other hand, has argued that all these authorities are to be reconciled with the decision in the Bithoor Case, by holding that they relate to property acquired by the father, with the use or by the aid of ancestral estate; and that they have no application to separate and self-acquired property, in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well-founded, or whether, if it be not so, the present case must be governed by the Bithoor Case. For if

they are right in holding that the grant was of a Raj descendible according to custom to the eldest male heir, the question whether, according to the law of the Benares School, a Hindoo can by will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent does not in this case arise. The only person entitled to impeach the disposition by will is Oogur Pertaub, the eldest grandson, who is a consenting party to it. There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power. And *cessante ratione cessat et ipsa lex*. (See the remarks of Sir William Mac Naghten on the case of Esarchunder Rai, 1 W. Mac. 7.)

It follows, then, that either by the special law of inheritance, or by the will, the Respondent was entitled to the estate of Hunsapore, and to whatever other wealth the late Maharajah could dispose of by his will.

Mr. Field has objected that this ruling does not cover that portion of the estate (if any) which came to Chutterdharee from his father, Mohesh Dutt. This may be true, but their Lordships are of opinion that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the Respondent being in possession of the whole, it was for the Appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either Appeal touching the amount of the Baboona allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say, that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the Appeal and the Cross Appeal with costs. The Appellant and the Respondent will each bear the costs of his Appeal.

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