Privy Council Appeal No. 19 *of* 1922.

Oudh Appeal No. 35 *of* 1919.

Balgobind, since deceased (now represented by Suraj Dat and another), and others - - - - - - *Appellants*

v.

Badri Prasad and another - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1923.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD CARSON.
SIR JOHN EDGE.
LORD SALVESEN.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Gonda, and dismissed the suit. The suit was a suit for the possession of the village Aunian Durga in the District of Gonda, and for mesne profits, and it depended on whether there was or was not a family custom in the village by which daughters and their issue were excluded from inheritance. The Subordinate Judge found that there was such a custom and decreed the suit. The Court of the Judicial Commissioner on appeal found that the custom was not proved, and accordingly dismissed the suit.

In order to understand how this question as to a custom excluding daughters and their issue from inheritance has arisen

in this suit, it is necessary to refer briefly to the family to which the plaintiff, Balgobind Pande, had belonged. Balgobind Pande and his three elder brothers, Sital Prasad Pande, Radha Pande, and Raghubar Pande, had, with their father, Narain Dat Pande, constituted a joint Hindu family which was governed by the law of the Mitakshara subject to any lawful variation of that law by custom. A lawful variation of that law would be a custom which excluded daughters and their issue from inheritance. Such a custom is not uncommon in Oudh and in other parts of India.

The elder brother of Narain Dat Pande was Harnarain Pande, who was a sanad holder, and was possessed of considerable immovable property in Oudh. Harnarain Pande gave some of his villages to Narain Dat Pande absolutely. Narain Dat Pande also acquired other villages, one of which was the village Binduli. Their Lordships do not know when Narain Dat Pande died. At the Settlement in Oudh after the Mutiny, the villages which Narain Dat Pande had self-acquired and those which he had acquired by gift from his elder brother were by courtesy described as taluqa Binduli, and the property was in the settlement papers referred to as a taluqa. It is not necessary to consider whether that property was or was not correctly described as a taluqa.

Sital Prasad Pande was at the time of the Settlement the manager on behalf of the then joint family, and he was also the Lambardar of some, if not of all, the villages included in the taluqa.

The Settlement Officer prepared a wajib-ul-arz for each of the villages. The fourth paragraph of the wajib-ul-arz of Binduli as translated by the official translator is as follows :--

> " Para. 4.—Rights of transfer and inheritance.
>
> " Each of the two co-sharers has the right to transfer his share ; but so long as one of them is willing to purchase, the other shall not sell to a stranger. The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co-sharer has several wives, of whom one has one son and the other several, then on the death of the co-sharer his share will be divided equally among his sons. There is no custom of Stribhag (division according to number of wives). When one wife has sons and another has daughters only, then such other will not get a share. The issue of the (former) wife will possess the share and maintain (in food and clothing) the daughters and bear the expenses of their marriage. If there is no male issue born of the wives, they will remain in possession in equal shares. The widows have no power to adopt ; on (their) death the nearest relation of the husband succeeds to the share. An unmarried wife and her children are given maintenance : they do not get (inherit) a share."

The vernacular words of the sentence which the official translator has translated as " The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares,

and the daughter does not get any share by inheritance," given, presumably correctly, by the learned Judicial Commissioners in their judgment, do not include between the words "equal shares" and the words "the daughter" any word which could be translated as "and." Their Lordships do not consider it necessary to refer this case back to the Court of the Judicial Commissioner for a report as to whether a word representing "and" is or is not in the original wajib-ul-arz between the words "equal shares" and the words "the daughter," as in either event the sentence, in their Lordships' opinion, would have the same meaning; that is, that a daughter and her issue are excluded from a right of inheritance. Paragraph 4 of the wajib-ul-arz of Binduli is not repeated in the wajib-ul-arz of Aunian Durga as the villages of the Settlement were treated as villages of the taluqa Binduli, having a common custom as to rights of inheritance, but reference as to the customs of Aunian Durga is made to paragraph 4 of the wajib-ul-arz of Binduli. Sital Prasad Pande signed the wajib-ul-arz of the village of Binduli, and verified before the Settlement Officer the wajib-ul-arz of Aunian Durga, and no exception was taken by anyone to the record of the custom.

After the Settlement the brothers separated and the village Aunian Durga fell to the share of the second brother, Radha Pande. Radha Pande married Musammat Janka, but whether the marriage took place before the Settlement or afterwards their Lordships do not know. Radha Pande had by his wife a daughter, Musammat Thakur Dei, but no son. Musammat Thakur Dei married and had a son, Badri Prasad, who is defendant 1. Radha Pande died in 1901, and on his death Musammat Janka came into the possession of Aunian Durga for the interest of a Hindu widow. On the 4th April, 1902, Musammat Janka granted a perpetual lease of 80 bighas of Aunian Durga to Tibhawan Tewari and Baleshar Tewari, the defendants 4 and 5, and on the 1st May, 1902, mortgaged with possession an undivided moiety of the village to the predecessors in title of defendant 3. On the 31st October, 1916, Musammat Janka made a gift of a 6-anna share in Aunian Durga to Gajadhar Prasad, defendant 2. On the 3rd November, 1916, Musammat Janka and her daughter Musammat Thakur Dei gave all such rights and interest as they possessed in the remaining 10-annas share of Aunian Durga to Badri Prasad, defendant 1. On the 4th March, 1917, Musammat Janka died. On her death the plaintiff Balgobind Pande was the next reversioner to her husband, Radha Pande; Sital Prasad Pande and Raghubar Pande being then dead. On the 24th August, 1917, Balgobind Pande gave an 8-annas share in Aunian Durga to Kesho Dat Ram Pande and Tikam Dat Ram Pande, who were grandsons of Sital Prasad Pande, being the sons of his son, Mahadeo Prasad, who was then dead. On the 7th September, 1917, Balgobind Pande, Kesho Dat Ram Pande and Tikam Dat Ram Pande brought this suit. Balgobind Pande is now dead, and is

represented in this appeal by his sons, Suraj Dat and Jagdish Dat, a minor, through his guardian.

It is not proved or contended that any of the alienations already mentioned by Musammat Janka were made for necessity, and the only question which it is necessary for their Lordships to consider is whether by custom daughters and their issue are excluded from inheritance in Aunian Durga. As has been already stated, the learned Subordinate Judge who tried the suit found that that custom was proved. The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the wajib-ul-arz of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion that paragraph 4 of the wajib-ul-arz of Binduli was ambiguous and that owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a wajib-ul-arz.

In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is in their Lordships' opinion that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not. How such a custom would operate in cases in which an owner died leaving no relation but a daughter who could inherit it is not necessary now to consider. If a daughter had no right to inherit her issue could not inherit. The provision that on the death of a co-sharer his sons became owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh.

Settlement Officers in recording customs in wajib-ul-arzes have to perform duties which the Government orders them to perform.

One of these duties was to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the wajib-ul-arz had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom; nor was there any evidence given in this suit in denial of or at variance with the custom.

Their Lordships find that the custom excluding daughters and their issue from inheritance was proved, and they will

accordingly humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and that the decree of the Subordinate Judge should be restored and affirmed.

In the Privy Council.

BALGOBIND, SINCE DECEASED (NOW REPRESENTED BY SURAJ DAT AND ANOTHER), AND OTHERS

v.

BADRI PRASAD AND ANOTHER.

DELIVERED BY SIR JOHN EDGE.

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