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is imposed on all plaintiffs, of establishing the fact or facts out of which their claim to relief arises. The lower courts having found there was no proof of a mortgage, in this instance, the Joint Judge's decree must be affirmed, with costs on the special appellant.

Decree affirmed.

Oct. 12.

Regular Appeal No. 15 *of* 1867.

BHUJANGRA'V bin DAVALATRA'V GHORPADE, and ANNA' SA'HEB bin DAVALATRA'V GHORPADE .....*Appellants.*

MA'LOJIRA'V bin DAVALATRA'V GHORPADE...*Respondent.*

*Hindú Law—Family Custom—*Jáhágir*—Partibility of* Jáhágir*—Primogeniture—Rights of the Children of different Wives of the same Caste to inherit Ancestral Property.*

Where there is a plurality of wives equal in caste, the sons of each wife (not being the first wife) take precedence according to the dates of their respective births, and without reference to the dates of the marriages of their respective mothers.

Succession in consequence of primogeniture amongst Hindús in India seems to be the rule only in the case of large *zamindáris*, and estates which partake of the nature of principalities.

In estates to which the ordinary Hindú Law of inheritance administered in Western India applies, it is not competent to a father to dispose of their ancestral property to one son to the prejudice of the others.

THIS was an appeal from the decision of Arthur Bosanquet, Acting Judge of the District of Kaládgi, in Original Suit No. 2 of 1866.

The plaintiff, Bhujangráv, sued his half-brother, Málojiráv, for possession of the *jáhágir* of Gajendragad and certain moveable property left by their father, Davalatráv Ghorpade, who died on the 24th of July 1864, on the ground that he, the eldest-born son of his father, was entitled by Hindú Law, and the custom both of the country and the family, to succeed to the "*gádi*."

The defendant, Málojiráv, answered that, his mother having been married earlier than the mother of the plaintiff, he should

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be considered as the eldest son, and was actually so considered by their father, Davalatráv, and appointed by him as his successor. He farther stated that the plaintiff, by accepting an allowance assigned to him by Davalatráv, acquiesced in the appointment made by him, and was, therefore, estopped from bringing this suit.

The plaintiff Bhujangráv's brother, Anná Sáheb, was subsequently joined as a plaintiff by order of the Court, under Sec. 73 of the Code of Civil Procedure.

The Acting Judge held that the whole property in dispute except the personal property was impartible, and that, according to the Hindú law, the plaintiff was entitled to it, but that although the defendant had failed to prove the family custom set up by him, yet that Davalatráv had appointed him as his successor, and that the plaintiff acquiesced in the arrangement by accepting an annual allowance. The Acting Judge, therefore, rejected the plaintiff's claim, except as to two-thirds of the personal property.

The appeal was argued before TUCKER and WARDEN, JJ.

Marriott and *Green* (with them *Dhirajlál Mathurádás*), for the appellants :—The plaintiff, Bhujangráv, is admittedly the eldest-born of the parties. The Hindú Law may recognise a distinction between the sons of the first-married wife and those of subsequently married ones; but the latter as between themselves stand on an equal footing: and, therefore, although the marriage of Málojiráv's mother took place prior to that of Bhujangráv's mother, yet Bhujangráv, being born first, is the eldest son: *Sivanananja P. Sethuráyar* v. *Muttu R. Sethuráyar and others* (*a*).

This judgment is founded on Manu, the highest authority in Hindú Law, who, after treating of the privileged position of the first-born son, lays down that "as between sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth (*b*)."

(*a*) 3 Mad. H. C. Rep. 75. (*b*) Manu, Ch. IX., Sec. 106.

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Next comes the question, what is Bhujangráv entitled to succeed to, as the eldest son of his father? The history of the course of inheritance, from the time of Málojiráv, the founder of the family, downwards, shows that the bulk of the property descended to the eldest son, the younger ones receiving *nemnuks* or allowances merely. [TUCKER, J. :—Will the family custom, which you are trying to prove, override Hindú Law?] Primogeniture prevails in Bengal and Madras (*c*). [TUCKER, J. :—The large *zamíndáris* in those presidencies are estates of a peculiar nature. It is difficult to say whether the customs regarding *zamíndáris* are applicable to minor chieftainships in Western India.] There does not seem to be any radical difference between the *zamíndáris* of Bengal and the chieftainships of Bombay: see Steele on the Law and Custom of Hindú Castes, p. 228, para. 71. A will of the father is set up, which, I submit, is not proved to be genuine; but assuming it to be so, a Hindú father cannot disinherit his son of ancestral property by grant or will (Miták., Ch. I., Sec. 1., cl. 27 ; Macnaghten's Hindú Law, p. 2; 3 Bom. H. C. Rep., A.C.J. 6 ; 4 Bom. H. C. Rep., O.C.J. 150; 8 Moo. Ind. App. 66; 9 Moo. Ind. App. 609 ; 8 Calc. W. Rep., Civ. R. 455.

Lastly, I come to the question whether the plaintiff received any allowance, and, if so, whether the receipt is binding upon him. The small allowance assigned to the plaintiff was not for his support, but for his personal expenses. Supposing, however, that was not the case, yet any receipt of an allowance by him during his father's lifetime would not be binding upon him, unless it was shown that he had received it in lieu of his share: *Rungama* v. *Átchama* (*d*).

White (with him *Shántárám Náráyan*), for the respondent:—The first question is whether the Judge was right in holding that the *jáhágir* was impartible. This depends, firstly, upon a question of fact, whether, having regard to the evidence, the *jáhágir* has been shown to be impartible, and forms an exception to the general rule of Hindú Law;

(*c*) 1 Mor. Dig. N. S. 187, 188; 5 Moo. Ind. App. 169.
(*d*) 4 Moo. Ind. App. 1.

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and, secondly, upon a question of law, to what extent the Court would enforce the family custom against the rule of Hindú Law as to equal shares. On this question much evidence has not been taken. It will be admitted that impartibility of immoveable property would be an exception to the general rule of Hindú Law. There have been decisions in Bengal and Madras with regard to certain estates in those presidencies; but I have not been able to discover any precedent to show that a *jáhágir* was held to be impartible either there or in the presidency of Bombay.

It appears that the law of primogeniture, where it does prevail in India, is founded on Manu, Ch. IX., Sec. 323. This passage has reference to estates of the nature of regalities or principalities. The cases quoted from Morley's Digest are all cases of *ráj*; those in Moore are cases of *zamíndáris*, which are cases of peculiarity of tenure. They do not proceed upon the usage of the country. [TUCKER, J.:—Is not a Maráṭhá *samsthán* somewhat of the nature of a *ráj*?] I submit not; the reference to Steele is not to minor *samstháns* or chieftainships, like that in dispute in the present suit, but to the reigning families of Sátárá, such as the Bhonslás, the Chowhans, and the Nimbálkars. This is a mere alleged family custom, not a custom of the country, and such the courts will not recognise.

The case of the defendant rests upon the settlement made by Davalatráv. A father can nominate a person out of the order of succession as his successor. Muhammadan sovereigns frequently exercised that right. The nomination was notified to the Collector and the officers of the *jáhágir* villages. It is not necessary that this nomination should be made by a will. An arrangement by word of mouth would be quite sufficient: *Sudanund Mohapattur* v. *Soorjo Monee Debee* (e). The power of the father to appoint the defendant as his successor depends upon the position the latter, as the son of the elder wife, occupied in the family. According to Hindú Law, a man takes a wife in fulfilment of a religious

(e) 8 Calc. W. R., Civ. R. 455.

duty. [TUCKER, J.:—Is not that duty accomplished as soon as he has married a first wife?] No; not till a son is born to him capable of saving him from *pat*: 2 Colebrooke's Digest, 567, 568.

In the absence of express authority in Hindú Law, and in the absence of a valid usage or custom, Davalatráv, I submit, acted in accordance with the law when he appointed the son by the elder wife as his successor: Bellasis' Selected Rep., Pt. I., p. 13.

Cur. adv. vult.

The judgment of the Court was delivered by

TUCKER, J.:—This action was instituted by Bhujangráv, one of the three sons of Davalatráv bin Bhujangráv Ghorpade, against his half-brother, Málojiráv, to recover from him possession of the *jáhágir* of Gajendragad, comprising twenty-six villages, on the ground that he, Bhujangráv, as the eldest-born son, had a right to succeed to his father's landed estate in preference to Málojiráv. He also claimed a half-share of certain moveable property valued at Rs. 81,985, which, he alleged, had belonged to his father, and had been appropriated by the defendant.

Málojiráv answered, that as the son of an elder wife, he was entitled to succeed to his father, and that his father had during his lifetime selected him for his successor, and had assigned to the plaintiff, Bhujangráv, a particular allowance, which Bhujangráv had accepted, and he had now no further claim.

Afterwards, by order of the Court, the plaintiff's uterine brother, Anná Sáheb, a minor, was made a co-plaintiff in the suit, the plaintiff representing him as his brother and guardian.

The District Judge of Kaládgi found that according to the custom of the family the landed estate was impartible, and that, according to the Hindú law, the plaintiff, Bhujangráv, was entitled to succeed to it. That no usage had been established which gave to the later-born son of an elder wife precedence over the earlier-born son of a younger

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wife; but that it was proved that the father of the plaintiffs and the defendant had nominated the defendant to be his successor, and that it was competent to him to make this selection, and any disposition of the property which he pleased.

That the moveable property was divisible, and it was not proved to have exceeded Rs. 4,000 in value. The District Judge, therefore, decreed for the defendant with respect to the lands, but awarded to each plaintiff Rs. 1,333-5-4 as their respective third-shares of the personalty, with costs in proportion.

Each party has acquiesced in the decree of the District Judge so far as it affects the moveable property, but both are dissatisfied with his decision regarding the *jáhágir*. The plaintiff, Bhujangráv, contends that if the Hindú law or any recognised usage gave him a right to succeed, his father could not deprive him of that right, either by a settlement *inter vivos* to which he (plaintiff) was no party, or by a will. That with regard to ancestral property, a Hindú father could make no disposition of that property opposed to the general law; and that in the present case the alleged selection and appointment of the defendant by his father was not established, as the documents produced were of a suspicious character, and, considering the custody they came from, and the evidence by which they were supported, were altogether untrustworthy. That there was no proof whatsoever that he had acquiesced in any proceedings of his father in favour of the defendant, or any reason why the general rule of succession in families in which primogeniture regulated the descent of property should not be observed in the present instance.

The defendant, on the other hand, urges that the evidence adduced established that there was not only a custom in the family, but also a usage in the district, that the son of an elder wife takes precedence over an earlier-born son of a younger wife. That the truth of the defendant's nomination by his father was scarcely disputed in the lower court, and

was amply proved. That in a case of this kind it was competent to the father to designate his successor, and, unless good grounds were shown against it, the Court would uphold the selection. That the Judge was wrong in declaring that the defendant had admitted that the plaintiff, Bhujangráv, was born before the defendant, and this fact had not been established.

The appeal has been ably argued by Messrs. Green, Marriott, and Dhirajlál for the appellants, and by Messrs. White and Shántárám for the respondent.

Before we enter upon the questions of law which are involved in this litigation, it is necessary that we should clearly ascertain what facts are admitted, and what facts are disputed.

It is admitted on both sides that the deceased Davalatráv was a Hindú *jáhágirdár* in the Southern Maráthá Country, who died on the 24th of July 1864. That he had three wives :—

1. Kamaljábái, who died without issue, date unknown.
2. Takvábái, mother of Málojiráv, defendant. This lady is now alive.
3. Jayavantábái, mother of the plaintiffs, who is also living.

That the landed property claimed was ancestral, and descended to Davalatráv by way of inheritance from his progenitors. It is also admitted that of Davalatráv's sons the plaintiff, Bhujangráv, is the elder-born. The defendant in appeal has denied that he had admitted that Bhujangráv was his senior in age, but in his deposition, No. 7, he described himself as twenty-one years of age, and declared that the plaintiff, Bhujangráv, was twenty-two or twenty-three. Upon this state of facts the plaintiff would, under the ordinary Hindú law, be entitled to the privileges which, under any law or usage, belong to an eldest son. On this point we concur with the District Judge, and in the decision of the Madras High Court in the case of *Sivanananja Sethura-*

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yar v. *Muttu R. Sethurayar* (*suprà*), which he has followed, namely, that among Hindús where there is a plurality of wives, equal in caste, the sons of each wife, not being the first wife, take precedence according to the dates of their birth, and without reference to the dates of marriage of their respective mothers; and we think that the defendant has failed to show that there was any usage of the district which is opposed to this rule, or that it has ever been a custom in this family that the younger son of a second wife should take precedence over the elder son of a third wife. In the particular instance in which he alleges such a supersession occurred, it may have been that the son who succeeded, if he were junior in age, which is not satisfactorily proved, was the offspring of a first wife. If, then, the descent of immoveable property in the family was exceptional, and followed a law of primogeniture, it is the plaintiff, Bhujangráv, who is the heir to his father, and not the defendant.

This custom of succession by reason of primogeniture has hitherto, so far as we are aware, been recognised in other parts of India as applicable only to large *zamíndáris*, and other estates which are considered to partake of the nature of principalities. Mr. Steele, in his work on the Custom of the Hindús, states at p. 228 that such a custom is to be found among several of the chief Máráthá families, and also among Deshmukhs and Deshpándes. With regard to the great Máráthá houses which acquired sway over kingdoms and principalities Mr. Steele's statement is without doubt correct; but amongst the lesser chieftains and district officers no uniform custom of this character has prevailed, and generally when such a custom has been set up in our courts it has not been established. The question, then, which we have to determine, is whether such a custom existed in this particular family. At first sight it would seem that there could be but one answer to this question, as both the plaintiff, Bhujangráv, and the defendant, Málojiráv, assert that there is such a custom, and each desires to have the benefit of it. But there are other interests to be consi-

dered, besides those of the two elder brothers, and as the minor, Anná Sáheb, has been joined in the suit, it is necessary for us to see whether the alleged custom has been proved independently of the assertions of the two sons who each claim to be head of the family. It must be remembered that, owing to the conclusion at which we have arrived with respect to the relative rights of the two elder brothers, it will now be more beneficial to the plaintiff, Bhujangráv, than to the defendant, that this custom should be established, and consequently, in the turn which matters have taken, it will be necessary to examine more particularly the statements of his witnesses. Looking at all the evidence which has been brought forward on either side, and more especially at the depositions of witnesses 45 and 46, who are both blood relations of the parties to the suit, and whom the plaintiff, Bhujangráv, declares to be the only reliable witnesses, we think that it is shown that the lands of the family have been always treated as partible, though in some instances, when division has been made, a larger share has been assigned to the head of the family, to defray the expenses which would devolve upon him in that capacity. It would seem from the statements of those witnesses that the founder of the family was one Málojiráv Ghorpade, who died about a hundred and fifty years ago. He, according to witness No. 45, possessed the *jáhágirs* of Kápsi and Datvád, besides the *jáhágirs* of Gajendragad, Sondur, Galgale, Nirgand, and Sángvad, and on his death equal partition was made between his three sons, each receiving lands which yielded a yearly income of about a lakh of rupees, or £10,000. The eldest received Kápsi, and the youngest Datvád, and the second (Bahirjiráv), from whom the plaintiffs and the defendant are descended, Gajendragad and the other smaller *jáhágirs*. The grandsons of this Bahirjiráv, again, divided the landed property of the family; and afterwards, a generation later, there was another partition amongst the sons of one of these grandsons, one of whom was the grandfather of the plaintiffs and the defendant, and another the witness Anandráv, No. 45. This last partition was unequal, the elder son receiving lands yielding Rs. 10,000 yearly, and each of the younger lands

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which returned an annual income of Rs. 4,000 respectively. According to the deposition of witness No. 45, property yielding an additional income of six thousand rupees was allowed to the eldest member of the family at this last partition for the expense of keeping up armed retainers for the fort of Gajendragad, and for the improvement of that village, which was the chief seat of this branch of the Ghorpade family, and also to enable him to distribute on ceremonial occasions the customary presents to the junior members of the family. We are unable, therefore, to concur in the view of the District Judge, that it is proved that the lands of this family were indivisible. On the contrary, we consider that the opposite allegation is established, and that it has been proved that such lands are divisible, the eldest son being entitled, as head of the family, to a somewhat larger share than his brothers.

There being no exceptional law of descent in this family, the remaining objections of the defendant are easily disposed of. No case has been cited to us which shows that in estates, where a law of primogeniture prevails, an incumbent can disinherit his eldest son, and appoint a younger son to be his successor; and certainly in estates to which the ordinary law of inheritance applies, as it does in the present instance, it is not competent to a father to dispose of his ancestral property to one son to the prejudice of the others. It is, therefore, of no importance whether the father in this instance nominated the defendant to be his successor, as alleged; but we may state that we do not concur with the District Judge in considering that there is satisfactory evidence that any such nomination was made. The defendant has produced two writings, one of which (exhibit No. 15) purports to be the record of an arrangement made for the management of the estate in A.D. 1849. This document is not signed, and is stated by one witness, No. 68, a clerk of the defendant, to have been prepared by order of Davalatráv, the father of the plaintiffs and the defendant, who affixed his seal to it and wrote the words "*Shri Subramanya*" on the top in token of execution. The

second writing is a letter which purports to have been written to the defendant ten years later by his father, in which he is informed that he is to succeed to the *jáhágir*. The only evidence that the father caused this letter to be written is also the witness No. 68, and it is only sealed, and not signed. Considering that the father's seals have been in the custody of the defendant since the father's death, and that the only witness who can speak to the execution of these deeds is the defendant's clerk, they cannot be said to be free from suspicion, the more especially as the arrangement made in No. 15 is not shown to have been carried out. The other persons who speak to the appointment of the defendant by the father are witnesses Nos. 71, 72, and 73. No. 71 is the Pátíl of Gajendragad, and he states that Davalatráv, two days before his death, which took place on the 24th of July 1864, sent for him and said "*I am ill now, and have not my wits about me;* till I recover possession of them, perform your work through Málojiráv (the defendant);" and Nos. 72 and 73, who depose that fifteen days before Davalatráv's death he said, in the presence of many persons, "I have given the seals to Bábá Sáheb," *i.e.*, the defendant, Málojiráv. Nothing further is said of the state of mind of Davalatráv at the time he made these declarations, nor is it mentioned by whom he was surrounded, and certainly if it had been competent to him to make a devise of his property to one of his sons, we should not, on such evidence alone, have held that a devise had been made. We hold also that it is not proved that the plaintiff ever acquiesced in the settlement alleged to have been made by the writing No. 15. We think, therefore, that the defendant has failed to establish any of the pleas he has set up, and that the plaintiffs have made out a claim to partition.

We, therefore, amend the decree of the District Judge, and declare—

1*st*—That the plaintiff, Bhujangráv, is the present head of this family.

2*ndly*—That the plaintiffs and the defendant are each entitled to equal one-third shares in the landed property

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mentioned in the plaint, after due provision has been made for the ladies and other members of the family who are entitled to maintenance out of this estate, and after an assignment has been made to the plaintiff, Bhujangráv, as head of the family, for the expenses and duties which may devolve upon him in virtue of his position. This assignment should not exceed a quarter-share, and will depend on the services and consequent expenses which are, at the present time, required from the head of the family, and must be determined by the court of first instance in execution of the decree.

3*rdly*—That the plaintiffs are entitled to recover from the defendant mesne profits without interest on account of their individual shares, exclusive of the elder son's portion, from the 24th of July 1864, the date of their father's death, till the date when they shall receive possession of their respective shares, after deducting from the sums which may be found due on this account the sums actually drawn by them from the family estate since their father's decease. The amount to be recovered as mesne profits, after making the above deductions, is to be determined by the Court executing the decree.

4*thly*—The defendant is to pay three-fourths of the plaintiffs' costs, and the plaintiffs one-fourth of the defendant's costs.