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**(1929) 01 AHC CK 0044**  
**In the Allahabad High Court**

Gaje Singh and Others

APPELLANT

Vs

Mt. Uchhaba and Others

RESPONDENT

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**Date of Decision :** 07-01-1929

**Acts Referred:**

**Citation :** AIR 1929 All 223

**Hon'ble Judges :** Sen, J; Niamatullah, J

**Bench :** Full Bench

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## Judgement

Niamatullah, J.—This is a reference by the Local Government, under Rule 17 of the Rules and Orders relating to Kumaun Division, made on the petition of Gaje Singh, and others who were plaintiffs in a suit brought by them to challenge the validity of a mortgage-deed dated 18th August 1925 executed by Mt. Uchabai, widow of Govind Singh in favour of Kalyan Singh and Tika Singh, in respect of property to which she had succeeded on the death of her husband, issueless, a few years before the date of the mortgage. The relationship of the plaintiffs with the deceased husband of Mt. Uchabai will appear from the subjoined pedigree.

Bhawan Singh

Bhawan Singh \_\_\_\_\_ | \_\_\_\_\_ | | | Gaje Gobind Sarup  
Khim Singh, Singh. Singh, Singh Plff. 1 married Plff. 2 | (1) Mt. Uchabai | Deft.  
1 | (2) Mt. Jhaupari | deceased \_\_\_\_\_ | \_\_\_\_\_ |  
\_\_\_\_\_ | | Mohan Singh, Diwan Singh, Deft. 4, Plff. 3 2. The suit as  
brought is simple. Plaintiffs claim to be the nearest reversioners and presumptive  
heirs of Gobind Singh on the death of Mt. Uchabai. The alienation is impeached  
on the usual ground that it was not warranted by such legal necessity as justifies  
a mortgage by a widow under the Hindu law. Defendant 4 has been impleaded as  
he attested the mortgage-deed, probably, in token of the same having been  
executed under justifying circumstances. The plaintiffs do not suggest that they  
formed with the deceased a joint Hindu family.

3. Written statement filed by the mortgagees (defendants 2 and 3) raised two  
main questions, viz., (1) that the property mortgaged, consisting of lands in a

sub-division of the village Sirda and a cowshed, is part of pacca khaikari tenure in which plaintiffs, as separated collaterals, can have no right of inheritance and, therefore, by themselves and without joining all other cosharers of the entire tenure, they cannot maintain the suit and (2) that the mortgage was justified by legal necessity as shown by the attestation of defendant 4 a person equally entitled with the plaintiff.

4. The Assistant Collector of Ranikhet who heard the case in the first instance upheld both the pleas. On first appeal, the Deputy Commissioner, and on second appeal the Commissioner, decided only the first plea and expressed no opinion on the second which related to the existence or otherwise of legal necessity for the mortgage effected by the widow. In arriving at a conclusion on the question of the plaintiff's right to inherit on the termination of the life-estate of defendant 1 all the three Courts considered that it was concluded by certain decision which had ruled that collaterals are not entitled to succeed to khaikari tenure unless they were joint in cultivation with the deceased tenant.

5. Dissatisfied with the decisions of the Kumaun Courts the plaintiffs moved the Local Government to make a reference to the High Court for the latter's opinion on the questions arising in the case, one of which is of general importance and likely to arise in other cases. This reference has been accordingly made.

6. It may be stated at once that the first plea does not relate to any family or local custom modifying the ordinary Hindu law to which the parties are subject in matters of inheritance but refers to a peculiar incident of the khaikari tenure which, according to the defendants' case is linearly heritable but cannot descend on the collaterals unless they were joint in cultivation with the last male holder or his widow. The judgments of the Courts whose decisions are questioned are based on that footing. The earlier decisions which the Courts profess to follow, likewise, treat it as an incident of the tenure and not as part of the personal law of the holders.

7. Whether the tenure in the hands of a male holder is transferable to any extent need not be considered but it may be safely premised that it is a permanent tenure and the holder thereof enjoys absolute immunity from ejection by the proprietor. That it is not limited in duration to one or more lives will be equally clear from such materials as are available. It is admittedly heritable by the male lineal descendants. Indeed, the defendants' written statement and the judgments of the Courts which uphold it unquestionably imply that "the male holder has an estate of inheritance but that collaterals as such cannot inherit, being; excluded in the matter of inheritance by the whole body of cosharers in the khaikari tenure. Such being the characteristics of the tenure as alleged by the defendants and found by the Courts the whole controversy boils down to the question whether the tenure being heritable, collaterals, not sharing in the cultivation of a deceased holder, are excluded from inheritance by the whole body of cosharers in the particular tenure. It may be observed that the collaterals as such are excluded but can apparently succeed if they are cosharers

in the whole tenure.

8. It must be conceded that an incidents of such an extraordinary character, attaching to an estate of inheritance, and so much opposed to ordinary notions of nature justice should be established by cogent evidence. Cases of hardship may frequently occur now when separation between the sons of the same father and between uncle and nephew is common enough.

9. Now, an incident of the kind mentioned above may come into existence in one of the three ways, viz. (1) by statute (2) by the terms of the grant creating the tenure or (3) by usage. Admittedly there is no rule of any enactment on the subject. The necessity of a codified law dealing with this and similar tenures in Kumaun has been pointed out several times by experienced Revenue Officers and it is high time that uncertainty in such matters should cease. The origin of a given tenure and the terms of the grant, if any, are lost in antiquity and cannot be ascertained with any degree of precision except" in so far as may be gathered from usage and subsequent treatment of the tenures. The investigation must, therefore, mainly rest on the third alternative which, again, reduces itself to what we can gather from settlement reports which were the only source of knowledge of officers who have had to administer that part of the country. Mr. Stowell's valuable Manual of the Land Tenures of the Kumaun Division is based mostly on the reports mentioned by him in the Bibliography given by him in the preface and on cases decided by Commissioners of Kumaun Division whose orders are final. Mr. Stowell's Manual is found to be freely quoted in the judgments produced in this case as also in those of the three courts Which decided it. I have preferred to refer to such of the original reports as could be found in the Court library or the Government Secretariat library in order to discover if there is anything in them to support the proposition that collaterals are not entitled to succeed to a share in pacca khaikar village unless they shared the cultivation of the deceased khaikar and the conclusion that I have reached is that this disability, assumed by some officers, is an innovation imported from a statutory provision in the Rent Act 12 of 1881 in force in the plains. A reference to the views of the successive officers who settled Kumaun and compiled the settlement reports will bring out my reasons for arriving at that conclusion.

10. It was in 1815 A.D. that Kumaun was annexed to British India by conquest. The first settlement was very summary, the 2nd was for one year, the 3rd and 4th for 3 years each, the 5th and 7th for five years each The last of these expired in about 1838. All these settlements were made by Mr. Traill whose long official connexion with the Kumaun region entitles him to be regarded as an authority where his pronouncement on a question relating to land tenures in Kumaun is to be found. He is freely quoted by succeeding settlement officers and Mr. Stowell has made copious and frequent use of his writings. The next settlement and the first long term (20 years) settlement was concluded by Mr. Batten in 1840. On the expiry of this term it was followed by another similar settlement made by Mr. Becket (1861-1864) but before he could write his report

he had to proceed to England owing to ill health and Sir Henry Ramsay the Commissioner compiled the report of that settlement.

11. The third long settlement was made in about 1896 by Mr. Pauw whose report is very illuminating and has been made full use of by Mr. Stowell. (I have collected the above information from the report of Mr. Pauw, pp. 55-58). It will thus appear that we must depend on Messrs. Traill, Batten, Becket, Sir Henry Ramsay and Mr. Pauw for guidance as regards the incidents of a given tenure in Kumaun and any one who has had to write on that subject or to decide any question in controversy has relied on the views of one or the other of these officers.

12. An idea of khaikar tenures and rules of succession relating thereto, as also a general conception of the relations subsisting between the proprietors and Government on the one hand and between the proprietors and their subordinate holders on the other can be obtained from the following extracts taken from Sir Henry Ramsay's and Mr. Pauw's settlement reports which are largely based, so far as the characteristics of the tenure are concerned, on Mr. Traill's writings. I was not able to procure any compilation of Mr. Traill himself.

The khaekur "says Sir Henry Ramsay," enjoys hereditary though not a transferable right in the land of cultivators; and on the death of a father the sons generally make a subdivision of the land, which not unfrequently reduces the holding of each so much that these khaekurs are obliged to cultivate other land as sirthans or in paekashtee in some distant village, where they make their own terms with the proprietor. Paekashts of long standing have now assumed the position of khackurs. No paekashts are in the position of contractors or sirthans.

There is no tenure corresponding to what is known in the plains as zamindaree. Where maafee rights which had been undisturbed since the conquest of the province existed, they invariably include the proprietary right, and the cultivators are only khaekurs. Where proprietary rights which had been recognised at the 20 years' settlement, or rights of the same kind acquired by purchase, existed, they could not be interfered with but, with these exceptions, the cultivators have been recorded as the owners of the land they occupy, while the permanent tenants can never be disturbed or interfered with by the enhancement of rent. In fact these tenants are in all respects equal to proprietors, with the exception that they cannot sell their holding: and they pay a small sum in addition to the quota of revenue due from the land recorded in their names. Sirthans must make their own arrangements. "

The only other tenure requiring notice is that which exists in some parts of the district, where whole villages are in possession of the permanent tenants, khaekurs. The proprietor residing in another part has no power to interfere with these khaekurs or their land, waste or cultivated" (Sir Henry Ramsay's settlement report of 1875 p. 15-16.)

13. Mr. Pauw quoting from Mr. Traill gives the following account of khaikari

tenures:

Where the land granted, "says Mr. Traill," was already held in property by others, those occupant proprietors, if they continued on the estate, sank into tenants of the new grantee, who, moreover, by the custom of the country was permitted to take one-third of the estate, into his own immediate cultivation or sir. Of the remainder of the estate, the right of cultivation rested with the original occupants, who were now termed khaekars or occupants in distinction from thatwan or proprietor. In Nagpur there are a number of villages illustrative of this system, the high castes, Bartwals, Bhandaris, Rawats, &c, no doubt the more recent grantees, being the proprietors of the whole village with cultivating rights in part only, while the Khasiya castes, no doubt the earlier occupants, hold the remainder of the village as khaekars of the high caste proprietors. It would appear that if the grantee did not at once exercise his right to take part of the village into his own immediate cultivation, he was subsequently debarred from getting a footing there at all, and remained entitled merely to his manorial dues. Mr. Batten derives the word khaekar from khana, to eat, and kar the royal revenue, that is, he may enjoy the land, so long as he pays the revenue. Besides the Government revenue (sitri) the khaekar was called on to pay to the proprietor various dues known as bhent (special cash payments) dastur (dues in kind) and pithai (an annual trilling cash rent).

The khurnis were tenants and settled on the estate by the proprietors, and by long continued occupancy might come to be considered in the light of khaekars from whom indeed they differed little, except in the nature of the rent to which they are liable. As the khurni or kaini according to Mr. Traill paid a higher rent than any other description of tenant, it was no doubt found convenient to allow him an hereditary right to cultivation, though strictly this right belonged only to the khaekar. The land of the childless khurni would, moreover, naturally revert to the proprietor at his death, and this may not improbably be the reason why the khaekar, who, in villages, where the grantee forbore to take cultivating possession in the beginning, now entirely excludes his heirs, so that on a khaekar in such a village dying without an heir or even collateral, his land reverted to the village body of khaekars should he die in a village where the proprietor holds land in cultivating possession, the holding passes not to the body of khaekars, but to the proprietor. The analogy of position between khaekars and khurnis would probably have been quite sufficient to establish this custom. Mr. Batten says regarding the khurnis "This class of tenants is fact becoming merged into that of khaekars." It seems doubtful whether during the period of British rule they were ever distinguished, as no mention is made of khurnis in the oldest settlement papers; they appear to have been treated exactly as khaekars, and certainly not only is no distinction made now, but the very name is lost, and it would be impossible to find out whether any given khaekar acknowledged for his ancestors a vassal tenant, or a reduced occupant proprietor. Sir H. Ramsay, however, is said to have acknowledged a distinction between pakka and kachchha khaekars, having reference no doubt to the under

proprietary and occupancy rights discussed in this paragraph, and in a settlement dispute relating to Mangaon, patti Dug in the Almora District, decided by Pandit Amba Datt, Deputy Collector, in 1843 A.D., the same technical expression, pakka khaekar is used.

The hissedari right is, as before mentioned, said to have been an introduction of the British rule. The idea of land without a private owner seems to have been repugnant to the earliest British administrators and as in the plains the proprietary right was conferred on the zamindars, or revenue collectors, so in Garhwal it was conferred on the occupant cultivators unless some one else could show that a grant of the land and not merely an assignment of the revenue, had been made to him. The cultivators were then termed hissedars or cosharers in the estate, and were allowed full rights of transfer in the cultivated land of the village. (Pauw's Settlement Report 1898, pp. 33-35 paras 37, 38 and 40).

Another kind of resident tenants, however, says Mr. Traill, "who rent the land which the proprietors from absence or other causes are precluded from cultivating themselves, have no right of occupancy, either acknowledged or prescriptive. The tenants pay their rent either in but kind (commonly at one-third of the produce), or in money, according to existing rates or engagements or to former usage. Where there is little demand for the land it is usually let for a moderate money rate, which tenure is termed sirtan, that is the renter pays merely sirti." The term sirti meant the Government land revenue proper under the Rajas, the original "agricultural assessment. (Pauw's settlement report p. 35 para. 41)."

It should be borne in mind that the word "hissedar" has become a technical expression denoting only proprietary cosharer.

At the outset a distinction must be made between khaekars in a village held entirely by khaekars, and khaekars in a village in which the hissedars have khudkasht, which is the modern form which the under-proprietary and occupancy rights have respectively assumed. In the former case (to quote Mr. J.R. Reid's words in the case of Padmu, of Timli, Lagga Pali, Khatli v. Gauri Datt, in an order dated 28th March 1889, as Commissioner), "the khaekars alone have a right to arrange for the cultivation, pasturage, etc., including the succession to land lapsing owing to the death, heirless, of khaekars, the breaking up of waste etc., while the hissedars have no right beyond the collection of revenue cesses and "padhanchari." It would be hardly necessary to give instances, by quoting cases, of such a well known and well-established principle were it not that owing to the absence of any written law on the subject of these tenures, and to the unscrupulousness and untruthfulness of litigants, new authorities are apt, merely from inability to ascertain the correct custom, to give decisions absolutely opposed to all recognized rights. It is sufficient to give one such instance. The village of Milai is held entirely by khaekars, who pay revenue to the muafidar. At the last settlement the khaekars who represent the old cultivators who have, sunk into tenants of the grantee were recorded as proprietors in consequence of

their independent position. On appeal they were subsequently reduced to the position of khaekars. But there could be no question of their under-proprietary right or the fact of their holding the whole village. Balmukand the present muafidar sued a khaekar Lalmani for recovery of possession of land broken up by the latter on the ground that it was his khudkasht (a perfectly preposterous plea; a similar suit had in fact been dismissed in 1888) and by some means or other got a decree. The defendant in appeal pleaded that the whole village was in possession of khaekars, and that the muafidar by custom could only take the malikana and had no right to interfere with the cultivation. The Commissioner, however, refused to modify the decision (5th May 1893) and an appeal to the Board of Revenue met with the same fate (2nd September 1893), though in the case of Padmu v. Gauri Datt, quoted above, the Board had themselves decided that the khaekars in a similar village were entitled to the possession of land which the hissedars had actually partitioned out amongst themselves. The cases of Khushal Singh of Dyuna, Talla Dora v. Lachi (8th June 1889), and Gangapuri of Mangaon, Dug v. Parsi Sah (20th December 1893), both of which went up at one time or another to the Board are perhaps the leading cases on the subject of the holdings of khaekars in villages held entirely by khaekars. Both are Almora cases and in both the custom was held to apply not only to principal but also to lagga villages held entirely by khaekars, when there was any evidence that the khaekari holding represented an old "under-proprietary tenure. They both refused to the hissedar the right to resume the land of an heirless khaekar and in both cases it was decided that the land should go to the common body of khaekars.

The principle is, however, by no means a modern one. Sir H. Ramsay mentions it in the Settlement Report of Kumaun, and a judicial decision by him to the same effect exists in Harak Singh of Chyurkot Sabli v. Dalip Singh of Jukani lagga of Bangar Sabli. in which the hissedars wanted to divide among themselves the unassessed waste land of the village of Jukani held entirely by khaekars, Sir H. Ramsay ruled: "Since all Jukani is in possession of khaekara the unmeasured land will not be divided amongst the hissedars" (30th November 1877). In the case of Banwa v. Bala Datt, of Rauthiya, Chalansyun, in which the defendant, a hissedar, got a deed of relinquishment from "a khaekar in a village held entirely by khaekars and the plaintiff, a khaekar, sued for the land, Mr. Ross, Commissioner, ruled:" The hissedar cannot get possession of any khaekar land. If a khaekar wishes to give up any of his land, it must go to the other khaekars. It was also ruled that the hissedar had no right to cultivate unmeasured land in the village (9th April 1888). Nor does the hissedar improve his position by obtaining by fraud or collusion the cultivating possession of land in the village. It has been laid down in the case of Devi Datt v. Prem Singh, decided, by Mr. J.R. Reid, Commissioner, on 9th January 1889, that a hissedar so obtaining land is on precisely the same footing as regards rights and privilege as any other khaekar, and that the land so cultivated is not equivalent to khudkasht nor does it affect the under-proprietary rights of the other khaekars.

In the case of villages in which the hissedars have land in their own cultivation or khudkasht, the khaekar's land, in the event of his leaving no heir, or collateral in cultivating possession, reverts to the proprietor. This reversion was noted in the last settlement agreement, though not the reversion to the body of khaekars. In the case of Ude Singh in 1876 this matter was discussed between Mr. Colvin, the Officiating Commissioner, and Mr. Backet, the latter explaining that the agreement was a "mere form". The khaekar may also relinquish his land at any time by a deed of relinquishment, ladawa, executed in favour of his landlord, but not to the prejudice of his partners in the holding. Thus, in the case of Choti v. Jivanand of U prainkhet, Bachhansyun, the plaintiff, widow of a deceased khaekar, sued to cancel a ladawa given by her eldest son to the hissedar defendant, as she had a younger son. Sir H. Ramsay ruled; If Paunlya did not wish to cultivate the land, his younger brother had the right to all, and Paunlya had no right to give it up by ladawa. The deed of relinquishment was accordingly cancelled (4th September 1878).

As regards the right of relatives to succeed, no doubt has ever been expressed as to the son's right. The daughter's right is more doubtful, though in the case of Mt. Sauni and another v. Parsadu, Pauri, Nandalsym, the plaintiffs sued to succeed their mother as khaekars, and got a decree which was upheld by Colonel Erskine on appeal (19th May 1890). In a former case a nephew had been preferred to a daughter and a daughter's son, even when the "latter were supported by the proprietor, while still earlier cases had declared the nephew incapable of succeeding at all; facts which only show the necessity for a clear exposition of existing rulings. The daughter's right is no doubt a highly equitable one, and would apply a fortiori in the case of a gharjawain and daughter's son, though it can hardly be said that the rights of either are generally recognized. The fact is that nine out of every ten hillmen are hissedars and every curtailment of the right of succession of the khaekar is to their advantage, as it brings in more lapsed holdings, which can now be let out at far better profit than 20 per cent on the revenue. As regards heirs other than descendants, the widow has an undoubted claim to succeed in the absence of sons, and in this is preferred to the daughters. In the case of Rattan Singh v. Dhaunkalu of Sirwana, Iriya Kot, the plaintiff hissedar sued to obtain land from the defendants cultivating on behalf of the deceased khaekar's widow, Sir H. Ramsay ruled:" while the wife of a deceased khaekar is alive this claim is inadmissible (9th May 1872). Collaterals, as a rule, are only allowed to succeed if they share in the cultivation of the holding (i.e. are what is known as shikmi). There are no definite rulings on the subject, but Mr. J.R. Reid has expressed his opinion that Section 9 of Act 12 of 1881 might fairly regulate succession in this case. The right of an adopted son to succeed would not be worth noticing were it not that it was denied in several cases by Mr. Boss while Commissioner. Sir H. Ramsay, how over, in the case of Kamrup v. Narain Singh, Kirkhu, Mawalsyun (1st February 1882), clearly uphold the right of an adopted son to succeed, and in the cases of Sri Ram v. Gaje Singh of Bhawain, Khatsyun (9th September 1892), and Kirpa, of Ghiri, Kapholsyun v.

Kedaru (1st August 1894) this view has been re-affirmed. Succession by relatives other than those mentioned can take place with the consent of the cosharer but not otherwise, but this may be regarded rather as a renewal of the khaekari right than a continuation of it. (Pauw's Settlement Report 1898 pp. 45-46 paras. 49 and 50).

The khaekari right is only heritable, not transferable. "This was definitely laid down by Colonel Fisher, as Commissioner, in the case of Suraj Singh and others v. Amardeb Gurasyun (2nd February 1885)." (Pauw's Settlement Report 1898 p. 47 para. 51).

The ejection of khaekars can only take place on a decree of Court which is usually only made in case of proved inability to pay the assessment, for instance non-satisfaction of a decree for rent. It thus happens that the ejection of khaekars is almost unknown. The hissedar is also very cautious in interfering with a khaekari holding unless armed with a ladawa as it generally ends in his being mulcted in costs, (Pauw's Settlement Report p. 48, para. 51).

14. Mr. Stowell has succinctly described the khaekar tenures, their origin and incidents in Chap. 3 of his Manual and defines a khaekar as

a permanent tenant with a heritable but nontransferable right in his holding and paying a rent fixed at settlement which cannot be altered during the currency of a settlement.

He says in a foot-note that the heritable and nontransferable character of the tenure was recognized by Mr. Traill as far back as 1829.

15. It will appear from these extracts that persons holding under the proprietors or hissedars are roughly divisible into two main classes, viz., (1) khaekars and (2) sirtans or tenants at will-Khaekars who are ex-proprietors fall in two categories, (a) pacca khaekars who hold the entire village in which the proprietor has no khudkasht and can only recover Hand revenue and manorial dues from khaekars and (b) kacha khaekars who hold part of the village, the remaining portion being cultivated by the proprietor entitled to recover rent from khaekars who, otherwise, have a permanent tenure. The word "under-proprietor" has been used to denote the former of the last two but it is materially different from the under proprietary tenure in Oudh, which is heritable and transferable in all respects and is recognized as full ownership.. There is absolutely nothing in the origin of these tenures to justify the assumption that only a restricted right of inheritance exists. As a rule a permanent tenure not limited to one or more lives is fully heritable. It is quite clear that from Mr. Traill down to Mr. Pauw all settlement authorities recognise that a khaekar tenure is heritable without qualification or reservation of any kind and a question of its lapsing would only arise on total extinction of heirs. The earliest indication that we can trace of the collaterals (who are undoubtedly heirs under Hindu law) being excluded is found in an opinion of Mr. J.R. Reid the Commissioner (noted at p. 46 of Mr. Pauw's report) who considered that Section 9, Act 12" of 1881 "might fairly regulate

succession in this case." This must have been in or about 1889 when he was Commissioner of Kumaun. Mr. Pauw quotes an earlier case *Suraj Singh v. Amerdeb*-(2nd February 1885) in which *khaekar*'s right was described as "heritable, not transferable." Mr. Pauw pointed out in noting the opinion of Mr. Reid, that "there are no definite rulings on the subject" which suggests that he was not in accord with Mr. Reid's view based on analogy drawn from Section 9, Act 12 of 1881.

16. Revenue officers who administered justice in civil cases in Kumaun based their judgments on the equities of each case as it arose and, in many instances,, their decisions were not strictly according to Hindu law, see for example, cases of daughter, nephew and even adopted son, noted by Mr. Pauw at p. 46 of his report. They are so conflicting that no rule can be deduced from them. Indeed they do not profess to be based on any rule but on the circumstances of individual cases.

17. In deciding the case under reference the Kumaun Courts considered themselves bound by the decision of the Commissioner in the case of *Upan Deo v. Bachi Singh of Thala Manral, Malla Salt* (dated 18th July 1892). I have not been able to get a full copy of the judgment but portions of it given at p. 85 of Mr. Stowell's book show fairly clearly that the question in that case related to the right of *hissedar* to a lapsed tenure as against the body of *khaekars* in a *pacca*, *khaekari* tenure and a reference is also made to the rights of collaterals. The relevant passage is this:

The custom of Kumaun is believed to be as alleged ("that is"), says Mr. Stowell, "as regards the *hissedar*'s not succeeding." But under the custom it is understood that collaterals have no prior title to lapsed *khaekari* lands; such lands lapse to the *khaokari* community.

18. No evidence of the alleged custom is referred to. How it was "understood" or "believed" to exist is not indicated. I am inclined to think that this halting expression of opinion is only an echo of the view previously expressed by Mr. Reid to which reference has already been made and which is based on an analogy drawn from the provisions of Act 12 of 1881. The decision in *Upan Deo*'s case appears to have been accepted by Courts subordinate to the Commissioner in some subsequent cases and copies of judgments in two of such cases are on the file. One of these is the judgment of Mr. Dible, Assistant Commissioner, 1st Class dated "20th Nov. 1915 which quotes the judgment of Mr. J.S. Campbell in Special Civil Appeal No. 3 of 1913 *Tili v. Bhawan Singh etc.*, Mr. Campbell ruled that:

in this individual case the plaintiffs have failed to prove any custom by which lands in the possession of a *khaekar* in a purely *khaekari* village, possession passes on his death without direct heirs, to the panch *khaekars* rather than to collaterals not in joint possession with him at the time of his death.

19. Mr. Campbell underlined (italicized) the words which I have underlined

(italicized) in the passage quoted above, probably to indicate that he enunciated no general rule. This has introduced a further complication viz,, that in some pacca khaekar tenures the collaterals do succeed. Accordingly the ratio decidendi adopted by Mr. Dible and presumably by other officers was that there was only a presumption that collaterals not joint in cultivation with the deceased could not succeed but evidence in a given case may show that they had such a right.

20. If a question of burden of proof arises, and it will arise if a special custom excluding collaterals from inheritance as regards a permanent tenure is pleaded, the party pleading such a custom must have the onus laid on it to prove by satisfactory evidence that such collaterals, though heirs under the personal law of the deceased tenant in respect of all other assets left by him, were excluded from inheritance as regards his rights in khaekari tenure. Generally speaking, proof of a custom of exclusion in such cases should consist either (1) of evidence showing that the Sovereign authority, while granting proprietary rights to others, imposed a condition on the resulting khaekar tenure that collaterals not joint in cultivation would not succeed in the event of khaekar dying without a lineal male descendant and widow or (2) of evidence of usage ancient, uninterrupted, uniform and certain, of exclusion of collaterals, such as is considered sufficient in law to override the ordinary law to which the parties may be subject. I have already pointed out that the rule of succession to a permanent tenure, heritable in its character, is in the absence of a statute, terms of a grant, if any, or valid and binding custom to the contrary, the same as is applicable to other properties left by a deceased tenant.

21. It seems to me that Kumaun Courts which excluded the collaterals in certain cases were either under a misapprehension as regards the right of inheritance possessed by a separated collateral under Hindu law, taking it for granted that separation so far affects his status as to make him a total stranger, or considered that the law as laid down in S-9, Act 12 of 1881, should be applied as an equitable rule in the absence of a custom specifically referring to the rights of collaterals. It was not, however, accepted by officers of standing without demur. I have already referred to the remark of Mr. Pauw in reference to the view of Mr. J.R. Reid. Mr. Stowell has likewise commented on it and urged its reconsideration. He says:

As regards succession by heirs of a deceased khaekar the same rules have been observed as in the case of khaekars in mixed villages. Thus only a limited class of heirs can claim to succeed. This is evidently on the analogy of the "occupancy tenant" position of the khaekar in mixed villages. It is inequitable on the under-proprietary theory and remembering the special character of these communities. Succession in these cases, it would seem reasonable, should be regulated by the ordinary rules of Hindu law as in the case of hissedars."

In the case of Upan Deo v. Bachi Singh of Thala Manral, Malta Salt (order of 18th July 1892), the Board applied the rule, excluding collaterals from any claim to succeed as of right, to a wholly khaekari village, but the ruling is not a very

positive one. From the phrases used in this decision it would seem that the Board were rather tentatively accepting a view of the case than laying down a decisive ruling. "The custom of Kumaun is" they say, believed to be as alleged" (i.e. as regards the hissedar's not succeeding.) "But under the custom it is understood that collaterals have no prior title to lapsed khaekari lands; such lands lapse to the khaekari community." Otherwise I have found no rulings laying down specifically that the same rules must apply to cases of inheritance in the villages as are applicable to khaekars in mixed villages. There seems, therefore, to be some room for an unfettered consideration of the question by the higher Courts." (p. 85).

22. It is possible to make an attempt to defend the view of the Kumaun Courts on the ground that the whole community of khaekars in a village hold the lands as a corporate body, rights of individuals not being recognized, so that if a sole tenant dies, land cultivated by him goes by survivorship to the whole body of remaining khaekars. Such a theory is farfetched and no indications in support of it can be discovered in any settlement report or judgments of Courts. On the contrary a tenure of such a character excludes all rights of inheritance and will admit of only survivorship, firstly in favour of shares in the cultivation and failing them in favour of the entire khaekar community of the village. In that view a separated son or other male lineal descendant will be in no better position than a collateral and yet the unqualified right of a son and other male lineal descendants, separate or joint is conceded on all hands, rights of individual holders inter se are recognized which militate against such a theory. Reports are full of references to partition and where division of land is permitted, compensating one cosharer at the expense of another will be very often inevitable. This, again, will negative the existence of what would be, technically speaking, joint tenancy belonging to a corporate body as distinguished from a tenancy-in-common held by a few individuals. I must, therefore, dismiss this line of argument. I have mentioned and examined it because the opposite party is unrepresented.

23. The only other question that called for decision was whether, assuming the plaintiffs are competent to question the mortgage made by defendant 1 in favour of defendants 2 and 3, the same is valid and binding. The mere fact that the tenure is not transferable is not enough to invalidate it as between the mortgagee on the one hand and the mortgagor or those bound by her actions on the other. The decisive factor, therefore, is whether the mortgage was justified by legal necessity. The Assistant Collector, in disposing of issue 5 says:

Both parties have adduced evidence on this issue. It is admitted by both parties that Gobind Singh's property was self-acquired and it is also proved from defendant's evidence that he built a number of retaining; walls and also a big compound wall and a house and cowshed. He must have spent a lot of money. Defendant 4, Mohan Singh is also a collateral of the deceased, Gobind Singh. He is a witness to the mortgage-deed which is in favour of outsiders. In the deed the

rukka executed by Gobind Singh is mentioned. The total amount of mortgage-deed may have been exaggerated but it looks probable that Mt. Uchhaba did take a loan to pay up legal debts and expenses. In view of decision of issue 2 against the plaintiff, this issue is not of much importance. This issue is decided in the affirmative.

24. In my opinion the finding, such as it is, is not justified on the grounds on which it proceeds. That it is a self acquired property of Gobind Singh is not relevant. That he must have borrowed money to make certain constructions which he did make is nothing, better than a surmise. To justify such a conclusion there should be legal evidence. That defendant 4, Mohan, a remoter collateral than plaintiffs, attested the mortgage-deed has no value. If examined as a witness, he might have given useful information but this was apparently not done. It is only if the presumptive heirs who alone are expected to take exception to the alienation in question, consent by attesting the deed inference of legal necessity is justified. A remoter reversioner cannot by his action bind the presumptive heirs: see Rangasami v. Nachiappa AIR 1918 P.C. 196.

25. A rukka alleged to have been executed by Gobind Singh was produced but the Assistant Collector does not treat it as duly proved. He relies on it because it is recited in the mortgage-deed. A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited. The learned Assistant Collector throws doubt on the defendants' case by observing that:

the total amount of mortgage-deed may have been exaggerated but it looks probable Mt. Uchhaba did take a loan.

26. The two Courts of appeal did not enter into this question.

27. I may note that I construe the concluding paragraph of the letter of the Government making the reference as calling for the opinion of this Court on all the questions arising in the case and mentioned in the petition to which it (the letter) refers.

28. In answering the reference I summarise my opinion as below: (1) The share of pacca khaekar tenure and its appurtenances in dispute in the case belonged to Gobind Singh, deceased husband of defendant 1 in full heritable right and the plaintiffs as his reversionary heirs are not debarred from succeeding to that share by reason of their not being joint in cultivation with him or defendant 1. (2) The finding of the Assistant Collector that the mortgage relied on by defendants 2 and 3 was justified by legal necessity is not correct.

Sen, J.

29. I entirely agree.