PRIVY COUNCIL.

PROTAP CHANDRA DEO (PLAINTIFF)

v.

JAGADISH CHANDRA DEO (DEFENDANT)

(AND CONNECTED APPEALS).

P. C.*
1927
May 3.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Hindu Law—Impartible estate—Alienation by will—Custom—Absence of previous alienations.

The holder of an impartible zamindari can alienate it by will, although the family is undivided, in the absence of proof of a family custom precluding him from doing so. The absence of any instance in which a previous holder has alienated the estate by will is not by itself sufficient evidence to establish a custom.

Sartaj Kuari v. *Deoraj Kuari* (1) and *Venkata Surya Mahipati* v. *Court of Wards* (the first Pittapur case) (2) followed.

There is no inconsistency between the above decisions of the Judicial Committee and *Baijnath Prasad Singh* v. *Taj Bali Singh* (3), and earlier decisions, declining with the right of succession to an impartible estate.

Judgment of the High Court affirmed.

A member of the family of the last holder of an impartible estate, although he is undivided and would have succeeded to the estate had not the holder divided it to another, is not entitled to maintenance out of the estate if (not being a son of the last holder) he fails to prove a custom whereby he has a right to maintenance, nor if he is in possession of villages under *khorposh* grants made to his predecessors for maintenance.

Rama Rao v. *Raja of Pittapur* (4) followed.

Where a suit to recover an estate succeeds, mesne profits and costs should not be made payable out of the estate, and not by the defendant, merely on the ground of the liability of the defendant to pay.

Decree and orders of the High Court reversed.

**Present:* VISCOUNT DUNEDIN, LORD PHILLIMORE, LORD WARRINGTON OF CLYFFE, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

(1) (1888) I. L. R. 10 All. 272 ; L. R. 15 I. A. 51.

(2) (1899) I. L. R. 22 Mad. 383 ; L. R. 26 I. A. 83

(3) (1921) I. L. R. 43 All. 228 ; L. R. 48 I. A. 195.

(4) (1918) I. L. R. 41 Mad. 778 ; L. R. 45 I. A. 148.

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CONSOLIDATED Appeals (No. 59 of 1925) by special leave, the first two being cross-appeals, from a decree of the High Court (June 20, 1924), affirming a decree of the Subordinate Judge of Midnapore (August 22, 1922) and the third being from two orders made by the High Court after its said decree.

The abovenamed respondent brought a suit against the abovenamed appellant claiming an estate known as the Dhalbhum Raj, and mesne profits. He claimed under the will of Raja Satrughna, the last holder who died in 1916. The family was undivided and governed by the Mitakshara: the estate was impartible and governed by a custom of lineal primogeniture. It was admitted that if the will was invalid, as the defendant contended, he was entitled to succeed. The history of the family (with a genealogical table) appears in a report of a former litigation at I. L. R. 29 Calc. 343. The defendant was descended from one Jugal Kishore, and the plaintiff from Jugal Kishore's brother, Kamala Kant.

Since 1905 the estate had been administered under the Incumbered Estates Act, 1876. Both the plaintiff who obtained probate and administration, and the defendant, applied to be placed on the register in respect of the estate. The defendant obtained registration; he got the estate discharged from management under the Act of 1876, and on his own application as a disqualified proprietor, it was placed under the Court of Wards.

From the death of Satrughna, the defendant had received Rs. 9,000 a year from the income of the estate.

The Subordinate Judge made a decree, declaring the plaintiff's title under the will. He held that there was nothing in law to render the will invalid, and that an alleged custom against alienation by will

was not proved. He granted mesne profits for three years, amounting to Rs. 27,000. On account of the inability of the defendant to pay the mesne profits and costs, he ordered that they should be realised out of the estate.

Both parties appealed to the High Court, the appeals being heard together. The learned Judges (Chatterjea and Chotzner JJ.), by a judgment elaborately discussing the authorities and the evidence, affirmed the decree of the trial Judge on all points.

Both parties appealed to the Privy Council from the decision. The plaintiff also appealed from later orders of the High Court continuing the appointment of a receiver and fixing the defendant's maintenance at Rs. 1,200 per month.

Dunne, K. C., Sir George Lowndes, K. C., and *Hyam*, for the appellant. The decision of the Privy Council in *Venkata Surya Mahipati* v. *Court of Wards* (the first Pittapur case) (1), holding that an impartible estate is alienable by will, and its judgment in *Sartaj Kuari* v. *Deoraj Kuari* (2), upon which that decision was based, are inconsistent with the Board's decision in *Baijnath Prashad Singh* v. *Taj Bali Singh* (3). They were decided on the view that there was no co-ownership, and therefore no right of survivorship in an impartible estate. But the case last cited decided that if the family is undivided, there is a real right of survivorship. In that view the estate in suit passed to the appellant immediately upon the death of the last holder, and there was nothing for his will to operate upon. Having regard to the inconsistency between the decisions it is now open to the Board to follow

(1) (1899) I. L. R. 22 Mad. 383 ; L. R. 26 I. A. 83.
(2) (1888) I. L. R. 10 All. 272 ; L. R. 15 I. A. 51.
(3) (1921) I. L. R 43 All. 228 ; L. R. 48 I. A. 195.

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either view. It is submitted that the view taken in the last decision is correct in Hindu Law. The custom of impartibility does not destroy the quality of an estate as joint family property: *Sivaganga case* (1), *Yanumula Venkayamah* v. *Yanumula Boochia Vankondora* (2), *Chowdhury Chintaman Singh* v. *Nowlukho Konwari* (3), *Doorga Pershad Singh* v. *Doorga Konwari* (4). The power of a Hindu to make a will is merely an importation into Hindu law, and does not entitle him to dispose of joint family property. The right to a partition is not an essential attribute to joint family property; it did not exist in the early periods of Hindu Law and is still not universal. For instance, it does not exist in the case of a Malabar Tarwad, though that cannot be disposed of by will. The view adopted in *Sartaj Kuari's case* (5), which altered what was previously well-established: see *Abdul Aziz Khan* v. *Appayasami Naicker* (6) and *Ram Narain Singh* v. *Pertum Singh* (7), was to a great extent based upon the *Tipperah case* (8), where the family was governed by the Dayabhaga, and on cases where the estate was separate property. Even if it is now too late to call in question *Sartaj Kuari's case* (5), it is submitted that having regard to the decision in *Baijnath Prashad Singh's case* (9) the view adopted in the first *Pittapur case* (10) should not be followed. There can have been few wills dealing with impartible estates since the date of the decision, especially having regard to the legislation in the Madras Presidency.

(1) (1863) 9 Moo. I. A. 543.
(2) (1870) 13 Moo. I. A. 333, 337.
(3) (1875) L. R. 2 I. A. 263, 270.
(4) (1878) I. L. R. 4 Calc. 190, 201; L. R. 5 I. A. 149, 159.
(5) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.
(6) (1903) I. L. R. 27 Mad 131, 142; L. R. 31 I. A. 1, 9.
(7) (1873) 11 Bom. L. R. 397.
(8) (1869) 12 Moo. I. A. 523.
(9) (1921) I. L. R. 43 All. 228; L. R. 48 I. A. 195.
(10) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.

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Alternatively the estate was by custom inalienable by will. Hindu wills have been recognised only during the last 150 years, and the evidence established that during that period at least no holder had attempted by will to alter the natural devolution of the estate, although in some instances the holder left a widow and no issue. The plaintiff had to prove impartibility, but it was part of the custom that the raj was inalienable by will and descended by primogeniture. The estate was in the jungle mahals, and there is no instance of a raj so situated being alienated by will. Being so situated Ben. Reg. X of 1800 threw on the plaintiff the onus of proving that the estate was alienable by will. But even if the onus of proof was upon the defendant, that onus was discharged by the evidence. That is supported by *Mahatabsingh* v. *Badansingh* (1). The custom being in accordance with Hindu law, the onus was less heavy than if it were in derogation of that law. It was held in *Sartaj Kuari's case* (2) that absence of proof of previous alienations did not establish a custom, but in that case it appeared that about eleven-twelfths of the original estate had been alienated. This estate was admittedly a raj and thus differed from the Pittapur estate. If the absence of any previous attempt to alienate the raj by will does not establish the custom it is difficult to see how it could be proved.

On the cross-appeals. The appellant as a co-owner had a right to maintenance.

DeGruyther, K. C., and *Dube*, for the respondent. The judgment in *Baijnath Prashad Singh* v. *Tej Bali Singh* (3) shows that it was not then the intention of the Board to interfere with the authority of the decisions

(1) (1921) I. L R. 48 Calc. 997 ; L. R. 48 I. A. 446.
(2) (1888) I. L. R. 10 All. 272, 289 ; L. R. 15 I. A. 51, 66.
(3) (1921) I. L. R. 43 All. 228 ; L. R. 48 I. A. 195.

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in *Sartaj Kuari's* case (1) and in the first *Pittapur case* (2) which have frequently been applied. It is now too late to reconsider these decisions, the second of which is conclusive against the appellant. No conflict in principle arises. Impartible estates are not dealt with by the Mitakshara, and it was necessary to decide who should succeed in case of an intestacy. *Baijnath's case* (3) decided merely that in that case the fact that the family is joint, must be taken into account, but it was not laid down that there was in an impartible estate any co-ownership which was a restraint upon the power to alienate. It was held in the *Tippera case* (4) that joint property was incompatible with an impartible raj, whether the family was governed by the Mitakshara or the Dayabhaga. The holder of an impartible estate can break up the joint family by an unequivocal statement of his intention to do so: *Jagadamba* v. *Narain Singh* (5) and cases there cited: in that case the estate would be separate property in the hands of the holder: *Thakurani Tara Kumari* v. *Chatturbhuj Narayan Singh* (6).

As to the alleged custom. Impartibility of itself did not render the estate inalienable, *Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (7) *Durgadut Singh* v. *Rameshwar Singh* (8). Impartibility arose from the fact that the estate was a raj. That Ben. Reg. X of 1800 applies only to intestate succession is shown by the first of the above decisions. The onus of proof was

(1) (1888) I. L. R. 10 All. 272, 289; L. R. 15 I. A. 51, 66.

(2) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.

(3) (1921) I. L. R. 43 All. 228; L. R. 48 I. A. 195.

(4) (1869) 12 Moo. I. A. 523, 540.

(5) (1922) I. L. R. 2 Pat. 319; L. R. 50 I.A. 1.

(6) (1915) I. L. R. 42 Calc. 1179; L. R. 42 I. A. 192.

(7) (1881) I. L. R. 8 Calc. 199, 206; L. R. 8 I. A. 248, 253.

(8) (1909) I. L. R. 36 Calc. 943: L. R. 36 I. A. 176.

upon the defendant: *Court of Wards* v. *Venkata Surya Mahipati* (1) on appeal to the Privy Council (1*a*) it was not suggested that view was wrong. It was concurrently found that the onus was not discharged. Absence of previous alienations by will is not sufficient: *Sartaj Kuari's case* (2). The evidence shows several cases of gifts and sales of parts of the estate that renders *Mahatabsingh* v. *Badansingh* (3) inapplicable. In Hindu law testamentary law rests upon the power of gift.

On the cross-appeals. The appellant was not entitled to maintenance. Not only was he in possession of villages granted to his predecessors for maintenance, but he proved no custom so entitling him. Except in the case of a son of a holder, a co-owner is entitled to maintenance, only if he proves a family custom supporting his claim: *Rama Rao* v. *Raja of Pittapur* (4) (the second Pittapur case); *Baijnath Prashad Singh* v. *Tej Bali Singh* (5), *Vikrama Deo Maharajulum* v. *Vikrama Deo* (6).

Dunne, K. C., in reply. The power to alienate by gift does not involve the power to devise: *Lakshman* v. *Ramchandra* (7). [Reference was made also to *Naraganti* v. *Venkatachalapati* (8) approved in *Kachi Kaliyana Rengappa* v. *Kachi Yuva Rengappa* (9).]

(1) (1896) I. L. R. 20 Mad. 167, 181.

(1*a*) (1899) I. L. R. 22. Mad. 383, L. R. 26 I. A. 83.

(2) (1888) I. L. R. 10 All. 272; L. R. 15 I. A. 51.

(3) (1921) I. L. R. 48 Calc. 997; L. R. 48 I. A. 446.

(4) (1918) I. L. R. 41 Mad. 778; L. R. 45 I. A. 148.

(5) (1921) I. L. R. 43 All. 228; L. R. 48 I. A. 195.

(6) (1919) 24 C. W. N. 226 (P.C.)

(7) (1880) I. L. R. 5 Bom. 48; L. R. 7 I. A. 181.

(8) (1881) I. L. R. 4 Mad. 250.

(9) (1905) I. L. R. 28 Mad. 508; L. R. 32 I. A. 261.

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The judgment of their Lordships was delivered by LORD WARRINTON OF CLYFFE. The subject-matter of the present appeal is a family estate known as the Dhalbhum Raj, situate in the districts of Singhbhum and Midnapur, in the province of Bengal.

The family is a joint and undivided one, governed by the Mitakshara school of Hindu law. The estate is ancestral, and succession to it is governed by a family custom according to the rule of lineal primogeniture. The Raj is impartible. The last holder of the estate prior to the present dispute was Raja Satrughna, who, in 1887, succeeded to it on the death of Raja Ram Chandra III.

On the 11th May, 1905, Raja Satrughna made a will, whereby he appointed the respondent executor, and bequeathed the estate to him and declared him to be the next Raja. Probate of the will has been duly granted to the respondent. It is admitted that, if the will had not been made or is inoperative, the appellant, according to the rule of lineal primogeniture, is the next heir, and as such is entitled to succeed to the estate.

The main question in the appeal is whether the estate is inalienable by will.

In both Courts in India, first by the Subordinate Judge of the district of Midnapur, and on appeal by the Judges of the High Court of Judicature of Bengal, this question has been answered in the negative, and the title of the respondent has thus been upheld.

Both Courts in India have held that the question is settled by decisions of this Board. Their Lordships agree with this view, and it will be sufficient for the purposes of the present judgment shortly to state the nature and effect of the previous decisions referred to.

The question of the alienability of an impartible Raj first came before the Board in the case of *Sartaj Kuari* v. *Deoraj Kuari* (1) on appeal from Allahabad. The question in that case was as to the validity of a gift *inter vivos* of part of an impartible estate made by the owner for the time being in favour of his younger wife. The validity of the gift was disputed by his son by the first wife, who contended that the owner had no power to alienate any part of the Raj estate except for purposes of necessity. The Board, by its judgment, delivered by Sir Richard Couch, held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible *Raj*, such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it.

This case was decided in the year 1888.

The next case was the first *Pittapur* case [*Venkata Surya Mahipati* v. *Court of Wards* (2)], decided in the year 1899. The question in this case was whether the Raj was alienable by will. The judgment of the Board decided two points: (i) that the *Sartaj Kuari's* case (1) covered by analogy the case of alienation by will, and (ii) that the law laid down thereby applied in Madras and was not confined to the North-West Provinces in which the case arose. The Board, therefore, not only followed their previous decision, but extended it so as to make it apply to alienation by will as well as to alienation *inter vivos*.

In the opinion of their Lordships, they ought to accept and act upon these decisions, unless it could be shown that they are inconsistent with other decisions

(1) (1888) I. L. R. 10 All. 272; L. R 15 I. A. 51.

(2) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.

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of the Board, or that some principle of law demanding a contrary decision was clearly ignored or forgotten.

Accordingly, a strenuous attack on the two judgments was made by counsel, which really resolved itself into the contention that they were inconsistent with judgments of the Board dealing with the right of succession, in which it had been held that such right is not affected by the impartible nature of the Raj. It was argued that the co-ownership, the existence of which was denied in the two cases in question, is essential to the right of succession, and accordingly that the two lines of decision are inconsistent with each other, and that it is open to their Lordships to choose between the two.

Their Lordships are unable to adopt this veiw. The last of the cases on the question of succession is *Baijnath Prashad Singh* v. *Tej Bali Singh* (1). In delivering the judgment of the Board, Lord Dunedin, referring to the *Sartaj Kuari's* case (2) said :—

"What was decided was that in an impartible Raj there was no "restriction on the power of alienation of the member of the family who "was on the Gaddi and was in possession in respect that there was no such "right of co-ownership in the other members as to give them a title to "prevent such alienation. The right of the other members that was being "considered was a presently existing right. The chance which each "member might have of a succession emerging in his favour was, obviously, "outside the sphere of inquiry"

The Board refused in terms to pronounce an opinion that the decision in the *Sartaj Kuari's* case (2) was wrong, though they pointed out that it would have been possible to decide the case differently

"if the theory had been accepted that impartibility being a creature "of custom though incompatible with the right of partition, yet left the "general law of the inalienability by the head of the family for other than "necessary causes without the consent of the other members as it "was."

(1) (1921) I. L. R. 43 All. 228 ; L. R. 48 I. A. 195.
(2) (1888) I. L. R. 10 All. 272.

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In the opinion of their Lordships the judgment last referred to is fatal to the contention that the *Sartaj Kuari's* case (1) and the *Pittapur* case (2) are inconsistent with those on the right of succession, and they must hold that no ground has been established for a refusal on their part to follow the decisions in those two cases.

But it was recognised in both those cases that the general rule thus established might be displaced by proof of a family local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it, and accordingly an attempt was made in the present case to prove such a custom. In both Courts in India the attempt failed, and, in their Lordships' opinion, no ground has been shown for reversing their findings in this respect.

Only two items of evidence were really relied upon in argument: (i) that there had been no instance of a will purporting to dispose of the estate, and (ii) a statement by Satrughna himself that a previous Raja Ram Chandra III had no right to make a will.

As to the first item, the mere absence of any will is an equivocal circumstance. It might be attributable to an assumption on the part of the several Rajas that the law did not admit of a bequest of the Raj, or to the absence of any desire on their part so to dispose of the Raj. It cannot, in their Lordships' opinion, be by itself sufficient evidence of the alleged custom.

As to the second, when it is examined, it will be found that it is a statement, not on oath, but made by way of pleading in proceedings in which Satrughna was disputing an alleged will of his predecessor and taking every possible objection to its validity, and was, therefore, a statement made in what he then considered to be his interest. Moreover, it is by no

(1) (1888) I. L. R. 10 All. 272. (2) (1899) I. L. R. 22 Mad. 383.

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means clear that the statement was intended to be based on a family custom at all (see the passage in the judgment of the High Court, p. 24, l. 17, and following).

The alleged custom varying the rule laid down in the cases above referred to has, in their Lordships' opinion, not been proved, and the rule itself must therefore apply.

One other point made by the appellant remains to be noticed. In his case the point is raised in paragraph 6 of the Reasons, which reads as follows:—

"Because the nature of the estate, being originally a Raj or principality "and not being affected or altered by permanent settlement, renders it "inalienable."

In the judgment of the High Court it is stated that in the Court below counsel for the defendant conceded that

"he could not press the contention that the estate was inalienable on "account of its being one of military or feudal nature." (Record II, page 46, l. 37),

but the Court nevertheless dealt with the point and over-ruled the appellant's contention. They pointed out that the grant of the estate under the first settlement of 1777 was on the usual conditions on which grants to zemindars were made. There was nothing feudal or military in it. Their Lordships agree with the High Court that in the present case, inasmuch as for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zemindari, no inalienability can result from the ancient nature of the tenure.

On the whole, their Lordships are of opinion that the main appeal fails, and ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

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There remain the cross-appeals of the respondent. These are three in number :—

First, the respondent (the plaintiff in the suit) raises objections to the provisions in the decree of the Subordinate Judge, as affirmed by the High Court, dealing with his claim for repayment by the appellant (the defendant in the suit) of moneys received by him by way of maintenance while the estate was in the charge of the Court of Wards after the death of Satrughna and with the costs of the suit and of the appeal to the High Court.

Secondly, he appeals from an order of the High Court, dated the 28th July, 1924, continuing, pending this appeal, the appointment of a Receiver already appointed by the Court pending the appeal to itself.

Thirdly, he appeals from a further order of the High Court, dated the 13th August, 1924, directing the Receiver to pay to the appellant the sum of Rs. 1,200 per mensem by way of maintenance pending this appeal.

While the estate was in the charge of the Court of Wards the appellant received the sum of Rs. 27,000 by way of maintenance, being three payments of Rs. 9,000 per annum. The respondent claimed repayment of this sum from the appellant by way of mesne profits. This claim was allowed by the decree, but on the sole ground that the appellant had no means to pay the mesne profits and the costs, it was directed that the respondent should realise the same from the estate and the appellant should not be personally liable.

In the opinion of their Lordships, the appellant was not entitled to maintenance out of the estate— First, on the ground that the maintenance of himself and his family was already provided for by a *khorposh* grant of certain villages to his predecessors, which villages are still in his possession ; and

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secondly, because he has failed to establish a right to maintenance by custom or relationship or in any other way (*see* the second *Pittapur* case, *Raja Rama Rao* v. *Raja of Pittapur* (1). This being so, and the respondent being thus entitled to receive back what had been wrongfully paid, it is difficult to understand why this burden should be thrown on the estate, which as the result of the suit had been recovered from the appellant. The same remark applies to the costs. The respondent may not be able to recover the money owing to the poverty of the appellant, but this is no reason why an order for payment should not be made.

Their Lordships will therefore humbly advise His Majesty that the first cross-appeal should be allowed with costs, and the decree of the High Court varied by directing the appellant to pay the Rs. 27,000 and the costs of the suit and of the appeal to the High Court.

As to the second and third cross-appeals, if the appellant is not entitled to maintenance, their Lordships fail to see why he should have received anything pending the litigation. They will therefore humbly advise His Majesty that these appeals also should be allowed with costs, and that the two orders of the 28th July, 1924, and the 13th August, 1924, should be set aside, and the appellant be directed to repay to the respondent the sums paid by him thereunder. The settting aside of the order of the 28th July, 1924, should be without prejudice to the liability of the Receiver to account.

Solicitors for defendant appellant: *Barrow, Rogers & Nevill.*

Solicitors for plaintiff-respondents: *Watkins & Hunter.*

A. M. T.

(1) (1918) I. L. R. 41 Mad. 778 ; L. R. 45 I. A. 148.