1918, March 11, 12 and May 2.

PRIVY COUNCIL.*

RAMA RAO (PLAINTIFF),

v.

RAJAH OF PITTAPUR (DEFENDANT).

[On appeal from the High Court of Judicature at Madras.]

Hindu Law—Joint family—Impartible zamindari—Right of junior members of family to maintenance—Custom of impartibility—No coparcenary in impartible estate—Exceptions are subjects of special texts in Mitakshara—Custom or usage brought so repeatedly before the Courts as to be recognized becoming law without necessity of proof.

In the absence of special custom, the grandsons of a deceased zamindar are not entitled to maintenance out of the impartible estate in the hands of his successor.

This follows from the fact that in an impartible zamindari there is no co-parcenary.

Sartaj Kuari v. *Deoraj Kuari* (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51; and *Venkata Surya Mahipati Ramakrishna Rao* v. *Court of Wards* (1899) I.L.R., 22 Mad., 383: s.c., L.R., 26 I.A., 83, followed. *Bachoo* v. *Mankorebai* (1904) I.L.R., 29 Bom., 51 (58), approved.

The view taken in the Madras Courts prior to the cases above cited that there was joint property in an impartible zamindari which only fell short of coparcenary because by custom there was no right to partition is no longer tenable.

The right of sons to maintenance in an impartible zamindari had been so often recognized that it is not necessary in each case to prove a custom.

There are other persons entitled to maintenance either by reason of their exclusion from the possession owing to personal disqualifications, or by reason of personal relationship to one of the line of zamindars, but the latter class does not include grandsons.

Yarlagadda Malikarjuna Prasada Nayudu v. *Yarlagadda Durga Prasada Nayudu* (1900) I.L.R., 24 Mad., 147 (155); s.c., L.R., 27 I.A., 151 (157) and

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* *Present*:—Viscount HALDANE, Lord DUNEDIN, Lord SUMNER, Sir JOHN EDGE and Mr. AMEER ALI.

Nilmony Singh Deo v. *Hingoo Lall Singh Deo* (1879) I.L.R., 5 Calc., 256 (259), approved.

In the present case no special custom had been proved or even alleged; and the claim was not based on personal relationship.

APPEAL No. 110 of 1916 from a judgment and decree (19th March 1915) of the High Court at Madras, which reversed a decree (22nd December 1911) of the Subordinate Judge of Rajahmundry.

The only questions for determination on this appeal were as to whether the appellant as a junior member of the family of the late Rajah of Pittapur was entitled to maintenance out of the estate, and if so, for what amount.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee. They will also be found in the report of the case in the High Court (SANKARAN NAIR and OLDFIELD, JJ.) in *Sri Rajah Rama Row* v. *Rajah of Pittapur*(1).

On this appeal—

Upjohn, K.C. and *A. M. Dunne, K.C.*, for the appellant contended that the appellant was entitled to suitable maintenance, out of the ancestral impartible estate; and that his right was not dependent on his admitting relationship to the present possessor of the Raj estate. The right to maintenance became vested in him on the death of the late Raja; and the devise to the respondent, it was submitted, was, as a matter of law, made subject to the appellant's right. By the decisions of the Board before the case of *Sartaj Kuari* v. *Deoraj Kuari*(2), it was established that the junior members of an impartible family had a right to maintenance, and that the same right existed whether the family property was partible or impartible. Reference was made to *Naragunty Lutchmeedevamma* v. *Vengamma Naidu*(3); *Beer Pertab Sahee* v. *Rajender Pertab Sahee*(4); *Muttuswamy Jagavera Yettappa* v. *Vencataswara Yettappa*(5); *Kachi Kaliyana Rungappa* v. *Kachi Vijaya Rungappa*(6); and *Periasami* v. *Periasami*(7).

(1) (1916) I.L.R., 39 Mad., 396.
(2) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(3) (1861) 9 M.I.A., 66 (85, 86). (4) (1867) 12 M.I.A., 1 (15).
(5) (1868) 12 M.I.A. 203; s.c., 2 B.R.P.C., 15.
(6) (1869) 12 M. I.A. 495 (505).
(7) (1878) I.L.R., 1 Mad., 312; s.c., L.R., 5 I.A., 61.

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The right to maintenance was not affected by the decision of the Board in *Sartaj Kuari* v. *Deoraj Kuari*(1), and the judgment shows that was expressly recognized. It also shows that it is the inability of the members to partition which gives them a right to maintenance. Reference was made to *Himmat Singh Bechar Singh* v. *Ganpat Singh*(2) ; *Ramchandra Sakharan* v. *Sukharangopal*(3) ; and Mayne's Hindu Law, eighth edition, pages 634, 638, paragraphs 454, 458, as authorities supporting that proposition. Since the case of *Sartaj Kuari* v. *Deoraj Kuari*(1) the right to maintenance of the junior members of a family whose estate is impartible has been recognized in *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards*(4); *Yarlagadda Mallikarjuna Prasada Nayudu* v. *Yarlagadda Durga Prasada Nayudu*(5) ; and *Kachi Kaliyana Rengappa* v. *Kachi Yuva Rengappa*(6). Such a right is a right in immovable property, and is enforceable against the estate in the hands of a devisee: *Golab Kunwas* v. *Collector of Benares*(7) ; and *Janki* v. *Naudram*(8). This principle is upheld in the Transfer of Property Act (IV of 1882), section 39 ; the Hindu Wills Act (XXI of 1870), section 3 ; and the Probate and Administration Act (V of 1881), section 149.

De Gruyther, K.C., and *Kenworthy Brown* for the respondent contended that the appellant had no right to maintenance against the respondent, or the estate in his hands. He was not a coparcener with the late Raja in the estate, and had no enforceable claim against it: nor has he any such claim against the respondent with whom he does not allege relationship in blood or co-ownership. He sets up no custom by which he is entitled to maintenance. The only other right to maintenance was founded on certain special texts of the Mitakshara, and was given on personal grounds: Stoke's Hindu Law Books, page 426; Mitakshara, Chapter I, section 12, verse 3 and Mayne's Hindu Law, eighth edition, page 626, paragraphs 451, 454. The decisions of the Board prior to *Sartaj Kuari* v. *Deoraj Kuari*(1) were

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(1) (1888) I.L.R., 10 All., 272 ; s.c., L.R., 15 I.A., 51.
(2) (1875) 12 Bom. H.C., 94 (96). (3) (1877) I.L.R., 2 Bom., 346.
(4) (1899) I.L.R., 22 Mad., 383 ; s.c., L.R., 26 I.A., 83.
(5) (1900) I.L.R., 24 Mad., 147 ; s.c., L.R., 27 I.A., 151.
(6) (1905) I.L.R., 28 Mad., 508 ; s.c., L.R., 32 I.A. 261
(7) (1847) 4 M.I.A., 246. (8) (1888) I.L.R., 11 All., 194.

based on the assumption that a coparcenary interest existed in an impartible estate. But no text of the Mitakshara supports such a claim. Impartible property is not the joint property of a joint family: Mayne's Hindu Law, eighth edition, page 340, paragraph 275. Right to maintenance of the junior members arises by reason of co-ownership: the widow's right to maintenance is provided for by special texts which would not be applicable to the male members of the family: see *Muttuswamy Jagavera Yettappa* v. *Vencataswara Yettappa*(1). Only the sons of the Raja are entitled to maintenance as junior members of the family. The cases relied on for the appellant are cases of sons against father, or a brother against brother; there is no case that extends the right to a grandson, or a nephew. After citing the cases referred to for the appellant reference was made to *Kattama Nachiar* v. *Rajah of Shivagunga*(2). Cases based on impartible property being joint property are not now applicable, such basis having been taken away by the later decisions in *Sartaj Kuari* v. *Deoraj Kuari*(3); and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards*(4). If the recognition of the right to maintenance is not based on community of interest, it is based upon custom; but no judicial recognition has been given to an invariable right by custom except in the case of a son or daughter of the holder of an impartible estate: see *Nilmoney Singh Deo* v. *Hingoo Lall Singh Deo*(5). The claim of the father of the appellant was satisfied. The appellant is a grandson of the late Raja and has no right unless he establishes a custom, but he has not even alleged such a custom. A right to maintenance of every descendant of a holder would not be consistent with the latter's right of alienation. The proposition laid down in Mayne's Hindu Law, eighth edition, page 634, paragraph 454, that as on of the holder is entitled to maintenance, "as that is the only mode in which he can benefit by the ancestral estate," is based solely in the note to *Himmat Singh Behar Singh* v. *Ganpat Singh*(6),

(1) (1868) 12 M.I.A., 203; s.c., 2 B.L.R., P.C., 15.
(2) (1864) 9 M.I.A., 203.
(3) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(4) (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83.
(5) (1879) I.L.R., 5 Calc., 256; (259).
(6) (1875) 12 Bom. H.C., 94 (96).

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and, it was submitted, is erroneous. Reference was also made to *Abdul Aziz Khan* v. *Appayasami Naicker*(1).

Upjohn, K. C., replied.

The judgment of their Lordships was delivered by

LORD DUNEDIN.

LORD DUNEDIN.—The plaintiff is the son of an adopted son of the late Rajah of Pittapur, and he sues the defendant, the present Raja of Pittapur, for maintenance. At the time that the suit was raised the father of the plaintiff was alive, but pending the suit he died. The Raj of Pittapur is an impartible zamindari, and was devised by will to the defendant, who was described in the will as the *aurasa* son of the late Raja born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the Raj, and alleged that he was not the legitimate son of the late Raja. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the Raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that in accordance with what had been laid down by this Board in the case of *Sartaj Kuari* v. *Deoraj Kuari*(2) the zamindari of Pittapur, being impartible, there was no right in the plaintiff to quarrel with the alienation made by the will of the late Raja.

The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular zamindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, viz., that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party. The learned Judge of the Subordinate Court gave judgment in favour of the plaintiff for maintenance

(1) (1903) I.L.R., 27 Mad. 131; s.c., L.R., 31 I.A., 1.
(2) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.

and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this: He considered that the zamindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the Mitakshara law exists also in this case. The learned Judges of the Court of Appeal held that after the decisions in *Surtaj Kuari* v. *Deoraj Kuari*(1) and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards*(2) it was impossible to base the plaintiff's right to maintenance on any right of coparcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Surtaj Kuari* v. *Deoraj Kuari*(1) embodied the theory that there was joint property in an impartible zamindari, which only fell short of coparcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself :—

"It must be conceded that the complete rights of ordinary coparcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very Raj in the

(1) (1888) I.L.R., 10 All., 272; s.c., L.R., 15 I.A., 51.
(2) (1899) I.L.R., 22 Mad., 383; s.c., L.R., 26 I.A., 83.

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Venkata Surya Mahipati Rama Krishna Rao v. *Court of Wards*(1). The import of these decisions was, in their Lordships' view, correctly stated by Sir L. JENKINS in the case of *Bachoo* v. *Mankorebai*(2): "It has now been definitely decided that in impartible properties there is no coparcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property; that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of coparcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the mad man, etc. Such persons are debarred from the rights of coparcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatised with the personal defect, get by their birth the full status of coparcenary.

(1) (1899) I.L.R., 22 Mad., 383; s c., L.R., 26 I.A., 83.
(2) (1904) I.L.R., 29 Bom, 51 at p. 58.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law.

Their Lordships will now revert to the position of an impartible zamindari as it has been fixed by the decisions before referred to. An impartible zamindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognized that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Sartaj Kuari* v. *Deoraj Kuari*(1). For example, in

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

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the case of *Yarlagadda Mallikarjuna Prasada Nayudu* v. *Yarlagadda Durga Prasada Nayudu*(1). The judgment says :—

"As to the zamindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir."

But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo*(2)

"We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right."

Apart from custom, what is left? The matter is tersely put by SANKARAN NAIR, J., in the Court of Appeal :—

"The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellant : *John Josselyn.*

Solicitor for the respondent : *Douglas Grant.*

J.V.W.

(1) (1900) I.L.R., 24 Mad., 147 (155); s.c., L.R., 27 I.A., 151 (157).
(2) (1879) I.L.R., 5 Calc., 256 (259).