PRIVY COUNCIL.

ULAGALUM PERUMAL SETHURAYAR, APPELLANT,

v.

RANI SUBBULAKSHMI NACHIAR, RESPONDENT.

J.C.* 1939, February 24.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu law—Mitakshara school—Impartible ancestral estate in Madras—Deed of settlement executed before Impartible Estates Act, (Madras Act II of 1902) came into force—Estate taken by settlor's son under deed—Character of estate.

The son of a Hindu governed by the Mitakshara law who succeeds to an ancestral impartible estate in Madras under a vested interest in a deed of settlement executed by his father while his elder brother was alive and before the coming into force of the Madras Impartible Estates Act takes the estate as self-acquired property. On his death intestate, his widow would, therefore, succeed to the estate in preference to his half-brother.

[*Sartaj Kuari* v. *Deoraj Kuari*(1), *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*(2), *Konammal* v. *Annadana*(3), *Shibaprasad Singh* v. *Prayagkumari Debee*(4), *Collector of Gorakhpur* v. *Ram Sundar Mal*(5) and *Raja Ajai Verma* v. *Musammat Vijai Kumari*(6), referred to.]

APPEAL (No. 79 of 1936) from a decree of the High Court (March 19, 1935) which modified a decree of the Subordinate Judge of Tinnevelly (April 23, 1931).

S. Kotilinga, a Hindu governed by the Mitakshara, was the owner of an ancestral impartible estate in the Madras Presidency. Having at the time a son, K. Kotilinga, living whom he wished to exclude from the

* *Present*: LORD ROMER, LORD PORTER and SIR GEORGE RANKIN.

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
(2) (1923) L.R. 50 I.A. 265, 275; I.L.R. 45 All. 596.
(3) (1927) L.R. 55 I.A. 114; I.L.R. 51 Mad. 189.
(4) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399.
(5) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.
(6) (1938) 43 C.W.N. 585 (P.C.).

PERUMAL v. SUBBULAKSHMI.

succession, he, by a deed executed four days before the Madras Impartible Estates Act came into force, settled the estate on himself for life and, subject thereto, granted it absolutely to the child with whom his second wife was then enceinte, should such child be born alive and a male. The deed further provided that, if the child should not be born alive and a male or being born alive and a male should die before him without leaving male issue, his second wife should take the estate absolutely.

A male child, Minakshi Sundara, was born to the settlor's second wife on 13th August 1902. In 1903, the settlor's first son, K. Kotilinga, died. In 1904, his second wife died. In 1906, a third son, Ulagalum, was born to the settlor by a third wife. On 7th January 1907, the settlor died and Minakshi Sundara, his son by his second wife, succeeded to the estate. Minakshi Sundara died intestate in 1929, leaving him surviving his widow (the appellant) and no issue. The widow claimed the estate as heir to her husband against his half-brother, Ulagalum (the respondent), on the ground that her husband took the estate under the deed of settlement as self-acquired property. She also alleged that her husband had separated from his half-brother.

The Subordinate Judge found in her favour on both grounds.

On appeal by Ulagalum, the High Court reversed the finding of the Subordinate Judge as regards the separation of Minakshi Sundara and Ulagalum but affirmed his findings that Minakshi Sundara took the estate as self-acquired property and that his widow was entitled to the estate.

Cornish for appellant.—It is not disputed that the owner of an impartible estate can dispose of it without reference

to his sons, but the property, being ancestral, cannot be converted into separate property and the sons acquire by birth a right in the property by survivorship. That right remains, subject to alienation by the owner.

Here, when the settlor died, the property still remained joint family property though only a single heir could succeed, The eldest son might be excluded, but the property still retained its character as joint family property.

If the father gave the property to a stranger, the stranger would take an absolute interest in it as separate property, but if the property is given to a son, the son takes it as joint family property. The right by birth in joint family property is beyond the father's control ; *Shibaprasad Singh* v. *Prayagkumari Debee*(1).

The owner of an impartible estate can alienate it ; *Sartaj Kuari* v. *Deoraj Kuari*(2), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(3), *Baijnath Prasad Singh* v. *Tej Bali Singh*(4) and *Collector of Gorakhpur* v. *Ram Sundar Mal*(5). But the right of survivorship is a consequence of joint status which can be got rid of only by severance in one of the ways recognized by Hindu law.

Though an impartible estate can be alienated to a stranger so as to give him an absolute right, it cannot be alienated to a member of the family so as to effect a change of status ; *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*(6).

The right of survivorship is a real right of property which should not be whittled away. It may be defeated by the owner of an impartible estate alienating the estate. The status of the family remains. In an ordinary joint family under the Mitakshara, a member may obtain partition and take away his share or a father may partition the property. Partition may be division of estate or of status ; *Girja Bai* v. *Sadashiv Dhundiraj*(7).

---

(1) (1932) L.R. 59 I.A. 331 ; I.L.R. 59 Cal. 1399.
(2) (1888) L.R. 15 I.A. 51 ; I.L.R. 10 All. 272.
(3) (1899) L.R. 26 I.A. 83 ; I.L.R. 22 Mad. 383.
(4) (1921) L.R. 48 I.A. 195 ; I.L.R. 43 All. 228.
(5) (1934) L.R. 61 I.A. 286 ; I.L.R. 56 All. 468.
(6) (1923) L.R. 50 I.A. 265, 274 ; I.L.R. 45 All. 596.
(7) (1916) L.R. 43 I.A. 151, 159 ; I.L.R. 43 Cal. 1031.

PERUMAL v. SUBBULAKSHMI.

In an impartible estate there can be no division of the estate. Apart from alienation to a stranger there can be only relinquishment or surrender. The estate can cease to be joint family property only if the other members relinquish their rights. Alienation to a member of the family cannot change the nature of the estate. The father cannot sever the status of the family by giving the estate to son A. in preference to son B.

Here, if the eldest son had survived his father, he would have taken the estate notwithstanding the settlement.

[Reference was made to *Konammal* v. *Annadana*(1), *Collector of Gorakhpur* v. *Ram Sundar Mal*(2) and *Rani Jagadamba Kumari* v. *Wazir Narain Singh*(3).]

There is no suggestion of surrender by the eldest son. The onus is on the widow to prove severance of the joint family. In this she has failed.

Dunne K. C. and *Chinna Durai* for respondent.—*Sartaj Kuari's* case(4) laid down the rule that the owner of an impartible estate has an absolute right to alienate it, and that is now the rule. The basis of the rule is that the owner is the absolute owner. No one has any interest in the estate except the impartible holder. If he dies intestate, the succession is according to custom. There is no co-parcenership.

There is no doubt as to what was intended by the deed of settlement here. The property is given "absolutely". The holder had the right to alienate absolutely and he has done so. [Reference was made to *Sartaj Kuari* v. *Deoraj Kuari*(4), *Baijnath Prasad Singh* v. *Tej Bali Singh*(5) and *Protap Chandra Deo* v. *Jagadish Chandra Deo*(6).] Survivorship imports co-ownership. If there is no co-ownership, there cannot be survivorship. The appellant's argument is that there is co-ownership during the life of the impartible holder though the holder has the absolute right to dispose of the estate, but what was decided in *Protap Chandra's* case(6) is

---

(1) (1927) L.R. 55 I.A. 114; I.L.R. 51 Mad. 189.
(2) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.
(3) (1922) L.R. 50 I.A. 1, 6; I.L.R. 2 Pat. 319.
(4) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
(5) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.
(6) (1927) L.R. 54 I.A. 289; I.L.R. 54 Cal. 955.

that there is no co-ownership. [*Raja Ajai Verma* v. *Musammat Vijai Kumari*(1) was referred to.]

The holder of the impartible estate, if and when he disposes of the property, gives, not the joint family title, but his own title ; *Rama Rao* v. *Rajah of Pittapur*(2).

Cornish in reply.—The father cannot, as here, in the case of an impartible estate, divide the estate and accelerate the succession. Mayne's Hindu Law (10th edition), page 849.

SIR GEORGE RANKIN.

The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—This appeal concerns the succession to the impartible estate of Urkad in the district of Tinnevelly and is brought from a decree, dated 19th March 1935, of the High Court of Madras affirming, upon the question now in dispute, the decree (23rd April 1931) of the Principal Subordinate Judge of Tinnevelly. Both Courts in India have held that, upon the death in 1929 of Minakshi Sundara, the estate of Urkad devolved upon his widow, Rani Subbulakshmi Nachiar, who was plaintiff in the suit and is respondent upon this appeal. The appellant is Ulagalum Perumal, the younger half-brother of Minakshi Sundara, who was the first defendant in the suit. It is not now contended that the appellant and Minakshi Sundara, were divided. The trial Court held that there had been a partition of the partible property of the joint family, but this finding was reversed by the High Court and is not appealed from.

In 1902 the zamindar was S. Kotilinga Sethurayar (hereinafter called the settlor) a Hindu governed by the Mitakshara. He held the impartible estate as ancestral property belonging to the joint family of which he was a member, and not as his separate property. His first wife had died, but he had married

(1) (1938) 43 C.W.N. 585 (P.C.).
(2) (1918) L.R. 45 I.A. 148, 153 ; I.L.R. 41 Mad. 778.

PERUMAL v. SUBBULAKSHMI.

SIR GEORGE RANKIN.

again. By his first wife he had a son, K. Kotilinga Sethurayar. His second wife was enceinte. Being displeased with his son he desired to defeat his son's prospect of succession to the estate by making use of the power of alienation recognized as belonging to owners of impartible estates by the decision of this Board in the case of *Sartaj Kuari* v. *Deoraj Kuari*(1). His power of alienation was however in danger of becoming restricted by legislation so as to become no greater than the power of a managing member of a joint Hindu family to alienate ancestral property. A few days before 2nd June 1902, when the Madras Impartible Estates Act, 1902 (Madras Act II of 1902), came into force, he executed a deed of settlement, dated 29th May 1902, in respect of the impartible zamindari. By that deed he declared that he was dissatisfied with the character and conduct of his son and was desirous that the son should not succeed to the zamindari. He settled the zamindari upon himself for life and subject thereto granted it absolutely to the child with whom his second wife, Thanga Pandichi, was then enceinte, if such child should be born alive and a male. If the child should not be born alive and a male or being born alive and a male should die before the settlor without leaving male issue the zamindari was to go to his wife Thanga Pandichi absolutely. His son was given a maintenance allowance and a house. The settlor appointed himself trustee of the settled property.

Thereafter on 13th August 1902 Minakshi Sundara was born of the second wife Thanga Pandichi. In 1903 the settlor's first-born son, K. Kotilinga Sethurayar, died. In 1904 the second wife died, and the settlor having married a third time the appellant

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

Ulagalum Perumal was born to him by his third wife in June 1906. On 7th January 1907 the settlor died and Minakshi Sundara succeeded to the zamindari, the estate being managed on his behalf by the Court of Wards till 1923, when he came of age. He died in July 1929 and as the Collector proposed to recognize his half-brother, the appellant, as entitled to succeed to the impartible estate, the widow brought her suit on 1st October 1929 to establish her right to succeed. Her case is that when in 1902 her husband took a vested interest in the estate by virtue of his father's exercise of his unfettered right of alienation, the estate ceased to be property of the joint Hindu family as truly and completely as if it had been granted to a stranger to the family. Accordingly, that the principle of survivorship cannot on his death be applied to carry the estate to the eldest member of the senior branch of the family; and that it descends to her according to the rules which govern succession to separate property.

The High Court was careful to point out that the present case raises no question such as might have arisen had Minakshi Sundara died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at birth. On this subject there has been much divergence of opinion in India and it was left unsettled by the judgment of the Board in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*(1).

It is clear that Minakshi Sundara did not take his interest under the deed of 1902 under any contract or

(1) (1923) L.R. 50 I.A. 265, 275; I.L.R. 45 All. 596.

PERUMAL v. SUBBULAKSHMI.

SIR GEORGE RANKIN.

bargain made by him or on his behalf or by any other persons so as to bind him. The settlor was disposing of the estate in full appreciation of his power to alienate, and there is no room for suggestions as to family arrangement or mere relinquishment by the settlor or mere supersession of the eldest son. Indeed, if the settlor's intention be supposed to govern the matter, the provisions of the deed of 1902 indicate, as the High Court notice, an intention that the estate should not continue to be joint family property ; as otherwise in certain quite probable events the deed would not effectively exclude the eldest son. In particular should the son to be born die in the lifetime of his elder brother leaving sons the elder brother would succeed as senior to any of such sons if the property were to pass by survivorship as joint family property.

The able argument of learned Counsel for the appellant was of a far-reaching character. He contended that it was not competent in law for the settlor to advantage one member of the family by terminating the right which other members of the family had in the estate. Or, putting the same matter in another form, that it was not competent for Minakshi Sundara to take the estate as self-acquired property. Learned Counsel contended that while an alienation to a stranger would defeat the rights of all the members of the family, the result of an alienation in favour of one member could not in law be to defeat the rights of the other members. For this contention he relied upon decisions of the Board to the effect that as the right of partition does not exist in the case of an impartible estate, junior members of the family will not be taken to have given up their interest in such an estate or their claim to succeed thereto unless they can be

proved to have surrendered it [*Konammal* v. *Annadana*(1) ; *Shibaprasad Singh* v. *Prayagkumari Debee*(2) ; *Collector of Gorakhpur* v. *Ram Sundar Mal*(3)]. He argued that a settlor having no right to partition the estate or to claim as against the eldest son or other members to hold it as his separate property, he cannot by an alienation compel a severance between one son and another. In the absence of surrender or relinquishment by a member of his interest, partition, it is said, is the only way by which joint family property can become the separate property of a member ; and this result is contrary to the custom of impartibility.

Their Lordships have given full consideration to this argument but do not consider that it can be sustained. No doubt joint property cannot if governed by a custom of impartibility be converted into separate property by any exercise of the right to call for a partition as the existence of such a right is inconsistent with the custom. But it does not follow that by no other way can the same result be arrived at. Admittedly it can be achieved by surrender or relinquishment. And it would seem that the right of any given person to succeed by survivorship to any given property must depend both upon the person continuing to be a member of the joint family and also upon the property continuing to belong to the family. If the zamindar has a power of alienation which is not limited by legal necessity nor liable to be controlled by any other member of the family, so that he can squander the property or give or sell it to a stranger, thereby defeating the rights of other members, there would

(1) (1927) L.R. 55 I.A. 114 ; I.L.R. 51 Mad. 189.
(2) (1932) L.R. 59 I.A. 331 ; I.L.R. 59 Cal. 1399.
(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

PERUMAL v. SUBBULAKSHMI.

SIR GEORGE RANKIN.

not seem to be great force in the reflection that when he transfers to a member of the family he is effecting a result similar to that produced by partition without having the power to compel partition. The status of an individual as a member of a Hindu joint family is in no way inconsistent with his owning separate property; and the right of unfettered alienation affirmed in *Sartaj Kuari's* case(1) may well produce results, when exercised in favour of a member, which are as favourable or more favourable to him than those which partition would have produced. If the property ceases to be the property of the joint family there is nothing to which the right by survivorship can attach and there is no added difficulty in its becoming the separate property of an individual member. The right of alienation was held to belong to the holder of an impartible estate because the other members of his family, having no right to call for partition, were thought to have no right to control him: if in some cases the result of this doctrine upon the rights of the other members is to defeat them altogether, the right of alienation cannot, in their Lordships' opinion, be limited in other cases merely by reason that the holder had no right to call for partition.

If then there be no rule of law to prevent the settlor from giving or Minakshi Sundara from taking the estate as self-acquired or separate property, it remains to consider whether the interest given to Minakshi Sundara under the deed should be regarded as joint family property and not as his separate property by reason that the transfer to him was voluntary and not for valuable consideration and that the interest transferred was an interest in the whole

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

of the zamindari estate and not only in a part thereof. Assuming without affirming that such considerations might in certain circumstances lead to the conclusion that the property was taken as joint family property, their Lordships cannot in the present case attribute to them any cogency in that respect, in view of the fact that Minakshi Sundara took a vested interest at a time when his elder brother was alive, and under a provision which was intended to defeat the ordinary course of succession to the estate. It so happened that at the time of the settlor's death Minakshi Sundara was his eldest surviving son, but this accident cannot retrospectively affect the operation of the deed of 1902.

In the case of *Raja Ajai Verma* v. *Musammat Vijai Kumari*(1), Raja Fateh Singh, a Hindu governed by the Mitakshara and owner of an impartible estate in the Shahjahanpur district of Agra, had made a will whereby half the estate was left to his eldest son and half to his second son, Vijai Verma. The will was challenged, but the High Court of Allahabad upheld it on appeal. The younger son had died leaving an only daughter, Vijai Kumari. In the view of the High Court she was entitled to succeed to half of the estate, though the Board held on appeal that she was excluded by a custom in this Rajput family which disinherited daughters. The learned Judges of the High Court (MUKERJI and BENNET JJ.) said in their judgment :

"The third issue is as follows :—'Whether in the case of it being found that the property is impartible and Vijai Verma got a half share in it under his father's will the property taken by Vijai Verma would descend by way of inheritance to a

(1) (1938) 43 C.W.N. 585 (P.C.).

PERUMAL v. SUBBULAKSHMI.

SIR GEORGE RANKIN.

single male heir by the rule of lineal primogeniture and whether, therefore, Vijai Kumari will be excluded from inheritance ? '

" The question raised in this issue is not free from difficulty, and there is no clear decided authority either way. On principle, however, we think the issue ought to be answered in favour of Vijai Kumari.

" The argument on behalf of the defendant is fairly summarised in the issue itself. It is urged that by virtue of family custom the property of the Raja of Pawayan is an impartible estate descendible in a particular way and the mere fact that a portion of it is given away to one of the members of the family will not change the character of the property and make its mode of descent different from the original method. But this argument overlooks the fact that Vijai Verma is not entitled to inherit any portion of the property in suit. He is as much a stranger for the purposes of inheritance as one who has nothing to do with the family. He gets the property by virtue of the ' gift ' made by his father in his favour under the will. It matters little whether the gift is in favour of a stranger or in favour of a person belonging to the same stock as the defendant. The property in the hands of Vijai Verma must be treated as self-acquired property for the purposes of descent to his heirs."

At the hearing before the Board this view was not challenged, and in the judgment delivered on 19th December 1938 by Sir GEORGE LOWNDES, it was stated :

" Assuming, as their Lordships do in this judgment, that a moiety of the estate passed by the will of Raja Fateh Singh to Vijai Verma, it is admitted that it would be partible property in his hands and would descend as such on his death."

While their Lordships do not doubt that the High Court of Allahabad rightly held in that case that the property in question, if it passed under the will to Vijai Verma, became his self-acquired property, they are not to be taken as affirming that any different result would have ensued had Vijai Verma been the

person entitled to inherit. They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's* case(1) according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognize, however, that as between the grantee and his sons questions may arise upon which these considerations, or some of them, may have importance.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Nehra & Co.*

Solicitors for respondent: *Hy. S. L. Polak & Co.*

C.S.S.

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