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respondents 1 and 2 for the balance due under it for the dower debt. This charge will in any case have to be worked out by the executing Court, and when this question is taken up it will be open to the respondents 1 and 2, if so advised, to set up their claim as mortgagees from Izatunnissa Begam.

Inasmuch as the only competent question throughcut the proceedings has been that of construction of the decree, upon which the appellants have succeeded, their Lordships think that the costs both here and below should be borne by the contesting respondents, and they will humbly advise His Majesty that the decree of the High Court should be set aside and the appeal allowed upon the terms of this judgment.

Solicitor for appellants: H. S. L. Polak.

Solicitor for respondents: Francis and Harker.

APPELLATE CIVIL.

Before Terrell, C.J., and James, J.

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April, 27, 29, 30. May, 2.

RAJA MADHUSUDAN DEB

v.

KHESTABASI SAHU.*

Hindu law—Mitakshara law of alienation, whether applicable to impartible estates governed by rule of primogeniture—Estate Patia Killah in Orissa, whether alienable in absence of custom.

The Mitakshara law of alienation is inapplicable to an impartible estate in which the rule of primogeniture prevails.

The Killajat Mahal of Orissa known as Patia Killah is, in the absence of any custom to the contrary, alienable.

*Circuit Court, Cuttack. First Appeal no. 20 of 1927, from a decision of Babu Brajendra Kumar Ghose, Subordinate Judge of Cuttack, dated the 23rd August, 1927.

Sartaj Kueri v. *Deoraj Kueri*(1), *Baijnath Prasad Singh* v. *Tej Bali Singh*(2) and *Protap Chandra Deo Dhabal Deb* v. *Jagadish Chandra Deo Dhabal Deb*(3), followed.

Gopal Prasad Bhakat v. *Raghunath Deb*(4), not followed.

Kali Krishna Sarkar v. *Raghunath Deb*(5), referred to.

The facts of the case material to this report are stated in the judgment of Terrell, C. J.

B. K. Roy and *B. Mahapatra*, for the appellant.

B. N. Dutta and *S. K. De*, for the respondent.

May, 2, 1929.

COURTNEY TERRELL, C. J. and JAMES, J.—This is an appeal from a decision of the Subordinate Judge of Cuttack decreeing a mortgage suit instituted by Khetrabasi Sahu and others, members of a joint family, against defendant no. 1, Raja Madhusudan Deb, the son of the mortgagor Raja Raghunath Deb, now deceased. This defendant is the appellant. A subsequent mortgagee, the Raja of Kanika, was impleaded as defendant no. 2 but he was dismissed from the suit on the ground that he had been brought on the record more than twelve years from the due date of the mortgage.

The mortgage in suit, dated the 13th August, 1913, was executed by the mortgagor in favour of one Bhaban Sahu, the then karta of the family of which the plaintiffs are members. The mortgage debt was expressed as being in respect of certain antecedent debts incurred between March and June 1913 to Bhaban Sahu and a further cash advance by him at the time of execution.

The defences with which we are now concerned are based on the allegations (*a*) that the mortgaged property was inalienable by family custom, and, (*b*)

(1) (1888) I. L. R. 10 All. 272, P. C.
(2) (1920-21) 25 Cal. W. N. 564; L. R. 49 I. A. 195.
(3) (1926-27) 31 Cal. W. N. 943.
(4) (1905) I. L. R. 32 Cal. 158.
(5) (1904) I. L. R. 31 Cal. 224.

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that the antecedent debts and the cash advance were incurred without legal necessity. The Subordinate Judge found that the mortgaged property was inalienable by family custom but that it could be mortgaged to secure debts incurred for legal necessities, and further, that the debts incurred were in fact so incurred.

The mortgaged estate is one of the killajat mahals of Orissa and is known as the Patia Killa. It was the subject of a series of transactions by the mortgagor before the date of the mortgage in suit. About July 1907 he mortgaged it to one Birendra Kishore Das for Rs. 35,000. Subsequently in order to pay off this mortgage he again mortgaged it for Rs. 50,000 to Bhaban Sahu the mortgagee in the present case and a trust deed was executed placing the estate under the control of trustees. In 1910 this mortgage was paid off and the trustees discharged. The money necessary for this was obtained by mortgaging the estate to one Radha Prasad Bhagat and another deed of trust was executed the trustees being the gomasthas of the mortgagee. To pay off this mortgage the mortgagor on the 26th February 1913 again mortgaged the estate to Bhaban Sahu for a sum of Rs. 1,07,000. The trustees appointed in connection with Bhagat's mortgage were discharged and a new deed of trust was made; this time Sarat Babu and Mahendra Babu, persons known to Bhaban Sahu the mortgagee, were appointed.

During the months of March, April, May and June 1913 the mortgagor was in acute financial embarrassment and he approached the mortgagee Bhaban Sahu for advances which were secured by a series of handnotes. The total of the principal and interest secured by these handnotes had amounted in August to Rs. 3,928-3-3 and the debtor took a further cash advance of Rs. 1,071-12-9 and executed the mortgage in suit for Rs. 5,000. We will return to these debts on the question of legal necessity.

It is necessary, however, first to deal with the question of whether the mortgaged estate is inalienable and whether there is any restriction of alienation save when there is no legal necessity to raise money. Some of the customs governing the question of alienation of the tributary or non-regulation mahals of Cuttack are recorded in a work known as the Pachis Sawal or twenty-five questions which has sometimes been consulted by the Courts and is admitted as authoritative.

Question 16 is as follows:—

"In case a Raja possessing heirs should during his lifetime sell or give away his Raj would such sale or gift be considered valid and has such a case occurred?

Answer. It would not be right and such a case has never happened but if done in favour of a son it would be right."

Question 17 is as follows:—

"Suppose a Raja has no principal or direct heir while alive and disposes by sale or gift of his Raj would the transaction be valid?

Answer. Such an instance has never taken place but the transaction would be correct in accordance with the Shastras."

Now we are unaware of any case in Indian law of an estate totally inalienable save where the limitation upon the exercise of the right of alienation has been imposed by some paramount power. This Patia Killa is an impartible estate devolving in primogeniture. Therefore the Mitakshara law cannot be invoked by members of the family as such by reason of their rights as co-parceners to object to alienation. As was said by Sir Richard Couch delivering the judgment of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*(1). "The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons." It follows that the defendant must fall back on the allegation that the estate is wholly inalienable quite apart from any question

(1) (1888) I. L. R. 10 All. 272, P. C.

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of whether the debts paid off by reason of the alienation were or were not incurred for legal necessity. The decision of the Privy Council above quoted was followed in *Baijnath Prasad Singh* v. *Tej Bali Singh*(1) and more recently also in *Protap Chandra Deo Dhabal Deb* v. *Jagadish Chandra Deo Dhabal Deb*(2). In the last mentioned case Lord Warrington quoted the decision of Lord Dunedin in *Baijnath Prashad Singh* v. *Tej Bali Singh*(1) in the passage in which that learned Lord comments on the *Sartaj Kuari case*(3). Lord Dunedin had said "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" that the case might have been differently decided. The result of these three judgments of the Privy Council establishes the proposition that the defendant must either prove a custom according to which the estate is wholly inalienable or he must fail and that the question of whether or not the mortgage debt was or was not incurred for legal necessity is irrelevant.

Now the nature of the Patia Killa has been considered on two former occasions. The first is in the case of *Kali Krishna Sarkar* v. *Raghunath Deb*(4). In this case Raja Dibya Singh Deb the elder brother and predecessor of Raja Raghunath Deb the predecessor of the present defendant no. 1 had mortgaged the estate to the plaintiff and had obtained a personal decree against the mortgagor which he made no attempt to execute during the mortgagor's lifetime. He attempted to execute the decree against the Raj in the possession of Raja Raghunath as assets of the deceased in the possession of his legal representative.

(1) (1920-21) 25 Cal. W. N. 564; L. R. 49 I. A. 195.
(2) (1926-27) 31 Cal. W. N. 943.
(3) (1888) I. L. R. 10 All. 272, P. C.
(4) (1904) I. L. R. 31 Cal. 224.

It was held that the rule governing succession to a partible estate could be applied to an impartible estate and that the successor did not hold the estate as assets of the deceased. No custom was alleged in that case forbidding the alienation of the property; nor was any such custom referred to in the decision of the Court. The second is the case of *Gopal Prosad Bhakat* v. *Raghunath Deb*(1). In this case also the suit was to recover the sum of money as principal and interest due under a mortgage executed by Dibya Singh the predecessor of Raghunath Deb but the defendant contended that according to the custom of the Raj the late Raja had no right to alienate the property and " That he had by right of survivorship under the Mitakshara law obtained the Rajgi Gadi of Patia and the properties appertaining thereto and was not liable for the debts of his predecessor ". The learned Judges consulted the Pachis Sawal and came to the conclusion that the Raj was inalienable and that the mortgage was prima facie invalid. They nevertheless found, as the Subordinate Judge in the case before us has found, that the mortgage was to secure debts which were incurred under legal necessity and that as Raghunath Deb succeeded by right of survivorship he took the property subject to the Mitakshara rule that he was liable for debts proved to have been contracted for legal necessity. As to the question of custom they found as follows: " There is nothing in the Pachis Sawal to satisfy us that the custom of the Raj against alienation is of such a nature as not to render the defendant liable for debts contracted by his predecessor for legal necessity ".

Now having regard to the decisions of the Privy Council above referred to the reasoning of the learned Judges in this case was in our opinion unsound. It is to be noted however that the decision was in 1904 subsequent to the decision of the Privy Council in *Sartaj Kuari's* case(2) (decided in 1888), which

(1) (1905) I. L. R. 32 Cal. 158. (2) (1888) I. L. R. 10 All. 272. P. C.

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although cited was not referred to in the judgment and it preceded the two later cases. If by reason of the Privy Council decision the decision of the Court must be considered as having been founded on erroneous reasoning it is very difficult to see how any effect can be given to the Pachis Sawal as establishing a restriction in any degree upon the rights of alienation, for if the Mitakshara limitation of alienation based on the law of necessity is not applicable it would appear that no practical limitation can be imposed of any kind, and the Patia Raj is therefore freely alienable by the Raja for the time being. It is to be noted that the Privy Council ruling does not preclude a finding of fact that a *custom* is established forbidding alienation save for necessity as opposed to the application of the Mitakshara rule. But there is no evidence in this case upon which such a finding of fact could be based. The answers to questions 16 and 17 of the Pachis Sawal do not go far enough for this purpose and there is no recorded instance of a successful objection by an heir based on such a custom. The passage above quoted from the judgment in *Gopal Prasad* v. *Raghunath Deb*(1) shows that the decision was not based on a finding that such a custom existed, but on the erroneous view that the Mitakshara law was applicable.

No evidence has been adduced in this case regarding the history of the Patia estate before the annexation of Orissa, and it is not possible to say on the materials before us whether the Killadar enjoyed the same independent status as the Chiefs in the hilly tracts who occupied what are now known as the Feudatory Estates in Orissa, or whether he was merely an Oriya zamindar whose rights were respected by the Rajas of Berar. The Chiefs of the hilly area held what were called Garhjat states enjoying an independence which was not known in the more level country (the Moghalbandi). Patia lies within the Moghalbandi; it was treated as an ordinary

(1) (1905) I. L. R. 32 Cal. 158.

zamindari immediately after the annexation, and it would appear to be probable that the Killadar was merely a local zamindar. The estate in its present form, so far as we can judge from Regulation 12 of 1805, was created at the settlement which immediately followed on the annexation, when the Killadar of Patia obtained the status of a permanently-settled zamindar of the Bengal Presidency. This status was expressly confirmed by section 35 of Regulation XII of 1805. It appears from the evidence in the present case that no revenue was assessed upon the estate; but whether the status of the Killadar was that of a revenue-paying zamindar or that of a zamindar whose title to hold without paying revenue had been confirmed is a question which has little practical importance in this connection. He is described in Regulation 12 of 1805 as a zamindar who had obtained permanent settlement. One of the privileges which he thereby acquired by the Regulations, whether he paid revenue or not, was that of alienating his estate by sale if he chose to do so. This privilege meant that the paramount power withdrew any restrictions which might hitherto have been placed on alienation; and the fact is important in connection with the question of whether the estate can be sold, since it is clear that no restriction on sale or alienation is imposed from above.

So far as public law was concerned, the estate became alienable as soon as the proprietor was declared by Regulation 12 of 1805 to enjoy the status of the proprietor of a permanently-settled estate. If in spite of that there was any restriction on alienation, the restriction would be necessarily the result of the private law by which the proprietor was governed, that is to say of Hindu Law. But Hindu Law in respect of family property recognises no perpetuities except in estates dedicated to religious or charitable uses.

In 1814 when the Pachis Sawal were compiled, the Killadar of the time replied to the questions which

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were put to him that it would not be right to alienate when an heir of his body was in existence; but that he had complete power to alienate if the only heirs in existence were brothers. We cannot understand how these answers can be held to imply that the Killadar had no power of alienation. What they do imply is that he had a greater power of alienation than that of the ordinary Hindu possessor of property, since his brother who would presumably be joint with him in the ceremonial sense of the term and would in the absence of direct heirs enjoy the spes successionis had no power to impeach an arbitrary transfer of the estate. So far from being in the position of a person who had no power to transfer his estate, the Killadar could do what he pleased with it if he had no son living. The answer that it would not be right to sell the estate if a son were living does not necessarily imply that the son had a legal right to impeach such a transaction. It means no more than that the son would have a right to criticise the transfer. It cannot in our opinion mean that the father could not alienate the property for legal necessity, because an estate which cannot be alienated for legal necessity (including even estates dedicated to religious or charitable uses) is unknown to Hindu Law.

The only evidence of the existence of the alleged custom which is adduced in the present case is the answer which the Killadar gave when he was questioned in 1814. We do not consider that the answer shows that the son could legally impeach an alienation made in any circumstances, still less that he could impeach an alienation made for legal necessity. Nothing in the Pachis Sawal, in our opinion, justifies the view that the Killadar was more restricted in the matter of alienation than the ordinary managing member of a joint family. The answers indicate that he had a considerably greater power of alienation; but if the answer given in the Pachis Sawal had indicated that the Killadar by family custom had no power of alienation at all, we would

hold that such a custom was not enforceable, since it would be unreasonable and opposed to public policy. Such a custom would not be merely in variation of Hindu Law of property. It would be a custom repugnant to Hindu Law; and it is certainly against public policy to allow a family by a custom created by itself to establish a permanent monopoly of possession of any given area of land.

It is perhaps unnecessary to consider whether such a custom would be reasonable or not, since there is nothing in the evidence which would justify a finding that it exists. It would not be unreasonable that a son should be able to impeach his father's alienations on the ground that they were made without necessity, since this would be in accordance with ordinary Hindu Law; but we do not consider that the Pachis Sawal proves that the son has even this limited power of impeaching his father's alienation. A family custom by which the son can impeach alienation in any circumstances, even if it was made for family necessity, would be certainly unreasonable; and it would be a custom which could not, in our opinion, be recognised by the Courts.

It is desirable, however, to decide the questions of fact involved in the point of legal necessity in case the view above expressed should be held to be erroneous and we will briefly deal with the nature of the debts secured by the mortgage upon which this suit is based. We agree with the decision of the learned Subordinate Judge that the evidence shows that from March to June 1913 Raja Raghunath Deb was in a state of acute financial embarrassment. The plaintiff's evidence shews that the trustees under the mortgage did not take over charge until July or August 1913 and that from March until July there was little or no collection of rents from the estate and we share his view of the evidence of the defendant's witnesses who contradicted the evidence of the plaintiff. Although they stated that they had collected rents from the tenants they were unable to give the names of any

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such tenants and one of them had to admit that he himself paid no rent during that period. It would have been very easy for the defendant no. 1 to produce the accounts of the estate proving that collections had in fact taken place if such had been the fact. The defendant's witnesses stated that Raghunath was in cultivating possession of the nijchas lands but they were unable to give any particulars of the crops secured. We entirely agree that they are not to be believed. The defendant attacked each debt with a view to shewing that the plaintiff's account of the circumstances of its incurrence was unreliable and in our opinion he had wholly failed. We do not propose to go in detail through the debts. The learned Subordinate Judge has reviewed the evidence as to every one of them and after a perusal of the evidence with the assistance of the learned Advocates for the defendant we are left in agreement with the findings of the Subordinate Judge and we are satisfied that there was legal necessity for the debts secured by the mortgage. For these reasons the appeal fails and is dismissed with costs.

Appeal dismissed.