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J. C.*
1936.

July, 29.

PRIVY COUNCIL.

SOMESHWARI PRASAD

v.

MAHESHWARI PRASAD.

On Appeal from the High Court at Patna.

Hindu Law—Impartible Estate—Incorporation of property with Estate—Khorposh—Purchase of Khorposhdar's interest by holder of estate—Effect of purchase.

The interest of a khorposhdar in the land granted to him for maintenance by the holder of an impartible estate is not an impartible estate and the purchaser of that steps into the shoes of the khorposhdar and holds it as partible property subject to the ordinary rule of succession. The mere fact of the purchase of the khorposhdar's interest by the holder of the ancestral impartible estate does not cause a merger of the estate purchased in the ancestral estate.

Decree of the High Court [*Someshwari Prasad Narain Deo* v. *Maheshwari Prasad Narain Deo*(1)] modified.

Appeal (no. 87 of 1934) from a decree of the High Court (February 26, 1931) which modified a decree of the Subordinate Judge of Patna (August 22, 1925).

The material facts are stated in the judgment of the Judicial Committee.

*Present: Lord Thankerton, Sir Shadi Lal and Sir George Rankin.

(1) (1931) I. L. R. 10 Pat. 630.

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Dunne, *K. C.* and *Hyam*, for the appellants.

DeGruyther, *K. C.* and *Wallach*, for the respondents.

In the course of the argument *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*(1) was referred to and distinguished on the facts.

The judgment of their Lordships was delivered by—

SIR SHADI LAL.—The dispute in this appeal relates to the succession to an estate, situate in the Province of Bihar, which is known as the Dhanwar Estate. The succession opened on the death of Ran Bahadur Narain Deo, which took place on the 6th October, 1900. He left surviving him, two sons, Ishwari Prasad Narain Deo and Harihar Prasad Narain Deo. It appears that the Court of Wards had taken possession of the estate in the lifetime of the deceased, but released it after his death to his elder son Ishwari Prasad.

The suit was commenced in 1917 by the younger son for a partition of the estate, and subsequently his sons and other persons were added as plaintiffs. The claim was resisted on the ground that the estate was impartible, and that the succession to it was governed by the rule of lineal primogeniture. It was pleaded that the plaintiff, Harihar Prasad, being a junior member of the family, was entitled, not to a share in the estate, but only to maintenance. The Courts below, the Subordinate Judge who tried the suit, and the High Court at Patna, who heard the appeal from his judgment, have upheld this plea; and the principal question for determination is whether the estate descends according to the rule of lineal primogeniture.

Now, the Dhanwar Estate is an estate of considerable age, and, apart from the traditions which rest upon doubtful material, there is abundant documentary evidence to show that in the first half of the 18th

(1) (1932) I. L. R. 59 Cal. 1399; L. R. 59 I. A. 331.

century, it consisted, not only of 17 nankar (revenue free) villages and 53 khalsa (revenue paying) villages, but also of other territories. The estate was, at that time, known as Pargunnah Kharagdiha, and was held by Mode Narain, an ancestor of Ran Bahadur. Mode Narain was evicted in 1752 by one Kamdar Khan, who was succeeded by his son Ekbal Ali Khan. In 1774, Ekbal Ali Khan rebelled against the East India Company, who had acquired the Diwany of the Province of Behar, with the result that he lost the estate by forfeiture. Mode Narain's grandson, Girwar Narain, had helped the Company in suppressing the rebellion; and he was rewarded in 1775 with the grant of 17 nankar villages. In 1805, one khalsa village, Mandhirkha, was settled with him; and this was followed in 1810 by the settlement of other khalsa villages, 52 in number. These villages (both nankar and khalsa) formed part of the estate, which had descended to Mode Narain from his ancestors, and from which he was expelled by force in 1752.

The pedigree table of the family which is not in dispute, shows that Girwar Narain had a younger brother Sobh Narain; but all the villages were granted to the elder brother, who provided only maintenance for his younger brother.

After Girwar Narain's death, the whole of the estate, comprising seventy villages, devolved upon his elder son Khem Narain, and upon the latter's death descended to his son Ran Bahadur. It appears that during Ran Bahadur's tenure several immovable properties were purchased out of the income which accrued from the ancestral estate, and it is a matter for consideration whether the properties so acquired are governed by the same rule of succession as is applicable to the ancestral estate.

The Courts below have discussed the evidence in detail and reached the conclusion that the ancestral estate is impartible, and that its devolution is governed by a family custom under which it passes to a single

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heir according to the rule of primogeniture. The learned judges of the High Court, in concurrence with the Subordinate Judge, hold that the following facts have been established:—

(*1*) The estate, prior to 1752, partook of the nature of a Raj and descended to a single heir in accordance with the rule of lineal primogeniture.

(*2*) The same incidents of impartibility and descent to a single heir continued after the grant made by the East India Company to Girwar Narain.

(*3*) The junior members of the family received only maintenance out of the estate. They did not assert their right to a share in the estate, or if some of them asserted that right, they failed in their attempt.

These conclusions are supported by evidence, and their Lordships are not prepared to depart from their usual practice of not disturbing concurrent findings on issues of fact recorded by the Courts in India. It is clear that these findings fully establish the custom of primogeniture invoked by the defendants. In view of this custom the plaintiffs' claim to a share in the ancestral estate must fail.

There remains, however, the question of whether they are entitled to a share in the properties acquired by Ran Bahadur. In the plaint they asked for a partition of the entire estate left by him and considered it unnecessary to make any distinction between the ancestral estate and the self-acquired properties. The trial judge dismissed the suit *in toto*, but the High Court, while holding that the custom proved by the defendants operated as a bar to their claim *quoad* the ancestral estate, remitted the case to the Subordinate Judge for the determination of their right to succeed to the self-acquired properties. The Subordinate Judge, thereupon, directed the plaintiffs to submit a list of the properties, which, according to them, were acquired during the time of Ran Bahadur. He, however, refused to allow them to include in that list

any of the villages enumerated in lists *A* and *B* which they had filed with their plaint, on the ground that both those lists mentioned only the ancestral estate, and did not include any self-acquisitions. This view of the learned judge was affirmed by the High Court.

Their Lordships do not think that the plaintiffs should be debarred from proving that there are some properties in those lists which were acquired in the lifetime of Ran Bahadur. List *A* comprises nankar villages, and list *B* enumerates the khalsa villages, but there is no warrant for the assumption that all of them are ancestral. As stated already, the plaintiffs claimed a share under the Hindu law in the entire estate of Ran Bahadur, and had no occasion to separate in their plaint the ancestral estate from the self-acquired properties. It was only after the remand by the High Court that it became necessary to specify the latter. It is possible that all the villages described in the lists are ancestral, but there is no reason why the plaintiffs should not be given an opportunity to assert and prove their claim.

Their Lordships are, therefore, of opinion that the plaintiffs should be allowed to specify the villages included in the lists *A* and *B*, which, they say, were acquired by Ran Bahadur. If their claim is denied by the defendants, the Court should consider such application, as may be made by them, for the discovery of the title deeds of those villages as contemplated by Order XI of the first Schedule to the Civil Procedure Code.

In compliance with the directions of the Court, the plaintiffs produced three lists of the properties, which were not included in the lists *A* and *B*, but were said to have been acquired in the lifetime of Ran Bahadur. The rule is firmly established that if any property acquired by the holder of an impartible estate is intentionally incorporated by him with the estate, it would not be governed by the ordinary rule of inheritance but would devolve on a single heir.

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The learned judges of the High Court have considered the contentions of both the parties with regard to the properties included in the lists submitted by the plaintiffs, and have disallowed their claim to some of those properties. The controversy is now confined to three items, and their Lordships proceed to deal with them.

The first of these three properties is a village called Sheor Mohammadabad. There is ample evidence to prove that this village was the ancient seat of Dhanwar Raj, and in view of its sentimental importance to the holder of the estate, it was only natural that Ran Bahadur should desire it to be impartible estate. The learned judges of the High Court have, upon a survey of the evidence, oral as well as documentary, arrived at the conclusion that Ran Bahadur did intend to incorporate this village with the ancestral estate; and their Lordships do not find any reason for dissenting from that conclusion.

The other two villages, namely, Telonari and Palangi, were acquired after Ran Bahadur had been adjudged a lunatic and the Court of Wards had assumed superintendence of his estate. No question of his intention to incorporate these villages with the ancestral estate can, therefore, arise, and the only matter for consideration is whether there are any special circumstances which would justify the view that they merged in the estate.

Now, these villages were two of the 17 nankar villages which originally formed part of the Dhanwar estate. They were granted by the holder of the estate to two cadets of the family as khorposh or maintenance. They were sold, in 1883 and 1879 respectively, in execution of decrees against the Khorposhdars, and purchased on behalf of Ran Bahadur by the Manager of the estate.

It is common ground that a village granted to a junior member in lieu of maintenance is resumable on

failure of his male line, but until that event takes place, the grantor has no interest in the property. The grantee is the absolute owner thereof, and has an unrestricted power of transfer. If a transfer is made, the transferee holds the property as a full proprietor, and the grantor has no right to interfere with him until the extinction of the male line of the grantee. When that incident takes place, the tenure of the grantee comes to an end, and the property reverts to the grantor.

The interest of the Khorposhdar in the land granted to him for maintenance is not an impartible estate, and the purchaser of that estate steps into the shoes of the Khorposhdar and holds it as a partible property subject to the ordinary rule of succession. There is no warrant for the proposition that the mere fact of the purchase having been made by the holder of the ancestral estate causes a merger of his self-acquisition in that estate.

There is neither a statutory provision in India nor any rule of common law which can be cited in support of merger in a case of this character. Nor can merger be established on the doctrine of justice, equity and good conscience. Even in cases where a lesser interest vests in a person who holds the greater interest, merger would depend upon the intention of that person. If no intention is expressed or implied, or the party is incapable of expressing his intention, the Court has to consider what is beneficial to him. In the present case, it would not be to the advantage of Ran Bahadur that these self-acquired villages should merge in the ancestral impartible estate, as merger would not only deprive him of his unrestricted power of disposal over them, but also operate as a gift to the elder son and rob the junior members of the family of their right of inheritance under the ordinary law.

Their Lordships cannot endorse the decision of the High Court with regard to Telonari and Palangi,

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and hold that both these villages shall be added to the list of the properties to be partitioned among the persons who are Ran Bahadur's heirs under the Hindu law.

The result is that the appeal is allowed to the extent indicated above, and the decree made by the High Court modified by including the villages Telonari and Palangi among the properties to be partitioned and by referring to the trial Court under Order XLI, r. 25, of the Code of Civil Procedure the questions whether any villages to be specified by the plaintiffs from lists *A* or *B* were the self-acquired properties of Ran Bahadur and if so, whether any such self-acquired villages were incorporated by him with the estate. The appellants having failed on the main issue must pay the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitors for respondents: *Watkins and Hunter.*

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Sept., 8, 9, 10, 11, 14, 18.

APPELLATE CRIMINAL.

Before Fazl Ali and Dhavle, JJ.

BIPAT GOPE

v.

THE KING EMPEROR.*

Trial by jury—Code of Criminal Procedure, 1898 (*Act V of 1898*), *sections* 282, 283—*Sessions Judge, inherent power of, to discharge a jury—*

The Sessions Judge discharged the jury, after the trial had proceeded for five days as he considered that absolute impartiality might not be evinced by them, and empannelled a fresh jury.

*Death Reference no. 29 of 1936 with Criminal Appeal no. 198 of 1936, directed against the order of P. Chaudhury, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 11th August, 1936.