## APPELLATE CIVIL.

*Before Mr. Justice Phear and Mr. Justice Ainslie.*

RAJAH RAM NARAIN SINGH (PLAINTIFF) *v.* PERTUM SINGH AND OTHERS (DEFENDANTS).* 1873 *June.* 20.

*Hindu Law—Impartible Raj—Mitakshara Law—Alienation by Father—Consent of Son.*

Where, in a part of the country the general law of which is the Mitakshara, a custom exists, with regard to ancestral immoveable property, that it is not partible among the members of the joint family, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity.

See also 13 B.L.R 451.

THIS was a suit for khas possession of Ruttunpore and other mauzas in Pergunna Gundhore, after setting aside a bond, a letter of assignment, and a potta for a term of eleven years, executed by Rajah Mohendernath Singh, the father of the plaintiff, on the ground that the property in dispute was the ancestral property of the plaintiff, that, according to the Mitakshara law and the custom of primogeniture which was prevalent in the family, the plaintiff's father had no right to alienate; and that therefore the plaintiff, as the eldest son and born during the lifetime of his father, was entitled to recover possession. The plaint stated that the plaintiff's father was incapable of managing his affairs; that the defendants, Pertum Singh and Nawab Singh, in collusion with one Gujjadhur, who had great influence over the plaintiff's father, obtained from him for a nominal consideration of Rs. 10,000, by way of *zur-i-peshgi*, a potta upon an inadequate jumma of the land in dispute, in favor of Radhay Singh and Mudhoo Singh, the grandsons of the said Pertum Singh, and Nuckhoo Singh and Mahal Singh, the sons of the said Nawab Singh, a bond in their own favor for securing the principal sum with interest, and a letter of asignment in favor of

* Regular Appeal, No. 40 of 1872, from a decree of the Judge of Bhaugulpore, dated the 11th October 1872.

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the lessees, Radhay Singh and others, assigning the rent towards payment of the interest due on the bond; that according to the custom of the country, the three deeds were several parts of one and the same mortgage transaction; that the debt was incurred without legal necessity; and therefore the plaintiff's father had no power to alienate immoveable property; that the property in dispute formed portion of an impartible raj; and that the plaintiff was entitled to recover possession thereof.

The defendants Radhay Singh and others, the lessees, stated (*inter alia*) in defence, that the potta, dated 21st Asar 1268 F.S. (13th July 1861), was for a limited term of years, and not in the nature of a *zur-i-peshgi* lease; that the bond, dated 22nd Asar 1268 F.S. (14th July 1861), did not contain any condition for the hypothecation of the property in dispute; and that the potta was granted in good faith for the better management of the zemindari and for personal benefit.

The defendants Pertum Singh and Nawab Singh stated (*inter alia*) that the plaint disclosed no cause of action; that the bond was executed by the plaintiff's father for a good consideration; that the other defendants had taken the lease for their own benefit; that the lease was executed previous to the bond, and not on the same day; that these transactions were separate and independent; and that the lease was not a *zur-i-peshgi* one.

The Subordinate Judge found that the lease, bond, and letter of assignment formed parts of the same transaction; that the lease was a *zur-i-peshgi* one but was not such a transfer of ancestral property by the father, as under the Mitakshara law would entitle the son to sue for cancellation thereof, and that the loan under the bond was a *bonâ fide* transaction. He held that the bond and lease could not be interfered with. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* (Baboos *Romesh Chunder Mitter* and *Boodh Sen Singh* with him) for the appellant.

Mr. *C. Gregory* for the respondents Radhay Singh and others, the lessees.

Babqos *Chunder Madhub Ghose* and *Nilmadub Sen* for the respondents Pertum Singh and Nawab Singh.

Mr. *Woodroffe* contended that there was not sufficient evidence to show that there was legal necessity for the loan. The rent reserved by the *ticca* lease was inadequate. The property in dispute formed portion of an impartible raj. The father had no right to create an incumbrance on the estate. There is no dispute as to its being an impartible raj. The learned Counsel cited *Maharani Hiranath Koer* v. *Baboo Ramnarayan Singh* (1), *Katama Natchier* v. *The Rajah of Shivagunga* (2), *Nilkristo Deb Barmano* v. *Bir Chandra Thakur* (3), and *Beer Pertab Sahee* v, *Maharaja Rajender Pertab Sahee* (4).

Mr. *C. Gregory* contended that the bond did not create any incumbrance on immoveable property. The *ticca* lease was a separate transaction. There was acquiescence on the part of the plaintiff. His cause of action arose when Radhay Singh and others took possession of the property. He cannot now contest the validity of the lease. The case of *Maharani Hiranath Koer* v. *Baboo Ramnarayan Singh* (1) is not applicable to the present suit. The property in dispute not being a joint family property, the plaintiff is bound to show that his father could not alienate.

Baboo *Chunder Madhub Ghose* contended that there was no cause of action against Pertum Singh and Nawab Singh. The plaintiff has failed to prove that the transaction was a nominal one.

Mr. *Woodroffe*, in reply, cited *Stree Rajah Yaunmula Venkayamah* v. *Stree Rajah Yaunmula Boochia Vankondora* (5).

The judgment of the Court was delivered by

PHEAR, J.—With regard to the principal issue of fact in this case, we concur in the finding of the lower Court. It appears

(1) 9 B. L. R., 274.
(2) 9 Moore's I. A., 539.
(3) 3 B. L. R., P. C., 13; S. C., 12. Moore's I. A., 523.
(4) 12 Moore's I. A., 1.
(5) 13 Moore's I. A., 333.

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to us that the granting of the *ticca* potta, and the execution of the bond, were but two steps in one transaction by which the plaintiff's father secured to the bond-holder at least the repayment of the interest stipulated for in the bond, by means of the rents reserved in the *ticca* lease. It is almost impossible, I think, to take any other view of the matter. The story set up by the defendant, amounting really to a statement on the part of the bond-holder and the *ticcadars*, relatives on intimate terms of association with each other as they were, that each was quite ignorant of the dealing of the other with the plaintiff's father, is entirely unworthy of credit. And then there is the very significant fact that the period of the lease just exceeds the period of maturity of the bond-debt, if I may use the term, *i.e.*, by two or three months only: eleven years was the period in one case, and ten years and three-fourths in the other. We agree with the Subordinate Judge that this was one transaction, and we think that it has the character of a mortgage transaction to the extent which I have mentioned. It was, therefore, clearly, for the period during which the *ticca* potta was expressed to endure, an incubrance upon the estate.

We also think, on the evidence which has been brought before us, that the *ticca* rent reserved by the potta was, as the plaintiff terms it, an inadequate rent. The jummabandi papers proved by the plaintiff's witness, the *patwari*, coupled with his own testimony, is *primâ facie* evidence at any rate, going to show that the assets of the property which was the subject of the *ticca* lease amounted to somewhere about Rs. 4,000 per annum, during pretty nearly the whole period, and this evidence has not been met by the defendants in any way whatever. It is obvious that, if this evidence was untrue, the defendants had the very best possible means in their power of showing that it was so. The *ticcadars* for some nine years previous to suit had been the actual receivers of the rents and profits of this estate. They could have shown to a pice what it was that they realized during the whole of that period. They have in truth given no evidence as to the amount of rents and profits which they realized. To my mind the conclusion is inevitable that the case of the plaintiff in this respect is a true one. I therefore think, not only that

the original transaction was a transaction having the chacracter of a mortgage, a transaction which had for its purpose at any rate to secure to the bond-holder the payment of the interest due on his bond, but also that the *ticca* itself was a grant of a very beneficial character to the grantee ; so that the grant, independently of its forming part of the mortgage transaction, would be an incumbrance upon the estate. In other words the incumbrance effected by the assignment of the *ticca* rent to secure the payment of the interest on the bond was increased by reason of the inadequacy of that rent. With this view of the facts of the case, it remains to be considered whether the plaintiff had a right to ask for possession and enjoyment of the property free of these incumbrances which his father had put upon it.

Thus we come to the question whether the father held and enjoyed the property with the incidental power of alienating or incumbering it as against his successors.

It is perhaps somewhat unfortunate that no issue of fact was distinctly raised in the Court below for the purpose of ascertaining the nature of the father's proprietary right in this property. But we have it asserted in the plaint, and not contradicted by the defendants, that the property in question had descended to the plaintiff's father from his father. It was therefore in the hands of the plaintiff's father an ancestral property as distinguished from a self-acquired property ; and its incidents and the rules which would govern its descent, would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitakshara law, excepting so far as that might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, I need hardly say that one of the incidents of ancestral property in the hands of the father (as I have just observed this property was) would be that he would have no power of alenation or of incumbering as against any members of the family who were joint with him in respect of his property.

Now, admittedly, the present plaintiff was born during the lifetime of his father and while the father had this property ; and

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therefore by the Mitakshara law, if it operated uncontrolled' the plaintiff immediately became joined with his father as regards right to his ancestral property, and any alienation or incumbrance which the father at any time should make without his concurrence would be void as against him, unless it was justified by family necessity.

In this way I think we have reached a point in the case, at which we must enquire whether there has been any established custom or any other established authority proved such as had the effect of overiding the general law, the Mitakshara law, which otherwise would govern the incidents and descents of this property.

Some such custom or authority has been made out to a certain extent, or rather we must take it that there is in this case something of the kind active. For the plaintiff in his plaint asserts that this property is impartible amongst the members of the joint family, and descends from the hands of the father to those of the eldest son, if he has sons, and so on : in other words that it is not in any form divided or distributed in possession amongst the members of the joint family. This must be of course under the coercion, and as the effect, of some authority external to the Mitakshara law. The defendant does not deny this, and consequently we must take that as a fact in the case. But that fact does not go further than the plaintiff has asserted it: it goes no further than the result which I have mentioned, namely, that this joint family property is not partible amongst members of the joint family, but goes on the decease of the last holder to the hands of the elder member in lineal descent of the joint family. If then the custom or authority has this effect, and so far controls the general law, but does not go further, there must still remain the other incidents which I before drew attention to, namely, one amongst others, that the holder of the property cannot alienate any portion of it, excepting for a family necessity, without the consent of all the members of the joint family. It seems to me that in arriving at this position, we have the authority of the Privy Council expressed in several judgments ; in particular it is expressed in the judgment in the case of *Stree Rajah Yaunmula*

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*Venkayamah* v. *Stree Rajah Yaunmula Boochia Vankondora* (1) on which Mr. Woodroffe very greatly relied yesterday. Another case, in which the like doctrine has been lately enunciated by a judgment of this Court, is *Maharani Hiranath Koer* v. *Baboo Ramnarayan Singh* (2). One of the learned Judges of this Court who pronounced an opinion in that matter differed in regard to the final result from the other members of the Court: but it seems to me upon the best consideration which I have been able to give to all the judgments reported in that case that in reality he did not materially differ from the other Judges in his view of the principles which ought to govern the case. He appears to have been of opinion that the property which was there the subject of suit did exist in the condition of separate property in the hands of every successive taker. It is possible, I think, that the facts and circumstances of the enjoyment of a particular subject of property may be such as to bring about this result, and probably a peculiar state of things in this respect will account for the special character of the judgment which was given by the Privy Council in the *Tipperah* case (2). There were some expressions thrown out by their Lordships in the Privy Council in the *Tipperah* case (2) and by some of the learned Judges who gave judgment in the case of *Maharani Hiranath Koer* v. *Baboo Ramnarayan Sing* (3) which seem to imply that there is a different law of descent in the case of what is termed a separate property, from the law of descent in the case of joint property. I do not myself readily accept that view. The distinction between joint property and separate property under the Mittakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal

(1) 13 Moore's I. A., 333.

(2) 3 B. L. R., P. C., 13; S. C., 12 Moore's I. A., 523.

(3) 9 B. L. R. 274.

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of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root, and it continues to go down by one rule of descent only. As I understand the matter, there is substantially no different rule prevailing in the one case, and in the other. It is simply the occurrence of a fresh starting point for a new joint family which makes the distinction between the two cases. While the joint family endures, there is, strictly speaking, no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence notwithstanding the death of individual members; and it is now settled that under the Mitakshara law no individual member of the family has any specific interest in the property, or the power of creating any for himself, independently of the other members: he has only a right to insist upon a partition being effected by all. But by the nature of the case, the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a a new joint family. Thus the Mitakshara law itself does nothing to keep property in the condition of being separate property throughout a series of takers, and indeed is hostile to such a state of things. If, however, in any given case property is so situated that it does pass from one taker to another taker, just in the same condition as if it were the separate self-acquired property of each of them personally, independently of the family element, then this result I conceive can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law. The Privy Council appear to have been of opinion in the *Tipperah* case (1) to which I have already alluded that some result of this kind arose

(1) 3 B. L. R., P. C., 13; S.C., 12 Moore's I. A., 523.

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out of the state of facts before them. But in the case which is now before us, and in the other cases in this Court to which I have just referred, there is an entire absence from the facts of any authority or custom, if any there could be, which should have the effect of making the property separate property, and not joint family property, as it passess into the hands of the successive takers. It appears to me then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its pertibility amongst the existing joint members of the family; and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards his property, to alienate or incumber the estate, excepting upon a justification of a family necessity. No such ground justifying the father's deeds of 21st and 22nd Asar(13th and 14th July) has been even attempted to be proved.

The result to my mind is that the plaintiff is entitled to have it declared that the two deeds, the *ticca* potta and the bond of the 21st and 22nd of Asar (13th and 14th July), had the effect of placing an incumbrance on the estate, and that the plaintiff was entitled, to have possession of the property at the time of his father's death free from that incumbrance. The plaintiff must have his costs in both the Courts.

*Appeal allowed.*

## ORIGINAL CIVIL.

*Before Sir Richard Couch, Kt., Chief Justice, and Mr Justice Pontifex.*

1873 *March* 27 & *June* 9.

KEDERNATH DUTT AND ANOTHER (TWO OF THE DEFENDANTS) *v.* SHAMLOLL KHETTRY AND OTHERS (PLAINTIFFS).

*Equitable Mortgage—Unregistered Document—Evidence Act* (1 *of* 1872), *s.*91—*Registration Act* (*VIII of* 1871 ),*s.*17.

The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day, the defendant by way of further