APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

1909
Feb. 5.

LALITESHWAR SINGH

v.

RAMESHWAR SINGH.*

Hindu Law—Impartible Raj—Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend.

In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which is not a subject for partition: also, there can be no separation in estate, as there is nothing upon which such separation can operate.

An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case.

APPEAL by the plaintiff, Laliteshwar Singh, from the judgment of Fletcher J.

This suit was brought by the plaintiff, Laliteshwar Singh for a declaration of his title to the Durbhanga Raj and for the recovery of possession of the property of the Raj from the defendant, who was then in possession. The two widows of the late Maharajah were made party-defendants to the suit.

The Durbhanga Raj is an ancient impartible Raj, and its properties appertain to the Raj and devolve on the successor to the Raj.

In 1850, Maharajah Rudra Singh of Durbhanga died leaving four sons Moheshwar Singh, the eldest, Ganeshwar, the second and two other sons. His successor Moheshwar Singh died in 1860 leaving Lakshmishwar Singh, his eldest son, and the respondent Rameshwar Singh, and was succeeded to the Raj by Lakshmishwar Singh. Ganeshwar Singh died in 1903, leaving two grandsons by his predeceased eldest son, two grandsons by his predeceased second son, the appellant

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Laliteshwar Singh, his third son, and a fourth son. Lakshmishwar Singh died on the 17th December 1898 without leaving issue, and on his death his brother Rameshwar Singh entered upon and took possession of the Raj. On the 27th March 1907 this suit was filed.

It was alleged by the plaintiff that on the 28th August 1880 the defendant Rameshwar Singh had renounced and relinquished all his claims to the properties of the Raj, at the time held by his father Moheshwar Singh, that the defendant had long been separate in food and worship from his brother Lakshmishwar Singh, and that on the 28th August 1880 owing to disputes and differences between them they became separate in estate and were never thereafter re-united in food, worship or estate, whereas, he, the plaintiff, continued to be joint in estate with Lakshmishwar Singh until his death. The plaintiff further alleged that the succession to the Durbhanga Raj was governed by the *ordinary* rule of primogeniture subject to the *kulachar* or family custom whereby the reigning Raja had the power of abdicating and assigning the Raj in favour of his nearest immediate male heir, and that no such abdication or assignment had been made by the late Maharajah Lakshmishwar Singh. The plaintiff accordingly claimed, that on the death of the late Maharajah, he became entitled to succeed to the Raj and its property by survivorship. He added that he was ignorant of his rights until the recent claim by the defendant Maharanis to the property of the Raj.

The defendant Rameshwar Singh denied that he had in any way renounced or relinquished his right of succession to the properties of the Raj, or that he had at any time become separate with the late Maharajah in estate and stated that a certain deed of the 20th August 1880 only purported to give him certain properties as a maintenance or *babuana* grant. He alleged that the succession to the Durbhanga Raj and its properties was regulated by the *kulachar* or family custom according to which the succession devolved upon the next immediate male heir of the last holder, to the exclusion of females according to the rule of *lineal* and not *ordinary* primogeniture. The

defendant submitted that he had rightfully succeeded to the Raj on the death of Lakshmishwar Singh by virtue of the *kulachar* or family custom, by virtue of an adoption alleged to have occurred in November 1896, and lastly as the united brother of the late Maharajah. The defendant further alleged that in 1904, at the instigation of the plaintiff, the widows of Lakshmishwar Singh instituted an action contesting the defendant's title and claiming the Raj, and that on this action being compromised in March 1906 by a consent decree confirming the defendant's title, the present suit was instituted for the purpose of harassment and extortion. A further plea of limitation was raised in defence.

The suit was set down for settlement of issues. In his opening Counsel for the plaintiff admitted that the plaint required amendment. Fletcher J., however, on the 30th March 1908, dismissed the suit on the ground that the plaint could not be so amended as to disclose a valid cause of action. The judgment of his Lordship was as follows :—

FLETCHER J. This suit is set down for settlement of issues.

On Mr. Hill opening his case, it was admitted by him that the plaint requires some amendment. The question is whether the plaint can be so amended as to disclose a reasonable cause of action, which ought to be tried by this Court.

The suit is brought to recover possession of the Durbhanga Raj estate. The present Maharaja is the brother of the deceased Maharaja. The plaintiff alleges in his plaint that the present Maharaja ceased to be joint in food, estate and worship with the deceased Maharaja, that the plaintiff's father and the plaintiff remained joint in food, estate and worship with the deceased Maharaja and that upon the death of the deceased Maharaja in 1898 the plaintiff in accordance with the family custom succeeded to the Raj.

That is an obvious error because the plaintiff's father did not die until the year 1903 and if any one succeeded to the Raj, it must be according to the plaintiff's own account his own father. That, as Mr. Hill says, is capable of being amended.

Now, it is admitted by both sides that the Raj is an impartible estate. In fact this is the substance of the plaintiff's claim, *viz.*, that he succeeded to the Raj as an impartible estate. It is well established by authority that an impartible estate is capable of alienation by the holder either *inter vivos* or by will. The only case in which this estate is to be considered joint is for purposes of succession and maintenance of the younger members of the family. The Raj is therefore to be considered joint estate only in the case for determining

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who is to be the successor to the Raj and being an impartible estate the defendant could not have separated *quoad* the Raj from the late Maharaja.

The plaintiff also alleges that by the *kulachar* or family custom the succession to the Raj is governed by the rules of lineal primogeniture and not of ordinary primogeniture. It is however admitted that whether the succession to the Raj is according to ordinary or lineal primogeniture, the right of the defendant is prior to that of the plaintiff unless it can be shown that the defendant separated in estate from the late Maharaja.

As I have already said, it is the plaintiff's own case that the Raj is an impartible estate and so incapable of partition, it follows, in my opinion, that there could be no separation in estate between the late Maharaja and the defendant *quoad* the Raj.

In my opinion, the plaint in this case cannot be amended so as to disclose a valid cause of action. The whole basis of the suit rests upon a separation in estate between the late Maharaja and the defendant with respect to this impartible estate. The suit is therefore, in my opinion, frivolous and vexatious and I order that the same be dismissed with costs including all costs reserved.

From this judgment, the plaintiff appealed.

Mr. Pugh, for the appellant. This suit should not have been dismissed on the pleadings. The proposition, that in the case of an impartible Raj, the question of the alleged separation was immaterial, is, it is submitted, erroneous. The question of separation from the joint family is a material question of fact which must be decided on the evidence. The test of the right to succeed to an impartible Raj, is whether the claimant was joint with the late holder, or separate from him. The Privy Council has in numerous cases laid down this test as deciding the right to succeed: see *Katama Natchiar* v. *The Rajah of Shivagunga* (1), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (2), *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari* (3), *Periasmi* v. *Periasmi* (4), and *Doorga Persad Singh* v. *Doorga Konwari* (5). *Ram Nundon Singh* v. *Janki Koer* (6) was tried on the question of fact, whether there had been separation or not. In the present case, the appellant's claim as a joint cousin is prior to that of the respondent, a separated brother. It was

(1) (1863) 9 Moo. I. A. 539.
(2) (1870) 13 Moo. I. A. 333.
(3) (1875) L. R. 2 I. A. 263.
(4) (1878) L. R. 5 I. A. 61.
(5) (1878) I. L. R. 4 Calc. 190.
(6) (1902) L. R. 29 I. A. 178; I. L. R. 29 Calc. 828.

admitted in the Court of first instance that some amendment of the plaint was necessary. The amendment is of a formal nature to shew that the plaintiff's cause of action arose in the lifetime of his father, as he must be taken to have abdicated in favour of his son, or at any rate, if not on the 17th December 1898, on the father's death in 1903, and to make it more clear that the plaintiff claimed priority over the sons of his predeceased elder brothers, as the *kulachar* or family custom was of succession by the rule of ordinary and not lineal primogeniture.

Mr. Garth (*Mr. Dunne*, *Mr. Chakravarti* and *Mr. B. C. Mitter* with him), for the respondent. It has been held in the later decisions of the Privy Council that an impartible estate is capable of alienation by the holder either *inter vivos* or by will: *Thakur Shankar Baksh* v. *Dya Shankar* (1), *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipati Surya Rao* (2). It follows that the owner of an impartible Raj is the absolute owner, and the other members of the joint family during the life of the holder have no present interest in the Raj, and having none, there is nothing to relinquish, and in Law there can be no separation, *quoad* the Raj. A member may cease to be joint in food and worship, but not *quoad* the Raj. All that exists during the life of the holder is a *spes successionis*. And this does not amount even to a reversionary right. *Nund Kishore Lal* v. *Kanee Ram Tewary* (3) was also referred to.

Mr. Pugh, in reply. The decisions in the Privy Council cases cited against me cannot overrule the decisions in the Privy Council cases cited by me. They must stand together and be reconciled. During the life of the holder of an impartible estate, the interest of the other members may be a *spes successionis*, which would be no present interest. But this is not inconsistent with the theory, that the test of the right of succession on the death of the holder is whether the claimant was joint with the holder, or not.

Cur. adv. vult.

(1) (1887) L. R. 15 I. A. 63. (2) (1899) L. R. 26 I. A. 83.
(3) (1902) I. L. R. 29 Calc. 355.

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MACLEAN C.J. This is a suit to recover possession of the Durbhanga Raj estate, one of great value. The present Maharajah is a brother of the late Maharajah; and the plaintiff's case is that the present Maharajah and the late Maharajah had long been separate in food and worship, and owing to disputes and differences between them, they on or about the 28th of August 1880 became separate in estate and were never thereafter re-united in food, worship or estate. He further alleges that on or about the last-mentioned date the defendant Maharajah for valuable consideration moving from the late Maharajah renounced and relinquished by deed all his claims to any of the properties moveable and immoveable held by Maharajah Moheshwar Singh or which might have been subsequently acquired and added thereto: that the late Maharajah died suddenly on the 17th December 1898 intestate and without having abdicated or assigned the Raj, leaving no issue, natural or adopted, but leaving the plaintiff and the Maharajah defendant his brother, from whom he had been separated as aforesaid, and leaving behind him amongst other things, the property described in the schedule to the plaint, whereof he was the owner, being entitled thereto as an impartible Raj, subject to the *kulachar* custom or usage mentioned in the 10th paragraph of the plaint. The case of the defendant put shortly is that the Durbhanga Raj is an ancient impartible estate held and enjoyed by the defendant's family for several centuries, and the devolution thereof, and the succession to the said Raj are regulated by the *kulachar* or family custom attaching to the said Raj, according to which the succession devolves upon, and passes, to the next immediate male heir of the last holder, to the exclusion of females, according to the rule of lineal primogeniture: and the defendant denies that the rule of ordinary primogeniture governs such succession as stated in the 10th paragraph of the plaint. He also says that it is wholly untrue that the defendant and the late Maharajah became, on the 28th day of August 1880, or at any time, separate in estate, the fact being that, on the 20th of August 1880, an arrangement was come to between the late

Maharajah and the defendant, by which, according to the usual custom and practice of the family, certain properties known as Pargana Bachur were given by the late Maharajah to the defendant to have and to hold the same as a maintenance or *babuana* grant with the same incidents as are usually attached to *babuana* grants made to junior members of the said Raj family.

In his argument before us, Counsel for the plaintiff relied upon the deed effecting this arrangement, and which is appended to the written statement, though not set forth in the plaint. The Raj admittedly is an impartible estate, and being an impartible estate the defendant could not have separated so far as the Raj is concerned, from the late Maharajah. All interest, the defendant could then claim in the Raj, was a *spes successionis* which was clearly not a subject for partition. In the suit brought by the defendant against the late Maharajah the question raised was whether the Raj was partible or not, and the compromise was based on the condition that the defendant withdrew that plea and not that the defendant accepted the terms offered as compensation for the rights which he had in the Raj, which in fact was then only a *spes successionis*. There was nothing to separate.

With respect to the case that succession to the property of the Raj is governed by the rule of ordinary primogeniture, and not by the rule of lineal primogeniture, it was conceded that, whether the succession to the Raj was according to the rule of ordinary primogeniture or that of lineal primogeniture, the plaintiff cannot succeed unless he can show that the defendant separated in estate from his brother, the late Maharajah. But if it was an impartible estate there was nothing upon which separation of estate could operate.

I now pass to the question of amendment. The suit was set down for settlement of issues. Counsel for the plaintiff admitted that without amendment, the plaint disclosed no cause of action. It is not clear what the proposed amendments were, nor is it clear that leave to amend was ever asked for: if it were admitted that the plaint as it stood disclosed no cause of action and an amendment was asked for, it would have been

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preferable to ascertain what the amendment asked for was, and if the Court thought that the amendment was permissible to have dealt with the case on the footing of that amendment. But apparently nothing was said as to what the proposed amendment was to be. When the case came before us, Counsel asked for leave to amend, and at the bar the amendment he asked for was of a very formal nature, merely to show how the defendant as a third son of Maharajah Kumar Ganeshwar Singh, who did not die until the year 1903, had become entitled to the Raj, notwithstanding the existence of other members of the family, the grandsons, who survived the Maharajah Kumar Ganeshwar Singh. We asked that these amendments should be reduced into writing; this has been done and they assume a different and wider aspect. But the amendments, even if we allowed them at this late stage of the case, only show that the claim of the plaintiff is dependent upon the so-called separation between the present Maharajah and his brother the late Maharajah, and, as has been shown, this Raj being impartible, there could be no such separation in estate. Apart from this, however, in the exercise of the judicial discretion which is vested in us, we think it is too late, at this stage of the case, to allow the amendment, which was not submitted or asked for to the Court of first instance. The appeal, therefore, must be dismissed. We think the suit is a vexatious one, and we dismiss the appeal with costs.

HARINGTON AND BRETT JJ. concurred.

Appeal dismissed.

Attorneys for the appellant: *Pugh & Co.*

Attorneys for the respondent: *B. N. Basu & Co.*

J. C.