Privy Council Appeal No. 74 *of* 1917.
Allahabad Appeal No. 15 *of* 1916.

Baijnath Prashad Singh and others - - - - - *Appellants*

v.

Tej Bali Singh, since deceased - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH FEBRUARY, 1921.

Present at the Hearing:

LORD DUNEDIN.
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD DUNEDIN.]

The question arises as to the succession to the zamindary of Agori Barhar. The estate is of great value, and the question raised is one of wide importance.

The estate fell vacant by the death of Rani Kunwari, the widow of the last male holder, Raja Kesho Saran Shah. She died in 1913, having possessed the estate since the death of her husband in 1871, but it was conceded that her possession was not due to any title arising out of separation or self-acquisition.

This couple left no children, and to trace the succession you have to go up for five generations to find an ancestor common to Raja Kesho Saran Shah, the last male holder, and the two claimants who are adversaries in the appeal. This common ancestor, Raja Sudisht Narayan Shah, had three sons, from the eldest of whom Raja Kesho Saran was descended. There is no one left in this line. The descendants of the second son are also extinct.

The plaintiff is the great-great-great-grandson of the third son. The defendants are his uncles, being younger brothers of his father. It will thus be seen that the plaintiff is the direct senior

lineal descendant of the common ancestor, the person who, by the law of primogeniture as applied in England, would succeed. But the uncles are one degree nearer to the common ancestor than he is. The question is which is entitled to succeed, the paintiff or the uncles defendants jointly. The uncles on the death of the widow managed to seize the property, which accounts for their being defendants in the suit.

The family in question was an ancient family, holding sway as independent Rajahs. They were dispossessed by a neighbouring Rajah in the eighteenth century, but, having helped the English, they were reinstated by Warren Hastings. Their Lordships are satisfied that the reinstatement, which was finally carried out at a subsequent period, restored the family possessions to what they had always been in ancient times, viz. an impartible raj or zamindary, and that the zamindary now is ancestral property and not self-acquired. They do not think it necessary to add anything to what was said by the Subordinate Judge and by the Court of Appeal in arriving at these conclusions.

Now if the property now in question were not an impartible zamindary, the question would be easy of solution. It has admittedly to be determined in accordance with the Mitakshara law. It would all depend on whether the property in question were held joint or not. And both the Courts below have held that this family still exists as a joint family, and that there has been nothing equivalent to partition—with which finding their Lordships agree. The whole point, therefore, turns on the fact that this is an impartible zamindary, and it is necessary to examine the decisions which deal with them, and are very numerous. They will be taken in their chronological order.

The first case is the *Sivagunga* case, decided in 1863 (9 Moore, I.A., 539), judgment delivered by Lord Justice Turner. In that case the contest was between the representatives of a widow and those of nephews of the last holder, named Gowery Vallabha Taver. The zamindary in question was admitted to be impartible. The claims in the case were stated by Lord Justice Turner as follows :—

> " (1) Were Gowery Vallabha Taver and his brother Oja Taver (the father of the nephews) undivided in estate, or had a partition taken place between them ?
>
> " (2) If they were undivided, was the zamindari the self-acquired and separate property of Gowery Vallabha Taver ; and, if so,
>
> " (3) What is the course of succession, according to the Hindu law of the south of India, of such an acquisition where the family is in other respects an undivided family ? "

They answered the first question by saying that the estate was undivided.

They answered the second question in the affirmative.

That being so, they held that the widow was entitled to succeed.

In the course of the judgment, the following quotation is to be noted (p. 588) :—

> " The zamindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at

a time. But whatever suggestions of a special custom of descent may have been made, the rule of succession is now admitted to be that of the general Hindu law prevalent in that part of India (*i.e.* the Mitakshara), with such qualifications only as flow from the impartible nature of the subject. Hence if the zamindar at the time of his death and his nephews were members of an undivided Hindu family, and the zamindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zamindar at the time of his death was separate in estate from his brother's family, the zamindary ought to have passed to one of his widows, and, failing his widows, to a daughter or descendant of a daughter preferably to his nephews."

It will be noted that the actual judgment went on the ground of its being self-acquired property, but the passages above quoted certainly lay down that so long as a zamindary was family property, although impartible, the selection of the next holder would be determined by taking the senior member judged by survivorship.

The *Tipperah* case, 1869 (12 Moore, I.A., 523). This was a contest between two claimants for the raj of Tipperah. It was held that there was a custom of allowing each Rajah to appoint his successor, and one of the claimants, being held to be duly appointed, was preferred. But in discussing what would happen if that appointment was not made out, with a view to determining the conflicting claims of the full and the half-blood, Lord Chelmsford says as follows (page 540, bottom). After saying that the presumption in any Hindu family is for joint property, he goes on :—

"Still, when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law by judicial construction a fiction involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is the title to the Throne and the Royal Lands is as in this case one and the same title : survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest ; for claims to one estate in lands and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title of heirship, cannot in the absence of custom furnish the rule to ascertain the heir to a property which is solely owned and enjoyed and which passes by inheritance to a sole heir."

He then goes on to cite the *Sivaganga* case with approval as to what it says about the law of inheritance being religion, duty, and superior efficacy of sacrifice ; but he seems not to have noticed that the pronouncement quoted above is in the teeth of what was said in the *Sivaganga* case, and being in general terms might be so interpreted. The fact is, though curiously it seems to have escaped notice on many occasions, that the *Tipperah* case was under the Dayabhaga law, not the Mitakshara. The Dayabhaga differs from the Mitakshara in several particulars, and there is no succession by survivorship.

Raja Suraneni Venkata v. Raja Suraneni Lakshma Vinkama Row, 1869 (13 Moore, at p. 140). The zamindary in this

case was held to be partible, so that the decision does not affect the question, but Sir J. Colvile comments upon a misapprehension of the *Sivagunga* case :—

> "The *Sivagunga* case was this: The family was shown to be undivided, but the impartible zamindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was that in that case the zamindary should follow the course of succession as to separate property, although the family was undivided; but if that zamindary had been shown to have been an ancestral zamindary, as in this case, the judgment of the Board would no doubt have been the other way. Their Lordships think it necessary to make this observation in order to avoid future misconception as to what was decided here in the *Sivagunga* case."

That case, therefore, followed the dicta in *Sivagunga* as against the dicta in the *Tipperah* case.

Raja Venkayama v. Raja Boochia Vankondora, 1870 (13 Moore, I.A., 333). In this case the decision does not touch the question, but again Sir J. Colvile comments on the *Sivagunga* case, and repeats what he said in the former case that the judgment would have been the other way if the property had not been self-acquired. He adds, at p. 339 :—

> "It is, therefore, clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that if they were to hold that it did so they would affect the titles to many estates held and enjoyed as impartible in different parts of India."

Maharani Hiranath Koer v. Baboo Ram Narayan Singh, 1872 (9 Bengal, L.R., 274). In this case Sir R. Couch, C.J., in the Court of Appeal, points out, at p. 324, the conflict between the *Sivagunga* and *Tipperah* cases, and, quoting the last-mentioned case of *Ventana*, follows it and *Sivagunga* in preference to the *Tipperah* case.

Periasami v. Periasami, 1878 (5 I.A., 61). The zamindary was held to be self-acquired, and the decision is therefore not in point; but, speaking of an estate that was ancestral, Sir J. Colvile says (p. 70, middle) :—

> "He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a raj or other impartible estate descendible to a single heir."

Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari, 1878 (5 I.A., 149). The decision here turned upon *res judicata*. But in the course of his judgment Sir Barnes Peacock said (p. 159, bottom) :—

> "The impartibility of the property does not destroy its nature as joint family property or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate."

And he bases this pronouncement upon the *Sivagunga* and *Periasami* cases.

Naraganti Achammagru v. Nayanivaru, 1881 (I.L.R. 4 Madras, 250). This case decided that an impartible Palaiyagam, in the event of death, passes by survivorship. At p. 266 the law is thus stated :—

> " Where property is held in coparcenary by a joint Hindu family, there are ordinarily three rights vested in coparceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment, and the right of partition as the right of an undivided coparcener, are from the nature of the property incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that right remains."

There follows more to the same effect, and attention is called to the incompatibility of the *Sivagunga* and *Tipperah* cases, and *Sivagunga* is followed.

This is the first *decision* precisely in point. It is also to be noted because it is the case quoted with approval by Lord Macnaghten in 32 I.A., as will be subsequently mentioned.

Rajah Rup Singh v. Rani Baisni, 1884 (11 I.A., 149). This was a case between a widow and the nearest male heir. This decision is exactly what it has been said above the *Sivagunga* case would have been if the property had not been self-acquired. Here it was ancestral and the male was preferred.

Sir Barnes Peacock, delivering a judgment by a Court of which Lord Blackburn was a member, approved (p. 154) of Sir R. Couch's judgment in *Maharani Hiranath Koer v. Babu Ram Narayan Singh* (9 Bengal. L.R., 274) above cited.

Up to this point, with the single exception of the *Tipperah* case, which as stated was not under Mitakshara law, the law is all one way and seems to affirm these propositions :—

(1) The fact that a raj is impartible does not make it separate or self-acquired property.

(2) A raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

(3) If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, *i.e.*, the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the raj without the others sharing it.

There now comes a case which introduces a different line of thought.

Sartaj Kuari v. Deoraj Kuari, 1888 (15 I.A., 51). In this case a deed of gift had been made of thirteen villages of the Rajah to his younger and, it may be supposed, favourite Rani. The suit was raised at the instance of the older Rani as guardian of her son, to set aside the deed. The zamindary was impartible,

and the case, therefore, raised the point as to whether the holder of an impartible raj could alienate when there are no purposes of necessity.

The High Court of the North-Western Provinces, affirming the judgment of the Subordinate Judge, held that he could not.

They cited the cases above quoted and drew the deduction that, inasmuch as the right of single enjoyment was not incompatible with a restriction on alienation, and as such restriction was part of the general law of the joint family, that result followed. In particular they said :—

> "It must be conceded that the complete rights of ordinary coparcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant ownership."

The Board reversed, the judgment being delivered by Sir R. Couch. The point of the judgment is that the title to prevent alienation rests upon the present co-ownership of the person who wishes to restrain.

> "The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it. . . . By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed."

It will now be best to abandon for the moment the chronological order of all cases and to trace the developments directly attributable to this judgment.

Venkata Rao v. Court of Wards, 1899 (26 I.A., 83). (The first *Pittapur* case.) This case decided two points :—

(1) That the case of *Sartaj*, which was a case of direct *inter vivos* gift, covered by analogy the case of alienation by will.

(2) That the law as laid down in *Sartaj*, which was a case from the North-Western Provinces, also applied in Madras, notwithstanding the older Madras decisions, Madras being under the Mitakshara law.

No general remarks are made which need be quoted. The zamindary in question was the zamindary of Pittapur.

Raja Rama Rao v. Raja of Pittapur, 1918 (45 I.A., 148). (The second *Pittapur* case.) This was a suit for maintenance. It was sued by the son of the adopted son of the Rajah, who had left the whole zamindary by will to a son born after the adoption of the plaintiff's father. The plaintiff denied that the defendant was in truth a son, but said he was a supposititious child.

Accordingly, on his own theory, he was preferring a claim for maintenance against property in the hands of a third party. The Board held that such a claim could only be based on the ground of coparcenary, and that as by the *Sartaj* case coparcenary was decided not to exist in an impartible raj, the claim, not being based on relationship, must fail.

The matter is tersely put by Sankaran Nair, J., in the Court of Appeal :—

> "The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship. . . . As there was no community of interest, the property is not burdened with his claim in the hands of a donee."

It is upon these two cases that the appellants in this case base their argument.

The appellants' Counsel argues that the selection of his clients by the rules of ordinary succession to self-acquired, or non-ancestral property is the logical and inevitable conclusion to be reached from the decision in the *Sartaj* case that in an impartible raj no coparcenary exists—a decision which he says was logically extended to settle the question of maintenance in the second *Pittapur* case, and should be equally logically extended to succession.

Now the first observation that must be made is that Sir R. Couch in *Sartaj Kuari's* case did not intend that his judgment should have any such effect. This is quite clear from the latter part of it. All the older cases, including his own judgment in the case in 9 Bengal L.R., had been quoted. How does he deal with the cases? He says :—

> "The judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Rajah or zamindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family."

And he then goes on with the discussion, on the assumption that the cases have thereby been distinguished so that nothing now being done could overrule them.

The matter, however, does not rest here. For after the decision in the *Sartaj* case other succession cases did arise which shall now be quoted chronologically—remembering that the date of the *Sartaj* case is 1888.

Raja Jogendra Bhupati Harrochundra Mahapatra v. Nityanand Man Singh, 1890 (17 I.A., 128). This was a competition between a legitimate and an illegitimate son, but in the beginning of the judgment (*Sartaj's* case having been cited *inter alios*), Sir R. Couch says (p. 131) :—

> "Now it may be well first to dispose of a point arising out of the fact that this is an impartible raj, which it is admitted to be. According to the decision in the *Sivagunga* case which, as their Lordships understand, is not now disputed, the fact of the raj being impartible does not affect the

rule of succession. In considering who is to succeed on the death of the Rajah, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in the case is, what would be the right of succession supposing instead of being an impartible estate it were a partible one."

This passage is absolutely conclusive as to Sir R. Couch's view. The other parties to the judgment were Lord Watson and Sir Barnes Peacock.

Sri Raja Lakshmi v. Sri Raja Surya, 1897 (24 I.A., 118). The question was as to whether partition had in fact taken place. But Lord Davey said :—

"It will however be found that as between the Appellant and Respondent the question whether the zamindari is partible or not is of no importance. Even if impartible it may still be part of the common family property and descendible as such. . . . The real question therefore is whether it has ceased to be part of the joint property of the family of the first zamindar."

Ram Nunden Singh v. Janki Koer, 1902 (29 I.A., 178). This was a case as to the Bettiah raj—the same raj as was the subject of a recent decision to be afterwards referred to.

The actual decision does not touch the point, because it rests on a finding that the raj was in the hands of an heir who had been reinstated by grant from the E. India Company to a self-acquired property.

But a question incidentally arose as to what was the state of affairs in the old family before the forfeiture, and Lord Davey in dealing with this says :—

"It appears that the Raja Kishin Singh was joint in estate with his brother, and therefore was entitled to succeed him in the family property by survivorship."

Kaliyana Rengappa v. Yuva Rengappa, 1905 (32 I.A., 261). The leading question was whether the estate was partible or impartible. It was decided to be impartible. Lord Macnaghten says :—

"There were two other questions raised in the appeals which may be mentioned for the purpose of putting them aside. It was objected by the appellant in the first five appeals that, assuming the estate to be impartible, still he was entitled as the preferable heir. . . . The first of these two questions is concluded by authority. It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves, not on the coparcener nearest in blood, but on the nearest coparcener of the senior line—a position held by the principal respondent."

And then he quotes the case in 4 Madras L.R. It was said that he here made a mistake—the case in 4 Madras L.R., not being a decision of the Board. But, although if the sentence be read in one way that may be so, he was even then right in fact, for in the case of *Muttuvaduganadha Tevar v. Periasami* (23 I.A., 128), Lord Hobhouse, delivering judgment in the Privy Council, had said (p. 137) that their Lordships agreed "on both points" with the presiding Judge of the High Court. Now one of the points was the question of de-

ciding succession in an impartible estate, and as to that the presiding Judge had approved (p. 132) of the decision in 4 Madras L.R., 252.

Lastly, *Parbati Kunwar v. Chandarpal Kunwar*, 1909 (36 I.A., 125), where Lord Collins (p. 136) quotes with approval a judgment of the Appeal Court of Madras :—

> "The first principle is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law. . . We have first to ascertain the class, and we have next to select the single heir, applying the special rule."

And he then went on to cite Sir R. Couch in the passage already cited in 17 I.A., p. 131.

It will be apparent from this long series of authorities that there are under the Mitakshara law only two possible lines of devolution and that the only test to be applied is, Was there community or was there separation? The argument of the appellants would involve there being two tests, (1) Was the property joint or separate? and (2) If it was joint, was it an impartible raj? If this were right, there would have been no enquiry in the *Sivaganga* case whether the raj was self-acquired property or not. It would have been enough to take the admission that it was an impartible raj. The appellants' argument, therefore, is entirely based on what was said in the case of *Sartaj Kuari* and the second *Pittapur* case which followed it.

Now if the whole subject were open it would probably have been better if the words "coparcenary" and "coparceners" had not been used. It is one of the inevitable inconveniences of translating an Eastern language into the technical law terms of a foreign system of the West. It is quite true that in Colebrooke's Translation of the Mitakshara, the term "coparcener" appears, *e.g.* secs. 4 (1) and 9 (1), but assuredly the thing called coparcenary is not identical with coparcenary as understood in English law. A very simple instance will show this. Take the ordinary case of a member of a joint family under the Mitakshara law, and what happens if he dies? His right accresces to the other members by survivorship, but if a co-parcener dies his or her right does not accresce to the other co-parceners, but goes to his or her own heirs. It is therefore necessary not to fasten the attention on the word "coparcenary," but rather to enquire what actually was decided in the case of *Sartaj Kuari*. Now what was decided was that in an impartible raj there was no restriction on the power of alienation by the member of the family who was on the Gaddi and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the

other members that was being considered was a presently existing right. The chance which each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry.

Turning next to the second *Pittapur* case, it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*. The decision, therefore, was the logical outcome of the decision in the *Sartaj Kuari* case, but again the question of succession was outside the scope of enquiry.

No doubt it would have been possible to decide the case of *Sartaj Kuari* differently 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. This is recognised by Sir R. Couch when in delivering the judgment of the Board, he says :—

> " The question of how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom, is one of some difficulty."

Even, however, if their Lordships thought the decision in *Sartaj Kuari* wrong—an opinion which they do not pronounce—the case has stood too long to be now touched. But the judgment expressly affirmed the general proposition which had been laid down in the *Tipperah* case :—

> " When a custom is found to exist, it supersedes the general law, which however, still regulates all beyond the custom."

This is the key note of the position. The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited, and there is, in their Lordships' view, no necessary logical deduction from the decisions in the *Sartaj Kuari* and the second *Pittapur* cases which forces them to an opposite conclusion.

It is true that in a very recent and unreported case as to the succession to the Bettiah raj a different result was indicated. One of their Lordships was a party to that judgment, and their Lordships have consulted the other members of the Board who decided that case. Their Lordships are satisfied that in that case the appellant, who was wrong on the merits, practically invited a decision upon the off-hand view that the *Sartaj Kuari*

and the second *Pittapur* cases concluded the question, and this view was accepted without argument and without citation of the authorities. In these circumstances, their Lordships while not doubting the soundness of the decision do not hold themselves bound by the reasons given.

Their Lordships are, therefore, of opinion that, this zamindary being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara law, and that the respondent, being the person who in a joint family would, being the eldest of the senior branch, be the head of the family, is the person designated in this impartible raj to occupy the Gaddi. The decision appealed against was right. They will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

BAIJNATH PRASHAD SINGH AND OTHERS

v.

TEJ BALI SINGH, SINCE DECEASED.

DELIVERED BY LORD DUNEDIN.

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