

Privy Council Appeal No. 59 of 1934

Patna Appeal No. 25 of 1932

Bindeswari Charan Singh - - - - - Appellant

v.

Thakur Bageshwari Charan Singh - - - - - Respondent

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER, 1935

*Present at the Hearing:*

LORD THANKERTON.

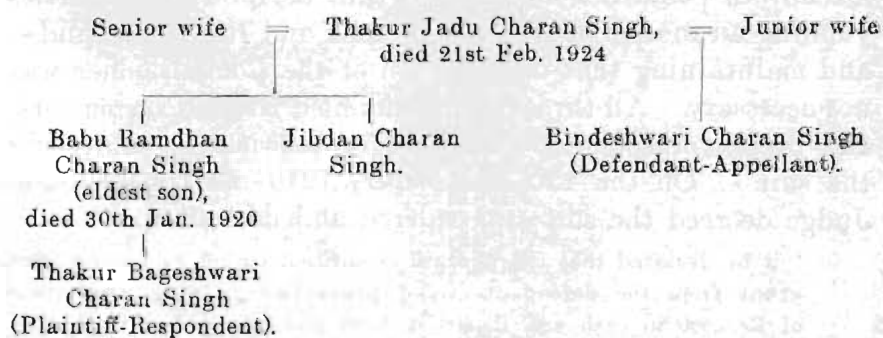
SIR JOHN WALLIS.

SIR GEORGE RANKIN.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a decree of the High Court of Judicature at Patna dated the 29th July, 1932, which reversed a decree of the Additional Subordinate Judge of Hazaribagh dated the 31st March, 1928, and decreed the plaintiff-respondent's suit with costs.

The following pedigree shows the relationship of the parties :—



Thakur Jadu Charan Singh was the owner of an impartible estate in the District of Hazaribagh. On his death intestate in 1924 the respondent succeeded to the estate, his father having died in 1920.

The management of the estate was vested in a manager appointed under section 2 of the Chota Nagpur Encumbered Estates Act (VI of 1876) from 1894 until the 15th May, 1909, when it was released and made over again to Jadu Charan,

in accordance with the provisions of the Act. The estate was again vested in a manager under the Act on the 24th July, 1921, and it is still under management.

On the 17th November, 1909, Jadu Charan executed a maintenance grant in favour of the appellant, transferring to him villages and lands yielding an annual income of Rs.1.300. Doubt being entertained as to whether, in view of the provisions of section 12A of the Act, the sanction of the Commissioner to the grant should have been obtained, the appellant, on the 4th March, 1916, sought the sanction of the Commissioner, but this was refused by an order dated the 26th April, 1916.

Section 12A provides as follows:—

“12A.—(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner—

(a) to alienate such property, or any part thereof, in any way, or

(b) to create any charge thereon extending beyond his lifetime.

(2) If the Commissioner refuses to sanction any such alienation or charge, an appeal shall lie to the Board of Revenue, whose decision shall be final.

(3) Every alienation and charge made or attempted in contravention of subsection (1) shall be void.”

The present appellant, having attained majority on the 4th September, 1917, instituted suit No. 117 of 1917 in the Court of the Subordinate Judge of Hazaribagh against Jadu Charan and his brothers Ramdhan and Jibdhan, claiming a maintenance grant of the yearly value of Rs.4,000—he being already in possession under the grant of 1909 of properties yielding an income of Rs.1,200 in cash and Rs.100 in kind—and maintaining that the sanction of the Commissioner was not necessary. All three defendants filed written statements, the present respondent's father, in particular, contesting the suit. On the 12th November, 1919, the Subordinate Judge decreed the suit and ordered and decreed that:—

“it be declared that the plaintiff is entitled to get as maintenance grant from the defendant No. 1 properties yielding an income of Rs.3,500 in cash and Rs.500 in kind annually and it be further declared that the grant made to the plaintiff by his father on Kartik Sudi 5, 1966 S. is legally valid and after leaving out the khorposh properties so obtained by the plaintiff, he do get additional properties in maintenance from the defendant No. 1 yielding an annual income of Rs.2,300 in cash and Rs.400 in kind.”

Defendant No. 2, the present respondent's father, who had not appeared at the trial, applied for a rehearing under Order IX, Rule 13 of the Code of Civil Procedure, but the application was rejected. On the 21st February, 1920, Jadu Charan, defendant No. 1, in implement of the order of the Court, executed and registered a maintenance grant to the

present appellant of further properties yielding an income of Rs.2,300 in cash and Rs.400 in kind. This grant was filed in Court and entered, as satisfaction of the liability of defendant No. 1, on the 27th February, 1920.

The respondent's father having died on the 30th January, 1920, the respondent became the owner of the impartible estate, which again came under the Encumbered Estates Act on the 24th July, 1921. The respondent instituted the present suit, through his representative and next friend, the manager of the estate, on the 14th May, 1926, and impleaded as defendants the appellant and the mortgagee of some of the properties in suit. In the plaint the respondent asked for a declaration that the two maintenance grants of 1909 and 1920 are illegal and invalid and not binding on him, and asked for possession and mesne profits. The suit was defended by the appellant, and the following issues, settled in the suit, are relevant to this appeal:—

4. Are the judgment and decree passed in suit No. 117 of 1917 collusive?

5. Are (*sic*) the findings in suit No. 117 of 1917 of the Subordinate Judge of Hazaribagh operate as *res judicata* in the present suit?

7. Are the grants dated 17th November, 1909 (Kartik Sudi 5 of 1906 Sambat) and dated 21st February, 1920, affected by section 12A of the Encumbered Estates Act?

Although the question of collusion is maintained in the respondent's case, it could not be seriously pressed in view of the concurrent findings of the Courts below, but their Lordships desire to point out that collusion is not the appropriate term to apply to the obtaining of a decree by a fraud on the Court; the terms of the issue suggest that the Court was implicated in the matter.

The learned Subordinate Judge held that the findings in the suit of 1917 did operate as *res judicata* and that, in accordance therewith, section 12A did not affect the grant of 1909 or the grant of 1920, as the latter was executed by way of carrying out the order in the judgment and decree in that suit. He therefore dismissed the present suit. On appeal, this decision was reversed by the High Court, for reasons which render it convenient to restate the provisions of section 11 of the Code of Civil Procedure, viz.—

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

The judgment of the High Court was delivered by Agarwala J., with whom James J. concurred, and, with reference to the 1909 grant, it appears to their Lordships that the learned Judges have disregarded the express prohibition of section 11. They clearly hold that the question

of the validity of the 1909 grant in view of section 12A of the Encumbered Estates Act was directly and substantially in issue and was decided in the 1917 suit and that the similarity of the parties satisfied the condition of section 11 of the Code, but Agarwala J. then states :—

“Reverting to the question of the operation of the doctrine of *res judicata* on the grant of 1909, the point for determination is whether the decision in the 1917 suit can render valid a transaction which sub-section 3 to section 12A declares to be void . . . . Now the third sub-section of section 12A declares that an alienation or charge made without the previous sanction of the Commissioner is void, that is to say, it is void *ab initio*. The grant of 1909 was in my opinion still-born and the decision in the suit of 1917 could not impregnate it with life. I therefore hold that we are not bound to treat the grant of 1909 as valid merely by reason of the conclusion as to its validity arrived at by the learned Subordinate Judge in the 1917 suit.”

Truly the third sub-section of section 12A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. The decision of the Court in the suit of 1917 determined that the section had never applied to the transaction of 1909, and it is difficult to follow the reasoning of the learned Judge which allowed him not only to express a strong contrary view as to the applicability of the section, which he was entitled to do; if he so chose, but to try anew the issue as to its applicability—in face of the express prohibition in section 11 of the Code. In support of his view, the learned Judge refers to the opinion of Sir George Rankin, then Chief Justice, in *Tarini Charan Bhattacharya v. Kedar Nath Haldar*, (1928) I.L.R. 56 Cal. 723, at p. 736, and to certain other cases, but these lend no support to the reasoning of the learned Judge.

With regard to the 1920 grant, the learned Judge, taking the view—rightly, as their Lordships think—that the suit of 1917 was brought under the Code of Civil Procedure, states,

“The only effect of the decree in that suit was to declare the appellant to be entitled to obtain from Jadu Charan properties yielding an annual income of Rs.4,000. But Jadu Charan was incompetent to give effect to the decree unless the Commissioner sanctioned a transfer or charge under section 12A.”

It is not clear how far this view is based on the learned Judge's opinion as to the 1909 grant, but, in any event, their Lordships are clearly of opinion that the learned Subordinate Judge was right on this point, and that the decision in the suit as to the construction of section 12A is *res judicata* as to the validity of the grant of 1920 which was made in fulfilment of the obligations of that decision.

Their Lordships are therefore of opinion that, in view of the decision in the suit of 1917, it is not open to the respondent to challenge the validity of the grants of 1909 and 1920, and that they are binding on him, and they will, accordingly humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside and that the judgment and decree of the Additional Subordinate Judge of Hazaribagh should be restored. The respondent will pay to the appellant his costs of this appeal and in the High Court.

In the Privy Council.

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BINDESWARI CHARAN SINGH

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THAKUR BAGESHWARI CHARAN  
SINGH.

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DELIVERED BY LORD THANKERTON.

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