

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rani Sartaj Kuari and another v. Rani Deoraj Kuari, mother and guardian of Lal Narindur Bahadur Pal, from the High Court of Judicature for the North-Western Provinces of Bengal; delivered 21st January 1888.*

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Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The question in this appeal is whether a gift of 17 villages made by the Appellant Raja Bhawani Ghulam Pal, on the 18th February 1887, to the Appellant Rani Sartaj Kuari, his younger wife, is valid. The suit was brought by the Respondent, as mother and guardian of Lal Narindar Bahadur Pal, the minor son of Bhawani Ghulam Pal, against the Appellants. The plaint stated that the estate of Maholi had been in the Plaintiff's family for a very long time, and, according to the custom of the country and its neighbourhood and the provisions of Hindu law, the eldest son of the Raja succeeds to the estate; that since the establishment of the raj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognized usage, the successor of the Raja and

occupant of the gaddi had had no other right under any circumstances except to enjoy possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The plaint then stated the gift, and prayed for a decree for establishment and declaration of the Plaintiff's right by voidance of the deed of gift. The written statements of the Defendants alleged that Bhawani Ghulam Pal was proprietor of the estate and authorized to make any transfer, and it would be proved on inquiry that, on account of the separation of the family and other reasons, transfers of every description had been made in the family from of old, without any objection or obstruction being offered.

The history of the family is given in the judgement of the High Court. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur Fyzabad, in the province of Oudh, and Mahauli and Rasalpur, in the district of Baoti, in the North-West Provinces. It would appear that, some 300 years ago, two brothers, named Alakdeo and Tilakdeo, Surajbansi Rajputs, coming, as they alleged, from Kumaon, invaded the locality in which the property is situated, and killing one Kaulbil, the then Rajbhar, appropriated his lands, and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years been attached to the family. It was admitted that the raj or estate was impartible, that there was in the family the custom of primogeniture, and that the family was governed by the law of the Mitakshara. The evidence as to the size of the estate originally

was very vague, some witnesses saying it contained 600 or 700 villages, and others 1,300. At the time of the gift in question it did not contain more than 100. The estate had been thus reduced by gifts by successive Rajas to younger members of the family, who were called Babus, for maintenance, and to Brahmins for religious or charitable purposes. The former classes of gifts were called "birt" and the latter "shankalp." The former were stated by the witnesses to have been of considerable extent, some being of 50 or more villages. It did not appear that a Raja had ever made an alienation by way of sale of any part of the estate. The Subordinate Judge framed the following issue :—

" Is the Defendant competent to execute the deed of gift during his lifetime in favour of his second wife according to the family custom and Hindu law? Is the deed of gift legal? Has the Plaintiff no right according to Hindu law to get it cancelled? Is the Plaintiff alone competent to sue in the presence of other rightful heirs, and is the Plaintiff's claim legal or not?" The Subordinate Judge decided that the deed of gift was invalid, and made a decree for the Plaintiff. He appears to have held that the estate being impartible it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the Defendant had failed to prove this.

The Defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the Plaintiff and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property in which he had an immediate present

interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing these (the North-West) Provinces is concerned, except where it is clearly overridden by well recognized family custom, an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the Defendant Raja and the minor Plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, and the law of the Mitakshara being applicable, the gift not having been made for necessary purposes was void, and must be set aside. Accordingly the appeal was dismissed, with costs.

A similar view of the law was taken by the High Court at Calcutta in *Ram Narain Singh v. Pertum Singh*, 11 Beng. L.R., 397.

The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dáya-Bhága, the law in Bengal, is found in Ch. 1, Sect. 1, v. 27, where it is said that property in the paternal or ancestral estate is by birth, and the father is subject to the control of his sons, and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. In this case, if there were no family custom the Raja's power over the estate would be governed by this law, and the gift in question would be void. But, as was said by this Committee in the Tipperah case, 12 Moore, I. A. 542, "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." It is admitted that the raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is super-

seded and whether the right of the son to control the father is beyond the custom is one of some difficulty.

The Judges of the High Court have quoted in support of their view passages from several judgements of this Committee. In all of them the question was as to the succession to the property on the death of the Raja or Zemindar, 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. The saying in the Shivagunga case, 9, Moore, I. A., 592, that "the zemindari, though "impartible, was part of the common family "property," must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case. In *Pershad Singh v. Darga Kunwari* (4, I. L. R., Calc., 201), it is evident from what is quoted by the High Court that this question was not considered. In *Periasami v. Periasami*, 5, I. A., 61, the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shown by the previous sentence to be the younger brothers "taking such right and interests in respect of "maintenance and possible rights of succession "as belong to the junior members of a raj or "other impartible estate descendible to a single "heir." In *Rajah Yanumula Venkayamah v. Raja Yanumula Boochia Vanhondora*, 13, Moore, I. A., 333, which was quoted in the argument for the Respondent for a passage in the judgement at p. 339, where the estate is spoken of as being part of the common family property though impartible, the question in the suit being

in regard to the succession, their Lordships at p. 340, after noticing evidence of the grants of portions of the estate, say, "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate in favour of the junior members of the family, who, but for the impartibility of the estate, would be coparceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the coparcenary in it which under the Mitakshara law is created by birth does not exist.

And in *Baboo Beer Pertab Lahee v. Maharajah Rajender Pertab Lahee*, 12 Moore, I. A., 1, the case of the zemindary of Hansapore, in Behar, where the Mitakshara law prevails, an impartible raj, which by family usage and custom descended according to the rule of primogeniture, subject to the burthen of making Babooana allowances to the junior members of the family for maintenance, the question was whether the Rajah had power to make a testamentary disposition of the raj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "*cessante ratione cessat et ipsa lex.*"

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully

“empowered to make an alienation, since the estate is in common.” (Mitakshara, Ch. 1, Sect. 1, v. 30).

The argument in support of the view of the High Court appears to be that, although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient to enable them to prevent an alienation. The learned Judges of the High Court say, “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 co-ownership.”

In the case in the 11th Bengal L. R., 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405) in the judgement, “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 partibility 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 this property, to alienate or incumber the estate excepting upon a justification of a family necessity.” Both Courts appear to have thought that, in order to prevent

alienation by the father, there must be a co-ownership in the son or sons.

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. In the Hansapore case there was a right to have Babuana allowances as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. 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. In Bengal there is joint family property, but where property is held by the father as its head his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition. *Dáya Bhága*, Ch. 1. In the case of the raj of Patcum, in Chota Nagpore, which was admitted to be an impartible raj, and one in which the custom of primogeniture existed, it was held by the High Court at Calcutta (I. L. R., 5 Calc., 113), that it was necessary for the Plaintiff to show that there was some custom which would prevent the operation of the general law, empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was

not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed (L. R., 8 I. A., 248). In *Naraen Khootia v. Lohenath Khootia* (I. L. R., 7 Calc. 461) it was held by the same High Court that the fact that the raj of Chota Nagpore is impartible does not prevent the Maharaja for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the law of the Mitakshara. It had been previously held by the same Court in a case in 13 Bengal L. R. 445, where the Plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shewn to be inalienable. Their Lordships think this is the correct view.

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the onus was upon the Defendants (the Appellants) to prove that by custom the estate was alienable, and they have found that the custom was not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the Plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would

make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability: For the foregoing reasons, their Lordships are of opinion that the Plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The Respondent will pay the costs of this appeal.

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