

Privy Council Appeals Nos. 14 and 15 of 1917.

Bengal Appeals Nos. 54 and 55 of 1913.

Radhakant Lal and Others - - - Appellants,
v.
Mussammat Nazma Begum and Others- - Respondents.
Radhakant Lal and Others - - - Appellants,
v.
Mussammat Nasiban - - - Respondent.

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1917.

Present at the Hearing :

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR WALTER PHILLIMORE, BART.

SIR LAWRENCE JENKINS.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

THE suits to which these consolidated appeals relate concern the validity and effect of two deeds of gift made by one Drigpal Lal, deceased, the father of the first plaintiff and appellant, and grandfather of the other plaintiffs and appellants, in favour of two concubines and the daughter of one of them.

The son asserts that he and his father were joint members of a Hindu family, and that the properties to which the gifts relate were part of the joint family estate. This is the question to be determined in the suit.

Some of the properties in question came to Drigpal from the estate of his brother, Din Dayal, and others were acquired by the use of the revenues of Din Dayal's estate; and the first matter to be enquired into is whether the property which came to Drigpal from Din Dayal's estate was self-acquired property or came to him as part of the joint family estate.

The circumstances in which it was acquired are as follows:—

Drigpal and Din Dayal were two of five brothers who were at one time all members of a joint Hindu family. Din Dayal was adopted by his uncle and went out of the family. Another brother died without male issue. This left Duli Chand, Drigpal, and Kanhaya.

These three brothers separated in estate in the year 1876.

Din Dayal died on the 8th March, 1878, leaving no issue, but leaving surviving him his widow, Rukmini, and two widows of his adoptive father.

The succession to his estate if he died intestate would therefore be as follows:—

The widow Rukmini would take for her life, giving maintenance to the other widows. These, if they survived her, would take for their lives (it matters not for this purpose in which order *inter se*), and then those who at the death of the survivors of the three widows would be the male heirs would take the property. At the moment of Din Dayal's death these would be the three brothers; but it could not be foreseen who would be the male heirs when the succession ultimately devolved upon them. Din Dayal, though he made no legal will, expressed his last wishes as to the disposal of his estate, and they were, according to the recital in an *ekrarnama*, dated the 3rd April, 1878, and executed by the widow, to the following effect:—

“that after my death you” (that is, Duli Chand and Drigpal) “and Babu Kanhaya Lal shall, as proprietors, enter upon possession of all my properties, movable and immovable, all mortgage and simple bonds, all decretal moneys, zarpeshgi moneys and Bhurna moneys, houses and money at Ramna situated in Sahebguego, zillah Gaya, and over every other kind of properties belonging to me; that you shall allow my wife to remain during her lifetime in possession of my dwelling-house situated in Kasba Haswa . . . ; that you shall pay to her one lakh of rupees in cash to defray the expenses of performing religious rites and pilgrimage, from your own pocket; that shall you allow all money in cash and ornaments which are in the house at Haswa to remain in the possession of the Mussummat during her life; that you shall pay her rupees ten thousand in cash annually, besides clothing and grains sufficient for her use; that you shall pay to Mussummat Jado Koer and Dhupa Koer, the widows of Babu Murali Ram, who are my mothers, rupees 2,500 each annually in cash, besides clothing and grains sufficient for their use; that you shall make a hiba or gift to Mussummat Rama Koer, daughter of Babu Girdhar Lal, my deceased brother, of 16 annas of mouzah Lodipur Jafra and Shaikhpara appertaining to Lot Lodipur Jafra, 16 annas of mouzah Korigawan appertaining to Lot Sandha Manjhigawan . . . and 16 annas of mouzah Kumharwa Girji Bandbauna appertaining to Lot Samandih, &c., being 12 kalams known as mahal Ratni . . . with all the dependencies and all the chunks of the mouzah aforesaid, situate in zillah Gaya; that you shall pay rupees 1,300 in cash annually, and clothing and grains sufficient to meet her requirements, to Mussummat Annapurna, Tawait, provided that she does not lose her chastity and character and continue in the Pardah; that

you shall make gift to Babu Somar Ram of 16 annas of mouzah Jatsari . . . ; and that you shall execute deeds in accordance with the above directions in favour of these persons."

All parties were desirous that these wishes should be carried into effect, and accordingly a series of documents were executed, the first being the *ekrarnama* already mentioned whereby the widow purported to dispose of all the property of her deceased husband in favour of the three brothers.

Then there was a bond given by the brothers to the widow with a mortgage, to secure the payment of the lakh of rupees; a covenant, with a charge on certain property, to pay to the father's widows the stipulated annuities and maintenance; a covenant with the concubine to pay her the agreed annuity and maintenance; a deed of gift in favour of the adopted nephew; and a similar deed of gift in favour of the niece.

The lakh of rupees was paid in two instalments within six months of the death, and the bond was discharged. The money found to pay Rukmini by the three brothers came out of ancestral family property.

The three brothers entered into possession of the estate, and paid the annuities and maintenance to the various ladies. The father's widows died first, and then Rukmini in the course of the year 1882.

The annual income of the property is said to have been rather more than half a lakh, so that the arrangement, as it turned out, was not such a bad bargain for Rukmini, and was advantageous to the father's widows. For the concubine, niece, and adopted nephew it was pure gain.

It was contended on behalf of the defendants that the *ekrarnama* of the 3rd April, 1878, executed by Rukmini in favour of the three brothers was inoperative to pass more than her life interest, and that the brothers who survived her must be deemed to have taken the property by inheritance, in which case, being an inheritance from a collateral, it would be self-acquired, and not to have taken it by purchase, in which latter case it would be ancestral family property.

That it was the intention of the deed to pass the whole property is obvious. If Rukmini was only conveying her life interest, and if either of the father's widows had survived her, the survivor's estate would have been interposed before that of the brothers. Even if it be supposed that the father's widows were so far parties to the transaction that they could not have claimed their life interest in the event of their surviving Rukmini, there was, as already observed, no certainty that the three brothers would have all survived Rukmini, so as to be the heirs at her death. Moreover, the gifts in favour of the adopted nephew and niece would have failed.

It may be, however, that though this was the intention of the deed, its only legal operation would be the restricted one for which the defendants contend.

A widow has only a limited power of disposition of the

property. She can, however, alienate the estate in certain circumstances and under certain conditions. Whether in the circumstances of this case she could effect a valid alienation is a matter of some difficulty. The Subordinate Judge thought that she could; the High Court held that she could not.

Their Lordships are relieved from pronouncing upon this point of law, because they are of opinion that as regards the property which came from Drigpal the plaintiffs can succeed upon another ground.

Assuming that the three brothers—and in particular Drigpal—acquired this property as collateral heirs, and took it therefore as self-acquired property, it is well established that a member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock; and this is, in their Lordships' opinion, that which happened in the present case.

As already stated, Drigpal and his two brothers had made a partition of their joint family estate in 1876. At the time of the death of Din Dayal and the accession of the three brothers to his property, Drigpal was acting as guardian of his younger brother Kanhaya. Accordingly one book was kept for their joint share of Din Dayal's estate; and this system of book-keeping, which started on the 2nd October, 1878, was continued till the 11th February, 1880, when Kanhaya came of age. Thereafter no separate book was kept by or for Drigpal in respect of the property which had come to him from Din Dayal; but there was one account for all Drigpal's receipts from all sources, whether it was income from joint family property, or from that which he had acquired from Din Dayal, or any other source of revenue, and similarly for all his expenditure of whatever kind.

Now his son, Radhakant Lal, the first plaintiff and appellant, had been born on the 31st May, 1877, and from that time forward there had been a joint family estate for him and his father. And, if the accounts from 1880 onwards are such as to show a blending of the properties, the ordinary inference to be drawn is that Drigpal had thrown the property which he had acquired from Din Dayal into the common stock.

This matter has come more than once before this Board, and was the subject of decision in the cases of *Lal Bahadur v. Kanhaia Lal* (L.R. 34, I.A., p. 65) and *Pandit Suraj Narain v. Pandit Ratan Lal*, decided on the 30th January, 1917.

The Subordinate Judge held that Drigpal had amalgamated the two properties, and the two grounds upon which his decision to this effect is supported by the present appellants are:—

First, the intermixture of and the blending of the receipts and payments in one account with those belonging to the ancestral family property;

And, secondly, that when Drigpal and his younger brother Kanhaya took the further step of effecting what is called “a

deorh partition," that is, not merely a separation of interest, but an actual partition of the several properties constituting their estates, mutual exchanges were made whereby Drigpal gave up his share in some ancestral family property for Kanhaya's share in property which came from Din Dayal, and *vice versa*.

The High Court took the opposite view. As to the argument drawn from the exchange, the judgment of the High Court is as follows:—

"The first point made was with regard to the deorh partition which took place between Drigpal Lal and Kanhaya Lal on the 8th May, 1881. It was argued that, on that partition, Din Dayal's properties were exchanged for joint properties and *vice versa*. When, however, this point came to be investigated it appeared that there was no such general interchange as the plaintiffs would have us believe. Only two possible instances were given us, and of these one is capable of an obvious explanation and the other is not fully proved. The first instance was with regard to mouzahs Sikandarpur and Asarhi. It is doubtless the case that mouzah Sikandarpur was ancestral while mouzah Asarhi had come from Din Dayal. These mouzahs are contiguous and of equal value so far as one can tell from the *jama*. They both form part of mahal Asarhi Sikandarpur. At the partition it seems that Drigpal took 10 annas 8 pies of Sikandarpur, while Kanhaya Lal took 10 annas 8 pies of Asarhi, so that each brother got two-thirds of a separate village instead of a one-third share in the two. This clearly was a matter of convenience and cannot, we think, be regarded as evidence of amalgamation of properties ancestral and acquired from Din Dayal. Neither of these villages, it may be observed, forms part of the subject-matter of the present suit.

"Then it was said that for mouzah Pillich, touzi No. 204, an ancestral mouzah, two mouzahs, Nanand and Sonchari, which came from Din Dayal, were exchanged. For this the evidence is Exhibits 45 and 47, applications made by Drigpal Lal, and Exhibit 64, an application made by Kanhaya Lal, for mutation of names. The exchange of these villages does not appear to have been very satisfactorily established from these two Exhibits. In the absence of any *koras* or other reliable evidence as to the precise details of this partition, it would be impossible to draw the conclusion which the plaintiffs wish us to draw from the very meagre evidence with regard to these two exchanges."

It should be observed that the High Court agrees with the Subordinate Judge in respect of the exchange of Sikandarpur and Asarhi; and their Lordships are of opinion that the exchange of Pillich for the two mouzahs specified was satisfactorily proved by the documentary evidence. This evidence was further supplemented by the oral evidence of the witness Gajadhar Lal. Moreover, there was oral evidence uncontradicted from this witness and from Bhekhi Lal, proving the exchange of two more villages. A more striking proof of the throwing together of the two properties into a common stock there could hardly be.

Drigpal gives ancestral family property, and receives his brother's share in property coming from Din Dayal. He gives

Din Dayal property and receives his brother's share of ancestral family property.

There is not only one case which standing by itself could with difficulty be explained away; but there are four instances.

Turning now to the accounts, the Judges of the High Court agree that, from and after the "deorh partition" in 1881, Drigpal's accounts were undoubtedly more or less mixed up. But they observe that Drigpal had five Tehbils or tills. The judgment then proceeds as follows :—

"We have been taken through the accounts at great length by the learned counsel for the respondents, and we do not think that it is possible to draw any very definite conclusion from these accounts; first, because a large number of the accounts which were kept by Drigpal or under his direction, relating to his estate, have not been produced: and, secondly, because the plaintiff Radhakant, who alone could speak with authority as to these accounts, and their precise object and nature, has not ventured to go into the box. All the papers which were in the possession of Drigpal at the time of his death have passed to Radhakant, and the fact that he has not produced so many of them must weigh very strongly against him. There is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit. In particular, we may mention that with the exception of Exhibits 16 and 18 no books of account of the mica mining business—either the Seha books at the mines or the stock books—are forthcoming. None of the 'Khazana haveli' or of the Calcutta books have been produced, nor have any books after 1308. In 1304 certain mouzahs acquired after the death of Din Dayal, and in 1310 certain of the Din Dayal villages, were set apart for the pocket expenses of Drigpal, and in 1309, it is said, a certain ancestral village was set apart for the pocket expenses of Radhakant. In respect of the village set apart for Drigpal, separate accounts were admittedly kept. None of these books have been produced. The tamasuki bahis dealing with bonds and money-lending business are not forthcoming, nor the books of the mail-cart business. The learned counsel for the respondents attempted to minimise the effect of this non-production of books; but it is, in our opinion, a very serious matter. If all the books of Drigpal had been produced, it might have been possible to ascertain precisely how his accounts were kept and with what object.

The plaintiffs are said not to have produced the books of the general account already mentioned, which was begun on the 11th February, 1880. The books of the general account were produced to about the end of the year 1892. The explanation offered of the non-production of the later books is that after 1892 they were thought to be of no importance, because all the properties which Drigpal bought had been acquired by this time, and the only object of producing the accounts after the first year or two was to show that these properties had been bought out of the common stock, and therefore formed part of it.

This is not strictly accurate, for one property at least was bought after 1892. But once given that the account shows

that the properties had been blended, the later accounts are, for this purpose, immaterial. Properties once brought into a common stock cannot be taken out of it again.

Then, as to the statement that "there is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit," their Lordships cannot accept this as accurate.

The account already so often mentioned purports to be a general account, into which all receipts and payments are brought. It might, perhaps, be said that it is only a cash book and not a ledger. But it appears to be a similar book to that which was produced to the Board in the case of *Pandit Suraj Narain v. Pandit Ratan Lal*, as to which their Lordships observed: "It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources"; and from which their Lordships drew the inference in that case that the man who kept the account had "so blended his own property with the joint property as to make the whole joint property."

As to the non-production of the *khazana haveli*, their Lordships cannot see what assistance the production of these books, if, indeed, such are kept, would have been.

No doubt the plaintiff, Radhakant, did not give evidence; but the men of business of the family did. And it does not appear that any point was made in cross-examination or in the conduct of the trial, that any material books had been kept back; and no such idea seems to have occurred to the Subordinate Judge.

There remains one piece of evidence which makes in favour of the respondents, and that is furnished by the recitals in the two deeds which are attacked by the present suits. They are in similar terms and are as follows:—

"My income from ancestral properties was only 13,000 rupees, but subsequently I got the estates of Babu Girdhari Lal and Babu Dindyal Lal, yielding an income of 29,000 rupees. After my separation from Babus Dulichand and Kanhayalal, I acquired lots of properties by my own labour and exertions and from my own fund, by means of trade, and the 'ticca' (meaning a ticca lease of Dourchanch, which by making improvement now yields an income of 38,000 rupees). In this way I am now possessed of four kinds of properties, viz. :—

"(1st.) The ancestral properties;

"(2nd.) The estate of Babu Girdhari Lal;

"(3rd.) The estate of Babu Dindyal Lal; and

"(4th) The self-acquired properties:

"with regard to which I have full powers of transfer."

The effect of these recitals, which were probably intended to make evidence, is somewhat weakened by the fact that, in a deposition made in another suit, Drigpal stated that a property which he gave to a son by one of these concubines, named Sultan Bahadur, had been given with the consent of his lawful son, the plaintiff Radhakant; and this property came from Din Dayal.

Their Lordships cannot attach sufficient countervailing weight to these recitals to displace the strong evidence from the exchanges and the accounts; and upon the whole, they come to the conclusion that, assuming that Drigpal acquired his share of the property of his brother Din Dayal as self-acquired property, he so dealt with it afterwards as to make it joint property with his ancestral family estate, of which family, the first plaintiff and, as they were born, the other plaintiffs were members.

Turning now to the deeds of gift which are attacked by the plaintiffs in the present suits, the four properties purported to be conveyed to Mussummat Nasiban, which are the subject-matter of the second suit, were properties which form part of the estate of Din Dayal, and therefore could not be conveyed away from the joint family estate.

As to the properties purported to be conveyed to Mussummat Nazma Begum and her daughter, the matter is more complicated. There are thirteen properties: two appear to have come from Din Dayal; the rest appear to have been bought by Drigpal at various times after Din Dayal's death.

Drigpal had a nucleus of joint family property, the income of which was nearly half a lakh. He carried on for some years a business of extracting and selling mica, as he says in the recitals in the deeds of gift; and he also claims to have carried on a profitable mailcart business.

It was suggested for the respondents and accepted by the High Court that the profits of these two businesses and the properties purchased with them might be considered self-acquired. But in one instance certainly the land from which the mica was extracted was ancestral family property. It appears also from some of the books which have been produced that the moneys paid for wages and other expenses of winning the mica were supplied out of the general income of Drigpal, and that the profits were—as the Subordinate Judge has found—devoted to the general maintenance of the family and the education of the son Radhakant. From whatever source some of the lands from which the mica was gotten may have been acquired, the mica business was dealt with as part of the joint family property.

As to the mail-cart business, it was doubtful whether there were any profits; and the receipts and payments in connection with it were all brought into the one general account.

The final result therefore is that all the properties purporting to be conveyed to the respondents were joint family property of which Drigpal could not so dispose, and that the plaintiffs and appellants are entitled to recover them from the respondents, that is, the two concubines, and the daughter of the one, and the mortgagees.

It is right to say that their Lordships were informed by counsel at the bar that so far as the deeds of gift purported to pass personal property, they are not to be deemed to be

attacked in the present suits, and that the recovery is to be limited to the lands.

The Subordinate Judge only gave a judgment in respect of five-sixths of the property, taking it that, at the time of Drigpal's death, there were six members of the family, namely, Drigpal himself, Radhakant, and the latter's four sons, and being of opinion that Drigpal had therefore one-sixth share in the properties which he could pass by the deeds of gift.

This, however, is an error. Drigpal had no separate sixth share. The whole property belonged to the one Hindu family, and accrued upon his death to the surviving members.

The plaintiffs appealed in respect of this matter to the High Court, and their Lordships are of opinion that their appeal should have been allowed.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed; that the judgment of the High Court should be reversed; that the judgment of the Subordinate Judge should be varied by declaring that the plaintiffs have right to the whole, and should get possession of the whole, of the landed properties covered by the two deeds of gift, instead of five-sixths only, and that it, so varied, should be restored; and that the plaintiffs should have their costs in the High Court, and on appeal to His Majesty in Council.

The judgment of the Subordinate Judge decreeing that each party should bear his own costs of the proceedings before him should be allowed to stand.

In the Privy Council.

RADHAKANT LAL AND OTHERS,

vs.

MUSSAMMAT NAZMA BEGUM AND
OTHERS.

RADHAKANT LAL AND OTHERS,

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DELIVERED BY
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