

Martand Rao - - - - - *Appellant*

*v.*

Malhar Rao - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE  
CENTRAL PROVINCES.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1927.

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*Present at the Hearing :*

LORD SHAW.

LORD SINHA.

SIR JOHN WALLIS.

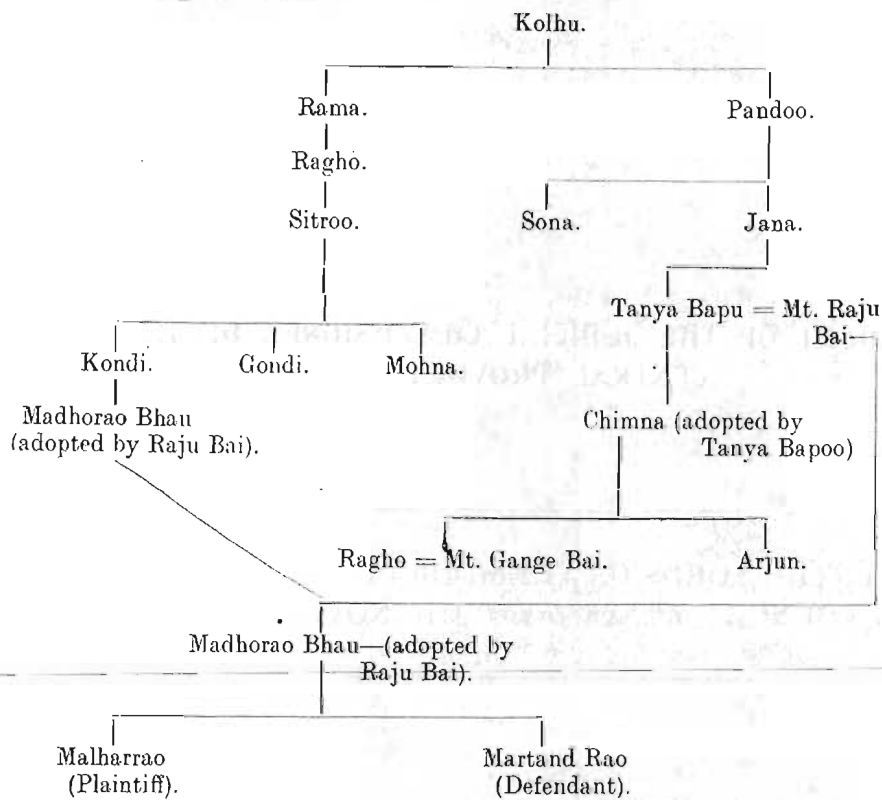
[*Delivered by* LORD SINHA.]

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This is an appeal against a judgment and decree, dated the 23rd February, 1923, of the Court of the Judicial Commissioner, Central Provinces, reversing a judgment and decree, dated the 1st March, 1920, of the Court of the District Judge, Bhandara.

The suit in which the said decrees were made was brought by the plaintiff, Malhar Rao, against his younger brother, Martand Rao, claiming that, on the death of their father, Madho Rao, he alone was entitled to succeed to the Amgaon Estate, situate in the Bhandara District of the Central Provinces, to the exclusion of his younger brother, on the allegation that by the terms of the grant under which the estate was held, and by a family custom and also by a territorial custom, the said estate was impartible and succession thereto was governed by the rule of lineal primogeniture, and that the younger brother was entitled to suitable maintenance only and not to any specific share in the estate.

The pedigree of the family from its founder, Kolhu Kunbi, including the Amgaon branch (under Pandoo) and the other branches, is given below :—



Seventeen issues were framed by the Trial Court, of which the following four only are material at this stage, viz., Issues Nos. 1, 2, 9 and 10 :—

(1) Was the Zamindari of Amgaon conferred on Pandoo by the Bhonsla Raja subject to the condition that it was to be impartible and to devolve on the eldest son, females having no right of succession, as alleged by the plaintiff, or was it conferred on Sonba (or Sona) without any condition being attached to the grant as alleged by the defendant ?

(2) In the time of the Bhonsla Raj, whenever a Zamindari was granted, did the grant always carry with it the conditions mentioned in paragraph 5 of the plaint (*i.e.*, impartibility and single succession) and also the incident of inalienability ?

(9) Was devolution to Zamindari property governed by the rule of primogeniture in the family of Pandoo and Kolhu ; if so, are the parties bound by the said custom ?

(10) Is there a territorial custom to the effect that Zamindari property is impartible, inalienable and devolves by the rule of primogeniture as alleged by the plaintiff ; if so, are the parties bound by the said custom ?

After having considered the evidence minutely and elaborately on each of these issues, the District Judge held in favour of the defendant on all the four issues and dismissed the plaintiff's suit with costs. On appeal, the method adopted by the Appellate Court was different.

As their Lordships understand the judgment of the Judicial Commissioners, they accepted as conclusive the opinion which they considered to have been expressed in certain official Reports of great authority that the estate in question was in the nature of a *raj*, and they then proceeded to consider whether the evidence

adduced in the case in any way displaced that opinion. This is an inconvenient, if not an erroneous, method, and their Lordships consider it necessary at the outset to point out that, though such official Reports are valuable and in many cases the best evidence of *facts* stated therein, *opinions* therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such Reports may be.

There are certain propositions of law by reference to which this case must be decided, and their Lordships consider that they can all be taken as well settled.

(a) When there is a dispute with respect to an estate being impartible or otherwise, the *onus* lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(b) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of Lord Justice James in the case of *Umrithnath Chowdhry v. Goureenath Chowdhry* (13 Moore I.A. 542, at p. 549) :—

“ The custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back.”

(c) That if an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.

As regards the first issue, the District Judge came to the conclusion that the estate of Amgaon was granted by the Bhonsla or Mahratta Government of Nagpur in favour of one Sonba (or Sona) without any condition attached to it as regards devolution.

On the second issue he found that the plaintiff had adduced no evidence in support of his allegation that in the time of the Bhonsla Raj, whenever a Zamindari was granted, the grant always carried with it the condition of succession by lineal primogeniture and inalienability. He accordingly found against the defendant on both the first and second issue.

On the ninth issue, the plaintiff's case was that, in the Amgaon family itself, taking either Pandoo or Sonba to be the original grantee, there was a custom of succession by lineal primogeniture which had grown up, having been derived from the parent stock of the Kampta Zamindari, which started with one Kolhu, father of Pandoo and grandfather of Sonba, other descendants of whom

came to be proprietors of two other Zamindaris, viz., Palkhera and Kirnapur, where the same custom also prevailed. The District Judge held that the family custom relied upon by the plaintiff had not been proved.

On the tenth issue, the District Judge's conclusion, after an exhaustive survey of the evidence in regard to territorial custom as set up by the plaintiff, was summarised in paragraph 92 of his judgment as follows :—

“ The above is all the evidence in regard to territorial custom as set up by the plaintiff. It shows that a number of Zamindaris, viz., Bijli, Chichwada, Gangazeri, Jambhli, Palkhera, Nausari along with Maneri and Karanja, Arjuni and Fukimeta have been actually partitioned. In regard to Chichgarh Zamindari, the Judicial Commissioner has held that, though it cannot be divided by metes and bounds, the co-sharers of the Zamindari are entitled to divide the profits thereof in proportion to their respective shares. In regard to Chutia, Palasgaon, Chichwada and Bijli, it has been held that those Zamindaris are not impartible and that the co-sharers are entitled to share the profits of the Zamindari. In regard to Gondumri, the present Zamindar had actually made an application to have it partitioned between himself and his co-sharers, but the application had to be filed owing to the commencement of the settlement operations. With reference to Bhadra Zamindari, the learned Judicial Commissioner had held that it is not impartible and that half share thereof could be attached and sold in execution of the decree against Faizuddin, brother of the Zamindar. It has also been shown that the history of succession in the Zamindaris of Kampta (including Deori-Kishori and Warad) and Hatta does not justify a finding that those Zamindaris are impartible and governed, as regards succession, by the rule of primogeniture. In the face of this evidence—and there is no other evidence before me in proof of territorial custom—it would be simply absurd to contend that the territorial custom set up by the plaintiff has been proved. On the contrary, the proof is exactly the other way. My finding on issue No. 10, therefore, is that the plaintiff has failed to prove the territorial custom pleaded by him in this case.”

The Judicial Commissioners, in consequence of the method they adopted, did not record their findings on the issues specifically in the same way as the District Judge. They summarise their judgment as follows :—

“ The Amgaon Zamindari before the Thirty Years' Settlement was of the nature of a *raj* and therefore impartible and subject to the rule of single succession, the other members of the family of the Zamindar of the moment being entitled to a suitable maintenance and not to any specific share in the income. . . . In addition, a custom had by that time grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those conditions. . . . Nothing occurred at the Thirty Years' Settlement or has occurred since to alter the nature of the grant or to affect the validity of the family custom.”

Their Lordships presume that by the first portion of their finding the Court of the Judicial Commissioner came to the conclusion that the Amgaon estate was from its nature a *raj* and therefore impartible. In that view, it was unnecessary for them to consider whether it was so also by virtue of a territorial custom (Issue 10). But inasmuch as they say that their “ decision will almost certainly govern nearly all the estates of the group known

as the Zamindaris of Bhandara and Balaghat or the Wainganga Zamindaris," it may be taken that they found Issues Nos. 1, 2 and 10 all in favour of the plaintiff, though they do not say so specifically.

As already stated, the Appellate Court founded their conclusion chiefly upon a view of certain official Reports put forward in the plaintiff's supplementary statement. This is what they say :—

"Now it is perfectly clear from the history of the estates given in the 'Report on the Zamindaris and other Petty Chieftaincies in the Central Provinces' submitted to the Government of India in 1863 by Sir R. Temple and in the Bhandara Settlement Report of 1868, and from the summaries of that history in the Note [by Sir Reginald Craddock] already mentioned, that before 1860 the Wainganga Zamindaris were of exactly the same nature as the Chanda, Raipur and Bilaspur Zamindaris and the Chhindwara Jagirs, with a difference only in degree : indeed, their difference from some, if not all, of the estates classed as Feudatories was of degree only and not of quality. Every one of these estates was before the Settlement a real Zamindari of the nature of a *raj*. . . . Such an estate is impartible and subject to the rule of single succession, and does not admit of any coparcenary."

Their Lordships have carefully examined the Reports in question, as well as the earlier Report by Sir Richard Jenkins dated 1827 and a later history contained in the District Gazetteer for Bhandara by Mr. Russell, I.C.S., all referred to in the judgment of the District Judge.

Sir R. Jenkins was British Resident at the Mahratta Court of Nagpur from 1810, and submitted a Report to the Government of India on the whole administration of the Nagpur State, then conducted under British supervision, in the course of which there is given an instructive history of the Province and all the institutions thereof. Sir R. Temple was Chief Commissioner of the Central Provinces after the British annexation in 1854, and submitted his Report to the Government of India with a view to the forthcoming Revenue Settlement for 30 years. Mr. Lawrence was the officer in charge of that Settlement. Sir Reginald Craddock, afterwards Chief Commissioner, recorded, as Secretary to the Local Government, a Note for Government use on the status of the Zamindars of the Central Provinces which goes exhaustively into the whole question.

All these Reports were freely referred to at the Bar, and their Lordships consider that, so far as they contain a historical narrative of the Zamindari of Amgaon as well as the other Zamindaris in the Central Provinces referred to therein, they are of great value, and probably the best available history thereof under the circumstances.

Before considering these Reports, their Lordships think it necessary to note that the word "*raj*" by itself does not necessarily imply impartibility. The State of Nagpur itself, though undoubtedly a *Raj*, was not impartible, but was repeatedly divided, and when we consider that of these Zamindaris, more than a

hundred in number, some existed from before the time of the Gond Rajas, viz., from the time of the Rajputs who preceded the Gonds, some were created by the Gond Rajas, and some by the Bhonslas, who did not obtain the sovereignty of Nagpur till after 1750, it would follow that, as regards antiquity at least, there is very great difference between these estates, by whatever name they may have been called.

It may or may not be correct that many of these Zamindars were merely holders of office with no interest in the soil. It is always difficult at this distance of time to distinguish between Zamindaris of which the holders were entitled to the soil as ancient Chieftains, and cases where from office-holders or rent-collectors they developed in course of time into proprietors of the soil. But it is settled law that unless considerable age can be ascribed to any particular Zamindari, of whichever class it may be, it cannot claim to be governed by either ancient or invariable custom.

Now, after a consideration of all these Reports, their Lordships are unable to accept the conclusion of the Judicial Commissioners that the Amgaon estate was of the nature of a *raj* and therefore impartible.

It is obvious that there is considerable difference both as regards nature, origin and quality between the different Zamindaris. It is true that in some parts of Sir R. Temple's Report he described the Zamindars generally as "dependent Chiefs" and said that, "although there may be differences in the origin of some of the tenures, and also differences of degree, the status of their holders will be found in every case to be now essentially the same." But he was far from expressing the view that every one of them was of the nature of a *raj*, and was, on the contrary, urging that even those who had been previously independent Chieftains had *by that time* been reduced to the position of either Talukdars or mere Malguzars.

With regard to the Zamindaris of the Wainganga District, with which only this case is concerned, this is what Sir R. Temple said in Appendix B :—

"The larger Zamindars in this class do not hold their tenures by any very ancient or strong title.

"The first seven Zamindaris, viz., (1) Kampta, (2) Hatta, (3) Amgaon, (4) Binjhli, (5) Pulkhaira, (6) Purara, and (7) Tikheri-Malpuri, were originally included in Kampta; and Kampta was not technically a Zamindari until A.D. 1843. It seems, indeed, to have been rather of the nature of a Talukdari tenure. The tract was known as the Kampta Taluk, and its holder was designated a Patel. . . . Kampta was certainly reported by Mr. Jenkins as a Zamindari; but nevertheless his Report bears out the above remarks. And, moreover, the holder's petition in A.D. 1843 begs for, and the Raja of Nagpur's takid (injunction) in reply confers, the title of Zamindar for the first time on payment of a heavy nazar."

And further on :—

"On the whole, the Zamindars of the Wainganga District present, from one point of view, a weaker aspect as Chiefs than the Zamindars of other classes. . . . They were situated nearer the seat of Government, and,

being in a comparatively open and accessible country, they obtained less lenient terms than the Zamindars of Chhattisgarh, or the Chiefs of Sambalpur, or the hill Thakurs of Chhindwara."

With regard to Amgaon, it is stated in the same Appendix as follows :—

" This originally formed part of the Kampta Estate, the second holder of which, Gondu Patel, brother of Ram Patel, in the time of Raghoji I, apportioned Amgaon to his nephew, Sau Patel. In A.D. 1819, Sau Patel was succeeded by his nephew, Tania Bapu, who died in 1838. After this the estate remained under Government management for four years, owing to a dispute about the succession, but in A.D. 1843 the late Raja of Nagpur continued the estate, which then for the first time was called a Zamindari, to an adopted son of Tania Bapu, named Chimna Patel. This individual died in A.D. 1862, and was succeeded by his son Raghoba, a minor."

It would appear from Mr. Lawrence's Settlement Report that Amgaon was not a part of Kampta Taluka, as Sir R. Temple thought. The plaintiff admitted this fact in his supplementary statement, but whichever is correct, Sir R. Temple or Mr. Lawrence, Amgaon was not conferred on Pandoo, but on his son Sonba by a patta or painama dated 1796. It may well be doubted whether an estate of which the origin dates back only to 1796 could claim at the time of the Thirty Years' Settlement in 1863 that it was governed by an *ancient* and *invariable* custom.

It appears, moreover, from Sir Reginald Craddock's Note that after a good deal of correspondence between Sir R. Temple, as Chief Commissioner of the Central Provinces, and the Government of India, it was finally decided that only holders of certain estates should be recognised as Feudatories, and all others as ordinary subjects. Sanads were granted to the former, expressly mentioning that the succession was in their case to be a single heir. That provision was omitted in the case of sanads to most Zamindars of the second class, amongst whom was included the Amgaon Zamindar, though with regard to some others like Chanda that condition was expressly attached.

The learned Judicial Commissioners appear to have fallen into an error in considering that it was " due to some mistake or a series of mistakes that a sanad on the lines of what is known as the Chanda Patent was never given to the proprietors of the Wainganga Zamindaris." It was the result not of mistake, but of a classification deliberately made in view of the nature, origin and status of the different Zamindaris in the Central Provinces.

Having regard to the fact that these experienced officials were dealing with Zamindaris in the Central Provinces which belonged to all the three classes of Zamindars previously mentioned, it would be strange if they were all found to be " of the same kind, with a difference only in degree," as the Judicial Commissioners assumed.

On a careful perusal, however, of all these Reports, their Lordships find that, so far from finding them all to be of " the nature of a *raji*, it was found necessary to divide and classify them

(a) as *Feudatories*, having semi-sovereign rights in some degree (real Rajas), and (b) ordinary subjects. These last were again subdivided into—

- (a) Those who were recognised to have proprietary rights unrestricted, such as the Zamindars of Balaghat and Bhandara.
- (b) With proprietary rights restricted, such as the Zamindars of Chanda, Bilaspur and Chhindwara.
- (c) Those whose proprietary rights were not yet recognised, *e.g.*, Sambalpur.

There are passages here and there both in Sir Richard Jenkins' Report and Sir R. Temple's Report which speak of all these Zamindaris indiscriminately as Chiefs or Chieftains, but on a complete perusal it becomes apparent that they are clearly and carefully distinguished, and when the origin of the Kampta Zamindari and the Amgaon Zamindari, of which the former is sometimes, but wrongly, said to be the parent, as given in these Reports, is considered, it becomes fairly obvious that they are of both such comparatively modern origin (not earlier than 1796 and possibly as late as 1843 when they first obtained recognition as titular Zamindaris), and the circumstances under which they came into existence and continued are such that they could not possibly be classed as appertaining to the category of sovereign or semi-sovereign Chiefs whose possessions were necessarily impartible.

Their Lordships agree with the decision of the District Judge on Issues Nos. 1, 2 and 10, and consider that neither by the terms of the grant, nor by territorial custom, any more than by its inherent nature, can the Zamindari of Amgaon be considered an impartible estate.

There remains for consideration Issue No. 9—the question of family custom, which the District Judge rightly considered as the most important issue in the case. Plaintiff sought to make out this custom, first, by proving that in the family which was in possession of Amgaon itself this custom grew up, and, secondly, that it was derived from the parent stock—the family of Kolhu, the original grantee of the Kampta Zamindari.

The custom alleged by the plaintiff was that in the Amgaon family only the Zamindari, but nothing else, passed according to the rule of primogeniture.

The District Judge finds on the evidence that every instance of devolution in the family was in strict accordance with the ordinary rules of Hindu law governing succession, and that not a single Zamindar from Sonba downwards left more than one heir at his death, and therefore there was not one instance of anomalous or irregular succession in the Amgaon family. Their Lordships see no ground to differ from this conclusion.

As regards instances of such irregular succession in other branches of the family of Kolhu, the District Judge dealt with



Palkhera and Kirnapur, which were two Zamindaris belonging to other branches of the family of Kolhu.

With regard to Palkhera, it appears that it did not afford even a single instance of succession by primogeniture, and that there had been in fact a division of the Zamindari amongst the sons of Deoo.

With regard to Kinrapur, it would appear that succession had in many instances up to 1846 depended entirely on the will of the Sovereign power. Further, at the Thirty Years' Settlement, proprietary rights were recognised as being vested in three brothers, and not in one of them only.

There have been certain decisions with regard to some of these Bhandara Zamindaris in the Judicial Commissioner's Court at Nagpur which are referred to in both the judgments in this case. They are not altogether consistent and were necessarily based on the evidence adduced in those particular cases. Their Lordships do not think it would serve any useful purpose to examine these decisions for the purposes of this case.

On a consideration of the whole evidence, their Lordships are unable to concur in the conclusion of the Judicial Commissioners that by the time of the Settlement a custom had grown up in the Amgaon family that the estate should be held as an impartible state subject to the rule of single succession. They agree with the District Judge that the family custom relied upon by the plaintiff has not been proved.

Their Lordships therefore humbly advise His Majesty that the judgment and decree of the Judicial Commissioners dated the 1st March, 1920, should be set aside and the judgment of the District Judge restored. The plaintiff-respondent must pay the costs of the appeal in the Judicial Commissioners' Court, as also of this appeal.

In the Privy Council.

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MARTAND RAO

vs.

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DELIVERED BY LORD SINHA.

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