Privy Council Appeal No. 122 *of* 1919.

Amar Nath and another - - - - - - *Appellants*

v.

The Firm of Hukam Chand-Nathu Mal and others - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1921.

Present at the Hearing:

VISCOUNT CAVE.
LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

This was a suit, brought to recover the principal amount of four hundis, to which five persons were made defendants. The plaintiffs were successful in both Courts below, and their Lordships' Board gave special leave to appeal to two of the defendants, but one only, Mr. Gokal Chand, now appears.

Sundry points connected with the validity of the hundis and their presentation were pleaded by some of the defendants, but not by the appellant. It has been held in the Courts below, that as a matter of practice he was not entitled to avail himself on appeal of points which had not been raised by him below. Before their Lordships this decision was but faintly contested, and they see no reason to doubt or to review it.

The real issue in the appeal is one of some importance. Joti Mal and his sons, of whom the appellant is one, constituted a

joint Hindu family governed by the Mitakshara law, which carried on a joint ancestral business as moneylenders under the style of Nagar Mal-Joti Mal at Ferozepore, and the hundis in question were given by this firm in the way of its business for debts due to the plaintiffs, who were near relatives. In the conduct of this business the appellant took no part. He was not privy to the debts incurred. In his youth he was for seven years absent from India for the purpose of being specially trained in England for the Indian Civil Service. He succeeded in entering that service and, returning to India, was posted to the Central Provinces. At the commencement of the suit he was joint-magistrate at Sitarpur and in receipt of the substantial emoluments of that office, but he has never severed himself from the joint family of which he became a member at his birth.

In a joint Hindu family, such as this, the rule is that the acquisitions of the members are joint property and partible, that is to say, liable to be shared with the other members of the family, and impartibility is the exception.

One of the recognised exceptions is property acquired by the possession of special "science" or "learning." Where, as often happens, this is acquired outside the family and has to be paid for in one form or another at the expense of the family, it is described by the accepted writers as acquired "to the detriment of the family property." In that case it is regarded as a family investment, and the emoluments, which its possessor is thus enabled to obtain, are joint property of the family as fruits of the investment thus made in the person of one of its more gifted members. Of the exact meaning of "science" in the original text it is not now necessary to speak, nor need anything be said of the cases of science imparted within the family, or of science obtained by the pupil either by his own exertions or from educational benefactions, or in any other way not detrimental to the family funds.

The question, what is "science" in this connection must be intrinsically one of fact, though the area of discussion has been steadily narrowed by typical decisions, conclusive of numerous cases. The whole doctrine is not without anomalies. If the test is the returns obtained from the family investments, how far are these emoluments the result of the science—the specialising in education at the expense of the family funds—and how far are they the rewards of the learner's brains and industry and good fortune? Many a learned man makes nothing and many a sciolist gets on in his profession by pertinacity and mother wit. Again, if the specialist education is deemed to be the stock from which success —and income—accrue, this is true of success and income to the end of the learner's life, yet it is unquestioned that the individual can sever from the family at will on the footing of bringing his accumulations into hotchpot as part of the family property and without capitalising future earnings or being under future liability as to what he may make thereafter.

The distinction between acquisitions made by a coparcener

solely by his own exertions and those which have involved the use of the patrimony is as old as the laws of Manu. The text of the Mitakshara gives as an instance of impartible acquisition that which has been gained by "science" or learning. Difficulties in applying this simple distinction are supposed to begin when Vijnaneswara makes the comment on this illustration, that "without detriment to the father's estate" must be implied throughout the passage, so that the gains of this kind, which are impartible, are not gains of science as such, but gains of science made without any detriment to the father's estate and acquired by the coparcener's exertions independently of patrimonial help. Succeeding commentators developed this point, not always in terms that can be completely reconciled, but the rule itself is simple and logical; though difficulties arise, as with so many rules, in the application. If the substance of the distinction is between acquisitions which have and acquisitions which have not involved the use of the patrimony and therefore such detriment to it as use of it or expenditure out of it involves, there is no logical reason for making any further distinction between gains made by science and gains made by labouring on the patrimony or by laying out the family funds and reaping the fruits of the outlay, nor for distinguishing cases where the learning employed is a specialised and cases where it is a mere ordinary education. The connection between the outlay and its fruits may be more difficult to trace; for a distinction can be made between the use of family funds in acquiring gain and the use of family funds to qualify a member of the family to acquire gain by his own efforts. It may be said to be direct in the one case and remote in the other, but if risk of or detriment to family property is the point in both cases, there appears to be no such merit in "science," recognised by the sages of the Hindu law, as would warrant the exclusion of gains of science as such from the category of partible acquisitions.

Whatever doubt might once have existed, when the Hindu law was to be gathered from text writers only, has been removed by a series of decisions, and it is now clear that personal earnings and acquisitions may remain partible throughout the unseparated member's life, if he was originally equipped for the calling or career, in which the gains were made, by a special training at the expense of the patrimony. It has been so held in the case of a Prime Minister (*Luximon's* case, 2 Knapp 60), a dancing girl (*Chalakonda's* case, 2 Madras High Court Rep. 56), and a pleader (7 Madras High Court Rep. 47 and 6 Bombay High Court A.C.J. 1); but *secus* of an astrologer (32 All. 305). The like distinction is found in the case of a Karkun (15 Bomb. 32), and an army contractor (20 All. 435). The grounds on which in the three last-mentioned cases, however, the gains were held to be impartible serve to define the rule still further. In none of them was it held that the occupation in itself was such that the gains of science could not be said to apply to it. Impartibility rested in every case on the slightness or the peculiar character of the

education by which the science was acquired. Thus in the first mentioned case the gains were really due to the astrologer's native talent for that profession. In his early youth its rudiments had been instilled into him by his father, an astrologer likewise, but without expense to the family or anybody else, for the casting of horoscopes seems to be a profession in which the equipment is slender and a gift for inspiring confidence is the main thing. It was not, however, suggested that, if the special training had been similar to the skill in song and dance, which enhanced the attractions of a nautch girl, the gains of the astrologer would not equally have been partible gains. As a profession, astrology enjoyed no immunity. Still more striking is *Lakshman Mayoram's* case (I.L.R. 6 Bombay 225), where the family member was actually a Subordinate Judge. At the family expense he had received a slight elementary education of an entirely non-professional character. His law he had picked up for himself. His salary was held impartible, not because a judge stands outside the rule or because a knowledge of law in the nineteenth century is not within the term "learning" as used in the eleventh, but because in these matters a self-taught man has the best of it, for gains are impartible which are not the result, directly or indirectly, of anything but his own exertions.

The present case is the first in which such an official position as that of the appellant has come into question, but, except for its higher respectability, there does not seem to be any ground on which as an occupation it can be taken out of the rule which the earlier cases establish. Mr. J. D. Mayne's well-known work on Hindu Law has throughout all its editions contained the statement in Section 283 that a post in the Covenanted Civil Service of India is a post to which the rule would apply, and this never seems to have attracted comment, still less to have aroused dissent, among the many judgments which have dealt with this subject. In the case in L.R. 45, I.A. 41 (*Metharam Ramrakhiomal* v. *Rewachand Ramrakhiomal*), the judgment under appeal actually acquiesced in his view, if it did not adopt it, and this passage is recited in the judgment of their Lordships' Board, without dissent or comment. It is true that an Indian civil servant is not always what is commonly called a scientific man, but his is certainly a special and in many cases an eminently learned profession.

As no distinction in principle can be found between Mr. Gokal Chand's official position and the decided cases, it remains only to consider two questions raised on his behalf. The first, whether in his particular case there is either proof or presumption of the requisite detriment to the patrimony ; the second, whether, if so, that detriment is not so remote that the appellant's official salary should be regarded as being wholly acquired by his own personality, integrity and learning and therefore as being impartible.

The appellant was not called at the trial nor was any evidence given as to his education and early life, but there is no question here of an ordinary education, which must be the stepping-stone

to the acquisition of any learning, such as might be given in a mission (I.L.R. 6 Bombay · 225), or a Government school (*Metharam Ramrakhiomal* v. *Rewachand Ramrakhiomal supra*) still less of a mere provision of "food and apparel." Neither has any question been raised of an equitable distribution of the acquisitions between the separate and the family estates. Admittedly Mr. Gokal Chand spent seven years in England acquiring that comprehensive and costly education which qualified him to pass with success into this Service. The family to which he belongs is a family of hereditary moneylenders, and the ordinary education, which all its male members would naturally and appropriately enjoy, may be taken to be one of considerable extent and to include varied attainments; but there can be no doubt that, alike in the subjects of study, the proficiency to be attained, and the mentality which is formed as the result of it. Mr. Gokal Chand's education must have been very different from that of other members of his family. Mr. Gokal Chand's education was, above all, a specialised education.

Among the unseparated members of a joint Hindu family, possessed of ancestral property by means of which the science, whose gains are in question might itself have been acquired (*Bai Mancha* v. *Narotamda Karhidas*, 6 Bomb. High Court, A.C.J. 1), the presumption, even in the case of such special gains, is that the acquisitions of all members are partible, until the contrary is proved. This was first decided in *Luximon's case* (2 Knapp 60). Observations have since been made on the slender evidence which connected Luximon's position as Prime Minister to the Peishwa with the joint family property, either through his education or otherwise, but the rule there laid down as to the presumption, though for a time not always acquiesced in, is now unquestionable and binds their Lordships. It is true that a distinction may be drawn between a presumption in favour of partibility, which is a legal attribute of the gains in question, and a presumption in favour of detriment to the patrimony involved in acquiring the specialised learning, the use of which has produced the gain, which is a question of fact; but, in their Lordships' opinion, if it is in general incumbent upon the joint family member to prove that his case is an exception to the prevailing rule of partibility, it is also incumbent upon him to prove the particular facts, which are needed to establish the exception. For this there is the authority of the decisions in 7 Madras High Court Rep. 47, and in 10 Sutherland's Weekly Reporter, 122. It must accordingly be taken that the whole burden of proof was on Mr. Gokal Chand. If he desired to give evidence to show that his specialised education in England was obtained by the "presents of a friend," the charitable benefactions or the educational foundations of strangers, or by his own self-taught efforts. this should have been done by him at the trial. If, as their Lordships hold, his official position cannot be taken out of the area of partibility, it must now be presumed in the absence of evidence to the contrary that his gains, not being in their nature incapable of being family acquisitions, are partible.

Then can it be said that the gains, which are partible, are such as result only directly from the use of joint family funds, and that emoluments, which are the consideration for the personal services of an official selected for his special personal qualifications, result remotely only and too remotely from any family outlay? Not only is no authority forthcoming for the first part of this contention, but the contrary has been continuously assumed in all the cases which turn on "gains of science." The point of all of them is, that persons qualified for earning money by specialised education, enjoyed to the detriment of family funds, become, as it were, a continuing investment for the family benefit. No decision attempts to distinguish between the personal and the family elements in the ultimate gains; it would probably be impracticable to do so. There is equally little ground for contending that partibility depends on *causa proxima*, or is negatived by the intervention of the personal element of the individual coparcener's character. It is true that in the very learned judgment of Mr. Collett in *Chalaconda's case* he expresses the view, that logically the rule should have regard to the use of family property in acquiring the partible gains themselves "during and for the purposes of the acquisition," and not to its use in acquiring the science by means of which they are gained, and he cites Sir T. Strange's opinion that in order to make the gains in question partible the common fund must have been directly instrumental in procuring them. There is also an allusion in I.L.R. 6 Bombay at p. 243 to "the branch of science 'which is the immediate source of the gains,'" a passage, however, intended to distinguish between elementary and specialised education, and not between the direct and indirect fruits of the latter. This view was, however, overruled on appeal in *Chalaconda's case*, and has never been re-established. For fifty years and more the current of authority has run the other way, and in any case, in their Lordships' opinion, it is now too late to change it.

It is true that, partly in the hands of the commentators and partly under the decisions of the Courts, changes may be traced in the rules laid down with regard to gains of science, and these changes have been in the direction of narrowing the category of partible gains. From maintenance out of family funds during the period of education, the basis of partibility changed to the receipt of the education itself at the family expense, and then education generally was narrowed to specialised education, which is now the basis. No corresponding change, however, is to be traced upon the question what is science? in the sense in which the text of the Mitakshara uses the term. On the contrary, while the principle has remained the same, the application of it has tended to widen, as changing times have brought up fresh instances of callings, to which special science and not the native wit of man is the means of entrance. It may be difficult to see now why the anomaly should have arisen, by which the gains of a man's own labour or of his own bargains are impartible, because they are the fruits of his own effort, while the gains of his science are partible, though

they are the fruits of his effort too. In each case the member of the joint family is indebted to the family funds for something; in the former for the nurture, which has made him strong to labour, in the latter for the professional education in addition, which has made him also skilled in art. Conversely the dull coparcener, who learns but turns his learning to poor account, must share his gains such as they are, while his brother, who learns without teaching and acquires professional skill by intuition only, keeps his greater gains for himself. All that can be said is that the rule, if really anomalous, is too old and well settled to be altered now.

Their Lordships are also fully alive to the incongruity, more striking perhaps to Western than to Indian minds, of applying to such an occupation as Mr. Gokal Chand's an ancient rule, which had its origin in a state of society possibly simpler than and certainly different from the state of society existing in the present day, but this anomaly proceeds largely from the occidental habit of relying on mere analogy in the application of legal rules instead of deducing the application from a logical apprehension of the principle as the best Eastern thinkers do. Be this as it may, they conceive it to be of the highest importance that no variations or uncertainties should be introduced into the established and widely recognised laws, which govern an ancient Eastern civilisation, and least of all in matters affecting family rights and duties connected with ancestral customs and religious convictions.

The appellant's liability is, of course, a liability in respect of his share in the family property, including therein such of his own earnings as are partible under the rules above explained. Questions that may arise in regard to property, not the gains of science or partible on any ground, and also in regard to the statutory rules, which restrict the alienability of an official's emoluments, may properly be the subject of decision in execution proceedings if they arise. Their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly tender this advice to His Majesty.

In the Privy Council.

AMAR NATH AND ANOTHER

v.

THE FIRM OF HUKAM CHAND-NATHU MAL AND OTHERS.

DELIVERED BY LORD SUMNER.

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