Privy Council Appeal No. 59 *of* 1925.

Bengal Appeals Nos. 20 *of* 1924 *and* 13–15 *of* 1925.

Sri Protap Chandra Deo Dhabal Deb - - - - *Appellant*

v.

Raja Jagadish Chandra Deo Dhabal Deb - - - - *Respondent*

Raja Jagadish Chandra Deo Dhabal Deb - - - - *Appellant*

v.

Sri Protap Chandra Deo Dhabal Deb - - - *Respondent*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondent*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *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 3RD MAY, 1927.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD PHILLIMORE.
LORD WARRINGTON OF CLYFFE.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The subject-matter of the present appeal is a family estate known as the Dhalbhum Raj, situate in the districts of Singhbhum and Midnapur, in the province of Bengal.

The family is a joint and undivided one, governed by the Mitakshara school of Hindu law. The estate is ancestral, and succession to it is governed by a family custom according to the rule of lineal primogeniture. The Raj is impartible. The last holder of the estate prior to the present dispute was Raja Satrughna, who, in 1887, succeeded to it on the death of Raja Ram Chandra III.

On the 11th May, 1905, Raja Satrughna made a will, whereby he appointed the respondent executor, and bequeathed the estate to him and declared him to be the next Raja. Probate of the will has been duly granted to the respondent. It is admitted that, if the will had not been made or is inoperative, the appellant, according to the rule of lineal primogeniture, is the next heir, and as such is entitled to succeed to the estate.

The main question in the appeal is whether the estate is inalienable by will.

In both Courts in India, first by the Subordinate Judge of the district of Midnapur, and on appeal by the Judges of the High Court of Judicature of Bengal, this question has been answered in the negative, and the title of the respondent has thus been upheld.

Both Courts in India have held that the question is settled by decisions of this Board. Their Lordships agree with this view, and it will be sufficient for the purposes of the present judgment shortly to state the nature and effect of the previous decisions referred to.

The question of the alienability of an impartible Raj first came before the Board in the case of *Sartaj Kuari* v. *Deoraj Kuari* (15 I.A. 51) on appeal from Allahabad. The question in that case was as to the validity of a gift *inter vivos* of part of an impartible estate made by the owner for the time being in favour of his younger wife. The validity of the gift was disputed by his son by the first wife, who contended that the owner had no power to alienate any part of the Raj estate except for purposes of necessity. The Board, by its judgment, delivered by Sir Richard Couch, held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible Raj, such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it.

This case was decided in the year 1888.

The next case was the first *Pittapur* case (*Venkata Surya Mahipati* v. *Court of Wards* (26 I.A. 83)), decided in the year 1899. The question in this case was whether the Raj was alienable by will. The judgment of the Board decided two points: (1) that the *Sartaj Kuari* case covered by analogy the case of alienation by will, and (2) that the law laid down thereby applied in Madras and was not confined to the North-West Provinces in which the case arose. The Board, therefore, not only followed their

previous decision, but extended it so as to make it apply to alienation by will as well as to alienation *inter vivos*.

In the opinion of their Lordships, they ought to accept and act upon these decisions, unless it could be shown that they are inconsistent with other decisons of the Board, or that some principle of law demanding a contrary decision was clearly ignored or forgotten.

Accordingly, a strenuous attack on the two judgments was made by counsel, which really resolved itself into the contention that they were inconsistent with judgments of the Board dealing with the right of succession, in which it had been held that such right is not affected by the impartible nature of the Raj. It was argued that the co-ownership, the existence of which was denied in the two cases in question, is essential to the right of succession, and accordingly that the two lines of decision are inconsistent with each other, and that it is open to their Lordships to choose between the two.

Their Lordships are unable to adopt this view. The last of the cases on the question of succession is *Baijnath Prashad Singh* v. *Tej Bali Singh* (48 I.A. 195). In delivering the judgment of the Board, Lord Dunedin, referring to the *Sartaj Kuari* case, said :—

> "What was decided was that in an impartible Raj there was no restriction on the power of alienation of the member of the family who was on the Gaddi and was in possession in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance which each member might have of a succession emerging in his favour was, obviously, outside the sphere of inquiry."

The Board refused in terms to pronounce an opinion that the decision in the *Sartaj Kuari* case was wrong, though they pointed out that it would have been possible to decide the case differently

> "if the theory had been accepted that impartibility being a creature of custom though incompatible with the right of partition, yet left the general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was."

In the opinion of their Lordships the judgment last referred to is fatal to the contention that the *Sartaj Kuari* case and the *Pittapur* case are inconsistent with those on the right of succession, and they must hold that no ground has been established for a refusal on their part to follow the decisions in those two cases.

But it was recognised in both those cases that the general rule thus established might be displaced by proof of a family local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it, and accordingly an attempt was made in the present case to prove such a custom. In both Courts in India the attempt failed, and, in their Lordships' opinion, no ground has been shown for reversing their findings in this respect.

Only two items of evidence were really relied upon in argument: (1) that there had been no instance of a will purporting to dispose of the estate, and (2) a statement by Satrughna himself that a previous Raja Ram Chandra III had no right to make a will.

As to the first item, the mere absence of any will is an equivocal circumstance. It might be attributable to an assumption on the part of the several Rajas that the law did not admit of a bequest of the Raj, or to the absence of any desire on their part so to dispose of the Raj. It cannot, in their Lordships' opinion, be by itself sufficient evidence of the alleged custom.

As to the second, when it is examined, it will be found that it is a statement, not on oath, but made by way of pleading in proceedings in which Satrughna was disputing an alleged will of his predecessor and taking every possible objection to its validity, and was, therefore, a statement made in what he then considered to be his interest. Moreover, it is by no means clear that the statement was intended to be based on a family custom at all (see the passage in the judgment of the High Court, p. 24, l. 17, and following).

The alleged custom varying the rule laid down in the cases above referred to has, in their Lordships' opinion, not been proved, and the rule itself must therefore apply.

One other point made by the appellant remains to be noticed. In his Case the point is raised in paragraph 6 of the Reasons, which reads as follows :—

> " Because the nature of the estate, being originally a Raj or principality and not being affected or altered by permanent settlement, renders it inalienable."

In the judgment of the High Court it is stated that in the Court below counsel for the defendant conceded that

> " he could not press the contention that the estate was inalienable on account of its being one of military or feudal nature " (Record II, page 46, l. 37),

but the Court nevertheless dealt with the point and overruled the appellant's contention. They pointed out that the grant of the estate under the first settlement of 1777 was on the usual conditions on which grants to zemindars were made. There was nothing feudal or military in it. Their Lordships agree with the High Court that in the present case, inasmuch as for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zemindari, no inalienability can result from the ancient nature of the tenure.

On the whole, their Lordships are of opinion that the main appeal fails, and ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

There remain the cross-appeals of the respondent.

These are three in number :—

First, the respondent (the plaintiff in the suit) raises objections to the provisions in the decree of the Subordinate Judge, as

affirmed by the High Court, dealing with his claim for repayment by the appellant (the defendant in the suit) of monies received by him by way of maintenance while the estate was in the charge of the Court of Wards after the death of Satrughna and with the costs of the suit and of the appeal to the High Court.

Secondly, he appeals from an order of the High Court, dated the 28th July, 1924, continuing, pending this appeal, the appointment of a Receiver already appointed by the Court pending the appeal to itself.

Thirdly, he appeals from a further order of the High Court, dated the 13th August, 1924, directing the Receiver to pay to the appellant the sum of Rs. 1,200 per mensem by way of maintenance pending this appeal.

While the estate was in the charge of the Court of Wards the appellant received the sum of Rs. 27,000 by way of maintenance, being three payments of Rs. 9,000 per annum. The respondent claimed repayment of this sum from the appellant by way of mesne profits. This claim was allowed by the decree, but on the sole ground that the appellant had no means to pay the mesne profits and the costs, it was directed that the respondent should realise the same from the estate and the appellant should not be personally liable.

In the opinion of their Lordships, the appellant was not entitled to maintenance out of the estate—First, on the ground that the maintenance of himself and his family was already provided for by a *khorposh* grant of certain villages to his predecessors, which villages are still in his possession; and, secondly, because he has failed to establish a right to maintenance by custom or relationship or in any other way (*see* the second *Pittapur* case, *Raja Rama Rao* v. *Raja of Pittapur* (45 I.A. 148)). This being so, and the respondent being thus entitled to receive back what had been wrongfully paid, it is difficult to understand why this burden should be thrown on the estate, which as the result of the suit had been recovered from the appellant. The same remark applies to the costs. The respondent may not be able to recover the money owing to the poverty of the appellant, but this is no reason why an order for payment should not be made.

Their Lordships will therefore humbly advise His Majesty that the first cross-appeal should be allowed with costs and the decree of the High Court varied by directing the appellant to pay the Rs. 27,000 and the costs of the suit and of the appeal to the High Court.

As to the second and third cross-appeals, if the appellant is not entitled to maintenance, their Lordships fail to see why he should have received anything pending the litigation. They will therefore humbly advise His Majesty that these appeals also should be allowed with costs, and that the two orders of the 28th July, 1924, and the 13th August, 1924, should be set aside and the appellant be directed to repay to the respondent the sums paid by him thereunder. The setting aside of the order of the 28th July, 1924, should be without prejudice to the liability of the Receiver to account.

In the Privy Council.

SRI PROTAP CHANDRA DEO DHABAL DEB

v.

RAJA JAGADISH CHANDRA DEO DHABAL DEB

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(*Consolidated Appeals.*)

DELIVERED BY LORD WARRINGTON OF CLIFFE.

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