Privy Council Appeal No. 7 *of* 1930.
Bengal Appeals Nos. 71, 72 *and* 79 *of* 1925.

Shiba Prasad Singh - - - - - - - *Appellant*

v.

Rani Prayag Kumari Debi and others - - - - - *Respondents*

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

v.

Same - - - - - - - - - *Respondents*

Rani Prayag Kumari Debi and others - - - - - *Appellants*

v.

Shiba Prasad Singh - - - - - - - *Respondent*

(*Consolidated Appeals*)

AND

Privy Council Appeal No. 49 *of* 1922
Bengal Appeals Nos. 2 *and* 3 *of* 1922

Shiba Prasad Singh - - - - - - - *Appellant*

v.

Rani Prayag Kumari Debi and others - - - - *Respondents*

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

v.

Same - - - - - - - - - *Respondents*

(*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 7TH APRIL, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
LORD SALVESEN.
SIR JOHN WALLIS.
SIR DINSHAH MULLA.

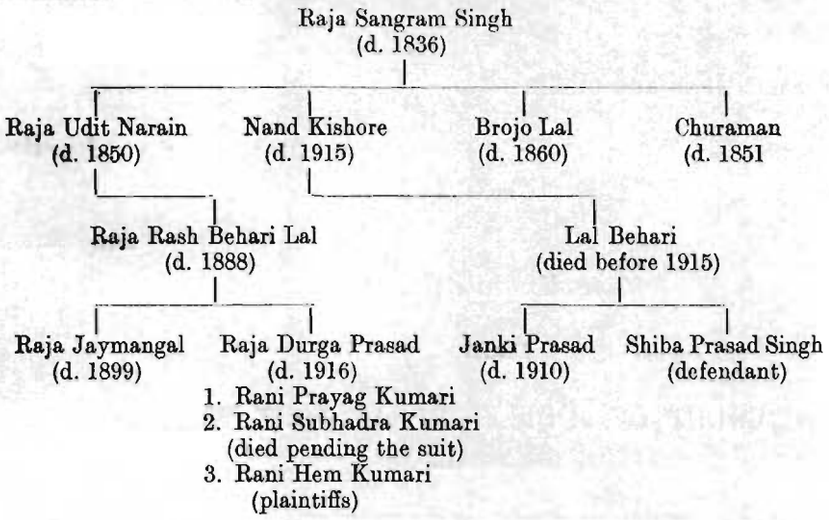
[*Delivered by* SIR DINSHAH MULLA.]

The questions involved in these appeals relate to the right of succession to an estate known as the Jheria Raj, situated in the district of Manbhum, and other property, movable and immovable, left by Raja Durga Prasad.

The suit out of which the appeals arise was instituted by the widows of Raja Durga Prasad in the Court of the Subordinate Judge of the 24-Perganas against Shiba Prasad Singh, a distant agnatic relation of the Raja, to recover the estate and other property. On November 3rd, 1921, the Subordinate Judge passed a decree whereby he allowed the suit in part and dismissed it as to the rest. Both parties appealed to the High Court at Calcutta, and the High Court by its decree dated August 17th, 1925, allowed the appeals in part. From this decree of the High Court both parties have appealed to His Majesty in Council.

The parties are governed by the Mitakshara School of Hindu law. The Raj is ancient and ancestral, and it is impartible by custom, and succession to it is governed by the rule of lineal primogeniture. The last holder of the estate was Raja Durga Prasad, who died childless on March 7th, 1916, leaving three widows and Shiba Prasad Singh, his second cousin.

The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below :—



Raja Sangram Singh died in 1836, leaving four sons. The Raj then devolved successively on Raja Udit Narain, Raja Rash Behari Lal, Raja Jaymangal, and Raja Durga Prasad. Shiba Prasad Singh is the great-grandson of Raja Sangram Singh.

On August 27th, 1915, Raja Durga Prasad made a will whereby he purported to dispose of some of the properties in dispute. The will is governed by the Hindu Wills Act, 1870. Several sections of the Indian Succession Act, 1865, are thereby made applicable to wills governed by the Act. Amongst them is section 187, which provides that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration with the will . . . annexed." No executor has been appointed under the will of Raja Durga Prasad nor have any letters of administration with the will annexed been obtained by any person. None of the parties, however, to this litigation seeks to establish any right as a legatee under the

will. On the contrary, both parties claimed in the Courts in India, and they claim here, on the footing of intestacy. Their Lordships have been assured by counsel in the case that no person other than the parties to these appeals is interested in the succession to any of the properties in dispute. The will, it may be observed, has been held to be genuine by both the Courts in India.

After the death of the late Raja, Shiba Prasad Singh entered into possession of the estate and other properties. Shortly afterwards disputes arose between him and the widows, and on August 5th, 1916, three *bantannamas* were executed, one by each widow, whereby for the consideration mentioned in those writings they acknowledged Shiba Prasad Singh as the rightful successor of the late Raja, and relinquished their claim as the heirs of their husband to all properties left by him.

On March 6th, 1919, the present suit was brought by the three widows against Shiba Prasad Singh. In their plaint they stated that Raja Udit Narain had separated from his brothers, that they as the heirs of their husband were entitled to succeed to the Raj and all other properties left by him, that the *bantannamas* were obtained by Shiba Prasad Singh by fraud and undue influence, that he had wrongfully taken possession of the Raj and the properties, and they claimed possession and other reliefs. As regards the Raj it was also alleged that if all the three widows together were not entitled to it, at least the senior widow was. The widows are hereinafter referred to as the plaintiffs and Shiba Prasad Singh as the defendant.

The properties in dispute are described in two schedules annexed to the plaint, being Schedule *ka* and Schedule *kha*, which their Lordships were told correspond to the Schedules *ka* and *kha* annexed to the decree of the Subordinate Judge. Schedule *ka* consists of seven items. Schedule *kha* contains a number of items and sub-items. It will be convenient to group these properties under the following heads :—

(1) The impartible estate or Raj ..	Sch. *ka*, 1.
(2) Immovable properties acquired by Raja Rash Behari Lal, the father, and Raja Jaymangal, the brother, of the late Raja, and come to his hands ..	Sch. *ka*, 2–7.
(3) Immovable properties acquired by the late Raja	Sch. *kha*, 1–8.
(4) Improvements on the Raj estate..	Sch. *kha*, 9–19.
(5) Jewellery	Sch. *kha*, 20 (1–23).
(6) Furnishings and equipments of the palace, etc.	Sch. *kha*, 20 (24–83), etc.
(7) Cash and deposits in banks ..	Sch. *kha*, 21.

Besides the above, the plaintiffs claimed all other properties, both movable and immovable, left by the late Raja, which

might on inquiry be found to have come to the hands of the defendant.

The defendant by his written statement denied that the *bantannamas* were obtained by him by fraud or undue influence. He also denied that Raja Udit Narain had separated from his brothers, and alleged that he and the late Raja were, at the time of the Raja's death, members of a joint undivided family, and he claimed the Raj by survivorship. He based his claim to the other properties on a family custom, according to which, it was alleged, all accumulations and acquisitions made by the Raja for the time being passed to his successor together with the Raj. He also claimed those properties on the alternative ground that they had been incorporated with the Raj. There was a further plea that females were excluded by custom from succession to this Raj.

The Subordinate Judge found that the *bantannamas* were obtained by the defendant by fraud and undue influence, and they were set aside. He also found that the two customs alleged by the defendant were not proved. On the issue whether the family was joint, he found that no separation had taken place, and that the defendant and the late Raja were members of a joint family at the time of the Raja's death. All these findings were affirmed by the High Court on appeal.

It is necessary, however, to state here a point of difference between the two Courts as regards the issue as to jointness. One of the elements considered by both the Courts in determining that issue was whether the two branches of the family were joint in worship. The Subordinate Judge found that they were. The High Court, differing from him, found that they were not, but they held that this in itself was not sufficient to constitute a complete separation, and the family, therefore, was still joint.

On his finding that the family was joint, the Subordinate Judge awarded to the defendant the impartible estate [Schedule *ka*, 1], on the ground that he was entitled to it by survivorship, and the improvements on the estate [Schedule *kha*, 9–19], on the ground that they formed part and parcel of the estate. He also awarded to the defendant the self-acquisitions of Raja Rash Behari Lal and Raja Jaymangal [Schedule *ka*, 2–7], on the ground that they were incorporated with the impartible estate. As to the properties acquired by the late Raja [Schedule *kha*, 1–8], he held that they had not been incorporated with the impartible estate, and he awarded them to the plaintiffs. This part of the decree was affirmed by the High Court, but as to items 3 to 7 of Schedule *ka* on different grounds. The High Court, while agreeing with the Subordinate Judge that item 2 of Schedule *ka* was incorporated with the estate, held that items 3 to 7 were not. They then proceeded to deal with the whole group of items 2 to 7, and said :—

> "But properties Nos. 2 to 7 of Schedule *ka* were either the *ancestral* properties or properties which devolved upon Raja Durga Prasad on Raja

> Jaymangal's death, and we do not think they can be claimed by the plaintiffs as the self-acquisitions of Raja Durga Prasad. If Telo and the other properties which were acquired by Raja Jaymangal were not incorporated with the estate, they would devolve upon his [Raja Jaymangal's] widow, Rani Chalur Kumari, and not upon the plaintiffs. We accordingly agree with the Court below so far as properties 2 to 7 of Schedule *ka* are concerned."

As to the movables, the Subordinate Judge held that the plaintiffs were entitled to all the jewellery, cash and deposits in banks. He also awarded the greater part of sub-items 24 to 83 of item 20 of Schedule *kha* to the plaintiffs. He held that the defendant was also entitled to retain some furniture and other articles. Dealing with this part of the case, he said :—

> " Plaintiffs are certainly not entitled to the furniture in the European guest house, Dheiya pleasure house, Raja's Khash Cutcherry, Sadar Cutcherry of the Raj estate, and Purulia bungalow. I also do not allow the claim for electric light, *punkhas* and machineries, etc., in the Rajbari, as they would follow the estate."

This part of the decree was affirmed by the High Court subject to certain variations as to sub-items 24 to 83.

The Subordinate Judge had not dealt with the plaintiffs' claim to the rents, royalties and other monies which had accrued in the lifetime of the late Raja, but had been realised by the defendant after his death. The High Court held that these belonged to the plaintiffs.

The High Court also directed an inquiry as to all other movable and immovable property that might have been left by the late Raja and had come to the defendant's hands, and ordered that it should be delivered to the plaintiffs.

From this decree of the High Court both parties have appealed to His Majesty in Council. The defendant is the appellant in the first two appeals (Nos. 71 and 72 of 1925), and the plaintiffs are the appellants in the third appeal (No. 79 of 1925).

The main contention of the plaintiffs before their Lordships was that the Courts below had erred in holding that the family was joint. They maintained that the findings of the two Courts in India on the issue as to jointness were not concurrent, and that the facts as found by them did not establish that the family was joint, but, on the contrary, that there was a separation ; if so, they claimed that they as the heirs of their husband were entitled to the Raj and all other properties.

The defendant relied on what he alleged were the concurrent findings of the Courts below in his favour as to jointness, and urged that if he was entitled to the impartible property as a member of the joint family, he was also entitled to the other properties, both movable and immovable, on the ground either that they passed with the Raj by the family custom alleged by him or they had been incorporated with the impartible estate. Failing these, he maintained that he was entitled at the least to the furnishings and equipments of the palace and

other buildings on another ground. This and other subsidiary questions raised by him will be referred to later.

The defendant accepted the concurrent findings against him as to the *bantannmas* and as to the two customs that had been pleaded by him. Eliminating these matters, the principal questions that remain for their Lordships' consideration are as follows :—

First, whether the late Raja and the defendant were, at the time of the Raja's death, members of a joint undivided Hindu family.

Second, whether the holder of an impartible estate has the power to incorporate other properties belonging to him with the estate. And, if so,

Third, whether any such properties had in fact been incorporated with the estate, and, if so, which ?

First, as to whether the family was joint. The rules as to what constitutes separation in the case of an ordinary joint family are well established by the decisions of the Board. Generally speaking, " the normal condition of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption " : *Tipperah case,*[1] at p. 540. Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu family. Such a separation may be due to various causes, and the family may yet continue joint in estate : *Suraj Narain* v. *Ikbal Narain.*[2] To constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family : *Girja Bai* v. *Sadashiv-Dundiraj*[3] ; *Kawal Nain* v. *Prabhu Lal.*[4]

Similar rules have been applied by the Board in the case of impartible estates. Thus in *Chowdhry Chintamun Singh* v. *Mussamat Nowlukho Konwari,*[5] Sir J. Colvile, in discussing whether a document operated as a separation of a joint family in respect of an ancestral impartible estate, said (p. 271) :—

> " There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or to transfer any right or contingent right of property which they might have,"

and it was held that the family had not separated in respect of that estate. A similar test was applied in *Jagadamba* v. *Narain Singh,*[6] where their Lordships said :—

> " The cases of *Girja Bai* v. *Sadashiv Dhanjiraj* and *Kawal Nain* v. *Prabhu Lal* [both cited above] are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever ; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation.

---

[1] (1869) 12 Moo. I.A. 523.
[2] (1912) L.R. 40 I.A. 40, at p. 46.
[3] (1816) L.R. 43 I.A. 151.
[4] (1917) L.R. 44 I.A. 159.
[5] (1875) L.R. 2 I.A. 263.
[6] (1923) L.R. 50 I.A. 1.
[7] (1927) L.R. 55 I.A. 114.

The latter case illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate; and, further, that there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking."

The latest case on the subject is *Konammal* v. *Annadana*,[1] a case from Madras. In that case their Lordships, after observing that it had been established by the judgment of the Board in *Baijnath Prasad Singh* v. *Tej Bali Singh*,[2] that an impartible estate must be considered as the joint property of the family for the purposes of succession, and after referring to some of the earlier authorities, said as follows:—

"Those authorities, in their Lordships' opinion, go far to support the inference deduced by Ramesam J. from an examination of the cases that in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention, expressed or implied, on behalf of the junior members of the family to give up their chance of succession to the impartible estate."

In the present case it was admitted for the plaintiffs that there was no evidence of any intention on the part of the junior members of the family to renounce their right of succession to the Raj. The only argument, therefore, open to the plaintiffs was that in the case of an impartible estate a separation merely in food and worship was sufficient to effect a severance of the joint status of the family. But this position could not be maintained in the face of the decision in *Baijnath's* case, as understood by the Board in *Konammal* v. *Annadana*. It was accordingly argued, relying upon *Sartaj Kuari* v. *Deoraj Kuari*,[3] that in the case of an impartible estate there was no co-ownership and therefore no jointness in estate; that *Baijnath's* case did not decide that there was co-ownership even for the purposes of succession; that the interest of a junior member, if any, was only a *spes successionis*, and that there was, therefore, nothing in the case of an impartible estate for the junior members to renounce. Such being the argument, it is necessary to consider what *Baijnath's* case actually decided.

The decisions prior in date to *Baijnath's* case, so far as they are material for the present purpose, fall to be divided into two classes, namely, (1) those relating to succession to an impartible estate, and (2) those relating to other rights in such estate. The first class begins with the *Shivagunga*[4] case in 1863. The question in that case was one of succession to an impartible *zemindary*, the rival claimants being the representatives of a widow and those of the nephews of the last holder. The actual decision proceeded on the ground that the *zemindary* was self-acquired property, but the judgment contains the following passages:—

"The *zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family

[1] (1927) L.R. 55 I.A. 114.
[2] (1921) L.R. 48 I.A. 195.
[3] (1888) L.R. 15 I.A. 51.
[4] (9 Moo. I.A. 543.)

at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence, if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *zemindary*, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar*, at the time of his death, was separate in estate from his brother's family, the *zemindary* ought to have passed to one of his widows, and, failing his widows, to a daughter, or descendant of a daughter, preferably to nephews, following the course of succession which the law prescribes for separate estate."

The *Shivagunga* case was governed by the Mitakshara law, and the principle enunciated above was followed by the Board in subsequent Mitakshara cases, where it was held that the selection of a successor in the case of an ancestral impartible estate descendible by primogeniture was to be determined by survivorship.

The second class of cases begins with *Sartaj Kuari* v. *Deoraj Kuari*, decided in 1888 (*supra*). In that case the holder of an ancestral impartible estate executed a deed of gift of part of his estate in favour of his younger wife. A suit was brought by the son by his elder wife for a declaration that the estate being ancestral, the Raja had no power to alienate any part of it. The High Court of Allahabad held that the Raja had no power to alienate, but the Board reversed the High Court and upheld the gift. The decision proceeded on the ground that the inability of the father under the general law of the Mitakshara to alienate an ancestral estate arises from the proprietary right which the sons acquire at birth in such an estate, and that this right is so connected with the right to a partition that, where that right does not exist, as where the estate is impartible, the proprietary right falls with it. The *Shivagunga* case and the other cases following it were distinguished on the ground that the question in all those cases was one of succession, and not of alienation, and that all that was decided in those cases was " that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family." The decision in *Sartaj Kuari's* case was followed in the *first Pittapur*[1] case, where the right of the last holder to alienate the estate by will was upheld, and in the *second Pittapur*[2] case, where the right of the junior members of the family to maintenance out of the estate (except by custom) was negatived. Here ends the second class of cases.

Then came *Baijnath's* case in 1921. The contest was as to succession to an ancestral impartible estate. The parties were governed by the Mitakshara law and the family was joint. If the rule of survivorship applicable to ancestral property were applied, the respondent would be entitled to succeed; on the other hand, if the rules of succession to separate property were applied, the appellants would be entitled to succeed. It was

[1] (1899) L.R. 26 I.A. 83. [2] (1918) L.R. 45 I.A., 148.

argued for the appellants before the Board that *Sartaj Kuari's* case had established that there was no coparcenary in an impartible estate, that that decision was logically extended to the question of maintenance in the *second Pittapur* case, and that it should be equally logically extended to succession; in other words, that the estate should descend, not as coparcenary, but as separate property. But this argument was not accepted, and it was held that the estate being the ancestral property of the joint family, the successor was to be designated by survivorship. The earlier decisions were examined at great length by the Board, and *Sartaj Kuari's* case was distinguished on the ground that " the right of the other members that was being considered [in that case] 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." Similar observations were made as to the *second Pittapur* case. It was also observed that it would have been possible to decide *Sartaj Kuari's* 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 as to restraint against alienations as it was. Their Lordships consider that the judgment in *Baijnath's* case reaffirmed the earlier decisions of the Board as to succession to an impartible estate.

The question again arose, though in a different form, in *Protap Chandra Deo* v. *Jagadish Chandra Deo*[1] in 1927. In that case the last holder of an ancestral impartible estate died leaving a will whereby he bequeathed the Raj to the respondent. The case was on all fours with the *first Pittapur* case, where the right to alienate such an estate by will was recognised. But it was argued on behalf of the appellant that the will was inoperative, and this was put upon the ground that the judgments of the Board in *Sartaj Kuari's* case and the *first Pittapur* case had proceeded on the view that there was no co-ownership and therefore no right of survivorship in an impartible estate, that that view was inconsistent with *Baijnath's* case, which decided that there was a real right of survivorship and no right, therefore, to alienate by will, and that it was open to the Board to choose between the two lines of decision, and that the decision in *Baijnath's* case was correct in Hindu law. But the Board held that there was no inconsistency between the two lines of decisions, and the will was upheld.

The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the *Tipperah*[2] case: " Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of

[1] (L.R. 54 I.A. 289.) [2] (12 Moo. I.A. 523, at p. 542.)

maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case and the *first Pittapur* case; and so also the third as held in the *second Pittapur* case. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath's* case. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there isan ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no evidence in this case of any such intention. The plaintiffs, therefore, have failed to prove separation, and the defendant is entitled to succeed to the impartible estate. Being entitled to the estate, he is also entitled to the improvements on the estate, being the immovable properties specified in items 9 to 19 of Schedule *kha*. These improvements, in fact, form part of the impartible estate.

The second question is whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him. Questions of incorporation have been dealt with in several decisions of the Board, but the competency of incorporation was not challenged in any of them. The point, however, was raised in a Madras case which is referred to later. The question now under consideration embraces all other properties in dispute, and it is one of wide importance. It may be as well to consider first what was actually decided in the cases referred to.

The first of them is *Srimati Rani Partati Kumari Debi* v. *Jagadis Chunder Dhadal.*[1] The contest there was as regards succession to an ancestral impartible estate and 4 *mouzahs* that had been purchased on behalf of the last holder out of the savings of the estate. It was contended that the *mouzahs* had been incorporated with the estate and therefore passed with the estate.

[1] (1902) L.R. 29 I.A., 83.

It was in evidence that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate. In dealing with this part of the case, the Board said :—

> " Their Lordships do not find in these meagre facts adequate grounds for holding that the Raja intended to incorporate the four *mouzahs* with the ancestral estate for the purposes of his succession. The four *mouzahs* must therefore follow the rule of the Mitakashara as to self-acquired property."

The next case is *Janki Pershad Singh* v. *Dwarka Pershad Singh*.[1] This was a case under the Oudh Estates Act, 1869. The properties alleged to have been incorporated were all immovable properties. In dealing with the question of incorporation, their Lordships said :—

> " As has been pointed out by this Board in the case of *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhadal*, the question whether properties acquired by an owner become part of the ancestral estate for the purposes of his succession depends on his intention to incorporate the acquisitions with the original estate."

It was held upon the facts of the case that the evidence was not sufficient to establish such an intention.

Similar observations were made in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*.[2] Here again the properties were immovable.

The last case cited before their Lordships was *Rani Jagadamba Kumari* v. *Wazir Narain Singh*.[3] In that case the properties alleged to have been incorporated consisted partly of movables and partly of immovables, and had all been acquired by the late Raja out of the income of the Raj. The facts relied upon to show that there was an intention to incorporate were not very different from those in the first case cited above. The High Court of Calcutta held that the whole of the property so acquired, except certain Government promissory notes, represented an accretion to the estate and descended with it. On appeal, the Board held that no part of the property constituted an accretion to the estate. Their Lordships observed that the income of an ancestral impartible estate was the absolute property of the owner of the estate, and not an accretion to the estate, as in the case of an ordinary joint family estate. Referring to the judgment of the High Court, the Board said :—

> " It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the *corpus*, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of the joint family property ; but no such considerations necessarily apply to the income from impartible property. . . . Whether it be possible in any circumstances to treat movable property as an accretion to a landed estate of this character

[1] (1913) L.R. 40 I.A., 170. [2] (1916) L.R. 43 I.A. 269, 281–282.
[3] (1923) L.R. 50 I.A. 1.

> is a matter not arising for decision. . . . In both *Janki Pershad Singh* v. *Dwarka Pershad Singh* and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*, the addition of family property to the original raj is considered. Both these cases dealt with property other than movable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired properties, whether the *mauzas*, mortgages or other personal estate, as part of the original raj."

The actual point of the decision in the above case was that where the estate is impartible, no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does not decide that if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property.

The power of incorporation now under consideration has also been recognised in several cases in India: *Lakshmipattu* v. *Kandasami*[1]; *Ramasami* v. *Sundaralingasami*[2]; *Sabajit Partap* v. *Indarjit Pertap*[3]; *Gurusami* v. *Pandia Chinna*.[4] The first of these cases was decided in 1893.

The arguments advanced on behalf of the plaintiffs may now be considered. First, it was said that the estate in this case is one of the estates within Bengal Regulations 11 of 1793 and 10 of 1800, and that there are indications in those Regulations that no addition could be made to those estates. Their Lordships think that neither of these Regulations contains any such indication.

Next, it was argued that there was no principle of law on which the power to incorporate could be supported.

The Mitakshara recognises two modes of devolution according to the nature of the property. Ancestral or joint family property devolves by survivorship; self-acquired property descends to the heirs of the last owner in the order prescribed by the law. The Hindu law, however, enables persons governed by that law to alter the course of devolution of their property from one channel into another by declaring, expressly or impliedly, their intention to do so. Thus, if a member of a joint family declares his intention to separate from the other members, there is, as already stated, an immediate separation, and his undivided interest in the joint family property will on his death pass not to the surviving members of the family, but to his heirs. Similarly, a Hindu possessing self-acquired property may incorporate it with the joint family property, in which case it will pass on his death not to his heirs, but to the surviving members of the family. The material text of the Mitakshara on this subject is as follows:—

"Among unseparated brothers, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place: and a double share is not allotted to the acquirer" (Mit., ch. i,

[1] (1893) 16 Mad. 54.
[2] (1894) 17 Mad. 22, at p. 444.
[3] (1905) 27 All. 203.
[4] (1921) 44 Mad. 1.

sec. 4, verse 31). This verse means that if a member of a joint family augments joint family property, whatever may be the mode of augmentation, the property which goes to augment the joint family property becomes part of the joint family property, and he is entitled on a partition to an equal share with the other members of the family, and not to a double share as in some other cases dealt with in the preceding verses. This is the verse on which the whole doctrine of merger of estates by the blending of income is founded : *Gooroochurn Doss* v. *Golucknoney Dossee*.[1]

If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property : *Rajani Kanta Pal* v. *Jaga Mohan Pal*.[2] But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartible estate mixes the income of his self-acquired property with the income of the estate. Blending of income, however, is not the only mode of indicating the intention to incorporate. A member of a joint family may possess self-acquired property which yields no income for the time being, as where it is land not yet brought into cultivation. If he desires to incorporate such property with the joint family property, it may be done by declaring, expressly or impliedly, his intention to do so. The crucial test in all such cases is intention, and the intention may be expressed by the blending of income or in some other way. On the same principle a member of a joint family, who is the holder of an ancestral impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate; by so doing he expresses his intention to alter the course of devolution of the self-acquired property. This, their Lordships think, he is entitled to do, though the ancestral estate is impartible. All that can be said against it is that he may alienate the self-acquired property the moment after the declaration of his intention to incorporate. It is true that he can alienate the property, but that is not because the property still retains the character of self-acquired property, but because on incorporation with the impartible estate it is impressed with all the incidents of that estate, one of which is that he can alienate it at his pleasure. The mere fact, however, that he may alienate the property after incorporation does not conclude the matter, for he may not alienate it at all. Surely, then, the property will pass not as his separate property, but by survivorship as joint property—devolution by survivorship being another incident of an impartible estate. The fact is that when self-acquired property is incorporated with an ordinary joint family estate, the property so incorporated is impressed with all the incidents which attach to an ordinary joint family estate; and when self-acquired property is incorporated with an ancestral impartible estate, the property

[1] (1843) 1 Fulton 165, at pp. 173–174. [2] (1923) L.R. 50 I.A. 173, at p. 178.

so incorporated is impressed with all the incidents which attach to an ancestral impartible estate. The mere possibility, therefore, of the holder alienating the property after incorporation is no reason for denying to him the power which the Hindu law gives him of changing the mode of descent to his property. Nor is there anything in that rule of law which is inconsistent with the custom of impartibility. Apart, therefore, from the question of succession by primogeniture presently to be considered, their Lordships are of opinion that the holder of an impartible estate is entitled to incorporate other properties belonging to him with that estate.

Lastly, it was argued that the holder of an impartible estate cannot so incorporate his self-acquisitions with the estate as to make them inheritable by the rule of primogeniture. In support of this argument two passages were cited from the *Tagore* case,[1] namely, (1) "A private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and the gift must fail, and the inheritance takes place as the law directs"; and, (2), "Upon this point it is unnecessary to repeat what has already been said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, differing from that described by the law of the land." Reliance was also placed upon a passage in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*,[2] which is as follows:—"The Crown has in British India power to grant or to transfer lands, and by the grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon such lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case." In that case a *taluq* had been granted by the Crown to a Hindu under a *sanad*, subject to descent by primogeniture, and it was held that the grantee could not incorporate other lands with lands comprised in the *taluq*. This decision was followed in a recent case, *Nawab Mirza Mohammad* v. *Nawab Fakr Jahan Begam*.[3]

On the authority of the above rulings it was argued that to allow the holder of an impartible Raj to incorporate his self-acquisitions with the Raj would be to allow him to impose upon the self-acquisitions a line of descent at variance with the ordinary law applicable to his case. Their Lordships do not think that the principle of the above decisions applies to the present case. The Raj has not been granted by the Crown, nor has any line of descent been prescribed by any *sanad*. It is an ancient ancestral estate. It is impartible by custom. It descends by the rule of primogeniture by a family custom. The family is joint. The parties are governed by the Mitakshara school of Hindu law.

[1] L.R. Sup., Vol. 47, at p. 65. [2] (1918) L.R. 45 I.A. 134, 143.
[3] P.C. Appeals Nos. 131 and 132 of 1929.

Under that law ancestral property devolves by survivorship to all surviving members of the joint family. In the present case the estate devolves not on all, but only on one member of the family, and that is by virtue of the family custom.

A Hindu family, no doubt, cannot by agreement between its members make a custom for itself of succession to family property at variance with the ordinary law. But where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law. The rule of succession in such a case is recognised by the State as part of the law of the family, though it is no more than the result of a course of conduct of individual subjects of the State constituting the family. " Under the Hindu system of law, clear proof of usage," even if it be a family usage, " will outweigh the written text of the law " : *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*.[1]

Had the Raj been an estate granted by the Crown under a *sanad* subject to descent by primogeniture, as was the *taluq* in the *Rajendra Bahadur* case, the boundaries as defined by the *sanad* could not have been enlarged by any Raja, nor could he have added other properties to it so as to make them descendable by the rule of primogeniture. But the Raj here is not held under any *sanad*. It is impartible by custom, and it descends by primogeniture by custom. The boundaries, therefore, of such an estate, if they could be circumscribed at all, could only be circumscribed by statute or custom. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom. There is no question of any statute here. Nor is there any evidence of any custom excluding such a power. If so, there is no reason why the Raja could not enlarge the Raj by adding other properties to it. He is not by so doing creating another and a separate estate distinct from the Raj itself. He is not assuming to legislate, nor is he creating another Jheria Raj or any other Raj. If other properties are added to the Raj estate, they will not form a new estate, but will be an accretion to the Raj estate, and will pass, on the death intestate of the last holder, as one entity with that estate. To such a case the rule in the *Tagore* case does not apply, nor the rule in *Rajendra Bahadur's* case. A similar conclusion was reached by the High Court of Madras in *Gurusami* v. *Pandia Chinna* already referred to.

None of these considerations, however, apply to movable property. Such property, their Lordships think, cannot form an accretion to an ancestral impartible estate. The income even of such an estate is not an accretion to the estate. As was said by the Board in *Jagadamba Kumari* v. *Narain Singh* (*supra*), " the income when received is the absolute property of the owner of the impartible estate." It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate.

[1] (1868) 12 Moo. I.A. 397, at p. 436.

The conclusion to which their Lordships have come on this part of the case is that while immovable property can be incorporated with an impartible estate, movable property cannot.

This leads to the consideration of the third question, whether there was an incorporation in fact. The movables having been excluded, the enquiry under this head is confined to immovable properties only. These are properties that were acquired by Raja Rash Behari Lal and Raja Jaymangal, being items 2 to 7 of Schedule *ka*, and those acquired by the late Raja, being items 1 to 8 of Schedule *kha*.

Considerable evidence, both oral and documentary, was produced before the Subordinate Judge on this part of the case. The defendant also relied upon the will of the late Raja as evidence of past incorporation. Both the Courts in India held that there was no indication in the will of any past incorporation. The Subordinate Judge held upon other evidence in the case that items 2 to 7 of Schedule *ka* were incorporated with the estate, and awarded them to the defendant. The High Court found that item 2 only was incorporated, but items 3 to 7 were not. These they awarded to the defendant upon other grounds already stated. Those are legal grounds founded upon facts unconnected with incorporation. In the view which their Lordships take of this branch of the case, it is unnecessary to consider whether they are good grounds. All that their Lordships need say is that they are highly debatable grounds.

Both Courts concurred in holding that items 1 to 8 of Schedule *kha* were not incorporated with the estate, and they awarded them to the plaintiffs.

It was argued on behalf of the defendant before their Lordships that the will contained unmistakable indications of a past incorporation with the impartible estate of all immovable properties which the late Raja possessed at the date of the will, and reliance was placed on the second paragraph of the will. That paragraph is in these terms :—

> " The entire Parganas, Jheria and Jainagar, in the district of Manbhum, are my ancestral *zemindaries* in respect of which revenue is payable to Government, and besides these I have other immovable properties in Manbhum and other districts. Whoever will be my heir on my death, shall get the said properties, and it is not necessary to make any direction with regard to them. But six annas of the diamonds and other jewelleries, gold and silver, etc., mentioned in the schedule hereto, which I have, and those which I shall purchase hereafter besides these, and all cash moneys, notes, gold and silver, etc., which will be there in my own *Tehbil* or in the Bank of Bengal or any other bank at the time of my death, shall form part of my *zemindary*, and whoever will get the *zemindary* at any time shall possess and enjoy the same, and my wives (those who will be living at the time of my death) shall get the remaining ten annas of the said diamonds, and other jewelleries, the notes, cash moneys, silver and gold, etc., in equal shares, and they shall have absolute right of ownership thereto, that is to say, they shall be competent to give away and sell the same at their pleasure and no one shall ever be competent to object thereto."

The opening sentence of the above passage relates to the Jheria Raj and other immovable properties. As to all these the Raja says, " Whoever will be my heir on my death shall get the said properties, and it is not necessary to make any direction with regard to them." He then goes on to say : " *But* six annas of the diamonds and other jewelleries," etc. In other words, as their Lordships read it, the Raja says that it is not necessary to give any testamentary directions as to the immovable properties : they will go as a matter of course to the next heir to the Raj ; *but* it is necessary to give such directions as to diamonds and other jewellery, etc. This, their Lordships think, is the only reasonable interpretation that can be put upon those words. They indicate that the Raja had, before he made this document, treated the immovable properties as part of the Raj. The word " but " brings into contrast the immovable properties, as to which he says it is not necessary to give any directions, with diamonds and other jewellery, as to which he proceeds to give testamentary directions. The words " shall get the said properties " in this part of the document are not, in their Lordships' view, words of disposition ; they are equivalent to " will get the said properties." The only inference that can be drawn from this part of the document is that the Raja had treated the immovable properties which he then possessed as part of the Raj and that they were incorporated with the Raj estate. Their Lordships may add, to prevent any misconception, that had they considered on the construction of the document that the passage relating to immovable properties contained a testamentary disposition of those properties, their Lordships could not have given any effect to it, as the document has not been proved as a will.

For the reasons stated above, their Lordships are of opinion that the defendant is entitled not only to items 2 to 7 of Schedule *ka*, but also to items 1 to 8 of Schedule *kha*, and that the Courts in India were wrong in rejecting his claim as to the latter items.

The High Court by its decree has directed an enquiry as to whether the late Raja left any other immovable properties acquired by him, and ordered that if any such be found, the defendant should deliver them to the plaintiffs. In view of the opinion already expressed by their Lordships and having regard to the terms of the will, this part of the decree must be varied by declaring that such of these properties as might have been acquired by the late Raja on or before the date of the will will pass to the defendant, but those acquired after that date will pass to the plaintiffs, unless it is shown by the defendant that they were added by the late Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant.

Their Lordships will now turn to the subsidiary questions raised by the defendant in regard to movables and to accounts.

The defendant recovered after the death of the late Raja rents, royalties and other monies that had accrued due to the Raja in his lifetime. The decree of the Subordinate Judge is silent as to these items. The High Court, on appeal, awarded them to the plaintiffs. As to these items, the defendant urged before their Lordships that no claim for them was made in the plaint, and that even if it was, the Court of the Subordinate Judge who tried the case had no jurisdiction to entertain the claim. On the question of jurisdiction it was argued that the suit was essentially one for the recovery of immovable property within the meaning of Section 16 of the Code of Civil Procedure, and that no cause of action in respect of the rents, royalties and other monies could be joined with a claim for such property without the leave of the Court in view of the provisions of Order 2, rule 4, of Schedule I to the Code. The material part of that rule is as follows: "No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except . . . (*c*) claims in which the relief sought is based on the same cause of action."

Their Lordships think that both these contentions must fail. The claim is sufficiently covered by the plaint, and it was fully considered by the High Court. As to jurisdiction, their Lordships are of opinion that the cause of action in respect of the rents, royalties and other items was the same as that in respect of the immovable properties, namely, wrongful withholding of possession by the defendant, and that the case falls under clause (*c*) of rule 4.

One other matter on which there is controversy between the parties is as to an item of Rs. 48,249–3–9, alleged to have been paid by the defendant to the plaintiffs at the time of the execution of the *bantannamas*. The *bantannamas* were executed on August 5th, 1916. Two schedules are attached to each *bantannama*, Schedule 1 purporting to be a list of jewellery, cash and deposits in banks left by the late Raja, and Schedule 2 showing the shares allotted to each party. All three *bantannamas*, including the schedules, are similar in terms. It appears from Schedule 2 that eight items of jewellery, Rs. 448,400–4–0 out of the deposits in banks, and Rs. 112,249–3–9 out of the cash were allotted to the plaintiffs. From the last item a sum of Rs. 64,000 was deducted, which left Rs. 48,249–3–9 to be paid to the plaintiffs, and it is this item which is now in dispute. As to the Rs. 64,000, it was stated in the *bantannamas* that this money was in a safe which was in the possession of the plaintiffs, and that it had been agreed between the parties that the plaintiffs should retain it and that it should be deducted out of the plaintiffs' share in the cash. As to the deposits, it was arranged that they should be divided when received from the banks.

The defendant alleged that the jewellery that came to the plaintiffs' share was made over to them in the morning of August 5th, 1916, and that the sum of Rs. 48,249–3–9 was paid to them in the evening of that day. The plaintiffs denied receipt

of any jewellery or cash. They also denied that the safe contained Rs. 64,000 or any other sum. A vast mass of evidence, both oral and documentary, was recorded by the Subordinate Judge on this branch of the case. The Subordinate Judge prefaces his judgment by characterising all oral evidence in the case as "untruthful or biased," except the evidence of Colonel Brown, who, however, did not depose to any of the facts now in dispute. The Subordinate Judge then says: "I shall not rely upon oral evidence unless it is corroborated by documentary evidence, or unless under the circumstances disclosed in the particular matter under investigation it seems to be natural and probable." He found that no jewellery was given to the plaintiffs nor was there any sum of Rs. 64,000 in the safe, as alleged by the defendant. As to the item of Rs. 48,249–3–9, however, he found that it was paid to the plaintiffs. On appeal, the High Court, while agreeing with the Subordinate Judge as to the findings in respect of jewellery and Rs. 64,000, differed from him on the finding as to the Rs. 48,249–3–9, and found that the amount was not paid. The defendant contends that this finding of the High Court is erroneous.

It is in evidence that the *bantannamas* were executed by the plaintiffs behind a *purdah* in a room in the *Andar-mehal*, and that the only person amongst those present who had access to the plaintiffs was Pran Krishna, a brother-in-law of the second plaintiff. The defendant's case is that Rs. 48,000 was paid in currency notes of Rs. 1,000 each, and that the balance of Rs. 249–3–9 was paid partly in small notes and partly in cash, that he gave the notes and the cash to Pran Krishna, when the *bantannamas* were executed, for payment to the plaintiffs, and that Pran Krishna paid the whole amount to the plaintiffs behind the *purdah*. Pran Krishna was not called as a witness; nor is the fact of payment endorsed by the Sub-Registrar, who was present at the time, on the *bantannamas*, probably because the money was not paid in his presence, nor was any admission of receipt of consideration made in his presence.

It has been the practice of this Raj for several years past to keep a register of currency notes. This register contains entries of notes with their numbers received by the Raja from banks against cheques drawn by him, and entries also of payment out of notes and their numbers. The entries in the register relating to the 48 notes alleged to have been handed over to the plaintiffs were exhibited at the trial of the case.

It appears that certain properties belonging to one Sinha had been sold in execution of a mortgage decree obtained by T. Lal and S. Lal against him in the Court at Bhagalpur. The mortgagor raised money by selling the properties to Thakur Prasad, a son of a sister of the third plaintiff. The sale deed was executed on October 26th, 1916, and the purchase money, which consisted of currency notes, was paid to the pleader of the decree-holders. These notes were sent by the decree-holders to the

Benares Bank at Bhagalpur and they were credited to their account with the bank. It appears from the register of the bank that 26 of these notes bear the same numbers as 26 out of the 48 notes in the Raja's register. The halves of five of these notes, which are preserved in the Currency Office, purport to bear the signature of the third plaintiff on the back. It was admitted by the first plaintiff, who was examined on commission, that the third plaintiff sent a lac of rupees in currency notes with a messenger from Jheria for payment of the purchase money on behalf of Thakur Prasad. Behari Lal De, a *Tehsildar* in the employ of the Jheria Raj, deposed that the signature on each of the five halves was the signature of the third plaintiff. The third plaintiff did not give evidence in the case.

The plaintiffs being *Purdahnishan* ladies, the onus was on the defendant to prove the payment, but the identity of 26 notes having been established, and the signature on five of them having been sworn to as being the signature of the third plaintiff, the burden shifted upon the plaintiffs, and it was then for them to show that these notes came into the hands of the third plaintiff, not in the way alleged by the defendant, but in some other way, and that the signature on the five notes was not her signature. But no adequate explanation is forthcoming as to the identity of the notes, nor is there any denial of the signatures by the third plaintiff. It appears to their Lordships that the evidence of the *Tehsildar*, standing uncontradicted as it does, is fatal to the plaintiffs' case. The only criticism made against it was that he, having admitted that he had never seen the plaintiffs in the *Andar-mehal*, could not have seen the third plaintiff sign, and he could not therefore know her signature. But a signature may be proved in other ways, and that is what was done in this case. As to the identity of the notes, it was argued that the share of the third plaintiff being one-third, she could not have received, even if the 48 notes had been handed over to the plaintiffs, more than 16 notes, while the notes alleged to bear the same numbers were no less than 26. As against that, however, there is this fact, that no less than five halves have been deposed to as bearing her signature, and she has not denied her signature. It was also urged, on the strength of the evidence of the first plaintiff and that of Mukhdeshwar Baral, a Mohurrir, that the plaintiffs used to get from the Raja's treasury large notes in exchange for small notes, and small notes in exchange for large notes. But there is no evidence that any of the notes which bear the signature of the third plaintiff were so obtained. In fact, the plaintiffs are confronted at every point of their case with the signature of the third plaintiff on the five halves. Such being the evidence, their Lordships find themselves unable to agree with the finding of the High Court as to the item of Rs. 48,249–3–9, and they agree with the Subordinate Judge that the amount must be taken to have been paid.

The defendant also claims credit for the expenses of the funeral and *sradh* ceremonies of the late Raja and for all monies paid by him to the plaintiffs since the death of the Raja. Particulars of this claim appear in part in paragraph XIX of the petition for leave to appeal to His Majesty in Council, and more fully in ground No. 30 of the grounds of appeal. Ground No. 30 is in these terms :—

> " For that in any case this Honourable Court should have held that the defendant is entitled to get credit for the expenses of the funeral and *Sradh* of late Raja Durga Prasad Singh and for all his debts and liabilities paid by him and also for all monies paid to the plaintiffs in cash since the death of their husband under whatever denomination such payments may have been made, including the sum of Rs. 50,000 paid on the 16th March, 1920, and the aggregate sum of Rs. 44,000 (made up of Rs. 900) a month paid from 5th August, 1916, to the middle of October, 1916, and Rs. 1,500 a month paid from the 28th January, 1920, to the 27th March, 1921."

This was also a ground of appeal to the High Court. The High Court allowed the defendant's claim in respect of the debts and liabilities of the late Raja, but no directions have been given in respect of the other claims.

As to the expenses of the funeral and *sradh* ceremonies, the defendant contended before their Lordships that if the movables left by the late Raja were awarded to the plaintiffs, those expenses should be borne by them. On the other hand, it was urged for the plaintiffs that if the defendant's claim to succeed to the Raj was allowed, he as the successor to the Raj was bound by custom to perform those ceremonies. These are questions of fact on which no evidence appears to have been led by the defendant before the trial Judge. Their Lordships are therefore unable to entertain this claim at this stage.

The facts as to the defendant's claim for monies alleged to have been paid by him to the plaintiffs appear to be as follows :— Shortly after the institution of this suit the plaintiffs applied for the appointment of a receiver. The application terminated in a compromise, and on January 28th, 1920, the parties filed a petition containing the terms of the compromise. Paragraph 4 of the petition is as follows :—

> " Defendant to pay month by month to each of the plaintiffs Rs. 500 (Rupees five hundred) on account of maintenance from the date hereof. This without prejudice to the rights of the parties as to the amount of maintenance or otherwise *which may be ultimately payable to the plaintiffs.*"

Paragraph 9 is in these terms :—

> " The defendant will advance to the plaintiffs Rupees two lacs and fifty thousand out of the money withdrawn by him from the Bank of Bengal in part payment of their dues. Defendant will further pay to the plaintiffs a further sum of Rupees fifty thousand on account of arrears of maintenance, but it is expressly agreed between the parties that this amount will be subject to adjustment *when and if the rate of maintenance is ascertained by Court.*"

The decree of the Subordinate Judge directs that credit should be given to the defendant for Rs. 250,000, but no direc-

tions are given in the decree either of the Subordinate Judge or of the High Court in regard to the item of Rs. 50,000 or the payments alleged to have been made by the defendant of Rs. 300 per month to each plaintiff under the terms of the *bantannamas* or of Rs. 500 per month under the terms of the compromise.

It is clear that the *bantannamas* having been set aside, the defendant is entitled *prima facie* to a refund of all payments made by him under them. It appears, however, from the judgment of the High Court that the plaintiffs applied to the Court to remand the case to the trial Judge to determine what maintenance they were entitled to, but the defendant objected on the ground that the plaintiffs could not have both the property and maintenance, and the High Court refused to direct any inquiry and left the question of maintenance to be decided in a separate suit.

It does not appear, at least from the judgment, that the defendant at that time asked the High Court to make any order as regards the payments alleged to have been made by him to the plaintiffs. It may be that the High Court intended to leave this question also open. However that may be, their Lordships see no reason why the defendant's claim should not be considered in the present proceedings, and why, if the plaintiffs claim maintenance in addition to the properties awarded to them, their case also should not be considered together with the plaintiffs' claim. A separate suit would involve a repetition of a good many facts already recorded in this suit.

The only question that remains to be considered is as to some of the movables, being the furniture, furnishings and equipments of the palace and other buildings situated in the Manbhum district and elsewhere. The Subordinate Judge, as already stated, awarded to the defendant the furniture in the *cutcherries* and four other buildings on the ground that "they would follow the estate." This decision was affirmed by the High Court on appeal. As regards sub-items 24 to 83 of item 20 of schedule *kha*, the Subordinate Judge awarded the greater part thereof to the plaintiffs. This part of the decree was varied by the High Court to some extent. No reasons are given by either Court in support of its view.

The claim made by the defendant to the movables on the ground that they were incorporated with the impartible estate has failed; and so also the claim based on the ground that all property, whether movable or immovable, left by the last holder passed to the next succeeding Raja by a family custom. The defendant having failed on both these grounds, the movables in question should pass to the plaintiffs in the ordinary course of succession, unless the defendant can establish his claim to them on some other ground. The only ground urged on his behalf was that the very conception of a Raj involved that the Raj should carry with it all such furniture, furnishings and equipments

as were necessary for the support of the dignity of the Raja and the gaddi and such as were provided for use and service with the palace and the land and buildings connected with it. Their Lordships are unable to adopt this view. The question is purely one of fact, and there is no evidence on the record to support the claim. The claim could possibly have been founded on custom, but no such custom was alleged or proved. Their Lordships think that the Courts in India were wrong in awarding any of the furniture, furnishings and equipments to the defendant, and that they should all pass to the plaintiffs.

In the result, their Lordships will humbly advise His Majesty that the appeals preferred both by the plaintiffs (No. 79 of 1925) and by the defendant (Nos. 71 and 72 of 1925) should be allowed in part, and that the decree of the High Court be affirmed subject to the following directions and modifications :—

(1) That it should be declared that the defendant, and not the plaintiffs, is entitled to the immovable properties specified in items 1 to 8 of Schedule *kha* annexed to the decree of the Subordinate Judge.

(2) That it should be declared that if as a result of the inquiry directed by the High Court by their decree it be found that Raja Durga Prasad left any immovable properties other than those specified in Schedules *ka* and *kha* annexed to the decree of the Subordinate Judge, the defendant shall be entitled to such of them as were acquired on or before the date of the Raja's will dated August 27th, 1915, and that the plaintiffs shall be entitled to such of them as were acquired after that date, unless it is shown by the defendant that they were added by the Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant : and that there should be an inquiry to ascertain whether any of them were so incorporated.

(3) That it should be declared that the defendant is entitled to credit for Rs. 48,249–3–9, with interest thereon at the rate of 6 per cent. per annum from August 5th, 1916, and that this amount should be deducted from the amount payable by the defendant to the plaintiffs as provided by the decree of the Subordinate Judge.

(4) That it should be declared that the plaintiffs are entitled to all the furniture, furnishings and equipments left by Raja Durga Prasad, and that the defendant should be directed to deliver them to the plaintiffs, or to pay the value thereof as determined by the High Court.

(5) That the case be remitted to the High Court—

(i) To inquire into and determine the matters specified in clause (2) above ;

(ii) To determine whether the defendant is entitled to credit for the amounts, or any of them, alleged to have been paid by him to the plaintiffs, and referred

to in ground No. 30 of the grounds of appeal in his petition (No. 71 of 1925) for leave to appeal to His Majesty in Council (other than the expenses of the funeral and *sradh* ceremonies of Raja Durga Prasad), and to determine also any claim that may be made by the plaintiffs in respect of maintenance; and

(iii) To give effect to the above declarations and directions.

The plaintiffs will pay one-third of the defendant's costs of all the three appeals. The costs of further proceedings in India will be dealt with by the High Court.

On November 2nd, 1922, an Order in Council was made disposing of two appeals, being appeals Nos. 2 and 3 of 1922, preferred by the defendant from an order of the High Court dated February 9th, 1922. As to the costs of these two appeals, liberty was reserved to the parties to apply to His Majesty in Council after the determination of the appeals from the decree of the Subordinate Judge which were then pending in the High Court. The plaintiffs will also pay one-third of the defendant's costs of those appeals.

In the Privy Council.

SHIBA PROSAD SINGH

v.

RANI PRAYAG KUMARI DEBI AND OTHERS

SAME

v.

SAME

RANI PRAYAG KUMARI DEBI AND OTHERS

v.

SHIBA PRASAD SINGH

(*Consolidated Appeals*)

AND

SHIBA PRASAD SINGH

v.

RANI PRAYAG KUMARI DEBI AND OTHERS

SAME

v.

SAME

(*Consolidated Appeals*)

DELIVERED BY SIR DINSHAH MULLA.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1932.