**PRIVY COUNCIL**

Sri Radha Krishna Chanderji

Vs.

Ram Bahadur and others
(Lords Dunedin, CJ, Shaw Sumner, Sir John Edge and Mr. Ameer Ali. JJ)

3.8.1917

**JUDGMENT**

**Lord Sumner J.**

1. This was a suit to recover possession of 150 *bighas* of land in Mouzah Nagdah, in the pergunnah of the same name and the district of Monghyr. The plaintiffs had acquired inter alia such right in that land as could be sold under a decree in favor of mortgagees against two members of a joint Hindu family, named Rudra Parkash Misser and his younger brother, Dharam Parkash Misser, and they alleged this right to be the full title to the land. The principal defendant, an idol by his *shebaits,* who were in actual possession by their tenants, claimed in right of a judgment-creditor of the father of Rudra and Dharam*,* who had bought the land at an execution sale under his decree in 1883 and they alleged that the title thus derived from the father was better than any title that could be derived from his sons. They also relied on adverse possession. They proved that they had held the land by their tenants for many years before the suit, but the plaintiffs in reply alleged effective interruption of their possession within twelve years before the suit. The Subordinate Judge decided for and the High Court against the defendant; hence this appeal. The respondents did not appear at their Lordships' bar. There were other parties to the suit, but in substance none were interested except those above mentioned.

2. Pandit Babu Sheo Parkash Misser, who lived at Mirzapur Gobardhan, in the district of Monghyr, was the head of a joint Hindu family of Zamindars, governed by the *Mitakshara* law, which was entitled to considerable property in Behar. In 1873 he executed what has been called, somewhat loosely, a deed of gift in favor of his only son, Pandit Babu Rudra Parkash Misser, then a child. There were other members of the family besides Sheo and Rudra. By this deed he recited that among other family properties there was an 8 annas share in Mouzah Nagdah and he conveyed by gift to

his son all his rights and interests in that and other properties and then declared that

> " Rupees 400 per month...shall continue to be paid to me.... for defraying the expenses of the maintenance of me, the declarant, and for meeting my personal expenses and above that, 150 bighas of land by measurement, situate in Mouzah Phulwaria, or in any other Mouzah, shall remain in my possession and occupancy as zirat land, and the measurement and the demarcation of the boundaries thereof shall be made as soon as possible, and the said land shall be held by me in my possession as zirat without paying any rent there for ".

3. There were other provisions, but it does not seem material to consider them on the present appeal.

4. No doubt so unusual a transaction might be called in question on various grounds. The appellant did, indeed, suggest that its object was to defeat and delay creditors, but, as such a point ought to have been made at the trial, so that the facts might have been investigated, their Lordships decline to entertain it.

5. The appellant in the proceedings below made this deed the basis of his claim of title, and as the respondents accepted it as valid in the courts below, the only question which arises upon it for their Lordships is one of construction, namely, what was the interest in the 150 *bighas* which Sheo Parkash reserved to himself? It is not necessary to examine what precise right Sheo Parkash may have had, as head of a joint family, to make such an arrangement, although no separation of the family took place nor were its properties divided, or to create a new *zirat* land out of that which had been theretofore merely part of the *zamindari* land of his family. In the view which their Lordships take it is sufficient to answer this one question. That interest continued no longer than his life, and determined when he died in 1893 leaving his two sons, Rudra Parkash and Dharam Parkash, him surviving. Subsequent events made the words "as *zirat* land" of some importance. Their Lordships think that on the true construction of these words, as used in this connection, they merely mean "for the personal use and maintenance of the declarant himself without paying any rent therefor." As between ryot and *zamindar*, and sometimes as between the *zamindar* and the revenue authorities, questions as to *zirat or zariat* lands involve very different considerations. The present case, however, is not one which touches a ryot's claim to be protected against dispossession so long as his rent is paid, or a *zamindar's* claim to an abatement of jemma in respect of lands held by him for his maintenance as *zirat.* In this case the word is used merely to describe kind of interest reserved to the grantor under this particular deed, and its interpretation does not affect the general law and custom as to

*zirat* lands. The land was never in fact cultivated by Sheo Parkash nor had it ever been recognized by village usage as his private land. The deed reserves a certain area, to he thereafter particularly set out, for the declarant's occupation, rent free, as part provision for his personal maintenance, his sons and other dependants being otherwise provided for under the general disposition of the family properties made by the deed. So used, the terms " *zirat*" ceased to be a description truly applicable to these lands after the death of the declarant, nor could third parties, who were entitled to his rights alone, found upon this word any claim to rights in the land, which he could never have enjoyed. With the determination of his interest this land would again form part of the general *zamindari* property of the undivided family. During the lifetime of Sheo Parkash the interest of his son Rudra in the 150 bighas would be a vested *zamindari* interest in reversion. On the father's death the suspension of his right as *zamindar* to collect rents from the tenants of it would terminate, and as manager and head of the joint family, he would possess and enjoy this parcel in like manner as the rest of the family property. Such upon the argument presented to their Lordships, appears to be the true effect of this deed.

6. That the interest of Sheo Parkash, tale quale was validly assignable has not been contested, and their Lordships will assume it to be so for present purposes. Some years after he executed his deed Sheo Parkash was sued for debt by the predecessors-in-title of the present appellant. For what the debt was contracted or when, does not appear. A decree was obtained, and in execution proceedings his right to the 150 bighas was sold in 1883 to the decree-holders. They then claimed to have this area delimited and obtained an order in 1886, which was duly executed in 1888, that a sufficient area of land fit for khudkhast should be set out. To these proceedings Rudra Parkash and Dharam Parkash were made defendants. Evidently Sheo Parkash had not asserted his right to have this land set apart for his use, and probably, as was stated below but not proved, he had received money payments, which had made any demarcation' unnecessary. Clearly there was no partition by the family. The decree-holders in 1886 got possession of the 150 bighas as if they had been in the occupation of *Sheo Parkash* and for his interest therein, whatever it might be. Doubtless they supposed that interest to have been absolute, and the family may have thought so too, but the point does not seem to have been raised. Subject to the question of dispossession in 1898, they have enjoyed the rents of it ever since. A series of zarpeshgi pattahs mustajiri pattahs, and kabuliyats was produced, and sufficiently established the case.

7. Before their Lordships the appellant took this new point. Even if the interest of Sheo

Parkash in the land, which was sold in execution, determined with his life it was said that the interest of his sons must be deemed to have been sold too, for the ancestral property in a joint Hindu family may be made liable for the father's debts, unless they can be shown to have been for an illegal or immoral consideration. Such rules, however, do not always apply. The creditor's conduct, for example, may evidence his intention not to resort to such a right, whereby, after all, one man's property is taken to pay another man's debt. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interest, and no further. In the present case there is strong evidence of such an intention. The certificate of sale moreover, dated the 10th January, 1884, recites that the decree-holder, Krishna Mohan Ghatak, has bought

> "The right and interest of the judgment debtor, Sheo Parkash Misser, to be allotted by division, namely, by a separate allotment of 150 bighas of land...for the purpose of cultivation."

8. It does not appear that he claimed execution at any time against the family property generally. The whole of the facts should have been investigated at the trial. Certainly their Lordships ought not to decide upon a general claim of right, now first raised, when there appears to be, to say the least of it, a prima facie answer, which might have been completely made out if the appellant had raised the contention in the Courts below. They are of opinion that such an argument is no longer open to him.

9. In 1889, while Sheo Parkash was still alive, his two sons mortgaged the family estate including their share in Mouzah Nagdah, to the predecessors-in-title of the present plaintiffs. After his death the mortgagees took proceedings to enforce the mortgage, and, among others made the predecessors of the present defendants parties to them. In due course a decree was obtained, and upon the application for a sale in execution it was asked that the order should apply to the mortgaged properties " with the *zarait* lands " (*mai arazi zirat*). On a formal objection being taken to the addition of these words by the predecessors of the present appellant, it was held that the Court was bound to sell the mortgaged property as described in the mortgage bond without addition. The order thereupon made must be construed as if it applied only to "Nagdah, original with dependency, all the *zamindar's* rights, together with the tolas known by district names or otherwise," following the language of the mortgage. The sale accordingly took place, and the mortgagees were the purchasers. They received a sale certificate that they were entitled to all the *zamindari* rights in 8 *annas pucca* of *Mouzah Nagdah*," and, the land being in occupation by cultivating tenants under an

apparently *bona fide* title they received formal possession as usual after due proclamation by beat of drum in 1898.

10. This interruption, if such it was, of the defendants' actual possession was not of long duration. Hence, the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before suit began. The Subordinate Judge held that in fact the symbolical possession, given under the circumstances mentioned, did not apply to the 150 bighas. He construed the order as if it had expressly excluded them because of the deletion from the proposed order of the words "*mai arazi zirat*." Their Lordships think that this cannot be sustained. The true construction of the decree depends on what the Court actually ordered, not on what it refused to order. The order for possession applied to the 150 bighas because, following the description of the mortgaged lands, it extended to the lands in which the mortgagors, as *zamindars* and members of the undivided family, had a reversionary *zamindari* right, albeit subject to the interest which Sheo Parkash retained for his life.

11. In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court, following a decision of the Full Bench in *Jugobundhu Mukerji v. Ram Chandra*[1] By sack held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered. In the result the appeal fails, and their Lordships will humbly advise His Majesty that it ought to be dismissed with such costs as have been incurred by the respondents in entering their appearance.

Appeal dismissed.

Cases Referred.

1. [1880] 5 Cal.584 : 5 C.L.R.548 (F.B.)