PRIVY COUNCIL

Nageshar Baksh Singh

Vs.

Mt. Ganesha

P.C.A.No. 88 of 1918
(Lords Shaw Phillimore, J. Mr. Ameer Ali and Sir Lawrence Jenkins. JJ)

19.12.1919

JUDGMENT

Lord Shaw J.

1. This is an appeal from a judgment and decree, dated the 8th of August, 1916, of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree, dated the 23rd of December, 1913, of the Subordinate Judge of Gonda.

2. In the suit which is brought the plaintiffs pray for a decree for possession of the village of Sonahra, *pargana* Paharapur, *tahsil* and district Gonda, by cancellation of a certain sale deed thereof executed on the 30th of December, 1871, in favour of Thakur Mirtunjai Baksh Singh, now represented by the appellant. The grantors of the deed were three Hindu *pardanashin* ladies Musammats Basanta, Rani and Maharani.

3. A pedigree is given in the papers, which gives the family descent from one Bishan Prasad. Bishan was the owner of; inter alia, two villages, Harsinghpur and Sonahra. No question arises with regard to Harsinghpur in this appeal. It appears, however, that a question analogous to that now raised was settled relative to that village over thirty years ago, and was answered in a sense adverse to the present appellant. It was held in that suit that the sale deed had not been granted for consideration or with legal necessity, and that Harsinghpur was part of a joint undivided family property with reference to which the deed was ineffective. Their Lordships have, however, considered the present appeal, which is confined to the case of Sonahra, on its own merits.

4. Bishan Prasad owned, as already mentioned, these two villages. The pedigree as flowing from him is as follows:-

5. The facts of the case and relative dates are stated in a judgment passed by the Court of the Judicial Commissioner dated the 17th of December, 1915:-

> "The village in question originally belonged to Santokhi, to whom it was granted under a Birt Patta by Raja Dat Singh, the Taluqdar of the village, in 1128 Fasli. From Santokai the property passed to his lineal male descendants the last of whom were Gokaran.....representing one branch of his line, and Sheo Dayal,...representing another branch of his line. The summar settlement was made with Gokaran. Gokaran died some time in 1858, leaving a widow Musammat Basanta. Sheo Dayal died in 1865, leaving two widows, Musammat Rani and Musammat Maharani, and a daughter by the former, named Musammat Ganesha. On the 30th of December, 1871, Musammat Basanta, Musammat Rani and Musammat Maharani sold the village in dispute to the father of the defendant respondent. Musammat Basanta died in 1885, Musammat Maharani in 1888, and Musammat Rani in 1908. Musammat Ganesha, the daughter of Sheo Dayal, is alive and one of the plaintiffs to the suit."

6. It is manifest that if the three ladies, grantors of the deed under challenge, were fully vested owners, the one of an 8 *anna* share and the other two of a 4 *anna* share each, of the village, they were in a position to grant a proper title. But of course, on the accepted facts, such ownership in the ladies would be impossible.

7. Even although, however, they had possessed the village, not as complete owners, but as enjoying the same in shares as widows of former proprietors, and also enjoying, it may be, all the powers attaching to that status, it might also be that a valid sale could have been effected under the deed in question. The condition of such validity would, of course, be that the deed was for consideration and was granted by reason of legal necessity.

8. It is possible at once to disburden the case of much of the material which entered into the procedure of the Courts below on this last mentioned issue. For it has been found, after a special remit by the Court of the Judicial Commissioner to the Court of the Subordinate Judge on that topic, that the deed challenged was granted without consideration and without legal necessity. There are concurrent findings to that effect. Were the deed, accordingly, a deed of the widows of deceased owners, with no further rights in or over the village than such widows would have, the challenge must prevail. To this the retort was made that the plaintiffs had not proved that they were reversioner's to Gokaran, and as there had been a separation of shares they must fail as

to Gokaran's moiety. They alleged such separation. This raises a question fundamental to the case and anterior to the issues just mentioned. That question is one upon which very careful and exhaustive argument was presented to the Board. Was the village or was it not joint undivided family property at the date of the sale ? The appellant strongly contends that it was not. It must stand admitted that the village was ancestral property since the early portion of the eighteenth century. But it was maintained that a partition of this joint undivided family property was made. No deed expressly to that effect was executed. The argument, however, is that the facts of the case are sufficient to show that a definite separation of family interests took place, the shares being correctly stated in the Government Returns and papers to be afterwards mentioned as an 8 *anna* share to Musammat Basanta, widow of Gokaran, who died in 1885, and a 4 *anna* share to each of Musammats Rani and Maharani, widows of Sheo Dayal, who died in 1865.

9. Upon this issue, whether it be named "partition" or whether it be named "separation of interests.", it is important to ascertain at what date it is alleged that the transaction took place. Upon this subject the Board, notwithstanding repeated inquiries, has found itself unable to ascertain what is the attitude definitely adopted by the appellant. The difficulties are, of course, considerable. Apart from separation, the descent of the property would in ordinary course be, up till the year 1858, to Gokaran, Basanta's husband. When Gokaran died in 1858, the property in its entirety would then pass to Sheo Dayal, his nephew, the only other male representative, and Sheo Dayal died in 1865. There is nothing in the case to suggest that there was any transaction of the nature of partition between Gokaran and Sheo Dayal. If, however, there was no such partition, the ancestral property of this village became that of Sheo Dayal in ordinary course, and the whole right of Musammat Basanta therein was a right as Gokaran's widow to maintenance therefrom.

10. During this period, that is to say, when Sheo Dayal was proprietor, it would be impossible to maintain that he executed any deeds of partition of this property; such partition would in short have been in the nature of the conveyance from himself, as owner in entirety, of a certain part of the property to another not in the line of his succession. There is no such evidence. If there had been, serious questions with regard to it might have been raised. Therefore the whole question is still further postponed to that period of time subsequent to Sheo Dayal's death.

11. Sheo Dayal left two widows, and the fact cannot be disputed that in so far as light can be thrown upon the subject by the village records, Basanta did have in her

enjoyment an 8 *anna* share, and Sheo Dayal's two widows did each have a 4 anna share of the enjoyment of this village. The real facts appear to be that the three ladies lived together, the dominating personality, if any, among them being naturally the much senior widow Basanta. From these facts and specially from the records the appellant has stoutly argued that separation as a fact is proved. He forcibly founds upon the Settlement decree obtained by the three widows, passed by the Settlement Assistant Commissioner of Gonda, and dated the 6th of December, 1869. In this judgment that officer ordered that "a decree for superior proprietary right in favour of Rani and Maharani, wives of Sheo Dayal, and Mussammat Basanta, wife of Gokaran, be passed."

12. To this it is instantly answered, first, that to found upon that decree as either a root of a title or as conclusively settling it, is to mistake the true nature of the decree itself; and secondly, that the decree not only does not deal with other rights in the property, but expressly reserves these other rights.

13. On this latter point of reservation there can be no question. It is contained in gremio of the decree. It is no doubt true that, as already mentioned, the decree is in name for superior proprietary rights in favour of the widows, but it is expressly declared that that decree should "be passed subject to the rights of the other shareholders." If it be correct, as alleged by the appellant, that the property had at that time been de facto separated into one 8 *anna* and two 4 *anna* shares, and that this decree of December, 1869, was a de jure recognition of that fact, then the entirety of the property was disposed of, and language of reservation, or the mention of other shareholders, was hardly appropriate, but might be contended to be repugnant to the transaction which is pleaded.

14. In the opinion of their Lordships, the terms of this decree must be looked upon as a whole. When on the one hand it declares for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other shareholders, it completely conserves such reversionary and other ownership rights as are inherent in the succession to a joint family property and it negatives the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. In short, in the view of the Board this decree is not equivalent to an affirmation of a partition or separation having taken place but is entirely consistent with the existence of the property as joint and undivided, and therefore with no prejudice being effected to the right of the reversioner therein, who is represented by the respondent.

15. But the decree of December, 1869, has a much more solid value by the testimony which it itself affords of what was the true nature of the property and what was the exact point in dispute in the competition for it. There were three separate claims to the property. One was by Partab Bali and others. Their claim was got rid of (the Commissioner remarking that it would certainly have failed) by a small payment. The second claimant was Rai Sadhan Lal, and after inquiry it was found that his interference with the village was regarded as unlawful, and his claim completely failed. He had been *muafi* holder and his right expired with the settlement. The third party to the proceeding was the three widows, and their right without any question is dealt with as a right in ancestral property. "To the satisfaction of the Court" they "have been proved to be the old *zamindars*." Then an examination of the title is made, and it is solemnly affirmed:-

> "Let it be known that on their behalf a Birt Patra Sanad bearing the seal of Raja Dat Singh dated Jeth Sudi 2nd, 1128 Fasli has been produced, which shows that the villages Sonahra and Harsingpur were given by way of Birt to their common ancestor, Santokhi Avasthi, on Rs. 3,562. Its genuineness is proved.

16. and fourthly, it appears from the evidence on record that their ancestors always remained in possession within and beyond limitation; and lastly, that both the Summary Settlements were made with them."

17. It thus appears that the property was treated as *a unum quid*, as ancestral and as property to which, as an ancestral undivided property, the three widows vindicated their right. Upon the whole, this would have been sound evidence in any Court in favour of the continuance as and from that date of the property as joint and undivided. Their Lordships are of opinion that the Court of the Judicial Commissioner was right in so treating it.

18. The use of the term "superior proprietary rights" in the decree is, in their Lordships' opinion to distinguish these from any under-proprietary tenure and from any other inferior rights. In short, the possession by these ladies of the whole of the village among them was a broad fact which permitted the Government to make the entry in such a way as to have the full representation of the entirety of the village, with all the responsibilities attached to that representation, on the record. It is and has for many years, under the decisions been, acknowledged that even one or two names may be inserted as representatives of a community of ownership, the details of which need not be minutely recorded.

19. But, furthermore, it must be remembered that the policy set forth in Lord Canning's Circular of the 28th of January, 1859, in which it was stated that the rights conferred "on each holder of land or the free and incontestable grant from the paramount power and cannot be called into question by subordinate officers," and that the decision approved by the Chief Commissioner, "is considered to be final and lasting," was greatly modified as regards *zamindars* and others not being *taluqdars*. In a letter issued on the 10th of October, 1859, which was afterwards appended to Act I of 1860, it was directed :-

> "As regards *zamindars* and others, not being *taluqdars*, with whom a summary settlement has been made, the orders conveyed in the limitation Circular No. 31 of the 28th of January, 1859, must not be strictly observed, opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner."

20. The authoritative exposition of this subject was made in *Prince Mirza Jehan Kadr Bahadoor v. Afsar Bahu Begum*[1] and the passage rightly founded upon in the Court below from the judgment of the Privy Council as delivered by Sir Arthur Hobhouse, is here repeated :-

> "The first observation on these proceedings is that the settlement courts were clearly inquiring into the old titles, as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. Lincoln suggests, whether in 1863, that effect was realised to the minds of the Government Officers as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they inquired who would be entitled if no confiscation had taken place and effected settlements with those persons. Certainly that was the operation in which the three lower settlement courts were engaged with regard to Sohrawan when the case came before Sir Charles Wingfield as the highest Court of Appeal."

21. The Board does not think it necessary to enter upon much detail with reference to the enjoyment of the property in the time of Sheo Dayal, but they simply note that one document not without importance is printed applicable to the year 1861, that is to say, to the period after the death of Gokaran in 1858. It is dated the 31st of December,

1861, and is a copy of a Rubkar of the Collectorate of Gonda issued by Captain Ross. The plaintiff in the proceedings was Sheo Dayal himself; the defendant was Rai Sadhan Lal, already mentioned; and the judgment discloses as follows: that

> "on a perusal of the file it appears that Sheo Dayal Avasthi claims the lease (patta) of villages Sonahra and Harsingpur on the basis of the zamindari right set up by him, and by right of inheritance from Gokaran, deceased, with whom the villages were settled in 1857."

22. The language used is not strictly accurate. Sheo Dayal could not claim by right of inheritance, but solely by right of survivorship. But otherwise the proceeding is instructive. It contains a warning to the muafidar to respect Sheo Dayal's rights, and there is not a trace of question that that property was treated as having been succeeded to in its entirety by Sheo Dayal as successor to Gokaran.

23. There are further elements in the case which need not be dealt upon, as, for instance, a transaction by way of mortgage of the whole subject by the three widows themselves, in the year 1865. In this mortgage, dated the 9th of November of that year, the property is referred to simply as the village Sonahra, and it is mortgaged as "our ancestral *zamindar*i under a Birt Patra which has been in our possession and occupation without the co-partnership of anybody else from the time of our ancestors."

24. But the Board is unwilling to enter into further detail and contents itself with expressing the view that no partition or separation of this joint ancestral property has been proved. It should be said, however, that in December, 1871 when the sale deed now under challenge was executed, the very form of the deed is somewhat inconsistent with the transaction of shares of divided property The village is sold as "the entire village". No reference is made to shares of 8 *annas* or 4 *annas*. There are circumstances of considerable suspicion attached to the deed, and it seems somewhat surprising that Mathura Nath, their general agent, should not have incorporated in the deed some reference to this transaction of partition (if true) of which so much has been made in the subsequent proceedings.

25. The state of the records was much pressed upon the Board by the Counsel for the appellant, that is to say, the entries which were contained in the *Wajib-ul-arz* and in the *khewat* of the village. of the two the claim made with regard to the *khewat* is the stronger. Under the *wajib-ul-arz* entries it is pretty clear that the village was treated as a *unum* quid even although the shares in the possession were stated as so many *annas* respectively.

26. The Court of the Judicial Commissioner, which is no doubt acquainted with entries in such records, does not attach to them the importance which the appellant seeks, and the Board is of opinion that in this it was right. The broad question of partition of rights or separation of interests is not of course dealt with in such entries, and the inference of such a transaction from such records may be weak or may be strong according to circumstances.

27. Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the Law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records or even of the materials for the first entry Birdwood, J., in the Bombay case *Bhagoji v. Bapuji*[2] said as follows :-

> "At the rehearing the lower appellate Court should have its attention directed to the ruling in *Fatma v. Darya Saheb*[3] in which it was held that the Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person. "

28. and the Board refer in particular to the judgment of Sir John Edge in *Gajendar Singh v. Sardar Singh*[4]. "In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only to Allahabad but to other provinces in India as a whole. The main proposition is, of course, widely familiar, namely, that given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. The presumption is peculiarly strong in the case of the sons of one father." The learned Judge further refers to "experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares"; and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect :-

> "A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to

the presumption in law as to jointure, that the family to which such definition referred had separated."

29. The Board is, on a review of the whole of this case, of opinion that the presumption against partition of this ancestral property has not been overcome and that the property accordingly remains joint, with the consequence that the appeal fails. As to the attempted case of adverse possession by Basanta, it is, in their Lordships' opinion, wholly without foundation. On the facts disclosed as to the actual enjoyment of the property and the conduct of all parties, including Basanta, with regard to it, no plea of adverse possession could be successfully put forward.

30. Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

Appeal dismissed.

Cases Referred.

1. [1885] 12 Cal. 1 : 12 I.A.124 : 9 Jur.322 : 4 Sar. 630 (P. C.)
2. (1888) 13 Bom. 75
3. (1873) 10 Bom. H. C. 187
4. (1896) 18 All. 176 : 1896 A.W.N. 23