PRIVY COUNCIL

Shiba Prasad Singh

Vs.

Rani Prayag Kumari Debi

P.C.A Nos.7 of 1930, and 49 of 1922
(Lords Blanesburgh, Thankerton J. Salvesen, Sir John Wallis and Dinshah Mulla JJ.)

07.04.1932

JUDGMENT

SIR DINSHAH MULLA J.

1. 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, moveable 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 3rd November 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 17th August 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 7th March 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 27th August 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."

2. 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 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.

3. 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 5th August 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 6th March 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.

4. 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 and 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 lands...	Sch. ka 2-7
(3) Immovable properties acquired by the late Raja...	Sch. kha 1-8
(4) Improvments on the Raj estate...	Sch. kha 9-19
(5) Jewellery...	Sch. kha 20 (1-23)
(6) Furnishing and equipments of the palace etc...	Sch. kha 20(24-83) etc.
(7) Cash and deposits in banks...	Sch. kha, 21

5. the above, the plaintiffs claimed all other properties, both moveable 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 chat 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.

6. On his finding that the family was joint, the Subordinate Judge awarded to the

defendant the impartible estate (Sch. ka, 1), on the ground that he was entitled to it by survivorship, and the improvements on the estate (Sch. 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 (Sch. ka, 2-7), on the ground that they were incorporated with the impartible estate. As to the properties acquired by the late Raja (Sch. 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, 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, 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 that 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, Schedule kha are concerned."

7. As to the moveables, 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, 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., etc., in the Rajbari, as they would follow the estate."

8. 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 moneys which had accrued in the lifetime of the late Raja, but had been realized 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 moveable 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 favor 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 moveable 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.

9. The defendant accepted the concurrent findings against him as to the bantannamas 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, [*Nil Krishto Deb v. Bir Chunder Thakur*

10. 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*

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* and *Kawal Nain v. Prabhu Lal* Similar rules have been applied by the Board in the case of impartible estates. Thus in *Chowdhry Chintamun Singh v. Mt. Nowlukho Konrvari* 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 of 2 I. A.) :

> "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* where their Lordships said :
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> "The cases of *Girja Bai. v. Sadashiv Dhanjiraj* and *Kawal Nain v. Prabhu Lal (Supra)*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. 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."

11. The latest case on the subject is *Kanammal v. Annadana* 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* 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."

12. 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 (Supra), as understood by the Board in *Kanammal v. Annadana (Supra)*. It was accordingly argued, relying upon *Satraj Kuari v. Deoraj Kuari* that in the case of an impartible estate there was no co-ownership and therefore no jointness in estate ; that Baijnath's case (Supra)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 (Supra)actually decided.

13. The decisions prior in date to Baijnath's case (Supra), so far as they are material for the present purpose, fall to be divided into two classes, namely, (Supra)those relating to succession to an impartible estate, and (Supra) those relating to other rights in such estate. The first class begins with *Katamn Natchiar v. Rajah of Shivaganga [1863] 9 MIA 539 (PC)*. The question in that case was one of succession to an impartible zamindari, 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 zamindari was self-acquired property, but the judgment contains the following passages:

> " The zamindari is admitted to be in the nature of principality impartible, and capable of enjoyment by only one member of the family 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 Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject. Hence, if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the zamindari, 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 zamindar, at the time of his death, was separate in estate from his brother's family, the zamindari 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."

14. The Shiragunga case (Supra) 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 *Satraj Kuari v. Deoraj Kuari (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 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 (Supra)and the other cases following it were distinguished on the ground that the question in all these 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."

15. The decision in Sartaj Kuari's case was followed in *Rama Krishna Row v. Venkata Kumara Mahipati Surya Row (Supra)*, where the right of the last holder to alienate the estate by will was upheld, and in *Gangadhara Rama Row Bahadur v. Rajah of Pittapur* 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.

16. Then came Baijnath's case, 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 appellant would be entitled to succeed. It was argued for the appellants before the Board that Sartaj Kuari's case had established that there was no co-parcenary in an impartible estate,that decision was logically extended to the question of maintenance in *Gangadhara Rama Row v. Rajah of Pittapur* , and that it should be equally logically extended to succession ; in other words, that the estate should descend, not as co-parcenary, 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 Satraj Kuari'a 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."

17. Similar observations were made as to *Gangadhara Rama Row v. Rajah of Pittapur (Supra)*. It was also observed that it would have been possible to decide Satraj Kuari's case (Supra) 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 (Supra) re-affirmed 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* 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 *Rama Krishna Rao v. Venkata Kumara Mahipati Surya Row (Supra)*, 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 Satraj Kuari's case (Supra)and Rama Krishna. *Row v. Venkata Kumara Mahipati Surya Row (Supra)*had proceeded on the view that there was no co-ownership and therefore no right of survivorship in an impartible estate,that view was inconsistent with Baijnath's case (Supra) 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 (Supra)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 case (Supra) :

> "Where a custom is proved to exist, it supersedes the general law, which however still regulates all beyond the custom."

18. 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 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 Satraj Kuari's case and *Rama Krishna v. Venkata Kumara (supra)*, and so also the third as held in *Gangadhara v. Rajah of Pittapur (Supra)*. 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 co-parcener acquires by birth in joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. Nor is this right a mere spes successions 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 is an 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 of 19 Schedule kha. These improvements, in fact, form part of the impartible estate.

19. 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 *Parbati Kumari Debi v. Jagadis Chunder Dhabal* The contest there was as regards succession to an ancestral impartible estate and 4 mauzas that had been purchased on behalf of the last holder out of the savings of the estate. It was contended that the mauzas had been incorporated with the estate and therefore passed with the estate. 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 mauzas with the ancestral estate for the purposes of his succession. The four mauzas must therefore follow the rule of the Mitakashara as to self-acquired property."

20. The next case is *Janki Pershad Singh v. Dwarka Pershad Singh* 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 ***Pabati Kumari Debi v. Jagadis Chunder Dhabal (Supra)***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."

21. 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* Here again the properties were immovable. The last case cited before their Lordships was *Jagadamba Kumari v. Wazir Narain Singh (Supra)*. In that case the properties alleged to have been incorporated consisted partly of moveables 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 :

22. 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 moveable property as an accretion to landed estate of this character is a matter not arising for decision... In both *Janki Pershad Singh v. Dwarka Pershad Singh (Supra)* and Murtasa, *Husain Khan v. Mahomed Yasin Ali Khan (Supra)*, the addition of family property to the original raj is considered. Both these cases deals with property other than moveable 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."

23. 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 Ramasami v. Sundaralingasami (1894] 17 Mad 422*; *Sabajit Partap v. Indarjit Pertap [Gurusami Pandian v. Chinna Thambiar*. 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 Regns. 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 he supported.

24. The Mitakshara recognizes 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. 1, Section 4, verse 31."

25. 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. Goluck-money Dossee, [1843] 1 Fulton 165*.

26. 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* But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartibly 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 importable estate, may declare his intention to incorporate his self-acquired property with the impartibly 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 importable. 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 importable 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 importable 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 importable estate the property so incorporated is impressed with all the incidents which attach to an ancestral importable 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 importable estate is entitled to incorporate other properties belonging to him with that estate.

27. Lastly, it was argued that the holder of an importable 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 *Ganendro Mohan Tagore v. Juttendro Mohun Tagore case* 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 necessary to repeat what has already been said as to the incompetence 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."

28. Reliance was also placed upon a passage in *Rajindra Bahadur Singh v. Raghubans Kunwar, (at p. 143 of 45 IA)* 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."

29. In that case a taluk 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 taluk. This decision was followed

in a recent case, *Nawab Mirza Mohammad Sadiq Ali Khan v. Fakr Jahan Begam* 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 decent 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 Mitaksbara school of Hindu law. 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 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,* 30. Had the Raj been an estate granted by the Grown under a sanad subject to descent by primogeniture, as was the taluk 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 descendible 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 (Supra) does not apply nor the rule in Rajendra Bahadur's case (Supra). A similar conclusion was reached by the High Court of Madras in *Gurusami v. Chinna (Supra)* already referred to.

31. None of these considerations however apply to moveable 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 estateAs 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. 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 moveable property cannot. This leads to the consideration of the third question whether there was an incorporation in fact. The movables having been excluded the inquiry 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. (Their Lordships after considering evidence held) : 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 Son. kha, and that the Courts in India were wrong in rejecting his claim as to the latter items.

32. 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 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.

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

34. The defendant recovered after the death of the late Raja rents, royalties and other moneys 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 Civil Procedure Code, and that no cause of action in respect of the rents, royalties and other moneys 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, Schedule 1 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."

35. 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), Rule 4.

36. 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 bantannamu. (Their Lordships after holding that the sum was paid by the defendants to the plaintiffs and after considering other miscellaneous claims of both the parties proceeded.) 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, 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 Schedule 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

27th August 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.

37. That it should be declared that the defendant is entitled to credit for Rupees 48,249-3-9, with interest thereon at the rate of 6 per cent per annum from 5th August 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.

38. That it should be declared that the plaintiffs are entitled to all the furniture, furnishings and equipment 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.

39. 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.

40. 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.

41. On 2nd November 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 9th February 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.

Order accordingly.

Cases Referred.

[1869] 12 MIA 523=12 WR 21=3 BLR 13=2 Sar 467 (PC)] (at p. 540).

[1912] 35 All 80=16 OC 129=18 IC 30 =40 IA 40 (PC).

AIR 1916 PC 104=37 IC 321=43 IA 151=12 NLR 113=43 Cal 1031 (PC)

AIR 1917 PC 39=40 IC 286=44 IA 159=39 All 496 (PC).

[1875] 1 Cal 153=2 IA 263 (PC),

AIR 1923 PC 59=77 IC 1041=50 IA 1=2 Pat 319 (PC)

AIR 1916 PC 104=37 IC 321=43 IA 151=12 NLR 113=43 Cal 1031 (PC)

AIR 1928 PC 68=108 IC 354 = 55 IA 114=51 Mad 189 (PC),

AIR 1921 PC 62= 60 IC 534 = 48 IA 195=43 All 228 (PC),

[1888] 10 All 272=15 IA 51=5 Sar 139 (PC)

AIR 1918 PC 81= 47 IC 354 =45 IA 148=41 Mad 778 (PC),

AIR 1927 PC 159= 102 IC 599=54 IA 289=54 Cal 955 (PC).

[1902] 29 Cal 433 = 29 IA 82 = 8 Sar 205 (PC).

[1913] 35 All 391=40 IA 170=20 IC 73 (PC).

AIR 1916 PC 89=36 IC 299=43 IA 269=19 OC 290=38 All 552.

[1893] 16 Mad 54.

1905] 27 All 203=2 ALJ 720=(1905) AWN 244;

AIR 1921 Madras 340=61 IC 242=44 Mad 1

AIR 1923 PC 57=73 IC 252=50 IA 173=50 Cal 439 (PC).

[1872] IA Sup Vol 47=9 Beng LR 377=18 WR 359=3 Sar 82 (PC).,

AIR 1918 PC 25=48 IC 213=45 IA 134=21 OC 106=40 All 470 (PC)

AIR 1932 PC 13=136 IC 385=59 IA 1=6 Luck 556 (PC).

[1868] 12 MIA 397=1 BLR=10 WR 17=2 Sar 361 (PC).