SUPREME COURT OF INDIA

Thakore Shri Vinayasinhji

Vs.

Kumar Shri Natwarsinhji

C.A.No.2477 of 1972

(M. M. Dutt and M. H. Kania, JJ.)

18.11.1987

JUDGEMENT

DUTT, J.:-

1. This appeal by special leave is at the instance of the plaintiff-appellant, since deceased, and is directed against the judgment and decree of the Gujarat High Court reversing those of the Civil Judge, Senior Division, Himatnagar, whereby the learned Civil Judge decreed the suit instituted by the appellant.

2. The late Thakore Sartansinhji, the father of the appellant, was the Ruler of the former Mohanpur State situate in the district of Sabarkantha, Gujarat. After independence, the said Mohanpur State merged in the then State of Bombay (now the State of Maharashtra). The former Ruler, the father of the appellant, by a deed of gift dated May 14, 1951 gifted certain properties to his youngest son, the respondent No. 1 herein. By his will dt. May 22,1951, the former Ruler also bequeathed certain properties to the respondent No. 1 and his mother. The father of the appellant died on Dec. 9, 1955 and on his death the appellant became the Ruler. On May 10, 1956, the suit out of which this appeal

arises was instituted by the appellant challenging the validity of the said deed of gift and the will. In the suit, the case of the appellant was that as the rule of primogeniture applied to the Raj Estate, he being the eldest son succeeded to the 'Gadi'. It was contended that the former Ruler, that is, the father of the appellant, had no power of alienation either by gift or by will and, accordingly, the disposition made by him by the said deed of gift and the will in favour of his younger brother, the respondent 1, was illegal and invalid.

3. The respondents including the younger brother of the appellant, contested the suit, inter alia, denying that the former Ruler had no power of alienation as contended by the appellant. It was averred that the deed of gift and the will were perfectly legal and valid. The learned Civil Judge decreed the suit in part declaring that the deed of gift and the will were illegal and directed the respondent 1 to hand over to the appellant the possession of the properties which were all agricultural lands, as mentioned in the deed of gift. The learned Civil Judge passed a decree for mesne profit, but refused the prayer of the appellant for an injunction on the ground that the appellant had failed to prove his possession of the properties mentioned in the plaint.

4. Being aggrieved by the judgment and decree of the learned Civil Judge, the respondents preferred an appeal to the High Court. The High Court, after considering the facts and circumstances of the case and the evidence adduced by the parties, held that the former Ruler had the power of alienation and, accordingly, the deed of gift and the will impugned in the suit were legal and valid. The appeal was allowed and the judgment and decree of the learned Civil Judge were set aside. Hence this appeal by special leave.

5. During the pendency of the appeal in this Court, the appellant Thakore Harnathsinhji Vinayasinhji died on June 27, 1985 leaving behind him the present appellants, who were already on record, as his heirs and legal representatives.

6. It is not disputed that the Raj Estate, of which the deceased appellant was the Ruler, is impartible and that the rule of primogeniture, which is one of the essential characteristics of an impartible estate, is also applicable. The question that is involved in this appeal for our consideration is whether the holder of an impartible estate, to which the rule of primogeniture applies as an essential characteristic of such an estate, can alienate the properties comprised in the estate by a deed of gift or will. The legal position that prevailed up to 1888 was that a holder of an impartible estate could not transfer or mortgage such estate beyond his own life-time so as to bind the coparceners, except for purposes beneficial to the family and not to himself alone. In 1888, for the first time, in Rani Sartaj Kuari v. Deoraj Kuari, (1888) 15 Ind App 51 the Privy Council recognised the power of alienation by the holder of an impartible estate and held that such power of alienation could be excluded by custom or by the nature of the tenure. In that case, the Privy Council also took the view that in an impartible Raj Estate, the son is not a co-sharer with his father. This view, however, was not accepted by the later Privy Council decisions and it is now well settled that co-ownership of the joint family exists in impartible estate.

7. At this stage, it will be profitable for us to refer to the illuminating judgment of Sir Dinshah Mulla in the case of Shiba Prasad Singh v. Rani Prayag Kumari Debi, AIR 1932 PC 216. Sir Dinshah Mulla while delivering the judgment of the Judicial Committee of the Privy Council observed as follows :-

"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 (1888) 15 Ind App 51 and Rama Krishna v. Venkata Kumara (1899) 26 Ind App 83 (PC), and so also the third as held in Gangadhara v. Rajah of Pittapur, (1918) 45 Ind App 148 : (AIR 1918 PC 81). '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, (1921) 48 Ind App, 195 : (AIR 1921 PC 62). 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 is an ancestral impartible estate has ceased to be joint, A. 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."

8. The law has been clearly and succinctly stated in the passage extracted above. There is, therefore, no restraint on the power of alienation of the holder of the impartible estate, as any restraint on the power would be incompatible with the custom of impartibility. The impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property, except as regards the right of survivorship which is not inconsistent with the custom of impartibility. The right of survivorship has been held to be a birth right and is not a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate.

9. Mr. Dholakia, learned Counsel appearing on behalf of the appellants, does not dispute that the holder of an impartible estate has the power of alienation by transfer inter vivos. It is, however, submitted by him that he has no such power to make a disposition by a will which would affect the right of survivorship by birth of the junior members of the family, which is the only right that remains and, as recognised by the Privy Council in Shiba Prasad's case (AIR 1932 PC 216) (supra),

is not opposed to the custom of impartibility. It is submitted by the learned counsel that disposition by will is incompatible with the right of survivorship by birth. The right of the junior branch to succeed by survivorship to the Raj on the extinction of their senior branch has also been definitely and emphatically reaffirmed by the Privy Council in Collector of Gorakhpur v. Ram Sundar Mal, AIR 1934 PC 157. Counsel submits that the right of alienation by will and the right of survivorship by birth cannot co-exist and, as it is now a settled law that in an impartible Raj Estate, the right of survivorship by birth of the junior members to succeed to the estate still remains, it will be beyond the power of the holder of the estate to defeat such right by a will.

10. Attractive though the contention is, we regret we are unable to accept the same. It has been already noticed that in Sartaj Kuari's case (1888-15 Ind App 51) (PC) (supra) the right of alienation of the holder has been recognised and in Shiba Prasad's case (AIR 1932 PC 216) (supra) such right of the holder is reiterated. Impartibility is essentially a creature of custom which supersedes the general law. It is true that the impartible estate retains the character of joint family property only to the extent that there is a right of survivorship by birth to the junior members of the family but, as the Privy Council has observed in Shiba Prasad's case (supra) that in all other respects it is clothed with the incidents of self-acquired and separate property, so it follows that the holder of the impartible estate has the unlimited right of alienation not only by transfer inter vivos, but also by will. When the holder has the power to dispose of the estate during his lifetime, it would be quite illogical to hold that he would not have the power of disposition by a will.

11. It is, however, submitted that no assumption should be made of the power of disposition by will from the existence of the power of the holder to alienate during his lifetime. In support of this contention, the learned Counsel for the appellants has placed reliance upon a decision of this Court in Chinnathayi v. Kulasekara Pandiya Naicker, 1952 SCR 241 : (AIR 1952 SC 29) where it has been observed by Mahajan, J. in delivering the judgment of the Court, that in the case of an impartible estate the power to divide it amongst the members does not exist, though the power in the holder to alienate it is there, and from the existence of one power the other cannot be deduced as it is destructive of the very nature and character of the estate and makes it partible property capable of partition. We do not think that the said observation bears any analogy to the contention made on behalf of the appellants. In that case, this Court was concerned with the question whether the holder of an impartible estate could divide the estate amongst the members. In laying down that there is no such power of division, this Court has pointed out that such a power would be contrary to the nature and character of the estate, that is to say, the impartibility of the estate. In the instant case, the question is whether the holder has power of disposition by will. The power of alienation, as already noticed, has been recognised without any reservation inasmuch as such power is not incompatible with the impartibility of the estate. The rights which are available to the members of the Hindu joint family under the Mitakshara law have been curtailed to a great extent, as most of the said rights would be inconsistent with the nature and character of the estate. Chinnathayi's case (supra) lends no support to the contention of the appellants.

12. We may now consider a later decision of the Privy Council in Sri Raja Rao v. Venkata Kumari, (1899) 26 Ind App 83. In that case, the Privy Council considered the question of extension of the

decision in Sartaj Kuari's case (1888-15 Ind App 51) (supra) to a will and it was held "If the Rajah had power to alienate, he might do it by will and the title by the will would have priority to the title by succession." As the case before the Privy Council related to an impartible Raj Estate, succession to the estate would be by survivorship. The Privy Council, however, took the view that title by will would have priority to the title by succession. In other words, it follows that the holder of the Raj Estate can defeat the right of survivorship by disposing of the estate by a will. The learned counsel for the appellants, however, submits that in laying down that an impartible Raj Estate is alienable by a will, the Privy Council proceeded on the basis that there was no right of survivorship by birth. We are afraid, we are unable to accept this contention. It is true that the Privy Council in that decision has not referred to the right of survivorship of the junior members of the family, but it should not be assumed that the Privy Council was not aware of the legal position that in an impartible Raj Estate the junior members would succeed to it by survivorship. Raja Rao's case (supra) is, therefore, an authority for the proposition that a holder of an impartible estate cannot only dispose of the estate by transfers inter vivos, but also by a will and that when such a disposition is made by a will, it defeats the right of survivorship.

13. It is submitted by the learned counsel for the appellants that in extending the decision in Sartaj Kuari's case (1888-15 Ind App 51) (supra), the Privy Council in Raja Rao's case (1899-26 Ind App 83) (supra) did not give any reason for extending the power of alienation of the holder of an impartible estate to alienation by a will, thereby defeating the right of survivorship by birth, which is the only right that is available to the junior members of the family. It may be that no reason has been given by the Privy Council but, at the same time, there is also no reason why when the holder is entitled to dispose of the estate during his lifetime, he is not so entitled to dispose of the same by a will.

14. Our attention has been drawn by the learned Counsel for the appellants to a decision of the Privy Council in Seth Lakhmi Chand v. Mt. Anandi, AIR 1926 PC 54. In that case, the question that arose was whether a member of a joint Hindu family could make a disposition by a will or not. The Privy Council relied upon the following observation made in its earlier decision in Lakshman Dada Naik v. Ramchandra Dada Naik, (1879-80) 7 Ind App 181 :-

"Its, the High Court's, reasons for making distinction between a gift and a devise are that the coparcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate".

It is submitted on behalf of the appellants that the same principle against alienability by will by a coparcener should also be applied to an, impartible estate, otherwise it will defeat the right of survivorship by birth which is the only right that is conceded to in favour of the junior members of the joint Hindu family. The decision in Lakhmi Chand's case (supra) or in Lakshman Dada's case (supra) does not relate to an impartible estate, but to a coparcenary property and, accordingly, the

principle of law that is applicable to a coparcenary property or to the coparceners is inapplicable to an impartible estate or to the holder thereof except, as has been noticed earlier, that an impartible estate is considered to be a joint family property to the extent of the junior members succeeding to the estate by right of survivorship. Similarly the decision of this Court in M. N. Aryamurthi v. M. L. Subbaraya Setty, AIR 1972 SC 1279 relating to coparcenary property has no application to the instant case.

15. It is urged on behalf of the appellants that to hold that the holder of an impartible estate has the power of disposition by a will defeating the right of survivorship would be quite illogical. It may be that the holder of an impartible estate can defeat the right of survivorship by leaving a will and such right cannot be said to have been founded on any logical basis. But, it has to be borne in mind that the whole concept of impartibility is a creature of custom including the right of alienation of the holder of such estate. In matters of custom, it is hardly possible to justify every incident on some logical basis.

16. Much reliance has been placed by the learned counsel for the appellants on the decision of the Privy Council in Baijnath Prasad Singh v. Tej Bali Singh, AIR 1921 PC 62 where it has been ruled that the fact that a Raj Estate is impartible does not make it a separate or self-acquired property. It is submitted that if the impartible estate is not a separate or self-acquired property, as held by the Privy Council, how then a holder of such an estate will have the power of disposition by a will. There can be no doubt that an impartible estate is not a separate or self-acquired property of the holder thereof, but it has been observed by Sir Dinshah Mulla in Shiba Prasad's case (AIR 1932 PC 216) (supra) that it is clothed with the incidents of self-acquired and separate property. One of such incidents is that the owner is entitled to dispose of the same in whatever manner he likes either by a transfer during his life time or by a will. The contention of the appellants proceeds on the assumption that the right of survivorship is an immutable right and cannot be defeated by the' disposition by a will.

17. Mr. Mehta, learned Counsel appearing on behalf of the respondents, has invited our attention to a statement of law in Mulla's Hindu Law, Fifteenth Edition, Para 229(2) to show that a right of survivorship of a coparcener can be defeated in certain cases. Para 229(2) is as follows :-

"Para 229(2). The right of a coparcener to take by survivorship is defeated in the following cases :-

(i) Where the deceased coparcener has sold or mortgaged his interest, in States where such sale or mortgage is allowed by law;

(ii) Where the interest of the deceased coparcener has been attached in his lifetime in execution of a decree against him. A mere decree obtained by a creditor, not followed up by an attachment in the

lifetime of the debtor will not defeat the right of survivorship, unless the judgment-debtor stood in the relation of father, paternal grandfather or great-grandfather to the surviving coparceners. This rule must be read subject to the provisions of Ss. 6 and 30 of the Hindu Succession Act, 1956, in cases where those sections are applicable;

(iii) Where the interest of the deceased coparcener has vested in the Official Assignee or Receiver on his insolvency. On the annulment of insolvency the interest which vested in the Official Receiver revests under S. 37 of the Provincial Insolvency Act in the insolvent and if on that date he is not alive, it goes to his heirs under the law."

18. Thus, the right of a coparcener to take by survivorship can be defeated under certain circumstances, as enumerated in Mulla's Hindu Law in the passage extracted above. In para 587 of Mulla's Hindu Law, it is stated that an impartible estate is not held in coparcenary, though it may be joint family property. Indeed, this proposition has not been disputed by either party in this appeal. When under certain circumstances the right of a coparcener to take by survivorship can be defeated, no exception can be taken, if the right of survivorship of junior members of an impartible estate to succeed to it is defeated by the holder thereof by disposition by a will.

19. The same principle as laid down in Raja Rao's case (1899-26 Ind App 83) (supra) has been reiterated by the Privy Council in a later decision in Protap Chandra Deo v. Jagadish Chandra Deo, (1927) 54 Ind App 289 : (AIR 1927 PC 159). In this case it has been ruled by the Privy Council that the holder of an impartible Zamindari can alienate it by will, although the family is undivided, unless a family custom precluding him from doing so is proved.

20. In Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Marine Sultan Bahadur v. Shri Pushavathi Visweswar Gajapathi Raj, (1964) 2 SCR 403 : (AIR 1964 SC 118) it has been held by this Court that it must be taken to be settled that a holder of an impartible estate can alienate the estate by gift inter vivos, or even by a will, though the family is undivided; the only limitation on this power would flow from a family custom to the contrary or from the condition of the tenure which has the same effect. The same principle of law has been reiterated by this Court in Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo, (1982) 1 SCR 417 : (AIR 1981 SC 1937). In view of the above Privy Council decisions and of the decisions of this Court, it must be held that the holder of an impartible estate has the power of alienation not only by transfer inter vivos, but also by a will, even though the disposition by will may altogether defeat the right of survivorship of the junior members of the family.

21. The only question that remains to be considered by us relates to the alternative plea of the appellants that by virtue of a family custom the holder of the impartible estate, with which we are concerned, had no power of alienation either by a transfer inter vivos or by a will. In support of this contention, our attention has been drawn on behalf of the appellants to a few correspondence

between the original appellant, since deceased, and the political agent of the Mohanpur State. Before considering these correspondences, a few facts are necessary to be stated. In 1938, the former Ruler, that is, the father of the deceased appellant, during his lifetime gifted certain villages and properties by way of jiwai (maintenance) to his younger son. In that connection, some correspondence ensued between the appellant and the political agent of the State. Before such a gift was made by way of jiwai to the younger son, the original appellant by his letter dt. Aug. 1, 1937 drew the attention of the political agent of the State to the proposed jiwai worth, according to him, Rs. 10,000/-. It was slated in the said letter that despite his pointing out to his father that the proposal of jiwai was too big in proportion to the annual revenue of the State which was about Rs. 60,000/-, his father turned a deaf ear to his earnest entreaties not to make such a jiwai. In that letter, it was stated by him that "big jiwai was proposed contrary to the prevailing practice in all the States and Talukas of this Agency and the past precedent of the State". In reply to the said letter the political agent, by his letter dt. Aug. 13, 1937, informed the appellant that he would not sanction any grant which the former Ruler wished to make to his younger son without any previous discussion with the appellant. The appellant also had written to his father on June 26, 1938, inter alia, stating that "whatever he wished to give him is excessive in proportion to the income of the State and it is unreasonable and against the practice and rules prevailing in the State". The political agent, it appears, refused to sanction the proposed jiwai. Further, it appears that, the appellant had given consent to the execution by his father of a deed of gift dated February 9, 1940 in favour of his younger brother for his jiwai. The political agent granted sanction to the said deed of gift, as it was with. the consent of the appellant.

22. The appellants have placed much reliance upon the above documentary evidence in proof of their contention that there was a family custom prohibiting alienation by the Ruler of the State. The correspondence related only to the question of granting jiwai to the younger son of the former Ruler. It would appear from the correspondence that the entire attempt of the appellant was against the quantum of maintenance that was proposed to be granted by the Ruler to his younger son. It was not the contention of the appellant that in view of a family custom, the Ruler had no right of alienation, but his case was that in view of the annual revenue of the State the quantum of the jiwai would be out of proportion. It was only on this ground that he protested against the proposed jiwai. We do not think that the correspondence referred to above prove any custom of inalienability of the impartible estate.

23. It is submitted on behalf of the appellants that as there was no instance of alienation till before the impugned deed of gift and the will, it should be presumed that there was a family custom of inalienability of the estate. More or less, a similar contention was made before the Privy Council in Protap Chandra Deo's case (AIR 1927 PC 159) (supra) that the absence of any instance of a will purporting to dispose of the estate was itself sufficient evidence of the custom of inalienability of the estate. The said contention was overruled by the Privy Council. There must be some positive evidence of such a custom. Mere absence of any instance of alienation will not be any evidence of custom. Moreover, as noticed already, the correspondences which are being relied upon as the evidence of the alleged family custom of inalienability are far from being such evidence, for the only question that formed the subject-matter of all this correspondence related to the propriety of the quantum of jiwai. Accordingly, we hold that the appellants have failed to prove that there was any family custom of inalienability of the estate. No other point has been urged in this appeal by either

party.

24. For the reasons aforesaid, the judgment and decree of the High Court are affirmed and this appeal is dismissed. There will, however, be no order as to costs in this Court.

Appeal dismissed.