Dattatraya Alias Prakash and Others

Vs

Krishna Rao Alias Lala Saheb Baxi through Lrs. and Others

Civil Appeal No. 1072 of 1976

(N.M. Kasliwal, K. Ramaswamy JJ)

20.08.1991

JUDGMENT

K. RAMASWAMY, J. –

1. This appeal by special leave under Article 136 of the Constitution of India arises against the decree and judgment dated February 2, 1978 in First Appeal No. 10 of 1966 of the M.P. High Court at Gwalior Bench. Krishna Rao @ Lala Saheb, fro short "respondent" laid the Civil Suit No. 9-A of 1962 before the Additional District Judge, Gwalior for partition of the plaint schedule 1 to 3 properties in equal moiety and allotment of one such share to him. Pending this appeal he died and his legal representatives are on record. The trial court by its judgment and decree dated January 31, 1966 granted preliminary decrees for partition of half share in schedule 1 and 2 and half share in the movable property, namely compensation amount, jewellery and utensils as found in the inventory prepared by the Nazir except the stridhana property of defendant 3 i.e. mother of appellants 1 and 2. The High Court while confirming the decree of the trial court directed the respondent to bring into hotchpotch his jewellery and the appellants to have a half share therein and dismissed the appeal and the cross objections.

2. The admitted facts are that one Ghanshyam Sadashiv Baxi Saheb, for short 'Ghanshyam 1' was the common ancestor. He had two sons by name Yesaji 1 and Phatoji. Yesaji 1 had a son by name Ramakrishna, whose son was Yesaji @ Baba Saheb for short Yesaji 2. Yesaji 2 rendered meritorious military service to Ranaji Scindhia and in recognition thereof the Raja of Gwalior granted permanent jagir of Chandupura village under Ex. D-20, together with the buildings situated in 100 bighas of land and the residential bada with right of enjoyment and succession from generation to generation. By virtue thereof the ownership, possession and enjoyment was continued successively for seven generations up to Dwarkanath by rule of primogeniture. Ghanshyam @ Tatya Saheb for short Ghanshyam 2 had two sons by name Dattatraya Rao @ Bapu Saheb for short Dattatraya 1 and the respondent. Dwarkanath was the son of Dattatraya 1. The appellant, Dattatraya @ Prakash and Pradip @ Anil, appellants 1 and 2 are sons of Dwarkanath. Aruna Bai, defendant 3 is his widow. Ghanshyam 2 died on June 20, 1909. Dattatraya 1 died on February 6, 1926 and Dwarkanath died on May 19, 1956.

3. Dwarkanath being minor on his succession to the estate the court of wards took over management and the respondent was appointed as a Superintendent. On death of Dwarkanath since appellants 1 and 2 were minors Aruna Bai, their mother, initially managed the estate with the assistance of the respondent. Subsequently the respondent came into full control and management till date of suit. The respondent filed the suit for partition in the year 1962 pleading that all the plaint schedule 1 to 3 properties are coparcenary and he is entitled to a half share therein. The respondent received

maintenance from jagir income at the rate of Rs 125 per month.

4. In the written statement, the appellants, while admitting the geneology, their residential house at Gwalior as ancestral, they disputed the nature of the properties as joint family, status of the respondent and the appellant as coparceners. They admitted that till death of Ghanshyam 2 in 1909 the family was joint and thereafter they were separated by mess and residence in the year 1929. The house M. No. 626 Holka No. 101 at Gwalior was the residential old house but the verandah and two rooms on both sides were constructed by Dattatraya 1. The shops in the back side of iron gate at Kampoo Road were not existing during life time of Ghanshyam 2, but the lands were purchased by Dattatraya 1 with the jagir income and the shops and the rooms were constructed with the jagir income. It was also pleaded that four shops situated on eastern side of iron gate were constructed by the appellants' mother from the compensation of the jagir lands and the personal amount belonging to them. Jeherin Araji lands were purchased by Dattatraya 1 from his personal amounts. The room situated on eastern side of Shashikala Ranglekar was purchased and constructed during the minority of Dwarkanath from the income of the jagir. The property adjacent to the gate on the north of the bada namely two rooms, gate the pucca house along with the well were constructed from the income of the jagir by Dattatraya 1. The pator on the south side of the staircase was constructed by Dwarkanath from jagir's income. Pucca walls adjacent to the quarters and the southern side of the main residential bada are estate properties and as per law and custom of Gwalior State Dwarkanath became the owner of the property. The respondent has no right to a share but had only right to maintenance. After the death of Ghanshyam 2 the respondent continued to receive maintenance from his brother Dattatraya 1 who continued in possession and enjoyment of the jagir as his personal property. The respondent had right to share only in the private property. The residential house except verandah and two rooms shown as Nos. 1, 2 and 3 in the enclosed map belong to the family and those three items belong to Dattatraya 1. Accordingly it is their plea that the jagir being impartible estate is the separate and self-acquired properties of Dattatraya 1 and Dwarkanath by rule of primogeniture and the concept of coparcenary and joint family status are inapplicable to it. The respondent has no share therein, but has only right to maintenance as a junior member of the family as per the law and custom of Gwalior State. It was further pleaded that the respondent and his wife were given jewellery at the time of their marriage. The jewellery found by Nazir belong to the family of the appellants and some of them are stridhana of defendant 3. The respondent is not entitled to any share therein or in the utensils.

5. The trial court found that till date of death of Ghanshyam 2 in 1909, he was jagirdar, Dattatraya 1 and Dwarkanath succeeded as jagirdars by rule of primogeniture. After the abolition of the jagir compensation was paid to Dwarkanath during his lifetime as the eldest member of the family, and appellant 1 also had been paid balance of the compensation. If a joint family possesses property which was admittedly joint the presumption would be that the property continued to be joint and the burden lies upon the member who claims as separate property to plead and prove it as separate or self-acquired property. The respondent was living jointly with his brother Dattatraya 1. Number of sale deeds show the purchase made by Dattatraya 1; that old pators and two shops were remodelled by the court of wards. The purchase of the plots by Dattatraya 1 and constructions made thereon by him on the ancestral lands are the joint family properties. The bada at Gwalior is the residential house and was not a part of the grant in Ex. D-20. Therefore, the residential bada on the Kampoo Road is an ancestral property of the family. Whatever accretions were made therein must be deemed to be incorporated for the benefit of the family unless it is specifically shown that it was self-acquired and separate property by Ghanshyam 2 or Dattatraya 1 or Dwarkanath. After the abolition of the jagir Dwarkanath received compensation. The four shops constructed also form joint family property. The properties given under Ex. D-20 in the village Chandupura are the jagir properties.

This is also ancestral and impartible property. There is no evidence to show that out of the jagir income received, any property purchased or constructed were kept as separate properties. Therefore, whatever accretions were made by Dattatraya 1 or Dwarkanath or Aruna Bai are joint family properties. It was also found that the respondent did not make any contribution, nor improved the properties. As there is no evidence to show that Dattatraya 1 treated the income of the property as his separate income, the plaint schedule 1 properties are ancestral properties. The jagir compensation received from time to time also form the joint family properties. The relations between the family was smooth and cordial till 1962. There was no partition earlier thereto. Merely because succession to the jagir was governed by the rule of primogeniture, it did not clothe the jagir with the incidence of separate and self-acquired property. Therefore, they are joint family properties liable to partition. The jewellery except the stridhana of defendant 3 are joint family properties. The High Court substantially upheld the findings of the trial court. It held that rule of primogeniture and survivorship was introduced by the Manual of Jagirdars of the Gwalior State (Qwaid Jagirdaran) in the year 1913 (Samwat 1970) and with the abolition of the jagir in 1951 under the Madhya Bharat Abolition of Jagir Act 28 of 1951 (Samwat 2008) for short 'the Act', the properties became the ancestral Hindu Joint Family properties and they are partible, irrespective of the fact in whose name it was entered either as bhumidar in revenue papers or jagirdar. The rooms constructed in the ancestral bada are accretions to the ancestral house and became part and parcel of it. There is no evidence that the money spent for construction came from separate or own funds of the appellants. All the rooms became accretions to the ancestral property and became joint family property. The jewellery are joint family properties to the extent found by the trial court and are liable to partition. The compensation paid under the Act also belongs to the joint family property. It directed to bring into hotchpotch the jewellery of the respondent for partition in equal shares.

6. Shri T. U. Mehta, learned senior counsel for the appellants, contended that the courts below erred in holding that the properties are joint family properties, liable to partition. Since it is a jagir grant, as per the custom and law, the eldest made member succeeds by rule of primogeniture and survivorship. Therefore, they are the separate properties of the eldest descendant, subject to right of maintenance by the junior members of the family. Despite they being members of the undivided Hindu Joint Family, the concept of coparcenership cannot be applied to jagir estate. The respondent having had the benefit of maintenance right through, is not entitled as coparcener to a partition of the plaint scheduled properties as the joint family properties. The jewellery are the exclusive property of the appellants/defendants.

7. Shri Bobde, learned senior counsel for the respondent argued that though the jagir was granted to the named individual, the recitals therein unmistakably point to the fact that, it is to be enjoyed by the family from generation to generation. It would, therefore, be the coparcenary property. Appellants and the respondent being governed by the Mitakshara law are entitled to equal moiety. The jewellery is the joint family property. There is no partition at any time. It was further contended that after the abolition of the jagir under the Act, Dwarkanath or appellants received compensation and the properties were acquired from the income of the compensation. The properties, therefore, are impressed with joint family character and are partible. Thus the decree for partition is not illegal.

8. The facts, as found or not disputed in the pleadings, are thus : Admittedly, Chandupura village was granted as jagir under sanad (Ex. D-20) and thereafter the family lived in Gwalior for several generations in the bada. Certain accretions or incorporations were made to the properties of the family from out of the income derived from the estate or compensation received under the Act. Dattatraya 1, Dwarkanath and defendant 3 improved the properties. The respondent, right through,

received maintenance from the estate and did not contribute anything for the improvement of the estate. He had his education from the maintenance granted from the estate and became a Judicial Officer. After the abolition of the jagir under the Act compensation received also was used to build shops. The jagir remained indivisible and impartible and devolved successively for seven generations on the eldest male lineal descendant and it continued till Dwarkanath's death in 1956. They are governed by Mitakshara Hindu law and rule of primogeniture. Under the Act the jagir lands were resumed and jagir was abolished. During the management of the estate by the court of wards, the respondent admittedly worked as Superintendent. The family remained undivided till date of suit. There is no evidence that any jagirdar in particular, Dattatraya 1 or Dwarkanath treated the accretions as separate or self-acquired property.

9. From these facts the question emerges whether the plaint schedule properties are coparcenary. In our view, the courts below fell in serious misconceptions of law. Qwaid Jagirdaran only recognised and reiterated the existing law or custom of impartibility and indivisibility of jagir, etc. and succession by rule or primogeniture. High Court also committed error in holding that impartibility came to an end with the abolition of jagir under the Act and that earlier thereto and subsequent to the Act the properties were coparcenary. Neither court appreciated the correct legal position.

10. In Chapter 25 of Mayen's Hindu Law, (12th edn. at page 1065, paragraph 744) it is stated that liability to partition is an ordinary feature of joint family property, but it must not be supposed that joint property and partible property are mutually convertible terms. If it were so, an impartible estate could never be joint property. There are estates which by special law or custom descend to one member of the family, generally the eldest, to the exclusion of the other members and which are impartible, though they are joint property, in the eye of the law, belonging equally to the either members; and their rights are hedged in by a number of restrictions or limitations. The common instances of this class are the ancient zamindaries... or feudatory estates held on military service tenure such as.. royal grants.. services such as jagirs....

11. In Baijnath Prasad Singh v. Tej Bali Singh [48 IA 195 : AIR 1921 PC 62 : 23 Bom LR 654] the Judicial Committee held that succession to impartible estate will be regulated according to the ordinary rule of Mitakshara law and that the respondent being a person who in joint family would, being eldest of the senior branch, be head of the family, is the person designated in this impartible estate to occupy the gaddi. Accordingly it was held that rule of primogeniture would apply and not the ordinary rule of Mitakshara law of survivorship that would be applicable to impartible estate.

12. In Katama Natchier v. Rajah of Shivagunga [(1863) 9 Moore IA 543 (PC)] the Board held that the Zamindari is admitted to be in the nature of a Principality, impartible and capable of enjoyment by only one member of the family at a time and that therefore Mitakshara law of succession of the eldest male member would be applicable. In Sartaj Kuari v. Deoraj Kuari [15 IA 51 : ILR 10 All 272 (PC)] the Board held that there was no coparcenary in impartible estate. Protap Chandra Deo v. Jagdish Chandra Deo [54 IA 289 : AIR 1927 PC 159 : 31 CWN 943] ruled that there is no co-ownership in an impartible and that, therefore, no right of coparcenary survivorship would arise in an impartible estate.

13. In Anant Bhikkappa Patil v. Shankar Ramchandra Patil [AIR 1943 PC 196, 201 : 70 IA 232 : 48 CWN 94] it was held that : (AIR p. 201)

> "Now an impartible estate is not held in coparcenary, though it may be joint family property. It may devolve as joint family property as separate property of the last male

> owner. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g., lineal male primogeniture. In the latter case, jointness and survivorship are not as such in point; the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom."

In Amarendra Man Singh Bhramarbar v. Sanatan Singh [60 IA 242 : AIR 1933 PC 155 : 1933 ALJ 710], it was held that the zamindari property belonged to the adopted son as to the last male owner.

14. Thus it is settled law that succession to an impartible estate is governed by rule of primogeniture and the eldest male member of the family would succeed by survivorship to the impartible estate. It is seen from the record and it is not controverted even across the bar that for seven successive generations, the jagir estate descended on the eldest male member of the family by rule of primogeniture.

15. The question then is whether the jagir is partible as Hindu Joint Family property. In Shiba Prasad Singh v. Rani Prayag Kumari Debi [59 IA 331, 351 : AIR 1932 PC 216 : 63 MLJ 196] relied on by Sri Mehta, Sir Dinshaw Mulla, speaking for the Board held that impartibility is essentially a creation 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 and the third are incompatible with the custom of impartibility. To this extent the general law of 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 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 birthright of the senior member to take by survivorship still remains. Nor is this right a mere succession 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. Therefore, 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.

16. In Chinnathayi & Veeralakshmi v. Kulasekara Pandiya Naicker [1952 SCR 241 : AIR 1952 SC 29] this Court held that the right to bring about partition of an impartible estate cannot be inferred from the power of alienation that the holder thereof may possess. In the case of an impartible estate the power to divided it amongst the members does not exist, though the power in the holder to alienate it is there. This Court further held that : (SCR pp. 260-61)

> "To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case, it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The

> test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and intention to impress upon the zamindari the character of separate property."

17. In Shiba Prasad Singh case [59 IA 331, 351 : AIR 1932 PC 216 : 63 MLJ 196] it was further held thus : (AIR p. 224)

> "Surely then the property will pass not as his separate property but by survivorship as joint property - devolution by survivorship being another incident of an impartible estate. The fact is that when self-acquired property is incorporated with an ordinary joint family estate the property so incorporated is impressed with all the incidents which attach to an ordinary joint family estate and when self-acquired property is incorporated with an ancestral impartible estate the property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate. The mere possibility therefore of the holder alienating the property after incorporation is no reason for denying to him the power which the Hindu Law gives him of changing the mode of descent to this property. Nor is there anything in that rule of law which is inconsistent with the custom of impartibility."

18. Accordingly it must be held that the impartible estate, though descends by rule of primogeniture and survivorship on the eldest male member of the family, it must also be proved that the junior members gave up expressly or by implication his right to a share therein.

19. The further question is whether it is competent to the holders of an ancestral impartible estate to incorporate with the estate other properties acquired or incorporated by him or them with the income of the impartible estate. In Smt Rani Parbati Kumari Debi v. Jagadis Chunder Dhabal [29 IA 82 : ILR 29 Cal 433 (PC)] the question was regarding succession to an ancestral impartible estate and four mauzas that had been purchased on behalf of the last holder out of the savings of the estate. The Board held that there must be evidence to establish the intention of the holder express or implied to incorporate the property as part of the estate. Though the collection of the rents was by the estate servant and the papers were kept in the estate, the Board held that the evidence was not sufficient to hold that the Raja intended to incorporate the four mauzas with ancestral estate for the purpose of his succession. The four mauzas must, therefore, follow the rule of Mitakshara as to self-acquired property. In Janki Pershad Singh v. Dwarka Pershad Singh [40 IA 170 : ILR 35 All 391 (PC)] the movable and immovable properties were acquired from the income of the estate and were incorporated as part of the estate, yet the Board held that the question whether the properties acquired by an owner becomes part of the ancestral estate for the purpose of the succession would be considered from the intention of the holder of the estate. It was held, on facts, that no sufficient evidence was adduced to establish such an intention. In Murtaza Husain Khan v. Mohd. Yasin Ali Khan [43 IA 269 : AIR 1916 PC 89 : 18 Bom LR 884] as regards immovable properties the same view was reiterated. In Rani Jagdamaba Kumari v. Wazir Narain Singh [50 IA 1 : AIR 1923 PC 59 : 25 Bom LR 676] the Board held that the income of ancestral impartible estate was the absolute properties of the owner of the estate and not an accretion to the estate as in the case of ordinary joint family estate. While reversing the judgment of the High Court it held : (IA p. 7)

> "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 mixed 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."

20. In Rani Jagdamba Kumari case [50 IA 1 : AIR 1923 PC 59 : 25 Bom LR 676] the Board held that the income received is the absolute property of the owner of the impartible estate and it does not attach to the estate as does the income of ordinary ancestral estate attaches to the estate. While immovable property can be impressed with the impartible estate "movable property cannot". It was further held that the income received is the absolute property of the owner of the estate it derives from and in no way differs from the property he might have by his won saving. It is a strong assumption to make that the income of the property of that nature is so affected by the sources from which it came that it still retains its original character. In CIT v. Hon'ble Sri Ravu Swetachalapati Ramakrishna Ranga Rao, Rajah of Bobbili [AIR 1937 Mad 515 : 5 ITR 78 : (1937) 1 MLJ 707 (FB)] the Full Bench held that the income received by the holder of the impartible estate was not received as a member of the Hindu Undivided Family. The income is has and the junior members have nor right therein. In Shiba Prasad case (1932), [29 IA 82 : ILR 29 Cal 433 (PC)] the Board held that it is; possible to incorporate immovable property as a part of the estate, but movable properties are the separate properties and they cannot be incorporated and the doctrine of incorporation does not apply in the words thus : (AIR p. 226)

> "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.'"

21. In CIT v. Dewan Bahadur Dewan Krishna Kishore, Rais, Lahore [AIR 1941 PC 120 : (1941) 9 ITR 695 : 44 BLR 196] Sir George Rankin speaking, for the Board, held that when in a family governed by the Mitakshara, by custom the rule of primogeniture controls the devolution of impartible property, the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom; hence the estate retains its character of joint family property and devolves by the general law upon the person who, being in fact and in law joint in respect of the estate, is also the senior member in the senior line. Hence a holder of the estate receiving income from house property cannot be said to be the owner of such property. It is the joint family that is the owner and, therefore, he cannot be assessed as an individual in respect of such income.

22. In Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur v. Pushavathi Visweswar Gajapathi Raj [(1964) 2 SCR 403 : AIR 1964 SC 118], it was held that immovable property subsequently acquired also would become impartible and ceases to be partible and becomes impartible but the theory of incorporation cannot apply to movable property. In case there is a family custom even in respect of movable properties, as per the custom those movable properties also become part of impartible estate. Incorporation is a matter of intention. It is only where evidence has been adduced to show the intention of the acquirer to incorporate the property acquired by him with the impartible estate of which he is the holder, then an inference can be drawn about such incorporation. The question, therefore, is one intention of acquirer. By custom in the family the jewellery would be treated to form part of the regalia which belong to the holder of the estate and then would form part of impartible estate. In that case as per custom in the family certain

jewellery were treated as part of impartible estate and belonged tothe estate.

23. The income of an impartible estate, thus is not income of the undivided family but is the income of the present holder, notwithstanding that he has sons or brothers from whom he is not divided. The fact that the son's or brother's right to maintenance arises out of the eldest brother's possession of impartible estate and is a right to be maintained out of the estate, does not make it a right of a unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the holder's income. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable nor can it be said that the respective chances of each son to succeed by survivorship make them all co-owners of the income with their father or make the holder of the estate a manager on behalf of a Hindu family of which he and they are the male members of the family.

24. It is equally well settled law that the holder of impartible estate can incorporate other properties belonging to him with the estate so as to make them also impartible and descendable to a single heir by survivorship. It is one of intentions to the proved as a fact whether the accretions are his separate properties or incorporated as part of impartible estate. The intention may be express or implied by conduct or treatment of the properties. In Muttuvaduvgandha Tevar v. Periasami @ Udayuana Tevar [23 IA 128 : ILR 19 Mad 451 (PC)], the Privy Council held that the doctrine of representation between the father and his three lineal descendants has been on the assumption that he is reborn in them and the eldest to exclude his brother is continued to his lineal male heirs. In Ravu Janardhana Krishna Ranga Rao Bahadur v. State of Madras [AIR 1953 Mad 185 : ILR 1953 Mad 479 : 7 DLR Mad 202] relied on by Sri Mehta, it was held that in the case of an estate to which the incident of impartibility attaches by custom, custom supersedes the general Mitakshara law excepting in the matter of devolution of the property by right of survivorship. When an impartible estate was acquired by the government under the Madras Estates (Abolition and Conversion into Ryotwari) Act compensation received retains the incident of impartibility attached to the estate and the principle that conversion would not alter the nature of the estate is universal.

25. In Thakore Shri Vinayashinhji v. Kumar Shri Natwarsinhji [1988 Supp SCC 133] relied on by the appellants, this Court held that there is no restraint on the power of alienation of the holder of the impartible estate. There is a right of survivorship by birth to the senior members of the family, but in all other respects it is clothed with the incidents of self-acquired and separate property with the holder of impartible estate and unlimited right of acquisition not only by transfer but by will. In Sri Raja Rao Venkata Mahipati Gangadara Rama Rao Bahadur v. Raja of Pittapur (Second Pittapur case) [45 IA 148 : AIR 1918 PC 81 : 20 Bom LR 1056] and in Maharajah of Jeypore v. Vikarama Deo Garu [52 IC 333 : AIR 1919 PC 126 : 21 Bom LR 930] the Board also held that apart from custom and from near relationship to the holder, the junior members of the family have no right to maintenance out of the income of the impartible estate.

26. It is also thus well settled law that the right of joint enjoyment which is ordinary incident to a coparcenary, where the joint estate is partible, is excluded by the rule of primogeniture and impartibility. The income of an impartible estate and the accumulation of such income are the absolute property of the holder. The immovable properties would be incorporated with impartible estate. It must be proved that the holder had impressed the immovable properties as part of the estate. But the movable properties will not. Movables are not an accretion to the estate as in the case of ordinary joint family estate.

27. It is seen that the grant of Chandupura jagir was in perpetuity and the enjoyment is from

generation to generation. Geneology abstracted hereinbefore establishes that devolution by survivorship to the eldest male member continued till time of Dwarkanath and the respondent received only maintenance from the jagir estate. What was implicit was made explicit by Qwaid Jagirdaran issued in Samwat 1970 by the Maharaja Scindhia of Gwalior State. In paragraph 2 thereof it has been stated that jagir grant shall be indivisible and impartible property. In paragraph 2 of the preamble it is stated that the jagir in its entirety would continue in the family in which they were conferred. Thus, it is indivisible and impartible and succeeded by lineal eldest descendant of the family by rules of primogeniture.

28. Chandupura jagir was granted under Ex. D-20 with 100 bighas of lands and the buildings situated therein, accretions made in such estate out of its income are impartible estate governed by the rule of primogeniture and was succeeded by Dwarkanath as last eldest male descendant in the family. Therefore, they were not the joint family properties but are separate properties of Dwarkanath and the respondent has no right to a share therein as a coparcener. The other lands acquired from the income thereof stand incorporated as part of the jagir and are not partible. Section 9 of the Act recognises the existing legal position and that the junior member has only right to maintenance and directs payment 5 thereof out of the compensation amount and creates a charge thereon. Therefore, the properties enumerated in items 1 to 3 and 5 of schedule 2 are not partible. The preliminary decree in that regard is set aside. There appears to be dispute regarding item 4. So it is left out to be decided in separate proceedings.

29. Both the courts found as a fact that the accretions were from out of the income of the jagir. Schedule 1 ancestral residential bada and other properties situated at Gwalior are not covered by the sanad Ex. D-20. Admittedly, all the members of the joint family lived therein. The prior partition in 1929 set up by the appellants was negated by the courts below. Though Dattatraya 1 and Dwarkanath improved the properties from the income of jagir estate as part of the joint estate, there is no evidence to establish that either Dattatraya 1 or Dwarkanath treated those properties as their separate or self-acquired properties. Both the courts found as a fact that accretions formed part of the joint family properties. Equally there is no evidence that the respondent had given up his share therein either expressly or by implication by conduct. His assertion to be a coparcener and the properties to be coparcenary shows that he continued to claim to be a member of the joint family and admittedly the properties are joint. The accretions stood blended with ancestral joint family properties.

30. Under Section 3 of the Act what was resumed was only jagir lands. Resumption means taking back what was given; what was resumed are the lands and not the property of a person from whom it was taken by the rightful owner. Therefore, what was resumed is the right, title and interest in the jagir lands covered by the provisions of the Act and compensation was paid in lieu thereof. Under Section 5-(b)(i) notwithstanding the vesting in the State under Section 4 thereof (I) all open enclosures used for.. domestic purposes and in continuous possession for 12 years immediately before the date of the resumption; (II) all open house sites purchased for valuable consideration; (III) all private buildings, places of worship, wells, etc. situated in.... house site specified in clause (I) and (II); (IV) all groves wherever situated and lands appurtenant thereto shall continue to belong to and be held by the jagirdar and be settled on him; (V) all tanks, trees, private wells and buildings in the occupied lands shall continue to belong to or be held by the family. Thus it is clear that all private properties including buildings in the jagir belong to or held by the jagirdar remained to be the property of the jagirdar. All private properties in the jagir other than impartible jagir, therefore, remained to be joint family property. We, therefore, hold that schedule 1 properties are partible. The preliminary decree for partition of them are upheld.

31. It is seen that 100 bighas of land in Chandupura was granted as jagir. What had remained after the Act is hardly 5.41 bighas. So the rest of the lands, obviously, was resumed by the government, under the Act. By operation of Section 8 of the Act it is jagirdar who is entitled to receive compensation money payable under the Act. Therefore, the money received towards compensation of jagir lands also retains the character as impartible. Under the Act by operation of Section 19 of the Act the jagirdar is declared to be pucca tenant of khudkhast lands of Dwarkanath. From the impugned judgment it is clear that there are plethora of precedents of Madhya Pradesh High Court that after the abolition of these estates under the Act the lands became joint family properties which received approval from Anant Kibe v. Purushottam Rao [1984 Supp SCC 175] relied on by Sri Bobde. Therein this Court held that the combined effect of sub-section 158(1)(b) and 164 of the M.P. Land Revenue Code was that the incident of impartibility and the special mode of succession by the rule of primogeniture which were granted in terms of the grant of inam lands under the Jagir Manual stood extinguished. Bhumiswami right was conferred on the holder of the land i.e. Dwarkanath. In Madhya Bharat Land Revenue and Tenancy Act, 1950 by operation of sub-section 54(7), 69 and 82 the lands become the pucca tenancy of bhumiswami i.e. Dwarkanath. Therefore, the devolution of the right of pucca tenancy is by succession opened to appellants 1 and 2. Accordingly we hold that items, 2, 3 and 5 of scheduled 2 lands become the properties of the appellants.

32. Cash grant of item 1 in schedule 3 of a sum of Rs 6895 is to the family; the respondent had already received maintenance as a junior member from the family and so he is not entitled against to a share therein. The decree is accordingly set aside. Regarding item 2 by operation of Section 18 of the Act the jagirdar is entitled to it and that, therefore, the respondent had no share herein. The jewellery and utensils being movable properties are separate and personal properties belonging to the appellants. Admittedly the respondent was given jewellery at his marriage etc. Therefore, the jewellery and utensils are no liable to partition. The decree for partition of them is set aside.

33. The appeal is partly allowed. The judgment and decree of the trial court as confirmed by the High Court to the extent of all the items in schedule 1 for partition in to equal shares and allotment of one such share to the respondent is confirmed. The decree for partition of schedule 2 and 3 of the jewellery and utensils is set aside.

34. The appeal is allowed to the above extent, but parties are directed to bear their own costs.

</html