**ALLAHABAD HIGH COURT**

Janki Bai

Vs

Parsotam Rao Tantia

(John Stanley,CJ. William Burkitt, J.)

04.03.1907

**JUDGMENT**

**John Stanley, C.J. and William Burkitt, J.**

1. This appeal arises out of a suit for partition of family property brought by one Ram Chandar Rao, who died during its pendency, and is now represented on the record by his widow Musammat Janki Bai. The Court below granted decree in favour of the plaintiff, and against this decree this appeal has been preferred. Ram Chandar Rao was one of the three sons of Nana Narain Rao, deceased, the other sons being Vasudeo Rao and Parsotam Rao. Nana Narain Rao had also two daughters, namely, Sarda Bai, and Rohni Bai. The defendants to the suit are Parsotam Rao, Madho Rao (son of Vasudeo Rao), and Waman Rao, son of Parsotam Rao. Madho Rao has since died. Nana Narain Rao acquired the estate of his father, Ram Chandra Panth, under the will of the latter, dated the 24th of January 1852. This will was disputed by his younger brothers on the ground that a Hindu had no power to make a disposition in the nature of a will of his self-acquired property, and on the further ground that, assuming the existence of such a power, the alleged will was not the will of Ram Chandra Panth. The zillah Court of Cawnpore decided in favour of the will. Upon appeal the Sadr Adalat of the North-Western Provinces reversed that decision, but on appeal to their Lordships of the Privy Council the will was upheld and the decree of the zillah Court restored. (The case is reported in 9 Moore's Indian Appeals, 96.) Nana Narain Rao having thus become owner of the property of his father executed an instrument in the nature of a will on the 22nd of December 1864. This document is described in the instrument itself as "an instrument relating to the partition of his estate (matruka khas) among the heirs of Nana Narain Rao, the eldest son and executor of Ram Chandra Panth, as drawn up by him, dated 22nd December 1864." It recites three deeds of gift, in favour of his wife, and sons Vasudeo and Parsotam Rao, respectively, and that a third son Ram Chandar had been born and that consequently the deeds of gift should not be acted on. It then recites that three fresh detailed lists, giving the name of each heir, had been prepared, and that one of these lists was given to each heir, and one general list was sent to the Court to remove future disputes, so

that each heir should act "according thereto, and not in contravention thereof." The document then provided that the heirs should all, according to their family custom, "live together with clean breast and maintain the good name of their ancestors and contains this important provision that although the property had, with a view to mutual disagreement, been partitioned, still the partition was not to be a bar to the members of the family living together. It then provides for the custody of jewelry, gold and silver ornaments set apart for the worship of Thakurji, and also for the expenses of the testator's obsequies and the investiture and marriage ceremonies of his son. Ram Chandar Rao, and his daughter Rohni Bai, in case these ceremonies should not be celebrated during his lifetime. In the seventh paragraph it is recited that mauza Lalpur, in the district of Cawnpore, stands in the name of Vasudeo Rao, and mauza Balwapur, in the same district, in that of Parsotam Rao; and that there is no village standing in the name of Ram Chandar Rao, and accordingly a provision is made that mauza Binaur should be given to Ram Chandar Rao., In paragraph 8 is a direction that "his three sons should divide and take in equal shares the zamindari shares" in the following villages, namely, a 2 anna share in mauza Baroha, a 2 1/2 anna share in mauza Shahpur and a 2 1/2 anna share in mauza Bhikhar. In paragraph 9 it is provided that his three sons should occupy the houses and shops, etc, in Lashkar and the kothi at Cawnpore, under the control of their mother, and should not partition them. Further directions are given, which it is unnecessary here particularly to refer to. Schedules appended to the instrument give the specification of the property and shares of property allotted to each son. A copy of the instrument enclosed in a. sealed cover was handed to the Collector and by him directed to be kept in the office with due care until registration and was deposited in the record-room, This instrument forms the basis of the plaintiff's claim. To uphold the dignity of the family the members of it continued to live after the manner of a joint family, in fact they adopted the suggestion in the instrument executed by their father that the separation in interest effected by it should not be "a bar to their; living together." When the plaintiff Ram Chandar Rao instituted the suit for partition, out of which this appeal has arisen, he was evidently at a loss to determine what the legal effect of the instrument of 1864, taken in conjunction with the mode of living of the family since the death of his father had upon the status of the family. It was not of much moment to him whether or not that document worked a separation in interest of the family property. If it did so, he would be entitled to his share under it. If, on the other hand, it had not that effect, he would be entitled to a one-third share of the estate. Accordingly we find in the plaint an alternative claim put forward. In it the document of the 22nd of December 1864 is set forth in considerable detail, and in paragraph 10 it is stated that although the shares of all the three sons had been fixed by it and they considered themselves to be owners of a one-third share each, yet in compliance with the instructions of their father they all with their children lived together and the income from the whole property, irrespective of the fact that the properties were recorded in the names of individual members, was disbursed for the purposes of the family generally. Then

follow these words: "They (that is the members of the family) were not joint in residence and expenditure in the same way as members of a joint Hindu family are, but in order to maintain mutual good-will and union, each brother had a fixed share in the property and considered himself owner of a specified share therein." The allegations contained in paragraph 12 of the claim are in conflict with those in paragraph 10, for in the former of these paragraphs it is alleged that although the name of Vasudeo Rao was recorded in respect of mauza Lalpur, and after his death the name of his son, Madho Rao; was entered and the name of the defendant, Parsotam Rao, was entered in respect of mauza Balwapur, and some property had been purchased at auction solely in the name of the plaintiff, yet just as the names of all the three brothers were entered in mauza Binaur, though it had been allotted to the plaintiff alone, it was understood in respect of the whole property that when the actual division took place each brother would have a third share in each property. This is inconsistent with the earlier passage in the plaint to which we have referred. The plaintiff in his prayer to the plaint claimed partition of all the property, movable and immovable, on the basis of the family being joint, and also in the alternative he claimed to be entitled to his share as specified in the document of the 22nd of December 1864.

2. We now turn to the defence. In the first paragraph of the written statement under the heading "further pleas of the defendants" they set out the will of Ram Chandra Rao Pant in favour of Nana Narain Rao and say that Nana Narain Rao had fall power to devise the portion of the estate of Ram Chandar Rao which devolved upon him under the will, and that he exercised this power in the instrument of the 22nd of December 1864. The paragraph ends as follows: "He (i.e., Nana Narain Rao) had therefore full power to devise it and he exercised this power in this way that he executed a will, dated the 22nd December 1864, and kept it in deposit as an instrument in the Collectorate and the Civil Court at Cawnpore, and under it, after the death of Nana Narain Rao Sahib, his three sons took possession, as specified below, of the property and interests bequeathed to them as executors, and not as heirs." The word "executors," we presume, is intended for "devisees" in contradistinction to heirs. Then in the next paragraph the provisions of the will are stated whereby his wife Saubhagwati Lachhmi Bai Sahiba was appointed executrix and provision was made for her during her life and after her death for the division amongst the three sons and two daughters of Nana Narain Rao of what should be left. Reference is then made to purchases made by Nana Narain Rao after the execution of the will and to gifts of ornaments made by him on the occasion of marriages in the family or amongst the dependents. In the fourth paragraph is a statement that after the death of Nana Narain Rao the property undisposed of devolved on his three sons and two daughters in accordance with the terms of the will. In the sixth paragraph the defendants say that the will was acted on and in the earlier portion is the following passage: "After the death of the said Nana Narain Rao Sahib all the three of his sons took proprietary possession of the property as mentioned in the lists entered in the will and which remained after the additions and alterations and transfers and appropriations made by him. But

according to the instructions of the said testator which were binding on them, and in order to maintain the dignity of the family, all the three brothers, like members of a joint family, remained joint in residence, food and expense But the management of their respective properties continued to be in the hand of Vasudeo Rao Anna Sahib, who was the senior member of the family, and during his lifetime he acted in Consultation with all the members." In the seventh paragraph reference is made to differences amongst the members of the family and to the division of jewelry and ornaments made in consequence of these differences. This paragraph contains a statement that Vasudeo Rao, Parsotam Rao, and the plaintiff filed a suit in respect of a promissory note for Rs. 20,000 to which Musammat Sarda Bai had made claim, and that in consequence of this the parties determined to divide all the ornaments and jewelry, but that during the pendency of the suit Vasudeo Rao died. It then recites a settlement, dated the 7th of June 1887, whereby Musammat Sarda Bai received a note for Rs. 20,000 and relinquished her rights under the will, and also a settlement with Musammat Rohni Bai, dated the 6th of February 1887 whereby in consideration of a sum of Rs. 6,000 she also relinquished her rights under the will. Then follows this passage: "In order to avoid the disturbance of the mutual union which existed on a firm footing in consequence of natural love and the directions of their father, they with mutual pleasure and in confidence held a meeting at their own dwelling house and the plaintiffs and the defendants Nos. 1 and 2 sitting together, and having regard to the dignity of the family and to the fact that there was no equal to them in respect at Bithur, and that the circumstances of the family should not be disclosed to anyone, fully considered over the matter, and, with a view to avoid dispute in future, divided among themselves all the gold and silver ornaments and jewels intended for males and females which were left by the said testator (that is Nana Narain Rao) at the time of his death, and thus enforced the aforesaid will without reducing anything to writing and took those things into their actual possession and retained the same." Later on, in paragraph 14, the defendants say that the plaintiff is merely entitled to a declaratory decree in respect of the property mentioned in his in list No. 1 annexed to the written statement and to a decree for delivery of possession after partition-to the extent of one-third of the property in dispute, as mentioned in lists Nos. 2 and 3, and to a declaratory decree in respect of his right of residence in the dwelling houses, etc.

3. Now nothing can be clearer than this that in their defence the defendants set up and relied upon the instrument of the 22nd of December 1864 as a binding document. It is to be noticed that the family jewelry and ornaments were divided in accordance with it and that to this extent at least the terms of it were enforced. It is also manifest that the defendants did not regard the conduct of the members of the family in regard to the family property after the death of Nana Narain Rao as being inconsistent with the provisions of that instrument or as in any way affecting its full operation. The allegations of the plaintiff and of the defendants as to the status of the family are as nearly as may be identical.

4. Ram Chandar Rao filed a replication and in reply to paragraph 6 of the written statement, in winch it is alleged that the three brothers remained joint in residence, food and expenses like members of a joint family, emphasized the position which he took up by a statement that the family was not a joint Hindu family, and averred that the true facts were set forth in paragraphs 9, 10, and 11 of the plaint. From this replication it is clear that it was not the case of the plaintiff Ram Chandar Rao that the family was a joint Hindu family.

5. Before the settlement of issues Ram Chandar Rao died, namely, on the 28th of December 1901, and on the 29th of April 1902 his widow was brought upon the record in his place. Upon his death there was a complete volte face on the part of the defendants. In view of his death it was in the interests of the defendants that the family should be regarded as a joint family, as in that case his widow would not be entitled to a life estate in his share, but merely to maintenance, and hence we find that, notwithstanding the positive assertion made by them in their written statement that the will of Nana Narain Rao was binding upon them, they shifted their ground and set up the case that Nana Narain Rao had no power to make a partition, of his property and further that if the instrument which was executed by him did have the effect of causing a separation in interest amongst his sons, the evidence established a complete reunion of the family.

6. The plaintiff Musammat Janki Bai abandoned the claim to relief on the basis that the family was a joint family and claimed relief solely on the basis of the will, accepting the accuracy of the lists of property appended to the written statement of the defendants. She also withdrew her claim in respect of the ornaments and jewelry which had been divided among the two surviving brothers and their nephew after the death of Vasudeo. She accepted in fact the defendants' case in regard to the jewelry which had already been divided. The Court below held in favour of the plaintiff and gave her a decree for separate possession of all the property mentioned in the defendants' list No. 1 and one-third after partition of the properties mentioned in the defendants' lists Nos. 2 and 3 and also of the houses in dispute. The learned Subordinate Judge appointed the Court Amin a commissioner for the partition of the properties not paying revenue to Government. To this appointment we shall have a word to say presently.

7. Two main grounds of appeal have been relied upon by Mr. Porter in his argument on behalf of the appellants. The first is that the property which devolved on Nana Narain Rao under the will of his father was not his separate property but became joint family property in the hands of himself and his sons, and that therefore Nana Narain Rao had no power to partition it as he purported to do by the document of 1864. This argument was largely based upon the authority of the case *Tara Chand v. Reeb Ram*[1] in which it was laid (down that property which devolves upon a Hindu father under a will is ancestral property and that his children cannot be deprived of the right given to them therein at the moment of their birth according to the doctrines of the

Mitakshara. He also relied upon Muddun *Gopal Thakoor v. Ram Buksh Pandey*[2] We are not disposed, in view of the pleadings of the parties and the clear admission in the written statement of the defendants of the right of Nana Narain Rao to dispose of his property amongst his sons, to permit this defence to be now set up. But, assuming that it is open to the defendants to do so, we are not prepared to follow the rulings on which the learned Counsel for the defendants appellants relies. We prefer to follow the rule which is laid down in the case of *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*[3] in which this subject was discussed and dealt with at considerable length. In that case it was held that a son to whom his father leaves his self-acquired property by will takes the property under the will and not by inheritance, and that as property received by will is held by Hindu law to be received by gift, such property is self-acquired in the hands of the son and is not subject to partition in his lifetime at the suit of his son. As to any property which was subsequently acquired out of the common fund by the three brothers, the rules laid down in Section 45 of the Transfer of Property Act would apply, and they would accordingly be entitled to hold it in shares in proportion to their interest in the common fund.

8. Then Mr. Porter maintained that the document of 1864 was never acted on and that the members of the family continued as a joint Hindu family. Again he is met by the admissions made by his clients in their written statement, and in view of these admissions, it is hardly open to him to press his contention. But let us see on what that contention is based. Before the hearing the vakil for the defendant Parsotam Rao intimated in an application of the 26th of January 1906 (No. 309 of the record) the intention of his client to produce evidence to prove a number of matters manifesting the mode of living and of dealing with the family property adopted by the members of the family after the death of Nana Narain Rao. The principal of these matters were that all the members of the family were joint in food, residence and worship and in their money dealings and zamindari business; that the arrangements of the whole ilaka and the household business were joint; that the expenses of all the members on account of food, ceremonies and other necessaries were joint, namely, they used to be defrayed from the same fund, and all the income of all kinds of property used to remain joint although that property might be in the name of any member; that after the death of Nana Narain Rao a good deal of property was purchased and that some of this property was not purchased in the name of all the members, but in the name of particular members; but that still all the members used to enjoy the profits, which used to be included in the joint income of the ilaka. The plaintiff's vakil on behalf of his client admitted all these matters and an order was passed that in view of this admission it was not; necessary for the defendants to produce evidence in proof of their allegations. Mr. Porter relies upon the facts so admitted as establishing the case of his clients that the family was joint family; and he further contends that, even if the will of 1864 had the effect of working a separation in title, the conduct of the parties thereafter amounted to and proved a reunion in estate of the family.

9. We are unable to accede this contention. The matters which are set forth in the proceeding of the 26th of January 1906, prove no more in our opinion than that which is stated in paragraphs 9, 10 and 11 of the plaint and only show that the members of the family after the death of Nana Narain Rao, lived after the manner of a joint Hindu family. This is in accordance with the views of both parties as appears from their pleadings. The defendants did not, in their written defence, allege that the family was joint; in it is to be found no suggestion of any reunion. The position in fact taken up by both parties was identical. But in addition to this there had never been a joint title to the testator's property in the hands of his sons. Nana Narain Rao held it as self-acquired property, he made three separate devises to his sons, who took separately as self-acquired property the interest so devised to them. That being so, a question of reunion does not arise. That cannot be reunited which had never been joint. The word reunion implies that the property had at one time been joint in the hands of a family which afterwards separated and later on agreed to reunite and to hold their property jointly. Here there was never any union of interest in the property devised by the testator. Moreover, if there was evidence of a reunion we think that a tenancy in common and not a joint tenancy with benefit of survivorship would have been the result.

10. In Appovier's case (1866) 11 Moc. I.A., 75 it is laid down that "when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided," and later on their Lordships say: "It is necessary to bear in mind the two-fold application of the word 'division.' There may be a division of right, and there may be a division of property, and thus after the execution of this instrument there was division of right in the whole property although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed until some future time when it would be convenient to make that partition," * * *" and it there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property, that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject matter. This may at any time be claimed by virtue of the separate right."

11. In the case before us the instrument of 1864 provided that the property of Nana Narain Rao should be the subject of ownership in certain defined shares and from the date when that instrument came into operation the family became a divided family with reference to the

property, the subject of the will. This was in fact a separation in interest and in right.

12. This leads us to the consideration whether the subsequent conduct of the family in regard to their mode of life and dealings with the property, controlled or altered their status. Upon this question the ruling of their Lordships of the Privy Council in the case of *Balkishen Das v. Ram Narain Sahu*[4] has a close bearing. In that case four members of a joint Hindu family, grandsons of one Lalji, entered into an agreement (ikrarnama,) by which certain properties were given exclusively to two of the members, and with regard to the remainder, it was recited that a 4 anna share had been allotted to one of these members, and that out of the remaining 12 anna share, specified shares had been allotted to the other three. It was provided that either joint or separate registration, in the Collectorate of their respective names might be effected, and it contained the following passage: "Every one of us has by virtue of this deed the power either to continue to live together as a member of the joint family as before or to separate his own business, none of us having any objection thereto. There were concurrent findings of fact in the lower courts that in pursuance of the option reserved to them by the deed in question, the three descendants of Lalji remained joint. The first Court said that from the evidence of the plaintiff's witnesses it appeared that these three persons" formed members of a joint undivided family and that Ramjiban and Thakur died when living in commensality with Ram Narain, the plaintiff. All the three brothers were jointly in possession of the properties. Ramjiban was the head and manager of the family until his death and after him the plaintiff is in possession." The High Court confirmed this finding. On appeal their Lordships of the Privy Council reversed the decision of both Courts, holding that the ikrarnama effected a separation in estate between the members of the family and its legal construction and effect could not be controlled or altered by the subsequent conduct of the parties. Lord Davey, who delivered the judgment of their Lordships, in the course of his judgment referred to the fact that "Mahabir Parshad appears to have taken his share and that no more is heard of him, and that Ramjiban, Ram Narain and Thakur Parshad and after the latter's death Ramjibam and Ram Narain appear to have continued to live together and to have collected their revenue and enjoyed their property in all external respects in the same manner as before the execution of the ikrarnama." Referring to the ikrarnama he remarked: "There is no difficulty in the construction of the, ikrarnama, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners," and then referring to the passage in it which gave liberty to any of the parties either to live together as member of a joint family as before, observed that this clause "conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment but not the tenure of the property or their interest in it. Consistently with the broad principle laid down in Appovier's case, this was determined by the allotment to them of defined shares which, to use Lord Westbury's

illustration, converted them from joint holders into tenants in common. He further expressed disapproval of the view that the legal construction of an unambiguous document like the ikrarnama could be controlled or altered by evidence of the subsequent conduct of the parties. He observed that" their Lordships did not regard the subsequent actions of the parties as inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition. "

13. There is a close resemblance between the facts of this case and those of the case before us and in view of this decision we find it impossible to yield to the contention of the appellants. We have in the will of Nana Narain Rao in clear and unambiguous terms a disposition of his property amongst the members of his family. We have in the pleadings of the parties a recognition of the validity of this instrument--a recognition elicited at a time when their views had not been warped by any selfish considerations. We have the fact that in accordance with its provisions the jewelry and ornaments were divided and the claims of the daughters of Nana Narain Rao settled by agreement. In view of these matters we are wholly unable to hold that the family remained joint in title and interest. There is no evidence which would justify us in holding that the members of the family ever became reunited in interest.

14. We think therefore that the view of the Court below is correct, and dismiss the appeal with costs.

15. We notice that the Subordinate Judge has appointed the Amin of the Court as a commissioner to effect partition. By a recent ruling of this Court it has been held that under the provisions of the Code of Civil Procedure, at least in the absence of the agreement to the contrary, the Court is bound to appoint at least two commissioners. We therefore set aside his order whereby one commissioner only is appointed, and direct him to comply with the requirements of the Code.

Cases Referred.

1(1866) 3 Mad., H.C. Rep., 50
2(1863) 6 W.R., C.R., 71
3(1886) I.L. Rep., 10 Bom., 528
4(1903) L.R., 30 I.A., 139