NAGPUR HIGH COURT

Sukhambai

Vs

Ramsharan Sao

Second Appeal No. 327 of 1945

(Mudholkar, J.)

16.08.1949

JUDGMENT

Mudholkar, J.

1. The suit out of which this second appeal arises was instituted by the resps for possession of certain 'sir' fields in a thekedari village.

2. The village in question is Mouza Pushera of which the Zamindar of Pandaria is the superior holder. At the date of suit, Narayansao was the protected thekedar of the village. The relationship between him and the resps would be clear from the following genealogical tree:

3. Ramsaran Sao, Shamlal and Badri Sao Were the pltfs and are the resps to this appeal. The original defts were Narayansao and Hiralal. Narayansao died during the pendency of the suit and upon his death his widow Mst. Sukhambai, applt 1 was brought on record as one of his legal representatives, the other legal representative, his son Hiralal, being already on record as deft 2. During the pendency of the appeal before the lower appellate Ct. Hiralal died and his widow Mst. Foolbai, applt 2, was brought on record in his place.

4. It is common ground that Jivnath was the original protected thekedar and that upon his death the thekedari was held successively by Balabhadra Sao, Chamroo Sao and Narayan Sao. The Appellants had pleaded that Jivnath held four thekedari villages, that after his death there was a partition and that the village Pushera ultimately fell exclusively to the share of their branch. Both the Cts below have held that the partition has not been proved. That is a finding of fact, properly arrived at, and is binding on me. Therefore, the rights of the parties must be decided upon the basis that there was no partition.

5. The resps' case is that in the year 1912 there was a private settlement between the five sons of Laxman Sao and Chamroo Sao, the then thekedar, whereunder they were allotted 60 acres of Sir and Khudkast land. They allege that they began to cultivate that land separately and that they were also given their share of "other profits" in the village. Chamroo Sao died issueless in the year 1922 and Narayan Sao was recorded as the protected thekedar in his place. The resps allege

that he accepted the private arrangement entered into by Chamroo Sao with the sons of Laxman Sao and allowed them to remain in possession of the land allotted to them by Chamroo Sao.

6. It is common ground that Narayan Sao was in arrears with regard to the 'theka' jama and that the 'theka' was forfeited on 7-4-1937. During the pendency of an appeal before the Financial Comr by Narayansao against the order of forfeiture, resp 1 made an appln in which he sought the conferral upon him of the protected status and agreed to pay all the arrears of the 'theka' jama. The Financial Comr sent down the case to the D. C. for enquiring into his rights. During the enquiry Hiralal made an appln in terms similar to those in which resp 1 had made. His appln was rejected by the D. C. while that of resp 1 was granted and the status of a protected thekedar was conferred on him on 22-7-1938. Hiralal then went up in appeal to the Financial Comr who held in his favour and eventually he was accorded the status of protected thekedar on 12-12-1939. In pursuance of this he obtained possession from the Ct in the month of February 1940.

7. The resps contend that the said Hiralal and his father Narayan Sao forcibly ejected them from the possession of the Sir land, which is 29.20 acres in area, in June 1940. According to them, this was illegal as the land was given to them "on account of their share in the family property by way of maintenance and under a private arrangement" and also as they were in possession thereof.

8. Hiralal denied that the resps or then father were co-sharers in the thekedari of Pushera and also denied the family arrangement pleaded by them. According to him, it was only out of compassion and brotherly feeling that Chamroo Sao allowed the resps to cultivate some lands in the village as they had lost their own lands. The lower appellate Ct has, however, held that the family arrangement pleaded by the resps has been proved. That again is a finding of fact which being based upon some evidence is binding on me.

9. Faced with these two findings of fact, the learned counsel for the applt confined his arguments to two points. In the first place, he argued that the kind of family arrangement pleaded by the resps was recognised only in the first proviso to Section 109 (1) (a), Land Revenue Act, 1917, while the corresponding provision - Section 65 A of the Land Revenue Act, 1881, which was in force in 1912 when the family arrangement pleaded by the resps was entered into, contained no such provision. Therefore, according to him, the resps cannot legally base any claim thereon. He also put the same point in a slightly different form and argued that a protected thekedar had no authority to give any particular field in perpetuity even to a person entitled to maintenance, citing the decision in '*Bhagwan Singh v. Darbar Singh*'[1], as his authority for the proposition. Then he referred to *'Shibaprasad Singh v. Prayagkumari Debee'*[2], and asserted that, at any rate, before the Land Revenue Act of 1917 was passed, a junior member of the family of the thekedar had no right at all to claim maintenance. That being the position, the agreement of 1912 could not improve the position of the Respondents

[1]24 NLR 179: (AIR 1928 PC 96)

[2]59 Cal 1399 at p. 1413: (AIR 1932 PC 216)

10. Section 65 A, Land Revenue Act, as amended by Act XII (12) of 1898 sets out the incidents of the tenure. The amended section was considered by a Division Bench of the late Ct of the Judicial Comr in *'Pagwa v. Budhram'*[3], where it was held that it had the effect of prohibiting the partition of the 'theka'. The amended section saves "arrangements to the contrary in force at the time of the declaration". The family arrangement pleaded by the resps is of the year 1912-

13. If it is construed as partition or as an "arrangement to the contrary", then obviously it is unenforceable.

11. According to the resps' learned counsel, there is nothing in Section 65 A, Land Revenue Act, as amended, which precludes the thekedar from assigning a particular property to a junior member of the family in lieu of his right to maintenance. Such an agreement, according to him, is quite competent under the Hindu law and, in the absence of any limitations in Section 65 A on the powers of a thekedar to enter into an agreement of this kind as the first proviso to Section 190 (1) (a) of the Act of 1917 has placed, it is said that the agreement could attach itself to the property and bind the successors of the thekedar who entered into the agreement.

12. Section 65-A, however, makes the 'theka' impartible. Therefore, as held in the second Pittapur case, *'Gangadara Rama Rao v. Raja of 'Pittapur[4]',* apart from custom and relationship to the holder, a junior member of the family of the holder of an impartible estate is not entitled to any maintenance out of the impartible property even though it is joint family property. The authority of this decision has, according to the learned counsel for the respondents, been shaken by the decisions of their Lordships of the Privy Council in *'Baijnath Prasad v. Tej Bali Singh[5]', 'Protap Chandra v. Jagadish Chandra[6]', 'Collector of Gorakhpur v. Ram Sundar Mal[7]',* and *'Konammal v. Annadana[8]',* While it seems clear that these decisions reject the basis of the decision in not only the second Pittapur case but also in the first Pittapur case, *'Venkata Surya Mahipati v. Court of Wards[9]',* and *'Sartaj Kuari v. Deoraj Kuari[10]',* that there can be no co-ownership of the joint family in impartible property, the rule stated in the Second Pittapur case has been accepted by the Privy Council in these and several other cases.

13. One of these cases is "***Shibaprasad Singh v. Prayag Kumari Debee', 59 Cal 1399: (AIR 1932 PC 216)***. This is what their Lordships say at pp 1412 and 1413:

> "The question again arose, though in a different form, in '***Protap Chandra v. Jagadish Chandra', 54 Cal 955: (AIR 1927 PC 159)***. In that case the last holder of an ancestral impartible estate died, leaving a will, whereby he bequeathed the 'raj' to the Respondent The case was on all fours with the 'first Pittapur case', 22 Mad 383: (26 IA 83 PC), where the right to alienate such an estate by will was recognised. But it was argued on behalf of the applt, that the will was inoperative, and this was put upon the ground that the judgments of the Board in 'Satraj Kuari's case', 10 All 272: (15 IA 51 PC) and the 'first Pittapur case', (22 Mad 383 : 26 IA 83 PC) had proceeded on the view that

[3]10 NLR 64: AIR 1914 Nag 48 [5]43 All 228: (AIR 1921 PC 62) [7]56 All 468: (AIR 1934 PC 157)
[4]45 IA 148: (AIR 1918 PC 81) [6]54 Cal 955: (AIR 1927 PC 159) [8]51 Mad 189: (AIR 1928 PC 68)
[9]22 Mad 383: (26 IA 83 PC)
[10]10 All 272: (15 IA 51 PC)

> there was no co-ownership and, therefore, no right of survivorship in an impartible estate, that that view was inconsistent with 'Baijnath's case', 43 All 228: (AIR 1921 PC 62) which decided that there was a real right of survivorship and no right, therefore, to alienate by will, and that it was open to the Board to choose between the two lines of decision, and that the decision in 'Baijnath's case', (43 All 228: AIR 1921 PC 62) was correct in Hindu Law. But the Board held that there was no inconsistency between the two

lines of decisions, and the will was upheld.

The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the 'Tipperah case', *'Nibkristo Deb v. Birchandra'*[11]*,*

> "Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." 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 'Sartaj Kuari's case', (10 All 272: 15 IA 51 PC) and the 'first Pittapur case', (22 Mad 383: 26 IA 83 PC); and so also the third as held in the 'second Pittapur case', (45 IA 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."

14. The view taken here has been reaffirmed in two recent decisions of their Lordships. *'Commissioner of Income-tax, Punjab v. Krishna Kishore'*[12]*,* and *'Raja Krishna Yachendra v. Raja Rajeshwara Rao*[13]*',*

15. While the decisions of their Lordships, other than those in the two 'Pittapur cases', (22 Mad 383: 26 IA 83 PC) and (45 IA 148: AIR 1918 PC 81) and 'Sartaj Kuari's case', (10 All 272: 15 IA 51 PC), establish beyond doubt that though co-ownership of the joint family may exist in impartible property, it seems clear that a distinction must be drawn between present rights and future rights of the members of the family. This is because of the peculiar character of the property. Thus, while the junior members have future or contingent rights, such as a right of survivorship, they have, apart from custom or relationship, no present rights as, for instance, a right to restrain alienation or to claim maintenance. The relationship must, of course, be such as to entitle the person to claim maintenance from the holder whether he possesses any property or not.

16. Bearing the distinction in mind, the various decisions of their Lordships do not appear to be wholly irreconciliable. In the light of these decisions, therefore, it must

[11] 12 MIA 523: (Beng LRPC 13)
[12] ILR (1942) 23 Lah 1: (AIR 1941 PC 120)
[13] ILR (1942) Mad 419: , (AIR 1942 PC 3)

be said that the sons of Laxman Sao had no right to claim maintenance from Chamroo Sao, the then thekedar.

17. In his capacity as thekedar, Chamroo Sao had, no doubt, an unrestricted right to deal with the income of the village as he chose as would follow from the decision in *'Comr of Income-tax, Punjab v. Krishna Kishore*[14]*',* In the exercise of that right he could make over some of the fields in the village to the sons of Laxman Sao and let them enjoy the profits accruing from them even though these persons had no right to claim maintenance from him. But then the arrangement he

had entered into could not bind his successors for the simple reason that his right to dispose of the income as he chose would naturally terminate with his death. For, no custom has been alleged entitling junior members of the family to maintenance nor did section 65 A of the Land Revenue Act of 1881 confer such a right on a junior member of the family. Again, the relationship between Chamroo Sao and Laxman Sao's sons is not such as to entitle the latter to claim maintenance from him. Therefore in my opinion, even in the absence in Section 65 A, Land Revenue Act 1881 of any express limitations upon the power of thekedar to enter into an arrangement with other members of the family similar to those specified in the first proviso to Section 109 (1) (a), Land Revenue Act of 1917, such an arrangement could not bind his successor. So neither Narayan Sao nor Hiralal was bound by the arrangement and accordingly the pltfs' suit must fail.

18. I am referred to the decision in *'Nara-yanprasad v. Laxman prasad*[15]*',* where Sen J. has held that where thekadari rights in respect of a village are acquired by the joint family out of joint family funds, the village would be Joint family property and a member of the joint family would be entitled to a share in the theka and to be maintained out of it. In that case also, the protected status was conferred upon the thekedar while Section 65 A, Land Revenue Act of 1881 was in force. That decision is distinguishable on the ground that the learned Judge was not called upon to decide whether an arrangement entered into by members of a thekedar's family with a thekedar, when the Land Revenue Act of 1881 was in force, was binding on his successor.

19. Apart from that, the learned Judge did not consider the decisions of their Lordships of the P. C. to which I have referred and which, in my view, conclude the matter in so far as the rights of junior members of a family owning an impartible estate are concerned. Therefore, with great deference to the learned Judge, I express my inability to accept the view taken by him.

20. Since the learned Judge, has, in the decision just referred to, based his ultimate conclusion on the first proviso to Section 109 (1) (a), it is desirable to examine it. It runs thus:

> "nothing herein contained shall prevent a protected thekedar, or 'any member or members of his family who would be entitled to share in the theka or to be maintained out of its income', from making any arrangement, binding on themselves only, for the joint or divided management and enjoyment of the

[14] ILR (1942) 23 Lah 1: (AIR 1941 PC 120)
[15] 1945 N L J 291: AIR 1945 Nag 229

> village or part thereof."

21. The words I have underlined (here into inverted commas) do indeed show a recognition of the rights of members of the thekedar's family to claim a share in the theka or to be maintained out of its income. In Section 65-A, Land Revenue Act of 1881, there is no such recognition. After prohibiting partition, the most that it does is to save "certain arrangement to the contrary.....in force at the time of the declaration" of the protected status. Clearly, therefore, the Legislature when it enacted the proviso had not in mind any pre-existing statutory rights of the nature referred to in the proviso. Since their Lordships of the P. C. have made it abundantly clear that, apart from custom or grant, the members of the family of the holder of an impartible estate

have no right to claim any maintenance out of it (or a share therein), It must be presumed that what the legislature had in mind were the rights under a custom or grant. In the case cited all the facts had not been ascertained and it is possible that there was either a custom or a grant under which a member of the family could claim a share in the profits. In the present case, however, neither custom nor grant has been pleaded. Therefore, the proviso has no bearing on it.

22. Even if the matter were held to be governed by the provisions of section 19 (1) (a), Land Revenue Act of 1917, the arrangement must be deemed to have terminated at the death of Chamroo Sao by virtue of the proviso to that section. No arrangement subsequent to Chamroo Sao's death has been proved, and, therefore as held in *'Bhagwan Singh v. Darbar Singh*[16]*',* the thekedar is entitled to the possession of all the lands included in the theka. Thus, even applying the provision the pltfs suit must fail.

23. The second point urged by the learned counsel for the Appellants is also a good one. It is this that where a theka is forfeited, all arrangements arrived at by the erstwhile thekedar came to an end and that, therefore even if Narayan Sao had been bound by the arrangement arrived at by Chamroo Sao, it terminated upon the forfeiture of the theka in the year 1937. Section 11 (111?), Land Revenue Act of 1917 provides for the forfeiture of the protection under certain circumstances. When the forfeiture takes place, the D. C. has the option of doing one of two things: confer upon the former thekedar the rights of an occupancy tenant "in the whole or part of his Sir land or khudkast" or invest a co-sharer with

> "all the rights of the thekedar in the village or part of the village concerned subject to his acceptance of the liabilities of the thekedar for arrears of theka-jama".

In this case, the D. C. chose the second alternative, and conferred protection upon Hiralal. Since the only liability which Hiralal could be made to accept was that in respect of the arrears of theka-jama, it would follow that he would be free from all other liabilities to which the theka was subject till then. Therefore, the family arrangement must be deemed to have come to an end at least when Hiralal was appointed the protected thekedar. It is true that Hiralal obtained the protection by virtue of his being the person who was entitled to succeed Narayan Sao had he been

[16]24 NLR 179: (AIR 1928 PC 96)

dead on the date of forfeiture but this fact cannot, under the law, make any difference. What he gets is by virtue of Section 111, C. P. Land Revenue Act, and not by inheritance.

24. For these reasons, I set aside the decree of the lower appellate Ct and dismiss the pltfs suit with costs in all the Cts.

Decree set aside.