Privy Council Appeal No. 110 *of* 1916.

Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur - - - - *Appellant*

v.

Sri Rajah Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Rajah of Pittapur - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1918.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

The plaintiff is the son of an adopted son of the late Rajah of Pittapur, and he sues the defendant, the present Rajah of Pittapur, for maintenance. At the time that the suit was raised the father of the plaintiff was alive, but pending the suit he died. The Raj of Pittapur is an impartible zemindari, and was devised by will to the defendant, who was described in the will as the *aurasa* son of the late Rajah born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the raj, and alleged that he was not the legitimate son of the late Rajah. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that in accordance with what had been laid down by this Board in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (15 I.A., 51) the zemindari of Pittapur, being

impartible, there was no right in the plaintiff to quarrel with the alienation made by the will of the late Rajah.

The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular zemindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, viz., that by birth he had a right to maintenance out of the property constituting the raj, which right followed the property into the hands of a third party. The learned Judge of the Subordinate Court gave judgment in favour of the plaintiff for maintenance and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this : He considered that the zemindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the Mitakshara law exists also in this case. The learned Judges of the Court of Appeal held that after the decisions in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* and *Sri Rajah Rao Venkata Mahipatri Rama Krishna Rao Bahadur* v. *Court of Wards and Another* (26 I.A., 83) it was impossible to base the plaintiff's right to maintenance on any right of co-parcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* embodied the theory that there was joint property in an impartible zemindari, which only fell short of co-parcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself :—

> "It must be conceded that the complete rights of ordinary co-parcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible zemindari there is no co-parcenary, and consequently no person existed who as co-parcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very raj in the

Pittapur case (26 I.A., 83). The import of these decisions was, in their Lordships' view, correctly stated by Sir L. Jenkins in the case of *Bachoo* v. *Mankorebai* (I.L.R. 29, Bomb., p. 58): "It has now been definitely decided that in impartible properties there is no co-parcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property; that this co-parcenary interest carries with it the incohate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of co-parcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that the right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the madman, &c. Such persons are debarred from the rights of co-parcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatised with the personal defect, get by their birth the full status of co-parcenary.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law.

Their Lordships will now revert to the position of an impartible zemindari as it has been fixed by the decisions

before referred to. An impartible zemindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zemindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zemindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zemindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zemindari has been so often recognised that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*. For example, in the case of *Raja Yarlagadda Mallikarjuna Prasada Nayndu* v. *Raja Yarlagadda Durga Prasada Nayndu*. (27 I.A., 157) the judgment says :—

"As to the zemindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zemindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir."

But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo* (I.L.R. 5, Calcutta, at p. 259) :—

"We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right."

Apart from custom, what is left? The matter is tersely put by Sankaran Nair, J., in the Court of Appeal :—

"The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship. . . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

SRI RAJAH RAO VENKATA
MAHIPATHI GANGADHARA RAMA
RAO BAHADUR

v.

SRI RAJAH VENKATA KUMARA
MAHIPATHI SURYA RAO BAHADUR
GARU, RAJAH OF PITTAPUR.

DELIVERED BY LORD DUNEDIN.

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