Privy Council Appeal No. 97 *of* 1936

Ulagalum Perumal Sethurayar - - - - *Appellant*

v.

Rani Subbulakshmi Nachiar - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY, 1939

Present at the Hearing:

LORD ROMER
LORD PORTER
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN]

This appeal concerns the succession to the impartible estate of Urkad in the district of Tinnevelly and is brought from a decree dated 19th March, 1935, of the High Court of Madras affirming, upon the question now in dispute, the decree (23rd April, 1931), of the Principal Subordinate Judge of Tinnevelly. Both Courts in India have held that upon the death in 1929 of Minakshi Sundara the estate of Urkad devolved upon his widow Rani Subbulakshmi Nachiar who was plaintiff in the suit and is respondent upon this appeal. The appellant is Ulagalum Perumal the younger half-brother of Minakshi Sundara who was the first defendant in the suit. It is not now contended that the appellant and Minakshi Sundara were divided. The Trial Court held that there had been a partition of the partible property of the joint family, but this finding was reversed by the High Court and is not appealed from.

In 1902 the zemindar was S. Kotilinga Sethurayar (hereinafter called the settlor) a Hindu governed by the Mitakshara. He held the impartible estate as ancestral property belonging to the joint family, of which he was a member, and not as his separate property. His first wife had died, but he had married again. By his first wife he had a son, K. Kotilinga Sethurayar. His second wife was enceinte. Being displeased with his son he desired to defeat his son's prospect of succession to the estate by making use of the power of alienation recognised as belonging to owners of impartible estates by the decision of this Board in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1887) L.R. 15, I.A. 51. His power of alienation was however in danger of becoming restricted by legislation so as to become

no greater than the power of a managing member of a joint Hindu family to alienate ancestral property. A few days before the 2nd June, 1902, when the Madras Impartible Estates Act, 1902 (Madras Act II of 1902), came into force, he executed a deed of settlement dated 29th May, 1902, in respect of the impartible zemindari. By that deed he declared that he was dissatisfied with the character and conduct of his son and was desirous that the son should not succeed to the zemindari. He settled the zemindari upon himself for life and subject thereto granted it absolutely to the child with whom his second wife, Thanga Pandichi, was then enceinte, if such child should be born alive and a male. If the child should not be born alive and a male or being born alive and a male should die before the settlor without leaving male issue the zemindari was to go to his wife Thanga Pandichi absolutely. His son was given a maintenance allowance and a house. The settlor appointed himself trustee of the settled property.

Thereafter on the 13th August, 1902, Minakshi Sundara was born of the second wife Thanga Pandichi. In 1903 the settlor's first-born son, K. Kotilinga Sethurayar, died. In 1904 the second wife died, and the settlor having married a third time the appellant Ulagalum Perumal was born to him by his third wife in June, 1906. On the 7th January, 1907, the settlor died and Minakshi Sundara succeeded to the zemindari, the estate being managed on his behalf by the Court of Wards till 1923, when he came of age. He died in July, 1929, and as the Collector proposed to recognise his half-brother, the appellant, as entitled to succeed to the impartible estate, the widow brought her suit on 1st October, 1929, to establish her right to succeed. Her case is that when in 1902 her husband took a vested interest in the estate by virtue of his father's exercise of his unfettered right of alienation, the estate ceased to be property of the joint Hindu family as truly and completely as if it had been granted to a stranger to the family. Accordingly, that the principle of survivorship cannot on his death be applied to carry the estate to the eldest member of the senior branch of the family; and that it descends to her according to the rules which govern succession to separate property.

The High Court was careful to point out that the present case raises no question such as might have arisen had Minakshi Sundara died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at birth. On this subject there has been much divergence of opinion in India and it was left unsettled by the judgment of the Board in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1923) L.R. 50, I.A. 265, 275.

It is clear that Minakshi Sundara did not take his interest under the deed of 1902 under any contract or bargain made by him or on his behalf or by any other persons so as to bind him. The settlor was disposing of the estate in full appreciation of his power to alienate, and there is no

room for suggestions as to family arrangement or mere relinquishment by the settlor or mere supersession of the eldest son. Indeed, if the settlor's intention be supposed to govern the matter, the provisions of the deed of 1902 indicate, as the High Court notice, an intention that the estate should not continue to be joint family property; as otherwise in certain quite probable events the deed would not effectively exclude the eldest son. In particular should the son to be born die in the lifetime of his elder brother leaving sons the elder brother would succeed as senior to any of such sons if the property were to pass by survivorship as joint family property.

The able argument of learned counsel for the appellant was of a far-reaching character. He contended that it was not competent in law for the settlor to advantage one member of the family by terminating the right which other members of the family had in the estate. Or, putting the same matter in another form, that it was not competent for Minakshi Sundara to take the estate as self-acquired property. Learned counsel contended that while an alienation to a stranger would defeat the rights of all the members of the family, the result of an alienation in favour of one member could not in law be to defeat the rights of the other members. For this contention he relied upon decisions of the Board to the effect that as the right of partition does not exist in the case of an impartible estate, junior members of the family will not be taken to have given up their interest in such an estate or their claim to succeed thereto unless they can be proved to have surrendered it. (*Konammal* v. *Annadana* (1927) L.R. 55, I.A. 114; *Shiba Prasad Singh* v. *Ram Prayag Kumari Debi* (1932) L.R. 59, I.A. 331; *Collector of Gorakhpur* v. *Ram Sundar Mal* (1934) L.R. 61, I.A. 286.) He argued that the settlor, having no right to partition the estate or to claim as against the eldest son or other members to hold it as his separate property, he cannot by an alienation compel a severance between one son and another. In the absence of surrender or relinquishment by a member of his interest, partition, it is said, is the only way by which joint family property can become the separate property of a member; and this result is contrary to the custom of impartibility.

Their Lordships have given full consideration to this argument but do not consider that it can be sustained. No doubt joint property cannot if governed by a custom of impartibility be converted into separate property by any exercise of the right to call for a partition as the existence of such a right is inconsistent with the custom. But it does not follow that by no other way can the same result be arrived at. Admittedly it can be achieved by surrender or relinquishment. And it would seem that the right of any given person to succeed by survivorship to any given property must depend both upon the person continuing to be a member of the joint family and also upon the property continuing to belong to the family. If the zemindar has a

power of alienation which is not limited by legal necessity nor liable to be controlled by any other member of the family, so that he can squander the property or give or sell it to a stranger, thereby defeating the rights of other members, there would not seem to be great force in the reflection that when he transfers to a member of the family he is effecting a result similar to that produced by partition without having the power the compel partition. The status of an individual as a member of a Hindu joint family is in no way inconsistent with his owning separate property; and the right of unfettered alienation affirmed in *Sartaj Kuari's* case (*supra*) may well produce results, when exercised in favour of a member, which are as favourable or more favourable to him than those which partition would have produced. If the property ceases to be the property of the joint family there is nothing to which the right by survivorship can attach and there is no added difficulty in its becoming the separate property of an individual member. The right of alienation was held to belong to the holder of an impartible estate because the other members of his family, having no right to call for partition, were thought to have no right to control him: if in some cases the result of this doctrine upon the rights of the other members is to defeat them altogether, the right of alienation cannot, in their Lordships' opinion, be limited in other cases merely by reason that the holder had no right to call for partition.

If then there be no rule of law to prevent the settlor from giving or Minakshi Sundara from taking the estate as self-acquired or separate property, it remains to consider whether the interest given to Minakshi Sundara under the deed should be regarded as joint family property and not as his separate property by reason that the transfer to him was voluntary and not for valuable consideration and that the interest transferred was an interest in the whole of the zemindari estate and not only in a part thereof. Assuming without affirming that such considerations might in certain circumstances lead to the conclusion that the property was taken as joint family property, their Lordships cannot in the present case attribute to them any cogency in that respect, in view of the fact that Minakshi Sundara took a vested interest at a time when his elder brother was alive, and under a provision which was intended to defeat the ordinary course of succession to the estate. It so happened that at the time of the settlor's death Minakshi Sundara was his eldest surviving son, but this accident cannot retrospectively affect the operation of the deed of 1902.

In the case of *Raja Ajai Verma* v. *Musammat Vijai Kumari* (Appeals Nos. 79-81 of 1936) (at present unreported), Raja Fateh Singh, a Hindu governed by the Mitakshara and owner of an impartible estate in the Shahjahanpur district of Agra, had made a will whereby half the estate was left to his eldest son and half to his second son, Vijai Verma. The will was challenged, but the High Court of Allahabad upheld it on appeal. The younger son had died leaving an only daughter, Vijai Kumari. In the view of the High Court she

was entitled to succeed to half of the estate, though the Board held on appeal that she was excluded by a custom in this Rajput family which disinherited daughters. The learned Judges of the High Court (Mukerji and Bennet JJ.) said in their judgment:—

> "The 3rd issue is as follows:—' Whether in the case of it being found that the property is impartible and Vijai Verma got a half share in it under his father's Will the property taken by Vijai Verma would descend by way of inheritance to a single male heir by the rule of lineal primogeniture and whether, therefore, Vijai Kumari will be excluded from inheritance? '
>
> "The question raised in this issue is not free from difficulty, and there is no clear decided authority either way. On principle, however, we think the issue ought to be answered in favour of Vijai Kumari.
>
> "The argument on behalf of the defendant is fairly summarised in the issue itself. It is urged that by virtue of family custom the property of the Raja of Pawayan is an impartible estate descendible in a particular way and the mere fact that a portion of it is given away to one of the members of the family will not change the character of the property and make its mode of descent different from the original method. But this argument overlooks the fact that Vijai Verma is not entitled to inherit any portion of the property in suit. He is as much a stranger for the purposes of inheritance as one who has nothing to do with the family. He gets the property by virtue of the ' gift ' made by his father in his favour under the Will. It matters little whether the gift is in favour of a stranger or in favour of a person belonging to the same stock as the defendant. The property in the hands of Vijai Verma must be treated as self-acquired property for the purposes of descent to his heirs."

At the hearing before the Board this view was not challenged, and in the judgment delivered on 19th December, 1938, by Sir George Lowndes, it was stated:—

> "Assuming as their Lordships do in this judgment, that a moiety of the estate passed by the will of Raja Fateh Singh to Vijai Verma, it is admitted that it would be partible property in his hands and would descend as such on his death."

While their Lordships do not doubt that the High Court of Allahabad rightly held in that case that the property in question, if it passed under the will to Vijai Verma became his self-acquired property, they are not to be taken as affirming that any different result would have ensued had Vijai Verma been the person entitled to inherit. They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's* case (*supra*) according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognise, however, that as between the grantee and his sons questions may arise upon which these considerations, or some of them, may have importance.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

(15610—3A) Wt. 8168—30 180 3/39 P. St. G. 338

In the Privy Council

ULAGALUM PERUMAL SETHURAYAR

v.

RANI SUBBULAKSHMI NACHIAR

DELIVERED BY SIR GEORGE RANKIN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1939