
(1875) 07 PRI CK 0004

Privy Council

Case No: None

Chintamun Singh

APPELLANT

Vs

Nowlukho Konwari

RESPONDENT

Date of Decision: July 1, 1875

Citation: (1876) 1 ILRPC 153

Hon'ble Judges: J. W. Colvile, B. Peacock, M. E. Smith, R. P. Collier, JJ.

Judgement

J.W. Colvile, J.

1. The only question raised by this appeal is whether the appellant, the plaintiff in the Courts below, or the respondent, was entitled to succeed to the property called talooka Gungore, the appellant claiming as the nearest collateral male heir of the last possessor, and the respondent claiming as the widow of the last possessor.

2. It was admitted on the opening of the case, and seems to have been admitted throughout the proceedings below, that the enjoyment of this talooka has long been by a single member of the family, and that it has passed from father to son according to the rule of primogeniture for several generations. The existence of this family custom has moreover been litigated at various times from a very early period, and has been affirmed by repeated decisions. By that of the 17th May 1809 it was held that the talooka was one which by custom descended according to the law of primogeniture; that it was one of those estates which were in the contemplation of the Legislature when it passed Regulation XI of 1793; and that the rights of all parties under the custom were saved to them by the fifth section of that Regulation. It seems to their Lordships too late to question what is affirmed by many reported cases, that a custom of descent according to the law of primogeniture may exist by kulachar, or family custom, although the estate may not be what is technically known either as a raj in the north of India or as a polliam in the south of India.

3. That being so, it is necessary next to consider what are the limits of the custom as established, and what would have been the course of descent of this property had the family remained wholly undivided.

4. There is some evidence in the luksimnaiuan of 1832 of what the family understood to be the custom. To that reference will afterwards be made. It is to be observed, however, that if the evidence were wholly silent as to that point, the general law as laid down in decided cases seems to be that, where the family to which ancestral property held in this peculiar manner belongs is governed by the law of the Mitakshara, that law, in the event of a holder dying without male issue, would, if the family be undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor.

5. The cases upon this point are collected and reviewed in the judgment of Chief Justice COUCH in *Maharani Hiranath Koer v. Ram Narayan Singh* 9 B.L.R. 274 see at p. 319. In the last of them, which was decided here as late as the 2nd February 1870,--viz., the case of *Stree Rajah Yanumula Venkagamah v. Stree Rajah Yanumula Boochia Vankondora* 13 Moore's I.A. 333 the point which has been taken in the present case by the learned Counsel for the respondent appears to have been taken by Sir Roundell Palmer and Mr. Leith, who argued for the appellants in that case. The judgment however says: "Accordingly the strength of the argument of the learned "counsel for the appellant has been directed to show that this case should be" governed by *Katama Natchiar v. The Rajah of Shivagunga* 9 Moore's I.A. 539 which is generally known as the "Shivagunga case." They have gone "so far as to argue that the estate in question in this case being impartible," must, from its very nature, be taken to be separate estate, and consequently "that, according to the decision in the Shivagunga case, the succession to it is" determinable by the law which regulates the succession to a separate estate, "whether the family be divided or undivided. The authority invoked, however," affords no ground for this argument. The decision in the Shivagunga case "will be found to proceed solely and expressly on the finding of the Court that" the zemindari in question was proved to be the self-acquired and separate property of Gowary Vallaba Taver. It assumes that if this had not been so, the "decision would have been the other way." In that case the estate was held to pass to a very remote collateral male heir in preference to the widow of the last possessor.

6. This authority seems to dispose of the arguments of the learned Counsel for the respondent, which went to show that even while the family remained a joint and undivided family in the full sense of the term, this property would have been treated as separate property, and therefore governed by the law of the Mitakshara as to separate succession.

7. It is however found as a fact, and cannot be denied, that there has been to some extent a separation of this family; and the question, therefore, is, whether this particular property after that separation lost the character which it before possessed, and became subject to a different rule of succession. According to the rule laid down by Sir William

Macnaghten (Principles of Hindoo Law, title Partitions, Vol. 1, page 53),--"If at a general partition any part of the property is left joint, the widow of a deceased brother will not participate notwithstanding the separation, but such undivided residue will go exclusively to the brother." That authority was in fact one of those upon which this board in the Shivagunga case decided the converse of the proposition,--viz., that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession. The question, therefore, really seems to be whether by reason of the acts of the parties on the several occasions of the partial partition in 1832, and of the compromise of the suit of 1852, the plaintiff's father waived his rights of succession, or whether the parties by their joint action have impressed upon this talooka the character of separate property which must now pass according to the laws of separate succession.

8. (Their Lordships, after going into the terms of the transaction of 1832, continued): If it had been intended to make this property, which had been joint, separate property, it would not have been necessary to enter into so detailed an account of the family custom or of the manner in which it had previously passed. The statement of the family custom their Lordships are disposed to construe very much as it was construed by the Subordinate Judge who decided this cause in the first instance. In a document between Hindus, and indeed in the Mitakshara itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is intended to comprehend the whole class. And their Lordships think that in the above statement of the family custom, it was not intended to confine the passing over of the whole, in the event of the proprietor dying without issue, to a younger brother of the deceased or his eldest son; and further, that the words "without issue" are to be taken to import "issue in the male line." Accordingly, the real effect of that definition of the family custom was, that the property was ancestral property; that though ancestral property, it was held by special custom by one person at a time, according to the rule of primogeniture, with a provision that where the direct male line failed it should then go over to the collateral lines. It has already been shown that this course of devolution was consistent with the general law. Their Lordships conceive that the partition which took place in 1832 of the other property cannot be held to have affected the character or the mode of descent of this property as thus denned.

9. (Their Lordships then considered the character of the compromise of 1852, and found that that transaction really amounted to no more than an agreement to waive the claim to a share in, and to the consequent right to a partition of, the talooka Gungore, and continued): If this be so, their Lordships are further of opinion that the written statement of Chintamun Singh, which was filed in the suit afterwards brought in 1863 by Rowshun Singh, can be taken only to be a disclaimer of any interest in the talooka as claimed by Rowshun Singh in that suit, which of course, if Rowshun Singh had succeeded in establishing his claim, would have brought in Chintamun Singh as a coparcener entitled

to a partition. It cannot carry the case further than the act of his father, and it seems only to be an admission that he was content to abide by whatever his father had agreed to in the earlier suit of 1852.

10. This being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the Subordinate Judge be confirmed, and that the appeal to the High Court be dismissed with costs. The appellant must also have his costs of this appeal.