(1874) 05 CAL CK 0009

Calcutta High Court

Case No: None

Thakoor Kapilnauth Sahai Deo		APPELLANT
	Vs	
The Government		RESPONDENT

Date of Decision: May 5, 1874

Judgement

Sir Richard Couch, Kt., C.J.
The facts out of which this suit arose are as follows:--Bishnath Sahai, the father of the plaintiff, was a descendant from Ainee Sahai, a younger brother of Maharaja Roghonath Sahai Deo, formerly Raja of Chota Nagpore, and was in possession of an estate consisting of the Pergunnas Odeypore and Siri in Lohardugga, the subject of the suit, which had been granted by Maharaja Roghonath Sahai Deo to Ainee Sahai. On the 4th of December 1857, Captain G.N. Oakes, Principal Assistant Commissioner at Lohardugga, wrote to Captain W.H. Oakes, Deputy Commissioner of Chota Nagpore, as follows:--

Dated Chota Nagpore, the 4th December 1875.

Sir,--It appearing from the proceedings of this Court, herewith transmitted, that Thakoor Bishnath Sahai has been guilty of rebellion, and cannot, after diligent search, be found, I have the honor to request that you will hold in enquiry under s. 2, Act XXV of 1857, in order that, on proof of his having been guilty of the above offence, all his properly shall be forfeited to Government.

On the 10th of December 1857, the Deputy Commissioner replied to this letter that an enquiry had been held by his Court, and as it had been proved that Thakoor Bishnath Sahai had been guilty of rebellion, and could not, after diligent search, be found, an order had that day been passed by the Court adjudging that all the property of Thakoor Bishnath Sahai should be forfeited to Government, and requested the Principal Assistant Commissioner to adopt the necessary measures to carry out the orders of the Court. Accordingly, on the same 10th of December, in a proceeding of the Faujdari Court of the Lohardugga Division, held before the Principal Assistant Commissioner, after stating that

a letter from the Deputy Commissioner, dated that day, to the effect that Thakoor Bishnath Sahai was proved guilty of rebellion against the Government, that he was absconding, and had not been arrested, though several measures had been adopted for his arrest, and that all his moveable and immovable properties should therefore be confiscated and taken by Government, it was ordered that a perwanna be drawn up to the address of the jemadar, directing that he should proceed and confiscate and make au inventory of the rebel''s property which was confiscated, and to the tehsildar directing him to send for all the ryots and prepare a jamabandi. Mahipat Lal, the tehsildar of the attached estates'' department in Zilla Lohardugga, proved that this perwanna or order was executed on the 5th of January 1858 by all the ryots being summoned, and recognizances being taken from them for the payment of their rents, and that since then the collections had been made from his office. On the 9th of September 1858, the tehsildar made a return giving the names of the villages of which the estate consisted. At the Sessions Court of the Commissioner and Deputy Commissioner of Lohardugga, held on the 14th, 15th, and 16th of April 1858, under Acts XIV and XVI of 1857, Bishnath Sahai was tried and convicted of rebellion against the Government between the 2nd of August 1857 and the 21st of March 1858, and was sentenced to death. He was hanged on the 21st of April 1858, and on the same day an order was made in the Court of the Deputy Commissioner that the whole of his moveable and immovable property should be confiscated.

2. In July 1858, Mussamut Thakoorani Banessuri Kuar Deyi, describing herself as the mother and guardian of the plaintiff, who was born on the 25th of September 1854, presented a petition to Captain Davis, the Senior Assistant Commissioner of Lohardugga, alleging that the first ancestor of Bishnath Sahai got the estate for khur-o-posh (maintenance), with the condition attached that the same was to be enjoyed by him and by his family and descendants; that the custom as to ancestral khur-o-posh land was that the eldest descendants have become maliks in succession with the title of Thakoor of the whole zamindari, and the younger brothers have received khur-o-posh according as they deserved, and on the death of the Thakoor, his son, and in case of the Thakoor dying childless, the eldest surviving descendant of the party, through whom the inheritance descended, had been entitled to enjoy and possess the estate as khur-o-posh; that on the death of Bishnath Sahai, his right and interest died with him, and according to the family custom, the confiscated land belonged to her infant son, the plaintiff, as his ancestral inheritance, and praying for the restoration of the land and house which had been confiscated. This petition is endorsed as registered in the suit-book on the 26th of July 1858; and on the 17th of September 1858 the following order was made upon it:--"That report will be made for khur-o-posh (maintenance) and house of petitioner." On the 23rd of July 1859, an order was made by the Court of Lohardugga, held before Captain Davis, Senior Assistant Commissioner, by which, after stating that sanction of the Government to the sum of Rs. 30 per month for food and raiment for Mussamut Thakoorani Banessuri Kuar, wife of Thakoor Bishnath Sahai, had been accorded, it was ordered that the Thakoorani should be informed that her application of the 23rd of March could not be

granted. The application of the 23rd of March is not in evidence, and it does not appear that any formal order was made on the petition of the 26th of July 1858.

3. The present suit was begun in the Court of the Deputy Commissioner, Lohardugga, on the 1st of April 1872, by a petition for permission to sue in form■ pauperis, which was granted on the 19th of June 1872. The suit having been removed into this Court, a written statement of the plaintiff was filed on the 23rd of July 1873.

4. The case of the plaintiff has two aspects. One, which is in the plaint, is that the estate was to devolve on the death of Ainee Sahai on the next Thakoor in succession, which would be his eldest son, and then to the eldest son of such succeeding Thakoor, and so on in perpetuity; and if a Thakoor died without leaving a son, it would go to his next brother or his eldest son; and that no Thakoor had any interest beyond his own life, and had no power to alienate the estate in any way, either voluntarily or involuntarily, the estate being devoted towards maintaining the title and dignity of Thakoor. The other, which is in the written statement, is that the estate was granted to Ainee Sahai Deo for the maintenance of himself and his descendants, all of whom were governed by the Mitakshara law, according to the custom and usage prevailing in his family, and for the support of the dignity and title of Thakoor; that the estate was by the custom of the family impartible and descendible, according to the law of primogeniture, upon the male heirs of the original grantee, subject to the rights of such descendants as the members of a joint family to receive maintenance thereout, either directly or by the allotment of separate villages to be held by the grantees and their male descendants in the male line; that the estates, which with the title and dignity of Thakoor devolved upon the successive holders thereof, were subject to the Mitakshara law, save in so far as that law was modified by the aforesaid usage and custom; and that by the provisions of the Mitakshara law so modified, the plaintiff became on his birth a co-owner with his father in the ancestral estates, and on his father''s death became entitled to hold and enjoy them with the title and dignity, notwithstanding any sentence of confiscation pronounced against Bishnath Sahai, or the estates held by him as Thakoor.

5. We will first consider the case in the plaint. By the decree of the Dewanny Court of Zilla Ramgurh, dated the 23rd of February 1815, in the suit in which Roghonath Sahai Deo, the grandfather of the plaintiff and others were plaintiffs, and Dukhin Sahai Deo and others were defendants, it was declared that the custom of the Nagpore Pergunna was that, on the death of the Raja and of the Thakoor, the eldest son becomes the Raja and Thakoor, and that the plaintiff, Thakoor Roghonath Sahai Deo, he being the eldest son of the late Thakoor Naththan Sahai Deo, was, as regards the entirety of the dihat (villages) which were in the hands of Thakoor Dhirajnath Sahai Deo, deceased, after his father, through having become the Thakoor, alone entitled to, inasmuch as he bore with him the interest of that person according to the recognized family custom of both parties; and to the others, that is, the brother, the uncle, and the nephew, of the plaintiff Thakoor Roghonath Sahai Deo, there did not reach, according to the usage and custom of their family, the right to sue for the dihat which formed the subject-matter of the suit, in the way

that the plaintiff Roghonath abovenamed had done, inasmuch as, under the operation of the established family custom, they were simply entitled to get villages from the said Thakoor Roghonath Sahai Deo, just enough for their support, in the same way as others who are brothers and Thakoors.

6. Col. Dalton, the Commissioner of Chota Nagpore, a witness for the Government, said that Chota Nagpore zamindari constitutes Chota Nagpore Proper; and in his letter to the Government of Bengal of the 28th March 1859, in which he submitted a report on this estate, and another on the Chota Nagpore Division, the proprietor of which had also been hanged for rebellion, he says that the original deed of gift to Ainee Sahai had not been found, "it was doubtless conferred as a maintenance grant; and according to the terms of such grants and the practice established by decision of the Courts in regard to this estate, it was inherited in succession by heirs male of the original grantee; the late Bishnath Sahai was the seventh Thakoor of this line, the direct descent was broken three generations ago, when, in consequence of the death of Thakoor Dhirajnath without issue, the estate and the title was inherited by Nath than Sahai, who was Dhirajnath''s cousin, thrice removed." The evidence of the plaintiff''s witnesses as to the nature of the grants and the course of the descent was to the same effect. And Col. Dalton, in his valuable work on the Ethnology of Bengal, p. 169, says:--"The circumstances under which the Raja''s ancestor rose to power precludes his making any division of the raj. It remains to this day an undivided estate, and the succession to it is regulated by local custom of primogeniture acknowledged under Regulation X of 1800; but as the families increased, the younger members, or collateral branches, were supported by maintenance grants, which lapse to the parent estate in failure of heirs male to the grantee."

7. But the grant being for maintenance, and the descent being to the heirs male of the original grantee, do not make the estate inalienable. So long as there is an heir male, the grantor or his heirs cannot resume the estate; but we have no evidence of any law or usage existing in Chota Nagpore Proper, or in this family, at the time of the grant to Ainee Sahai, which would authorize a grant, with a condition against alienation and creating a succession of life-estates. A particular law or custom is necessary to convert an estate which is conditional upon there being an heir male into an estate which cannot be aliened, so that it shall not descend to the heir, as was done in England by the Statute de Donis. The evidence, instead of proving such a law or usage, and that the grant was in those terms, shows the contrary, it being proved that alienations of parts of such estates as these have been made in jagir and mukarrari. The instances spoken of, where attempts have been made to set aside such alienations, are too recent to be of any value.

8. We will now consider the case in the written statement. The foundation of this is that the successive holders of the estate were subject to the Mitakshara law, save in so far as that law was modified by the usage and custom; and that the estate was impartible and descendible, according to the law of primogeniture, upon the male heirs of the original grantee.

9. Now Upendranath Sahai Deo, a member of the family, in answer to the question,--"in the Maharaja"s family what shasters prevail?" said, "we follow the customs of our family; if the shasters agree with our customs, we obey them; if they do not agree, we do not obey the shasters, but follow the customs of the family. "And from Col. Dalton"s work before quoted, it appears (p. 163 and following pages) that this family were not Hindus, and were governed by their own customs. They have adopted the law of the Mitakshara, but it has been grafted upon their own customs, which is important in considering to what extent they are governed by it.

10. The question appears to be reduced to this:--Is the law of Mitakshara, by which each son has by birth a property in the paternal or ancestral estate (Ch., i. s. 1, v. 27), consistent with the custom that the estate is impartible, and descends to the eldest son? The property by birth gives to each son a right to compel the father to divide the estate--Luchmun Persad and Another Vs. Raja Ram Tewary and Others and Nagalinga Mudali v. Subbiramaniya Mudali 1 Mad. H.C. Rep., A.C. 77, which is inconsistent with the estate being impartible. On the father"s death, the whole estate goes to the eldest son, and the property by birth in the others has no effect. Property by birth in such an estate is a right which can never be enjoyed by the younger sons.

11. It is not only not necessary to secure the descent to the eldest son, but if it had effect in respect of the younger sons, it would prevent it. This part of the Mitakshara law cannot be reconciled with the custom, and we think we should hold that it is not applicable to this estate. The following authorities support us in this:--In Neelkisto Deb Burmono v. Beerchunder Thakoor 12 Moore"s I.A., 523; at p. 540, the Judicial Committee say:--"Still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is the title to the throne, and the royal lauds is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims."

12. In Stree Raja Yanumula Venkayamah v. Stree Raja Yanumula Boochia Vankondora 13 Moore"s I.A., 333; at p. 340, where, by the custom of the family, the talook was impartible and descendible to a single heir, their Lordships say:--"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj, or impartible estate, in favor of the junior members of the family, who, but for the impartibility of the estate, would be coparceners with him;" from which they appear to be of opinion that the Mitakshara law, by which the sons become co-sharers with the father by birth, does not apply to an impartible estate. And Scotland, C.J., in Sri Raja Yanumula Gavuridevamma Garu v. Sri Raja Yanumula Ramandara Garu 6 Mad. H.C. Rep., 93; at p. 105, says:--"Instead of the several members of the family holding the property in

common, one takes it in its entirety, and the common law rights of the others, who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners inter se to the undivided share of each and to a provision for maintenance in lieu of coparcenary shares."

13. In Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee 12 Moore''s I.A., 1, the zamindari was impartible, and was treated as the self-acquired estate of Chutterdharee Sahee. He had four grand-sons living at the time of his death, and he made a will giving the estate to the son of the eldest grandson, who was a consenting party to it. Their Lordships said in the judgment (p. 39):--"But the question whether, according to the law of the Benares school, a Hindu can by will make an unequal distribution of his self-acquired immovable property amongst his male descendants without their consent, does not arise in this case. The only person entitled to impeach the disposition by will is Ongur Pertab, the eldest grandson, who is a consenting party to it. There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their grandfather in his self-acquired lands, which is the foundation of the supposed restriction on his power." The plaintiff''s case in truth is that only the eldest son becomes a co-owner with his father, which is not the law of the Mitakshara. Either all the sons must become so, or none of them do, and the right of the eldest is only to inherit on his father''s death.

14. Now by s. 3 of Act XXV of 1857, the forfeiture extends to all property and effects of or to which the offender shall, be possessed or entitled. Bishnath Sahai was possessed of the estate, and had, we think, an interest in it beyond an estate for life, which interest was forfeited, and the plaintiff did not on Bishnath Sahai''s death become entitled to the estate.

15. It remains for us to decide the question of the law of limitation. We have thought it better not to decide the suit solely upon this ground, but to give our judgment on the main question also.

16. S. 9 of Act XXV of 1857 requires a suit for the recovery or restoration of property, which has been seized under the Act, to be instituted within one year from the time of the seizure. The Act contains no exception in favor of infants. There is no ambiguity in the language, nor anything in the Act to show an intention that they should be excepted. We have no authority to add to this section an exception which the Legislature has not thought fit to make. We must, therefore, hold that the suit is barred by s. 9, although it has been repealed by Act IX of 1871. We notice that it has been repealed because the learned Counsel for the plaintiff appeared to rely upon that as preventing its application to this suit. But the right to bring a suit was extinguished, and it was not revived by the repeal of the Act. The suit of the plaintiff will be dismissed, and the amount of stamps which would have been paid by the plaintiff, if he had not been permitted to sue as a pauper, which will be calculated by the Registrar, is to be paid by the plaintiff.

(1) The judgment of the Judicial Committee arrived in India after the argument in the present case was concluded. The case is reported, ante, p. 292, and the judgment of the Agra High Court upon the question of limitation will be found at p. 294.