

(1908) 12 CAL CK 0003
In the Calcutta High Court

Bhuyian Sarat Kumar Das Mahapatra	Vs	APPELLANT
Akshoy Narain Das and Others		RESPONDENT

Date of Decision : 16-12-1908

Acts Referred:

Citation : 9 Ind. Cas. 961

Hon'ble Judges : Doss, J;Caspersz, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit instituted by a person, styling himself Bhuyian Sarat Kumar Das Mahapatra and directed against the defendant No. 1 Bhuyian Chowdhury Kanongoe Vilayati Akshoy Narayan Das Baliar Singh Mahapatra and other defendants including the defendant No. 5 father of the plaintiff, and defendant No. 3 Bhuyian Chowdhury Kanongoe Vilayati Guru Prosad Das Baliar Singha Mahapatra his father's brother. The plaintiff sought to recover a one-fifteenth share of a certain property in Perganah Orissa Balisai.

2. The members of the family are mentioned in the genealogical tables filed by the parties. For the purposes of this appeal, it will be sufficient to refer to the genealogical table given in the judgment of the Subordinate Judge. It will be observed that Kapali and Ankuri were sons of Biswanath. The parties to this litigation are descended from Kapali Das through many generations. One of the intermediate members of the family was Jagannath, whose brother was Raghunath. Through Jagannath are descended the present plaintiff and the defendants.

3. In the year 1801 there was litigation between Jagannath and Raghunath and when the matter came up to the Sudder Court from the District Court of Midnapur it was held that the appellant, namely Jagannath, defendant in the action, was to remain in, possession of the entire property in dispute, and that he should, in accordance with the custom of the family, provide for the maintenance of the respondent, that is to say, Raghunath and his brothers.

4. The present suit is, in effect, aimed at the decision arrived at on that occasion, the 29th July 1802. The substantial questions in issue between the parties are two in number, namely, first, whether there is any custom of primogeniture prevalent in the family to which the parties belong and secondly, whether the plaintiff's suit is barred by limitation because he was excluded from the share more than 12 years before suit, such exclusion being to his knowledge.

5. The Subordinate Judge has dealt with the matters before him in a very complete manner. He gives the history of the family as based on certain publications to which he had access, namely, a memorandum of Midnapur by Mr. Bayley, dating from the year 1852 and Mr. Hunter's Statistical Account of Cuttuck. In tracing the history of the family, the Subordinate Judge finds that the property was in the nature of a military fief the holder being a military officer, and, by the custom of the family, the eldest male is entitled to succeed to the entire property. The title of the fief-holder was Bhuiyan, which is the Hindu equivalent of zemindar. In the opinion of the lower Court, on the evidence adduced before it, neither the plaintiff nor the defendants Nos. 2 to 8 had any title whatever, and the defendant No. 1 alone was to be regarded as the Bhuiyan.

6. The Subordinate Judge then proceeded to consider the effect of Regulations XI of 1793, X of 1800 and XII of 1805. He thought that the rule for the future abolition of custom of primogeniture contemplated by Regulation XI of 1793 was abrogated by the subsequent Regulations mentioned and that these Regulations would apply in favour of the defendant No. 1 in the present litigation, he being the holder of the impartible property.

7. Then, the Subordinate Judge dealt with the other evidence in the case, and, in particular a kabala executed by Rudra Narayan, the defendant No. 5, father of the plaintiff. He observed: "All these facts go to show that the ancestral properties descended according to the primogenitural rule, and that Rudra Narayan and his brother Guru Prosad got maintenance only." These also show that Rudra Narayan separated from defendant No. 1 from long time, that is long before 12 years from suit. More specifically, the Subordinate Judge recorded a finding that Rudra Narayan had separated about the year 1866. In this view of the matter, the suit was barred by limitation, and that is the express finding recorded by the Subordinate Judge. On the merits of the case, therefore, the Subordinate Judge dismissed the plaintiff's suit with costs.

8. Now, the learned Vakils for the plaintiff-appellant have submitted their arguments to us on the two points which we have mentioned, namely, first, whether the custom of primogeniture prevails in this family, and whether that custom was defeated by the provisions of Regulation XI of 1793; and secondly, whether the plaintiff's suit was barred within the meaning of Article 127, Schedule II, of the Limitation Act.

9. With regard to the prevalence of the custom of primogeniture, the sheet anchor of the case for the defendant No. 1 Bhuiyan Chowdhury Kanongoe Vilayati

Akshoy Narayan Das Baliar Singh Mohapatra is, of course, the decree of 1803. The Judges of the Sudder Court who decided that appeal applied the provisions of Section 5 of Regulation XI of 1793. They said that, inasmuch as "the entire property in dispute came, on the death of the father of the parties in 1196 Amli a few years anterior to the 1st of July 1794 into the possession of the appellant (Jagannath) consequently, u/s 5, Regulation XI of 1793, the said property could not be partitioned." It was, therefore, ordered--"that the appellant do remain in possession of the entire property in dispute and do in accordance with the custom of the family provide for the maintenance of the respondent and his brothers and defendants." The custom of primogeniture was, on that occasion, asserted and recognised in favour of Jagannath, the grandfather of the defendant No. 1. It appears that Jagannath had only one son, Sambhu Narayan; and, on the death of the latter, the defendant No. 1 succeeded, in the year 1860, and in accordance with the mutation proceedings of the 30th July 1860 the defendant No. 1 was registered and remained in possession. At that time, no doubt his brothers, the defendant No. 5, defendant No. 3 and two other sons of Sambhu Narayan were minors; but it appears that, so far from claiming any share of the property, all the members of the family were content to receive maintenance; and in particular, Rudra Narayan, defendant No 5, the father of the plaintiff obtained decrees for maintenance and also was sued for rent in respect of certain property which he took on lease from the Bhuiyan.

10. There is a kabuliat which bears date so far back as 19th December 1876. In that document the tenant Rudra Narayan admits that the property leased appertained to the zemindary of the Bhuiyan, the defendant No. 1. He accepted a lease of the land, and declared that he and his heirs would be debarred from making sale, gift, mortgage, or kutki, to any one, of the jote right to the said land. On the basis of this kabuliat rent-decrees were recovered by the Bhuiyan. There is a tabulated extract from certified copies of decree at page 104 of the paper book. In the rent-suit litigation, the defendant Rudra Narayan has all along admitted the kabuliat of 1876. In Rent Suit No. 1 of 1902 which was decided on the 20th May 1902, he pleaded payment, and on that occasion the possession of the Bhuiyans was amply recognised, as a consequence, on the evidence recorded by the Munsif. The position of the defendant Rudra Narayan as a pauper and dependent, was also indicated. It appears then, that since the decree of 1802, the junior members, such as the plaintiff's father and uncle have been receiving maintenance and at no time was any claim advanced to a share in the ancestral property.

11. It is true that no ancient papers have been produced in support of the custom we are dealing with. It is, however, not necessary or possible in such a case, especially where the family history may be taken back some nine hundred years, for ancient Sanads in proof of the origin of the title to be produced. In 1802, the existence of the family custom was recognised and given effect to, not as a question of legality merely but as custom applicable to and enforced in the family of the Bhuiyans.

12. In some respects, we have derived assistance from the similar case of *Shyamanand Das Mohapatra v. Roma Kanta Das Mohapatra* 32 C. 6, but the most difficult question in the appeal, one which has been argued strenuously on behalf of the plaintiff, is this--whether the operation, so to speak of the decree of 1802 which was based on the provisions of Section 5, Regulation XI of 1793, must now be regarded as having come to an end, whether if the subsequent Regulations do not save the particular custom in this particular family in regard to subsequent devolutions, the ordinary rule of Hindu Law must be applied and the custom held to have ceased. Reliance is placed on the decision of their Lordships of the Privy Council in *Rajah Deedar Hossein v. Ranee Zuhooroonissa*. 2 M.I.A. 441.

13. That decision was considered in an unreported judgment of this Court, in Appeal from Original Decree No. 148 of 1895, decided on 25th August 1899. The learned Judges made the following observations on this part of the case, namely, "that the Court below ought to have held, as a matter of law, that the rule of primogeniture and impartiality can apply only to a Raj or principality:" The learned Judges said, Assuming that some of the observation made in the case of *Rajah Deedar Hossain v. Ranee Zuhooroonissa* 2 M.I.A. 441 might at first sight lend some countenance to the appellant's contention, it is too late, as their Lordships of the Privy Council observed in *Chintamun Singh v. Nowlukho Konwari* 1 C. 153 : 2 I.A. 263 : 24 W.R. 255, 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 as a Raj in the north of India or as a polliam in the south of India and their Lordships gave effect to such a custom in that case."

14. In *Baboo Beer Partab Sahee v. Moharajah Rajender Pertab Sahee* 12 M.I.A. 1 : 9 W.R. 15, (the passage to which we refer is at page 37) their Lordships said they could not safely draw any inference concerning the intentions of Government in making a particular grant in 1790 from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large zemindaries held as Raj, or subject to kulachar or family custom.

15. Another decision of the Judicial Committee to which we may refer is the one we have already cited in the extract from the judgment of the unreported case, the particular passage being at page 269: "By that decision of the 17th May 1809, it was held that the taluka 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 5th 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."

16. Turning now to Regulation XI of 1793 we observe that it was a Regulation, as appears from the preamble, for the future abolition of a certain custom of primogeniture. It was not aimed at abolishing all such customs but customs which had originated in considerations of financial convenience," and which were "repugnant both to the Hindu and Muhammadan Law." The learned Vakil for the plaintiff-appellant has laid stress on Section 3 of the Regulation; but as we read the section it merely gives effect to the general intention expressed in the preamble. It says that if any zemindar, independent talukdar or other actual proprietor of land shall die without a Will, or without having declared by a writing or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs, such persons shall be at liberty to hold the property as a joint undivided estate or to secure partition, if they so desire, under the provisions of Regulation XXV of 1793. There is certainly nothing in the section to lead us as to impose a construction which is contrary to the general scope of the Regulation as declared in the preamble.

17. With regard, however, to the subsequent Regulations X of 1800, and XII of 1805, we are not prepared to go as far as the learned Subordinate Judge appears to have gone. The litigation of 1801 was in the zillah Court of Midnapur. That, of course, was before the annexation of Orissa, and it may be assumed that it referred to a property which was situated within the limits of the territorial jurisdiction exercised under the East India Company in those days. Regulation XII of 1805, which was passed after the annexation of Orissa, can, therefore, have no application to the property in suit. Nor do we think that the jungle mahals of Midnapur and other districts, specified in Regulation X of 1800, can be regarded as including pergunah Orissa Balisai now in suit. The term "Jungle Mahal" had a well recognised meaning, and a list of some of the pergunas of Midnapur included in the jungle mahal, is annexed to Section 3 of Regulation XVIII of 1805. As the property in suit does not seem to appertain to any pergunah therein specified we do not think that the provisions of Regulation X of 1800 and of Section 36 of Regulation XII of 1805, can assist the plaintiff. But without in any way exhaustively considering the provisions of these early Regulations, we think it quite sufficient to base our judgment on the plain fact that the family custom, or kulachar, whereby the rule of primogeniture has been given effect in the family of the parties to the suit, has been amply proved by the evidence on the record, and, according to the opinion of the Judicial Committee, such a kulachar is in no wise taken away or rescinded by the application of Regulation XI of 1793.

18. The family had a military origin; and, although the head of the family is not a Rajah, he bears the honourable title of Bhuiyan," and, in all respects, he is a chieftain in lineal succession to his male ancestors.

19. In our view, the further question of limitation does not arise in this case as we find that the estate is an impartible Raj, and that, consequently, the plaintiff has no title to the property. But, if it were necessary to decide it, we should give

effect to the fact that, since over 40 years the members of the plaintiff's family, including his own father, have been sedulously excluded from any share of the property, and the fact that they have been in receipt of fixed sums of maintenance from the year 1866 to 1905. These facts cannot be explained in any other way than by the supposition that they not only knew that they were not entitled to any definite share in the property but that they were excluded from that share and that they knew of such exclusion.

20. We have examined all the evidence including the accounts of defendant No. 1, and the maintenance decrees, as well as the oral evidence, and the kabuliat of 1876 to which reference has been made in the earlier part of our judgment, and it is impossible to resist the conclusion that the plaintiff has been lawfully and effectually excluded from any share in the family property.

21. In the result, therefore, we must dismiss this appeal with costs.