
(2008) 09 AHC CK 0183

In the Allahabad High Court

Case No : Second Appeal Nos. 1930 and 2017 of 1983

Chandra Nath Kala, etc

APPELLANT

Vs

Trijugi Narain and others, etc.

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 14 Rule 3, 100
Evidence Act, 1872 — Section 65(a), 67
Hindu Succession Act, 1956 — Section 30, 5(ii)
Registration Act, 1908 — Section 57(5)

Citation : (2008) 09 AHC CK 0183

Hon'ble Judges : Poonam Srivastava, J

Final Decision : Allowed

Judgement

Mrs. Poonam Srivastava, J.—Heard Sri V.K.S. Chaudhary, Senior Advocate, assisted by Sri O.P. Mishra and Kunal Ravi Singh, learned Counsels for the plaintiffappellant and Sri R.N. Singh, Senior Advocate, assisted by Sri A.K. Singh and Sri V.K. Rai Advocates for the defendantrespondents.

2. Both the appeals are connected appeals since it relates to one and the same property. The dispute relates to Plot No. 16 which is a new number of old plot No. 9 which the plaintiffs claim to be in possession since a very long time. The facts giving rise to the dispute are that the State Government gave the land in question Which was Nazul land, on lease to one Bachchu Lonia on 12.9.1873. After the death of Bachchu Lonia, the property devolved on his son Ram Bharose. Raja Raghubir Singh., Maharaja of Maihar purchased the aforesaid lease hold property from Ram Bharose by means of saled deed on 12.8.1896.

3. Maharaja Brijnath Singh was the son of Raja Raghubir Singh who was the ruler of Maihar State. Maharaja Brijnath Singh had two wives, Smt. Surendra Kumari and Smt. Tej Kumari. He had two sons from his first wife and one son from the second wife Rani Tej Kumari. On 11.2.1966 Maharaja Brijnath Singh executed a registered Will bequeathing Palace of Maihar and Privy Purse to the sons of first

wife and the rest of the property to Rani Tej Kumari for her son after making provision for maintenance for others in his life time. The plaintiff Chandra Nath Kala claimed possession of the disputed property situated in Kydganj, Allahabad from the time of his ancestors. However, soon after the death of Maharaja Brijnath Singh on 13.10.1968, Govind Singh, son of senior Maharani executed a saledeed in favour of the defendants Trijugi Narain Dubey and Surendra Nath by means of a saledeed dated 18.11.1968. After the saledeed was executed, Trijugi Narain and another tried to take possession and this led to the institution of the Original Suit No. 194 of 1968, Sanku and Chandra Nath Kala v. Trijugi Narain and Surendra Nath. The suit was instituted on 20.11.1968 i.e. two days after the saledeed was executed by Govind Singh. The relief of injunction was claimed to restrain the defendants from interfering in plaintiffs possession over the property which consists of Kotharies and a compound. The title was claimed by adverse possession.

Temporary injunction was granted on 21.11.1968 and according to the plaintiffappellant, the injunction is operative till date, and they continue to be in possession. Rani Tej Kumari executed a special power of attorney in favour of Sri Vimal Kumar Singh in respect of the property in suit (old No. 9, new No. 6), Chaukhandi, Kydganj, Allahabad and two plots in Mohalla Arail to conduct negotiation for sale etc. The special power of attorney is on record as Paper No. 43A. The facts pleaded further reveal that the plaintiff who claimed possession since much before 30 years, got the saledeed executed in favour of Chandra Nath Kala by Rani Tej Kumari (through his power of attorney) on 6.6.1969. An amendment application was filed in Original Suit No. 194 of 1968 with a prayer to bring the subsequent events in the pleadings which was allowed by the trial Court. The defendants filed a civil revision challenging the order of the trial Court allowing the amendment application filed by Chandra Nath Kala to include the facts regarding execution of the saledeed in his favour by Rani Tej Kumari. Thus the amendment was with a view to raise an alternative plea. After the amendment was allowed, it was incorporated in the plaint which resulted in setting up of the plaintiffs claim on two grounds; (i) by adverse possession (ii) alternatively on the basis of the saledeed by Rani Tej Kumari who was given exclusive right on the basis of the Will in her favour by Raja Brijnath Singh. The Civil Revision No. 125 of 1971 was allowed by this Court on 10.12.1971 and the order of the trial Court allowing the amendment application was set at naught. After the aforesaid judgment, Chandra Nath Kala instituted another Original Suit No. 64 of 1972, Chandra Nath Kala v. Trijugi Narain. Surendra Narain and Sankoo were also arrayed as one of the defendants. This suit was instituted on 7.3.1972 claiming their right over the disputed property on the basis of the saledeed as well. Both the suits namely Suit Nos. 194 of 1968 and 64 of 1972 were considered and tried together, though the evidence was led in Original Suit No. 194 of 1968 which was treated as the leading case. Sanku who was coplaintiff in the earlier suit with Chandra Nath Kala was arrayed as a defendant in the subsequent suit. He filed his written statement on 27.9.1972 claiming that they

were owners in possession and they had perfected their possessory title, thus the claim set up by the plaintiffappellant Chandra Nath Kala was accepted by Sanku who was arrayed as one of the defendants in the subsequent suit. The name of Sanku was already entered as lessee of the State in the Municipal record. However, Trijugi Narain and Chandra Nath Kala filed applications for making entries of their names on the basis of the saled deed. NagarAdhikari, Mahapalika dismissed the applications of the defendantrespondent Trijugi Narain but the application of the appellant Chandra Nath Kala was allowed on 7.8.1976. This judgment was challenged before the Small Causes Court by Trijugi Narain which was allowed on 10.12.1982. The Additional District Judge vide order dated 18.3.1983 allowed the mutation Second Appeal No. 3 of 1983 setting aside the order of the Judge Small Causes Court in favour of Trijugi Narain and restored the order of the NagarAdhikari dated 7.8.1976 directing entry of name of Chandra Nath Kala. All these orders are also on record and was adduced in evidence.

4. The defendants denied the plaintiffs case and claimed that Raja Brijnath Singh had no right to execute the Will In favour of Rani Tej Kumari. The saled deed executed by Govind Singh in favour of Trijugi Narain and others was for a consideration of Rs. 6,000/ and property in question being a Joint Hindu Family, it could not have been bequeathed to Rani Tej Kumari exclusively. Besides, after the amendment was rejected, the subsequent Suit No. 64 of 1972 was not maintainable.

5. Learned Munsif framed as many as 13 issues. Issue No. 11 was framed on the question of maintainability of the subsequent Suit No. 64 of 1972 in view of decision of this High Court in Civil Revision No. 125 of 1971 rejecting the amendment application. The defendants claimed that the subsequent suit is barred since the amendment application was rejected by this Court. However, it appears that the objection was not pressed and the learned Munsif decided issue No. 11 against the defendants and held that the suit is maintainable. The other issue Nos. 2,3, 4 and 7 related to each other regarding the validity of Will dated 11.2.1966 executed by Brijnath Singh in favour of Rani Tej Kumari, whether Brijnath Singh was entitled to execute the Will being a Karta of HUF and whether Rani Tej Kumari denounced her claim on the property in dispute. Learned Munsif came to a conclusion that the appellant has no right on the basis of saled deed executed by Rani Tej Kumari in his favour and also the claim on the basis of adverse possession was decided against the appellant separately. Both the suits were dismissed on the same day though by separate judgment on 25.5.1983. The appellants preferred two appeals before the Additional District Judge vide Civil Appeal No. 517 of 1,983 and Civil Appeal No. 476 of 1983 which were also dismissed vide judgment dated 25.8.1983. Both the judgments are under challenge in these two second appeals which were admitted by this Court on the following substantial questions of law:

(1) Whether Maharaja Brijnath Singh was entitled to make the Will and his Will

was valid and effective regarding the property in suit?

(2) Whether Govind Singh having accepted the Will and having taken advantages and a bequest under the Will, it was not open to him to question the Will and the other bequest made thereunder?

(3) Whether the leasehold rights could be sold under the law and at any rate, the Wajibularz permitted the sale of abadi rights?

(4) Whether the plaintiff was entitled to a decree on the basis of his possessory title against defendant Nos. 1 and 2?

(5) Whether the alleged lease to Satyanarain (which was not proved) came to an end on the property which was let having fallen down and destroyed?

6. The first argument on behalf of the plaintiffappellant advanced by learned Senior Advocate Sri V.K.S. Chaudhary regarding the validity of the Will and the consequent saledeed by Rani Tej Kumari in favour of the plaintiff is that Maharaja of Maihar Raja Raghubir Singh, the then Ruler of Maihar State and father of Maharaja Brijnath Singh purchased the suit property from Ram Bharose, son of Bachchu Lonia, original holder. This was treated as part of Maihar State. Learned Counsel has placed paragraph 15 of the written statement filed on behalf of defendant Nos. 1 and 2 to establish that the subjectmatter of dispute was a part of the Maihar State till Govind Singh sold it to the defendants and in paragraph 18 it is admitted that Satya Narain executed "Sarkhat" (rent note) in respect of Maihar State. It is also admitted that Sanku said to be successor of Satya Narain was tenant in occupation of the property in question and was part of Maihar State.

7. Maharaja Brijnath Singh was the Ruler of Maihar State, when it acceded to the Dominion of India in 1946. He was also the Ruler of Maihar State in 1948 when Maihar State merged in what came to be known as part B State of Vindhya Pradesh under the Constitution and also when the part B State of Vindhya Pradesh was merged in the State of Madhya Pradesh. Maharaja Brijnath Singh was thus owner of an impartible estate called the Indian State of Maihar in which the property in dispute was blended. Learned counsel has placed "White Paper on Indian States" to substantiate that the private property of the Ruler and the property of the State came to be demarcated when Maihar State acceded to the Dominion of India. Admittedly the property in dispute came to be separated from the Maihar State and demarcated, designating it as private property of the Ruler (vide para 157 of "the White Paper on Indian States"). It makes this settlement final between the State and the Ruler. The property in suit, which belonged to the State of Maihar was thus carved out of impartible estate as private property of Raja Brijnath Singh. Shri V.K.S. Chaudhary has placed extract of White Paper, speaking of the principles on which private property was declared, (speaks vide para 158(i) at the end). "The Rulers were also allowed to retain one or two houses outside the State, for example, at a hill station or a seaside resort." This property was at the Prayag Tirth.

8. The finding of the lower appellate Court regarding applicability of the law of primogeniture governing impartible Indian States submits that this is a misconception of law and did not arise. Further the legal right, which Govind Singh inherited by birth, could not be taken away by the father. The property was private and personal of the purchaser. The Will in favour of Rani was invalid, is challenged on the ground that the property at Allahabad was always treated as property of Maihar State. This is also the admitted position in the written statement and also oral statement of the defendant. Secondly there was no distinction between Maihar State and alleged "private property of the Ruler" till this distinction came into play only when Union of India carved out the Rulers Private Properties from the State and settled it with them. "The White Paper on Indian States" further mentions, vide

"(Paragraph 156): The Instruments of Merger and Covenants establishing the various Unions of States are in the nature of overall settlements with the Rulers who executed them. While they provide for integration of the States and for transfer of power from the Rulers. They also guarantee to the Rulers privy purses, succession to the "gaddi", rights and privileges and full ownership, use and enjoyment of all properties belonging to them as distinct from the State properties...."

"(Paragraph 157): In the past the Rulers made no distinction between private and State property.....With the integration of States, it become necessary to define and demarcate clearly the private property of the Ruler.....By and large inventories were settled between the representatives of the Ministry of States (Union of India) and the Rulers concerned.....The settlement thus made are final between the States and the Rulers concerned."

"(Paragraph 158(i).....The Ruler's palace and houses (used for private guests and personal staff) were treated as his private property. The Rulers were also allowed to retain houses outside the State....."

(b) Under the heading "(3) Recognition of Rulers" (page 129) it is laid down, "The Rulers of merged and integrated States have been guaranteed succession according to law and custom."

(c) Rulers were recognized and defined after the merger of their State in Article 366(22) of the Constitution. The Constitution of India defined "Ruler" in relation to an Indian State, as meaning the person by whom any such covenant or agreement as is referred to it clause (1) of Article 291 was entered into and who for the time being is recognized by the President as the Ruler of the State....."

[These provisions were amended by Constitution (Twenty sixth) Amendment Act, 1971 with effect from 28.12.1971]

Thus Maharaja Brijnath Singh continued and was recognized as the "Ruler" at all material times.

(d) Further "Vindhya Pradesh Merger Agreement", vide Appendix XXXIII of the

"White Paper on Indian States" (page 285) provided.

"(Article VI) The Government of India guarantees the succession, according to law and custom to the gaddi of each covenanting State and to the personal rights and privileged, dignities and titles of the Ruler thereof."

"[Article VII(i)] The Ruler of each Covenanting State shall be entitled to full ownership use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of making over the administration of the State to the Raj Pramukh in pursuance of the Covenant."

At page 238 "Maihar" is mentioned as the Covenanting State at serial No. 8 of part A, Salute States.

(e) If the reasoning given by Lower Appellate Court that the property in dispute was joint family property and Maharaja Brijnath Singh had no power to execute the Will is accepted, then on the same principle execution of the saledeed by Govind Singh in favour of defendant Nos. 1 and 2 would also be void, since Govind Singh, a member of the Joint Hindu Family, alone would not be competent to execute the saledeed. Consequently, Defendant Respondents cannot get any right or title regarding the property in dispute."

9. Thus there are two conclusions; firstly the property in dispute was part and always treated as part of the impartible estate (namely the State of Maihar). It was part of impartible estate and governed by the law of primogeniture under the Hindu Law. This custom of primogeniture was guaranteed by the Government of India. The property in dispute was impartible property. The holder for the time being of an impartible property is alone entitled to the possession and enjoyment thereof. No member of the Joint Hindu Family gets a right therein by birth. [Vide Article 105 of Hindu Law by S.V. Gupte (AIR publication)]. Secondly [vide Article 106 of Hindu Law aforesaid] impartible property; although joint family property, can be disposed of by the holder by an act inter vivos or by will.

[The ordinary law of the Joint Hindu Family does not apply and the sons get no right in impartible estate by birth.]

10. Under the Covenant the palace at Maihar with the residences of employees and the properties lying at Allahabad including the property in dispute were recognized as private property of the Ruler. Thus, the Covenant recognized them as private property of Brijnath Singh alone and the learned Counsel thus submits that Raja Brijnath Singh was fully entitled to dispose of the property in dispute by will as it came to be recognized and separated as private property of the Ruler.

11. The law relating to impartible estate is detailed in Articles 104, 105, 106, 108 and 109 of S.V. Gupte Hindu Law (AIR publication) supra. The law in respect of impartible property is that the son does not get any rights by birth and the holder of impartible estate can dispose of the property by will. This has been laid down in a series of decisions by the Privy Council and the Supreme Court. In support of this argument, learned Counsel has relied on several decisions. Mirza

Raja Pushpavathi Vijayaram Gajapathi Raj Manne Sultan Bahadur v. Sri Pushpavathi Visweswar Gajapathiraj Rajkumar of Vizianagram, AIR 1964 SC118 Paragraphs 10,12,13,14,15 of the said judgment are quoted below:

"10. In their appeals, defendants 1 and 2 challenged the correctness of the decision of the Court below that the Prince of Wales Market was impartible and that the permanent leasehold rights in respect of nine villages were also not partible. They also contended that the Courts below were in error in holding that any jewels could be treated as regalia of the Zamindar and as such impartible. According to them, none of the 38 jewels should have been held to be impartible. Defendant No. 4 contends that the Court of Appeal was in error in reversing the decision of the trial Court particularly when the conclusions recorded by the trial Court in her favour were based mainly on the appreciation of her oral evidence.

12. We would not revert to the dispute, between the plaintiff and defendants 1 and 2. In dealing with this dispute, it is necessary to consider some points of law which have been argued before us. The first point which must be examined is in regard to the character of an impartible estate such as that which the Vizianagram family owns. Since the decision of the Privy Council in Shiba Prasad Singh v. Rani Prayag Kumar Debi, 59 Ind App 331 : (AIR 1932 PC 216), it must be taken to be wellsettled that an estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. If the holder has got the estate as an ancestral estate and he has succeeded to it by primogeniture, it will be a part of the joint estate of the undivided Hindu family. In the illuminating judgment delivered by Sir Dinshah Mulla for the Board, the relevant previous decisions bearing on the subject have been carefully examined and the position of law clearly stated. In the case of an ordinary joint family property, the members of the family can claim four rights: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; (4) the right of survivorship. It is obvious that from the very nature of the property which is impartible the first of these rights cannot exist. The second is also incompatible with the custom of impartibility as was laid down by the Privy Council in the case of Ran; Sartaj Kuari v. Deoraj Kuan, 15 IInd App 51: ILR 10AII272 (PC) and the First Pittapurcase Venkata Surya v. Court of Wards, 26 Ind App 88 : ILR 22 Mad 383 (PC). Even the right of maintenance as a matter of right is not applicable as laid down in the Second Pittapurcase, Ram Rao v. Raja ofPittapur, 45 Ind App 148: ILR 41 Mad 778 : (AIR 1918 PC 81). The 4th right viz. The Right of survivorship, however, still remains and it is by reference to this right that property, though impartible, has, in the eyes of law, to be regarded as joint family property. The right of survivorship which can be claimed by the members of the undivided family which owns the impartible estate should not be confused with a mere spes succesionis. Unlike spes successions, the right of survivorship can be renounced or surrendered.

13. It is also follows from the decision in Shiba Prasad Singh, 59 Ind App 331:

(AIR 1932 PC 216) case that unless the power is excluded by statute or custom, the holder of customary impartible estate, by a declaration of his intention, can incorporate with the estate selfacquired immovable property and thereupon, the property accrues to the estate and is impressed with all its incidents, including a custom of descent by primogeniture. It may be otherwise in the case of an estate granted by the Crown subject to descent by primogeniture. As Sir Dinshah Mulla has pointed out, questions of incorporation have been dealt with in several decisions of the Board as well as decisions of Indian High Courts, but the competency of incorporation was not challenged in any of them. It is clear that incorporation is a matter of intention and it is only where evidence has been adduced to show the intention of the acquirer to incorporate the property acquired by him with the impartible estate of which he is a holder that an inference can be drawn about such incorporation. In all such cases, the crucial test is one of intention. It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending selfacquired property with the joint family property. In the latter category of cases where a person acquires separate property and blends it with the property of the joint family of which he is a coparcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not by succession. On the other hand, if the holder of an impartible estate acquires property and incorporates it with the impartible estate, he makes it ? part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible. In both cases, however, the essential test is one of the intention and so, whenever intention is proved either by conduct or otherwise, an inference as to blending or incorporation would be drawn.

14. It was urged before the Privy Council in the case of Shiba Prasad Singh, 59 Ind App 331 : (AIR 1932 PC 216) that to allow the operation of the doctrine of incorporation, would really give the holder of impartible estate a right to prescribe a customary rule of succession different from that of the ordinary law, but this argument was rejected on the ground that "under the Hindu system of law, clear proof usage", even if it be a family usage, "will outweigh the written text of the law", Vide Collector of Madura v. Moofoo Ramalinga Sathupathy, 12 Moo Ind. App 397 at p. 436 (PC). "The power to incorporate", observed Sir Dinshah Mulla, "being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom." It is, of course, true that none of the considerations which are relevant in respect of immovable property would apply to movable property, and so, the theory of incorporation cannot apply to such movable property. That however is not to say that by a family custom, movable property cannot be treated as impartible. If a family custom is proved in the manner in which family customs have to be proved that certain category of movable property is treated by the family as impartible, that custom will, no doubt, be recognised. That, broadly stated is the position of Hindu law in respect of impartible property which has been clearly enunciated in

the case of Shibi Prasad Singh, 59 Ind App 331 : (AIR 1932 PC 216).

15. There is another aspect of this matter to which reference may be made at this stage. Prior to the decision of the Privy Council in the case of 15 Ind App 51: ILR 10 All 272 (PC), it was always assumed that a holder of an ancestral impartible estate cannot transfer or mortgage the said estate beyond his own lifetime so as to bind the coparceners, except, of course, for purposes beneficial to the family and not to himself alone. The reason for this view was that in a large number of cases impartible estates were granted on military tenure, and so, if alienations were freely allowed, the purpose of the grant itself would be frustrated if not destroyed. In 1888, however, this view was shaken by the decision of the Privy Council in Rani Sartaj Kuan's case 15 Ind App 51: ILR 10 All 272 (PC). In that case the holder of the estate had gifted 17 of the villages of his estate to his junior wife and the validity of this gift was questioned by his son. The son's plea, however, failed because the Privy Council held that:

"if, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or it may be in some cases, upon the nature of the tenure."

This decision was again affirmed by the Privy Council in the First Pittapur case, 26 Ind App 83 : ILR 22 Mad 383(PC). As a result of these decisions it must be taken to be settled that a holder of an impartible estate can alienate the estate by gift inter vivos, or even by a will, though the family is undivided; the only limitation on this power would flow from a family custom to the contrary or from the condition of the tenure which has the same effect."

12. The next decision relied upon is, *So Rajah Velugoti Kumara Krishna Yachendra Varu and others v. Sri Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and others*, AIR 1970SC 1795. Paragraphs 14,15,16 and 17 of the said judgment are quoted below:

"14. Section 2(2) of the Madras Impartible Estates Act, 1904 (Madras Act 2 of 1904) defines an "impartible estate" as "an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India. In relation to the Venkatagiri Zamindari the expression "Estate" in Section 3(a) of the Abolition Act refers obviously to the Venkatagiri Estate which till then was subject to the operation of the Madras Permanent Settlement Regulation and the Madras Estates Land Act. In relation to the Venkatagiri Zamindari Section 66 of the Abolition Act enacts that with effect from the notified date the Madras Impartible Estates Act, 1904 shall be deemed to have been repealed in its application to the Estate. The question arises whether the word "estate" in Section 66 of the Abolition Act denotes the zamindari consisting of properties which stood transferred to the Government under the Abolition Act and properties which are not so transferred, or whether the expression "estate"

refers to only the Venkatagiri Estate which until the notification issued under the Abolition Act took effect was the subject of the Permanent Settlement Regulation and the Madras Estates Land Act. The High Court has given sufficient reasons in support of its view that the word "estate" in Section 66 of the Abolition Act denotes only the estate governed by the Permanent Settlement Regulation and the Estates Land Act and not any other part of the impartible zamindari. In other words the Abolition Act has no application to properties which are outside the territorial limits of the Venkatagiri Estate. The result, therefore, is that in relation to Venkatagiri Zamindari the Madras Impartible Estates Act has been repealed so far as the Act applied to the Estate which by operation of Section 3(b) of the Abolition Act has got transferred and became vested in the State Government. In relation to other properties which have not become so vested in the Government the Madras Impartible Estates Act (1904) continues to be in force. It is the case of the plaintiffs that items 14, 15 and 16 of Schedule B did not vest in the Government under Section 3(b) of the Act. Items 14, 15 and 16 are Motimahall, Mount Road Madras, the District Judge's Bungalow Nellore and Venkatagiri Raja's bungalow, Kalahasti. It is conceded on behalf of defendant No. 1 that items 14, 15, 16 did not vest in the Government under Section 3(b) of the Abolition Act. It is further claimed on behalf of the plaintiffs that items 14, 15 and 16 have become partible properties after the coming into force of the Abolition Act and plaintiffs should be granted their shares of these properties. The contentions of the plaintiffs is that the Zamindari was made impartible by the agreement entered into by the brothers in 1889 and the properties which have not been taken over by the Government should be divided among the family members. We have already given reasons for the view that the Zamindari was impartible independently of the agreement of 1889 and that the agreement was no more than a conscious affirmation by the parties of what the position was previously in fact and in law. To put it differently the agreement of 1889 merely acknowledged and defined antecedent rights and antecedent obligations. It is, therefore, difficult to accept the contention of the plaintiffs that the three items of property in Schedule B have become partible properties. Since the Abolition Act did not affect these items the properties have continued to be what they were at the time of incorporation with the zamindari, namely the properties retain their impartible character.

15. We are also not impressed with the argument that as there was incorporation of the buildings with the original impartible estate the buildings ceased to have any impartible character when the impartibility of the parent estate was gone. It is true that the buildings which are outside the geographical limits of the Venkatagiri Zamindari cannot be brought within the definition of the Estate as defined in the Estate Lands Act and the Abolition Act cannot, therefore, be made applicable to such buildings. But the buildings have acquired the character of impartibility as a result of incorporation with the parent estate and that character cannot be lost unless the statute intervenes. Section 4 of the Impartible Estates Act itself contemplates parts of an Estate being impartible. In (1964) 2 SCR

403 : (AIR 1964 SC 118) the effect of integration is described as follows :

"In all such cases, the crucial test is one of intention. It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending selfacquired property with the joint family property. In the latter category of cases where a person acquires separate property and blends it with the property of the joint family of which he is a coparcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not by succession. On the other hand, if the holder of an impartible estate acquires property and incorporates it with the impartible estate, he makes it a part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible. In both cases, however, the essential test is one of intention and so, wherever intention is proved, either by conduct or otherwise, an inference as to blending or incorporation would be drawn."

16. It was urged on behalf of the plaintiffs that the effect of the Abolition Act in regard to Venkatagiri Estate was to take away the character of impartibility in relation to property both inside and outside the territorial limits of the Estate. It was also contended that the object of the Abolition Act was threefold (1) to eliminate the class of middlemen; (2) to abolish permanent settlement; and (3) to introduce ryotwari system. The argument was that in the face of the avowed objects of legislation it was futile to contend that the character of impartibility still continued in a truncated form. It was said "Cessante ratione legis, cessat et ipsa lex" (reason is the soul of the law and when the reason for any particular law ceases, so does the law itself). It is not possible to accept this principle in the present case. For, many times custom outlives the condition of things which give it birth. As observed by Lord Atkinson in *Rao Kishore Singh v. Mst. Gahenabai*, AIR 1919 PC 100.

"It is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times after that condition had completely altered. Therefore, the principle embodied in the expression "cessat ratione cessat lex" does not apply where the things which gave it birth."

We accordingly reject the contention of the plaintiff on this aspect of the case.

17. We are also unable to accept the contention of the plaintiffs that the property of the impartible estate was held in coparcenary as joint family property and became partible amongst the members once it lost its character of impartibility. In other words, the contention was that junior members had a present interest in the impartible estate and were entitled to a share in the estate once impartibility was removed. In our opinion there is no justification for this argument. The law regarding the nature and incidents of impartible estate is now well settled. Impartibility is essentially a creature of custom. The junior members of a joint

family in the case of ancient impartible joint family estate take no right in the property by birth and, therefore, have no right of partition having regard to the very nature of the estate that it is impartible. Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This, of course, is subject to Section 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as coowners. This is now made clear by the Judicial Committee in *Commr. Of I.T., Punjab v. Krishna Kishore*, 68 Ind App 155 : (AIR 1941 PC 120), 68 Ind App 181 : (AIR 1942 PC 3). The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. In the former case Sir George Rankin observed:

"But they find it necessary to say that the law as declared in the cases of *Bajinath* (AIR 1921 PC 62) and *Shiba Prasad Singh* (AIR 1932 PC 216) has not been unsettled by the *Gorakhpurcase* (AIR 1934 PC 157). The observation itself and its context show that the reference to the other judgments of the Board is controlled by the reference to *Bajinath's* case (AIR 1921 PC 62) as having negated the view that an impartible estate could not be in any sense joint family property. The issue in the *Gorakhpurcase* (AIR 1934 PC 157) was *Indarjit's* right to succeed, and the passage cited was addressed to that. It appears to waive aside, as no longer an obstacle, the extreme logic that as there is no right to a partition, the junior branch could have no right actual or prospective, which the enjoyment of maintenance could evidence. It need not be taken as swinging to the opposite extreme, indeed, it would be in a high degree unreasonable, having regard to the line of decisions, to interpret it as meaning that there is no reason why holders of impartible estates should not now be told that, unless they can prove a custom to the contrary, all junior male members of the family have a claim for maintenance that is, all who have not relinquished their right of succession. The point made is only this, that rights of maintenance out of an impartible family estate however little they may be, and to whichever member they be extended would not be enjoyed or enjoyable by any one who had ceased to be joint in respect of the estate. In their Lordships' opinion, this should not be taken to affirm any disputable doctrine as to the origin of the right of maintenance, or any other doctrine which would make junior members "actual coowners" or the right a "real right" in the sense negated by the Board in *Bajinath's* case (AIR 1921 PC 62)."

To this extent the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate, though it may be an ancestral joint family estate, is clothed with the incidents of self-acquired and separate property to that extent. The only vestige of the incidents of joint family property, which still attaches to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is assumed to be joint family property and the only right which a member of the joint family acquires by

birth is to take the property by survivorship but he does not acquire any interest in the property itself. The right to take by survivorship continues only so long as the joint family does not cease to exist and the only manner by which this right of survivorship could be put an end to is by establishing that the estate ceased to be joint family property for the purpose of succession by proving an intention, express or implied, on behalf of the junior members of the family to renounce or surrender the right to succeed to the estate. In the latest case *Anant Bhikappa v. Shankar Ramchandra*, 70 Ind App 232 : (AIR 1943 PC 196), the Judicial Committee clearly affirmed the principle that the property was not held in coparcenary:

"Now an impartible estate is not held in coparcenary (*Sartaj Kauri v. Deoraj Kuari*, (1887) 15 Ind App 51 (PC) though it may be joint family property. It may devolve as joint family property or as separate property of the last male owner. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g. Lineal male primogeniture. In the latter case jointness and survivorship are not as such in point; the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by custom."

13. The next decision relied upon by counsel is, *Thakore Shri Vinayasinhi (Dead) by Lrs. v. Kumar Shri Natwarsinhji and others*, 1998 (Supp) SCC 133 (Paras 7, 8,10,12,13,14,15,16,17,18,19,20). [These rulings quote and rely upon the Privy Council case AIR 1932 PC 216, *Shiba Prashad Singh v. Rani Prayag Kumari Dei*]/]. For a ready perusal the extract of the judgment in the case of *Thakore Sri* (supra) is quoted below:

"The holder of an impartible estate has the power of alienation not only by transfer inter vivos, but also by a will, even though the disposition by will may altogether defeat the right of survivorship of the junior members of the family. When the holder of an impartible estate is entitled to dispose of the estate during his lifetime, there is no reason why he will not be entitled to dispose of the same by a will. There is no restraint on the power of alienation of the holder of the impartible estate, as any restraint on the power would be incompatible with the custom of impartibility. The impartible estate, though ancestral, is clothed with the incidents of selfacquired and separate property, except as regards the right of survivorship which is not inconsistent with the custom of impartibility. The right of survivorship is a birthright and is not a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate."

14. Sri Chaudhary has pointed out Section 5 Clause (ii) of the Hindu Succession Act, 1956 which is as follows :

"5. Act not to apply to certain properties. The Act shall not apply to.....

(ii) Any estate which descends to a single heir by the terms of any covenant or

agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act".....

15. The submission of the learned Counsel for the appellant is that even if it is assumed that Hindu Succession Act, 1956 applies, the Court failed to notice Section 30 and Explanation thereof. The relevant portion of it is as follows:

"30. Temporary succession. Any Hindu may dispose of by will or other testamentary disposition any property which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus.

Explanation. The interest of a male Hindu in a Mitakshara coparcenary property.....shall notwithstanding anything contained in this Act or any other law for the time being in force be deemed to be properly capable of being disposed of by him or by her within the meaning of this section."

16. Thus, the findings on the question of validity of will is an error of law because firstly, the property becoming private property of Maharaja Brijnath Singh (as recognized) he could dispose it of by will and secondly, even if it was joint family property, the share of Maharaja Brijnath Singh will be the share, which he could dispose of by will in terms of explanation to Section 30 of the Act. It is relevant that the will dated 11.2.1966 executed by Maharaja Brijnath Singh was acted upon and Govind Singh took possession of the Palace (with attached houses etc.) and the Privy Purse under the Will. He cannot blow hot and cold in the same breath and claim the other part of the will of recognized personal property of his, namely that lying at Allahabad (outside Maihar State) also, which was bequeathed to Smt. Tej Kumari and her son Kumar Narain Singh under the same will.

17. The lower appellate Court wrongly remarked in paragraph 9 of the judgment : "Maihar State ceased in the year 1948 and there was no such State in the year 1966, when the will in favour of Smt. Tej Kumari was executed." As admitted, there was the custom of primogeniture, which governed the devolution of the property on the eldest son, who alone inherited the property. Continuance of custom was also guaranteed by Central Government in the Covenant. Maharaja Brijnath Singh, who was the Covenanting Ruler was holder of the impartible estate, his status as Ruler continued till his death. He could execute the will, whether as holder of the impartible estate or as owner of personal property under the Covenant. The law of Joint Hindu Family never applied. (Status of Ruler was abolished by the Constitutional Amendment of 1971 with effect from 28.12.1971).

18. Learned counsel has placed the statement of Govind Singh, his brother Ram Chandra Singh and their mother Smt. Surendra Kumari admitted in their appeal before the Appellate Assistant Commissioner of income Tax at Jabalpur on 12.4.1971 (Paper No. 40/C) as follows:

"Properties whose income is assessed in this case (including the property at Allahabad) passed on to the person Nos. 4 and 5 mentioned in the assessment order (paper No. 41/C, Smt. Rani Tej Kumari and her son Kumar Narain Singh) as per will of late His Highness Maharaja Brijnath Singh as already decided in Appeal No. 270 dated 7.2.1970."

19. The defendant No. 1 Trijugi Narain himself admitted the execution of the Will.

20. Sri V.K.S. Chaudhary submitted that the second question on which the appeal was dismissed, was that the saledeed relied upon by the plaintiff was on the ground that the disputed property being lease land prior to the permission of the State Government for transfer of the entire property including the construction was necessary before any transfer was made. This reason for which the appeal was dismissed is not sustainable in law, firstly because this was nobody's case. This finding is beyond the pleadings and, therefore, is rendered without jurisdiction. Secondly because the lease hold rights are saleable. The Wajibularz permits sale of building and the right of residence and no permission is necessary for it. In support of this argument, learned counsel has placed Paper No. 37/C adduced in evidence in original suit No. 194 of 1968. Thirdly it is also submitted that in case the finding recorded by the Courts below that saledeed could have been executed by Govind Singh in favour of defendant Nos. 1 and 2, admittedly Govind Singh had also not sought any prior permission before executing the saledeed, therefore, this reasoning given by the Courts below is perverse and if the two saledeeds are not taken into consideration then the plaintiff should have been recognized to be in possession since before 30 years of the institution of the suit in the year 1968 and consequently have perfected their possessory title.

21. Sri R.N. Singh, Senior Advocate, assisted by Sri A.K. Rai has controverted the arguments emphatically. The question of validity of Will only arise when the original Will was brought on record. The trial Court framed specific issue regarding proof and validity of Will which was denied in the written statement as well. The original was not produced and no reasons were given nor any attempt was made to lead any evidence to establish as to why the secondary evidence be accepted while making assessment of the Will in favour of Rani Tej Kumari. Dr. K.C. Kumar who is one of the testifying witness was examined. Rani Tej Kumari was also examined by a commission and none of them were able to give any satisfactory answer for nonproduction of the original Will. The second objection regarding the Will is that it does not include the property in question since the property is not specifically mentioned in the Will, it goes long way to prove that the property was not bequeathed by Raja Brijnath Singh to her younger Rani. It is also argued by Sri R.N. Singh that the power of attorney to execute the saledeed in favour of Chandra Nath Kala is no proof of the fact that Rani Tej Kumari got the property in question under the Will and, therefore, the finding recorded by the Court below on the question of validity of Will is a finding of fact. The argument on behalf of the appellant that the certified copy could be relied upon is manifestly erroneous. The certified copy could only be relied upon to

establish that despite best efforts original could not be procured. Reliance has been placed on a Division Bench decision of this Court in the case of Gopal Das and another v. Sri Thakurji and another, AIR 1936 All 422. The Court held that unless the loss of original deed is proved, or it is proved that the original is in possession of or under the control of the opposite party, secondary evidence is inadmissible. Another decision cited by learned counsel is, Parsa Singh v. Smt. Parkash Kaur and others, AIR 1976 P&H 235. It is further submitted that since there was no pleadings by the plaintiff or the defendants, the question of impartible and right of execution of the Will could not be gone into and the Will could not be read in evidence. It is not necessary to go into the question whether the Will was acted upon or not or validity of the Will regarding the fact that Raja Brijnath Singh could execute the Will. So far the question raised by Sri Chaudhary regarding impartible property is concerned, the submission of the counsel for the defendants is that this was not part of the pleadings and, therefore, any argument on its basis is beyond the scope of Section 100, C.P.C. Learned counsel for the respondents states that no amount of evidence can be looked into in absence of pleadings.

22. The argument of Sri V.K.S. Chaudhary is that the objection raised on behalf of the defendant is not well founded. A bare perusal of Order 14 Rule 3, C.P.C. is sufficient to show that the Code of Civil Procedure has not restricted the framing of issues to the pleadings alone. To controvert the argument of Sri R.N. Singh, Sri V.K.S. Chaudhary has placed paragraphs 4 and 5 of the plaint where the question of Will dated 11.2.1966 in favour of Smt. Tej Kumari, the junior Rani as the full owner of all his property wherever situated is mentioned and pleaded, as well as the limited rights to his son Govind Singh, which was only palace at Maihar and the Privy Purse. Learned counsel for the appellant has emphatically disputed this objection. The pleadings alone is not to be taken into consideration while framing the issues or points to be determined. Paragraphs 4 and 5 of the plaint are quoted below:

"4. That in the course of enquiry by the plaintiff into the genuineness and validity of the aforesaid transfer, he came to know that Raja of Maihar, Sri Brijnath Singh died on 13.10.1968 and that, before his death, he had executed a registered deed of Will on 11.2.1966, thereby making his junior Rani, Smt. Tej Kumari, the full owner of all his properties wherever situated, and giving rights to his son Sri Govind Singh, only in his palace at Maihar and the Privy Purse. The will has been acted upon.

5. That thus, by virtue of the will aforesaid, Smt. Tej Kumari claimed to have title to the premises in suit on the death of her husband, Sir Brijnath Singh. She however realised that the plaintiff was in possession of the same adversely to the rightful owner for a long time and that it was difficult to get back possession from him. The premises however continued to be recorded in the name of Maharaja Sir Brijnath Singh. In view of the above circumstances she executed a deed of sale in favour of the plaintiff in respect of the premises on 6.6.1969

thereby putting an end to whatsoever rights she may have had in respect of the said premises."

23. In the written statement filed by the defendants, it is stated in paragraph 26 that there had never been any custom or long established practice for execution of Will by any Ruler of Maihar State and the property could not be bequeathed by Will and the said Will is without any right or authority nor was any right to execute a Will under the terms of the tenure or grant. Similar assertions have been made in paragraph 28 of the written statement.

24. In view of these assertions in the written statement, it cannot be said that the appellant is precluded from advancing argument as to how Raja Brijnath Singh had right to make the Will or the custom prevalent at the relevant time since these pleadings are very much in the plaint and written statement.

25. I am of the considered view that the arguments of Sri V.K.S. Chaudhary cannot be thrown out merely on the objection that there was no specific pleadings regarding applicability of law of primogeniture or it was an impartible State. Applicability of law of primogeniture or whether it was an impartible State or not are ancillary questions and has to be taken into consideration. The pleadings as quoted above relates to the execution of the Will and, therefore, any argument regarding legality and the right for execution of the Will by Raja is not beyond the scope of pleadings. Besides, Order 14 Rule 3 provides materials from which issues may be framed. For a ready reference, the Order 14 Rule 3 is quoted below:

"3. Material from which issues may be framed. The Court may frame the issues from all or any of the following materials:

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) the contents of documents produced by either party."

That it is evident that the allegations made on oath by the parties or by any persons present on their behalf, or contents of the documents produced by either party can very well be considered and issues could be framed by the Court as it is very material for a just decision. The trial Court had framed specific issue regarding the validity of the Will and also that whether the plaintiff gets a valid title on the basis of sale deed dated 6.6.1969 or whether Govind Singh son of Brijnath Singh had a right to transfer the disputed land in favour of the defendant Nos. 1 and 2. Since the plaintiffs have adduced the evidence, the statement before the Income Tax Department by Sri Govind Singh that it was the junior Rani who had a right and claim over the property situated at Allahabad on the basis of the Will, I consider it to be within the scope of Courts to have framed issues and record its findings. The plaintiffs are very well entitled to raise this

argument on the basis of Allahabad Amendment of Order 14 Rule 1, C.P.C. as well as Order 14 Rule 3, C.P.C. It is clear that under the law the judgment of the trial Court merged with that of appellate Court judgment. Sri Chandra Nath Kala had summoned the original Will of Maharaja Brijnath Singh vide Paper No. 93C dated 21.1.1976 which is on record. The trial Court allowed this application on 30.1.1976. PW2 Chandra Nath Kala also stated in his statement that Rani Tej Kumari has stated that the Will is to be in possession of Mukhtaream and that the Will is not traceable and, therefore, a certified copy was adduced in evidence. It is not disputed that the Will was a registered document which was also admitted by Rani Tej Kumari, PW1 vide Paper No. 120A. In the aforesaid circumstances, the certified copy of the Will cannot be said to be inadmissible in evidence. In the circumstances, the certified copy of the Will was admissible as secondary evidence under Section 65 clause (a) read with Section 67 of the Indian Evidence Act. The execution and attestation has also been proved vide paper No. 201 A/4. The attesting witness Dr. K.C. Kumar was examined as PW6 and once the existence of the Will is admitted by Govind Singh and proved under Section 57(5) of the Registration Act, 1908, the lower appellate Court committed grave error in completely negating the secondary evidence. Section 57(5) of the Registration Act reads as under:

"57(5) All copies given under this section shall be signed and sealed by the Registering Officer, and shall be admissible for the purpose of proving the contents of the original documents."

26. I cannot overlook that existence of the Will of Maharaja Brijnath Singh in favour of junior Rani is also a clear and unequivocal admission by the defendants. The mother of Govind Singh, Rani Surendra Kumari has also admitted that the disputed property along with some other properties were bequeathed by Maharaja Brijnath Singh by executing a Will. The memorandum of appeal before the Income Tax Commissioner in Appeal No. 270/6970 decided on 7.2.1970 vide paper No. 40C are on record. Sri Trijugi Narain, defendant has also admitted in his statement that Maharaja Brijnath Singh has willed "Niji Sampatti" in favour of Rani Tej Kumari and further a special power of attorney vide Paper No. 43A dated 9.2.1969 in favour of Sri Vimal Kumar Singh are also on record which shows that he was empowered to sell the disputed plots situated at Chaukhandi Kydganj, Allahabad. Thus the aforesaid documents and admissions are sufficient to establish that a Will was executed and a certified copy was adduced in evidence. Besides, the execution of the Will was very much pleaded by the plaintiffs. So far the question of impartible State and the right to execute the Will automatically becomes a relevant question and ancillary to be decided, since specific issue was already framed on the question of validity of the Will. The existence of the Will was pleaded, evidence has been led and, therefore, the right to execute the Will has also to be established by the plaintiffs. The documents have been specifically placed before me from the record by Sri V.K.S. Chaudhary and on a detailed consideration, I am in agreement with the submissions of the learned counsel that the lower appellate Court has failed to

give any finding on relevant questions. Besides, the finding by the lower appellate Court that the question of applicability of law of primogeniture governing of impartible State does not arise, is absolutely a wrong finding. The lower appellate Court was liable to consider these aspects while deciding the validity of the Will and the exception in Section 5(ii) of Hindu Succession Act as well as the personal custom prevalent at the time guaranteed in the Constitution by Government of India. Since there is already an admission by the defendants regarding existence of the Will and the property in dispute having bequeathed in favour of junior Rani, I hold that Govind Singh had no valid title and he cannot transfer the disputed land in favour of the defendants. It is wellsettled law that a person can transfer only the limited right to the extent he possessed but he cannot transfer anything more than he himself has a right or title and, therefore, necessary consequence is that the saledeed in favour of the defendants by Govind Singh cannot bestow any title on them better than what Govind Singh himself possessed. The finding by the lower appellate Court that the father had no legal right to debar the son namely Govind Singh from inheritance in the matter of ancestral property is in fact without consideration of the material questions raised on behalf of the plaintiffs.

27. The next argument on behalf of the defendantrespondents is on the question of adverse possession. The claim of the plaintiff is disputed, firstly that there is no evidence of proving the intention of the plaintiff against Raja of Maihar. Animus or intention for grant of an adverse title against the true owner is prerequisite and in absence of proof that animus or intention nobody can acquire a possessory title. Learned counsel has placed several decisions in support of this contention. P.T. Munichikkanna Reddy and others v. Revamma and others, JT 2007(6) SC 86. In this case it was held that a claim for title by adverse possession is only possible when there must be an intention to dispossess and it needs to be open a hostile enough to bring the same to the knowledge of the plaintiff. Since a right of adverse possession is not substantive right but a result of waiving, wilfull or omission or negligence or otherwise to defend or care for the integrity of property. Paragraph 30 of the said judgment is quoted below:

"30. Thus the test of *nee vi, nee clam, nee precario* i.e., "not by force, nor stealth, nor the licence of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession."

28. Similar view was followed by this Court in Pratap Bhan v. Smt. Krishna Devi Pandey and others, 2007(4) AWC 3809. It was held that it is settled law that for the ouster of the actual owner three circumstances namely hostile intention, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of actual owner should be proved.

29. Sri V.K.S. Chaudhary, learned Senior Advocate has placed before me Paper No. 182C which is a document dated 3.8.1945 and is a receipt by Maharaja Brijnath Singh in favour of Kali Prasad Gupta in respect of the disputed property

whereby an agreement to sell the property and it has been pointed out that there was a clear agreement that the purchaser will have a right to oust the unauthorized occupant from the disputed land. The agreement was to sell the property for an amount of Rs. 500/ and Rs. 250/ was taken as advance. This document has been placed to show from the record that the knowledge of unauthorized occupancy by the plaintiff was admittedly on or before 3.8.1945. In the circumstances, it is evident that this document was brought on record to establish the date of knowledge of hostile possession. Besides, Paper No. 128A to 132A is licence issued by Allahabad Municipal Board for lodging the pilgrims in favour of the plaintiff in which permission to lodge pilgrims has been granted regarding plot No. 9 which is now equivalent to the plot No. 16. This licence relates to the year 1948 to 1951. These licences for lodging pilgrims are in the name of Raghubir Prasad Kala who is elder brother of Chandra Nath Kala. Parties who came to Allahabad stayed in the said property and these evidence have completely been ignored by the lower appellate Court while, recording a finding that the possession by the plaintiffs is not proved. So far the report of the Commissioner dated 21.11.1968 vide Commissioner report. Paper No. 194C mentions that Chandra Nath Kala and Sanku are in possession of the disputed property. The receipts of water tax are also on record of Suit No. 194 of 1968. Thus the Court lost sight of the various admissions of the defendants' witnesses and the documents. It is already held above that they claimed right on the basis of sale deed executed by Govind Singh who had no right to do so and, therefore, the findings of the Courts below regarding adverse possession is also without any basis. The emphasis by Sri R.N. Singh on the basis of the institution of suit for possession by Trijugi Narain and Surendra Nath for possession against Sanku vide Original Suit No. 181 of 1969 in respect of plot No. 16, it is to be noticed that no suit was filed against the appellant Chandra Nath Kala and admittedly Trijugi Narain and Surendra Nath did not get possession of the land in question.

30. Sri V.K.S. Chaudhary has also placed reliance on two decisions of the Apex Court, *Sirajul Haq Khan and others v. Sunni Central Board of Waqf U.P. and others*, AIR 1959 SC 198. Paragraphs 19 to 24 of the said judgment are quoted below:

"19. The next question which calls for our decision is whether the appellant's suit is saved by virtue of the provisions of Section 15 of the Limitation Act. That is the only provision on which reliance was placed before us by Mr. Daron behalf of the appellants. Section 15 provides for "the exclusion of time during which proceedings are suspended" and it lays down that "in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded." It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order or an injunction which stays the institution of the

suit. And so in cases falling under Section 15, the party instituting the suit would by such institution be in contempt of Court. If an express order or injunction is produced by a party that clearly meets the requirements of Section 15. Whether the requirements of Section 15 would be satisfied by the production of an order or injunction which by necessary implication stays the institution of the suit is open to argument. We are, however, prepared to assume in the present case that Section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed or injunction issued in the previous litigation. But, in our opinion, there would be no justification for extending the application of Section 15 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship; but there can be no doubt that, in construing provisions of limitation, equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words used by them : *Nagendra Nath Dey v. Sores/7 Chandra Dey*, 34 Bom IR1065: (AIR 1932 PC 165).

20. In considering the effect of the provisions contained in Section 15, it would be useful to refer to the decision of the Privy Council in *Narayan Jivangouda v. Puttabai*, 47 Bom LR 1 : (AIR 1945 PC 5). This case was an offshoot of the wellknown case of *Bhimabaiv. Gurunathgouda*, 35 Bom LR 200: (AIR 1933 PC 1). It is apparent that the dispute between Narayan and Gurunathgouda ran through a long and protracted course and it reached the Privy Council twice. The decision of the Privy Council in *Bhimabai's* case (AIR 1933 PC 1) upholding the validity of Narayan's adoption no doubt led to a radical change in the accepted and current view about the Hindu widow's power to adopt in the State of Bombay, but this decision was of poor consolation to Narayan because the judgment of the Privy Council in *Narayan Jivangouda's* case (AIR 1945 PC 5) shows that Narayan's subsequent suit to recover possession of the properties in his adoptive family was dismissed as barred by time. The dispute was between Narayan and his adoptive mother *Bhimabai* on the one hand and *Gurunathgouda* on the other. On November 25, 1920, *Gurunathgouda* had sued *Bhimabai* and *Narayan* for a declaration that he was in possession of the lands and for a permanent injunction restraining the defendants from interfering with his possession. On the same day when the suit was filed, an interim injunction was issued against the defendants and it was confirmed when the suit was decreed in favour of *Gurunath gouda*. By this injunction the defendants were ordered not to take the crops from the fields in suit, not to interfere with the plaintiffs wahiwat to the said lands, not to take rentnotes from the tenants and not to obstruct the plaintiff from taking the crops raised by him or from taking monies from his tenants. Two important issues which arose for decision in the suit were whether *Narayan* had been duly adopted by *Bhimabai* in fact and whether *Bhimabai* was competent to make the adoption. These issues were answered against *Narayan* by the trial Court. *Bhimabai* and *Narayan* appealed to the Bombay High Court, but their appeal failed and was

dismissed, *Bhimabai v. Gurunathgouda*, 30 Bom LR 895: (AIR 1928 Bom 367). There was a further appeal by the said parties to the Privy Council. The Privy Council held that the adoption of Narayan was valid and so the appeal was allowed and Gurunathgouda's suit was dismissed with costs throughout. In the result the injunction granted by the Courts below was dissolved on November 4, 1932. On November 25, 1932, Narayan and Bhimabai filed their suit to recover possession of the properties from Gurunathgouda. They sought to bring the suit within time *inter alia* on the ground that the time taken up in litigating the former suit or at least the period commencing from the grant of temporary injunction on February 25, 1920 to November 4, 1932 when the injunction was dissolved by the Privy Council should be excluded under Section 15 of the Limitation Act. This plea was rejected by the trial Court and on appeal the same view was taken by the Bombay High Court. Rangnekar, J. who delivered the principal judgment exhaustively considered the relevant judicial decisions bearing on the question about construction of Section 15 and held that the injunction issued against Narayan and Bhimabai in Gurunathgouda's suit did not hold to attract Section 15 to the suit filed by them in 1932, *Narayan v. Gurunathgouda*, 40 Bom LR 1134 : (AIR 1939 Bom 1). The matter was then taken to the Privy Council by the plaintiffs; but the Privy Council confirmed the view taken by the High Court of Bombay and dismissed the appeal: AIR 1945 PC 5.

21. In dealing with the appellants' argument that the injunction in the prior suit had been issued in wide terms and in substance it precluded the plaintiffs from filing their suit, their Lordships observed that there was nothing in the injunction or in the decree to support their case that they were prevented from instituting a suit for possession in 1920 or at any time before the expiry of the period of limitation. It appears from the judgment that Sir Thomas Strangman strongly contended before the Privy Council that since the title of the contending parties was involved in the suit, it would have been quite futile to institute a suit for possession. This argument was repelled by the Privy Council with the observation that "we are unable to appreciate this point, for the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation." There can be little doubt that, if on considerations of equity the application of Section 15 could be extended, this was preeminently a case for such extended application of the said provision; and yet the Privy Council construed the material words used in Section 15 in their strict grammatical meaning and held that no order or injunction as required by Section 15 had been issued in the earlier litigating with this point, their Lordships did not think it necessary to consider whether the prohibition required by Section 15 must be express or can even be implied.

22. There is another decision of the Privy Council to which reference may be made. In *Beti Maharani v. Collector of Etawah*, ILR 17 All 198 at pp. 210, 211 their Lordships were dealing with a case where attachment before judgment under Section 485 of the Code of Civil Procedure had been issued by the Court at the instance of a third party prohibiting the creditor from recovering and the

debtor from paying the debt in question. This order of attachment was held not to be an order staying the institution of a subsequent suit by the creditor under Section 15 of Limitation Act of 1877. "There would be no violation of it" (said order) observed Lord Hobhouse, "until the restrained creditor came to receive his debt from the restrained debtor. And the institution of a suit might for more than one reason be a very proper proceeding on the part of the restrained creditor, as for example, in this case, to avoid the bar by time, though it might also be prudent to let the Court which had issued the order know what he was about". In *Sundaramma v. Abdul Khader*, ILR 56 Mad 490 :(AIR 1933 Mad 418) (FB) the Madras High Court, while dealing with Section 15 of the Limitation Act, has held that no equitable grounds for the suspension of the cause of action can be added to the provisions of the Indian Limitation Act.

23. It is true that in *Mt. Basso Kuar v. Lala Dhum Singh*, 15 IndApp 211, their Lordships of the Privy Council have observed that it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not; but this observation must be read in the context of facts with which the Privy Council was dealing in this case. The respondent who was a debtor of the appellant had agreed to convey certain property to him setting off the debt against part of the price. No money was paid by the respondent and disputes arose as to the other terms of the agreement. The respondent sued to enforce the terms of the said agreement but did not succeed. Afterwards when he sued for the debt he was met with the plea of limitation. The Privy Council held that the decree dismissing the respondent's suit was the starting point of limitation. The said decree imposed on the respondent a fresh obligation to pay his debts under Section 65 of the Indian Contract Act. It was also held alternatively that the said decree imported within the meaning of Article 97 of Limitation Act of 1877 a failure of the consideration which entitled him to retain it. Thus it is clear that the Privy Council was dealing with the appellant's rights to sue which had accrued to him on the dismissal of his action to enforce the terms of the agreement. It is in reference to this right that the Privy Council made the observations to which we have already referred. These observations are clearly obiter and they cannot, in our opinion, be of any assistance in interpreting the words in Section 15.

24. It is in the light of this legal position that we must examine the appellants' case that the institution of the present suit had been stayed by an injunction or order issued against them in the earlier litigation of 1940. We have already noticed that Civil Suit No. 1 of 1940 had been instituted against the appellants with the sanction of the Advocate General for their removal and for the settlement of a fresh scheme. The appellants were ordered to be removed by the learned trial Judge on October 16, 1941; but on appeal the decree of the trial Court was set aside on March 7, 1946. It is the period between October 16, 1941, and March 7, 1946, that is sought to be excluded by the appellants under Section 15 of the Limitation Act. Mr. Dar contends that the order passed by the trial Judge on October 16, 1941, made it impossible for the appellants to file the

present suit until the final decision of the appeal. By this order the appellants were told that they should not in any way interfere with the affairs of the Darga Sharif as members of the committee and should comply with the decree of the Court by which they were removed from the office. It is obvious that this order cannot be construed as an order or an injunction staying the institution of the present suit. In fact the present suit is the result of the notification issued by respondent 1 on February 26, 1944 and the subsequent steps taken by it in the purported exercise of its authority under the Act. The cause of action for the suit has thus arisen subsequent to the making of the order on which Mr. Dar relies; and on the plain construction of Section 15 of the Limitation Act. We have already held that the relevant words used in Section 15 must be strictly construed without any consideration of equity; and so construed, we have no doubt that the order on which Mr. Dar has placed reliance before us is wholly outside Section 15 of the Limitation Act. We would, however, like to add that this order did not even in substance create any difficulty against the institution of the present suit. The claim made by the appellants in the present suit that the properties in suit do not constitute a waqf and the declaration and injunction for which they have prayed do not infringe the earlier order even indirectly or remotely. We must, accordingly, hold that the High Court was right in taking the view that Section 15 did not apply to the present suit and that it was, therefore, filed beyond the period of one year prescribed by Section 5(2) of the Act."

31. The next decision relied upon by the counsel is *Bala Tripura Sundaramma v. Abdul Khader*, AIR 1933 Mad 418 (FB).

32. On the basis of the findings recorded above, I conclude that since material evidence has completely been ignored by the two Courts below and this has resulted in grave injustice to the plaintiff, the argument of the learned counsel for the defendantrespondents that the question of adverse possession and validity of the Will is a finding of fact and cannot be interfered in exercise of jurisdiction under Section 100, C.P.C., is without any substance. Admittedly, the questions raised regarding the validity of the Will, the right to bequeath the property in dispute by means of a Will and consequential rights accruing to the respective parties, is a question of law and fact regarding which relevant issues were framed but since the documents have been ignored, it has resulted in miscarriage of justice and, therefore, can very well be interfered with in the second appeal. Since these questions go to the root of the controversy and were liable to be considered by the Courts below, this has resulted in substantial error and I am of the view that the two judgments of the Courts below are cursory ignoring the material evidence and also without taking into consideration, legal questions and consequences and thus on account of the reason that material evidence has been overlooked it has resulted in a substantial error of law.

33. Sri R.N. Singh laid emphasis on the fact that the findings of the two Courts below are concurrent and this Court has a limited scope while exercising its jurisdiction under Section 100, C.P.C. and, therefore, it is submitted that the

questions raised in this second appeal on behalf of the appellant will amount to reappraisal of evidence and in view of recent decisions of the Apex Court as well as this Court, the judgments cannot be interfered with.

34. No doubt this objection of the learned Counsel for the respondents is well founded and the High Court should not ordinarily interfere in the findings recorded on appraisal of evidence but still the High Court is not completely handicapped if it appears that the Courts below have failed to take into consideration the evidence on record and legal principles emerging from such evidence and the questions which were debatable legal issues, were completely overlooked. The Apex Court in the case of Hero Vinoth (Minor) v. Seshammal, 2006(2) CRC 261, has held that:

(1) An inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document creating an easement by grant is constructed as an "easement of necessity" thereby materially affecting the decision in the case, certainly it give rise to a substantial question of law.

(2) The High Court should be satisfied that the case involves a substantial question of law and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law or settled legal principle emerging from binding precedents, and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable; but because the decision rendered on a material question, violates the settled position of law; and

(3) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonable capable of supporting the finding.

35. In view of what has been stated above, the judgments and decree dated 25.5.1983 passed by the 1st Additional Munsif Magistrate, Allahabad and 25.8.1983 passed by 1st Additional District Judge, Allahabad are, therefore, set

aside. The plaintiffs are declared to be the rightful owner of the disputed property. The sale deed executed in favour of the defendants are without any right or title specially since it is own admission of the vendors through whom the defendants claimed their rights and, therefore, I hold that they had no right or title over the disputed property. The appeals are accordingly allowed. Cost on parties.