

(1922) 02 PAT CK 0016

In the Patna High Court

Raja Sri Sri Shiva Prasad Singh

APPELLANT

Vs

Beni Madhab Chowdhury

RESPONDENT

Date of Decision : 16-02-1922

Acts Referred:

Transfer of Property Act, 1882 — Section 58

Citation : AIR 1922 Patna 529 : 70 Ind. Cas. 24

Hon'ble Judges : Das, J;Adami, J

Bench : Division Bench

Judgement

Das, J.—Two questions have been raised in this appeal, first, whether the appellant who applied for a decree as against the respondent under Order XXXIV, Rule 6, of the Code could maintain the application without a Succession Certificate, and, secondly, whether the document upon which the appellant relies operated merely as a charge, and, if so, whether the appellant was entitled to a decree under Order XXXIV, Rule 6, the Code.

2. The facts are these: Raja Durga Prosad Singh of Jheria brought a suit for royalty in respect of certain coal lands. He obtained a decree and the properties were sold on the 17th September 1915. The sale did not satisfy the claim of Raja Durga Prosad as against the respondent and there still remained a sum of Rs. 4,175 due to Raja Durga Pro ad. Raja Durga Prosad, it appears, died after the sale of the properties and the present appellant has succeeded to the Raja by survivorship. On the 15th July 1918 the appellant presented an application under Order XXXIV, Rule 6, for recovery of the sum of Rs. 4,175 from the respondent. The learned Subordinate Judge being of opinion that the appellant could not maintain the application without at Succession Certificate, has dismissed the claim of the appellant.

3. I am of opinion that the decision of the learned Subordinate Judge on this point cannot be supported. Admittedly the appellant has succeeded to the Jheria Raj by right of survivorship, but it was urged on behalf of the appellant that the estate being impartible the appellant could only have taken the estate by

inheritance, although he was selected as such successor by the application of the rule of survivorship. In support of his argument Mr. S. M. Mullick relied upon the decision of this Court in the case of Shyam Lal Singh v. Raja Bijay Narayan Kundu Bahadur 39 Ind. Cas. 36 : 2 P.L.J. 136 : 1 P.L.W. 140 : (1917) Pat. 121. I will consider this case in a moment, but it is necessary to point out that the law on the subject has been discussed very fully and elaborately by the Judicial Committee in the recent case of Baijnath Prasad Singh v. Tej Bali Singh 60 Ind. Cas. 534 : 43 A. 228 : 48 I.A. 195 : 19 A.L.J. 317 : Cri.L.J. 388 : 40 M.L.J. 387 : (1921) M.W.N. 300 : 25 C.W.N. 564 : 2 P.L.T. 257 : 23 Bom. L.R. 654 : 3 U.L.P.R. (P.C.) 35 : 29 M.L.T. 358 (P.C.). On an exhaustive review of all the decisions, starting with what is known as the Katama Natchier v. Raja of Shivagunga M.I.A. 539 : 2 W.R.P.C. 31 : 1 S. P.C.J. 520 : 2 S. P.C.J. 25 : 19 E.R. 843 their Lordships came to the conclusion that the question, of how to select the head of the family in a joint family is "part of the general law. In the course of their judgment, their Lordships said as follows. "That the custom of impartibility does not touch it," that is to say, touch the question of how to select the head of the family in a joint family "is shown by the long list. of authorities above cited, and there is, in their Lordships" view no necessary logical deduction from the decisions in Sartaj Kuan Deoraj Kuari and the second Pittapur cases which forces them to an opposite conclusion." Their Lordships quoted with approval the decision in the case of Naraganti Achammagaru Venkatachalapati Nayanivaru where the proposition was laid down in the following words: "Where property is held in co-parcenary by a joint Hindu family there are ordinarily three rights vested in coparceners--the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment, and the right of partition as the right of an undivided coparcener are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that right remains." Reviewing all the decisions of the Judicial Committee up to Sartaj Kuari's case 10 A. 272 : 15 I.A. 51 : 5 S. P.C.J. 139 : 12 Ind. Jur. 213 : 6 Ind. Dec. (N.S.) 182 (P.C.) their Lordships laid down three broad proposition-

1. The fact that a raj is impartible does not make it separate or self-acquired property.
2. A raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.
3. If it is the latter, succession Will be regulated according to the rule which obtains in an undivided joint family so far as the selection of the person entitled to succeed is concerned, i.e., the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the raj without the other sharing it.
5. Their Lordships then discussed the case of Sartaj Kuari v. Deoraj Kuari 10 A. 272 : 15 I.A. 51 : 5 Sar. P.C.J. 139 : 12 Ind. Jur. 213 : 6 Ind. Dec. (N.S.) 182

(P.C.) and said that what was actually decided in Sartaj Kuari's case 10 A. 272 : 15 I.A. 51 : 5 Sar. P.C.J. 139 : 12 Ind. Jur. 213 : 6 Ind. Dec. (N.S.) 182 (P.C.) was that in an impartible raj there was no restriction on the power of alienation by the member of the family who was on the gaddi and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. Their Lordships reviewed the cases subsequent to Sartaj Kuari's case 10 A. 272 : 15 I.A. 51 : 5 Sar. P.C.J. 139 : 12 Ind. Jur. 213 : 6 Ind. Dec. (N.S.) 182 (P.C.) and came to the conclusion that the rules laid down in the earlier cases on the question of succession have not been touched by Sartaj Kuari's case 10 A. 272 : 15 I.A. 51 : 5 Sar. P.C.J. 139 : 12 Ind. Jur. 213 : 6 Ind. Dec. (N.S.) 182 (P.C.). They thought that the key-note of the position was what was laid down in the *Neelkisto Deb Burmono v. Beerchunder Thakur* 12 M.I.A. 523 : 12 W.R.P.C. 21 : 3 B.L.R.C. 13 : 2 Sar. P.C.J. 523 : 2 Suth. P.C.J. 243 : 20 E.R. 436. viz. "when a custom is found to exist, it supersedes the general law, which, however, still regulates all beyond the custom. Basing their decision on the passage which has just been cited, they came to the conclusion that the selection of the person entitled to succeed is governed by the general law of the land, but that when the selection is made he holds the raj by virtue of the custom which prevents the others sharing it.

6. In my opinion the latest decision of the Judicial Committee completely negatives the arguments which have been advanced before us. But it was urged that we are conclusively bound by the decision of the Full Bench of this Court in the case of *Shyam Lal Singh v. Raja Bijay Narayan Kundu Bahadur* 39 Ind. Cas. 36 : 2 P.L.J. 136 : 1 P.L.W. 140 : (1917) Pat. 121. In that case the late Chief Justice of this Court with the concurrence of Chapman and Roe, JJ., came to the conclusion that there was no right to succeed by survivorship in an impartible estate, *Chamier, C.J.*, in delivering the leading judgment, said as follows: "all that their Lordships of the Privy Council have all along intended to lay down is that for the purposes of ascertaining the person entitled to succeed to an impartible estate you must have resort to the rule which would have governed the succession if the estate had remained partible." In my opinion it is impossible to uphold this view having regard to the decision of the Judicial Committee in the case of *Baijnath Prasad Singh Tej Bali Singh*. It is unnecessary to decide whether that case was rightly or wrongly decided, inasmuch as the question of succession was not raised in that case and all that was involved was the question whether any portion of the property in the hands of a holder of an impartible raj could be regarded as assets which the creditor could seize in execution of a decree obtained against his predecessor-in-title. We are in this case not concerned with that question. If we were we would be bound to follow the decision of the Judicial Committee which lays down in express terms that the question of selection of the successor is governed by the general law of the land and not by custom; but that when the selection is made he holds the property by custom which prevents others sharing in it. In my opinion the appellant took the impartible estate by survivorship and it was not necessary for him to obtain a Succession Certificate

as a condition for the maintainability of the application.

7. So far as the other question is concerned, the view of the learned Subordinate Judge was in favour of the appellant. But Mr. Susil Madhab Mullick on behalf of the respondent has urged before us that the appellant was not entitled to maintain an application under Order XXXIV, Rule 6, inasmuch as the document upon which the appellant relies created a charge and not a mortgage within the meaning of the term as defined in Section 58 of the Transfer of Property Act. The clause in the document upon which reliance is placed runs as follows:

This settled coal land, mines, coal raised by me, machineries, tools, bungalow, edifices coolie-shed erected by me as well as all other moveables and immovables shall ever be regarded as a security for the payment of the rent and cesses due, together with interest thereon due to you. I shall not be competent to transfer the said property by sale, gift, or remove the same, so long as the rent, etc., due to you will remain unpaid. If it is done so, it shall not be accepted.

8. Now, the broad distinction between a mortgage and a charge is this, that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific Immovable property. The line of division in England between a charge and a mortgage is a very clear one; but in this country the division is not so well-marked. It has been pointed out that there is very little difference, if any, between a charge and a simple mortgage as defined in Section 58 of the Transfer of Property Act; and that, in a simple mortgage, the interest transferred is the right to have the property sold. If that be so, it becomes a question of some nicety to distinguish between a simple mortgage and a charge. In the case of Dalip Singh v. Bahadur Ram¹⁵ Ind. Cas. 435 : 34 A. 446 : 9 A.L.J. 550 the late Chief Justice of this Court, then Mr. Justice Chamier, laid down the three essentials constituting a simple mortgage as follows: "In order that there may be a simple mortgage, there must be (a) a transfer of an interest in specific immovable property, (b) a personal undertaking by the mortgagor to pay the mortgage money, and (c) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold this case was followed by this Court in the case of Anand Ram Marwari v. Dhanpat Singh 38 Ind. Cas. 37 : P.L.J. 563 : 563 P.L.W. 341. Now, in the present case the conditions (b) and (c) have been fulfilled; but there is no express transfer of an interest in the property. In the case already cited Chamier, J. said as follows: "In a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred, then the requirements of condition (a) are satisfied." In my opinion the decision in Dalip Singh v. Bahadur Ram 15 Ind. Cas. 435 : 34 A. 446 : 9 A.L.J. 550 followed as it has been by this Court in Anand Ram Marwari v. Dhanpat Singh 38 Ind. Cas. 37 : 1 P.L.J. 563 : 2 P.L.W. 341 governs the

present case. It may be pointed out that the word used in the Bengalee document is "bandhak" which undoubtedly implies a mortgage. I am of opinion that the contention of Mr. S.M. Mullick on this point must be overruled.

9. I would allow the appeal, set aside the order of the learned Judge in the Court below and remand the case to that Court for decision as to the sum of money for which the plaintiff is entitled to a decree. The appellant is entitled to the costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Subordinate Judge.

Adami, J.

10. I agree.