

Harisingji Chandrasingji Vs. Ajitsingji Chandrasingji

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Court : Mumbai

Decided On : Jan-11-1949

Reported in : (1949)51BOMLR770

Judge : Weston and; Chainani, JJ.

Appeal No. : First Appeal No. 145 of 1945

Appellant : Harisingji Chandrasingji

Respondent : Ajitsingji Chandrasingji

Disposition : Appeal dismissed

Judgement :

Chainani, J.

1. The appellants in these two appeals are illegitimate sons of Sardar Chandrasinghji Himatsinghji, who was the Thakore of Matar estate, which is a talukdari estate in Amod taluka in Broach District. He was a Rajput by caste. The respondent is the eldest legitimate son of Sardar Chandrasinghji, and succeeded to the estate on the latter's death on July 10, 1939. By custom the estate is impartible, and succession to it is governed by the rule of primogeniture. In 1943 the two appellants filed two separate suits claiming maintenance from the respondent. They stated in their complaints that their mother was in the continuous

and exclusive keeping of Chandrasinghji, that there was a custom prevalent in Gujarat and in the Broach District according to which the junior members of the family and illegitimate sons were entitled to maintenance, and that they had, therefore, a right to recover maintenance from the estate, both according to custom and also according to law. The defendant disputed these statements. The trial Judge found that the mother of the appellants-plaintiffs was in the continuous and exclusive keeping of Chandrasinghji, and that apart from the talukdari estate, Chandrasinghji had left no separate property of his own. He also held that the appellants had not proved the custom as regards the right of illegitimate sons to claim maintenance from the estate. These findings have not been disputed in appeal. The trial Judge also came to the conclusion that as the estate was impartible, and as no custom giving a right to illegitimate sons to receive maintenance from it had been proved, the plaintiffs were not entitled to any relief. He, therefore, dismissed their suits. The plaintiffs have appealed.

2. The position of an illegitimate son rests upon two texts, as pointed out at p. 646 in Mayne's treatise on Hindu Law and Usage, 1938 Edition. According to Manu,

A son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted (by the other sons.)

Yajnavalkya has enlarged the rule as follows :

Even a son besotten by a Sudra on a female slave (dasipura) may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons.

This is cited as the first verse in Mitakshara, c. I. Section 12. In explanation of these texts, Vijnanesvara says in the second verse,

The son, begotten by a Sudra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for

half a share : that is let them give him half (as much as is the amount of one brother's allotment, However, should there be no sons of. a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters.' But, if there be such, the son of a female slave participates for half a share only.

The third verse in Section 12 of the Mitakshara is as follows:

From the mention of a Sudra in this place (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice. But, if he be docile, he receives a simple maintenance.

The last verse is obviously based on the conclusion drawn by the learned author from the position assigned to an illegitimate son of a sudra by the texts. Mitra Misra in the Viramirodaya (c. II, pt. II, Section 23, Shastri's translation, Ed. Calcutta 1879, p. 130) has interpreted the texts thus:

From the use of the term 'a person of the servile class' in Yajnavalkya's text, it appears that one begotten by a twice horn person on a female slave cannot, notwithstanding the desires of the father, get a share or a half-share after his death; the taking of his entire property is out of the question : but he is entitled only to maintenance, provided he be not disobedient.

3. The texts refer in terms only to dasiputra or the son of a female slave. But this restriction is now obsolete with regard to the right of maintenance given to an illegitimate son. In Muttusazmny Jagavera Yettappa Naicker v. Vencataswara Yettaya (1868) 12 M.I.A. 203 the Privy Council allowed maintenance to a son who was the result of a casual intercourse, while in Rahi v. Govind Valad Teja I.L.R. (1875) Bom. 97 the Bombay High Court, and in Viraramuthi Udayan v. Singaravelu I.L.R. (1877) Mad. 306 Kuppa v. Singaravelu I.L.R. (1885) Mad. 325 and Subramania Mudaly v. Valu I.L.R. (1910) Mad. 68 the Madras High Court allowed it in the case of an adulterous intercourse. In Muttusawmy Jagavera Yettappa Naicker v. Vencataswara Yettaya, at p. 220 the Privy Council has observed :

It appears, however, to their Lordships, that if it be established that the Respondent was the natural Son of this Hindoo Father, and recognised by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his Father, or of a concubine possessing a peculiar status therein.

In *Roshan Singh v. Balwant Singh* their Lordships, after referring to the third verse of Section 12 of the Mitakshara, which deals with the rights of an illegitimate son of a father belonging to the higher castes, stated (p. 56):

There is no reason to think that this effect of illegitimacy differed according to the particular mode of it.

4. A Hindu father is under a personal obligation to maintain his minor sons, irrespective of whether he has property or not. This is based on the following precept of Manu:

Aged parents, virtuous wife and an infant child must be maintained even by doing hundred misdeeds.

There is, however, no such obligation in regard to adult sons. It has, therefore, been held that a father is not bound to maintain an adult son out of the property which belongs exclusively to him; see *Premchand Peparah v. Hulashchand Peparah* (1869) 4 Beng. L.R. 23 *Nilmoney Singh Deo v. Baneshur* (1899) L.R. 37 IndAp 51; *Bhoopati Nath Chakrabarti v. Basanta Kumaree Debee* I.L.R. (1936) Cal. 1098 1111 *Ammakannu v. Appu* I.L.R. (1887) Mad. 91 and *Subbayya Thevar v. Marudappa Pandian* [1937] Mad. 42. As regards illegitimate sons, Mr. Justice Venkatramana Rao in *Muniappa Mudaliar v. Kuppuswami Mudaliar* : AIR1942 Mad419

It is a well settled principle of Hindu law that where the father is not possessed of any joint family property, he is under no personal obligation to maintain his legitimate son and the latter has no claim over the separate property of his father : vide 11 Mad. 91. An illegitimate son cannot claim higher rights than the legitimate son and the same principle ought to apply to him.

This decision was followed in *Krishna Rao v. Venkataramarao* : AIR1944 Mad362 in which it was held that an adult illegitimate son was entitled to maintenance both before and after his father's death, if the father was in possession of any joint family property.

5. It has been held in various cases decided by the Madras High Court that the texts cited above refer to the estate of a separated house holder, that is to the separate property of father (see *Ranoji v. Kandoji* I.L.R. (1885) Mad. 557 *Parvathi v. Thirumalai* I.L.R. (1887) Mad. 334 *Ramalinga Muppan v. Pavadai Goundan* I.L.R. (1901) Mad. 519 and *Gopalasami Chetti v. Arunachelam Chetti* I.L.R. (1903) Mad. 32 After referring to these cases, Sir Dinshah Mulla in his judgment in *Vellaiyappa Chetty v. Natarajan* (1931) L.R. 38 IndAp 402 has stated that verses 1 and 2 inc. I, Section 12 of the Mitakshara, which relate to a Sudra son make no mention of maintenance where the father has left no property to which the son can succeed, and that cases in which the maintenance is claimed out of joint family property must, therefore, be considered outside the texts. Following these decisions Mr. Justice Broomfield in *Hiralal Laxmandas v. Meghraj Bhikchand* [1938] Bom. 779 : 40 Bom. L.R. 937 has stated that it is now settled law that the texts apply only in the case of separate property of the father. Nevertheless maintenance to illegitimate sons out of joint family property in the hands of the surviving members of the joint family has been awarded in several cases: see *Hargobind Kuari v. Dharam Singh* I.L.R. (1884) All. 329; *Ananthaya v. Vishnu* I.L.R. (1893) Mad. 160; *Gopalasami Chetti v. Arunacfielam Chetti* I.L.R. (1903) Mad. 32; *Subramania Muddy v. Valu* I.L.R. (1930) Mad. 68; *Vellaiyappa Chetty v. Natarajan*; *Vellaiyappa Chetty v. Natarajan* and *Hiralal Laxmandas v. Meghraj Bhikchand*. Maintenance out of joint family property has been awarded on the recognised principle of Hindu law that where a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property (see *Vellaiyappa Chetty v. Natarajan*, p. 407). In *Vellaiyappa Chetty V. Natarajan* I.L.R. (1926) Mad. 340 Mr. Justice Krishnan has summed up the position thus (p. 346) :.the authorities are quite clear that when the illegitimate son cannot ask for a share, he is entitled to get maintenance from his putative father's joint family estate even in ths hands of his coparceners.

The decision in this case was affirmed by the Privy Council in *Vellaiyappa Chetty v. Natarajan*

6. So far as Sudras are concerned, the law as settled by the Privy Council in *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh Kamulam-mal v. Visvanaihaswami Naicker* and *Vellaiyappa Chetty v. Natarajan* is that an illegitimate son does not acquire at his birth any right to a share in the estate in the same way as a legitimate son would do, that during his father's lifetime he can take a share only by father's choice, that he cannot enforce a partition, that on the father's death he succeeds to the father's estate as a coparcener with the legitimate son, that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son, and that the share to which he is entitled is a half of that which he would have taken had he been legitimate. As regards illegitimate sons of Hindus belonging to the three higher classes, they are entitled to maintenance and not to any share of the inheritance: see *Chuoturya Run Murdun Syn v. Purhulad Syn* (1857) 7 M.I.A. 18 *Raja Parichat v. Zalim Singh* (1877) L.R. 4 IndAp 159 and *Roshan Singh v. Balwant Singh* (1899) L.R. 27 I.A 51 : 2 Bom. L.R. 529. In *Hargobind Kuari v. Dharam Singh* I.L.R. (1884) All. 329 in accordance with the last sentence in the third verse in Section 12 of the *Mitakshara* it was held that an illegitimate son was entitled to maintenance so long as he was 'docile', that is 'not disobedient' to the head of the family. The following passage from the *Viramitrodaya* of Mitra Misra was cited at p. 335 :

Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which under Hindu Law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied; but thereafter it cannot be ignored.

Cowell in his *Tagore Law Lectures* 1870, Vol. I, at p. 172 states :

But in the three superior castes, an illegitimate son has long ceased to possess a right to inherit. Nevertheless, he is not, as in English law, quasi nullius filius, but his status as a son in the family, and his rights to maintenance, are secured to him.

In *Ananthaya v. Vishnu* I.L.R. (1893) Mad. 160 the Madras High Court held that the maintenance given to an illegitimate son amongst regenerate classes is in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance. As stated in the judgment in that case (p. 161):

An illegitimate son is one of that class of persons who, by reason of their exclusion from inheritance, are allowed maintenance by the Hindu law, and this is clear from the facts that among Sudras he shares in his father's property together with the legitimate son.... The Smriti of Yajnya-valkya awards maintenance to an illegitimate son not as a provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives....

As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property....

This decision was followed in *Subramania Mudaly v. Valu* I.L.R. (1910) Mad. 68. In *Raoji Rupa v. Kunjalal Hiralal* I.L.R. (1030) Bom. 455 : 32 Bom. L.R. 888 in which the right of illegitimate sons to maintenance was disputed, the Privy Council at p. 458 has observed :

They (the lower Courts) also held that as dasiputras the sons were entitled to maintenance during their lives out of Balmukund's estate, and their Lordships have no doubt on the authorities that this is correct.

Ananthaya v. Vishnu was referred to and discussed in *Vellaiyappa Chetty v. Natarajan* (1931) L.B. 38 I.A. 402 33 Bom. L.R. 1526 in which, after reviewing the various decided cases, Sir Dinshah Mulla stated at p. 410 :

That maintenance in the case of twice born classes is in lieu of inheritance is apparent from the terms of verse 3,....

The question was again considered in *Hiralal Laxmandas v. Meghraj Bhikchand*, in which it was held that where a father has left no separate property, an illegitimate son is entitled to maintenance from the joint family property in the hands of surviving members of the family. In that case it was contended that the decision in *Ananthaya v. Vishnu* was not good law. This decision was, therefore, considered and discussed at length in the judgments of both Mr. Justice Macklin and Mr. Justice Broomfield who decided *Hiralal Laxmandas v. Meghraj Bhikchand*. In his judgment Mr. Justice Macklin has stated at pp. 785-786:

Moreover one of the main grounds of the decision in *Vellaiyappa's* case was the status of the illegitimate son of a Shudra as a member of his father's family, and one of the principal reasons for holding (as against some of the earlier authorities) that he was recognised as a member of his father's family was that he was mentioned in Chapter I of the *Mitakshara* (dealing with sons who are entitled to unobstructed inheritance) and immediately before Chapter II of the *Mitakshara*, which deals with persons entitled to an obstructed inheritance. It is difficult not to apply the same reasoning to the status of an illegitimate son in the regenerate classes.

In giving his reasons for saying that the regenerate illegitimate son unlike the Shudra does not obtain an actual share even by the father's choice, or the whole estate after the father's death, the author does not say that this is because the regenerate stands upon a different footing from the Shudra. What he does say is that the regenerate son is not mentioned along with the Shudra as a person entitled to the actual estate and therefore it must follow that he does not get the actual estate, and in fact all that he gets is maintenance. I can see nothing in this that suggests any withholding from the regenerate illegitimate son of any recognition of his status as a son and member of the family; on the contrary it seems to me that he is treated in that respect as being upon the same footing as the Shudra.

At page 787, he stated :

I think therefore that the decision in *Ananthaya v. Vishnu* ought to be accepted as correct and should be followed in this case.

7. Broomfield J. took the same view, and in his judgment at pp. 792 to 793 stated:

The illegitimate son of a Shudra gets his share because he is a member of the family and if h& cannot get a share because there is no separate estate, he gets maintenance in lieu of inheritance. But there is nothing in the judgment as far as I can see which necessarily points to the conclusion that the illegitimate son of a Shudra is the only one who can be regarded as a member of the family -The view that maintenance in twice-born classes is in lieu of inheritance is in fact accepted....

The argument for the appellant is that the principle does not apply because an illegitimate son in the regenerate classes cannot be said to be excluded from inheritance having never been in the category of possible heirs. It is true that as compared with the case of a son of a Shudri the principle has to be applied at an earlier stage. The latter according to the text gets a share of the inheritance if there is any separate estate. If there is none he may be said to be excluded from inheritance and therefore is entitled to maintenance out of the joint family estate. The illegitimate son in the twice-born classes is given maintenance originally by the text itself. But as that has been interpreted to mean that he gets maintenance in lieu of inheritance, and that seems no connote exclusion from inheritance of a member of the family who would have inherited but for the disqualification arising from the circumstances of his birth, I can see no convincing reason why the principle should not be applied in this case also. I think we want stronger grounds than have been shown to exist at present before we differ from the law as it has been laid down by the High Court of Madras for more than forty years.

It is clear from the authorities cited above that amongst the twice born classes an illegitimate son is awarded maintenance for life out of joint family property in lieu of inheritance and in recognition of his status as a son and a member of his father's family. The question for consideration now is to what extent or in what respect this right of an illegitimate son is affected owing to property being impartible property, succession to which is regulated by primogeniture. There is no direct authority on this point, and in the latest decision of the Privy Council reported in *Bhima Deo v. Chakrapani* A.I.R. [1945] 102 the Privy Council has left the question open.

Questions relating to impartible estates have been the subject of consideration by the Privy Council in various cases; see *Rani Sartaj Kuari v. Rani Deo raj Kuari* (1888) L.R. 15 IndAp 51. *Sri Raja Rao Ven-kata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards*, and *Venkat Kumari Mahipati Surya Rao Raja Yarlaggadda Mallikarjuna Prasada Nayudu v. Raja Yarlaggadda Durga Prasada Nayudu Rama Rao v. Raja of Pittapur* (1918) L.R. 45 I.A. 148 : s.c. 20 Bom. L.R. 1056 *Bajinath Prashad Singh v. Tej Bali Singh Jagadamba Kumari v. Narain Singh Protap Chandra Deo v. Jagadish Chandra Deo Shiba Prasad Singh v. Prayag Kumari Debi* (1982) L.R. 59 IndAp 331 : 34 Bom. L.R. 1567 *Collector of Gorakhpur v. Bam Sundar Mal Anant Bhikappa Patil v. Shankar Ramchandra Patil* (1943) 46 Bom. L.R. 1 *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore* (1941) L.R. 68 IndAp 153 : 44 Bom. L.R. 106 and *Baja Velugoti Sar'vagna Kumara Krishna Yachendra Bahadur Varu v. Baja Rajeswara Rao* The position as settled by these cases appears to be as stated in the following paragraphs. :

8. It has been held that property does not cease to be joint family property merely because it is impartible; see *Bajinath Prashad Singh v. Tej Bali Singh*, *Anant Bhikappa Patil v. Shankar Ramchandra Patil*, and *Commissioner of Income Tax V. Dewan Bahadur Dewan Krishna Kishore*. The only characteristic of joint family property which it retains is that the members of the family possess the right to take property by survivorship and the estate devolves 'upon that person who in fact and in law being joint in respect of the estate is also the senior member in the senior line'; see *Shiba Prasad Singh v. Prayag Kumari Debi*. In his judgment in this case at p. 345 Sir Dinshah Mulla has summarized the position in the following terms:

In the case of ordinary joint family property the members of the family have : (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; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case and the first *Pittapur Case*; and so also the third, as held in the second *Pittapur Case*. To this extent the general law of the *Mitakshara* has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and

separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains.

9. It is also settled that the holder for the time being of the impartible estate has complete right of disposition over the property and can transfer it absolutely, by gift, will or otherwise unless this right is restricted by custom or the nature of the tenure of the estate; see *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1887) L.R. 15 IndAp 51 *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkata Kumari Mahipati Surya Rao Rama Rao v. Raja of Pittapur and Protap Chandra Deo v. Jagadish Chandra Deo* (1927) L.R. 51 IndAp 280 : 29 Bom. L. R. 1136 The reasons for this view, as given in *Sartaj Kuari's* case at p. 63 are:

In *Baboo Beer Pertab Lahee v. Maharajah Uajender Pertab Lahee* (1867) 12 M.I.A. 1...their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth....

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common.

In *Rama Rao v. Raja of Pittapur* their Lordships stated at p. 153 :

It (*Sartaj Kuari's* case) settled that in an impartible Zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the de facto and de jure holder.

In referring to *Sartaj Kuari's* case, Lord Dunedin in *Bajinath Prashad Singh v. Tej Bali Singh* observed (p. 212):

No doubt it would have been possible to decide *Sartaj Kuari's* Case differently if the theory had been accepted that impartibility, being a creature of custom, though

incompatible with the right of partition, yet left the general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was. This is recognised by Sir. R. Couch when in delivering the judgment of the Beard, he says: 'The question of how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom, is one of some difficulty.' Even, however, if their Lordships thought the decision in Sartaj Kuari's Case wrong-an opinion which they do not pronounce-the case has stood too long to be now touched.

The two cases Rani Sartaj Kuari v. Rani Deoraj Kuari and Rao Venkata v. Court of Wards were again reviewed by the Privy Council in Protap Chandra Deo v. Jagadish Chandra Deo, and at p. 297 their Lordships stated that 'no ground had been established for a refusal on their part to follow the decisions in those two cases.'

10. It has also been held that the income of the impartible estate belongs absolutely to the holder of the estate for the time being and is not the income of the undivided family, and that the holder does not receive it as manager on behalf of himself and the members of the family; see Jagadamba Kumari v. Narain Singh and Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore. In the words of Lord Buckmaster in Jagadamba Kumari's case at p. 7 :

The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

The same view was taken in Commissioner of Income Tax v. Dewan Bahadur Dewan Krishna Kishore, in which their Lordships have stated (p. 179):

It is not true in fact or in law to say that the income from the estate is received by the assessee as the income of a joint Hindu family receivable by the karta, nor is it received by him on behalf of himself and his sons; but on his own account as the

holder by single heir succession of the impartible estate. The 'presently existing right' of the sons is to be paid a suitable maintenance, or to have it provided for them in the ordinary course of Hindu family life. The Hindu law is familiar not only with persons such as wives, unmarried daughters and minor children, for whose maintenance a Hindu has a personal liability whether he have any property or none, but also with cases in which the liability arises by reason of inheritance of property, and is a liability to provide maintenance out of such property. It applies to persons whom the late owner was bound to maintain. The facts that the sons' right to maintenance arises out of the father's possession of impartible estate, and is a right to be maintained out of the estate, do not make it a right of unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income....

It cannot, in their view, be held that the respective chances of each son to succeed 'by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and them, or on behalf of a Hindu family of which he and they are some of the male members.

The earlier decisions of the Privy Council recognised the right of maintenance of the members of the family, who, if the property was partible, would be entitled to claim maintenance out of it. In *Raja Yarlagadda Mallikarjima Prasada Nayudu v. Raja Yarlagadda Burga Prasada Nayudu*, it was held that the younger brothers of the Zamindar of an impartible estate retained such right and interest in respect of maintenance as belonged to junior members of a raj or other impartible estate descendible to a single heir. From the judgment in that case it appears that the right of younger brothers to maintenance was not seriously disputed, and that the main question raised before their Lordships was about the claim to arrears of maintenance. A different view was taken in *Rama Rao v. Raja of Pittapur* on the ground that the position had changed since the decision in *Sartaj Kuan's* case. In that case the last holder (the Raja of Pittapur) devised the estate by will to the defendant. The plaintiff was the son of an adopted son of the last Raja and he claimed maintenance. He rested his case on what he alleged was the general law, namely, that by birth he had a right to maintenance out of the property constituting the raj, which followed the property into the hands of a third party. His claim was

negatived. To quote from the judgment, which was delivered by Lord Dunedin (p. 153):

But the decision of the Board (in Sartaj Kuari's case) which binds their Lordships made that view no longer tenable. It settled that in an impartible zamindari there is no coparcenary,....

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitak-shara law the junior members, down to the generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property; that this co-parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is de facto accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of co-parcenary that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management.

At p. 154 it is stated:

An impartible zamindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance.

It was also observed (p. 154):

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family.

It was pointed out that there are certain relations such as the widow, the parents and an infant child, in regard to whom the holder of the estate has by reason of their relationship to him a personal obligation to maintain them and this obligation

is independent of the fact of there being ancestral or joint family property. The Privy Council also held in the same case that the right of sons to maintenance from an impartible estate had been so often recognised that it was not necessary to prove the custom in each case, and that it was this which would explain the reference to rights of maintenance in cases decided subsequent to the decision in Sartaj Kuari's case, e.g. Yarlagadda Mallikarjuna's case. With regard to other relations their Lordships stated (p. 155):

We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right.

This case was referred to in Bagnath Prashad Singh v. Tej Bali Singh, and Lord Dunedin, who had also delivered the judgment in this case, in his judgment in the latter case at p. 211 stated as follows:-

Turning next to Rama Rao v. Raja of Pittapur it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as obiter dicta.

Both these cases were considered in Protap Chandra Deo v. Jagadish Chandra Deo, In that case the family was joint and undivided and governed by the Mitakshara school of Hindu law. The last holder of the estate, which was impartible bequeathed it by a will to the defendant. The plaintiff was a member of the undivided family and would have succeeded to the estate had it not been devised to the defendant. He claimed maintenance. But this was refused by the Privy Council on two grounds, firstly, that maintenance had already been provided for by grant of certain villages, and secondly, because he had failed to establish a right to maintenance by custom or relationship to the holder of the estate. Reliance was

placed in regard to the second ground on the decision in *Rama Rao v. Raja of Pittapur*. These decisions were followed in *Vikrama Deo Maharajulum Guru v. Vikrama Deo Garu* (1919) 24 C.W.N. 226 In that case maintenance was claimed by a brother's son of the late Maharaja. In the trial Court both parties proceeded on the basis that according to the general Hindu law the plaintiff, being the son of a brother of the late Maharaja, was entitled to maintenance out of the estate. The defendant alleged a special custom which) according to him, deprived the plaintiff of his prima facie right, and as this was not proved, the plaintiff's claim was decreed. In appeal the Privy Council re-affirmed the decision in *Rama Rao v. Raja of Pittapur*, that apart from custom and certain near relationships to the holder of an impartible estate, the junior members of the family have no right to maintenance out of it and framed an issue, whether according to custom the plaintiff was entitled to maintenance out of the income of the zamindari, and sent the case back for trial on this issue. The same view was taken in *Shiba Prasad Singh v. Prayag Kumari Debi*; see the passage from the judgment in this case quoted above. In *Collector of Gorakhpur v. Ram Sundar Mal* the Privy Council observed:

One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Challapalli* case, which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family....

These observations led the Lahore High Court to hold in *The Commissioner of Income-tax, Lahore v. Krishnan Kishore* [1939] Lah. 520 that the members of a joint family have a right to maintenance which arises from their right in the property of the joint family, of which they are co-owners. The Madras High Court took a similar view in *Commissioner of Income-tax v. Zamindar of Chemudu* (1941) L.R. 68 IndAp 155 44 Bom. L.R. 196. These decisions were not approved by the Privy Council; see *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore*.⁵ In that case the previous decisions of the Privy Council were reviewed, and at p. 177 their Lordships of the Privy Council stated that the law as declared in *Baijnath Prashad Singh v. Tej Bali Singh* and *Shiba Prasad Singh v. Prayag*

Kumari Debi had not been unsettled by Collector of Gorakhpur v. Ram Sundar Mal. The view that apart from custom the other members of the family have no right to maintenance was reaffirmed, and at pp. 176 and 177 it was observed :

Single heir succession is inconsistent with any son having the same right in respect of income as he would have had in the income of partible property, and the use of the word 'maintenance' to describe the latter right cannot be allowed to confound the two. The right to maintenance in the former case is a right of a different character from that of a co-sharer to enjoy his share and live upon his own property by way of joint possession. To represent that custom takes away the right to maintenance from some members but leaves it to others does not explain the facts as to impartible estates. The son's right of maintenance out of impartible property cannot be accounted for as an original and separate right untouched when custom takes away his right to joint possession. It is not something that is left after something else has been subtracted. It is a different right given sometimes to sons only and sometimes to others in consequence of the impartible character of the property; being sometimes a right of maintenance simply, and sometimes a right to a maintenance grant of lands. In their Lordships' judgment, it can only be ascribed to custom, as has repeatedly been held.

In the same case at p. 177 their Lordships stated that they did not find it necessary to answer questions hitherto undecided with respect to maintenance. But in the subsequent case Raja Velugoti Sarvagna Kumar a Krishna Yachendra Bahadur Varu v. Raja Rajeswara Rao, the observations made in this case were relied Upon for holding that in the absence of a custom to the contrary a junior male member of a Sudra family has under the Hindu law no right to be paid maintenance out of the joint family impartible property. A case involving the right of maintenance of an illegitimate son, whose father belonged to a higher caste, was considered by the Privy Council in Bhima Deo v. Chakrapani Deo . The case was decided on another point, and the question whether an illegitimate son of the last holder is entitled to maintenance from the impartible estate was left open.

11. Relying on the above decisions of the Privy Council, the effect of which has been summarized by me above, it has been contended on behalf of the defendant

that the ordinary right of maintenance enjoyed by members of a joint family and illegitimate sons ceases to exist when the property is impartible, that such property is property of a different character with incidents of its own, that 'it is not that something that is left after something else has been subtracted.', that no person can claim maintenance from such property, which is the creature of custom, unless this right is given to him by custom and that the plaintiffs are not entitled to maintenance, as they have not proved any custom which gives them this right and as they are not so related to the defendant as to impose on him a personal obligation to maintain them. On the other hand reliance is placed by the appellants-plaintiffs on the following observations made by the Privy Council in *Neelkisto Deb Burmono v. Beerchunder Thakoor* (1867) 12 M.I.A. 523 and cited with approval in *Bajinath Prashad Singh v. Tej Bali Singh* (1921) L.R. 48 IndAp 523 23 Bom. L.R. 654 and *Shiba Prasad Singh v. Prayag Kumari Debi*

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

It has been urged on the plaintiffs' behalf that the basis of the decisions of the Privy Council in the cases in which they have rejected claims for maintenance is that in impartible property there is no co-parcenary, that consequently the junior members of the family, who otherwise as co-owners and by reason of joint possession and community of interest would be entitled to receive maintenance so long as there is no partition, lose their right of maintenance, that in the case of regenerate classes an illegitimate son is not a coparcener or co-owner, that his only right in the ancestral property is a right to receive maintenance from it, that this right has not been taken away by the custom which made the property impartible, and that he consequently continues to possess this right, which has been given to him by Hindu law.

12. I do not think that the argument advanced on behalf of the plaintiffs can be accepted. It is true that amongst the regenerate classes, to which the parties in this case belong, an illegitimate son is not a coparcener or a co-owner of the joint family estate. He is entitled to maintenance only, but this is awarded to him in lieu of inheritance and in recognition of his status as a son. If the property, though it

may be ancestral or joint family property, is impartible, even a legitimate son cannot, during the lifetime of his father, claim any interest or rights in it, apart from the right to maintenance given to him by custom, which has been judicially recognised. He is not a co-sharer with his father and the income from the estate is the absolute property of his father. He cannot ask for partition or separate possession of a share of the estate. If he is the eldest son, he possesses the right to succeed to the estate by survivorship. This right can also be defeated by the father by alienating the property. The other legitimate sons do not enjoy even this right, unless the eldest son dies without male issue. They are not entitled to any share in the estate or its income. An illegitimate son is not in and cannot be given any higher position. He is awarded maintenance by reason of his being disqualified from receiving a share in the inheritance, which he would have been entitled to get if he had been legitimate. In lieu of exclusion from inheritance, he is entitled to receive maintenance as long as he lives and not only until he attains majority. It has been contended that this right continues even when the estate is impartible, as it is not inconsistent with impartibility. But the right is founded on the consideration that an illegitimate son is deprived of the right to inheritance enjoyed by a legitimate son. In impartible property all legitimate sons are not entitled to inheritance. Consequently, the basis of the claim of an illegitimate son to maintenance goes. But just as impartibility is the creature of custom, so custom may, as observed by the Privy Council, confer upon an illegitimate son a right to maintenance, as it has conferred upon a legitimate son. In the absence of such custom, he is not entitled to maintenance as of right.

13. The matter can be looked at from another point of view. It is now settled that in the absence of a custom restricting his power of alienation, the holder of an impartible estate has full power to deal with and enjoy it as if it were his separate property. He may transfer or alienate it by gift, will or otherwise, even though it may be ancestral property. The income from the property belongs exclusively to him. In the words of Lord Buckmaster in *Jagadamba Kumari v. Narain Singh*

It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the raj.

No person, who is not one of those, whom the holder is personally bound to maintain, can therefore claim maintenance from the estate as of right, for such a right would be inconsistent with the right of the holder to alienate. Custom may, however, restrict the holder's power of alienation by making it subject to the right of certain members of the family to receive maintenance from the estate. In this view also, an illegitimate son cannot claim maintenance unless the right to it is given to him by custom.

14. In this case the plaintiffs alleged the existence of 3 custom according to which illegitimate sons of the holder of an impartible estate are entitled to receive maintenance from it. But this has not been proved. They are half brothers of the defendant. There is, therefore, no personal obligation on the defendant to maintain them. Maintenance cannot also be claimed on the ground that the last holder, the plaintiff's father, was legally bound to maintain them, as both of them are majors. The plaintiffs' claim must consequently fail.

15. Both the appeals are, therefore, dismissed with costs.

16. Per Curiam.-The appellants must pay the court-fee which they would have had to pay had they not been allowed to sue in forma pauperis. A copy of this judgment should be sent to the Collector.

Weston, J.

17. It seems to me that the question in this appeal turns upon two propositions which, on the authorities set out by my learned brother, must be taken to be well established.

(1) An impartible estate is the creation of custom and no coparcenary exists.

(2) The right of an illegitimate son to maintenance among the twice born classes is in lieu of inheritance.

18. When therefore custom has created an estate in which no coparcenary interest accrues to any person by birth, then, just as the ordinary right of a legitimate son to maintenance pending exercise of his right to obtain partition ceases as a legal

right, being inconsistent with the non-existence of coparcenary interest, so also the ordinary right of an illegitimate son to maintenance granted in lieu of the right to inheritance enjoyed by the legitimate son will not survive as a legal right. It may exist by reason of custom, general or special. No instance has been cited before us where general custom has been recognized, and special custom, though pleaded, has not been proved.

19. I agree therefore that the appeals must fail.

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