Privy Council Appeal No. 83 *of* 1937
Allahabad Appeal No. 16 *of* 1935

Ram Narain Sahu and another - - - - *Appellants*

v.

Musammat Makhna - - - - - - *Respondent*

FROM

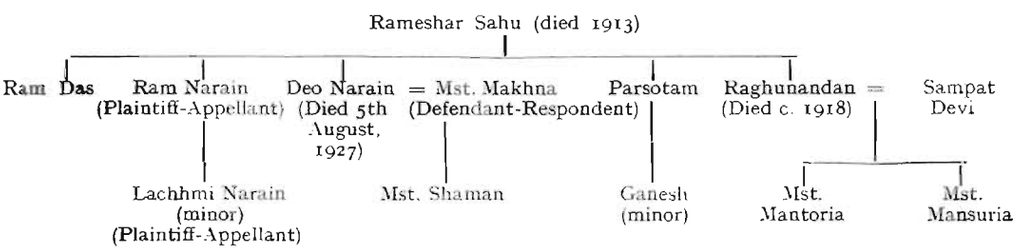
THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL, 1939

Present at the Hearing :

LORD THANKERTON.
LORD PORTER.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN]



The sole question in this case is whether at the date of his death (5th August, 1927), Deo Narain was separate in estate from all the other members of his family; or whether he was joint with the plaintiffs-appellants, viz., his brother Ram Narain and Lachmi Narain, the latter's son. If he died a separated Hindu, then, as he left no son, his widow, Musammat Makhna (defendant-respondent) became heir to his property: if at the time of his death he was a member of a joint Hindu family his interest passed by survivorship to his co-parceners. Both Courts in India have held in favour of the widow that he died separate.

In 1923 the family was joint. Four sons of Rameshar were alive and on 26th March, 1923, two of them, Ram Das and Parsotam (together with the latter's minor son) sued the other members of the family for partition, asking for allotment and separate possession of a one-half share. At that time and at all material times Deo Narain was a lunatic. His wife (the present respondent) was appointed his *guardian ad litem*. The plaint was in one respect disingenuous: it alleged untruly that there had been a division of cash and furniture among the members of the family. This was an attempt to deprive Deo Narain and Ram Narain's branch

of their proper shares, but it was detected and frustrated at the trial. Both Ram Narain and Deo Narain filed written statements but neither pleading contained a demand for partition as between themselves. On 15th September, 1923, certain accounts were directed and on 23rd April, 1924, the trial Judge ordered a partition, directing the amin to divide the immoveable properties into two lots and to report by 14th May, 1924, which lot should be given to the plaintiffs in that suit. This decree does not appear to have been drawn up until October, 1924, but a very few days after it was pronounced Deo Narain's *guardian ad litem* presented a petition to the Court (dated 3rd May and filed 10th May, 1924), praying that his share—viz., one-fourth—should be separated by the amin and stating that " there is an apprehension of loss in future if the said share is allowed to remain joint." His three brothers objected, but the Subordinate Judge on 27th May, 1924, granted her application and in the final decree for partition dated 16th August, 1924, a one-fourth share was allotted in severalty to Deo Narain. From this decree Ram Narain and his son appealed on 27th July, 1925, to the High Court at Allahabad, mainly on the ground that it was not in conformity with the preliminary decree of 23rd April, 1924, and before the appeal was heard Deo Narain died (5th August, 1927), leaving him surviving his widow and a daughter. The widow having been brought on the record of the appeal in his stead, the High Court on 19th July, 1928, allowed the appeal, holding that after the preliminary decree the Subordinate Judge was not competent to entertain an application that Deo Narain's share should be separated:—

> " We leave Ram Narain and Musammat Makhna to have their rights adjusted by means of a separate suit, if they so choose. In the meantime we are of opinion that the portion of the property which has not been allotted to the plaintiffs should be considered for the purpose of the present suit to be property held in common. What the legal effect of the application of Musammat Makhna upon the status of the family property or the constitution of the family *qua* Ram Narain and Deo Narain is, has got to be determined in a subsequent suit, if the parties are not agreed as to it, or if one or the other party choose to institute a suit."

The Board is not now sitting in appeal from this decision nor has the question of its correctness been argued before their Lordships who express no opinion upon it. Nor will they here inquire whether there is anything in the Code to prevent the learned trial Judge, before the preliminary decree had been drawn up and signed, from deciding to include in it a direction for the separation of the one-fourth share of Deo Narain and directing it to be drawn up and completed accordingly.

Between May, 1924—when the trial Judge in the partition suit accepted the respondent's demand that Deo Narain's share should be separated—until July, 1928, when this decision was reversed by the High Court, the two branches of Ram Narain and Deo Narain acted as though they were separate in interest and in title. Till 1924 they

had messed and lived jointly, but they ceased to do so about May, 1924. The trial Court has in the present suit found that Ram Narain acted as a divided member in matters connected with marriages and funerals. "Ram Narain himself had acquired and accepted severance by his unambiguous conduct." It is, however, objected by his learned counsel that the order of 27th May, 1924, in the partition suit, had left him no option in the matter pending his appeal to the High Court from the final decree.

The widow having on 1st September, 1928, succeeded before the Revenue Court in obtaining an order for entry of her name in the revenue records, the present suit was brought against her on 14th May, 1929, to determine whether Deo Narain died divided or undivided from Ram Narain and Lachmi Narain the plaintiffs. The suit was dismissed by the Subordinate Judge of Benares on 27th May, 1930, and the High Court has affirmed this decision (2nd April, 1935).

The Courts in India have proceeded in this case upon the view that though Deo Narain was a lunatic at the time of partition he was nevertheless entitled to a share on partition, not having been born a lunatic. This had been throughout admitted on behalf of the plaintiffs as it had been admitted by all parties in the partition suit and in the mutation proceedings which followed thereon in 1928. It seems that this doctrine prevailed in the High Court at Allahabad since *Tirbeni* v. *Muhammad,* (1906) I.L.R. 28, All. 247, but after the present case was decided by the High Court it has been departed from by a Full Bench decision in *Mool Chand* v. *Chahta Devi,* [1937] All. 825, which is in agreement with certain decisions of other High Courts. Their Lordships have not been asked to review these decisions and the important question which they raise has not been argued on this appeal. It is a matter of some embarrassment to their Lordships that they should be called upon to discuss the rights of a lunatic and the guardian *ad litem* of a lunatic to claim separation of estate in a partition suit upon an artificial assumption that a lunatic (if not lunatic from birth) is entitled to a share upon partition, when there exists high authority in India for the view that he has no such right.

The right of a member of a Hindu family who is *sui juris* to separate himself in estate and interest by declaring this intention was thus stated by Sir George Lowndes in *Bal Krishna* v. *Ram Krishna,* (1931) L.R. 58, I.A. 220, 224:—

> " It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Ikbal Narain,* (1912) L.R. 40, I.A. 40. The question was further examined in *Girja Bai* v. *Sadashiv Dhundiraj,* (1916) L.R. 43, I.A. 151, and the principle was reaffirmed, and the last mentioned case was followed in *Kawal Nain* v. *Prabhu Lal,* (1917) L.R. 44, I.A. 159, 161, where Lord Haldane says, ' the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate.' "

The effect of the exercise of this right upon the rights and status of other members of the family has been considered in a number of cases which have come before the Board.

In *Balabux Ladhuram* v. *Rukhmabai,* (1903) L.R. 30, I.A. 130, 137, Lord Davey, delivering the judgment of the Board, said:—

> " It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the out-going member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

In *Bal Krishna* v. *Ram Krishna* (*supra*), Sir George Lowndes said (p. 226):—

> " The separation of one member of the family, it is said, necessarily causes the separation of all. This problem has been discussed in many cases, the argument usually turning upon a question of presumption. The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others? The decisions of this Board show that it does not: per Lord Davey in *Balabux Ladhuram* v. *Rukhmabai,* (1903) L.R. 30, I.A. 130, 137, followed in *Jatti* v. *Banwari Lal,* (1923) L.R. 50, I.A. 192. But it is equally clear on these decisions that the other members of the family may remain joint: it is again their Lordships think, a question of their intention, which must no doubt be proved."

In 1924, Sir John Edge (*Palani Ammal* v. *Muthuvenkatacharla Moniagar,* L.R. 52, I.A. 83, 86-7), restated the matter and made some observations having reference to cases in which the claim to separate has been made by bringing a partition suit:—

> " It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. . . . In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known are parties to the suit, and that it is the decree alone which can be evidence of what was decreed."

The appellants rely strongly upon this last-cited passage and contend that the decree of the High Court in the partition suit refusing the claim made on behalf of the lunatic for a separation of his one-quarter share and confining the

partition to a division into two shares conclusively determines that the status of the lunatic continued to be joint with the present appellants. It is difficult, for more than one reason, to accept this contention. The decision of the High Court proceeded upon the general consideration that the preliminary decree not having provided for the separation of a one-quarter share the final decree could not make a separate allotment in respect of it. This was not a matter in any way having special reference to the disability of Deo Narain. If it was right it would have been equally right had Deo Narain been *sui juris,* and had he declared in the most solemn and explicit manner after the preliminary and before the final decree his intention to become separate in estate and interest. Yet it could hardly be right in that case to hold that because he did not get an allotment in severalty by the final decree he remained joint in status. The gap between preliminary and final decree is not seldom of considerable duration and the ordinary right of a coparcener to effect a separation of his estate interest or title—as distinct from a partition by metes and bounds—by a proper declaration of his desire to sever, is not abrogated by the mere fact that he has not claimed to exercise it prior to the preliminary decree.

Again while the decree in a partition suit is the only evidence of what was decreed, it is not uncommon for the Court, in passing a partition decree, to concern itself only with the division of the property into lots and the allocation of these lots to individual members or groups of members. A division by metes and bounds and allotment in severalty implies a separation of estate or interest; and a decree may contain directions which operate a severance of estate without any corresponding division by metes and bounds. This would result, for example, from a simple direction that the parties should hold in defined shares. But it is another matter altogether to say that if and in so far as the decree does not contain something to sever the estate title and interest of plaintiffs or defendants *inter se* they must be conclusively taken to have remained united. As a decree is not a necessary condition of separation in interest the proposition is by no means axiomatic and requires careful examination. In *Ram Pershad Singh* v. *Lakhpati Koer,* (1902) L.R. 30, I.A. 1, 9, 10, there had been a separation in 1861 and in a suit of 1868 the three plaintiffs were given a decree for possession of their shares of certain property. It was said by Sir Andrew Scoble of that decree:—

> "It was contended, on behalf of the appellants in the present suit, that although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se;* and that this might have been the legal effect of the decree is undeniable. But here, again, the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners."

It is not, however, necessary in the present case that their Lordships should decide this general question and they do no more than guard themselves against being supposed

to accept on this point the able argument of the appellants' learned counsel. The High Court's decree of 18th July, 1928, was made with express reservation of the question whether the estate or interest of the lunatic was divided or undivided and cannot be regarded as concluding the matter. It decided only that as Deo Narain's guardian had applied too late he could not in that suit be given a separate allotment in respect of his one-fourth share.

Upon the footing that a person who became a lunatic after birth has a right to a separate share upon partition, their Lordships are unable to dissent from the view taken by the High Court. It is not shown that the lunatic in this case remained joint in estate. Everything is against that interpretation of the conduct of the parties except indeed the fact that the application of the *guardian ad litem* for a separate allotment was made on 3rd or 10th May, 1924, a few days after the preliminary decree (23rd April, 1924), before anything had been done under it but not before it had been pronounced. Even so, however, the action of the guardian had the approval of the trial Judge in that suit and as a demand for separation of the estate and interest of the lunatic it had apparently the approval of the High Court: it is not shown to have been in any way contrary to the interests of the lunatic. In these circumstances the utmost effect that can be given to the preliminary decree will not in their Lordships' opinion avail the appellants.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs.

(16584—3A) Wt. 8075—41 180 5/39 P. St. G. 338

In The Privy Council.

RAM NARAIN SAHU AND ANOTHER

v

MUSAMMAT MAKHNA

DELIVERED BY SIR GEORGE RANKIN

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