Privy Council Appeal No. 25 *of* 1945

Patna Consolidated Appeals Nos. 10, 11 *and* 14 *of* 1941

Bhagwat Ram and another - - - - - - - *Appellants*

v.

Ramji Ram and others - - - - - - - - *Respondents*

Sri Newas Ram - - - - - - - - - *Appellant*

v.

Ramji Ram and others - - - - - - - - *Respondents*

Lakshmi Newas Ram - - - - - - - - *Appellant*

v.

Bhagwat Ram and others - - - - - - - *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1947

Present at the Hearing :

LORD THANKERTON

LORD UTHWATT

SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

These are consolidated appeals by the plaintiffs, defendant No. 2, and defendant No. 5, from a judgment and decree of the High Court of Patna dated 8th May, 1941, which varied a decree and judgment of the third Subordinate Judge of Patna dated 10th April, 1937, decreeing the partition of the joint family property.

The appeals arise out of a suit for partition instituted by plaintiff No. 1 (hereinafter called the plaintiff), and his son, plaintiff No. 2, against defendant No. 1 (hereinafter called the defendant) and defendants 2 to 4, the other members of a joint Hindu family governed by the Mitakshara law. Defendant No. 3 was a minor at the time of the suit but became a major subsequently. Defendant No. 5 was born more than 3 years after the suit began, and was made a party to the suit.

The following questions raised by the plaintiffs, defendant No. 2, and defendant No. 5, respectively, in their appeals, arise for determination before the Board:—

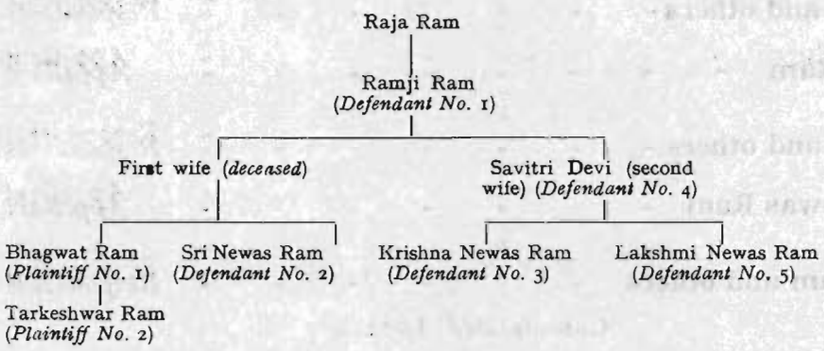
1. Whether items 27, 28, 29, valuable articles of jewellery, mentioned in the amended Schedule II of the plaint have been established to belong to the joint family.

2. Whether the Courts below should have held that defendant No. 2 was entitled to arrears of maintenance.

3. Whether it was open to defendant No. 5, born more than 3 years after the partition suit began, but before the actual division of the estate, to claim a separate share in the joint family estate as an " after born son," i.e., in other words, whether the Courts below should have held that the plaintiff and defendants 1 to 5 were each entitled to 1-6 share in the property.

Other questions raised in their appeals were abandoned by the Appellants in the course of the hearing of the appeals.

To appreciate the arguments, a few facts not disputed may be mentioned. The following genealogical table shows the relationship of the parties:



The defendant was the Karta of the joint Hindu family composed of himself and the rest of the parties to the suit. The plaintiff and defendant No. 2 are his sons by his first wife deceased. Plaintiff No. 2 is the son of the plaintiff No. 1. Previous to this litigation there had been a family dispute between the defendant and his father Raja Ram, on one side, and a Collateral, Saligram, on the other. This was settled by a compromise in 1912, on the terms, *inter alia*, that each party should retain possession of the jewellery and ornaments which were in its exclusive possession at the time of the compromise, and that the remainder should be divided later. That division took place in 1918, and the present plaintiff and the defendant came into possession of the items allotted to their share.

In 1918, the defendant married his second wife, defendant No 4. The plaintiff was married in 1925. Soon after his marriage, ill feeling arose between the plaintiff and his father. In 1929, the defendant agreed to make a separate allowance to the plaintiff and his brother, defendant No. 2, and continued making the allowance till July, 1931, when he ceased payment to both the plaintiff and defendant No. 2. The plaintiff then made a demand for partition which was refused; and then the suit out of which these appeals arise was instituted by the plaintiffs for partition of the joint family properties. The suit was instituted on 15th July, 1932.

For the purpose of these appeals, it is not necessary to refer to the various contentions of the parties. The findings of the Courts below to which their Lordships will now call attention show with sufficient clearness the nature of those contentions. Their Lordships will refer only to those findings which have been the subject of controversy before the Board, omitting the rest to which no exception has been taken before them.

Along with the plaint, 12 classified Schedules of movable properties were filed, of which Schedule I contained, amongst other items, items 1 and 5, valuable " puja " articles. Item 1 is a dakshinavarat sankh, and Item 5 is an " eakmukhi rudraksha." The Subordinate Judge found that these articles were in the possession of the defendant. As he did not produce them, the Subordinate Judge directed " that after the preliminary decree was passed the values of these articles for the purpose of making partition should be determined by the Court itself allowing the parties to produce further evidence which they may choose to adduce." The High Court did not think it right to interfere with this direction. It may be stated here that as regards the method of determining the value of these articles not produced by the defendant, Mr. Rewcastle, the learned Counsel appearing for the plaintiffs, argued that the Courts should have held that the maxim *omnia praesumuntur contra spoliatorem* applied, but after some discussion the learned Counsel was satisfied that the direction given by the Courts was not wrong and so the objection was withdrawn.

Schedule II of the plaint contained a list of the jewellery which the plaintiff alleged belonged to the joint family. In the Schedule filed along with the plaint there were 26 items. Eight further items were added by an amendment of the plaint on 2nd July, 1936. Items 27, 28, 29, described as Moti Ka Jausan, Nilam Kangani and bunch of pearls, worth 30,000Rs., 18,000Rs. and 4,000Rs., respectively, are the first three of these 8 items. Of these, the Subordinate Judge found that item 27 was a family jewel liable to be partitioned and in the custody of the defendant, but he had not produced it. As regards items 28 and 29, he held that it was not proved that they were family jewels or that they were in the custody of the defendant. The High Court held that there was not satisfactory evidence to establish that any of the three items were family jewels or that they were in the possession of the defendant.

The Subordinate Judge disallowed the claim for arrears of maintenance made by defendant No. 2. The High Court accepted that finding.

The Subordinate Judge further held that the birth of defendant No. 5 did not affect the shares to be allotted to the plaintiff and defendant No. 2. The High Court agreed with this view also.

In the result the Subordinate Judge passed a preliminary decree for partition in accordance with the directions contained in his judgment, awarding the plaintiffs a one-fifth share, defendant No. 2 a one-fifth share and defendants Nos. 1, 3, 4 and 5 a three-twentieth share each, in the properties of the family.

Against the preliminary decree, appeals were preferred to the High Court by the plaintiffs and defendants Nos. 2, 4, 5. In the appeal preferred by the plaintiffs, cross objections were filed by defendants 1 and 3.

The High Court varied the decree passed by the Subordinate Judge in certain respects. For the purpose of these appeals, the following variations may be mentioned. The High Court varied the decree to the extent that (1) the item of property in dispute, namely, a Jausan of pearls (item 27) should not be included in the list of joint family properties, (2) that defendant No. 3 be allotted a one-fifth share of the entire family properties. As he had attained majority during the pendency of the appeal and claimed separation of his share, the High Court, though he had not preferred an appeal, allowed him a one-fifth share which he was entitled to in order to avoid unnecessary litigation. Mr. Rewcastle stated at the commencement that he would contend that this decision was wrong, but very properly abandoned this argument.

Turning now to the appeal preferred by the plaintiffs, the only question which their Lordships have to consider is whether the finding of the High Court that none of the items 27, 28 and 29 belongs to the joint family can be maintained. To prove that these items are the family jewels in the possession of the defendant, the plaintiff relies mainly upon entries in the account books $L_2(12)$, and Z_{15} and Z_{16}. $L_2(12)$ mentions all the three jewels, while Z_{15} and Z_{16} refer, according to the plaintiffs, to item 27. Both Courts have found $L_2(12)$ not genuine and unreliable; while the High Court, differing from the trial Court, has held that Z_{15} and Z_{16}, in view of the defendant's explanation, cannot be accepted as supporting the plaintiffs' case. $L_2(12)$ is found in D_9 (*Kacha rokar bahi*), an account book for the years 1927-29. Comparing the position of miscellaneous entries such as these, in the various account books of the family, the learned Judges of the High Court state that $L_2(12)$ is at "an unusual place." Their Lordships have not had the advantage of examining these books, but they find that the conclusion arrived at by the learned Judges is supported by the reasons given by them to which no valid exception has been taken. There are other grounds also for holding that the entry is not genuine. D_9 is one of the numerous books filed by the defendant on 20th July, 1932, soon after the institution of the suit, but this entry was discovered only when the defendant was cross-examined on 29th April 1936. It is not known when the plaintiff or his lawyers discovered it

When the defendant's attention was drawn to this entry he denied that this was in the " bahi " when it was produced in Court. The Subordinate Judge thought that some unauthorised person must have interpolated it in the " bahi " while it was in the custody of the Court. The learned Judges of the High Court, while holding that the explanation is not unlikely, came to their final conclusion that the entry is not genuine on more cogent grounds. According to the evidence these valuable articles used to be exposed to view year after year on the occasion of the " diwali " festival. It is extraordinary that the plaintiff and his witnesses, while remembering all the articles mentioned in the plaint, many of which are of insignificant value, should have forgotten to mention these valuable articles when the plaint was filed. As already stated, these articles were added to the Schedule II as items 27, 28, 29, by amending the plaint on 2nd June, 1936. If these articles had existed, their Lordships agree with the High Court in thinking that they would have been included in the original second Schedule to the plaint. For this and the other reasons given by the Courts below their Lordships hold that $L_2(12)$ has not been proved to be genuine and reliable.

Z_{15} and Z_{16} are two entries in defendant's " pakka rokar bahi " for the year 1912-13 (which the plaintiff says refers to item 27). These show that Rs.10 and Rs.15-3-0 were sent to the firm of Lala Genda Lal Banshidar for repairing a Jausan of pearls. The explanation of the defendant is that Genda Lal's mother was a daughter of the defendant's father's sister, that she used to come and stay with him, and that these entries might relate to her Jausan of pearls sent for repairs. As already observed, it is inconceivable that the plaintiff should have forgotten to mention this valuable article in Schedule II filed along with the plaint. The explanation given by the defendant about these two entries in his account book appears to be reasonable, especially so having regard to the finding that $L_2(12)$, which mentions this item along with the other two items, has not been found to be genuine. As held by the High Court the evidence given by the plaintiff is not sufficient to prove that any of these three items belong to the joint family.

In his appeal, the only relief pressed by defendant No. 2 relates to his claim for arrears of maintenance. In their Lordships' view the Courts in India have not dealt with this question adequately. The High Court says that the remedy of a coparcener who is dissatisfied with the conduct of the Karta of the family is by way of partition and not by way of claim for damages; but the claim of defendant No. 2 in the present case for arrears of maintenance stands on a different footing and is distinguishable. It is not disputed that the defendants entered into an agreement with defendant No. 2 and his brother, the plaintiff, by which in 1929 a separate allowance of Rs.250 for each was agreed upon and their messing became separate from their father and his second wife. As a result of this arrangement, they left the family house. It is alleged that the payment went on for some time and altogether ceased after July, 1931. The present suit was instituted on 15th July, 1932. This agreement is referred to in the judgments of both Courts in India. The claim for relief is based upon a distinct agreement and the failure on the part of the defendant to carry it out. In their Lordships view, defendant No. 2 is entitled to relief to the extent to which he will be able to prove his claim. Their Lordships would therefore direct that provision should be made for this item in the preliminary decree.

Ground No. 4, relating to the expenses of his marriage, was given up by defendant No. 2, and Ground No. 5, relating to his liability to account for the value of the articles enumerated in Schedule 3 and for other articles, after being touched upon, was also abandoned.

The only question in the appeal by the defendant No. 5 is whether he is entitled to get a share equal to that of persons in the same class as himself though he was born after the suit for partition. It is not disputed that he was begotten as well as born after the institution of the suit for partition. The institution of such a suit by a member of a joint Hindu family effects a severance of the joint status of the family. The plaintiff and defendant No. 2 had effected in this case the severance of their joint status in 1932; and from that date they became entitled each to one-fifth share of the joint family properties. If the claim of defendant No. 5 is accepted, their shares will necessarily be reduced. The rights of a son born after partition—often referred to as an " after born son "—under the Hindu law, was much discussed by Hindu jurists, for the ancient texts bearing on the question are conflicting; but it is not necessary to examine these texts as the law to be applied is now well understood by the Courts in India and has also been correctly applied in this case. It is enough to state that the law is well settled that a son begotten as well as born after the partition, where a share has been allotted to the father, as in the present case, is not entitled to have the partition re-opened and to claim a re-distribution of the shares. He is only entitled to succeed to his father's share and to his separate or self-acquired property to the exclusion of the divided sons. This is the only point which their Lordships have to decide in the appeal by defendant No. 5. The only ground on which his claim is urged by Sir Herbert Cunliffe is that though born after the suit partition has not been completed by actual division of the estate. This argument is fallacious. Delivering the judgment of the Board in *Girja Bai* v. *Sadashiv Dhundiraj* (1916) L.R.43 Ind. Ap.151, Mr. Ameer Ali pointed out, " In Hindu law ' partition ' does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Approvier's Case* (1866), 11 Moo. In. Ap.75, both ' division of title and division of property.' " In the same judgment reference is made to another observation of Lord Westbury, " It is necessary to bear in mind the twofold application of the word ' division.' There may be a division of right, and there may be a division of property." Mr. Ameer Ali points out that severance of status which is a matter of individual volition should not be confused " with the allotment of shares " which may be effected by different methods. The learned Counsel's argument would involve this confusion. The fact that actual division by metes and bounds has not taken place cannot in any way affect the quantum of share to which the plaintiff and defendant No. 2 have already become entitled; in so far as their rights are concerned partition has already taken place and their shares cannot be diminished by the subsequent birth of the fifth defendant.

There remain no further questions for determination in these appeals before the Board. In the result, their Lordships will humbly advise His Majesty that the High Court's decree should be upheld with the variation as regards the claim of defendant No. 2, with respect to arrears of maintenance due to him. Their Lordships make no order as regards costs before the Board.

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In the Privy Council

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DELIVERED BY SIR MADHAVAN NAIR

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