

*Privy Council Appeal No. 148 of 1917.*

*Allahabad Appeal No. 13 of 1914.*

**Girdhar Das, since deceased (now represented by Brij Mohan Das) -** *Appellant*

*v.*

**Raja Sri Krishna Datt Dube and others - - - -** *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN  
PROVINCES, ALLAHABAD.**

---

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 26TH JANUARY, 1920.**

---

*Present at the Hearing :*

LORD SHAW.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by* MR. AMEER ALI.]

---

The suit which has given rise to this appeal was brought in the Court of the Subordinate Judge of Benares on the 8th August, 1910, to enforce a mortgage-bond for Rs. 50,000 executed by one Raja Harihar Dut Dube in favour of Bisambhar Das, the plaintiff's father, since deceased. By this bond, which bears date the 6th October, 1889, Harihar Dut purported to hypothecate a half share of a large property commonly known as the Jaunpur Estate in the Jaunpur District, then in his possession. Harihar Dut died in 1892, and on his decease the property came into the possession of his younger brother, Raja Shankar Dut Dube. Shankar Dut died three years later. The minor defendant Kishen Dut was adopted after Raja Shankar Dut's death by his widow under his authority.

The Court of Wards have assumed charge of the estate during Kishen Dut's minority.

The Jaunpur Estate owes its origin to one Sheo Lal Dube who lived towards the end of the eighteenth and the beginning of the nineteenth century, and appears to have been a man of considerable business ability. For his services to the British Government he had

received the title of Raja, which has continued in his family as all its heads in succession seem to have enjoyed it. Harihar Dut and Shankar Dut were fourth in descent from Sheo Lal, and in 1879 they were the only persons interested in the Jaunpur Estate. Harihar Dut was admittedly a person of extravagant habits ; he had, in the course of the few years during which he had been in possession of the property, contracted debts amounting to several lakhs of rupees. Shankar Dut was evidently more prudent and anxious to preserve intact the ancestral estate and dignity. In order to save the property from ruin in consequence of Harihar Dut's extravagance, the two brothers jointly applied in October, 1878, to the Court of Wards to assume charge of the estate and to discharge the debts with which it had become encumbered. The application was acceded to, and the Court of Wards held the estate for ten years, during which all the debts were paid off and the property was once more solvent. The law which vests in the Board of Revenue as the chief Revenue authority in the Province the powers of a Court of Wards defines the class of proprietors disqualified to manage their property and of whose estates it may assume charge. Among these proprietors are included persons declared by the Local Government on their own application to be "disqualified" (Act XIX of 1873, Land Revenue, N.W.P., sections 193 and 194). Harihar Dut and Shankar Dut came within this category. By a later Act (VIII of 1879, section 24), a further section (205 B) was inserted in Act XIX of 1873 which introduced the wholesome provision that :—

"Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon, or interest in, such property or any part thereof.

"And no such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence."

This provision of the law prevented Harihar Dut from encumbering the estate during the management of the Court of Wards. But Shankar Dut was, evidently and not without reason, apprehensive that his brother would resume his habits of extravagance on the release of the property by the Court of Wards. In order to prevent so far as possible his burdening the estate, Shankar Dut obtained from him an agreement by which among other conditions Harihar bound himself not to contract any debt without Shankar's consent. It was agreed that on a breach of this condition Harihar should forfeit his right to the possession and management of the estate which should devolve on Shankar. This document was executed on the 13th June, 1889, but was not registered until January, 1890. Whilst the property was under the administration of the Court of Wards, Harihar had borrowed Rs. 50,000 from Bisambhar Das on five promissory notes. The estate was released on the 1st October, 1889, and five days after, that is on the 6th October, he executed the mortgage-bond in suit, in substitution of the promissory notes.

Bisambhar Das appears to have brought an action on this bond in the lifetime of Shankar Dut, but it was withdrawn, owing, it is said, to some technical defect, with liberty to bring another suit.

The present action was instituted as already stated on the 9th August, 1910. The plaintiff Girdhar Das (who is insane and sues by his committee or certificated guardian, his wife) and the defendants other than the Collector and Kishen Dut are the heirs and representatives of the original mortgagee, Bisambhar. The plaintiff's claim to bring to sale the half share of the Jaunpur Estate under the mortgage rests on three grounds:—Firstly, that it is an impartible estate, and that therefore Harihar Dut had absolute power of alienation over it; secondly, that even if it was not an impartible raj but a property subject to the ordinary rules of the Hindu Law, it had been partitioned between the two brothers, and that at the time of the mortgage, Harihar was holding possession of his share separately from Shankar; and thirdly, that even if there was no partition, the debt was incurred by Harihar Dut as the managing member for legal necessity and the benefit of the joint family.

The Collector, representing the Court of Wards, joined issue with the plaintiff on all these points. He contended further that at the time of the mortgage Harihar had no right in the property, as he had under the agreement of the 13th June, 1889, relinquished all his rights in the estate in favour of Shankar Dut, and that even if for any reason the agreement was not enforceable, Harihar Dut as a member of the joint family was incompetent under the Hindu Law to execute the mortgage in question.

It appears that in a suit instituted in 1893, against Raja Shankar Dut by one of Raja Harihar Dut's creditors named Bithal Das, the validity of the agreement of the 13th June, 1889, was put in issue, and the High Court in that case had decided that it was a valid agreement made for valuable consideration and binding on Harihar Dut and all persons deriving title from him.

In the present case the Subordinate Judge, before whom it came for trial in the first instance, held that the Jaunpur Estate in question was "not an impartible raj, but an ordinary estate of a joint Hindu family," and as there was no proof of any legal necessity, the mortgage deed on which the suit was brought was "invalid." He referred to the decision of the High Court in Bithal Das' case with regard to the effect of the agreement of the 13th June, 1889, but properly observed that the parties were not the same in the present action, and that the pronouncement made in that case could not therefore operate as *res judicata*. Upon the findings of fact at which he arrived the Subordinate Judge dismissed the plaintiff's suit.

The learned judges of the High Court of Allahabad on appeal, after disposing of the question whether the estate in suit was an impartible "raj" or not, proceeded to deal with the case

on the basis of the agreement of the 13th June, 1889. They first expressed their agreement with the view of the first Court on the plaintiff's contention that the estate was impartible. They then went on to say as follows :—

“ There is no evidence of partition save certain recitals in applications and other documents, including the agreement to which we have just now referred, to the effect that they were owners in equal shares. We do not think that it is necessary, having regard to the view we take of the case, to decide that there had been what amounted in law to a partition between the brothers.”

It is to be regretted that the learned judges did not express more decisively their opinion on the contention of partition, as it would have saved much discussion before this Board. In the result they held that the agreement was valid and binding, and accordingly affirmed the decree of the Subordinate Judge dismissing the suit.

On appeal before this Board it is admitted that the concurrent finding of the two Courts in India on the question of impartibility is conclusive. The debate, therefore, has been confined to two points—viz., whether, accepting that the estate was at one time a joint family property, the plaintiff has succeeded in establishing that at the time of the mortgage the brothers were separate ; and secondly, whether the agreement of the 13th June, 1889, was invalid and inoperative as it was not entered into with the sanction of the Court of Wards. It is clear, however, that the latter question would require determination only if separation is established.

The Dube family, it should be observed, are subject to the Mitakshara law of the Benares School. Admittedly there has been no actual partition between the brothers ; nor is it alleged, much less proved that they enjoyed separately the rents and profits of their respective shares. It is not suggested that they were separate in mess and worship. What is contended for is that by their acts they had agreed to a “ division of interest,” which amounted in law to a separation. No doubt a disruption of the status of jointness may take place by agreement, without division of the estate by metes and bounds. Even an unambiguous expression of an intention by one member of the joint family to separate and hold his share separately will suffice. But the question is one of fact, and the onus is on the party alleging separation of interest or the intention to separate to affirmatively establish it.

The plaintiff in support of his contention relies principally on two documents. One is a deed of compromise bearing date the 2nd January, 1875, entered into between Raja Lachmi Narain Dube on one side, and the two brothers (Harihar and Shankar) on the other. Lachmi Narain was a cousin of Harihar and Shankar, and was at the time the head of the Dube family. Shankar was then a minor and was represented on the compromise by the Collector, the share of these two being apparently in 1875 in charge of the Court of Wards. The document recites that “ a dispute relative to a partition of the *riyasat*,” meaning

thereby the estate, " had been going on for a long time between the parties owing to which no benefit whatever had been derived, but on the contrary losses sustained, and that therefore they were entering into a compromise with the object of maintaining the *riasad*." The parties then proceed to make the following declaration :—

" The *riasad* is a *raj* which was acquired by the ancestors of the parties that we or our heirs will never express a wish to have the profits or anything else partitioned, if we make a partition, it will not be entertained and this *riasad* will always continue joint and we, both the parties, namely, Raja Lachhmi Narayan Dubey, first party, and Raja Harihar Dut Dubey and Shankar Dut Dubey, the second parties, have equal rights. The matters relating to *gaddinashini*, management of affairs, the expenses of the *riasad* and family, and possession of Lachhmi Narayan Dubey will continue as hereafter in accordance with ancient custom. After the present *gaddinashini* the person who may be the eldest in age and qualified, will be the *gaddinashini* in future. Matters connected with the management of *riasad* will also be attended to by us, the second parties, in concurrence with the others. The debts that are due up to this day by the parties will be paid from the whole of the *riasad*, and debts must on no account be contracted in future without the consent of the parties."

The parties to this document certainly do not evince any desire or intention to separate or to divide their respective interests in the joint estate ; on the contrary, they insist on the continued existence of the estate as the joint property of the three executants. They call the estate a " raj," and the head of the family for the time being " the eldest in age and qualified " as the *gaddinashin* ; but that in no way affects the status of the family as a joint Mitakshara family.

Particular stress, however, is laid on the terms of a document executed by Shankar Dut on the 13th June, 1879, shortly after the Court of Wards had assumed charge of the Jaunpur Estate. It is called an *Ikranama* or agreement and is in the nature of a deed-poll. By this deed Shankar Dut binds himself and his heirs not to raise any objection to the sale or transfer by the Collector, or any other duly authorised officer of the Court of Wards, of any zamindari *ilaka* " appertaining to the estate " and belonging to him, for the purpose of liquidating the debts with which it was burdened. At the same time he reserves his right to compensation against his brother. It is urged that the declarations contained in this document show a pre-existing severance of interest between the two brothers. It becomes necessary, therefore, to refer shortly to the terms of the document. It begins with the statement that the " executant " had presented an application jointly with Harihar on the 25th October, 1878, to the Collector, and the zamindari property belonging to him " which is held jointly with Raja Harihar Dut Dube has been placed under the management of the Court of Wards." It then goes on to say :—

" As the debts are heavy . . . and as Raja Harihar Dut Dube, and I, the executant, are the proprietors of a moiety share each, and if any *ilaka* belonging to the *riasad* is disposed of, then owing to the property being held in shares (jointly) there is no hope of getting a fair price owing to apprehensions of future objections being raised either by us, or our heirs,

I, the executant, do hereby agree and give it in writing that if the Collector of the District of Jaunpur, the officer of the Court of Wards, or with the permission of the said officer, the Manager transfers by sale any zamindari *ilaka* appertaining to the *riasat* belonging to me, the executant, with the object of liquidating the debts and applies the proceeds in liquidating the debts, then I, the executant, or my heirs and successors will raise no objections in future in respect of such transfer, and I, the executant, or my heirs and successors will make no objection (after the management of the Court of Wards has been removed) in respect of the transfer aforesaid either against the Court of Wards or the persons to whom the Court of Wards may transfer the property. But it must be understood that this *ikraranama* (deed of agreement) will in no way be detrimental to any of my rights which I had against Raja Harihar Dut Dube before its execution; because after the transfer of some of the *ilakas*, appertaining to the *riasat* only a large portion of the *riasat* will be left free from incumbrance, and then whatever claim I may have with reference to the *imlak* which may be in existence I will make it against the *imlak* which is left and against my partner."

This document was executed, as it clearly states, with the object of enabling the Collector or the Court of Wards to give good title to the transferees unhampered by the possibility of future litigation by any reversioner. It was the only mode by which a fair price could be assured. There is no statement that the properties were held separately or that the interests of the two brothers were separate or separately enjoyed; nor that any severance of interest was intended. On the contrary, it distinctly states that the estate was held "jointly" and that the two brothers were entitled to it in equal shares. The reservation by Shankar Dut of his rights is a natural corollary to the right of every joint tenant to claim upon partition compensation from his co-parceners in the event of unequal division. Reference has also been made to the joint agreement executed by Harihar and Shankar on the 13th June, 1889. Their Lordships have examined this document also with great care and given due weight to the considerations urged on behalf of the appellant, but they find no trace of any previous separation or intended separation. On the contrary, the whole policy of the agreement is to keep the estate undivided in the family. There is an evident and natural desire to raise the prestige of the estate by calling it a *raj*, and by styling the head or *karta* of the family the *gaddinashin*. But, as already stated, there is no indication throughout the document that there was an intention to disrupt the status of the family. The Court of Wards assumed charge of the estate as a joint estate, and throughout its administration treated it on that footing (*vide* for example the sale notification of the 15th August, 1879). The village administration papers (*Wajib-ul-Arz*) for 1886 contain statements to the same effect.

Their Lordships do not think it necessary to refer to any of the documents executed by Harihar Dut or Shankar Dut after the date of the mortgage of the 6th October, 1889, as its validity and enforceability against the estate must be determined on the basis of the status of the family at the time it was executed and of the powers of Harihar Dut to bind the property. On a careful

examination of the evidence their Lordships have come to the conclusion that the plaintiff has utterly failed to establish the separation on which he rested his claim. Admittedly there is no proof of such legal necessity as would justify the creation of the mortgage in respect of the joint family property. In this view of the case their Lordships do not consider it necessary to enter upon a discussion of the validity of the agreement of the 13th June, 1889.

A number of decisions by this Board were referred to on behalf of the appellant, but having regard to the facts of this case they require no examination.

In their Lordships' judgment this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

---

GIRDHAR DAS, SINCE DECEASED  
(NOW REPRESENTED BY BRIJ MOHAN DAS)

v.

RAJA SRI KRISHNA DATTA DUBE AND OTHERS.

---

---

DELIVERED BY MR. AMEER ALI.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1920.