Privy Council Appeal No. 59 *of* 1942

Allahabad Appeal No. 15 *of* 1940

RAJA JWALESHWARI PRATAP NARAIN SINGH - *Appellant*

v.

BABU PARCHAND BIR SINGH - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1944

Present at the Hearing:

LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

This appeal seeks to reverse a decree of the High Court of Judicature at Allahabad dated the 24th January, 1940, which in part affirmed and in part modified a decree of the Court of the Subordinate Judge of Basti dated the 1st June, 1936.

The parties are sons of the late Raja Pateshwari Pratap Singh who was proprietor of Raj Basti and died on the 19th March, 1928.

The Rajah made his will on the 16th July, 1927, and after summarising the state of his family, states that by way of a precautionary measure he considers it desirable to make proper arrangement for the maintenance allowance to his two younger sons, the respondent and Babu Bijai Bir Singh, as follows:—

> "After my death Lal Jwaleshwari Pratap Narain Singh my eldest son shall be the Raja for the time and the absolute owner of the entire movable and immovable property appertaining to Basti Raj. He shall continue to support as heretofore and meet all reasonable needs of his two brothers Babu Parchand Bir Singh and Babu Bijai Bir Singh so long as the latter two Babu Sahebs live in agreement with Lal Jwaleshwari Pratap Narain Singh and act for the betterment and improvement of the raj as desired by the latter. When the Babu Sahebs aforesaid or one of the babus do not want to work and look after the management under the orders of Lal Jwaleshwari Pratap Narain Singh or if, for some reason they want to become separate and live separately they shall be entitled to babuai rights subject to all the conditions relating to the property of Babus all along obtaining to this estate and it shall be the duty of Lal Jwaleshwari Pratap Narain Singh to give property yielding Rs.500 per mensem as profits, *i.e.* Rs. 6,000 per annum for the maintenance of his two brothers as per detail given below. He should separate such property from his management and place it in charge of the babus aforesaid who shall be responsible for payment of Government revenue and other zamindari matter in respect of the property aforesaid."

He then proceeds to provide for the male descendants of his sons and for the construction of a residence for his younger sons. The will then proceeds as follows:—

" In view of the fact that for various reasons I could not make proper arrangements for the education and future maintenance of Babu Parchand Bir Singh, I have considered it proper and have after full consideration come to the decision that in addition to the babuai rights of maintenance mentioned above, property yielding Rs. 100 per mensem as profits should further be allotted to him subject to all the conditions of babuai rights. I hereby direct that when Babu Parchand Bir Singh separates, Lal Jwaleshwari Prasad Singh should give him property yielding profits to the extent noted above. At the time of allotment of this property also, all the conditions relating to the selection of property as mentioned above should be born in mind. I have, therefore, executed these few presents by way of a will so that it may serve as evidence and be of use when required.

Written on 16th July, 1927.

Detail of maintenance allowance amounting to Rs.500 per mensem which comes to Rs.6,000 per annum.

Babu Parchand Bir Singh—Rs.300 per mensem.

Babu Bijai Bir Singh—Rs.200 per mensem."

At the date of the will and at his death the testator had three sons, the appellant, the respondent and Babu Bijai Bir Singh. The last-named is joined merely as a formal party interested under the will and is not otherwise concerned in these proceedings.

Differences having arisen between the parties, the respondent separated from the appellant in 1934 and the respondent thereupon claimed from the appellant the sum of Rs.2,500 mentioned in the will and in effect a decree awarding possession over such villages as would yield an income of Rs.400 a month. No point arises as to the Rs.2,500, but the appellant contended that he was liable to give possession of property producing Rs.300 a month only.

A further dispute arose between the parties which turned upon the effect of sect. 73 of the Agra Tenancy Act—Act III of 1926, the Act which was applicable at the date of the partition.

That section enacts, " When for any cause the local government or any authority empowered by it, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land . . . a collector . . . may order that the rents of the tenants holding such land or any portion thereof . . . shall be remitted or suspended for the period of such remission or suspension of payment of revenue to an amount which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which payment has been so remitted bears to the whole of the revenue payable in respect of the land ".

The exact date at which the parties separated does not appear in the record but it does appear that certain remissions of rent had been made before the date of the partition and that further remissions were made after that date. The appellant claimed that in allotting villages to answer the provisions of the will, the income should be calculated as if the original rents stood and no remissions had been made, whereas it was held by the High Court and is contended by the respondent in this appeal that the income must be calculated as at the date of the partition, and that a rise or fall or the possibility of a future rise or fall in the rents after that date will not diminish or increase the respondent's obligation.

In order to secure the rights which the respondent claimed were his he instituted the present suit on the 9th April, 1934, in *forma pauperis* in the Court of the Subordinate Judge of Basti.

In that suit the learned Subordinate Judge delivered judgment on the 1st June, 1936, and issued a decree against the appellant holding that the respondent was entitled to have possession of certain properties of the value of Rs.4,800 a year, but in directing the properties which were to be taken the learned Subordinate Judge calculated the income to be derived from them as if no remissions had been made under the provisions of sect. 73 of the Tenancy Act of 1926.

Both parties appealed from this decree, the respondent claiming that the remissions made under the Act should have been taken into consideration and that the properties from which the income was to be derived must be

of the value of Rs.400 a month as at the date of partition, even though the rental had at that time been reduced. The appellant on the other hand maintained, as he had maintained below, that the respondent was entitled to possession of lands producing Rs.300 a month only and that the rental value must be calculated as if no remissions had been made.

Both appeals were from the same decree but were separate appeals separately brought: the question at issue in the one was different from that in the other, different relief was sought and different grounds of objection given. The appellant's appeal was numbered 228 of 1936 and the respondent's 276 of the same year.

One judgment only was pronounced in the two appeals. In the result the appellant's appeal (No. 228 of 1936) was dismissed with costs, that of the respondent (No. 276 of 1936) allowed and the order of the Civil Judge modified.

In the latter appeal a separate decree was pronounced and it was ordered that the decree of the Subordinate Judge be modified and that a decree should be passed in favour of the respondent for the recovery of Rs.10,293-0-0 together with interest at the Court rate, and that in so far as the claim for possession was concerned the case should be remanded to the Court of the Subordinate Judge with direction to give the respondent after investigation a decree for possession of property which in 1934 yielded an actual income of Rs.400 a month and to base the income upon actual realisation after making provision for remissions.

It was further ordered that if the respondent had already realised any sum in execution of his decree, the appellant should be credited with that amount and with Rs.1,000 in respect of collecting charges. The respondent was also given a stated sum for costs.

The question of the amount per mensem to which the respondent is entitled under the terms of the will is one of some difficulty and if it were open to the appellant would require careful consideration by the Board.

But their Lordships do not think it is open.

They would point out that the only application for leave to appeal is against the decree in the First Appeal No. 276 of 1936 that paragraphs 3, 4 and 5 of the petition are as follows:—

> "3. That the plaintiff filed appeal. First Appeal No. 276 of 1936 in this court against that portion of the decree which awarded him possession over 7 villages only on the ground that the trial court should have taken into consideration the fact, the remissions of rent had taken place and therefore the net income of the villages decreed was less than Rs.4,800-0-0 a year.
>
> 4. That the court decreed the plaintiff's appeal and directed that a decree be given to the plaintiff over villages which after taking into account the remissions yield a net income of Rs.4,800-0-0 a year.
>
> 5. That the value of the subject matter of the suit in the court of first instance and the value of the subject matter in dispute on appeal to His Majesty in Council is upwards of Rs.10,000-0-0, that the decree sought to be appealed from, does not affirm the decree of the court below and that the appeal involves substantial questions of law."

Moreover the grounds of appeal are solely concerned with the question of the remissions and no complaint is made or reversal sought of the decree which dismissed the appellant's appeal and awarded Rs.400 and not Rs.300 a month to the respondent.

In these circumstances having regard to the practice and the terms of Order 45, Rules 1 to 5 of the Code of Civil Procedure, their Lordships do not think that this point is open to the appellant or that they would be justified in permitting it to be raised. Accordingly they would dismiss the appellant's appeal in this matter.

So far as the remissions are concerned the will specifically states that if the respondent or his brother wish to become separate or live separately they should be entitled to habuni rights and it should be the duty of the appellant to give property yielding 300 per mensem for the maintenance of the two brothers "as per detail given below". The will goes on to direct that the appellant should separate such property from his management and place it in charge of the respondent and his brother who should

be responsible for government revenue and zamindari matters and that the babus might on removal of the name of the Rajah for the time being have their names recorded in the khewat.

At a later stage the will contains the provision for an additional Rs.100 a month to be given to the respondent in addition to the sum of Rs.300 out of the 500 per mensem allocated to him.

In their Lordships' view this language clearly indicates an intention on the part of the testator that the amount of income which the property to be given would produce was to be calculated with reference to the date at which the separation took place. If there were any doubt in the matter it would, in their Lordships' opinion, be resolved by the terms to be found later in the will where it is said that the testator and the appellant intend to settle certain villages set out below according to the Agra Estate Act, that for this reason it was not possible to apportion any particular property for the babus, that the testator entrusted this duty to the appellant who might out of the property of the Raj set apart property yielding profits to the extent noted below, when any of the babus separate.

Their Lordships cannot read these provisions in any other sense than that the property was to be separated when the respondent should elect to live separately and the income which it would yield was to be ascertained at the moment of separation.

It was argued on behalf of the appellant that remissions were temporary only and the revenue and rental might at any future time be increased to its original amount and that in that case the respondent would gain an unjustified and unintended increase of income, beyond that specified in the will. Without pronouncing an opinion on this matter, and assuming it to be true that the rental might be increased at some future time to its original figure, their Lordships hold the provisions of the will clearly to indicate that property which produces the specified income at the date of the separation is to be transferred—the appellant taking the risk of a future rise and the respondent of a further remission. The obligation is not simply to provide an income of Rs.400 a month, but to transfer property producing that income. In default of any other indication their Lordships are of opinion that this means property producing that income at the date when the duty to transfer arises.

In their Lordships' view the decree of the High Court is right and should be confirmed with a slight modification for clarity's sake only.

They will accordingly humbly advise His Majesty that there is no appeal before them as to the question whether under the terms of the will the respondent is entitled to property producing an income of Rs.300 a month only and not to property producing Rs.400 a month and that no relief can be granted to the appellant in this respect. They will further humbly advise His Majesty that the appellant's appeal be dismissed with costs save that there be substituted in the wording of that decree the words " property which *at the date of the partition* (9th April 1934) yielded an actual income of Rs.400-0-0 a month " in the place of the words " property which in 1934 yielded an actual income of Rs.400-0-0 a month ".

The appellant must pay the costs of the appeal.

(35993) Wt. 8070—2 170 8/41 D.L. G. 338

In the Privy Council

RAJA JWALESHWARI PRATAP NARAIN SINGH

v.

BABU PARCHAND BIR SINGH

DELIVERED BY LORD PORTER

Printed by His MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1944