Privy Council Appeal No. 9 of 1918.

Amritrao and others - - - - - - *Appellants*

v.

Mukundrao and others - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

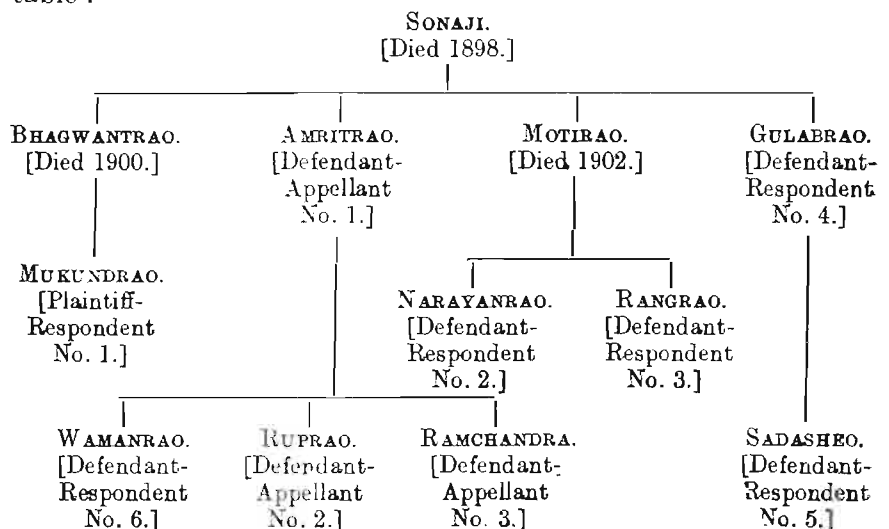
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1919.

Present at the Hearing:
LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a decree, dated the 8th September, 1913, of the Officiating Additional Judicial Commissioner (Mr. J. Mittra), modifying a decree, dated the 26th February, 1912, of the Second Additional District Judge, East Berar.

To make the evidence and contentions put forward in the case intelligible, it is necessary, especially as the respondents unfortunately do not appear before the Board, to set out as a preliminary the pedigree of the principal appellant Amritrao. It is not disputed that it is correctly set forth in the following table:—



[74] (C 1503—97) A

The family of Sonaji was a joint Hindu family governed by the Mitakshara Law.

Sonaji's second son, Amritrao, was evidently a man of enterprise. He and the other appellants contend that he separated completely and effectually from his family in or about the year 1870, twenty-seven or twenty-eight years before his father's death in 1898, and that after his separation he acquired by his own exertions the property, considerable for him, described in Schedule B attached to the plaint in the action out of which the appeal has arisen. He claims this as his own. The effort of his youngest brother Gulabrao and of the descendants of his younger brother Motirao, if not of the plaintiff in this suit, who is the adopted son of the eldest son of the family, Bhagwantrao by name, is to establish that the aforesaid property in Schedule B is, in reality, the property of the joint family, on the ground that he, Amritrao, never completely and effectually separated from his family, and that the wealth which he subsequently acquired is merely an accretion of the portion of the family property, whether his full share of it or not, of which he obtained the possession and enjoyment at the time of the alleged separation. It is obvious that if this latter contention were established the plaintiffs, the descendants of Motirao, Armitrao's brother, and his youngest brother Gulabrao would become entitled, each to one-fourth, of the property Armitrao claims as his own. The significance and effect of all Armitrao's action, and his efforts, after the year 1870, to acquire property depend upon the question whether he then effectually separated himself from his family or not. That is the dominant, if not indeed the crucial, question in the case. It is admitted that no regular deed of partition was executed at the time of this alleged partition, for the reason given, not unnatural if true, that the family then owned no land which needed to be divided, but even if this were not so, it is well established that the unequivocal and unmistakeable manifestation by a member of a joint Hindu family by his words or conduct of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and dwelling. And of course a separating member of such a family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest.

The pleadings in the action out of which this appeal has arisen are, having regard to the grounds of the decision of the Judicial Commissioner, worthy of attention.

Originally Amritrao and his three sons were not made defendants. They were added at the instance of Gulabrao. In the first paragraph of the plaint it is stated that Amritrao took some fields as his share and became separate thirty years before the date of the institution of the suit in the year 1907; that he had no right whatever to the joint property; and that after his

separation his three brothers remained joint. In paragraph 2 it is further stated that since the previous year Gulabrao and his grandson Sadasheo took possession of the entire property, *i.e.* the joint property mentioned in Schedule A, and denied the plaintiffs' claim thereto. The relief prayed is first the partition of this latter property, and then by amendment, presumably after the addition of Amritrao and his sons as defendants, if the property in his possession should be held by the Court to be joint, partition of the property described in both Schedules A and B.

It is clear from this that the claim to the property described in Schedule B was put forward by Gulabrao and not, in the first instance, by any other of the parties litigant. But he is not content, apparently, with merely increasing the amount of the family property by having the property in his brother's possession brought in as part of it. He aims in addition at decreasing the number of sharers, and consequently increasing the amount of his own share, and accordingly in his written statement, paragraph 3, he alleges that the plaintiff's adoptive father separated from his father Sonaji before he Gulabrao or the defendants 1 and 2, the sons of Motirao were born. The defendants Amritrao and his two sons filed their written statement in the month of February, 1910, in paragraph 5 of which they allege that Amritrao had separated from his father about forty years previously; that at the time he separated there was no family property to be divided, and that he then got nothing; that no portion of the property of which he was now possessed is ancestral property, and that all the property he holds was acquired by him after his separation. Upon these pleadings the two following issues, amongst others, were settled by the Additional District Judge :—

> "5. (*a*) Did Amritrao (defendant 5) separate from his father Sonaji, 40 years ago, as alleged ; and is the estate now in possession of defendant 5 and his sons the self-acquired property of defendant 5 ?
>
> "(*b*) If it be not his self-acquired property is not that estate liable to be brought into hotch-potch ?"

The Additional District Judge in over four closely printed pages of the record examines the evidence, oral and written, bearing on these issues in minute detail and with considerable acumen.

In paragraph 18 of his judgment he deals with the nature of Amritrao's interest in a field called Akhar situated at Nagarwadi, and comes to the conclusion that it can be safely stated that the lands at Nagarwadi in the possession at the date of the suit of Amritrao were never owned by his father Sonaji. As the nature of Amritrao's interest in this field is, in their Lordships' view, apparently, the pivot on which the judgment of the appellate tribunal turns, it is necessary to examine the evidence touching it :—

It is proved that Sonaji first lived at the village of Khed, that he then went to live at Udkhed and from thence went to live at Nagarwadi, where he continued to reside for twenty years,

for the whole or most of the period with his four sons, and then returned to the village of Khed leaving Amritrao behind him at Nagarwadi. The landed property in Schedule B consists of seven fields at Daharur, five fields at Nagarwadi, three fields and four houses at Khed and three houses at Nagarwadi. The other property consists of cattle, implements of husbandry, khand-juar and gold amounting to Rs. 500, and household furniture, &c. It is proved, indeed is not disputed, that this field Akhar stood in the revenue records in 1870 and still stands in the name of Amritrao. It is likewise not disputed that there is no documentary evidence to show that Sonaji ever acquired any lands at Nagarwadi. A witness named Hari, however, was examined on behalf of Amritrao. He stated in his evidence in chief that he was, when examined on the 26th September, 1911, about 62 years of age. He would therefore be about 21 years of age in the year 1870. He then states he was only 12 years old when he came to Nagarwadi, which was then not inhabited; that twelve to fifteen families then came from Khed, Sonaji and his family amongst them; that Sonaji went back to Khed taking Motirao and Gulabrao with him, but that Amritrao, then 30 years old, continued to live at Nagarwadi, that soon after Sonaji left for Khed Amritrao purchased a field called Bablicha from the witness's uncle for Rs. 700, and that fifteen years after Sonaji left Amritrao purchased from the witness's cousin another field called Vadicha and built a big house at Nagarwadi and two *guyavadas* adjoining it.

On cross-examination, however, the witness said that Amritrao and his father lived in the same house at Nagarwadi; that they owned one field called Akhar there; that they cultivated it, that they had two bullocks; that Sonaji was the Patel of the village, that the site of the Gayavada did not belong to Sonaji, and that Sonaji, so long as Amritrao was there, used to visit him at Nagarwadi, but that the latter never went to Khed; and that the fields above-mentioned were never sold in his presence.

In cross-examination on behalf of Gulabrao and his son Sadasheo, the witness said: "I do not know of any partition between Sonaji and defendant 5, *i.e.*, Amritrao; the latter has got fields at Dasoor. I do not know what fields Sonaji had or Bragwantrao had or Gulabrao has."

There is some apparent inconsistency between this witness's evidence-in-chief and on cross-examination; but it appears to their Lordships that the real weakness of his evidence lies in this that, while he may be testifying truly as to events which he saw or was acquainted with, his testimony as to the title of, or interests of these persons in the property they cultivated or were in possession of or inherited is perfectly worthless, especially as a separation may be effected by a fixed intention clearly expressed by the member of a family who desired it. Sonaji and his son Amritrao were on friendly terms. The latter was evidently prospering in his business. There was nothing unnatural in the father assisting the son in the cultivation of

this field Akhar, though he, the father, had no interest whatever in it. Yet from this statement by the witness Hari, uncorroborated by any evidence whatever, that the father and son owned this field which they cultivated together, the Judicial Commissioner comes to the conclusion that the field was family property. Not only does he do this, but taking that fact as established, he proceeds to hold that fields 1, 6 and 70 of Dasoor, owned in 1870 and then standing in Amritrao's name were also in the same position, and then treating them as the nucleus as family property, he apparently concludes that all the valuable property included in Schedule B has been acquired by the use and enjoyment during subsequent years of this nucleus, and is therefore an accretion of it, partaking of its character as family property.

It appears to their Lordships that these are not sound or legitimate conclusions from the facts proved.

The District Judge in paragraph 20 and 21 of his judgment finds that during Sonaji's lifetime he and his son Amritrao had different khatas with the same creditors, that on the former's death his khatas were continued in the names of Motirao and Gulabrao, and not of Amritrao (Exhibit 5 D. 3 proves this), that when the creditors sued for the recovery of the debts Amritrao was not made a defendant, and that it was clear that Amritrao was separate in food, residence and dealings from Sonaji and his brothers, while the dealings of Sonaji and his sons Motirao and Gulabrao were joint. And he further finds in favour of Amritrao and his sons, (1) cesser of commensality, (2) separation in residence and food for many years, (3) separate money transactions, and separate and exclusive dealing with the property in their possession. In paragraph 26 he ultimately finds that Amritrao separated from his father about 1870, that the property in his possession and that of his sons is his self-acquired, and is not liable to be brought into hotch-potch on a partition between the plaintiff and the defendants from 1 to 4—these are: Narayanrao Motirao, Rangrao Motirao, Gulabrao Sonaji and Sandsheo Gulabrao. This last triple finding is in entire accord with the evidence given by Motirao and Gulabrao in a suit instituted in the year 1900 in the Judicial Commissioners' Court on the death of Bragwantrao, in which the plaintiff in the present action and Amritrao both claimed the Patelki of Nagarwadi, which had been recorded in the name of the eldest brother, then recently deceased. Motirao on the 24th of July, 1900, in the course of his evidence, stated on oath that the only ancestral property his father left consisted of two fields and the Watan that Amritrao took his share and separated. And Bhagwantrao himself and Gulabrao kept the share together. That the Watan should be transferred to Makundrao by right of adoption. Gulabrao, in the course of his evidence, stated, "The deceased, Motirao, and myself were living together, and Amritrao was separate from us."

This is also in accord with the evidence, given by the present plaintiff and his three uncles in a suit instituted in the Revenue

Court in July, 1901, in which the plaintiff in the present suit claimed to be registered as the Deshmuki Watan. The evidence runs as follows :—

> "Amritrao stated as follows :—'I am separate. Motirao, Gulabrao and the deceased were joint. Deshmukhi may be recorded in my name in the place of the deceased.'
>
> "Motirao stated as follows :—"Amritrao is separate and all of us are joint. The name of the adopted son may be entered in the Deshmukhi register.'
>
> "Gulabrao stated :—'My statement is the same as that of my brother Motirao.'
>
> "Mukundrao (plaintiff) stated :—"Bhagwantrao Deshmukh is dead. He has no legitimate son. I am his adopted son. He has no wife. He has three real brothers, namely, Amritrao, Motirao and Gulabrao. Amritrao is separate and all of us are joint.'"

Again in mutation proceedings instituted in November, 1900, by the plaintiff in the present suit claiming to have recorded in his name a field, survey No. 2, situated in Mausa Indoor, 16 bigas in extent of which his adopted father was the khata holder, both he and Amritrao repeat the assertion that the latter was separate and his three brothers were joint. As to the field of Akhar, the Judicial Commissioner seems to have attached little weight to all this evidence, and relied in preference on that of the witness Hari. This has been already dealt with. Their Lordships are quite unable to concur with him in the view taken upon this point.

Having come to the conclusion on the evidence of Hari that this field, though standing in the name of Amritrao in the revenue records was family property, he proceeds to determine what other property similarly recorded was in reality the property of the family. And he finds that fields Nos. 1, 6 and 70 at Dasoor were owned if not acquired in 1870, but that they were uncultivated lands, and it was alleged could be acquired for nothing. Then he finds there were three fields at Nagarwadi which Amritrao claimed to have bought about the year 1870. No witness gives any evidence as to any of these fields, similar or at all to the effect of Hari's evidence. In reference to the field Akhar, yet the learned Commissioner says :—

> "The conclusion I have come to in reference to this field weakens any presumption that might have been made in respect of these Dasoor fields from the fact that they stand in Amritrao's name in the revenue records,"

and then states his conclusion and the grounds of it in the following passage of his judgment, p. 190 :—

> "Three of the fields he claims to have bought. These are Nagarwadi fields all acquired about the year 1870. The rest of the fields meaning the Dasoor fields were, according to him, acquired at Settlement. In my opinion it was for Amritrao to prove clearly that the fields acquired in 1870 were acquired after his father left Nagarwadi, notwithstanding that the fields stood in his name. For I have shown that another field acquired in 1870 was joint property though standing in his name. I am inclined to think that the field at Indoor and the Akhar field would be a sufficient nucleus after defraying the expenses of the family for the acquisition of the rest of the property as it was acquired from time to time. At any

rate if as I presume all the fields acquired in 1870 to be joint property—that would be amply sufficient for the acquisition of the others. Now Amritrao says that he dealt in cotton. But I find no sufficient proof on the record to show that he did so in the early seventies."

In their Lordships' view this reasoning would have been entirely faulty even if it had been satisfactorily established, which it has not been, that the field Akhar was the property of the joint family.

If the fact be as the plaintiff, his natural father and his two uncles have in effect declared, that in 1870 Amritrao took his share and separated from the family leaving his three brothers joint, then no such burden of proof as is in this paragraph indicated rests upon him. The suggestion that the surplus income from the field at Indoor and the field at Akhar, after defraying the expenses of the family was sufficient even by its most profitable use to acquire all the property in Schedule B appears to their Lordships to be quite fanciful.

The learned Commissioner then endeavours to discount the sworn evidence of Motirao in the two suits instituted in 1900 and 1901 to the above effect already mentioned. He says that this witness no doubt used the word " separated " in its technical sense but that he, the Commissioner, had formed the opinion that the statement was apparently made because Amritrao was living separate and holding property which he had claimed to be his exclusive property, and " that the plaintiff in the earlier stages of the present suit and his father believed that the property in the possession of Amritrao was the latter's self-acquisition in the profits of which they had not participated." That was a *bona fide* mistake to make when Amritrao was living in a different village holding property solely in his own name. It was just one of those mixed questions of fact and law on which one is apt to make a mistake. The father of this family, Sonaji, lived till 1898, Motirao till 1902, and Bhagwantrao till 1905. It appears to their Lordships that under these circumstances it is quite impossible to suppose that it was not perfectly well known in the family whether in fact Amritrao separated from it in the technical sense or not. The learned Commissioner does not indicate precisely on what grounds he bases his excuse for Motirao's erroneous testimony. Their Lordships are quite unable to concur in his opinion on this point.

The learned Commissioner then proceeds to deal with the evidence of the prime instigator of this litigation so far as it touches the property described in Schedule B—Gulabrao. This witness does not condescend to say that he made a mistake on a mixed question of law and fact when he swore distinctly on the 24th July, 1900, that he himself and his deceased brother Motirao were living together and Amritrao was separate from them, and again on the 29th July, 1901, when he swore that his statement was the same as that of his brother's, Motirao, which was to the effect that Amritrao was separate and all of them were joint. On the contrary, he admits he made these

statements. He deliberately contradicts them, but he neither explains them, nor excuses himself for having made them on the ground that he was mistaken as to the facts or on any other ground whatever. He now swears: "Though all the defendants, Amritrao, Motirao, are joint, they hold different fields in their respective names." And again: "There was no partition between Amritrao, Motirao, and myself; we were all joint. We took fields in our names as we found it convenient to do so."

In the face of this deliberate contradiction by Gulabrao on oath of his two earlier statements to be found at pp. 78 and 86 of the Record, it is not without some surprise that one reads the statement of the learned Commissioner at p. 193 of the Record to the effect, that this witness had not committed himself to a definite statement of facts which could *primâ facie* preclude him from arguing the appeal. The learned Commissioner states further that he was not prepared to hold the somewhat summary record of the witnesses' statement in exhibit P 2 (78) as a clear statement of facts which disentitled him to relief, that his later statements in P 5 (86), is certainly in accordance, with his present statement, which amounts to saying this that the statement, "Motirao and myself were living together and Amritrao was separate from us" is in accordance with the statement that "Amritrao, Motirao and myself are joint, there was no partition between us."

Their Lordships take an entirely different view. They think that Gulabrao is a wholly unreliable, if indeed not a deliberately false witness, and that the natural meaning of the statements he made in 1900 and 1901 is that Amritrao, having separated from his family, the property he had acquired was his own not that of his family. The appellant Amritrao has on every occasion made the same case. Their Lordships accept, as did the learned District Judge, his explanation of the lease to his father of his field at Dasoor. He stated that he was at the time he gave his evidence in this suit, the 26th of April, 1911, about seventy-five years of age. From the year 1870 till then, he has asserted ownership over the property mentioned in Schedule B as it was acquired, and also over the property by the aid of which it was acquired. Those who dealt with him in his business transactions treated him as acting and entitled to act for himself alone, his debts being his own separate debts and not the joint debts of himself and others. In the course of years, from 1870 till the institution of the present suit in 1907, none of the members of his father's family ever asserted a legal claim to a share of his increasing wealth. They would not have done so now but for the inconsistent conduct of the discredited and unreliable witness Gulabrao. He took advantage of a suit having been rightly instituted for the partition of the property, mentioned in Schedule A, to cause the plaint to be amended by adding Amritrao and his three sons as defendants, and to claim partition of the property in their possession described in Schedule B. The District Judge held that the original plaintiff Mukundrao

was entitled to such a decree as he claimed as to the property in Schedule A, but was not entitled to it as to the property in Schedule B. The Judicial Commissioner modified the decree by deciding that the plaintiff was entitled to a fourth share, not only of the property mentioned in Schedule A, but also of the immovable properties mentioned in Schedule B. Neither the plaintiff nor Gulabrao have appeared before their Lordships to support the decree of the Judicial Commissioner, hence the necessity of dealing at length in this judgment with the evidence and the grounds of the learned Commissioner's judgment. Their Lordships clearly are of opinion that the decision of the latter was wrong and should be reversed, and the decision and decree of the District Judge were right and should be restored, and that the costs incurred by the added defendants in the appeal before the Judicial Commissioner and before this Board should be paid by the respondents Gulabrao and Sadasheo. And they will humbly advise His Majesty accordingly.

In the Privy Council.

AMRITRAO AND OTHERS

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DELIVERED BY LORD ATKINSON.

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