*Privy Council Appeal No.* 138 *of* 1919.
*Patna Appeal No.* 18 *of* 1916.

**Dulhin Lachhanbati Kumri and others** - - - - *Appellants*

*v.*

**Bodhnath Tiwari, since deceased, and others** - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT PATNA.

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JULY, 1921.

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*Present at the Hearing:*
VISCOUNT CAVE.
LORD SHAW.
MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

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This is an appeal against a decree of the High Court of Judicature at Patna dated the 27th June, 1916, affirming a decree of the Subordinate Judge of Bhagalpur dated the 20th August, 1912.

The purpose of the suit was for a declaration of the plaintiffs' title to a Patni Taluk called Israin Kalan, in the district of Bhagalpur, and for khas possession of certain lands which are in the hands of the defendants. The defendants resist this claim on the ground that they are the holders of a mokurari lease of a considerable portion of the patni called Jadua Patti.

There were many issues in the case, each party attacking the title of the other. *Inter alia*, a strongly contested issue was whether the mokurari lease set up by the defendants was genuine. After a very full trial there is a concurrent finding by both Courts that it was.

The case was ably argued before the Board, and the point of contention may be said to have been that which was contained in the eighth issue tried before the Subordinate Judge. That issue was in these terms :—

> "Was the said mokurari interest merged in the patni interest of the defendants first party and thereby extinguished ?"

If this merger took place, the defence fails. If it did not take place, the defence succeeds.

Reduced to the simplest elements, and confined to those which bear upon the issues so determined, the facts may be stated thus: One Mathura Nath Ghosh was proprietor of the mauza holding, under Lakheraj title prior to 1846. On the 14th June of that year, he granted a mokurari lease respecting Jadua Patti in favour of Dhirnath Tiwari and Loke Nath Tiwari, the predecessors of the Tiwari defendants, at a rental of Rs. 66.11.3. There can be no doubt that this was an agricultural lease binding the lessees " to cultivate the said land at ease of mind," etc. Under this agricultural lease the lessees would, according to practice, either farm the lands themselves, or let them to other cultivators, drawing rents therefor. During their possession the value of the lands thus let in mokurari appears to have greatly risen.

Ten years later, *viz.*, on the 31st August, 1856, the owner of the Mauza, *viz.*, Mathura Nath Ghosh, already mentioned, granted a patni lease of the whole mauza in favour of two persons, Tej Narayan Tiwari and Kalit Nath Tiwari. More than two years afterwards, Tej Narayan Tiwari sold his half-share of the patni to Kalit. The exact date of this transaction was the 19th December, 1858.

The question as to whether these transactions were fundamentally joint family transactions and should be so treated for the purpose of the application of the doctrine of merger, is a question which will be afterwards referred to; but, in the meantime, it may be noted that *ex facie* of these two transactions, *viz.*, the patni lease and the mokurari lease, they are granted by the same grantor to grantees who are different persons. But for the introduction of this question of the joint family, the point of merger could not, in fact, arise, as there is no identity of person between the mokuraridars and the patnidars. This applies clearly to August, 1856, when the patni lease was granted, but it also further applies to December, 1858, when Tej Tiwari sold his half-share to Kalit Tiwari, because Kalit, although thereafter holding the patni *en bloc*, was not himself a mokuraridar of Jadua Patti.

Accepting for the moment, however, as relevant, the fact that Kalit Tiwari, the patnidar, was of the same joint family as Dhir Tiwari and Loke Tiwari, the mokuraridars under the 1846 deed, and accepting also as relevant, for the moment, that when a joint family interest can be postulated, the doctrine of merger should be applied to it, their Lordships note that much authority was cited to the Board as it had been to the Courts below, on the proposition broadly maintained that, prior to the Transfer of Property Act, there was no law of merger in the mofussil. The various points of this argument, including the question of whether the case law, applicable to the situation of mortgagor and mortgagee, could be applied by accurate analogy to the case of mokuraridar and patnidar—these various points need not be entered upon at length in the present case, in view

of the clear opinion which the Board has formed and which will be presently stated as to the true range of the doctrine of merger itself. It may, however, be mentioned incidentally that towards the close of the series of decisions referred to, there occurs the case of *Hirendra Nath Dutt* v. *Hari Mohan Ghosh*, which is reported 17th February, 1914, in 18 Calcutta Weekly Notes, p. 861, and in the judgment of the Court, consisting of Fletcher and Chatterjee, JJ., and delivered by the latter, a valuable review occurs of the series of decisions upon this branch of Indian law.

Before leaving the list of Indian cases referred to, it may, however, be also observed that no light is thrown upon this case by the later half of them, which were ruled by the provisions of the Transfer of Property Act. This case is not so ruled, but depends upon general law.

But, if the doctrine of merger is appealed to, that doctrine must be taken as it stands. Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given, *viz.*, *Capital and Counties Bank* v. *Rhodes* (1903, 1 Ch. Div. 631), and especially the judgment of Farwell, J., in *Ingle* v. *Jenkins* (1900, 2 Ch. Div. 368).

The doctrine of merger being thus applied to the present case, it is found on an examination of the circumstances, that they show with great clearness that instead of the mokurari lease having been extinguished by merger, it was, on the contrary, kept up as upon the one hand the source of right to the cultivators proceeding from the mokuraridars, and upon the other hand, the separate grant of subsisting right to the mokuraridars by their lease in respect of which the payment into the patni exchequer of the specific Rs. 66, specified in the mokurari lease, continued to be made. The argument of Mr. Kenworthy Brown upon the documents made this clear. It is not, however, necessary to enter upon the details thereof, for both of the Courts in India, after full investigation, are satisfied in that particular. Had there been a true merger in fact, and in intention, the whole of such transactions would, in all probability, have taken a different shape, and in particular no more would have been heard of the mokurari rent.

This raises the last question in the case, and it is one of some importance. It was strongly argued by the appellants' Counsel that it was sufficient for his purpose to show that mokuraridars and patnidar were of the same joint family, and

that the difference of name of the one set of persons from the other person was of no account.

Their Lordships are not of this opinion. The difference of name, it is not going too far to say, may be at least an element, and an important element, in the question as to whether merger was ever truly intended. There may under the law of England be complete fundamental identity of right between the holder under one title, and the holder under another, but a convenient method of indicating intention on the subject is to create, for the purpose of keeping up the separation of title, a trust by which merger in the legal sense is clearly avoided. In short, although the same person is truly and comprehensively the owner of all the rights which might have coalesced, the substance of separation is preserved by the form of title not having been allowed to merge into the one name.

To apply this doctrine to the Indian joint family, when a joint family interest might be said to cover rights acquired to property by several individuals belonging to the family, but when the rights which might otherwise be merged are conferred by titles taken in the names of different members of the family, and thereby the means of articulate differentiation is continued as effectively as by the artifice employed in England of the setting up of a trust *ad hoc*, then it appears to their Lordships that these circumstances are elements for consideration.

All the length that this judgment goes is that the fact that the two sets of title do not meet in identity of name, but are separately attached to separate members of the family, is a matter to be considered on the question of whether merger was ever intended. As already stated, however, in the present case, in addition to the title standing in the names of different members of the family, the transaction under which the mokurari lease and the rights consequent thereupon were kept alive, is quite plain upon the documents and accounts.

Their Lordships are of opinion that a sound view is taken of this case by both the Courts below, and that the appeal fails. They will humbly advise His Majesty accordingly, and that the appellants should pay the costs.

In the Privy Council.

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DULHIN LACHHANBATI KUMRI AND OTHERS

*v.*

BODHNATH TIWARI, SINCE DECEASED,
AND OTHERS.

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DELIVERED BY LORD SHAW.

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