

Privy Council Appeal No. 45 of 1937

Bengal Appeals No. 18 of 1937 and No. 10 of 1938

Raja Jogendra Narayan Deb (deceased) and Another

v.

Debendra Narayan Roy and Others

Raja Bhairabendra Narayan Deb

v.

Debendra Narayan Roy and Others

(Consolidated Appeals)

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 16TH FEBRUARY, 1942

Present at the Hearing:

LORD THANKERTON

LORD RUSSELL OF KILLOWEN

LORD MACMILLAN

SIR GEORGE RANKIN

SIR CHARLES CLAUSON

[*Delivered by* SIR GEORGE RANKIN]

The suit which is now before the Board was begun on 9th May, 1930, in the Court of the Subordinate Judge at Alipore in Bengal. The substantive claim made by the plaintiff was for declaration of title to and possession of the moveable and immoveable properties which had been comprised in an impartible estate in Assam known as the Bijni Raj. By a schedule marked B 19 items of immoveable property and 7 items or classes of moveable property were specified in the plaintiff as the subject matters of the claim. The suit was brought by one Debendra Narayan Roy as executor to the estate of the late Rani Abhayeswari Debi who had died on the 17th October, 1918, having made her will on the 30th August in that year. This lady was the survivor of two widows of Raja Kumud Narayan Bhup who had until his death in 1883 enjoyed the undisputed ownership and possession of the impartible estate. He had died sonless: a daughter had died unmarried soon after him. The other widow had died in 1891. The case made by the plaintiff was on the footing that the Bijni family was not a Hindu family and that succession to the estate was governed by a family custom of primogeniture which excluded females. On that footing it was averred in the plaintiff, as it had been recited in the will, that from 1891 and until her death, Rani Abhayeswari had been in possession of the entire estate on her own account under a claim of absolute right in herself and adversely to the person or persons entitled by the family custom to succeed to the estate. The cause of action alleged in the plaintiff was that soon after her death the Court of Wards had taken possession of the estate on behalf of Jogendra Narayan the first defendant, nephew to her late husband, being the son of his brother Kirti Narayan. Jogendra had on 27th November, 1918,

been found to be of unsound mind by an order made on inquisition and it is not in dispute that the Court of Wards on his behalf had taken possession of the Bijni estate in December of that year. As against Jogendra who was thus in possession, the person beneficially entitled under the will and in whose interest the suit was brought was a nephew of the lady's own, called Heramba Prasad Barua, son of her brother Bhabani Prasad. To Heramba she had bequeathed all the moveable and immoveable properties belonging to the Bijni estate. His representatives are the contesting respondents upon this appeal.

It is to be noticed upon this narrative that on the 9th May, 1930, when the suit was filed not quite twelve years had elapsed since December, 1918, when the Court of Wards had taken possession. Meanwhile a number of other claims to the estate had been put forward in the courts. It is not necessary that these should be here detailed but they explain why three other defendants were impleaded in addition to Jogendra, and show that much litigation was in prospect, since highly discrepant versions of the family custom as to succession were being maintained by different members of the family. Indeed the Court of Wards for Jogendra spent considerable sums in October, 1930, in compromising rival claims. His title to succeed was as the male agnate who had been nominated by Rani Abhayeswari herself on the 28th September, 1895. Bhairabendra, the second defendant, is the present appellant. He is a male agnate who had claimed the succession even as against Jogendra on the ground that his father through entering the family by adoption had been recognised as "Subha" and also because of Jogendra's unsoundness of mind. He said that the family was a Hindu family governed by the Bengal school of law as modified by certain customs. By these customs, he said, the "Subha" had a right to succeed if the last holder left no male issue: subject thereto the succession went to the male agnate nearest in degree to the last holder or the eldest of such agnates if more than one—that is to say, by the rule which in India is sometimes called "ordinary" as distinct from "lineal" primogeniture. Bhairabendra had been one of the plaintiffs in a suit (No. 225 of 1919) brought against Jogendra and others in 1919, but on 25th October, 1930, soon after the present suit had been begun, he had compromised with Jogendra recognising the latter's title for life in return for a lac and a half of rupees. The third defendant to the present suit was Surendra Narayan Deb the son of Uday Narayan who had been Bhairabendra's co-plaintiff in suit No. 225 and was also a claimant to the estate. The fourth defendant was Sourendra Narayan Chaudhury who had been substituted in another suit (No. 51 of 1922) as plaintiff on the death of one Samarendra. He too compromised with Jogendra on 25th October, 1930, withdrawing his claim for five lacs of rupees. The place of these last mentioned defendants in the family pedigree and their respective versions of the family custom need not here be set out but it may be mentioned that one claimant at least - Purnyendra nephew of the fourth defendant—claimed on the basis of "lineal" primogeniture.

Written statements on behalf of Jogendra and Bhairabendra were filed in February, 1931, and issues were settled in April, 1931. But the provincial legislature of Assam intervened in the matter by passing Assam Act II of 1931 called the Bijni Succession Act which received the sanction of the Governor on 27th March, 1931, and of the Governor-General on 9th May, 1931.

Certain important parts of the Act are set out hereunder:

An Act to regulate the succession in the Bijni Raj.

Whereas it is expedient to declare and supplement the customary law of succession in the group of estates known as the Bijni Raj in Assam with a view to the prevention of disputes and the preservation of the Raj;

And whereas the previous sanction of the Governor General has been obtained under sub-section 3 of section 80A of the Government of India Act to the passing of this Act:

It is hereby enacted as follows:—

2. In this Act,—

(1) "the Bijni Raj" or "the Raj" means the group of estates specified in the Schedule annexed to this Act, together with all additions and accretions to the property comprised therein that may have been or may hereafter be made from time to time by or on behalf of the Holder of the Raj and includes any securities held by him or on his behalf;

(2) "family" means the Bijni Raj family;

(3) "the Holder of the Raj" or "the Holder" means the owner of the Raj;

3. The Bijni Raj is hereby declared to be an impartible estate descendible to a single male Holder according to the provisions of this Act.

4.—(1) Raja Jogendra Narayan Bhup of Bijni is hereby declared and shall during his life-time be the Holder of the Raj with title dating from his nomination to the succession made by Rani Abhayeswari Debi on the 28th September, 1895.

(2) Upon the death of the said Raja the Holder of the Raj shall be the person now known as Kumar Bhairabendra Narayan Deb, son of the late Chandra Narayan Deb;

(3) From and after the death of the Holder succeeding to the Raj under sub-section (2), the succession shall be determined by nomination or appointment as hereinafter provided.

10.—(1) Without the previous sanction of the Governor of Assam, it shall not be lawful to sell, mortgage, devise, or in any other way transfer the Raj or any portion thereof or any interest therein otherwise than by lease for a term not exceeding 30 years.

(4) Without the previous sanction of the Governor of Assam neither the Raj nor any portion thereof nor any interest therein may be attached or sold in execution of any decree or order or other process of law.

The Schedule specifies three large estates in Assam which are said to be the same as items 1, 2 & 17 in the list of immoveable properties in Schedule B to the plaint.

The question for decision is as to the effect of this enactment upon the claim made by the present suit on behalf of the estate of the late Rani Abhayeswari to the properties of the Bijni Raj. It comes before the Board as the result of certain proceedings which may now be stated. The learned trial Judge allowed amended written statements to be filed setting up the Act as an additional defence, and framed certain additional issues of which those numbered 16, 17, 18 and 20 bear upon this matter.

16. Does Assam Act II of 1931 (the Act) bar the present suit? Is the said Act *ultra vires* of the Government of Assam? Is the said Act invalid as opposed to provisions of the Government of India Act and the rules made thereunder?

17. Can the said Act affect the present suit, the right of the plaintiff under the will, if any, having accrued long before the Act?

18. Can the said Act affect any of the properties outside the local limits of the Government of Assam?

20. Has the plaintiff any title to the Bijni Raj—the subject-matter of the suit—in view of Assam Act II of 1931 (the Act)?

These issues (and three others which need not now be referred to) were tried first. The decision of the learned trial Judge is dated 24th April, 1933. He decreed that the suit be dismissed in respect of the properties situate in Assam and that it remain pending in respect of the properties outside Assam—that is, in respect of items 8 and 9 of Schedule B to the plaint. These items are:—(8) the premises in Calcutta known as 147 Russa Road being about an acre of land with a masonry built house of two storeys thereon; (9) the land and buildings at Benares known as the Bijni *rajbati*.

From this decision an appeal was taken by the plaintiff to the High Court at Calcutta and on 17th March, 1936, Mukerji and Ghose JJ. set aside the decision of the trial Judge and ordered that the case be remanded for trial of the further issues; holding that the Act did not bar a claim to the Bijni estates if based upon adverse possession but only claims based upon an alleged right of succession.

By Order in Council dated 18th March, 1937, special leave was given to Jogendra to appeal from the High Court's decision, but he died on the 18th June in that year. By Order in Council dated 24th February, 1938, special leave was given to Bhairabendra to appeal from that decision and he was also substituted for Jogendra as appellant in the latter's appeal subject to any objection which might be raised at the hearing. The appeals were consolidated. On the 6th February, 1941, the plaintiff executor Debendra Narayan Roy having withdrawn from the contest the legatee Heramba Prasad Barua was added as a respondent thereto being respondent No. 5 in each appeal. He has since died but his legal representatives have been substituted in his stead and have appeared by Mr. Page to resist the appeal at the hearing.

Mr. Page's first objection was that Bhairabendra should not have been substituted for Jogendra in the appeal brought by the latter pursuant to special leave. It is admitted that this objection if upheld could have no effect whatever on the present case since Bhairabendra has an independent appeal of his own, but it is said that in another case some order has been made by a Bengal Court conditional upon the Board's action or advice in this regard. Their Lordships have no occasion to observe upon the propriety of such an order as is said to have been made and they do not propose to entertain an application which is without point so far as regards any matter before them.

The next contention advanced for the respondents was that, independently of any question whether it affected any property outside Assam, the Assam Act was *ultra vires* of the Assam legislature since it did not comply with the provisions of the Government of India Act and the Devolution Rules made under section 45A thereof. The grounds of invalidity suggested are really two. *First*, that the case was within the 51st item of Part II of Schedule I of the Rules, which classes as a "provincial subject" "any matter which, though falling within a central subject is declared by the Governor-General in Council to be of a merely local or private nature within the province"—but no such declaration was obtained. *Secondly*, that though "civil law including laws regarding status, property, civil rights and liabilities, and civil procedure" is specified as a central subject by item 16 of Part I of the Rules, yet the Act was not one "regulating any central subject" within the meaning of clause (e) of sub-section 3 of section 80A of the Government of India Act. Their Lordships are in agreement with both Courts in India in holding on the first point that the fact that the subject matter of the Assam Act was not made a provincial subject by declaration of the Governor-General in Council under item 51 of Part II did not render the Assam legislature incompetent to deal with it as a central subject provided the sanction of the Governor-General in Council was duly obtained. They agree also with the Courts in India upon the second point and have no difficulty in deciding that the Act was one which regulated a central subject and as such came within the competence of the provincial legislature when the necessary sanction had been given. By sub-section 2 of section 84 of the Government of India Act the validity of any Act of any local legislature is not open to question in any legal proceedings on the ground that the Act affects a central subject. Apart from any question of extra-territorial effect their Lordships can find no ground for impugning the validity of the Assam Act as a law made "for the peace and good government" of Assam—a phrase which in sub-section 1 of section 80A has reference to the scope and not to the merits of the legislation.

The question next in order is whether the Act purports to have effect outside Assam and if so whether it must be held to be invalid in part or in whole on this account. The question of construction comes logically first and is of importance by reason that items 8 and 9 of Schedule B to the plaint consist of a house in Calcutta and a *rajbati* at Benares. All the lands mentioned in the Schedule to the Act lie in Assam. The preamble refers to "the group of estates known as the Bijni Raj in Assam." The only words by which the Act could be given effect upon immoveables outside the province would seem to be those occurring in the first clause of section 2 whereby "the Raj" is defined—"together with all additions

and accretions to the property comprised therein." These words refer—though perhaps not exclusively—to the doctrine of law whereby the holder of an impartible estate may incorporate immoveable property acquired by him with the impartible estate. An exposition of this doctrine is to be found in the judgment of the Board in *Shiba Prasad Singh v. Prayag Kumari Debi* (1932) L.R. 59 I.A. 331 which clearly shows that it is not applicable to moveables. While there may be force in the consideration that the Assam legislature would little like to see the house in Calcutta or the *rajbali* at Benares descend in a different line of succession from that provided in the Act for the Assam estates, it may not have been thought wise to attempt to bring within the Act lands in another province. Much depends on the extent and the manner in which the Act was intended to have effect on the lands of the Raj. The Act must be carefully scanned to see whether the adjectival clause as to additions and accretions was intended to be controlled by no territorial limit. Their Lordships think that a consideration of the scheme of the Act and in particular of the provisions of sub-section 4 of section 10 shows that the phrase as to additions and accretions is not intended to apply to land in other provinces. It can hardly have been anticipated that a holder of this estate should be able in the future to acquire land in any part of India and by incorporating it with his impartible estate should be able to make it free from attachment by legal process without the previous sanction of the Governor of Assam. Their Lordships think that the learned trial Judge was right therefore in permitting the suit to proceed as regards the house in Calcutta and the *rajbali* at Benares. Had the Assam Act extended to these immoveables, no doubt an important constitutional question as to the competence of the Assam legislature would have arisen. But upon a true construction of the Act it does not arise and though it was the subject of considerable debate at the hearing their Lordships do not think fit to discuss it.

It remains to consider whether the Act bars the plaintiff's claim to the other immoveable properties of the Raj. These are all situated in Assam. Their Lordships cannot on this point accept the conclusions of the High Court. They see in the Act no intention to deal separately or differently with (a) ownership of the estate and (b) the status of holder of the Raj, or to give title to Jogendra and Bhairabendra, but only as against other claimants by succession and not so as to quiet their right to the estate. By its terms the Act makes Jogendra holder with effect from 28th September, 1895, and "holder" is stated to mean owner. This result was effected on the passing of the Act, and it is not consistent with the Act that the title of Jogendra should have come to an end at some time before 1918. The Act contains provisions regulating the succession after Jogendra's life and after Bhairabendra's life but its provisions as to succession in the future are not left hypothetical or in the air as regulations for succession to an estate which may no longer exist as such: on the contrary they are given basis in reality by the enactment that Jogendra shall be owner for his life and Bhairabendra after him. To what extent adverse possession after 1931 might defeat the scheme of the Act is doubtless a question. But no adverse possession before 1931 has any effect to prevent Jogendra taking the estate which the Act on its coming into force vested in him. That his title is made not only a title in the present but also to relate back to 1895 is not intended to give it infirmity or to expose it to attack, but to give it validity *ex post facto*. Hence with all due respect to the High Court whose judgment in this case is most careful and elaborate their Lordships find themselves in agreement on this point also with the learned trial Judge. The result is that in their Lordships' opinion the decree of the trial Court was correct.

Mr. Page for the respondents asked that since it has been held by the Board in the case already cited that moveable property cannot be incorporated with an impartible estate so as to form an accretion thereto, and since it does not appear that any separate issue as to moveables was asked for by the plaintiff or framed by the trial Court, their Lordships should direct that the suit should continue notwithstanding the provisions of the Assam Act as regards the items mentioned in the list of moveables appearing in Schedule B to the plaint. But it appears to their Lordships that learned

counsel for the plaintiff in India may well have had good reason to make no separate case as to moveables if only on the ground of limitation. They are not prepared to extend the area of the present dispute without clear necessity in the interests of justice and they are not of opinion that the decree of the trial Court should be modified as proposed.

They will humbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside and that of the Subordinate Judge at Alipore dated 24th April, 1933, restored. The contesting respondents who have been substituted for Heramba and the plaintiff Debendra must pay to the appellant Bhairabendra one set of costs of this consolidated appeal and his costs of the appeal in the High Court.

In the Privy Council

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(deceased) AND ANOTHER

v.

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AND OTHERS

RAJA BHAIRABENDRA NARAYAN DEB

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[DELIVERED BY SIR GEORGE RANKIN]

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