BHAIYA RAMANUJ PRATAP DEO

v.

LALU MAHESHANUJ PRATAP DEO & ORS. AND VICE-VERSA

August 26, 1981

[D.A. DESAI, A.D. KOSHAL AND R.B. MISRA, JJ.]

Hindu Succession Act, 1956, sections 4 and 6, scope of—Whether the provisions of section 6 overrides the customary Rule of primogeniture—Bihar Land Reforms Act, section 6, applicability of—Chota Nagpur Encumbered Estates Act, 1876, section 12A, conditions to be fulfilled—Indian Registration Act, sections 17 and 49, evidentiary value of unregistered documents of.

Bhaiya Rudra Pratap Deo was the holder of an impartible estate, known as Nagaruntari estate, in the district of Palamau. The succession to the estate was governed by the rule of lineal primogeniture. Under the said rule the eldest male member of the eldest line was to succeed to the estate while the junior members were entitled only to maintenance grants subject to resumption on extinction of the male line of the eldest branch. Rudra Pratap Deo Singh had a younger brother Harihar Pratap Deo who died in a state of jointness with his brother Rudra Pratap Deo in 1934 leaving behind his son Lalu Maheshanuj Pratap Deo alias Nila Bacha, and one other step son who also died in 1937 unmarried. Bhaiya Rudra Pratap Deo executed a deed of maintenance (Khorposh) on 14th April, 1952 in respect of eight villages. A dispute arose between the parties in respect of the agricultural plots of village Sigsigi. The proceedings under section 145 Crl. P.C. ended in favour of Nila Bacha. Bhaiya Rudra Pratap Deo, therefore, filed a civil suit No. 16 of 1955, on the grounds that (a) a fraud was committed by including two villages, namely, Sigsigi and Patihari in the formal deed of khorposh dated 14th April, 1952 and (b) that the khorposh grants are void under section 12A of the Chota Nagpur Encumbered Estates Act and the provisions of the Bihar Land Reforms Act, 1950 and therefore, no title accrued to the defendant on that basis. The suit was contested by the defendant on the grounds amongst others: The Nagaruntari estate was never an impartible estate governed by the rule of primogeniture, but in its origin it was a non-heritable Ghatwala Jagir and it was subsequently made heritable and raised to the status of a revenue paying estate and thus it became an ordinary joint family property partible amongst the members; there was no fraud committed by any one; and with the enforcement of the Hindu Succession Act, 1956, being a co-sharer with the plaintiff, he was entitled to remain in possession of all the eight villages covered by the khorposh deed till partition was made.

The learned Subordinate Judge held that by the khorposh deed the defendan twas given all the eight villages, but he did not acquire any interest in the

A said land as the deed was against the provisions of section 12A of the Chota Nagpur Encumbered Estates Act and the Chota Nagpur Tenancy Act; that the Nagaruntari Estate was an impartible estate governed by the rule of primogeniture but it ceased to be so after the enforcement of the Hinda Succession Act, 1956 and since Bhaiya Rudra Pratap Deo died, during the pendency of the suit and after this Act had come into force, the succession would be governed by survivorship and as such the legal representatives of the plaintiff as well as the defendant B would succeed. The first appellate court held that : (a) in asmuch as the khorposh grant was not made with the sanction of the Commissioner, the grant was void under section 12A of the Chota Nagpur Encumbered Estates Act; and (b) because the possession of the ex-proprietor with respect to the Bakasht land became that of a raiyat under the State of Bihar and raiyati right was not transferable without a registered document, the possession of the defendant was on the basis of a void agreement; and (c) that after the death of Bhaiya Rudra C Pratap Deo, section 6 of the Hindu Succession Act became applicable and both appellants and the defendants were entitled to succeed as co-sharers.

The second appeal by the plaintiffs was partly allowed inasmuch as the High Court found that the heirs of Rudra Pratap Deo were entitled to get a decree for possession of the suit land jointly with the sole defendant as also for mesne profits for their share, i.e. one half in addition to the entire mesne profits D to which Rudra Pratap Deo was entitled in his life time. Both the parties have come up in appeal to this Court against the judgment and decree of the High Court to the extent it went against them.

Dismissing the plaintiff's appeal and allowing that of the defendant, the Court

E HELD : 1. A bare perusal of section 4 of the Hindu Succession Act, 1956 indicates that any custom or usage as part of Hindu law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act. If rule of lineal primogeniture in Nagaruntari estate is a customary one it will certainly cease to have effect, even though it was part of Hindu law. [426 D-E]

F 2. Section 5(ii) of the Hindu Succession Act, 1956 protects an estate which descends to a single heir by the terms of any covenant or agreement entered into or by the terms of any enactment inasmuch as Hindu Succession Act is not applicable to such an estate. Section 5(ii) stands as an exception to section 4 of the Act. [426 G-H]

The rule of lineal primogeniture in the instant case, is not a statutory rule G but a customary rule and therefore, it is not saved by section 5(ii) of the Hindu Succession Act. [426 H, 427 A]

3. Section 6 of the Bihar Land Reforms Act only contemplates that the land will be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold it as a raiyat under the H state having occupancy rights in respect of such land subject to payment of fair and equitable rent. But if the intermediary was in possession in a representative capacity on behalf of the other coparceners as a necessary corollary

the land will be deemed to be settled with all those persons on whose behalf one particular intermediary was in khas possession. Consequently if the possession of Bhaiya Rudra Pratap Deo was on behalf of other coparceners the land will be deemed to be settled with all those coparceners and they shall all become raiyats. Here, the joint status of the family continued and therefore, after the death of Bhaiya Rudra Pratap Deo, his interest developed on other coparceners as well. [429 C-F]

4 : 1. Admittedly the defendant was a member of a joint Hindu family. Even in an impartible estate he was entitled to maintenance and the land in dispute had admittedly been given to the defendants by the impartible estate holders. This possession therefore, cannot be taken the possession of a tresspasser. [431 A]

4 : 2. Section 12A of the Chota Nagpur Encumbered Estates Act, 1876 would be attracted only when possession and enjoyment of the property is restored under the circumstances mentioned in the first or the third clause of section 12. The onus to prove that the conditions contemplated by section 12 were satisfied lay on the plaintiff, which he failed to do. [430 D-E]

4 : 3. The maintenance deed can be looked into for collateral purpose of ascertaining the nature of possession. Khorposh (maintenance) deed is a document which requires registration within the meaning of section 17 of the Indian Registration Act and as the document was not registered it cannot be received as evidence of any transaction affecting such property. Proviso to section 49, however, permits the use of the document, even though unregistered, as evidence of any collateral transaction not registered to be effected by registered instrument. [430F-H]

5 (a) A holder of an impartible estate can alienate the estate by gift *intervivos* or even by will, though the family is undivided, the only limitation on this power would flow from a family custom to the contrary or from the condition of the tenure which has the same effect. Therefore, it is not correct to say that the impartible estate would go to holder's successors alone and not to the other members or the family by survivorship. [431 B-C, 435 C-D]

(b) It must be taken to be well settled that the estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. If the holder has got the estate as an ancestral estate and he has succeeded by primogeniture, it will be a part of the joint estate of the undivided family. [433 D-E]

In the case of an ordinary joint family property the members of the family can claim four rights: (1) the right to partition, (2) the right to restrain alienation by the head of the family except for necessity, (3) the right to maintenance, and (4) the right of survivorship. It is obvious that from the very nature of the property which is impartible the first three rights cannot exist. The fourth right viz., the right of survivorship, however, still remains and it is by reference to this right that the property, though impartible, has in the eyes of law, to be regarded as joint family property. The right of survivorship which can be claim-

A ed by the members of the undivided family which owns the impartible estate should not be confused with mere *spec successionis*. Unlike *spec successionis* the right of survivorship can be renounced or surrendered. [433 G-H, 434 A-B]

Rajah Velugoti Kumara Krishna Yachendra Varu and Ors. v. *Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and Ors.* [1970] 3 SCR 88: *Raja Rama Rao* v. *Raja of Pittapur*, [1918] L.R. 45 I.A. 1<8; *Hargovind Singh* v. *Collector* B *of Etah*, A.I.R. 1937 All. 377 and *Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards*, [1899] L.R. 26 I.A. 83, discussed and distinguished.

Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur and Ors. v. *Shri Pushavathi Visweswar Gajapathi Raj and Ors.* [1964] 2 SCR 403, applied.

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Chinnathayal alias Veeralakshmi v. *Kulasekara Pandiya Naicker and Anr.* [1952] SCR 241, referred to.

6. The overwhelming evidence on the record, in the instant case, categorically proves : (a) that the disputed estate was an impartible estate till the death of the original plaintiff in 1957; and (b) it is open to a co-sharer to remain in D possession of the joint property and the proper remedy for the plaintiff in such case is to file a suit for partition where the equities of the parties would be adjusted and not a suit for possession of plots of one village and for mesne profits. [436 B, 437 B-D]

Collector of Bombay v. *Municipal Corporation of the City of Bombay and Ors.* A.I.R. 1951 SC 469, held inapplicable.

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CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 209 & 2280 of 1970.

CA. No. 209/70 arising out of certificate & CA. No. 2280/70 arising out of special leave from the common judgment and decree F dated the 28th February, 1968 of the Patna High Court in Appeal from Appellate Decree No. 1055 of 1962,

S.C. Misra and *U.P. Singh*, for the Appellant in C.A. No. 209/70 and for the Respondent in CA. No. 2280/70.

K.K. Sinha, *S.K. Sinha* and *M.L. Chibber* for the Appellant G in CA. 2280/70 and for the Respondent in C.A. 209 of 1970.

The Judgment of the Court was delivered by

MISRA J. These two connected appeals are directed against a H common judgment dated 28th February, 1968 of the Patna High Court, the first one by certificate and the second by special leave.

Bhaiya Rudra Pratap Deo was the holder of an impartible estate, known as Nagaruntari estate, in the district of Palamau. The succession to the estate was governed by the rule of lineal primogeniture. Under the said rule the eldest male member of the eldest line was to succeed to the estate while the junior members of the family were entiled only to maintenance grants subject to resumption on extinction of an heir in the male line of the eldest branch.

It appears that the estate was accorded protection under the Chota Nagpur Encumbered Estates Act, 1876, on the application of Bhaiya Rudra Pratap Deo as per notification dated 17th March, 1932 published in the Bihar Gazette dated 23rd March, 1932 and after liquidation of debt it was released from the operation of Chota Nagar Encumbered Estates Act in October 1945. Eventually the estate vested in the State of Bihar under the Bihar Land Reforms Act, 1950 in pursuance of a notification dated 5th of November, 1951. Harihar Pratap Deo, who was the younger brother of Bhaiya Rudra Pratap Deo, had died in a state of jointness with his brother Bhaiya Rudra Pratap Deo in 1934 leaving behind his son Lalu Maheshanuj Pratap Deo alias Nila Bacha, and one other step son who also died in 1937 unmarried. Lalu Maheshanuj Pratap Deo demanded land for khorposh (maintenance) from Bhaiya Rudra Pratap Deo in 1950. Bhaiya Rudra Pratap Deo executed a deed of maintenance on 14th of April, 1952 in respect of eight villages in favour of Lalu Maheshanuj Pratap Deo. A dispute, however, arose between the parties in respect of the plots of village Sigsigi which culminated in a proceeding under section 144 Cr. P.C. The proceedings were, however, later converted into proceedings under section 145 Cr. P.C. which ended in favour of Lalu Maheshnuj Pratap Deo on 4th of July, 1955. Bhaiya Rudra Pratap Deo feeling aggrieved by the order filed a suit which has given rise to the present appeals and which was later on numbered as suit No. 16 of 1955, against Lalu Maheshanuj Pratap Deo alias 'Nila Bacha' in respect of the agricultural plots of village Sigsigi and the grains in the custody and control of the police, Bisrampur, district Palamau.

The case of the plaintiff is as follows : After the vesting of the estate in the State of Bihar the defendant approached him with a request that the plaintiff should give him the villages Bhojpur, Jaungipur, Chitri, Rohila, Bhandar and Khundra but the plaintiff declined to do so as section 12A of the Chota Nagpur Encumbered Estate Act and the provisions of the Bihar Land Reforms Act stood as a bar.

A The defendant, however, implored and wanted to take a chance and try his luck. On the beseechment of the defendant the plaintiff allowed him six villages only, namely Bhojpur, Jaungipur Citri, Rohila, Bhandar and Khundra subject to acceptance of the State of Bihar. There was neither any proposal for villages Sigsigi and Patihari nor had the plaintiff ever agreed to give these two villages to the defendant. A formal unstamped and unregistered deed of Khorposh (maintenance) was no doubt created in respect of only six villages on 14th of April, 1952 subject to the approval of the authorities. The defendant, however, in collusion with the plaintiff's employees and ex-employees and without the knowledge and information of the plaintiff managed to use the plaintiff's signature and manufactured evidence to show that the two villages Sigsigi and Patihari had also been included in Khorposh grant and included these two villages in the formal deed dated 14th of April, 1952 in collusion with the typist and designing persons by perpetrating fraud on the plaintiff.

When the plaintiff came to know of the fraud and fabrication of the defendant he lodged protest before the authorities and the authorities refused to accept the plea of khorposh and they ordered the villages to be included in the compensation list of the plaintiff and the rent of all the sirjot lands was fixed in favour of the plaintiff. Thus, no khorposh grant remains even in respect of the six villages and such grants, if any, are void under section 12A of the Chota Nagpur Encumbered Estates Act and the provisions of the Bihar Land Reforms Act. Even assuming for the sake of argument that the two villages Sigsigi and Patihari were included in the deed dated 14th of April, 1952, the transfer is void *ab initio* and no title accrued to the defendant on that basis.

At the time of proceedings under section 145 Cr. P.C. paddy crops grown by the plaintiff were standing and on the petition of the plaintiff the same were harvested by the police. Subsequent cultivation was also done through the police, Bisarampur and the plaintiff is entitled to all the grains in the custody of the police.

On these allegations the plaintiff sought a declaration that the land in dispute, detailed in Schedule A, situated in village Sigsigi was the khasjot land of the plaintiff, that the defendant had no concern therewith and that he (the plaintiff) was entitled to the grain or the value thereof as detailed in Schedule B. The plaintiff also claimed a relief for possession over the disputed plots

and the grain or the value thereof. A relief for mesne profits to be ascertained in subsequent proceedings was also claimed. A

Bhaiya Rudra Pratap Deo, the plaintiff, died during the pendency of the suit and his two sons and four widows got themselves substituted in his place. His eldest son, Bhaiya Ramanuj Pratap Deo filed a petition before the Trial Court for substitution in place of his deceased father alleging that the Nagaruntari Estate was an impartible estate governed by the rule of lineal primogeniture under which the eldest son alone is entitled to succeed his father. His prayer was allowed. Subsequently the second son of Bhaiya Rudra Pratap Deo and his widows filed a petition for being substituted. The Sub-Judge impleaded all these persons provisionally as plaintiffs ordering to strike out an issue as to which of them was or were entitled to the fruits of the litigation, if eventually the court decided the suit as against the defendant. The conduct of the suit was given to plaintiff No. 1 under the provisions of rule 11, Order 1 C.P.C. B C D

The suit was contested by the defendant on the following grounds amongst others : The Nagaruntari estate was never an impartible estate governed by the rule of lineal primogeniture but in its origin it was a non-heritable Ghatwala Jagir and it was subsequently made heritable and raised to the status of a revenue paying estate and thus it became an ordinary joint family property partible amongst the members. His father died in a state of jointness with Bhaiya Rudra Pratap Deo sometime in 1934 when he was only four years old and he was living under the guardianship of his uncle. He was made to carry an impression, due to propaganda made by his uncle Bhaiya Rudra Pratap Deo that Nagaruntari estate was an impartible estate and being under this wrong impression he subsequently filed an application against his uncle in 1950 claiming khorposh grant of 22 villages including village Sigsigi from out of Nagaruntria estate and also partition of the self-acquired property of his grand-father. That application was, however, rejected. The Nagaruntari estate later on vested in the State of Bihar under the Bihar Land Reforms Act. Thereafter Bhaiya Rudra Pratap Deo of his own accord executed a khorposh deed in his favour in respect of eight villages including Sigsigi and got it typed in his house and sent it to him with a direction to take possession of the eight villages and accordingly he took possession of the same. The defendant denied that he had fraudulently got Sigsigi and Patihari villages inserted in the Khorposh deed or that this deed was illegal. The defendant E F G H

A claimed that he was a co-sharer with the plaintiff and was entitled to remain in possession of all the eight villages covered by the Khorposh deed till partition was made,

The Subordinate Judge held that by the khorposh deed Bhaiya Rudra Pratap Deo had in fact given to the defendant in khorposh B eight villages including village Sigsigi but the defendant did not acquire any interest in the said land on the basis of the khorposh deed as the same was against the provisions of section 12A of the Chota Nagpur Encumbered Estates Act and the Chota Nagpur Tenancy Act; that Nagaruntari estate was an impartible estate governed by the rule of lineal primogeniture but it ceased to be so after C the enforcement of the Hindu Succession Act, 1956 in June 1956 and since Bhaiya Rudra Pratap Deo died after this Act came into force the succession to the estate would be governed by survivorship as contemplated by section 6 of the Hindu Succession Act. As such the plaintiffs, as well as the defendant would succeed. The defendant is thus entitled to remain in possession of the said property as D one of the co-owners and the plaintiffs could not claim an exclusive khas possession till the matter is decided in a partition suit. On these findings he dismissed the suit.

Feeling aggrieved by the decision heirs and legal representatives of Bhaiya Rudra Pratap Deo, the deceased plaintiff, preferred an E appeal. On appeal the District Judge confirmed the findings of the Trial Court. He, however, held that the grant of khorposh by Rudra Pratap Deo after the release of the estate from the management of the Chota Nagpur Encumbered Estates Act was void under section 12A of the Act as the khorposh grant was not made with the F sanction of the Commissioner and also because the possession of the ex-proprietor with respect to the Bakasht land became that of a raiyat under the State of Bihar and the raiyati right was not transferable without a registered document. Thus, the possession of the defendant was on the basis of a void document. The learned Judge further held that the document of khorposh being unregistered was G not admissible in evidence but it could be used for a collateral purpose of explaining the nature of possession; that the defendant being a minor member of the family was put in possession of the property covered by it by the holder of the estate and his possession was as khorposh-holder (maintenance holder) and not as a trespasser H and he was not liable to be evicted. The Nagaruntari estate was found to be an impartible estate where succession was governed by

the rule of lineal primogeniture. But after the death of Bhaiya Rudra Pratap Deo section 6 of the Hindu Succession Act became applicable and the devolution of the property would not be governed by the rule of lineal primogeniture but by the ordinary rule of succession as is provided under the Hindu Succession Act. It was also held that Rudra Pratap had died in a state of jointness with the defendant and after Hindu Succession Act came into force the Nagaruntari estate became an ordinary joint family property of the parties and that the possession of the defendant was as a co-sharer. On these findings the appeal filed by the plaintiffs was dismissed by the District Judge.

Undaunted, the plaintiffs preferred a Second Appeal in the High Court which was partly allowed inasmuch as the High Court found that the heirs of Rudra Pratap were entitled to get a decree for possession of the suit land jointly with the sole defendant as also for mesne profits for their share, that is, one-half in addition to the entire mesne profits to which Rudra Pratap was entitled in his lifetime. Both the parties have come up in appeal to this Court against the judgment and decree of the High Court to the extent it went against them.

First we take up appeal No. 209 of 1970 filed by Bhaiya Ramanuj Pratap Deo, heir and legal representative of deceased plaintiff.

Mr. S C. Misra assisted by Mr. U.P. Singh raised a number of contentions. His first contention is that the rule of lineal primogeniture survived even after the enforcement of the Hindu Succession Act. To appreciate the contention it will be necessary to examine the relevant provisions of the Act. Section 4(1) (a) of the Act lays down :

> "4. (1) Save as otherwise expressly provided in this Act--
>
> (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act."

Section 6 of the Act provides :

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"6. When a male Hindu dies after the commencement of this Act, having at the time of his death in interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :

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Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

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A bare perusal of section 4 would indicate that any custom or usage as part of Hindu law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act. If rule of lineal primogeniture in Nagaruntari estate is a customary one it will certainly cease to have effect, even though it was part of Hindu law.

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Faced with this situation the learned counsel for the appellant invokes section 5 (ii) of the Hindu Succession Act. Insofar as it is material for the present discussion it reads :

"5. This Act shall not apply to :—

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(i) ... ...

(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into.....or by the commencement of this Act."

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This section protects an estate which descends to a single heir by the terms of any covenant or agreement entered into or by the terms of any enactment in as much as Hindu Succession Act is not applicable to such an estate. This section stands as an exception to section 4 of the Act referred to above.

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It is urged by Shri Misra that the rule of lineal primogeniture in the instant case is a statutory rule and not a customary rule and

therefore it is saved by section 5 (ii) of the Hindu Succession Act. In support of his contention he placed reliance upon Bengal Regulation 10 of 1800. Bengal Regulation 10 of 1800 reads as under :

(i) By Regulation 11, 1798 the estates of proprietors of land dying intestate are declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Muhamdan laws.

A custom, however, having been found to prevail in the jungle Mahals of Midnapore and other districts by which the succession to the landed estates invariably devolves to a single heir without the division of the property.....the Governor General-in-Council has enacted the following rule to be in force in the Provinces of Bengal, Bihar and Orissa from the date of its promulgation.

Regulation 11, 1798 (2) shall not be considered to supersede or affect any established usage which may have obtained in the jungle Mahals of Midnapore and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased.

In the Mahals in question the local custom of the country shall be continued in full force as heretofore, and the Courts of Justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those Mahals."

The following propositions are clearly deducible from this Regulation :

(a) The Regulation takes note of an earlier Regulation (Regulation No. 11 of 1798) according to which the estate of a proprietor of land dying intestate was to be divided amongst his heirs according to his personal law.

(b) It further notes that a custom had been found to prevail in certain areas by which land devolved on a single heir.

(c) It then lays down that such a custom would not be deemed to have been superseded by Regulation No. 11

A of 1798 and that in the said areas such custom shall be rule of decision.

This analysis of the Regulation leads to the further proposition that it did not by its own force declare that any estate would descend to a single heir. All that it did was to keep alive the custom B sanctioning the rule of primogeniture entailing impartibility of the estate. The rule of custom was thus recognised as such and no estate by the terms of the Regulation itself was made to descend to a single heir. In this view of the matter clause (ii) of section 5 of the Hindu Succession Act does not cover such a custom.

C Alternatively it was argued that even if the rule of lineal primogeniture did not survive after the enforcement of the Hindu Succession Act the suit land will be deemed to be settled with the plaintiff under section 6 of the Bihar Land Reforms Act and the plaintiff became the exclusive owner of the suit land. Section 6 D of the Bihar Land Reforms Act, 1950, insofar as it is material for this case reads :

6. (1) On and from the date of vesting all lands used for agricultural or horticultural purposes, which were in 'khas' possession of an intermediary on the date of E such vesting, including :—

(a) (i) proprietor's private lands let out under a lease for a term of years or under a lease from year to year, referred to in Sec. 116 of the Bihar Tenancy Act, 1885 (8 of 1885),

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(ii) landlord's privileged lands let out under a registered lease for a term exceeding one year or under a lease, written or oral, for a period of one year or less, referred to in Sec. 43 of the Chota Nagpur Tenancy Act, 1908 (Ben. G Act 6 of 1908),

(b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lease of an estate or tenure and cultivated H by himself with his own stock or by his own servants or by hired labour or with hired stock, and

(c) lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover 'khas' possession thereof ; shall subject to the provisions of Sec. 7 A and 7 B be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a 'raiyat' under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner."

This section only contemplates that the land will be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold it as a raiyat under the State having occupancy rights in respect of such land subject to payment of fair and equitable rent. But if the intermediary was in possession in a representative capacity on behalf of the other coparceners, as a necessary corollary the land will be deemed to be settled with all those persons on whose behalf one particular intermediary was in khas possession. Consequently if the possession of Bhaiya Rudra Pratap Deo was on behalf of other coparceners the land will be deemed to be settled with all those coparceners and they shall all become raiyats.

It is nobody's case that there has been any partition between the plaintiff and the defendant. The joint status of the family continued and, therefore, after the death of Bhaiya Rudra Pratap Deo his interest devolved on other coparceners as well.

It was next contended for the appellant that the defendant got the land under a khorposh deed which was void *ab initio* and, therefore, the status of the defendant was that of a trespasser and he was liable to ejectment on the suit of the plaintiff. According to the appellant the khorposh deed was void for two reasons: firstly beause there was no sanction of the Commissioner for the deed as contemplated by section 12 A of the Chota Nagpur Encumbered Estates Act, 1876; secondly because the deed was neither stamped nor registered. In order to appreciate the first reason it is pertinent to read section 12 A insofar as it is material for the purpose of the case :

"12 A (1) When the possession and enjoyment of

property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,—

(a) to alienate such property, or any part thereof, in any way, or

(b) to create any charge thereon extending beyond his lifetime.

(2) ... ...

(3) Every alienation and charge made or attempted in contravention of sub-section (1) shall be void."

Section 12 A would be attracted only when possession and enjoyment of the property is restored under the circumstances mentioned in the first or the third clause of section 12. It was for the plaintiff to show that the conditions contemplated by section 12 were satisfied, which he has failed to do.

As regards the second reason, the argument is based on section 17 read with section 49 of the Indian Registration Act. Section 17 of the Registration Act enumerates the documents requiring registration. Section 49 of the Registration Act provides that no document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registeted shall be (a) affect any immovable property comprised therein, (b)... (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Khorposh (maintenance) deed is a document which requires registration within the meaning of section 17 of the Indian Registration Act and as the document was not registered it cannot be received as evidence of any transaction affecting such property. Proviso to section 49, however, permits the use of the document, even though unregistered, as evidence of any collateral transaction not required to be effected by registered instrument. In this view of the legal position the maintenance deed can be looked into for collateral purpose of ascertaining the nature of possession.

Admittedly the defendant was a member of a joint Hindu family. Even in an impartible estate he was entitled to maintenance and the land in dispute had admittedly been given to the defendant by the impartible estate holder. His possession, therefore, cannot be taken to be the possession of a trespasser and the High Court in our opinion has erred in branding the defendant as a trespasser.

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This leads us to the last, but not the least in importance, contention raised on behalf of the appellants. According to Shri S.C. Misra the original plaintiff being holder of an impartible estate, his estate would go to his sucessors alone and not to the other members of the family by survivorship. The learned counsel relied upon the following cases in support of his contention : *Rajah Velugoti Kumara Krishna Yachendra Varu & Ors.* v. *Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and Ors.*,(1) *Raja Rama Rao* v. *Raja of Pittapur*,(2) *Hargovind Singh* v. *Collector of Etah*,(3) *Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards*.(4)

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In *Rajah Velugoti Kumara Krishna Yachendra Varu and Ors.* v. *Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and Ors.*, (supra)the first and the foremost case relied upon, a contention was raised on behalf of the plaintiff that the property of the impartible estate was held in coparcenary as joint family property and became partible amongst the members once it lost its character of impartibility. In other words the contention was that the junior members had a present interest in the impartible estate and were entitled to a share in the estate once impartibility was removed. This argument was repelled and this Court observed :

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> "In our opinion there is no justification for this argument. The law regarding the nature and incidents of impartible estate is now well settled. Impartility is essentially the creature of custom. The junior members of a joint family in the case of ancient impartible joint family estate take no right in the property by birth, and therefore, have no right of partition having regard to the very nature of the estate that is impartible. Secondly, they have

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(1) [1970] 3 SCR 88.
(2) [1918] LR 45 I.A. 148.
(3) AIR 1937 All. 377.
(4) [1899] LR 26 I,A. 83,

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A no right to inerdict alienation by the head of the family either for neeessity or otherwise."

This Court, however, further exposed the legal position in these words :

> "To this extent the general law of Mitakshara applica-
> B ble to joint family property has been modified by custom and an impartible estate, though it may be ancestral joint family estate, is clothed with the incidents of self-acquired and separate property to that extent. The only vesting of the incident of joint family property, which still attaches to the joint family impartible estate is the right of survivor-
> C ship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is assumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship but he does not acquire any interest in the property
> D itself. The right to take by survivorship continues only so long as the joint family does not cease to exist and the only manner by which this right of survivorship could be put an end to is by establishing that the estate ceased to be joint family property for the purpose of succession by proving an intention, express or implied, on behalf of the
> E junior members of the family to renounce or surrender the right to succeed to the estate."

The observations extracted above are self-explanatory and do not support the contention of the appellant, rather they support the defendant-respondent.

F In *Raja Rama Rao* v. *Raja of Pittapur* (*supra*) it was held :

> "An impartible Zamindari is the creature of custom; it is of its essence that no coparcenary in it exists. Apart, therefore, from custom and relationship to the holder the junior members of the family have no right to main-
> G tenance out of it."

In *Hargovind Singh* v. *Collector of Etah* (*supra*) the Allahabad High Court quoted with approval the following observations made by the Privy Council in *Baijnath Prasad Singh* v. *Tej Bali*
H *Singh* :(1)

(1) 43 All. 228 PC.

"...Zamindari being the ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara law, and that the respondent being the person who in a joint family woul l, being eldest of the senior branch, be the head of the family is the person designated in this impartible raj to occupy the Gaddi." A B

In *Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards (supra)* it was laid down that an impartible zamindari was not inalienable by will or otherwise by virtue only of its impartibility, and in the absence of proof of some special family custom or tenure attaching to the zamindari and having that effect. C

This question, however, need not detain us long as this Court had the occasion to consider the point at great length in *Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur and Ors.* v. *Shri Pushavathi Visweswar Gajapathi Raj and Ors.*(1) Dealing with the point in question this Court observed as follows : D

"Since the decision of the Privy Council in *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*(2) it must be taken to be well settled that an estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. If the holder has got the estate as an ancestral estate and he has succeeded to it by primogeniture, it will be a part of the joint estate of the undivided Hindu family. In the illuminating judgment delivered by Sir Dinshah Mulla for the Board, the relevant previous decisions bearing on the subject have been carefully examined and the position of law clearly stated. In the case of an ordinary joint family property, the members of the family can claim four rights : (1) the right of partition ; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance, and (4) the right of survivorship. It is obvious that from the very nature of the property which is impartible the first of these rights cannot exist. The second is also incompatible with the custom of impartibility as was laid down by the Privy Council in the case of *Rani Sartaj* E F G H

(1) [1964] 2 SCR 403.
(2) [1932] LR 59 I.A, 331.

A *Kuari* v. *Deoraj Kuari*(1) and the *First Pittapur case-Venkata Surya* v. *Court of Wards*(2). Even the right of maintenance as a matter of right is not applicable as laid down in the *Second Pittapur case—Rama Rao* v. *Raja of Pittapur*(3). The 4th right viz., the right of survivorship, however, still remains and it is by reference to this right that the property, though B impartible, has, in the eyes of law, to be regarded as joint family preperty. The right of survivorship which can be claimed by the members of the undivided family which owns the impartible estate should not be confused with a mere *spes successionis*. Unlike *spes successionis*, the right of C survivorship can be renounced or surrendered.

It also follows from the decision in *Shiba Prasad Singh's case*(4) that unless the power is excluded by statute or custom, the holder of customary impartible estate, by a declaration of his intention can incorporate with the estate D self-acquired immovable property and thereupon, the property accrues to the estate and is impressed with all its incidents, including a custom of descent by primogeniture...It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending self-acquired property with the joint family property. In the latter cate- E gory of cases where a person acquires separate property and blends it with the property of the joint family of which he is a coparcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not F by succession. On the other hand, if the holder of an impartible estate acquires property and incorporates it with the impartible estate he makes it a part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible.''

G Prior to the decision of the Privy Council in the case of *Rani Sartaj Kuari* v. *Deoraj Kuari* (supra), it was always assumed that a holder of an ancestral impartible estate cannot transfer or

(1) [1888] LR 15 I.A. 51.
H (2) [1898] LR 26 I.A. 83.
(3) [1918] LR 45 I.A.
(4) [1932] LR 59 I.A. 331.

mortgage the said estate beyond his own life-time so as to bind the coparceners, except, of course, for purposes beneficial to the family and not to himself alone. In 1888, however, this view was shaken by the decision of the Privy Council in *Rani Sartaj Kuari's case* (supra). In that case, the holder of the estate had gifted 17 of the villages of his estate to his junior wife and the validity of this gift was questioned by his son. The son's plea, however, failed because the Privy Conncil held that "if, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or it may be in some cases, upon the nature of the tenure". This decision was again affirmed by the Privy Council in the *First Pittapur case* (supra). As a result of these decisions it must be taken to be settled that a holder of an impartible estate can alienate the estate by gift *inter vivos*, or even by will, though the family is undivided; the only limitation on this power would flow from a family custom to the contrary or from the condition of the tenure which has the same effect.

Again in *Chinnathayal alias Veeralakshmi* v. *Kulasekara Pandiya Naicker & Anr.*[1] it was held by this Court that to establish that an impartible estate has ceased to be joint family property for purppses of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. In *Pushavathi Viziaram Gajapathi Raj Manne's case* (supra) this Court reiterated the same legal position.

For the foregoing discussion this appeal must fail.

This leads us to the other appeal filed by the defendant. The contention of the learned counsel for the defendant-appellant in

(1) [1952] SCR 241.

this case is that the possession of the appellant was not as a trespasser but he was a maintenance holder on the khorposh grant (maintenance) given by the impartible estate holder. The High Court, therefore, erred in law in passing a decree for possession and mesne profits against the defendant-appellant. It was further contended that the Nagaruntari estate was a partible estate.

As regards the first contention it is open to a co-sharer to remain in possession of the joint property and the proper remedy for the plaintiff in such case is to file a suit for partition where the equities of the parties would be adjusted. The learned counsel for the plaintiff-respondent on the other hand urged that the defendant's possession was only as a trespasser. In support of his contention he placed reliance on *Collector of Bombay* v. *Municipal Corporation of the City of Bombay & Ors.*(1) The majority took the view that :

> "The position of the Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was *prima facie* adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the Corporation took possession of the land under the invalid grant. This possession had continued openly, as of right and uninterruptedly for over 70 years and the Corporation had acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity. free from rent but only for the purpose of a market in terms of the Government Resolution of 1865."

In the instant case the defendant being a member of a joint Hindu family was entitled to maintenance from the impartible estate holder. The impartible estate holder executed a khorposh deed in favour of the defendant. If the document in question was invalid for want of registration or stamps the same can be looked into for collateral purpose to find out the nature of possession of the defendant-appellant. This being the position in the instant case, the case cited above is not of much help to the plaintiff-respondent. In

(1) AIR 1951 SC 469.

that case the sole basis of title itself was invalid. A perusal of the plaint also indicates that the plaintiff had given some grant to the defendant by way of maintenance and a formal deed of maintenance was executed. The execution of the document is not denied by the plaintiff. All that he says is that village Sigsigi was not included in the deed.

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We find considerable force in the contention raised on behalf of the defendant-appellant that the High Court has erred in passing the decree for possession and mesne profits against the defendant. The proper remedy for the plaintiff in this case was to file a regular suit for partition in respect of all the properties and not a suit for possession of plots of one village and mesne profits.

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The second contention that disputed estate was a partible estate has been raised only to be repelled. The overwhelming evidence on the record leaves no room for doubt that the disputed estate was an impartible estate till the death of the original plaintiff in 1957.

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In the result the first appeal No. 209 of 1970 filed by the plaintiff is dismissed while the other appeal filed by the defendant, No. 2280 of 1970, is allowed and the decree passed by the High Court is set aside and the decree of the Trial Court as affirmed by the first appellate court, is restored,

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In the circumstances of the case we direct the parties to bear their own costs.

V.D.K.

C.A. 209/70 dismissed
C.A. 2280/70 allowed.

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