APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

KUMARSHREE MAHENDRASINGHJI RANMALSINHJI (ORIGINAL PLAINTIFF), APPELLANT *v.* KUMARSHREE ISHWARSINHJI RANMALSINHJI, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1951 August 28

Exemptions from Land Revenue (No. 2) Act (Bom. VII of 1863), s. 6—Sansthan properties—Impartible estate—Sansthan governed by the rule of primogeniture—Whether the term "heritable and transferable" in s. 6 inconsistent with impartibility and descent by the rule of primogeniture—Sanads issued under the Act—Meaning of "private property" as used in the Sanads—Toda Giras Allowances Act (Bom. VII of 1887), s. 3—Whether the expression "lineal male heirs in male descent" excludes succession by rule of primogeniture—Immoveable property acquired by holder of impartible estate and incorporated with the estate—Whether such property becomes impressed with all incidents of impartible estate.

The Thakor of the Sansthan of Miyagaon, succession to which was governed by the rule of primogeniture, held certain Jat Inam Watan lands. He was also receiving the Toda Giras allowance. Sanads were granted to the then Thakor of Miyagaon by the Government under the Exemptions from Land Revenue (No. 2) Act, 1863. In a suit brought by a member of the junior branch for partition and separate possession of his share in the Jat Inam Watan lands, and for accounts of the Toda Giras allowances, and for recovery of his share therein it was contended on his behalf that though the succession to the Sansthan and the Sansthan properties was governed by the rule of primogeniture, the properties subsequently acquired by the Thakor out of the income of the Sansthan would be subject to the ordinary rule of succession, and that as the Sanads which were granted under the Exemptions from Land Revenue (No. 2) Act, 1863, declared the suit-lands as "Continued for ever by the British Government as the private property of the..... lawful holders....." the lands ought to descend according to the ordinary rule of succession.

Held, the words "private property" in the Sanads were used in contradistinction to the Government property. The expression "heritable and transferable property of the holder" in s. 6 of the Exemptions from Land Revenue (No. 2) Act, 1863, meant that the holders of the Sanads could transfer the properties and that their heirs determined in accordance with law would inherit the same, though subject to the restrictions in that behalf which may be laid down from time to time in accordance with law. A descent by the rule of primogeniture which is merely a special custom is included in the term "inheritance." It is only a mode of inheritance which is hallowed and sanctioned by special custom but is nevertheless inheritance. Therefore, the impartibility of the estate and the succession by special custom, i. e. descent by the rule of

* First Appeal No. 221 of 1948 with First Appeal No. 222 of 1948.

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primogeniture were not in any manner whatever inconsistent with the expression "heritable and transferable property of the holder" in s. 6 of the Exemptions from Land Revenue (No. 2) Act, 1863, nor with the terms of the Sanads.

Martand Rao v. *Malhar Rao*,[1] referred to.

The expression "lineal male heirs in male descent" in s. 3 of the Toda Giras Allowances Act, 1887, includes within its connotation succession by the rule of primogeniture.

Maharaval Mohansangji Jeysangji v. *The Government of Bombay*,[2] referred to.

Though the income of an impartible estate belongs exclusively to the holder of the impartible estate and the properties acquired by the Thakor for the time being would in the absence of anything more be his self-acquired property, it is open to him to incorporate his self-acquired immoveable properties with the Sansthan properties and thereupon the properties would accrue to the estate and be impressed with all its incidents including the descent by the rule of primogeniture.

Shiba Prasad Singh v. *Prayag Kumari Debi*,[3] relied upon.

Rajindra Bahadur Singh v. *Rani Raghubans Kunwar*,[4] and *Jagadamba Kumari* v. *Narain Singh*,[5] referred to.

First Appeals against the decision of J. M. Talati, Civil Judge, Senior Division, Broach.

Suit for partition.

One Ranmalsinghji, the Thakor of Miyagaon, died on June 6, 1933 leaving him surviving his widow Shriji Kunvarba and four sons Keshrisinghji, Mahendrasinghji, Ishwarsinghji and Mansinghji. He also left various moveable and immoveable properties consisting, *inter alia*, of Jat Inam Watan lands in the Wagra and Broach talukas of the Broach District. Keshrisinghji, as the elder son, succeeded to the Gadi and enjoyed the Watan lands as also the Toda Giras allowance of Rs. 1,437 which was granted by the British Government. On the death of Ranmalsinghji disputes arose between the brothers. The lands were entered in the first instance in the records of the Government in the name of Keshrisinghji by the Mamlatdar. In regard to the Wagra lands the matter was taken up to the Commissioner. On October 30, 1935 the Commissioner gave a decision that the names of all the brothers should be entered in the records of the Government in respect of the Wagra lands. With regard to the Broach lands, however, the Collector confirmed the decision of the Mamlatdar on September 10, 1935, with the result

[1] (1927) L. R. 55 I. A. 45.
[2] (1880) 4 Bom. 437.
[3] (1932) L. R. 59 I. A. 331.
[4] (1918) L. R. 45 I. A. 134.
[5] (1922) L. R. 50 I. A. 1.

that the Broach lands continued to be entered in the name of Keshrisinghji in the records of the Government.

On August 19, 1936 Keshrisinghji filed a suit, being Suit No. 162 of 1936 for a declaration that the Wagra lands were governed by the rule of primogeniture, that they belonged to him alone and were not divisible and that his brothers had no right over the same and also for an injunction restraining his brothers from obstructing him in the enjoyment of Wagra lands. Keshrisinghji died on January 30, 1940 and his eldest son Pushpasinghji succeeded to the Gadi. Pushpasinghji and his minor brother Pravinsinghji both were brought on the record of the suit in place of Keshrisinghji and prosecuted the suit.

On April 6, 1940 Mahendrasinghji filed a suit, being suit No. 3 of 1942 for partition and separate possession of his 1/5th share in the Jat Inam Watan lands situate in the Wagra and Broach Talukas and in other properties that may be found belonging to the parties in British India, as also for a declaration that he had a 1/5th share in the Toda Giras allowance of Rs. 1,437, and for accounts of the income regarding the allowance and the immoveable properties. He impleaded as defendants in the suit his two brothers Ishwarsinghji and Mansinghji, his mother Shriji Kuvarba and the sons of Keshrisinghji, Pushpasinghji and Pravinsinghji. As both the suits Nos. 162 of 1936 and 3 of 1942 related to the properties alleged to belong to the Miyagaon Sansthan, the parties agreed by a Purshis that all the evidence should be recorded in suit No. 3 of 1942 and that the documents in both the suits may be read in each other. The parties relied mainly on the various documents produced by them and the trial Judge was invited to arrive at his decision mainly on the documentary evidence adduced before him.

The trial Court held that the Jat Inam Watan lands situate in Wagra and Broach Talukas belonged to the Miyagaon Sansthan and as such descended by the rule of primogeniture to the Thakor of Miyagaon for the time being and that the Toda Giras allowance also was granted by the British Government to the person on the Gadi of Miyagaon Sansthan for the time being, and, therefore, that neither the plaintiff in suit No. 3 of 1942 nor his brothers had any right, title or interest therein. As a result the suit No. 3 of 1942 was dismissed. Following the ratio of this decision of his, the trial Judge decreed suit No. 162 of 1936 in favour of the heirs and legal

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representatives of Keshrisinghji and granted the declaration and injunction prayed for by them.

Mahendrasinghji (plaintiff in suit No. 3 of 1942) filed First Appeal No. 221 of 1948 against the dismissal of his suit. First Appeal No. 222 of 1948 was filed by Mahendrasinghji and his two brothers who were the defendants in suit No. 162 of 1936 against the decision of the trial Court decreeing the suit of the plaintiff therein for a declaration and injunction. Both the appeals were heard together.

S. M. Shah, for the appellant.

A. D. Desai, for respondents Nos. 1 to 3.

Purshottam Tricumdas, for respondents Nos. 4 & 5.

BHAGWATI J. [His Lordship, after narrating the facts, continued.] Before we proceed to the facts of the case it will be necessary to clear the ground by referring to the position in law. There was the Sansthan or the Thakrat of Miyagam of which the Thakor of Miyagam for the time being was the Sansthanik or Gadinashin. The *sansthan* properties were impartible and descended from Thakor to Thakor by the rule of primogeniture. This position was not contested before us. The main point of contest, however, was as to whether the suit lands were *sansthan* properties, because if they were not such, the Thakor of Miyagam for the time being would own the same as the absolute owner thereof and they would then descend to his sons and heirs in accordance with the ordinary rule of succession known to the Hindu law, thus impressing the properties which thus descended from him to his sons and heirs with the characteristic of being ancestral properties in which all the sons and heirs would have a share, the properties thus descending to them being ancestral properties *quae* their own sons and grandsons. It was, therefore, contended that the suit lands belonged in any event to Ranmalsinghji, and on Ranmalsinghji's death they descended to Keshrisinghji and his three brothers, were ancestral in their hands and were therefore liable to partition. As regard the toda giras allowance also it was contended that the same was the position on the death of Ranmalsinghji, and that even though Keshrisinghji and in his turn Pushpasinghji were the recipients of that allowance from the Government, the same really belonged to all the brothers and Pushpasinghji was bound to account to his uncles Mahendrasinghji, Ishwarsinghji and Mansinghji for the same.

The toda giras allowance was thus similarly treated as ancestral property in the hands of Keshrisinghji and liable to a partition just as much as the jat inam watan lands situate in Wagra and Broach talukas. The position in law in regard to the *sansthan* and the *sansthan* properties could not be and was not contested by the appellant. The *sansthan* and the *sansthan* properties were impartible and descended by the rule of primogeniture. It was, however, contended that even though that was the correct position in law in regard to the *sansthan* and the *sansthan* properties, the position in regard to the properties which would be subsequently acquired by the Thakor for the time being or the Sansthanik was quite different, and relying on a decision of the Privy Council in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*,[1] it was contended that whatever property was acquired by the Thakor for the time being or the Sansthanik out of the income of the *sansthan* or the *sansthan* properties could only be his self-acquired properties and subject to the ordinary rule of succession known to Hindu law. Reliance was placed on the passage occurring at page 143 of the judgment where the remarks of the Judicial Commissioner Mr. Chamier were quoted by their Lordships of the Privy Council with approval:

> "I take it that it is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh."

Their Lordships of the Privy Council had agreed with that statement of law and had proceeded to consider what were the lands of which Balbhaddar Singh died possessed which were acquired by him and did not form part of the taluka Mahewa as it was constituted at the date of the *sanad* of 1861 and were not lands acquired by him from the Government in exchange for lands which were included in that *sanad*. Our attention was drawn to the decision of their Lordships of the Privy Council in *Jagadamba Kumari* v. *Narain Singh*[2] where it was held that the income of the impartible estate when received was the absolute property of the owner of the impartible estate, that it differed in no way from property that he might

[1] (1918) L. R. 45 I. A. 134, s. c. 20 Bom. L. R. 1075.

[2] (1922) L. R. 50 I. A. 1, s. c. 25 Bom. L. R. 676.

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have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the raj, and that it was a strong assumption to make that the income of the property of that nature was so affected by the source from which it came that it still retained its original character. In that judgment their Lordships of the Privy Council had further pointed out that the confusion was due to the consideration of the position with regard to the ordinary joint family estate (p. 7):

> ".....In such a case the income, equally with the corpus, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property."

Relying upon these observations of their Lordships of the Privy Council in *Jagadamba Kumari* v. *Narain Singh* read along with the observations of their Lordships of the Privy Council in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* above set out, it was contended that the suit lands having been purchased by the Thakor for the time being or the *sansthanik* from the income of the *sansthan* or the *sansthan* properties were his absolute properties and could not be blended or incorporated by him with the impartible estate. We were at one time impressed prima facie with this aspect of the case. There is, however, a later decision of their Lordships of the Privy Council reported in *Shiba Prasad Singh* v. *Prayag Kumari Debi*[1] which has been noted by Sir Dinshah Mulla in his 10th edition of the principles of Hindu Law at page 636 and also by Mayne on Hindu Law and Usage, 11th edition, at page 848, sec. 711, where all these cases were considered and their Lordships of the Privy Council came to conclusion that unless the power was excluded by statute or custom, the holder of a customary impartible estate, by a declaration of his intention, could incorporate with the estate self-acquired immoveable property, and thereupon the property accrued to the estate and was impressed with all its incidents, including a custom of descent by primogeniture. The only qualification to this statement of the law was recognised by their Lordships in the case of an estate granted by the Crown subject to descent by primogeniture which was the case in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*. The

[1] (1932) L. R. 59 I. A. 331, s. c. 34 Bom. L. R. 1567.

position in law is thus summarised in Mulla's Principles of Hindu Law, 10th edn., at p. 636, s. 586:

".....Whether any immoveable property acquired out of the income has been incorporated with the impartible estate depends on the intention of the holder but moveable property such as the income of the impartible estate cannot be so incorporated."

and in Mayne on Hindu Law and Usage, 11th edn., at p. 848, section 711:

"It has long been settled that the holder of an impartible estate can incorporate other properties belonging to him with that estate so as to make them also impartible and descendible to a single heir. This is not an exception to the rule that a man cannot alter the law of succession to his property, for the custom governing the family is itself law and new acquisitions are only brought within its scope. The only exception is, it would seem, where an estate is granted by the Crown under a primogeniture sanad as in *Rajindra Bahadur's* case."

The position, therefore, thus correctly laid down in the passages from Mulla's Principles of Hindu Law and Mayne's Hindu Law and Usage quoted above and the decision of their Lordships of the Privy Council in *Shiba Prasad Singh* v. *Prayag Kumari Debi* is that though the income of an impartible estate belongs exclusively to the holder of the impartible estate, and the properties acquired by the Thakor for the time being or the *sansthanik* would in the absence of anything more be his self-acquired property, it is open to him to incorporate his self-acquired immoveable properties with the *sansthan* properties and that thereupon the properties would accrue to the estate and be impressed with all its incidents including the descent by rule of primogeniture. The question, therefore, which would arise for our consideration in this case would be whether the suit lands were *sansthan* properties initially or having been acquired by the Thakor for the time being or the *sansthanik* were by a declaration of his intention incorporated with the *sansthan* properties.

In regard to the suit lands Mr. S. M. Shah also drew our attention to the fact that after the enactment of the Exemptions from Land-revenue (No. 2) Act, 1863 (Bombay Act VII of 1863) which was the Act for summary settlement of claims to exemptions from the payment of Government land revenue and for regulating the terms upon which such exemption shall be recognised in future, in those parts of the Bombay Presidency which were not subject to the operation of Act XI of 1852 of the Council of India, *sanads* were granted by the Government

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to Deepsinghji Jaswantsinghji, the then Thakor of Miyagam, under the provisions of the Act. Section 6 of the Act provided that:

"When the Provincial Government shall; under clause 1 of s. 2, finally authorize and guarantee the continuance, in perpetuity, to the holders, their heirs and assigns, of land wholly or partially, exempt from the ordinary payment of annual land revenue, the said lands shall (subject to the enactment contained in s. 7) be the heritable and transferable property of the said holders, their heirs and assigns, without restriction as to adoption, collateral succession or transfer and such lands shall thenceforth be continued, in perpetuity, subject to a fixed annual payment to the Provincial Government, calculated at the rate of two annas for each rupee of the assessment, which assessment shall be ascertainable under the following rules:"

Mr. S. M. Shah, therefore, contended that the suit lands in respect of which the *sanads* as aforesaid were granted by the Government to Deepsinghji Jaswantsinghji became the heritable and transferable properties of the said holder and descended in accordance with the ordinary rule of succession known to Hindu law and became ancestral properties in the hands of Ranmalsinghji who was the successor-in-interest of Deepsinghji Jaswantsinghji and therefore the appellant was entitled to a partition thereof. He relied upon a decision of their Lordships of the Privy Council reported in *Martand Rao* v. *Malhar Rao*[1] where their Lordships observed that (p. 49):

".....if an impartible estate existed as such from before the advent of British rule, any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidence of impartibility and succession by special custom."

Mr. S. M. Shah urged before us that even though the *sansthan* and the sansthan properties were impartible and descended from Thakor to Thakor by the rule of primogeniture, the *sanads* which were granted by the Government after the Bombay Act VII of 1863 came into operation converted the suit lands into lands which were heritable and transferable properties of the holder of the *sanad*, Deepsinghji Jaswantsinghji because the impartible nature of the estate and the descent thereof by the rule of primogeniture were inconsistent with the express terms of the new settlement, and the presumption of the continuance of the estate with the previous incidents of impartibility and succession by special custom was therefore

[1] (1927) L. R. 55 I. A. 45, s. c. 30 Bom. L. R. 251.

rebutted. Our attention was drawn in this connection to the terms of the *sanads* themselves. In the *sanads* the lands which were brought under the summary settlement authorised by Act VII of 1863 of the Bombay Legislative Council were declared as—

"continued for ever by the British Government as the Private Property of the persons who shall, from time to time, be its lawful holders, without increase of the said quit-rent and without an objection or question on the part of Government whether the rights of the said lawful holders shall have accrued by inheritance, adoption, assignment, or otherwise, but on the condition that such lawful holders shall continue loyal and faithful subjects of the British Government."

Stress was laid on the words "private property" and "without any objection or question on the part of the Government whether the rights of the said lawful holders shall have accrued by inheritance, adoption, assignment, or otherwise". It was urged that whatever was the nature of the lands before the *sanads* were granted, they became the private properties of the holder and became heritable and transferable property of the holders, with the result that the lands thereafter descended according to the ordinary rule of succession known to Hindu law. We do not accept this contention of Mr. S. M. Shah for the appellant. The words "private property" were used in contradistinction to the Government property. It is well-known that the Government claimed to be the proprietor of all lands within the realm by virtue of the doctrine of the State proprietorship of all lands. The Government no doubt alienated certain lands in favour of the holders and entries were accordingly made in the alienation registers showing the title of the various holders of the lands which were thus entered therein. Except in regard to these alienated lands the Government continued to be the proprietor of the lands within the realm and was the over-lord in regard to all the lands which were granted to the tenants on various tenures. It was with reference to this position that the words "private property" were used in the *sanads*. The lands were jat inam watan lands and they became the private property of the holders of the *sanads*, all rights of proprietorship therein having been alienated by the Government in favour of the holders of the *sanads*. If they were thus the private properties of the holders of the *sanads*, they also became heritable and transferable properties of the holders of the *sanads*. When, however, the expression "heritable and

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transferable property of the holder" was used, it meant that the holders of the *sanads* could transfer the properties and that their heirs determined in accordance with law would inherit the same, though subject to the restrictions in that behalf which may be laid down from time to time in accordance with law. The *sanads* thus provided that the lawful holders for the time being would not have their rights questioned by the Government whether those rights accrued by inheritance, adoption, assignment or otherwise. If the lands descended to the heirs by inheritance or adoption or were transferred by assignment to or devolved otherwise upon the lawful holder thereof for the time being, the Government was not to enquire into the right of the lawful holder and was to recognise him as the holder of the lands under the terms of the *sanad*. These were the various modes prescribed for the devolution of the lands on the lawful holders thereof. The question would still arise whether a descent by the rule of primogeniture which is merely a succession by a special custom as observed by their Lordships of the Privy Council at page 49 in *Martand Rao* v. *Malhar Rao* would not be included in the term "inheritance". In our opinion, it is only a mode of inheritance which is hallowed and sanctioned by special custom but is nonetheless an inheritance. If that is so, we see no substance in the contention which has been urged before us by Mr. S. M. Shah for the appellant that the impartibility of the estate and the succession by special custom, i.e. descent by the rule of primogeniture, were in any manner whatever inconsistent with the express terms of the new settlement or the *sanads* granted under Bombay Act VII of 1883.

The toda giras allowances had their origin in the arrangements entered into by the Government with the Girasias to satisfy their claim from the public treasury on the condition of their abstaining from making a direct levy on the villagers. It was a political allowance in Gujarat and a sort of blackmail allowed by Government to be levied from villages which received the protection of the Girasias. The British Government for the sake of the peace of the country allowed the system to continue on certain conditions which were incorporated in the standard form of aggreement to be executed by the Girasias (Vide pages 241 and 242 of the Alienation Manual by Rao Bahadur R. N. Joglekar, 1st edition, 1921). The toda giras allowance in suit was granted on December 1, 1866, under the terms of clause (19) of the Resolution of the Government

dated November 27, 1862, which is quoted in *Maharaval Mohan-sanghji Jeysangji* v. *The Government of Bombay*[1] at p. 442:

"19. The conditions, on which this arrangement will be entered into, are that the girasia shall consent to abandon, for the future, his claims against the village communities, and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the *garas* from the British treasury. The *garas*, or any portion of it, may further be continued to the lineal male issue of a brother of the first British recipient in any case in which, on inquiry, the Revenue Commissioner may find that hardship would be felt by the discontinuance of the *garas*. If, in any case, however, the allowance has been enjoyed on condition of service, that condition will not be abandoned, although it is not expected that such service can now be taken with advantage to the public."

The *sanad* was granted to the Thakor of Miyagam for the time being, and was to be continued hereditarily in the manner thus described. It was, however, contended that when the Toda Giras Allowances Act, 1887 (Bombay Act VII of 1887), was enacted to declare and amend the law relating to toda giras allowances, s. 3 of the Act laid down that:

"Every toda giras allowance is continuable hereditarily to the lineal male heirs in male descent of the first recipient thereof under British rule:

Provided that, on failure of such heirs, the allowance, or some portion thereof, shall, whenever the Provincial Government has already so directed, or shall hereafter so direct, be continuable hereditarily to the lineal male heirs in male descent of a brother of the first recipient of such allowance under British rule."

This provision closely followed the terms of clause (*19*) of the Resolution above quoted. It was contended that the toda giras allowance was continuable hereditarily to lineal male heirs in male descent of the first recipient thereof and the plaintiff and his brothers being such lineal male heirs in such male descent were entitled to a share therein. The same observations, however, fall to be made in regard to this provision as we made earlier in regard to the expression "heritable and transferable property of the holder" to be found in s. 6 of the Bombay Act VII of 1863. The expression "lineal male heirs in male descent" does include within its connotation the succession by the rule of primogeniture. Succession by the rule of primogeniture also descends to the lineal male heirs in male descent though it is a special type of succession of the lineal male heirs in male descent hallowed or sanctioned by custom. Nonetheless it is a descent hereditarily to the lineal male heirs

[1] (1880) 4 Bom. 437.

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in male descent of the first recipient thereof and is therefore included within the provision laid down in s. 3 of the Act and is not in any manner whatever inconsistent with the same.

[His Lordship after considering the respective contentions of the parties in respect of the suit lands and the toda giras allowance, concluded:] The result, therefore, is that First Appeal No. 221 of 1948 fails and must be dismissed with costs.

On the reasoning adopted by us in our judgment delivered above, we are also of the opinion that the decision of the learned trial Judge in suit No. 162 of 1936 was correct, the suit lands situated in Wagra taluka belonged to Keshrisinghji and after him to Pushpasinghji, the Thakor of Miyagam, and the plaintiffs in that suit as the heirs and legal representatives of Keshrisinghji were rightly entitled to the declaration and injunction granted by the lower Court in their favour. The Appeal No. 222 of 1948 will also, therefore, be dismissed with costs.

VYAS J. [His Lordship in his judgment, after dealing with points not material to the report, proceeded.] I would now refer to the various authorities to which our attention was drawn by the learned advocates of the parties in support of their respective contentions. There is no doubt that in this case the onus to prove that the suit properties are impartible is on Pushpasinghji respondent No. 4. Where a family is governed by the Mitakshara school of the Hindu law and where it possesses anscestral properties which have come down from generation to generation, the initial presumption is that they are governed by the ordinary law of inheritance in the matter of descent and are partible amongst the heirs. Such being the normal position in law, if a party alleges that in a family governed by the Mitakshara, as this family is, the immovable properties which are undoubtedly ancestral properties in the sense that they have come down from generation to generation are governed by the rule of primogeniture in the matter of descent, the onus to prove so is upon him. This proposition of law which is put forward by Mr. Shah is perfectly correct and supported by the case of *Martand Rao* v. *Malhar Rao*[1]. In that case it was observed by their Lordships of the Privy Council that there were certain propositions of law which were well settled, and one of them was (p. 48):

"When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a

[1] (1927) L. R. 55 I. A. 45, s. c. 30 Bom. L. R. 251.

custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom."

In *Dattatraya* v. *Prabhakar*: *Prabhakar* v. *Dattatraya*[1] also, it was held:

"The normal state of a Hindu family is joint. Primogeniture depends upon usage or in some cases upon the nature of the estate. In cases of big Zemindaries and what are known as raj, the burden of proving that they pass by primogeniture is comparatively easy to discharge, but in other cases the burden is on the party, who sets up the case of primogeniture, to prove that there is a family custom by which the eldest son succeeds to the exclusion of the younger."

It is thus quite clear that the burden of proving that the suit properties are governed by the rule of lineal primogeniture is on respondent No. 4 Pushpasinghji, who is alleging so, and it is to be considered whether he has discharged that burden. Now, Mr. Purshottam says that that burden is discharged by Pushpasinghji in two ways: (1) By showing that the descent of the suit properties, by an ancient, clear, invariable custom, has been from a ruling Thakor to his eldest son to the exclusion of the younger sons; in other words the suit properties form a customary impartible estate. In regard to the Ochhan lands the submission of Mr. Purshottam is that ¼th of the said lands was originally given to the second branch of Fullabava as Jiwai and ¼th share was similarly given as Jiwai to the second and third branches of Takatsinghji and first branch of Fullabava, each branch getting 1/12th share. The remaining one-half of the Ochhan lands, like the rest of the suit properties, formed a constituent of the impartible estate from the very inception. The portions which were given as Jiwai to the second and third branches of Takhatsinghji and to the two branches of Fullabava ultimately reverted to the *gadi* or otherwise vested in the Thakor and were blended by him with the impartible *sansthan* and impressed with the character of impartibility. (2) By showing that as far as the *sansthan* of Miyagam at any rate is concerned, it is a customary impartible estate governed by the rule of lineal primogeniture, and the suit properties, though they may have had the character of self-acquisitions of the Thakor to start with, were impressed with impartibility by reason of incorporation with the *sansthan*.

[1] (1936) 39 Bom. L. R. 94.

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Now, taking up the second approach first, as far as the *samsthan* of Miyagam itself is concerned, there is no doubt that it has always been an impartible estate and has invariably descended as a single unit to the eldest son of Thakor on the death of that Thakor. This *samsthan* has been in existence as an impartible unit since times immemorial. It has at least been in existence since the time of the great great grandfather of Ranmalsinghji Jetisinghji, Ranmalsinghji himself having lived from about 1725 A.D. onward. In other words it has been in existence at least for 300 years and never in its long life has it descended in any other manner but as a single unit from a ruling Thakor to his eldest son. All the junior sons of the ruling Thakors have always been excluded, and as a matter of fact, in the arguments in these appeals before us, it has not even been seriously contended that the *samsthan* is not a customary impartible estate. As to the suit properties Mr. Purshottam's contention is: Assume the plaintiff's case that these were purchased by Thakor Ranmalsinghji Jetisangji from the income of the *samsthan* and became his self-acquisitions to be true. Even so, Thakor Ranmalsinghji himself had incorporated them with the impartible *samsthan* and thereby impressed the character of impartibility upon them.

Adverting now to the first approach adopted by Mr. Purshottam for showing that the suit properties are impartible, the fact, according to the plaintiff, is that the suit properties were purchased by Thakor Ranmalsinghji Jetisinghji in his own name or in the name of his sons. It would appear that the lines of the first two sons of Ranmalsinghji, namely, Shivsangji and Abhesangji, became extinct in the lifetime of Ranmalsinghji and these properties devolved on Ranmalsinghji's eldest surviving son Takhatsangji on his (Ranmalsinghji's) death. Admittedly none of the other branches which have descended from the other sons of Ranmalsinghji ever had any share in the suit properties, with the exception of course of Ochhan lands which were initially purchased in the names of four sons of Ranmalsinghji, namely, Abhesangji, Takhatsangji, Jagatbava and Fullabava. The said Ochhan lands, also, as I have shown already, ultimately went wholly to the senior branch of Takhatsangji and were thereafter incorporated with the estate of the *samsthan* and the character of impartibility was impressed upon them. There is no doubt that on Takhatsangji's death the suit properties descended to

his eldest son Jaswantsangji. Admittedly, the branches of two other sons of Takhatsangji, namely Mohanbava and Jetsangji, never had any share in these properties, except Ochhan lands to which I have just referred. On Jaswantsangji's death the suit properties descended to his eldest son Dipsangji, and the branches of his brothers Adesangji and Jethisangji never had any share in them. Adesangji and Jethisangji themselves also did not have any share in them. Dipsangji's son Doulatsangji appears to have died during Dipsangji's lifetime with the result that the properties descended to Doulatsangji's only son Ranmalsangji on Dipsangji's death. On Ranmalsangji's death they devolved on Kesarisinghji, his eldest son. It would appear that Ranmalsinghji Jetisangji was born in about 1725 A.D. (he was sixty years of age in 1785 A.D.). Thus, for the last two hundred years or more the descent of the suit properties (with the exception of the Ochhan lands) has been governed by the rule of lineal primogeniture. Mr. Purshottam contends, and we think quite rightly, that this is quite a strong and convincing piece of evidence to show the impartible nature of these properties. In any event, the above history of the descent of the suit properties establishes a well recognised, ancient, clear custom in this family, whereby these properties have invariably descended, on the death of a ruling Thakor, to his eldest son, to the exclusion of the younger sons. Thus, says Mr. Purshottam, he has established that the suit properties form a customary impartible estate.

Mr. Shah for the appellant has, however, strenuously contended that as the suit properties were not a part and parcel of the *samsthan* of Miyagam from the very inception but were purchased by the present Thakor's ancestor Ranmalsinghji Jetisangji out of the income of the *samsthan*, they are not impartible but are heritable according to the ordinary law of inheritance and partible amongst the heirs. The contention is that if immoveable properties are purchased by a Thakor out of the income of the *samsthan* they do not bear the character of the *samsthan* properties, but become the self-acquisitions of the Thakor, and, says, Mr. Shah the self-acquisitions are not governed by the rule of lineal primogeniture but are subject to the ordinary law of heritability. For this proposition, Mr. Shah has relied on the authority of the Privy Council case of *Jagadamba Kumari* v. *Narain Singh*.[1] In that case

[1] (1922) L. R. 50 I. A. 1; s. c. 25 Bom. L. R. 676.

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the deceased holder of an impartible estate had applied savings out of the income to purchasing immoveable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the income of the estate. It was held that the property so acquired had not become part of the impartible estate but remained the separate property of the deceased holder. It was observed by their Lordships of the Privy Council that the income of an impartible joint estate was not so affected by its origin that it should be assumed to accrete to the estate. As the holder was entitled to the whole of the income, the principle applicable to ordinary joint family estate that self-acquired moneys were to be regarded as joint property if mixed with the moneys of the joint family, did not necessarily apply to property acquired by the holder of the impartible estate out of the income.

In the above mentioned case, originally the estate was in debt, and as there was no evidence of any acquisition of property from other sources, it appeared that all the estate possessed by the Raja other than the impartible raj was derived from the income of the raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lacs, and other movable and immovable properties. With the exception of the Government promissory notes, the whole of these properties had been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. In the opinion of their Lordships of the Privy Council this conclusion was wrong and its error was due to the idea that the produce of the impartible estate naturally belonged to and formed an accretion to the original property. In the words of their Lordships (p. 7):

".....In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

In the Privy Council case referred to above some new properties were acquired out of the savings of Serampur *gadi*.

When there were savings in the hand of the manager of the estate, he used to send the money to the raja and take receipts from him.. The money was utilised by the raja by giving loans and purchasing other properties. On some occasions the raja used to lend the money himself, and those sums were not entered in the manager's books. When the loan was given through the manager, then he used to keep accounts of such money. The manager could not state the probable amount of the sums which had passed through his hands. The moneys that had passed through his hands were invested in loans and also in purchasing Zamindaris. The incomes of Zamindaris so purchased were also entered in the manager's books. They were treated as part of the income of the estate. Loans with interest repaid were also entered in the manager's books. That money was also treated as part of the estate. All this was done at the instance of the raja. In regard to the loans advanced by the raja personally and not through the manager and in regard to those that were not entered in the estate account at the time of the advance, the moneys, when repaid, used sometimes to go into the manager's hand and sometimes paid to the raja directly. The moneys that went into the manager's hand were entered in the manager's books. What was so entered into the estate account was considered as estate money with the raja's consent. The manager could not say if the raja had purchased any landed estate out of the moneys advanced by him personally. In their Lordships' opinion such a state of affairs was insufficient to affect the property with the character of impartibility.

It is argued by Mr. Shah on the authority of this decision of the Privy Council that the suit properties, though purchased or acquired out of the income of the Miyagam *samsthan,* had not acquired the character of the *samsthan* properties in the matter of descent, but had become the self-acquisitions of the purchasing Thakor and were therefore not subject to the rule of lineal primogeniture, but were descendible to the heirs, in other words, were partible amongst them.

Now, Mr. Shah is right when he says that these properties did not form a part of the *samsthan* from the very inception, but were purchased by the ruling Thakor who was acquiring properties out of the income of the *samsthan* between the years 1783 and 1809 A.D. Mr. Shah is supported in this contention by several sale deeds on the record showing that wanta lands were purchased by Ranmalsinghji Jetisanghji in various

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villages of Broach District in his own or his son's name between 1783 and 1809 A.D. (vide exhibits 799, 800, 301, 804, 805, 806, 808, 809 and 811). In some cases properties were acquired by mortgages which were never redeemed by mortgagors (vide exhibits 802, 803, 807 and 810). It is no doubt true that all the sale deeds relating to all the suit properties are not before us, but it is only natural that on account of antiquity it is not possible to lay hands on all the sale-deeds. Those that are on the record make it very probable that the properties in respect of which the sale deeds are not available now must also have been purchased about the same period when Thakor Ranmalsinghji Jetisangji was acquiring properties. In every sale deed we find a recital that the property was sold to the Thakor or his son by all the Patidars representing the whole village, from which it would appear that at the date of each transaction of purchase, the Thakor must not have owned any land in the village concerned. The Thakors of Miyagam are Garasias or Padhiyars. They are not Patidars and therefore if the Thakor had in fact owned any property in the village concerned before any particular transaction of purchase, the document would not have stated that the sale was made by all the Patidars of the village representing the whole village. It is no doubt true that the sale deeds on the record do not contain description of the properties so as to enable us to identify the properties, with the result that the identity of the purchased properties as being a part of the suit properties is not established. Even in the case of properties acquired by mortgages, the identity of the acquisitions as being a part of the suit properties is not established. But, says Mr. Shah, this is only natural, as these were pre-survey days and the properties did not bear any numbers. The position thus is fairly clear. There being no evidence whatever that these properties formed an integral part of the Miyagaon *samsthan* from the inception of the *samsthan*, there would appear no serious difficulty in holding that they must have been purchased long ago by one or the other Thakor of Miyagaon *samsthan*, in all probability Thakor Ranmalsinghji Jatisangji, out of the income of the *samsthan*. That being so, Mr. Shah is right in his contention that the ruling in *Jagadmba Kumari* v. *Narain Singh* would apply to the facts of this case and the suit properties acquired the character of self-acquisitions on purchase. But the point is that even so, the plaintiff's position in this case does not improve, since we have come to

the conclusion that although the suit properties became self-acquisitions of the Thakor in the first instance on the purchase thereof, the character of impartibility was subsequently impressed upon all of them by blending or incorporation with the *samsthan*. We shall see this when we deal with the question of blending.

Mr. Shah's next contention is that whatever might have been the character of the descent of the suit properties before the advent of the British rule, the incidents of the ordinary law of heritability and consequent partibility were impressed upon them when the *sanads* in respect of them were granted to Thakor Dipsangji in 1878, 1879 or thereabout by the British Government as the result of the enquiries made under the Summary Settlement Act VII of 1863. In the context of this submission a typical *sanad* is referred to by Mr. Shah and it is in these terms:—

"Whereas certain land described below has been brought under the Summary Settlement authorized by Act VII of 1863 of the Bombay Legislative Council it is hereby declared that the said land subject (in addition to Salami or other payment which may have been hitherto levied) to the payment to Government of an annual quit rent of Rs. 9-10-0 shall be continued for ever by the British Government as the private property of the persons who shall, from time to time, be its lawful holders, without increase of the said quit rent and without any objection or question on the part of Government whether the rights of the said lawful holders shall have accrued by inheritance, adoption, assignment or otherwise, but on the condition that such lawful holders shall continue loyal and faithful subjects of the British Government."

Now, Mr. Shah says (1) that the expression "private property of the persons" is used in the *sanad* in juxtaposition to *samsthan* property, (2) that the terms "assignment or otherwise" are suggestive of alienability of the lands granted, thus implying heritability as understood in the ordinary law of inheritance and partibility, and (3) that the prefix "Garasia" before the name of the grantee in the second column of the tabular statement appended at the foot of the *sanad* would show that the grant was not made to Dipsangji Jaswantsangji in his capacity as a Thakor, but only as a Girasia, thus implying that the properties granted were not to share the character of special descent by the rule of lineal primogeniture and impartibility of the *samsthan* lands. In short, the argument of Mr. Shah, on the basis of the *sanads*, relating to the suit properties, is that irrespective of whatever might have been the form or custom of descent in regard to these properties

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before the advent of the British, they were distinctly made subject to the ordinary law of inheritance by the terms of the grant made under the Summary Settlement Act VII of 1863.

Having pointed out what Mr. Shah calls the implications of the express terms of the *sanads*, he has gone on to deal with an important point whether a grantee of immovable properties under the Summary Settlement Act VII of 1863 can alter the character of the descent of the said properties by impressing upon them the type of descent inconsistent with ordinary law. Mr. Shah says that the grantee cannot do so, while Mr. Purshottam maintains that the grantee is at liberty to do so if he definitely intends to incorporate the said properties with the impartible estate of his. Whether the incorporation has occurred or not is a question of fact dependent upon the circumstances of each case, but, says Mr. Purshottam, if we are satisfied that the holder of an impartible estate did really and truly intend to blend his self-acquisitions—a reference is made only to immovable properties—with his impartible estate, then in the matter of their descent the normal law of inheritance is abrogated and the properties become subject to the special rule of inheritance by which the impartible estate of the holder is governed. Each party has cited an authority in support of the proposition set up by him. Mr. Shah has relied on the case of *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*,[1] whereas Mr. Purshottam has referred to the case of *Shiba Prasad Singh* v. *Prayag Kumari Debi*.[2] We shall first deal with *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*, in which it was held that the Crown had power in British India by a grant of lands to limit their descent in any way it pleased but a subject had no power to impose upon lands, or other property, any limitation of descent at variance with the ordinary law applicable. In that case one Bhup Singh had three sons Gajraj Singh, Girwar Singh and Dunia Singh. Gajraj Singh died childless in January 1860. Girwar Singh also died issueless in January 1865. Dunia Singh who survived Girwar Singh had two sons Balbhaddar Singh and Sheo Singh. Balbhaddar Singh was adopted by his uncle Girwar Singh whom he succeeded, and he died childless in December 1898. One Rani Raghubans Kunwar was the wife of Balbhaddar Singh. The property to which the suit related was property,

[1] (1918) L. R. 45 I. A. 134, s. c. 20 Bom. L. R. 1075.

[2] (1918) L. R. 52 I. A. 331, s. c. 34 Bom. L. R. 1567.

moveable and immoveable, of which Balbhaddar Singh died possessed on December 12, 1898. On his death his widow Rani Raghubans Kunwar and his brother Sheo Singh each claimed adversely to the other all the property of which Balbhaddar Singh had died possessed. The Court of Revenue made an order for the mutation of names in favour of Sheo Singh, and Sheo Singh obtained possession of all the property, moveable and immovable. Rani Raghubans Kunwar on February 6, 1900, brought a suit against Sheo Singh for possession of all the moveable and immoveable property. She alleged that Balbhaddar Singh had been adopted by his uncle Girwar Singh, and that Girwar Singh had by his will devised all his property to Balbhaddar Singh, who had enjoyed it until his death. Her suit was resisted by Sheo Singh, who alleged that all the property claimed by her appertained to taluka Mahewa and was impartible; that by a custom in the family females were excluded from the inheritance; and that the succession to the taluka was governed by the Oudh Estates Act under which it was claimed by Sheo Singh that a brother was entitled to succeed in priority to the widow. Sheo Singh denied that Balbhaddar Singh had been adopted by Girwar Singh. Furthermore, Sheo Singh relied upon a *sanad* of October 19, 1859, by which the Government had granted taluka Mahewa to Gajraj Singh and his heirs without other limitation of the line of inheritance. At some period of the litigation a copy of a *sanad* which was granted by the Government to Girwar Singh in 1861 was produced, and the Privy Council in 1905 held that the copy was admissible in evidence and that Girwar Singh had in fact surrendered to the Government the *sanad* which had been granted to Gajraj Singh in 1859 and the estate which had been granted by it, and in lieu of that *sanad* had accepted the *sanad* of 1861. The *sanad* of 1861 said expressly:

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

It was held by their Lordships of the Privy Council that the Crown had in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleased the descent of such lands. But, in the opinion of their Lordships, a subject had no right to impose upon lands or other property any limitation of descent which was at variance with the ordinary law of descent of property applicable in his

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case. Sir Edward Chamier, Judicial Commissioner of Oudh, had observed in the course of his judgment (p. 143):

"I take it that it is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law and that he cannot subject it to a rule of descent such as is contained in the primogeniture *sanad granted* to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh."

With that statement as to the law, which was contained in the judgment of the Judicial Commissioner of Oudh, Sir Edward Chamier, their Lordships of the Privy Council expressly agreed.

Mr. Shah is relying on this authority in support of his contention that once the suit properties became the self-acquisitions of Thakor Ranmalsinhji Jetisangji by reason of the purchase thereof by him from the income of the *samsthan,* it was not open to him to alter the law of descent applicable to those properties and make them subject to the character of impartibility by which the *sansthan* was governed. Succinctly Mr. Shah's submissions on the basis of the *sanads* and the authority of *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* are (1) that the incident of heritability as ordinarily understood in law was impressed upon the suit properties by the *sanads,* and (2) that the said incident having been impressed upon them, it was not open to the Thakor to alter the mode of descent so as to make it inconsistent with the ordinary law. Both these submissions must fail in this case. We shall deal with the first submission first. In our opinion, the expression "private property" occurring in the *sanads* was not used in juxtaposition to *samsthan* property, but was used to distinguish the property, which was granted, from Government property. Before the grant, the properties granted were all Government lands, and the grant altered that character and made them private lands, in the sense that the ownership thereof changed from Government to the Thakor. In the expression "private property" we see no justification for drawing a distinction between the *samsthan* lands of the Thakor and the lands granted by the *sanads* and for contending that the descent in the two cases—*samsthan* properties and the properties granted by the *sanads*—was intended to be different.

It is true that the words "assignment or otherwise" are indicative of the alienability but then it is to be remembered

that inalienability is not a concomitant of impartibility or descent by the rule of lineal primogeniture. It has now been well settled by authorities that an impartible estate is alienable (vide *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*[1] and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipati Surya Rao.*[2] In *Harisingji Chandrasingji* v. *Ajitsingji*[3] it was held that the holder for the time being of an impartible estate had complete right of disposition over the property and could transfer it absolutely by gift, will or otherwise, unless his right was restricted by custom or the nature of the tenure of his estate. In coming to this conclusion the previous decisions in the cases of *Rani Sartaj Kumari* v. *Rani Deoraj Kumari*,[4] *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipati Surya Rao*,[5] *Rama Rao* v. *Raja of Pittapur*[6] and *Pratap Chandra Deo* v. *Jagadish Chandra Deo*[7] were followed by this Court. Therefore, in the use of the words "assignment or otherwise" in the *sanads* we are unable to see any intention on the part of the grantor to divest these properties of the character of impartibility which, as we have seen already, had been impressed upon them by custom right from the time of Ranmalsinhji Jetisangji. In our view, the words "assignment or otherwise" are thoroughly consistent with the impartibility of the properties and their descent by lineal primogeniture.

The argument which Mr. Shah has made from the use of the word "Garasia" in front of the name Dipsangji Jaswantsangji occurring in the second column of the tabular statement at the foot of the *sanads* appears to us nothing more than a flight of fancy. Merely from that word we cannot reach a conclusion of considerable vital importance in the matter of descent of the properties. Garasia is the caste of the Thakors of Miyagam, whereas the term "Thakor" is descriptive of status. In our view, what was done by the use of the word "Garasia" was that the caste of the grantee was mentioned, and that was a natural thing to do. Description of status was out of place

[1] (1881) L. R. 8 I. A. 248.

[2] (1899) L. R. 26 I. A. 83, s. c. 1 Bom. L. R. 277.

[3] (1949) 51 Bom. L. R. 770.

[4] (1887-88) L. R. 15 I. A. 51.

[5] (1899) L. R. 26 I. A. 83, s. c. 1 Bom. L. R. 277.

[6] (1918) L. R. 45 I. A. 148, s. c. 20 Bom. L. R. 1056.

[7] (1927) L. R. 54 I. A. 289, s. c. 29 Bom. L. R. 1136.

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when properties were being granted to a person. In describing a person for the purpose of a grant it is necessary only to state the name, father's name and caste of that person and that was what was done while granting the *sanads* in regard to the suit properties. We have no doubt that the purpose of Government in employing the word "Garasia" before the name Dipsangji Jaswantsangji was not to take away the character of impartibility from these lands (which had been impressed upon them from the time of Ranmalsinhji Jetisangji with the exception of Ochhan lands which were blended with the *samsthan* later) and make them partible as the other self-acquisitions of Dipsangji Jaswantsangji, assuming that he had any such other self-acquisitions at the time.

As the *sanads* were granted under the provisions of the Summary Settlement Act VII of 1863, Mr. Shah has referred us to s. 6 of the said Act and has argued that the character of heritability was conferred upon the properties granted to Thakor Dipsangji Jaswantsangji as the result of enquiries made under the Summary Settlement Act. Now, s. 6 of the Act is in these words:

> "When the State Government shall, under clause 1 of s. 2, finally authorize and guarantee the continuance, in perpetuity, to the holders, their heirs and assigns, of land wholly or partially, exempt from the ordinary payment of annual land-revenue, the said lands shall (subject to the enactments contained in s. 7) be the heritable and transferable property of the said holders, their heirs and assigns, without restriction as to adoption, collateral succession or transfer and such lands shall thenceforth be continued, in perpetuity, subject to a fixed annual payment to the State Government, calculated at the rate of two annas for each rupee of the assessment,....."

Now, adverting to the word "heritable" occurring in s. 6, we are clearly of the opinion that heritability according to the rule of lineal primogeniture also was included in the concept of it. There is no doubt that the *sanads* which were granted under the Summary Settlement Act were the result of enquiries made in respect of these lands under the said Act. If as the result of the said enquiries it had been found that the second and third branches of Takhatsangji and the second and third branches of Jaswantsangji were co-sharers in these lands, we have no doubt that their names would have been mentioned along with the name of Dipsangji Jaswantsangji (Takhatsangji's senior or elder branch) in these *sanads*. If we turn to column 8 "Name of Holder" which means the name of holder as mentioned in the *sanad*, we find that in some of the extracts

from the Alienation Register which are a part of the record before us, names of co-sharers were mentioned, e.g., they were mentioned in the cases of Randa lands, Watarasa lands, Jhanghar lands, Simalia lands and so on. In the case of Watarsa lands the second and third branches of Takhatsangji were mentioned as the co-sharers in the column "Name of Holder". The point in brief is that if the enquiries under the Summary Settlement Act VII of 1863 had disclosed, as they should have and would have if it were a fact, that the branches of Mohanbava and Jatisangji (second and third sons of Takhatsangji) or the two brothers of Dipsangji, namely, Adesangji and Jethisangji, had any shares in these properties, the *sanads* would have shown them as co-sharers and mentioned their names also along with the name of Dipsangji Jaswantsangji. But in point of fact the sanads in respect of the suit properties, with the exception of Ochhan lands, were granted in the name of Dipsangji Jaswantsangji alone, which could only mean that the Government had recognized and respected the ancient custom of this family by which the descent in the matter of these properties was governed by the rule of lineal primogeniture and the *sanads* were granted on the basis of that recognition of the said custom. When we construe the word "heritable" occurring in s. 6 of the Summary Settlement Act, VII of 1863, under which Act the *sanads* were granted, in the light of this background which cannot be separated from the enquiries which resulted in the grant of the *sanads*, we must hold that the said word "heritable" extended to or included heritability according to the customary rule of primogeniture also which obtained in this family in respect of the *samsthan* and also in respect of these properties.

Now, let us turn to the decision in *Martand Rao* v. *Malhar Rao*[1] which laid down:

> "A settlement or regrant by the British Government of an estate which existed before British rule must be presumed, in the absence of evidence to the contrary, to continue previously existing incidents of impartibility and descendibility to a single heir."

We have already seen that before the advent of the British and right from the time of Ranmalsinghji Jetisangji, these properties (at the moment I am not referring to Ochhan lands) were characterized by the incidents of impartibility and descendibility to a single heir. For the reasons just stated, in the *sanads* which were granted under the Summary Settlement

[1] (1927) L. R. 55 I. A. 45, s. c. 30 Bom. L. R. 251.

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Act, VII of 1863, we see no evidence to show that the British Government, in settling these lands on, or in regranting them to, Dipsangji Jaswantsangji had intended to go counter to those already existing incidents as regards the descendibility of these properties.

As to the contention made by Mr. Shah on the authority of *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar,* clearly the ruling would not apply to the facts of this case. In that case the impartible estate was a raj which was granted by the Crown by a *sanad,* and the incorporation of any other immovable self-acquisitions in it would have meant the enlargement of the boundaries of the raj, which could not be done at the will of the holder of the raj, but could only be done by the Crown by whom the original boundaries of the raj were fixed. Obviously, in the case of a raj granted by the Crown, its boundaries could not be cut up or extended by the grantee who held the raj under a *sanad* from the Crown, i.e. under definite terms from the Crown, which could only be altered by the Crown. For these reasons the raj was impartible and the said character of impartibility could not be imprinted on the other immovable acquisitions of the holder, since by so doing the size of the raj would be increased. In the case before us there is not a tittle of evidence to show that the grant of the *sansthan* was made by the Crown. Indeed the *samsthan* has been in existence, not only since the time of Ranmalsinghji Jetisangji who was born about the end of the first quarter of the 18th century, but since four generations before him—since the time of Baraiya Mansangji, great great grandfather of Ranmalsinghji Jetisangji—in other words since a very long time even before the advent of the British rule. Therefore, this is not a case of the grant of a *samsthan* by the Crown. Here the character of impartibility and governance, in the matter of descent, by the rule of lineal primogeniture are the results of ancient, clear, invariable custom. Now, the power to incorporate is a power inherent in every Hindu owner, and it applies to a customary impartible estate unless it is excluded by statute or custom. There is no question of any statute here excluding this power to incorporate, nor is there any evidence of any custom excluding such a power. Accordingly there is no reason why the Thakor of this *samsthan* could not enlarge the *samsthan* by adding his other immovable self-acquisitions to it. By adding to the *samsthan* the other properties he was not creating another or distinct *samsthan.* In other words his

self-acquisitions added to the *samsthan* did not form a new estate, but were an accretion to the *samsthan* and passed, on the death of each successive Thakor, as one entity along with the *samsthan*. Therefore, in a case like the present one where we are dealing with an estate impartible by custom and not by reason of a *sanad* granted by the Crown, the holder of the estate can alter the course of descent of his other immovable self-acquisitions by incorporating them with the estate. Accordingly the ruling cited by Mr. Shah, *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar,* will not help the appellant.

The opposite ruling is the one relied upon by Mr. Purshottam, namely, the case of *Shiba Prasad Singh* v. *Prayag Kumari Debi,*[1] in which it was held by their Lordships of the Privy Council:

"Unless the power is excluded by statute or custom, the holder of a customary impartible estate by a declaration of his intention, can incorporate with the estate 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 is otherwise in the case of an estate granted by the Crown subject to descent by primogeniture."

It was also held:

"The blending of income from self-acquired property with income from an impartible estate raises no presumption of an intention to incorporate, but that intention can be indicated in other modes."

The gist of the decision thus was that the holder of a customary impartible estate is competent to incorporate his self-acquired immoveable properties with the impartible estate, but a presumption of an intention to incorporate cannot arise merely from the blending of the income of the self-acquisitions with the income of the impartible estate, but the intention must be gathered in other ways. The whole question whether the immoveable property acquired by the holder of an impartible estate could be incorporated with the impartible estate so as to impress upon it the character of impartibility was exhaustively examined in *Shiba Prasad Singh* v. *Prayag Kumari Debi* in which the previous decisions bearing on the point were reviewed and the law on the subject was finally settled. In that case the dispute related to the succession to the estate of Raja Durga Prasad Singh, who died childless on March 17, 1916, leaving surviving behind him his three widows Rani Prayag Kumari, Rani Subhadra Kumari who died pending the suit and Rani Hem Kumari. These widows were the plaintiffs in the suit

[1] (1932) L. R. 59 I. A. 331, s. c. 34 Bom. L. R. 1567.

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and respondents to the first appeal. One Shiba Prasad Singh, who was defendant in the suit and appellant in the first appeal, was a collateral relative of the deceased Raja Durga Prasad Singh. He was Raja Durga Prasad Singh's father's father's brother's son's son. The parties were governed by the Mitakshara and the chief item of property was the impartible estate of Jheria, situated in the Manbhum district, but the Raja had died possessed of considerable other immovable property also. Upon the death of the Raja, defendant Shiba Prasad Singh took possession of the estate of Jheria and also other property of the Raja the said other property consisting of cash, jewellery and other movables. Shiba Prasad Singh claimed that all the movable and immovable properties of the deceased Raja had passed to him by survivorship, whereas the three Ranis of the deceased Raja contended that the family had ceased to be joint and claimed the estate under Hindu law. As far as the immovable properties besides the impartible estate of Jheria and movables were concerned, the Ranis contended that they were the self-acquisitions of the deceased Raja. On a suit being filed by the widows of the deceased Raja against Shiba Prasad Singh to recover the estate and other property, the Subordinate Judge passed a decree whereby he allowed the suit in part and dismissed it as to the rest. Both parties appealed to the High Court at Calcutta, and the said High Court by its decree allowed the appeals in part. From the said decree of the High Court both parties appealed to His Majesty in Council. It may be noted that the parties were governed by the Mitakshara school of Hindu law. The raj was ancient and ancestral. It was impartible by custom and succession to it was governed by the rule of lineal primogeniture.

In the above mentioned case the properties which were the subject-matter of the suit included amongst others:

(1) The impartible estate or raj.

(2) Immovable properties which were acquired by the father and brother of the deceased Raja Durga Prasad Singh and which had come to the hands of the deceased Raja.

(3) Immovable properties acquired by the deceased Raja himself,

and two of the principal questions which arose for the consideration of their Lordships were:

(1) Whether the holder of an impartible estate had the power to incorporate other properties belonging to him with the estate,

and

(2) Whether any such properties had in fact been incorporated with the estate.

Their Lordships observed that these were questions of wide importance and stated that it would be as well to refer to certain cases in which the matter had already been considered.

The first case their Lordships of the Privy Council referred to was the case of *Shrimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal.*[1] The contest in that case was as regards succession to an ancerstral impartible estate and four mauzas that had been purchased on behalf of the last holder out of the savings of the impartible estate. It was contended that the mauzas had been incorporated with the impartible estate and therefore passed with the estate. There was evidence in the case that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate. In dealing with that aspect of the matter their Lordships of the Privy Council had observed in that case that they did not find in those meagre facts adequate grounds for holding that the Raja had intended to incorporate the four mauzas with the ancestral estate for the purposes of his succession. In their Lordships' opinion the four mauzas must therefore follow the rule of the Mitakshara as to self-acquired property.

The next case which was referred to by their Lordships in their judgment in *Shiba Prasad Singh* v. *Prayag Kumari Debi* was the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh.*[2] It was a case under the Oudh Estates Act, 1869. The properties alleged to have been incorporated were all immovable properties and it was held by their Lordships that the question whether properties acquired by an owner became part of the ancestral estate for the purposes of his succession depended on his intention to incorporate the acquisitions with the original estate. In that case also it was held that upon the facts the evidence was not sufficient to establish such an intention on the part of the owner. In *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[3] also the observations of their Lordships of the Privy Council were to a similar effect. There also the properties were immovable and a question had arisen whether the owner of an impartible ancestral estate who had

[1] (1901-02) L. R. 29 I. A. 82, s. c. 4 Bom. L. R. 365.

[2] (1913) L. R. 40 I. A. 170, s. c. 15 Bom. L. R. 853.

[3] (1916) L. R. 43 I. A. 269, s. c. 18 Bom. L. R. 884.

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acquired certain immovable properties had intended to incorporate the said immovable properties with the original impartible estate and it was held by their Lordships that upon the facts of the case the evidence was not sufficient to establish such an intention.

The next case which was referred to by their Lordships of the Privy Council while dealing with the case of *Shiba Prasad Singh* v. *Prayag Kumari Debi*[1] was the case of *Jagadamba Kumari* v. *Narain Singh*. We have already once referred to that case in this judgment. There the properties alleged to have been incorporated had consisted partly of movables and partly of immovables and had been acquired by the deceased Raja out of the income of the raj. The High Court of Calcutta had held that the whole of the property so acquired, except certain Government promissory notes, represented an accretion to the estate and descended with it. On appeal to the Privy Council, it was held by their Lordships that no part of the property had constituted an accretion to the estate. The reason for that finding was that their Lordships saw no evidence in the facts of that case of any sufficient intention to treat the acquired properties, whether the mauzas, mortgages or other personal estate, as part of the original raj. The actual point of the decision in *Jagadamba Kumari* v. *Narain Singh* was that where the estate was impartible, no such presumption as to an intention could be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does not decide that if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property.

Sir Dinshah Mulla who delivered the judgment of the Privy Council in *Shiba Prasad Singh v. Prayag Kumari Debi*[1] observed in the course of his judgment (p. 349):

"The Hindu law, however, enables persons governed by that law to alter the course of devolution of their property from one channel into another by declaring, expressly or impliedly, their intention to do so. Thus, if a member of a joint family declares his intention to separate from the other members, there is, as already stated, an immediate separation, and his undivided interest in the joint family property will on his death pass not to the surviving members of the family, but to his

[1] (1932) L. R. 59 I. A. 331, s. c. 34 Bom. L. R. 1567.

heirs. Similarly, a Hindu possessing self-acquired property may incorporate it with the joint family property, in which case it will pass on his death not to his heirs, but to the surviving members of the family....

If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property:.....But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartible estate mixes the income of his self-acquired property with the income of the estate. Blending of income, however, is not the only mode of indicating the intention to incorporate.....*The crucial test in all such cases is intention, and the intention may be expressed by the blending of income or in some other way.* On the same principle a member of a joint family, who is the holder of an ancestral impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate; by so doing he expresses his intention to alter the course of devolution of the self-acquired property. This, their Lordships think, he is entitled to do, though the ancestral estate is impartible."

Their Lordships of the Privy Council examined an argument that the holder of an impartible estate could not so incorporate his self-acquisitions with the estate as to make them inheritable by the rule of primogeniture. In support of the above argument two passages were quoted before their Lordships from *Jattendromohan Tagore* v. *Ganedromohan Tagore*: *Ganendromohan Tagore* v. *Jattendramohan Tagore*[1] (p.65):

".....A private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and the gift must fail, and the inheritance takes place as the law directs; and (2). Upon this point it is unnecessary to repeat what has already been said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, differing from that described by the law of the land."

Furthermore, in support of the argument mentioned above, namely, that the holder of an impartible estate could not so incorporate his self-acquisitions with the estate as to make them impartible by the rule of primogeniture, reliance was also put upon a passage in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*,[2] in which it was observed (p. 143):

"The Crown has in British India power to grant or to transfer lands and by its grant or on the transfer to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon such lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case."

On the authority of the above mentioned rulings in the *Tagore* case and *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*

[1] (1872) L. R. I. A. Supp. 47. [2] (1918) L. R. 45 I. A. 134.

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it was contended before their Lordships of the Privy Council in *Shiba Prasad Singh* v. *Prayag Kumari Debi* that to allow the holder of an impartible raj to incorporate his self-acquisitions with the raj would be to allow him to impose upon the self-acquisitions a line of descent at variance with the ordinary law applicable to his case. Now, their Lordships expressly stated in that judgment (*Shiba Prasad Singh* v. *Prayag Kumari Debi*) that they did not think that the principle laid down in the *Tagore* case and *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* applied to the case before them, namely, *Shiba Prasad Singh* v. *Prayag Kumari Debi.*[1] In the case before them the raj had not been granted by the Crown, nor had any line of descent been prescribed by any *sanad.* It was an ancient estate. It was impartible by custom. It descended by the rule of primogeniture by a family custom. The family was joint. The parties were governed by the Mitakshara school of Hindu law. Under that law ancestral property devolved by survivorship upon all surviving members of the joint family. But the raj devolved not on all, but only on one member of the family, and that was by virtue of the family custom. Their Lordships proceeded to observe (352):

"Had the Raj been an estate granted by the Crown under a sanad subject to descent by primogeniture, as was the taluka in the *Rajindra Bahadur* case, the boundaries as defined by the sanad could not have been enlarged by any Raja, nor could he have added other properties to it so as to make them descendible by the rule of primogeniture. But the Raj here is not held under any sanad. It is impartible by custom, and it descends by primogeniture by custom. The boundaries, therefore, of such an estate, if they could be circumscribed at all, could only be circumscribed by statute or custom. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom. There is no question of any statute here. Nor is there any evidence of any custom excluding such a power. If so, there is no reason why the Raja could not enlarge the Raj by adding other properties to it. He is not by so doing creating another and a separate estate distinct from the Raj itself. He is not assuming to legislate, nor is he creating another Jheria Raj or any other Raj. If other properties are added to the Raj estate, they will not form a new estate but will be an accretion to the Raj estate, and will pass, on the death intestate of the last holder, as one entity with that estate. To such a case the rule in the *Tagore's Case* does not apply, nor the rule in *Rajindra Bahadur's case*.....

The conclusion to which their Lordships have come on this part of the case is that while immoveable property can be incorporated with an impartible estate, moveable property cannot."

[1] (1932) L. R. 59 I. A. 331, s. c. 34 Bom. L. R. 1567.

The law on the question of incorporation of the other immovable self-acquisition of a holder of an impartible estate with the said estate, as settled in *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi,* is a final pronouncement on the subject and according to it the holder of the Miyagam *samsthan* could incorporate his other self-acquired immovable properties with the estate of Miyagam and thereby make the said self-acquisitions subject to the customary rule of primogeniture in the matter of descent. The question, therefore, is whether in this case the material before us is sufficient to indicate intention on the part of the holder of the *samsthan* to incorporate, and in this connection the undoubted circumstances of the case and the documentary evidence have left no doubt in our minds that the holder (Thakor) had that intention. In the first place it is clear from exhibit 819 which is a statement of Pushpasangji (respondent No. 4) that the amounts of all the accounts relating to wanta lands (suit properties) were always credited in the daily cash book of the *samsthan* and were mixed up with the cash balances in the said daily cash book. From the cash balances so mixed up, tribute amounts were being paid. It is also to be noted that no separate account of the wanta lands was ever maintained (vide para. 16, exhibit 819). In the history of the descent of the suit properties also there is a pointer to the fact of incorporation. On Takhatsangji's death these properties (I am not referring at the moment to Ochhan lands) which were for some time in possession and enjoyment of the second and third branches of Takhatsangji and the two branches of Fullabava along with the senior branch of Takhatsangji devolved on his eldest son Jaswantsangji, although Jaswantsangji had two brothers Mohanbava and Jetisangji alive at the time. On Jaswantsangji's death the properties devolved on his eldest son Dipsangji, though Dipsangji had two brothers Adesangji and Jetisangji alive at the time. It is not disputed that the junior sons of Takhatsangji or the junior sons of Jaswantsangji never claimed any share in these properties (here also I am excepting the Ochhan lands). This could only be consistent with one thing, namely, that during the lifetime of Takhatsangji and Jaswantsangji the junior sons of both of them must have known that these properties had accreted to the *samsthan* by incorporation and therefore they had no share in them. Otherwise, when the enquiries were in progress under the Summary Settlement Act VII of 1863 after the advent of the British, one cannot understand why Mohanbava's

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and Jetisangji's branches (these were junior sons of Takhatsangji) or Adesangji's and Jetisangji's branches (they were junior sons of Jaswantsangji) did not claim or contest any share in these properties. As we have seen already, the *sanads* in regard to the suit properties were given on the basis that their descent was regulated by the rule of lineal primogeniture, which could only have been possible by the incorporation of these properties with the impartible estate of the *samsthan*. In fact, not only the granting of the *sanads*, but even the preparation of the Alienation Register and the management of the suit properties by the Talukdari Settlement Officer were done on the basis of the complete blending of these properties with the impartible estate; otherwise the Talukdari Settlement Officer would have given the shares in the income of these properties to the branches or co-sharers, and the branches and co-sharers concerned would also have claimed them. No share at all in the income of these properties was demanded by any junior branch, and the Talukdari Settlement Officer used to hand over the entire income to the senior branch of Takhatsangji. These circumstances extending over a long period must point to the blending of the estate of the *samsthan* and the suit properties to the knowledge of all the junior branches.

Another piece of evidence which strongly points to the incorporation is the Tharav Bandh exhibit 813 dated 1897-98. It is a Tharav Bandh of the wanta in Broach District of Thakor Ranmalsinghji Doulatsangji. We find that in this Tharav Bandh the income of the wanta lands was treated as Darbari income or income of the *samsthan* and the outstandings in respect of the *wantas* were treated as Darbari outstandings, i.e., outstandings due to the *samsthan*. The point is that the income of the wantas was not treated as a personal or private income of the Thakor, as distinguished from the Darbari income. The outstandings which were due from the wanta lands were not treated as outstandings due personally or privately to the Thakor but were treated as due to the *samsthan*. This, in our opinion, conclusively shows that all differences between the impartible estate of the *samsthan* and the wanta lands were sunk and the wantas were completely merged in the *samsthan*. Accordingly the decision in *Shiba Prasad Singh* v. *Prayag Kumari Debi* would apply to the facts of this case, and Mr. Purshottam is right in contending on the basis of that case that the character of impartibility has been impressed on the suit properties by reason of the incorporation thereof with the *samsthan*.

Regarding Ochhan lands also we have come to the conclusion that after the shares of the second and third branches of Takhatsangji and of the two branches of Fullabava had also vested in the Thakor, thus making the vesting of the Ochhan lands complete in the senior branch of Thakatsangji, the said lands were also incorporated with the *samsthan* as were all the rest of the suit properties. Once the shares of the other sharers passed on to the Thakor representing the senior branch of Takhatsangji and the whole of these Ochhan lands became his self-acquisitions, he dealt with the said acquisitions in the same manner in which he had dealt with the other self-acquisitions (immovable), i.e., he incorporated them also with the impartible estate and thereby impressed upon them also the character of impartibility.

For the above mentioned reasons, I agree with my learned brother that the plaintiff's suit for partition of the suit immovable properties mentioned in schedules A and B must fail.

The next question with which we are concerned in these appeals is whether the toda giras allowance (cash allowance) of Rs. 1,437 mentioned in schedule C is the exclusive property of the Thakor for the time being on the *gadi* of Miyagam or is partible, upon the Thakor's death, amongst his heirs. The contention of Pushpasingji respondent No. 4 is that this allowance has always been enjoyed from its very inception by the ruling Thakor exclusively and the Fataya Princes have no right or claim to it. On the other hand, the case of the plaintiff is that this allowance is descendible hereditarily to the lineal male heirs and therefore upon the death of Ranmalsinghji Doulatsangji, the late Thakor, all his lineal male heirs, namely, plaintiff, defendant No. 1, defendant No. 2 and Kesarisangji (father of defendants Nos. 4 and 5) became entitled to shares in it. The plaintiff's further case is that defendant No. 3, the widow of Ranmalsinghji Doulatsangji, was also entitled to a share in it equal to a son's share. In other words according to the plaintiff, he himself, defendant No. 1, defendant No. 2, defendant No. 3 and Kesarisinhji (the father of defendants Nos. 4 and 5) became entitled to equal shares in this cash allowance on the death of Ranmalsinhji Doulatsangji. Now, in this case this cash allowance was first granted to Garasia Dipsangji by Her Majesty's Governor of Bombay by a *sanad* exhibit 572 dated December 1, 1866, and here are the terms of the *sanad*:

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"This sanad is issued under the signature of His Excellency Sir Henry Bartle Edward Frere, K.C.B., Her Majesty's Governor of Bombay, to the Grassia Deepsingjee Jesvantsinghjee inhabitant of Moze-meea Taluka, Baroda in the Gaekwar's Territory to the folowing effect:—

Whereas according to the agreement (a copy of which is attached) entered into by you on behalf of yourself, co-sharers and heirs, you have agreed to receive from the Government Treasury, on the conditions therein specified your Girass allowance as settled by Government and Government have been pleased to grant Sunnads to the Grassias whose Girass is declared hereditarily continuable, this writing is issued to you, to the effect, that so long as you, your cosharers and your and their heirs conform to the conditions of the agreement above mentioned, the annual allowance of Rs. 1,437/-. one thousand & four hundred & thirty seven only will be continued hereditarily in the manner below described.

Hereditary Class II.		
	Continuable to the Thakore of Mayagaum for the time being fourteen hundred thirty seven and failing that line to the lineal male heirs in male descent from	Rs. 1,437.

Sunnud No. 1148 ... ... 1st December 1866
Sd. (illegible) ... ... Sd. - Illegible
1st December 1866 ... Settlement XX
Revenue Commissioner N. D."

Now, it is argued by Mr. Shah for the plaintiff appellant that the words "you on behalf of yourself, co-sharers and heirs" and "so long as you, your co-sharers and your and their heirs conform to the conditions of the agreement above mentioned, the annual allowance of Rs. 1,437...will be continued hereditarily" occurring in the *sanad* would show that on the death of Ranmalsinghji Doulatsangji all his sons became entitled to shares in this allowance. We have given careful thought to this submission of Mr. Shah, but we feel it must fail. It is no doubt true that the grant was intended to continue hereditarily but what was meant by hereditary continuity was made clear in the *sanad* itself, and in this connection the important words are:

"The annual allowance of Rs. 1,437 will be continued *hereditarily in the manner below described.*

Continuable to the Thakore of Mayagaum for the time being."

It would appear that a standard printed form of a *sanad* containing the words "on behalf of yourself, co-sharers and heirs" and "you, your cosharers and your and their heirs" must have been taken up and the necessary blanks must have been filled up, which would account for the words "on behalf of yourself, cosharers and heirs" and "you, your cosharers and you and their heirs" which are found in the *sanad* exhibit 572. Actually, it is nobody's case that Dipsangji's brothers Adesangji and Jetisangji had any share in this allowance, and even now the heirs of Adesangji and Jetisangji are not claiming any share in it; so, the reference to the cosharers and the heirs of cosharers which is to be found in the *sanad* could not actually have been intended to be made in the case of the grant of this cash allowance. These words which must have occurred in the printed form and which should have been struck off appear to have been inadvertently kept on when the blanks were filled up. I would, therefore, not attach any face value to those words in construing the sanad exhibit 772. The important words, in our opinion, are "continued hereditarily in the manner below described. Continuable to the Thakor of Miyagaum for the time being." These words would show that the allowance was to be enjoyed only and exclusively by the Thakor of Miyagam for the time being, which meant that it was made descendible only to the eldest son of the Thakor, on the death of the Thakor. In the original *sanad* there were at first the words "lineal male heirs in male descent from" after the words "continuable to the" and before the words "Thakor of Mayagam for the time being." When we look at the original of exhibit 572 we find that the words "lineal male heirs in male descent from" are struck off. They must have been struck off by the authority granting the *sanad*. They could not have been struck off by Pushpasinhji for the purpose of creating evidence in his favour in respect to the toda giras allowance. The reason for this conclusion is obvious. This *sanad* was produced by the plaintiff himself. It was never in the custody of Pushpasinhji. Pushpasinhji's grandfather Ranmalsinhji had two wives. From the senior wife Kesarisinhji, the father of Pushpasinhji and Pravinsinhji, was born and he was the eldest son of Ranmalsinhji. From the junior wife plaintiff, defendant No. 1 and defendant No. 2 were born. It would appear that some time after the second marriage of Ranmalsinhji, his senior wife and Kesarisinhji

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lived separately from Ranmalsinhji who lived with his second wife and the sons born of her. That was the state of affairs when Ranmalsinhji died, with the result that the documents which were in possession of Ranmalsinhji came into the hands of the plaintiff and his brothers defendants Nos. 1 and 2. There is no doubt that this *sanad* exh. 572 which was in respect of the cash allowance which was received by Ranmalsinhji during his lifetime must have been in possession of Ranmalsinhji up to the time of his death. Surely, Ranmalsinhji and his grandfather Dipsangji had no reason whatever to strike off the words "lineal male heirs in male descent from", since neither of them had any competing cosharer who could possibly claim any share in this allowance. Therefore, there is no doubt, we think, that the words "lineal male heirs in male descent from" must have been struck off from the printed standard form of the *sanad* by the authority granting the *sanad*, since the object of the grant was to vest the allowance exclusively in the Thakor of Miyagam for the time being.

For the appellant our attention is invited to s. 3 of the Toda Giras Allowance Act (VII of 1887) which says:

"Every toda giras allowance is continuable hereditarily to the lineal male heirs in male descent of the first recipient thereof under British rule:

Provided that,.....",

and it is argued that according to the above mentioned provisions of the Act all the sons of the late Thakor Ranmalsinhji Doulatsangji would be entitled to share the allowance. It is true that the allowance was first granted in 1866, whereas the Toda Giras Allowance Act was enacted in 1887; but says Mr. Thakore for the plainitiff appellant, the Act, being a declaratory one, must be given a retrospective effect. Mr. Thakore is right in his contention that the Toda Giras Allowance Act must be given a retrospective effect. In his Interpretation of Statutes, ninth edn., Maxwell writes (p. 229):

"If a statute is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable."

There is no doubt that the toda giras allowance is a declaratory one, since this is how it begins: "Whereas it is expedient to declare..." Being a declaratory Act, it must be given a retrospective effect, but even so, we do not think the plaintiff is entitled to any relief in respect of this allowance. The words

"continuable hereditarily to the lineal male heirs in male descent" are wide and include a form of descent which is known by the name of descent by the rule of lineal primogeniture. The descent from the Thakor for the time being to his eldest son is also certainly a continuity of heredity in the line of male heirs in male descent of the first recipient and therefore, in our opinion, the words in the *sanad* exhibit 572 saying that the allowance will be continuable hereditarily to the Thakore of Miyagam for the time being are quite consistent with the provisions of s. 3 of the Toda Giras Allowance Act. Descent by rule of primogeniture is one of the forms of inheritance, and though it is a special form, it certainly falls within the scope of s. 3 of the Act as it continues heredity in male descent of the first recipient. That being so, we are of the opinion that the descent of this allowance from the Thakor of Miyagam for the time being to his eldest son is in keeping with the terms of the grant itself and also with the provisions of the Toda Giras Allowance Act, and accordingly the plaintiff's claim to a share in it must fail.

Toda giras allowance was initially a political allowance and was "a sort of black-mail allowed by former Governments to be levied from villages which received the protection of the Girasia" (vide Joglekar's Alienation Manual, 1st edition, page 45). It is thus clear that originally the toda giras allowance was an amount which was recovered by the Girasia from the villages which were receiving protection from him against plunders and depredations. The British Government for the sake of the peace of the country allowed the system to continue on the conditions (1) that the Girasias shall abstain from all violence and plunder, and continue to be loyal to the British Government, and (2) that they shall, whenever called upon, perform police or any other service which it may have been customary to exact from Girasias. There were certain other conditions also attached to the continuance of the system by the British Government, but into those we need not enter for the purpose of these appeals. Thus we see the reason why the allowance was granted exclusively to the Thakore of Miyagam for the time being the reason was that the Government looked up to the Thakore, alone for the safety of the peace in the Thakarat. Even at the date of the Toda Giras Allowance Act the Thakore was responsible for seeing that his Thakarat was free from plunders and depredations, and if, for securing that object, the grant was made descendible from a ruling

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Thakore, to his eldest son on the death of the Thakore, we do not see how the descent could be said to offend against continuity of heredity in the male line of the first recipient. We must therefore hold that the contention of Pushpasinhji that he alone, as the Thakore of Miyagam for the time being, is entitled to the cash allowance, is in keeping with the provisions of Act VII of 1887.

It is to be remembered that this particular cash allowance was granted by Government under the provisions of its Resolution No. 4309 dated November 27, 1862. That resolution is not on the record of these appeals, but it is found embodied in *Maharaval Mohansangji Jeysangji* v. *The Government of Bombay.*[1] Paragraph 17, 18 and 19 of that resolution give us the history of the circumstances under which the Toda Giras allowance was initiated and continued. Paragraph 17 of the resolution said:

"Government did not initiate these payments, but found them, on obtaining possession of the country, generated by the disorder of the previous rule. The holders were treated with unexampled indulgence; but the peace of the country called for the policy then adopted, and faith should now be kept with their descendants, although they are no longer dangerous to the State. This the Governor in Council is prepared in the strictest sense to do;....."

It would thus be obvious that this allowance was not initiated by Government. It was already found existing, in other words the Garasias were already found exacting the amount from the villages which were receiving protection from them and which would have been subjected to plunders and depredations at their own hands if the moneys were not paid to them. Although the British Government, on taking possession of the country, was not bound to respect that system, even so the resolution stated that faith should be kept with the descendants of the original Garasias, although the said descendants were no longer dangerous to the State.

Paragraph 18 of the resolution proceeded to say:

"At the same time the Governor in Council is not unwilling to make sacrifice of revenue in order to relieve the garasias from the necessity of resorting to law, and he is prepared, whenever the garasias may be willing to receive from Government his present income, instead of collecting it direct from the villagers, to continue that income to him under such reasonable rules and restrictions as may seem fit to Government to impose".

[1] (1880) 4 Bom. 437.

Then paragraph 19 of the resolution proceeded to deal with the conditions and this is what it said: (p. 442).

"The conditions, on which this arrangement will be entered into, are that the garasia shall consent to abandon, for the future, his claims against the village communities, and in return the allowance he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the garas from the British treasury....."

It would thus be obvious that an important condition which underlay the resolution, on the basis of which or in the light of which the provisions of s. 3 of the Toda Giras Allowance Act (VII of 1887) would appear to have been enacted, was that the allowance was to be continued hereditarily to the male issue of the first person who received the *garas* from the British treasury. In our opinion, the descent of the allowance from a ruling Thakore to his eldest son on the death of the Thakore would amount to a continuity of the allowance hereditarily to the male issue of the first recipient. Thus we see that the contention of Pushpasinhji respondent No. 4 that the allowance vests only and exclusively in the Thakore of Miyagam for the time being and descends, on the death of a ruling Thakore, to his eldest son and that the junior sons of the Thakore have no share in it is supported on all hands, i.e., by the terms of the grant itself (exhibit 572), by the terms of the resolution under which the toda giras allowance was recognised by Government and by the provisions of s. 3 of the Toda Giras Allowance Act. That being so, the plaintiff's case must fail in this behalf as well.

In the result, I agree with my learned brother that both these appeals must fail and be dismissed with costs.

Appeals dismissed.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

RAMCHANDRA LAXMAN GOLWALKAR (ORIGINAL DEFENDANT No. 3), APPELLANT *v.* THE BANK OF KOLHAPUR (ORIGINAL PLAINTIFF), RESPONDENT.*

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* First Appeal No. 500 of 1950.