APPELLATE CIVIL.

Before Walmsley and Suhrawardy JJ.

1923

May 4.

RAMESH CHANDRA SINHA

v.

MOHAMMED ELAHI BUKSH*

Hindu law—Mitakshara—What is required to be proved to show that a family is governed by the Mitakshara school.

For a family residing in Bengal to show that it is governed by the Mitakshara school of law, it is not absolutely necessary to prove immigration from the North-West since the establishment of the Dayabhaga system. Proof of origin of the family and practice continued after immigration is sufficient.

Pitambar Chandra Saha Chaudhuri v. *Nisikanta Saha* (1) explained.

SECOND APPEAL by Ramesh Chandra Sinha and another, the defendants Nos. 1 and 2.

The facts of the case as stated in the plaint are briefly these: A permanent tenure standing in the name of Fakir Sinha under Brahmattar Haripur, bears a *jama* of Rs. 65-1 anna and of this *jama* Rs. 28-9-4 is payable to one Amulyanath Chakrabarti, the eight annas *nishkar* holder, Rs. 18-4 to the plaintiff, the four annas *nishkar* holder and Rs. 18-4 to the defendants Nos. 1 and 2, the remaining four annas *nishkar* holders. Fakir Sinha was governed by Mitakshara law and Ghumani Sinha and Mohini Sinha became the owners of the permanent tenure by survivorship. They took loan from the

*Appeal from Appellate Decree, No. 1026 of 1921, against the decree of Surendra Krishna Ghosh, Subordinate Judge of Jalpaiguri, dated Dec. 21, 1920, affirming the decree of Girija Bhusan Sen, Munsif of that place dated Sep. 19, 1919.

(1) (1919) 31 C. L. J. 52.

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plaintiff, but they being unable to pay off the loan, the plaintiff brought a money-suit (suit No. 502 of 1911) in the Court of the Second Munsif at Jalpaiguri and got a decree, in execution of which he purchased the tenure on the 23rd April, 1912, and obtained delivery of possession thereof through Court in due course and was able to obtain recognition by all the co-sharer landlords except the defendants Nos. 1 and 2 who refused to recognise him without payment of *nazar.* The defendants Nos. 1 and 2 then instituted the collusive rent suit No. 703 of 1917 against the *pro-formâ* defendants, who had absolutely no right to and possession in the tenures, for their four annas share of rents for 1320 to 1323 and obtained an *ex parte* decree. They executed the decree and sought to bring the tenure to sale on the 20th November, 1918. The plaintiff, thereupon, brought the present suit, disputing the defendants' right to bring the property to sale, the *jote* in question being, as alleged, a permanent tenure and transferable without landlord's consent and the transfer in favour of the plaintiff in execution of decree being binding and contending that the *pro-formâ* defendants had no interest in the tenure and were improperly made parties in the rent suit No. 703 of 1917 and that this tenure was the subject of litigations between him and the *pro formâ* defendants and that it was established that they had no right to the tenure and that it was he who had 16 annas right to it.

Defendants Nos. 1 and 2 contended *inter alia* that Fakir Sinha was not governed by Mitakshara law and Ghumani and Mohini were not the sole heirs entitled to the property and that even if they be found to be the sole heirs, the tenure or holding was not transferable and so it did not pass to the plaintiff and they were not bound to recognise him as a tenant. It was

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further contended that if instead of Mitakshara school, the Dayabhaga school be found to rule, then some of the *pro-formâ* defendants (defendants Nos. 5 and 6) had interest along with Ghumani and Mohini, that this point was correctly recorded in the settlement *khatian* and that the decree was not a fraudulent one and was not liable to be set aside.

The Court of first instance decreed the suit with costs against defendants Nos. 1 and 2, the plaintiff's right to the *jote* in question being declared. The decree in rent suit No. 703 of 1917 was also declared to be fraudulent and not binding on the plaintiff. A perpetual injunction was made restraining the defendants Nos. 1 and 2 from executing the decree against the *jote*.

On appeal by defendants Nos. 1 and 2, the judgment and decree of the Court of first instance was confirmed.

Defendants Nos. 1 and 2 thereupon preferred this Second Appeal in the High Court.

Dr. Dwarkanath Mitter (with him *Babu Hemendranath Basu*), for the appellants. I submit that the respondents have failed to discharge the burden which lay on them of establishing that they are governed by the Mitakshara school of Hindu law. Not only should the respondents establish that they immigrated from the province where the Mitakshara system prevails, they must go further and show that the immigration took place after the introduction of the Dayabhaga system in Bengal. Jimutavahana flourished in the 14th century. I rely on the decision in *Pitambar Chandra Saha Chaudhuri* (1). The parties being residents of Bengal, *primâ-facie* they must be held to be governed by the Bengal school: *Soorendranath Roy* v. *Heeramonee Burmoneah* (2).

(1) (1919) 31 C. L. J. 52. (2) (1868) 12 Moo. I. A. 81, 90.

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Babu Braja Lall Chakrabarti (with him *Babu Santosh Kumar Basu*), for the principal respondent. The finding of the final Court of fact in this case is that the descendants of Fakir Sinha were governed by the Mitakshara school. The case of *Pitambar Chandra Saha Chaudhuri* (1) has therefore hardly any application. That case only lays down a presumption. The force of that decision has been greatly weakened by the later Full Bench decision in *Rajani Nath Das* v. *Nitai Chandra Dey* (2), where the same Judge who decided *Pitambar Chandra Saha Chaudhuri's* case (1) modified his views as regards the date of Jimutavahana. If both Mitakshara and Dayabhaga are of the 11th century, there is not much in the presumption from immigration since the establishment of Dayabhaga.

Dr. Mitter, in reply.

WALMSLEY J. This appeal preferred by the defendants Nos. 1 and 2 arises out of a suit brought for declaration of title to a *jote* and for a further declaration that a decree obtained by the defendants Nos. 1 and 2—the present appellants—against the *pro formâ* defendants in a rent suit was fraudulent. The Courts below have given the plaintiff the decree which he asked for and consequently this appeal is preferred by the defendants Nos. 1 and 2. It is not necessary to go further into the details of the case. The appellants have put forward two contentions. The first is that the so called tenure is only a *raiyati* and that the holding is a non-transferable *raiyati* holding and the plaintiff acquired nothing by his purchase. So far as this point is concerned, the answer given by the learned Judge of the Court of appeal is conclusive. The holding is shown in the record-of-rights

(1) (1919) 31 C. L. J. 52. (2) (1920) I. L. R. 48 Calc. 643.

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as a tenure and the defendants Nos. 1 and 2 presented an application under section 105 of the Tenancy Act on the footing that the holding was a permanent tenure. Other facts are given by the Judge; but it is not necessary to repeat them. This argument I may say has hardly been pressed and it fails.

The second argument is that the Courts below are wrong in finding that the family of Fakir Singh was governed by the school of Mitakshara law. The point which is pressed is this that the plaintiff ought to have proved over and above the fact that Fakir Singh's family came from the North-West and that various incidents of their lives show them to have followed the customs of the Mitakshara school of law, the further fact that the date of the family's immigration into Lower Bengal took place after the establishment of the Dayabhaga system of law. For this proposition, reference is made to the case of *Pitambar Chandra Saha Chaudhuri* v. *Nisikanta Saha* (1). If that case really lays down that, for a family residing in Bengal to show that it is governed by the Mitakshara school of law, it must prove immigration and immigration since the establishment of the Dayabhaga system and the continued practice of Mitakshara customs, it lays a very heavy onus upon the party making the claim and that onus is materially increased if it is correct that Jimutvahana flourished not in the 14th century but in the 11th century, as is said in the case of *Rajani Nath Das* v. *Nitai Chandra Dey* (2). However, it appears to me, on a correct reading of the case of *Pitambar Chandra Saha Chaudhuri* (1) that the learned Judges did not lay down that this third item of proof must be given. They were dealing with the question of the burden of proof and discussing what facts proved

(1) (1919) 31 C. L. J. 52. (2) (1920) I. L. R. 48 Calc. 643.

by one side shifted the burden of proof on to the other side and I do not think it is correct to say that they required that this third item of proof must always be given. So in the view I take of that case, the findings of fact recorded by the learned Judge of the Court of appeal below are sufficient to show that the plaintiff is entitled to say that the family of Fakir Singh was governed by the school of Mitakshara law, for he has given the necessary proof of origin and practice. The result is that this second argument also fails.

The appeal is accordingly dismissed with costs.

SUHRAWARDY J. I agree.

S. M. *Appeal dismissed.*

REFERENCE UNDER COURT FEES ACT.

Before Mookerjee J.

SACHHIDANANDA THAKUR v. MAHES CHANDRA DAS.*

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May 9.

Court Fee—Bengal Tenancy Act (VIII of 1885), s. 105, cl. 3—Appeal from decision under s. 105.

Where a court fee of annas eight only was paid by four tenants, who were tenants of one tenancy, in an appeal from a decision under s. 105 of the Bengal Tenancy Act :

Held, that the court fee paid was sufficient.

A stamp of annas eight is to be levied in respect of each tenancy, and not in respect of each tenant who may be one of a group of tenants holding a particular tenancy.

Upadhya Thakur v. *Persidh Singh* (1) referred to.

* Reference under section 5 of the Court Fees Act, 1870, in the matter of S. A. File No. 2540 of 1922.

(1) (1896) I. L. R. 23 Calc. 723.