PRIVY COUNCIL.

*P C. 1922

April 6.

SYED KASAM, SINCE DECEASED (DEFENDANT)

v.

JORAWAR SINGH AND OTHERS (PLAINTIFFS).

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Hindu Law—Joint family—Severance of joint status—Claim by member and agreement for division by arbitrator—Alienation of joint estate—Law in Berar—Purchaser's equitable right—Part only of price paid.

Where a member of a joint Hindu family governed by the Mitakshara claims his share of the family property, and the members of the family agree to appoint an arbitrator to partition the property among them, and to accept his partition, the claim and the agreement effect a severance of the joint status of the family.

The Judicial Committee accepted the view that the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that accordingly a member of a joint family in Berar can sell his undivided share without the consent of his co-owners; but no decision was given whether a purchaser, who has paid only part of the price, has an equitable right to claim a partition, nor as to the proper form of decree in that case in a suit by other members of the family.

Judgment of the Court of the Judicial Commissioner reversed.

APPEAL (No. 119 of 1920) from a judgment and decree of the Court of the Judicial Commissioner (September 6, 1917) reversing a decree of the Additional District Judge of East Berar, Amraoti.

The suit was brought in 1914 by respondents Nos. 1 to 6, to recover possession of immoveable properties in Berar. They alleged that they had formed a joint Hindu family with one Nain Singh, who died in 1906, and that a purported sale of the properties in

* *Present*: VISCOUNT CAVE, LORD SHAW and SIR JOHN EDGE.

1902 by Nain Singh to the deceased appellant, Syed Kasam, was "for bogus consideration," and they claimed the lands as their joint and ancestral family properties. The remaining appellants, and the other respondents Nos. 1 to 6, held from the deceased appellant. The deceased appellant by his defence denied that the consideration was bogus, and alleged that Nain Singh had separated ten years before the date of the sale. He further alleged that after the sale he entered into possession jointly with the other co-sharers; that in 1907 a settlement and division was made between the plaintiffs and himself, and that since he had been in separate possession and enjoyment of the properties.

The facts appear from the judgment of the Judicial Committee.

The Additional District Judge dismissed the suit. He found on the issues framed as follows: that the sale was not "bogus"; that Nain Singh was not separated ten years prior to the sale as alleged; that between 1903 and 1907 the purchaser was in joint possession, inasmuch as he took possession of certain fields "just as other members were separately cultivating"; that there had been in 1907-8 a settlement and division between the purchaser and the members of the family.

On appeal to the Court of the Judicial Commissioner the decree was set aside, and a decree made that the plaintiffs be put into possession upon paying Rs. 5,000 to the purchaser, the deceased appellant. The learned Additional Judicial Commissioner who heard the appeal found that the separation alleged by the defendants to have taken place about 1892 had not been proved. He said that before him it had been attempted to raise a new point, namely, that the reference to arbitration in 1905 effected a separation—

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but he was not prepared to allow the defendants to raise that new plea upon appeal. Upon the evidence he found that the alleged division in 1907-8 was not proved, and that only Rs. 5,000 of the Rs. 20,000 stated as the consideration for the sale, and admitted to be the value of the property, had been paid. He discussed whether in those circumstances the purchaser had an equity to enforce a partition. After referring to the decision of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (1) he said: "The case was from "Allahabad where alienation by a coparcener of his "own share is not recognized any more than it is re- "cognized in Bengal. I do not however understand "their Lordships to overrule the Bombay and Madras "rulings, followed by this Court, which recognize an "equity to enforce a partition in favour of a *bonâ* "*fide* transferee for value. But as pointed out in the "recent judgment we must henceforth bear in mind "that this is only an exception which must not be "carried beyond the limits already recognized." He held that upon the facts in the present case there was no such equity; he made a decree, as above stated, for possession upon repayment of Rs. 5,000 to the purchaser, and after the defendants had removed the existing crops.

De Gruyther, K. C., and *Parikh*, for the representatives of the deceased appellant. There was a separation in 1905. The evidence shows that Nain Singh claimed his share of the ancestral property, and that thereupon the members of the family entered into the agreement of December 1905, appointing an arbitrator to divide the property. That claim by itself, or when coupled with the agreement, was an unequivocal expression of an intention to separate, and thus put

(1) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 176.

an end to the joint status of the family: *Girja Bai* v. *Sadashiv Dhundiraj* (1), *Kawal Narain* v. *Prabhu Lal* (2). But apart from that contention, the trial Judge rightly found on the facts that in 1907-8 it was agreed by the plaintiff that the purchaser, who had till then been in joint possession of the whole property, should have the properties now in suit allocated to him. Even if Nain Singh was at the date of the sale undivided, he had power to sell his undivided share. In Berar the Mitakshara is to be interpreted in the same manner as in Bombay: *Ramprasad* v. *Subu Bai* (3), *Bhadia* v. *Bhagi* (4), *Balwant Rao* v. *Baji Rao* (5). According to the law in Bombay an undivided member can effectively alienate his share for valuable consideration: *Sura Bunsi Koer* v. *Sheo Prashad Singh* (6), *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (7). Fraud being negatived in this case, the plaintiffs were not entitled to set aside the sale upon terms, or at all. [Reference was also made to the Specific Relief Act (I of 1877), s. 18, and the Transfer of Property Act (IV of 1882), s. 43.]

Kenworthy Brown, for the respondents. The appellants are not entitled to rely upon the alleged separation in 1905, since that point was not raised by the pleadings, nor made at the trial. But in any case what took place in 1905 did not effect a separation. The authorities show that where an agreement is relied on for that purpose it must show an intention that from thenceforth the property is to be the subject of separate ownership: *Appovier* v. *Rama Subba*

(1) (1916) I. L. R. 43 Calc. 1031; L. R. 43 I. A. 151.
(2) (1917) I. L. R. 39 All. 496; L. R. 44 I. A. 159.
(3) (1905) 4 Nagpur L. R. 31.
(4) (1910) 10 Nagpur L. R. 24.
(5) (1920) I. L. R. 48 Calc. 30; L. R. 47 I. A. 213.
(6) (1879) I. L. R. 5. Calc. 148; L. R. 6 I. A. 88, 101, 102.
(7) (1880) I. L. R. 5 Bom. 48; L. R. 7 I. A. 181, 193, 194.

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Aiyan (1), *Joy Narain Giri* v. *Girish Chunder Myti* (2). The intention must be expressed clearly and unequivocally: *Suraj Narain* v. *Ikbal Narain* (3). The later decisions of the Board in no way modify the effect of those above cited. Here there is nothing to show an intention that the agreement was to be operative until a division by metes and bounds took place, and the evidence shows that the matter was not proceeded with. As the intention of the parties depends upon the facts, the Appellate Court rightly declined to allow the new case to be put forward. The family being undivided the purported sale was a nullity under the Mitakshara law: *Sahu Ram Chandra* v. *Bhup Singh* (4). To escape from that position it must be shown that Hindus in Berar are governed by a modification of the Mitakshara law; the cases referred to show only that the practice of the High Court in Bombay differs from that of the High Court at Allahabad. Further, the practice in Bombay rests upon the view that a *bonâ fide* purchaser for value has a right in equity to call for a partition. The purchaser here having paid only Rs. 5,000 out of the Rs. 20,000 due under the agreement of 1902 has no equitable right. Further, the right in equity is merely a personal right, and cannot be exercised after the death of the vendor: *Manjaya* v. *Shanmuga* (5), *Maharaja of Bobbili* v. *Venkataramajulu Naidu* (6).

De Gruyther, K. C., in reply. Although the transaction in 1905 was not specifically referred to, it was pleaded that Nain Singh was separate. An agreement, even by parol, to hold in specific shares effects

(1) (1866) 11 Moo. I. A. 75, 90.
(2) (1878) I. L. R. 4 Calc. 434; L. R. 5 I. A. 228, 232.
(3) (1912) I. L. R. 35 All. 80; L. R. 40 I. A. 40.
(4) (1917) I. L. R. 39 All. 437; L. R. 44 I.A. 176.
(5) (1913) I. L. R. 38 Mad. 684.
(6) (1914) I. L. R. 39 Mad. 265.

a separation : *Parbati* v. *Naunihal Singh* (1). The separation alleged to have taken place about 1892 was negatived merely because the Courts erroneously thought that either an agreement or a decree was necessary. On the recent authorities referred to, the claim by Nain Singh, followed by the agreement, ended the joint status, and it is not material whether the arbitration was actually carried through.

The judgment of their Lordships was delivered by

April 6. VISCOUNT CAVE. This is an appeal by the defendant in the suit against the decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the Additional District Judge, East Berar, Amroati, and giving judgment for the plaintiffs.

Nain Singh and the plaintiffs, who were the issue of his brother Khannu Singh, formed at one time a joint Hindu family, resident in Berar and subject to the law of the Mitakshara, as there interpreted. Before the date of the deed next mentioned, Nain Singh and the plaintiffs had become separate in mess and residence, but not in estate.

By registered sale-deed dated September 29, 1902, Nain Singh sold his half share of the ancestral property of the family (with some movable property) to Syed Kasam for Rs. 20,000, of which Rs. 15,000 were admitted by the vendor to have been received in advance, and the remaining Rs. 5,000 were paid to him in the presence of the registering officer. No partition was then effected, but the purchaser was allowed to hold and cultivate certain parts of the property corresponding in value to a half share. On December 4, 1905, all the members of the family signed a *karar-nama* appointing one Ghasi Ram as arbitrator to

(1) (1909) I. L. R. 31 All. 412 ; L. R. 36 I. A. 71.

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partition the property and agreeing to accept whatever partition he might make. The arbitrator divided the property into two lists, one (representing a moiety in value) containing the property to be allotted to Nain Singh, and the other (representing the remaining moiety in value) containing the property to be allotted to plaintiffs. The latter list was apparently divided into three sub-lists, one for each of the plaintiffs. These lists were handed to Nain Singh. The formal division was not at once carried out, as Nain Singh died on March 26, 1906; but after his death the lists appear to have been acted upon by all the persons interested, as the purchaser was put into possession of the property allotted by the arbitrator to Nain Singh, and the plaintiffs from time to time dealt with various parts of the lands contained in their lists.

On July 23, 1914, the plaintiffs brought the present suit against Syed Kasam, claiming possession of the lands of which he had been so put into possession on the ground that the family had continued joint in estate down to the death of Nain Singh, and that on the death of Nain Singh's widow (which occurred on July 10, 1910) the property had passed to them. They also alleged that the half share had been sold by Nain Singh to the defendant "for a bogus consideration of Rs. 20,000"—an expression which has no legal signification, but which apparently meant that the consideration of Rs. 20,000 had not in fact been paid.

The suit was heard by the Additional District Judge, East Berar, who dismissed it, holding that there had been an effective agreement for partition, and that the Rs. 20,000 had been paid. On appeal, the Additional Judicial Commissioner held that there had been no partition, and that although Rs. 5,000, part of the purchase money, had been paid before the

registering officer, the balance of Rs. 15,000 had not been paid, or if paid, had been at once returned. He declined to admit the plea that the *kararnama* effected a severance of the joint tenancy on the ground that this had not been specifically pleaded. He therefore set aside the decree of the lower Court, and directed the defendant to put the plaintiffs in possession of the property in suit on payment by the plaintiffs of Rs. 5,000. Against this decree the present appeal was brought. The original appellant, Syed Kasam, has died pending the appeal, and is represeuted by the present appellant.

Two points are taken on behalf of the appellants: First, it is said that the law of the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that according to that law as so interpreted Nain Singh had power to sell his undivided share in the joint family property without the consent of his co-owners; and their Lordships do not doubt that this statement is correct. But to this point it was answered by the Judicial Commissioner that the sale by Nain Singh in 1902 only gave to the purchaser an equity to enforce a partition, and that such equity was displaced by the fact that the purchase money was not fully paid. In view of their Lordships' opinion on the second question, to be hereafter stated, and of the fact that the evidence on the question of the payment of Rs. 15,000 was not fully brought to their notice, they do not think it necessary to deal with this point; nor do they express any opinion on the question whether, even if it was proved that part only of the purchase money was paid, the form of decree adopted by the Judicial Commissioner was appropriate to the case.

But, secondly, it is argued on behalf of the appellants that the transactions which took place in the

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year 1905 effected a severance of the joint estate, and accordingly the plaintiffs have no right to sue; and in their Lordships' opinion this argument should prevail.

It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place: and the commencemen of a suit for partition has been held to be sufficient to effect a severance in interest even before decree: see *Appovier* v. *Rama Subba Aiyan* (1), *Joy Narayan Giri* v. *Girish Chunder Myti* (2), *Girja Bai* v. *Sadashiv Dhundiraj* (3), *Kawal Nain* v. *Prabhu Lal* (4).

In the present case it was proved by the evidence of one of the plaintiffs (Jorawar Singh) and of Ghasi Ram that Nain Singh claimed his half share of the ancestral property, and that after discussion all the joint holders signed the agreement of December 4, 1905, appointing Ghasi Ram to partition the property and agreeing to accept whatever partition he might make; and this claim and agreement were quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship. It is true that the agreement was not specifically pleaded by the defendant Syed Kasam; but he pleaded that Nain Singh was separate in estate, and relied in his written statement on the division of the property which resulted from the agreement, and their Lordships do not think that the agreement leading up to that division can be put out of account.

(1) (1866) 11 Moo. I. A. 75.
(2) (1878) I. L. R. 4 Calc. 434; L. R. 5 I. A. 228.
(3) (1916) I. L. R. 43 Calc. 1031; L. R. 43 I. A. 151.
(4) (1917) I. L. R. 39 All. 496; L. R. 44 I. A. 159.

The subsequent division of the property between the co-owners was accepted by all parties and is not said to have been unfair; and there appears to be no reason why it should be disturbed. In these circumstances the sale to Syed Kasam could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives; and any proceedings for that purpose were statute barred before the commencement of the suit. This is sufficient to dispose of the plaintiffs' claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Judicial Commissioner should be set aside and the decree of the District Judge restored, and that the respondents should pay the costs in both the Courts below and the costs of the present appeal.

Solicitor for appellant's representatives: *E. Dalgado.*

Solicitors for respondents: *Downer & Johnson.*

A. M. T.