by art[illegible]gard to the requirements of s. 3 of Act XIX of 1841. The contrary, after citing the parties and having them before him, he has himself recorded that they may properly be left to their remedy by means of a regular suit, so far as the dispute between them is concerned.

In these circumstances, his jurisdiction under Act XIX of 1841 ceased. The order for taking an inventory had not been made prior to the time when he decided that the parties should be referred to a regular suit, and the Judge had no jurisdiction then to make an order for such inventory to be taken. He directs that the inventory is only to be taken in certain circumstances and under certain conditions; but the Act does not contemplate such order being made subject to conditions. The order appears to us to be made without jurisdiction and must be set aside on that ground. The respondent must pay the petitioner's costs in this Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

TELLIS (PLAINTIFF), APPELLANT,

and

SALDANHA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. Aug. 26. Oct. 8.

Indian Succession Act, 1865, effect of, on estates of Native Christians previously following Hindú law.

A and J, brothers, Native Christians, descendants of Brahmans, were living in coparcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, A died:

Held that J did not take the whole estate on the death of A by survivorship.

APPEAL from the decree of C. Venkoba Ráu, Subordinate Judge at Mangalore (South Canara), modifying the decree of A. Venkataramana Pai, District Múnsif of Mangalore, in suit 286 of 1883.

The facts of the case, so far as they are necessary for the purpose of this report, are set out in the judgment of the Court (Collins, C.J., and Parker, J.).

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* Second Appeal 1053 of 1885.

TELLIS v. SALDANHA.

The Acting Advocate-General (Mr. *Shephard*) and *Ayyana Ráu* for appellant.

Bháshyam Ayyangár and *Strinivása Ráu* for respondents.

JUDGMENT.—The first question raised in this second appeal is a very important one. The question is whether the Hindú rule of survivorship obtains in the families of Native Christians, who were living in undivided coparcenership at the time of the passing of the Succession Act and who have not since effected a partition.

The plaintiff, José Tellis, and Augustine Tellis, the late husband of defendant No. 1, were Native Roman Catholic Christians and were living in coparcenership as to their ancestral lands when the Indian Succession Act came into force in 1866. Their father had died previous to 1866. Augustine Tellis died in 1872, leaving a widow, defendant No. 1, and a daughter, Anna Tellis, defendant No. 2. The plaintiff's contention is that, by the rule of survivorship, he became sole owner of the ancestral property on the death of his brother in 1872 to the exclusion of defendants Nos. 1 and 2.

Both the Courts below have disallowed the plaintiff's claim. The District Múnsif held, on the authority of *Ponnusámi Nádan* v. *Dorasámi Ayyan*,(1) that the succession to the property of Augustine Tellis—including his share in the ancestral estate—was governed by the Succession Act. He referred to a case decided by the same Judges reported in 8, Indian Jurist, page 30, which appeared to him inconsistent with the former ruling, but considered himself bound to follow the ruling in the authorized reports.

On appeal, the Subordinate Judge, though not considering the Jurist case inconsistent, also followed *Ponnusámi Nádan* v. *Dorasámi Ayyan*.

The learned Acting Advocate-General, on second appeal, argues that both these cases are really in favor of the plaintiff's contention. He points out that in the latter case the plaintiff's father died after the Succession Act came into operation and urges that plaintiff may at his birth have acquired an interest to which the rule of survivorship gives effect, and of which the subsequent enactment of the Succession Act will not deprive him. It was urged that the Jurist case was on all fours with the present, since in that case also the father had died subsequent to the passing of

(1) I.L.R., 2 Mad., 209.

Act; and with regard to joint family property there properly speaking no succession, but the rule of survivorship applied. The Succession Act, it was said, applied only to property which was inheritable.

Against this Mr. *Bháshyam Ayyangár* urges that the term "joint tenants," as applied to Hindú coparceners with respect to their ancestral property, is misleading, since among them the joint tenancy with rights of survivorship is by operation of law and not by consent of the parties. He argues that, under the law of the Mitákshará, the chance of an increased share on partition accruing by the rule of survivorship is merely a contingent or possible right, and not a vested right; that if it were a vested right it might be attached and sold by a creditor, but it is not attachable (s. 266, cl. (*k*) of the Code of Civil Procedure); that the cases to which the Succession Act does not apply are cases in which the parties are Hindús by religion—*Joseph Vathiar's case*; (1) and hence that it is impossible, where the Succession Act is in force, to give to a Christian a contingent right which could only accrue to him were he a Hindú by religion and governed by Hindú law.

In reply the Acting Advocate-General argues that when two persons have come into such a relation that the rule of survivorship applies there can be no question of inheritance, and that whatever would be the case under the Bengal law, the plaintiff's claim by survivorship is good under the law of the Mitákshará. (Mayne, s. 242.)

The passage relied on by the plaintiff in *Ponnusámi Nádan* v. *Dorasámi Ayyan* does not appear to us to carry the proposition further than this—that where a Native Christian, whose family had up to 1866 observed the Hindú law of succession, had by such law acquired at his birth an interest in ancestral property, the subsequent enactment of the Succession Act would not divest him of such interest. It would still be open, therefore, to a son to sue his father and brother for a partition and separation of such share in the ancestral family estate. But it does not follow from this that until a partition was made all the rules of Hindú law would remain applicable after the passing of the Succession Act. It will be hardly contended that a managing member could bind the shares of the others, or that it would not be open to each member to give

(1) 7 M.H.C.R., 121.

TELLIS v. SALDANHA.

or bequeath his share to a stranger, and yet such alie... be opposed to, and inoperative under, Hindú law, though ... under the Succession Act.

In the Jurist case the present point did not arise. That was a suit brought by one of three brothers (Roman Catholic Christians), whose family had adhered to the Hindú law of succession up to 1866 and had not afterwards effected any partition. The father died in 1869 and the ancestral property continued to be managed by the second son as joint family property. On a suit brought by one of the brothers for partition, it was held that the Indian Succession Act did not apply, since on the father's death the estate which had been held by him and his three sons jointly continued to be held by the survivors, and that as there was no separate estate, no letters of administration were required. It was also held that the plaintiff's share was one-third, not one-fourth.

In that case no widow or daughter appeared to put in any claim under the Succession Act, and the three brothers had of course under either law equal rights in the father's share. As the only property in suit was property which the members of the family had practically agreed among themselves to treat as if it were joint family property under Hindú law, it would naturally follow that the plaintiff was entitled to one-third, and the question now in issue did not arise.

We are of opinion that coparcenership and the right of survivorship are incidents peculiar to Hindú law, which law, as far as it affected Native Christians, was repealed by the Succession Act. The Succession Act did not however take away any vested rights, and Augustine Tellis had a vested interest on 1st January 1866. That interest continued to vest in him till his death in 1872, when a case of intestacy arose which was governed by the Succession Act and not a case of coparcenary and survivorship governed by Hindú law. The right of survivorship pre-supposes that the rule of Hindú law is the rule of decision at the date of the coparcener's death, but the effect of the Succession Act was to convert vested coparcenary rights into individual rights and to subject such rights in cases of intestacy to the rules of succession provided by that Act. We are of opinion that the decision of the Courts below was right.

The next point is whether defendants Nos. 1 and 2 are liable to account to plaintiff for half rent for land No. 2 for three years or six. The Subordinate Judge ruled that the claim was governed

by art. 61 (apparently a clerical error for 62) of schedule II of the Limitation Act, and it is argued for the plaintiff that the case is similar to *Gooroo Das Pyne* v. *Ram Narain Sahoo.*(1)

Per contra Johuri Mahton v. *Thakoor Nath Lukee* (2) and *Kundun Lal* v. *Bansi Dhar* (3) were referred to. The Calcutta case does not apply. The Allahabad case was one in which one of two heirs (each entitled to a moiety of deceased's estate) received the whole of a certain sum of money in a banker's hands. It was held that art. 62 there governed the case.

The present case is that defendants Nos. 1 and 2, who were jointly entitled with plaintiff to the whole of rent for land No. 2, are called upon to give up to plaintiff his moiety. We think art. 62 will govern the case.

Lastly, it is urged that the Subordinate Judge improperly refused to enforce the clause for forfeiture against defendants Nos. 3 and 4. It is found that plaintiff refused to accept from these defendants a moiety of the rent, which was really all he was entitled to, and in any case it would be extremely unjust to enforce such a clause under present circumstances against tenants who have been holding on a mulgaini lease since 1841. The case is similar to *Nárayana* v. *Náráyana*,(4) and we think the penalty is one which should be relieved against.

The second appeal, therefore, fails and we dismiss it with costs.

PRIVY COUNCIL.

APPA RAO, *In re.*

P.C. J.C.* 1886. July 17.

Re-hearing—Infancy of party at the time of the hearing of appeal—"Res noviter" not itself a ground for a re-hearing.

There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard.

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(1) I.L.R., 11 I.A., 59. (2) I.L.R., 5 Cal., 830.
(3) I.L.R., 3 All., 170. (4) I.L.R., 6 Mad., 327.

* *Present:* Lord WATSON, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.