

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1878
Dec. 2.

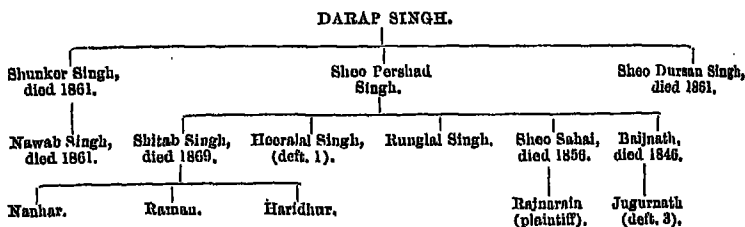
RAJNARAIN SINGH (PLAINTIFF) v. HEERALAL AND OTHERS
(DEFENDANTS).*

Mitakshara Law—Survivorship until Partition—Rule for Partition.

In joint families governed by the Mitakshara law, the principle of survivorship is in force until partition, and upon partition distribution amongst the different members of the family should be made not according to the ordinary Hindu rule of heirship, but *per stirpes*.

THIS was a suit brought by one Rajnarain Singh for the partition of his share in the joint family property, and for the recovery of a share in monies arising from the sale of certain properties.

The following is the genealogical tree of the family, which was governed by the Mitakshara law :—



The plaintiff alleged that Shunker Singh, Sheo Pershad, and Sheo Dursan were three brothers living together in commensality at the death of Darap Singh; that Shunker Singh died first, leaving a son Nawab Singh, who also died childless in 1861; that Sheo Dursan Singh also died childless in the year 1861; and that on the latter's death the whole property of Darap Singh devolved on Sheo Pershad; and that, on the death of Sheo Pershad in 1863, the whole property was divided into five portions amongst the sons and grandsons of Sheo Pershad, viz., one-fifth to Heera Lal, one-fifth to Runglal, one-fifth to himself,

* Regular Appeal, No. 337 of 1876, against the decree of Baboo Matadin Roy Bahadur, Officiating Subordinate Judge of Patna, dated the 31st of August 1876.

his father having died in 1856, one-fifth to Jugurnath, the son of Baijnath, who had died in 1846, and one-fifth amongst the sons of Shitab Singh, who had died in 1869.

The defendants, the surviving sons and grandsons of Sheo Pershad, alleged, that Sheo Pershad, the grandfather of the plaintiff, died before his other two brothers in 1859; and consequently that the plaintiff was only entitled to one-fifth of the estate left by Sheo Pershad, the estate of Sheo Dursan Singh and Nawab Singh devolving according to Hindu law on the cousins and nephews,—*i. e.*, Heeralal and Runglal, who alone, amongst the sons of Sheo Pershad, were alive at that period; and that the plaintiff being a grandson of a brother could have no share in such estate.

The Subordinate Judge found, that the plaintiff had failed to make out that his grandfather outlived Shunker and Sheo Dursan Singh, and that, on the other hand, the defendants had produced a certificate under Act XXVII of 1860, dated 6th August 1861, which proved, that after the death of Sheo Dursan Singh, Nawab Singh, Shitab Singh, and Runglal and Heeralal had applied for a certificate to collect the debts due to Sheo Dursan Singh, and in this certificate it distinctly appeared that Sheo Pershad Singh was styled “deceased;” he therefore was of opinion that Sheo Pershad had died before 1861,—*i. e.*, before the death of Nawab Singh and Sheo Dursan Singh,—and gave the plaintiff a decree for a one-fifteenth share of the entire property of Darap Singh, he being only entitled to a share in the estate left by his grandfather, and inasmuch as Runglal and Heeralal had admitted that they had held the management of the joint estate, he ordered them to render to the plaintiff an account of the mesne profits and other receipts from the death of Sheo Pershad Singh.

The plaintiff appealed to the High Court. (Prior to the appeal being heard, and after the judgment of the lower Court, one of the defendants, Runglal, died.)

Moulvie *Mohamed Yusuf* for the appellant.

Mr. *R. E. Twidale* and Baboo *Chunder Madhub Ghose* for the respondents.

1878

 RAJNARAIN
 SINGH
 v.
 HEERALAL.

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The judgment of the Court, so far as is material to the present report, was delivered by—

GARTH, C. J. (McDONELL, J., concurring).—We consider that this case is governed by the Full Bench judgment in the case of *Bhimul Doss v. Choonee Lall* (1), where it was virtually decided, that in joint families governed by the Mitakshara law, the principle of survivorship obtains until partition, and that upon a partition taking place, the distribution amongst the different members of the family is to be made not according to the ordinary Hindu rule of heirship, but *per stirpes*.

Runglal having died subsequently to the institution of the suit, and also after the decision in the lower Court, the plaintiff will be entitled to a one-fourth share instead of the one-fifth share claimed by him.

Appeal allowed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1879
 May 8.

LOKI MAHTO AND OTHERS (PLAINTIFFS) v. AGHOREE AJAIL LALL AND OTHERS (DEFENDANTS).*

Practice—Appeal from Order of Remand—Civil Procedure Code (Act X of 1877), ss. 562, 588, cl. (w)—Co-sharers—Sale of Share in Execution—Title.

Upon an appeal under s. 588, cl. (w), of the Civil Procedure Code, from an order of an Appellate Court under s. 562, remanding a case which has been disposed of upon a preliminary point in the Court of first instance, the High Court may enter into the merits of the adjudication by the Court of first instance on the preliminary point, and may, if it finds the order of the lower Appellate Court defective, allow the party, who had the benefit of a decree in the first Court, to retain that benefit.

The purchaser of the rights and interests of a judgment-debtor, who is a member of a joint family, at a sale in execution of a decree, does not

(1) I. L. R., 2 Calc., 379.

* Appeal from Appellate Order, No. 108 of 1878, against the order of Baboo Matadin Roy Bahadur, Subordinate Judge of Gya, dated the 28th of March 1878, reversing the order of Baboo Sheo Saran Lall, First Sudder Munsif of that District, dated the 5th of December 1877, and remanding the case to him or retrial.