1885

BHUBAN PARI v. SHAMANAND DEY.

The decree of the District Judge must, therefore, be reversed. The plaintiff's suit for *khas* possession will be dismissed, but it will be declared that the sale to defendant No. 6 is invalid, having been made without the consent of the plaintiff zemindar. Defendants 1 to 5 will have their costs in all the Courts against the plaintiff. Defendants Nos. 6 and 7 will pay their own costs.

Appeal decreed in part.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

JOGENDRO BHUPUTI AND OTHERS (DEFENDANTS), *v.* NITTYANUND MAN SING (PLAINTIFF).*

1885 June 2.

Hindu Law—Inheritance—Mitakshara—Sudra family—Dasiputra or son by a slave girl—Right of survivorship.

In a Sudra family of the Mitakshara school, a *dasiputra* or illegitimate son by a slave girl is a coparcener with his legitimate brother in the ancestral estate and will take by survivorship.

THIS was a suit for the possession of the ancestral *raj* and zemindari of Killa Sukinda in the Province of Orissa by right of survivorship under the Mitakshara law. The plaintiff alleged that he was a *Kshetri* or a member of the regenerate class and a son of Raja Upendra Bhuputi by a *phulbibahi* wife, Rani Chandra Kala *alias* Rambhudei; that according to family custom Raja Nundkishore Bhuputi by his oldest wife, Rani Nilmoni Patmabadie, succeeded to the *raj* and zemindari, but the plaintiff continued to live in commensality with him and receive his maintenance; that Nundkishore Bhuputi died on the 5th March 1878, leaving him surviving three widows and a daughter, and under the *shastras* the plaintiff, as the oldest surviving brother, was entitled to succeed.

It was contended on behalf of the defendants, the widows of Nundkishore Bhuputi, that the Rajas of Sukinda were not *Kshetri* but *Sudra* Khandaits; that the late Raja had left an adopted son, Jogendro, the minor defendant; and that, even if the adoption

* Appeal from Original Decree No. 100 of 1883, against the decree of W. Wright, Esq., Subordinate Judge of Cuttack, dated the 29th of March 1883.

failed, the plaintiff, as the son of a concubine, was not entitled to inherit.

The Court of first instance (the Subordinate Judge) found there was no adoption, and held that the parties being all *Sudras* the plaintiff as a *dasiputra* was under the Mitakshara law entitled to succeed to his brother by survivorship, and gave a decree.

The defendants appealed to the High Court.

Mr. *W. C. Bonnerjee*, Baboo *Kali Prasanna Dutt* and Dr. *Guru Dass Bonnerjee*, for the appellants.

The *Advocate General* (Mr. *G. C. Paul*), Baboo *Annada Pershad Bannerjee*, Baboo *Amarendra Nath Chatterjee*, Baboo *Kuruna Sindhu Mookerjee* and Baboo *Jogendro Chunder Bose*, for the respondent.

The facts and arguments sufficiently appear from the judgment of the Court (GARTH, C.J., and BEVERLEY, J.) which was delivered by

GARTH, C.J.—The plaintiff in this case sued to establish his title to the *raj* and zemindary of Killa Sukinda in the District of Kuttack. The plaintiff's father, Raja Upendra Bhuputi, Harichundun Mohapatra, admittedly died on the 23rd October 1857, leaving (1), a son Nundkishore by his Rani Nilmoni Patmabadia; (2), the plaintiff, his son, by a woman called Rambha or Chandra Kala; and (3), a third son, Abhirkishore, by another woman called Asili or Raskala. He was succeeded in the *raj* by his legitimate son, Nundkishore, who died on 5th March 1878, leaving no son but three widowed Ranis, and a daughter by one of them.

The plaintiff claimed to succeed to his half-brother Nundkishore on the allegation that his mother was a lawful *phulbibahi* wife of Raja Upendra.

The three widows on the other hand set up one Jogendro Bhuputi as the heir to the *raj*, alleging that he had been adopted by the late Raja on the 18th April 1877; and they further pleaded that, even if the adoption was not proved, the plaintiff could not succeed inasmuch as he was the illegitimate son of a slave girl, and that in that case the heirs would be the widows and the minor daughter of the deceased; or, if women were debarred from the

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

succession, then Jogendro would be entitled as the next legitimate heir of Raja Nundkishore.

The Subordinate Judge of Kuttack who tried the suit found against the adoption of Jogendro, and gave the plaintiff a decree. He came to the conclusion that the plaintiff being the son of a Sudrapathee by a slave girl was entitled to the succession by right of survivorship according to the Mitakshara law.

Against this finding the defendants have appealed, urging—

(1) That the Subordinate Judge is wrong in his view of the law;

(2) That even if his view of the law is correct, he is in error in finding that the Raja's family are *Sudras* (that being the only class among whom an illegitimate son can succeed); and

(3) That the adoption of Jogendro is sufficiently proved.

The plaintiff respondent on the other hand has filed certain cross objections to the effect that the Subordinate Judge should have found that the plaintiff's mother was a lawful *phulbibahi* wife.

The points therefore that we have to consider are—

(1) The question of adoption: if Jogendro was really adopted by the late Raja, the plaintiff obviously can have no claim to succeed; if, however, the finding of the Court below on the question of adoption be upheld, it will be necessary then to consider—

(2) Whether the plaintiff was a legitimate son of the late Raja by a *phulbibahi* wife;

(3) If not, whether he is nevertheless entitled to succeed on the ground of survivorship, as found by the Court below. And this last question involves the further point as to—

(4) Whether the parties are *Sudras*.

(1) First as to the question of adoption.

Raja Nundkishore died on the 5th March 1878, and it appears that a few days afterwards the three widows petitioned the Court of Wards to take charge of the estate on behalf of the adopted son, who was, and still is, a minor. At about the same time the plaintiff applied to have the estate made over to him as heir. An enquiry was held by Mr. Farrer, the Sub-divisional

Officer of Tajpore, who reported to the Collector of Kuttack on the 18th and 20th March 1878, that the alleged adoption was never really made, and also that the plaintiff, as the son of a slave girl, had no right to the succession. In this conclusion the Collector, who appears to have taken part in the enquiry, concurred. Ultimately, on the 30th December 1878, the Collector applied to the Civil Court to attach the estate under Regulation V of 1799, and Regulation V of 1827, until some one or other of the claimants should establish his right to the succession, and this was done on 6th January 1879. Claims were then preferred to the Judge, who thereupon made a further summary enquiry, and by an order dated 13th October 1879, the Judge (Mr. *Macpherson*) found against the adoption. A subsequent order by his successor (Mr. *Cochrane*), dated 17th February 1880, declared the plaintiff entitled to succeed to the estate, and put him into possession. These orders, however, were set aside by this Court on 23rd June 1880, as having been made without jurisdiction, and the plaintiff was required to give up possession of the estate, the various claimants being referred to a regular suit to establish their right to the succession. The plaintiff accordingly brought the present suit, in which the facts have been enquired into for the third time.

The Subordinate Judge, after noticing the evidence given on this point by both sides, sets out four reasons which satisfy him that no adoption in fact took place.

These reasons are :—

"1*st*.—An adoption was extremely unlikely at the time as the pregnancy of the youngest Rani must then have been known or at least suspected.

"2*nd*.—Had there been an adoption, it would naturally have been at the Raja's expense, and the expenditure would have been noted in his accounts; but, strange to say, those accounts contains no mention of any such expenditure.

"3*rd*.—The investiture ceremony would also, in case of an adoption, have been performed at the house of the adoptive, and not, as it is admitted to have been, at that of the natural parents.

"4*th*.—The adoption, too, would not, I imagine, have been kept a secret until after the Raja's death, as, although there may have

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

been an object for concealment prior to the birth of the youngest Rani's daughter, there certainly was none after, and that the adoption should notwithstanding not have been mentioned in public seems to me to indicate with tolerable clearness that it could not have been made."

The adoption is said to have taken place on the 18th April 1877; and the youngest Rani's daughter was born in January 1878. It is scarcely possible, therefore, that the Rani's pregnancy could have been known on the date on which the adoption is said to have taken place. Whether the adoption really took place on that date is a different matter, but we think there is not much force in the first of the above reasons which are given by the Subordinate Judge. The other reasons, however, seem well founded, and it is to be observed that, although they have been advanced on the occasion of each enquiry, there has been no satisfactory attempt to answer them.

The oral evidence in support of the adoption is to be found in the depositions of: *Pundub Thatmanthan*, a Paik, p. 123 of the Paper book; *Rajguru Upendra Panchanun*, the Priest, pp. 127, 130; *Dinobundhu Patnaik*, a Mohurrir, pp. 148, 158-9; *Bawaribundhu Patnaik*, a Mohurrir, pp. 162, 164, 165; *Madhub Patnaik*, Sherishtadar, pp. 172, 177; *Nilmoni Putmabadu*, Dowager widow, pp. 189, 199; *Markutmali Patmabadu*, Dowager widow, pp. 202, 205; *Raja Gour Mun Singh*, of Parikud, pp. 207, 208.

This evidence is for the most part general and vague, but there are several important contradictions as to the performance of the ceremony and the invitations sent out, and presents made on the occasion. Some importance has been attached to the evidence of the Raja of Parikud, who has been examined with a view to meet the objection that no one appeared to be aware of any adoption before the late Raja's death. This Raja says that he met Nundkishore in 1875 at Kuttack, and that he then told him of his intention to adopt a son (the translation in the paper book is not quite accurate), and that within two years from that time he received an invitation to the ceremony and sent presents in return. The letter of invitation, however, though said to be still in existence, is not produced, while on this and other matters the Raja's testimony is contradicted

by other witnesses. Moreover there seems no sufficient reason why Nundkishore should in 1875 entertain the idea of adopting a son. He was at that time no more than 32 years of age (p. 140). He had three Ranees one of whom had given birth to a son only the year before (p. 140); and another of whom gave birth to a daughter some three years later. Under these circumstances we are unable to attach any credit to the testimony of the Raja of Parikud.

It is worthy of remark that several important witnesses who are said to have been present at the time of the ceremony, and most of whom were examined by Mr. Farrer and the District Judge, have not been called as witnesses in this suit. These witnesses are the following:—*Padmalub Tikaitra*, the father of the so-called adopted son Jogendro; *Mokund Banpati*, the family priest; *Narsingh Paharaj*, the priest who is said to have negotiated the adoption; *Doyamohi Patnaik*, the late Raja's Dowan who appears to have denied all knowledge of any adoption; and *Degamber Rajguru*, a priest said to have been present at the ceremony of adoption.

These witnesses were for the most part disbelieved at the time of the former enquiry, and in this trial their places have been taken by others, and the points on which they contradicted each other have thus been carefully avoidod.

Much has been made of the fact that on Nundkishore's death Jogendro was immediately placed on the *guddee* as his successor, and that it was he who gave the order for the cremation of the deceased. It is said that this was done in the presence of the plaintiff who thus acquiesced as it were in Jogendro's assumption of the *raj*. But it may be that the plaintiff was under some misapprehension at that time, or he may have been persuaded by the Ranis not to question the alleged adoption, and it may not have occurred to him until later that, if the adoption was set aside, he might possibly be able to secure the succession for himself.

Then we also think that some weight must be attached to the fact that, when Mr. Farrer visited the Rajas of Sukinda and Panchkot in November 1877, nothing whatever was said by either

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

of them to lead him to suppose that any adoption had either taken place or was in contemplation.

On the whole we see no sufficient reason to depart from the conclusion arrived at on this point by the lower Court, *viz.*, that the fact of Jogendro's adoption by the late Raja has not been established.

(2.) The next point is whether the plaintiff is the legitimate son of a *phulbibahi* wife.

On this point, besides the oral evidence adduced by the plaintiff, the learned Advocate-General has drawn our attention to certain documents upon the record which show that, immediately after the death of Raja Upendra, the plaintiff was represented to be the son of a *phulbibahi* wife. Nundkishore being a minor, the estate was at that time taken under the charge of the Court of Wards, and the first document we are referred to is a copy list of the inmates of the Rajbari, printed at pp. 104-7 of the brief, in which Nittyanund Man Sing is entered as a son of a *phulbibahi* wife. The list, indeed, mentions no less than eight *phulbibahi* wives, besides a number of slave girls, including Rambha Behara and Asili Behara. This list appears to have been given by the Pat Rani Nilmoni, to the Nazir of the Collector on the 8th December 1857, when he went to take charge of the estate on behalf of the Court of Wards (p. 282). On the 18th January 1858 certain allowances for the *amlah* and members of the family were sanctioned by the Commissioner, and in the order of sanction (pp. 107-9) we find Nittyanund Man Sing under the head of *phulbibahi*, &c., described as the son of Chandra Kala. We are next referred to a petition presented by the Pat Rani Nilmoni to the Commissioner on the 17th December 1858, in which Chandra Kala is again mentioned as a *phulbibahi* and Nittyanund Man Sing as a *phulbibahi* son, and lastly a number of receipts have been filed showing that maintenance was regularly paid in accordance with the list of December 1857.

All these documents, it is said, having been in existence some twenty years before the present claim was preferred, are good and sufficient evidence of the truth of the plaintiff's allegation that he was the son of a *phulbibahi* wife Chandra Kala.

On the other hand it is contended that no reliance can be placed on these documents for this reason, that it was the Pat Rani's object to swell the maintenance charges, and a *phulbibahi* wife would receive a larger allowance than a slave girl, and moreover the Rani was very anxious to prevent the Raja Nundkishore from being sent to the Wards Institution in Calcutta, and this was another reason why she would purposely swell the maintenance charges of the household in order that there might be no sufficient surplus to pay for the minor Raja's education. On this point we would refer to the evidence of the Mukhtar Rajbullubh Ghose, witness No. 6, for the plaintiff (p. 35), and that of Madhub Patnaik, witness No. 14 for the defendants (pp. 107-1). It is important also to notice that in her petition of the 17th December 1858 that Pat Rani speaks of four persons in all, that is to say three Ranis and one *phulbibahi* only, as having had maintenance in the time of the late Raja Upendra.

Under these circumstances we think that too much weight must not be assigned to these documents. As opposed to them we have the statement made by the woman Rambha herself before Mr. Farrer, a statement which the Subordinate Judge seems to have considered almost conclusive on the point. This woman, it is to be observed, is mentioned in the list at p. 104 as a different person from Chandra Kala, and it can hardly therefore be contended that the list is correct, and that Chandra Kala and Rambha are identical. In her statement to Mr. Farrer (p. 210) Rambha said that Man Sing was her son, and that she was never married to Raja Upendra. Man Sing also admitted both in his deposition (p. 209), and in his petition of 29th April 1878 (p. 15, 16 of the supplementary papers) that the Rambha who was examined was his mother. The plaintiff has not himself ventured to go into the witness box to contradict or explain these admissions, and we think, therefore, that in the face of them we cannot hold that Nittyanund Man Singh was not the son of Rambha Behara, or that Rambha Behara was the same person as Chandra Kala *phulbibahi*. We agree with the lower Court that the plaintiff's mother was a slave girl and not a legal wife married after the *phulbibahi* form.

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

We next come to the question whether the plaintiff, as the son of a slave girl, is entitled to succeed to the estate on the death of the late Raja, his legitimate brother.

It is admitted that, if the plaintiff's father belonged to one of the regenerate classes, his illegitimate son could not under any circumstances succeed, and it is therefore of importance to consider in the first place whether the Rajas of Sukinda are genuine Kshetryas or belong to the Sudra caste.

In this connection it is to be observed that, while the plaintiff in his plaint describes himself as a *Khetri* by caste the Rani defendants in their written statements allege that the Rajas of Sukinda are Khandait Sudras. These allegations were probably made on both sides without perceiving the consequence that they might involve. But it is contended that the fact of Jogendro being invested with the sacred thread tends to show that the Sukinda Rajas as well as the Panchkot Rajas belonged to the Kshetrya caste. We think that this circumstance, although well worthy of notice, is by no means conclusive upon the point. No doubt the Rajas of Sukinda, like other Rajas of Kuttack, endeavoured to assume the rank of true Kshetryas, but whether they were so in fact is more than doubtful. The evidence seems to show conclusively that they were Khandaits, but Khandaits are not necessarily Kshetryas. On the contrary the Subordinate Judge, a gentleman of much experience, states confidently that a Khandait is of the Sudra class, and without going the length of confirming that assertion as a universal rule, we think that the evidence in this case tends strongly to the conclusion which has been arrived at by the Court below that the plaintiff's father was a Sudra.

There is little or no reliable testimony as to his being Khetri, whilst on the other hand we have seen that the Ranis themselves in their written statements allege that the Rajas of Sukinda were Sudra Khandaits, which they would probably have been unwilling to do if their caste had been really that of Khetri; and the priest of the family, who is a Brahmin of 80 years of age, and who has officiated as the family priest during the time of Upendro Raja, says distinctly that the Rajas of Sukinda are reported to be Khetris, but in reality they are

Khandaits, evidently using the term "Khandaits" in contradistinction to "Khetris," and thus confirming the view of the Subordinate Judge that Khandaits are not Khetris but Sudras.

Assuming then that the plaintiff's father was a Sudra and his mother a female slave, the question is whether, according to the rules of Hindu law, and having regard to the fact that the Raja's family belongs to the Mitakshara school, the plaintiff is entitled by right of survivorship to succeed to the *raj* after the death of his half brother Nundkishore, Upendra's legitimate son. If it were a question of *heirship*, that is to say if the plaintiff did not form part of the joint family with Nundkishore, and if the *raj* descended *to Nundkishore's heir*, it is alleged that Jogendro as the nearest of kin to Nundkishore would be heir to the *raj* in preference to the plaintiff. But if the plaintiff formed part of the joint family with Nundkishore, it is contended that upon Nundkishore's death he became entitled to the *raj* as he would to any partible property by survivorship.

The Subordinate Judge, relying upon the case of *Sadu* v. *Baiza* (1), has held that the plaintiff is entitled to succeed to the *raj* by right of survivorship.

On the other hand we have been referred to the case of *Krishnayan* v. *Muttusami* (2) in which it was held by a Division Bench of the Madras High Court that, although an illegitimate son might succeed to the estate of his father, he could not exclude any right by survivorship that accrued to his father's brother, nor could he succeed to the estate of that father's brother.

In the Bombay case above mentioned, which was the decision of a Full Bench concurring with Mr. Justice Nanabhai Haridas, the facts were as follows:—

One Manajee died leaving surviving him his two wives Baiza and Sabitri, a son Mahadu by Baiza, a daughter Darya by Sabitri, and an illegitimate son Sadu by a continuous concubine. Subsequently Mahadu and Sabitri died, and the property came into the possession of Baiza. Sadu then sued to recover it.

Sir Michael Westropp, C.J. said: "What we have to

(1) I. L. R., 4 Bom., 37.
(2) I. L. R., 7 Mad., 407.

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

consider is not what would have been the rights of the parties if Mahadu had died in the lifetime of his father, but what were their rights on the death of Mahadu he having survived his father. It appears to us that Mahadu, at least from the time of his father's death in 1850 until his own death in 1865, and Sadu, were co-parceners, and consequently that on the occurrence of the latter event the usual result of co-parcenary followed, *viz.*, that the surviving co-parcener took the whole property."

And after considering the authorities he proceeds: "No special provision is here made by Vijnyaneshvara for the case of the death either of the son of the wedded wife or the son of the female slave after the death of their father and before partition. But the effect of what he has said being, as we think, to create a co-parcenary between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenary, and that accordingly the survivor would take the whole if the other died without leaving male issue."

He then goes on to notice what he considers an inconsistency in the Hindu law in bringing in the daughter and the daughter's son to share the inheritance with the illegitimate son which he characterizes as "one of those arbitrary arrangements not uncommon in Hindu law," and in the result decides in concurrence with the other members of the Court that Sadu, the illegitimate son, succeeded to the joint estate by survivorship.

In the Madras case, V and S were undivided brothers of the Sudra caste. V died before S leaving two illegitimate sons by A, a continuous concubine. S. left two widows. It was held that although the illegitimate sons of A would be entitled to inherit the estate of V, they could neither exclude the right of survivorship of S nor succeed to the estate of S. In that case Turner, C.J., said: "But while we concede the claim of the illegitimate son we are unable to uphold the contention that he is entitled to take the undivided interest of his father. He is placed in the Mitakshara on the same footing with a daughter's son and the conception of co-parcenary pre-supposes Sapinda relationship and a legal marriage. Inasmuch as neither a widow, nor a daughter, nor a daughter's son, can exclude a co-parcener's right

of survivorship, it appears to us that neither can an illegitimate son do so. Another question is whether, as illegitimate sons, the second appellant and his brother are entitled to succeed to their paternal uncle Sundara. Adverting to the several secondary sons known to the ancient Hindu law, six of them are declared to be heirs to kinsmen in Datta Chandrika, s. V, 22. It follows that illegitimate children who are inferior to them all and who do not exclude the daughter's son, cannot succeed to collateral heirs. There can be no relationship between them as it is founded upon legal marriage."

This case to some extent conflicts with the decision of the Bombay Court, and we have accordingly done our best to elicit the true principle which underlies the scattered dogmas that are to be found in the text books on this point.

The text of the Mitakshara is as follows :—Chap. I, s. 12.

"Even a son begotten by a Sudra on a female slave may take a share by the father's choice.

"But if the father be dead, the brethren should make him partaker of the moiety of a share, and one who has no brother may inherit the whole property in default of a daughter or daughter's sons."

The questions before us, therefore, appear to be these :—

(1) Assuming the right of the son of a Sudra by a female slave to participate with a legitimate son in the inheritance upon a partition, does the father's estate after his death become the joint property of the legitimate and illegitimate sons in such sort that the right of survivorship exists between them;

(2) If so is that principle of survivorship applicable also to the case of an impartible Raj ?

It has been contended before us that the right of survivorship only obtains in those cases where an interest in joint property is acquired by any member of the joint family at his *birth*, and that a *dasiputra* cannot have such a right as it is only by the father's choice or pleasure that he obtains any share at all.

It is further argued that the text in Chapter I, s. 12, of the Mitakshara seems to place a *dasiputra* in the same category

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

and to entitle him to the same sort of rights as a daughter or a daughter's son.

A daughter or a daughter's son would not take by survivorship from a son, although she or he might take the whole property as heir to the father, and upon the same principle it is argued that a *dasiputra*, although he would upon partition share the inheritance with his legitimate half brother to the extent of one-half of what the half brother would take, he would not before partition succeed by survivorship to the legitimate son, although he might take the property as heir to his father.

There is no doubt a very clear distinction in the Mitakshara law between taking by heirship and taking by survivorship, and it was contended on the authority of certain passages in Varadarja's "Partition and Succession" that, although the *dasiputra* might be entitled to take a half share upon partition, he would take it *as heir and not by survivorship.*

As the question appeared to us to be one of some difficulty, we thought it right to consult our colleague Mr. Justice Mitter upon it, and the conclusion at which we have arrived is in accordance with that of the Bombay Court.

It is true that a *dasiputra* is not entitled to participate in the inheritance except at the pleasure of his father, and for that reason during his father's lifetime it seems admitted that he would have no right to enforce a partition, but it was the opinion of Mr. Justice Haridas, in the Bombay case that, after his father's death, an illegitimate son could enforce a partition as against his legitimate brothers.

Whether this is so or not it seems to us that the rule laid down in the Bombay case is correct, and is most consistent both with justice and authority.

If a Mitakshara father leaves several illegitimate sons, although born of different mothers, it seems clear that they would all jointly participate in the property, and would succeed to each other by survivorship (see Mayne on Hindu Law, s. 467, and cases there cited). If they can thus succeed by survivorship, *inter se*, there seems no reason why they should not succeed in the same way to a legitimate half brother.

It also appears clear that, when a son has been adopted and a natural son is afterwards born to the father, the adopted son upon partition would, like a *dasiputra*, take a less share than his natural brother. As a rule, he would take only one-fourth of his brother's share though the law upon that subject is different in different parts of the country; and yet, though he takes upon partition a much smaller share than his natural brother, it seems that before partition he would succeed to him by survivorship (see Mayne, s. 158, and the case in 1 Madras High Court Reports, p. 49, there cited.)

This case of an adopted son appears to us very analogous to that of an illegitimate son. In both cases there is the same sort of imperfect brotherhood to the legitimate son, and in both the superior position of the legitimate son is recognized by his receiving a larger share upon partition.

We see no reason, therefore, why an illegitimate son should be in a worse position than an adopted son as regards his succession by survivorship to the legitimate brother. It is obvious that practically speaking in a family composed partly of legitimate and partly of illegitimate sons, the fact of either a legitimate or illegitimate son dying before partition would result in the augmentation of the shares of all the survivors upon partition.

As an illustration of this principle let us suppose the case of a Mitakshara father dying and leaving him surviving one legitimate son A, and two illegitimate sons B and C. On the father's death B and C became entitled each to half a son's share, that is to say A would be entitled on partition to obtain a moiety of the estate, and B and C each one-fourth. But if before partition B were to die, and a partition were to take place between A and C, it is clear that A would take two-thirds of the property whilst C would take one-third. In other words the share to which B would have been entitled would remain a part of the joint estate or common stock, which A and C would divide between them. In this view A and C would be co-parceners, succeeding by survivorship to what B might have claimed upon partition. Can there be any doubt that the same result would follow if A (instead of B) died before partition? Can it be doubted that in that case B and C would take A's share by survivorship?

1885

JOGENDRO BHUPUTI v. NITTYANUND MAN SING.

It will be found that in the Madras case the point was somewhat different from that raised in the present. There the question was whether illegitimate sons could represent their father as regards the grandfather's estate, *so as to exclude the right by survivorship which would otherwise accrue to the father's brother.* It was held that they could not; and that, although they might succeed to their father's separate estate, they could not exclude their legitimate uncle in respect of joint ancestral estate. In the present case the question is not as between the plaintiff and his father's brother but between the plaintiff and his own brother. The father alone was solely entitled to the estate, and it may be, therefore, that the Madras case does not conflict with our present decision.

The next question is, whether the fact that this is an impartible *raj* makes any difference in the application of the principle? We think not. It has been frequently held, and especially in the *Shivagunga case* (1) that an impartible *raj* or zemindari subject to Mitakshara law, though it can only be enjoyed by one co-parcener at a time is nevetheless joint property, so far that the succession is governed by the principle of survivorship. We think, then, that on these grounds the plaintiff was entitled to succeed to the *raj*, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

1885

June 2.

BUDRI NARAIN (PLAINTIFF) *v.* SHEO KOER (DEFENDANT.)*

Security for costs—Civil Procedure Code (Act XIV of 1882), *s.* 549—*Appeal rejected for want of security—Extension of time for giving security.*

The proper construction of s. 549 of the Civil Procedure Code is that, where an appellant has been ordered to furnish security within a certain time, and that order has not been complied with, and no application has been made to extend the time within the period allowed, the Court is bound to reject the appeal.

THIS was an application under s. 549 of Act XIV of 1882,

* Appeal from Original Decree No. 52 of 1883 against the decree of Moulvie Mahomed Nurul Hossein, Khan Bahadoor, Subordinate Judge of Patna, dated the 2nd of October 1882.

(1) 9 Moore's. I. A. 539.