

this case no special circumstance is shown to exist. The decision of the lower Court upon this point is therefore correct.

(The Court then proceeded to deal with the other questions raised in the appeal, and concluded by varying the decree of the lower Court in certain particulars immaterial for the purpose of the report.)

1885
 CHORAMONI
 DEY
 v.
 HOWRAH
 MILLS COM-
 PANY.

Appeal allowed and decree modified.

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

BHUBAN PARI AND OTHERS (DEFENDANTS) v. SHAMANAND DEY
 (PLAINTIFF).*

1885
 June 17.

Land Tenure, Transfer of—Mourasi survarakari tenure, The mode of succession to—Consent of the zemindar to the transfer.

The tenure known in Orissa as *mourasi survarakari*, although recorded in the name of a single member, is descendible to all the heirs as joint heritable property, and cannot be transferred without the consent of the zemindar.

THE plaintiff brought this suit on the allegation that a certain mouzah within his zemindari, which was originally recorded in the name of one Michu Pari had since his death been settled with and stood in the name of his son, Karunakar, defendant, as *survarakar*; that under the Bengal Government Resolution of the 25th September 1888, the *survarakar* was entitled only to collect the rents and was not competent to alienate or divide the mouzah without the consent of the zemindar; that defendants 1 to 5, the coparceners of Michu and Karunakar, were not entitled to the property nor had they any right to sell their share to defendant No. 6; that Karunakar had by a deed of relinquishment transferred the tenure to the plaintiff (zemindar) and the plaintiff prayed that the *kobala* of sale in favor of defendant No. 6 be declared void and *khas* possession of the mouzah be given to the plaintiff.

The Munsiff found that the *survarakari* was a joint heritable tenure and dismissed the suit. The lower Appellate Court held

* Appeal from Appellate Decree No. 563 of 1884, against the decrees of J. B. Worgan, Esq., Officiating Judge of Cuttack, dated the 7th of January 1884, reversing the decrees of Baboo Haranath Ghose, Rai Bahadur, Munsiff of Balasore, dated the 5th of October 1882.

1886
 BHUBAN
 PARI
 v.
 SHAMANAND
 DEB.

that the zemindar was entitled on the strength of the deed of relinquishment to re-enter on the property and gave him a decree.

From that decision an appeal was preferred to the High Court. Baboo *Trailokya Nath Mitter* for the appellants.

Baboo *Abinash Chunder Banerjee* for the respondent.

The judgment of the Court (GARTII, C.J., and BEVERLEY, J.) was delivered by

GARTII, C.J.—The facts of this case are as follow:—

A certain mouzah in the district of Balasore constituted a *mourasi survarakari* tenure recorded in the name of Karunakar Pari, defendant No. 7. It has been found as a fact by both the lower Courts that the tenure was previously held by his father Michu Pari, and by his grandfather Edhab Pari. Besides Michu, Edhab left two other sons, who are represented by defendants 1 to 5.

In 1879 the defendants 2 to 5 brought a suit against their cousin, defendant No. 7, for possession of a share in the tenure, and that suit was decreed in their favor on 3rd June 1880. Five days prior to that decree, however, namely, on 29th May 1880, defendant No. 7 executed a deed of surrender of the tenure in favor of the zemindar, who is the plaintiff in the present suit. Subsequently on 24th September 1881, defendants 1 to 5 sold a share in the tenure to defendant No. 6.

The plaintiff then brought this suit to have it declared that defendants 2 to 5 had no interest in the tenure, and that the sale to defendant No. 6 was invalid.

The suit was dismissed in the Court of first instance; but on appeal the District Judge held that the tenure was the sole property of defendant No. 7, who surrendered it to the zemindar; and he accordingly gave the plaintiff a decree for *khlas* possession.

Against this decree the defendants 1 to 6 have appealed to this Court.

The question of law arising for our decision is simply this: whether a *mourasi survarakari* tenure in Orissa descends to all the heirs as joint family property, or to one heir only to the exclusion of the others?

The nature of these tenures was to some extent defined by the Government orders of the 25th September 1838; and in two cases, *Puddo Lochun Mundle v. Lukhun Burroah* (1), and *Doorjodhon Dass v. Chooya Daye* (2), it was held that those orders were to be recognized as authority in respect of the character or constitution of these tenures.

1885
 BHUBAN
 PARI
 v.
 SHAMANAND
 DEY.

These rules provide that the tenure be recognized as one of the existing tenures of Cuttack; that when the tenure is in the possession of several joint *survarakars*, the collector may, with the concurrence of the zemindar, select one or more to be the recorded "manager" of the *survarakari*; that the tenure may under certain circumstances be "hereditary property;" but that, whether hereditary or not, the tenure cannot be alienated or subdivided without the consent of the zemindar.

The effect of these rules, we think, is to place the tenure much on the same footing as ordinary tenures, and to constitute it joint heritable property, subject to this, that for convenience sake the name of one of the owners is to be recorded as the proprietor, who is to act as the *manager* for the rest, and to be directly responsible to the zemindar for the rent. The Munsiff states that this is the nature of the tenure as usually understood in Cuttack, and that this view has been frequently upheld by the Courts. No case has been cited to us which bears directly on the point, but we think that this is the true meaning of the rules.

The prohibition against alienation or subdivision appears to be directed against such a splitting of the tenure as would be effected in this case by the sale of a portion of it to defendant No. 6. Such a splitting of the tenure cannot take place, without the consent of the zemindar.

On the facts then, as found in this case, we must hold that defendants 1 to 5 had an interest in the tenure, which defendant No. 7 under the circumstances had no authority or power to surrender to the zemindar; and we must further hold that the sale of a portion of the tenure to defendant No. 6, not having been made with the consent of the zemindar, is invalid.

(1) S. D. A. Reports, 1860, Vol. II, p. 109.

(2) 1 W. R., 322.

1885

BHUBAN
PARI
v.
SHAMANAND
DIX.

The decree of the District Judge must, therefore, be reversed. The plaintiff's suit for *khata* 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. NITYANUND
MAN SING (PLAINTIFF).^a

1885
June 2.

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

In a Sudra family of the Mitakshara school, a *dasputra* 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 *phulbihadi* wife, Rani Chandra Kala *alias* Rambhudei; that according to family custom Raja Nundkishore Bhuputi by his oldest wife, Rani Nilmoni Patmabadi, succeeded to the *raj* and zemindari, but the plaintiff continued to live in commonsality 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

^a 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.