

estate in the hands of Radhamani, as the surviving widow after the death of Nilamani. Many of the stipulations in the mortgages were personal to Nilamani, and they cannot be held to have been binding or intended to be binding upon Radhamani or her interest in the event of her surviving.

Their Lordships are, therefore, of opinion that the mortgages were not binding upon Radhamani, and that the decree of the High Court ought to be reversed, with costs in that Court, and the decree of the District Judge affirmed.

They will humbly advise Her Majesty accordingly.

The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. *Pemberton & Garth.*

Solicitor for the respondent—*Mr. R. T. Tasker.*

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MUTTUVADUGANATHA TEVAR (PLAINTIFF), APPELLANT,

v.

PERIASAMI (DEFENDANT), RESPONDENT.*

1892.
March 1.
April 26.

Hindu law—Impartible zamindari—Obstructed inheritance—Interest of holders of—Inheritance by daughters' sons—Civil Procedure Code, ss. 13, 43—"Res judicata."

In a suit to recover possession of the impartible zamindari of Shivaganga, it appeared that the Istimrar zamindar died in 1829, and that after an interval of wrongful possession by his brother and his descendants, his daughter established her title to succeed him and was placed in possession in 1864. She died in 1877 leaving the present plaintiff (her son), and three daughters her surviving. A suit was then brought by the father of the present defendant, who was the elder sister (deceased), against the present plaintiff and the daughters for possession of the zamindari to which he claimed to be entitled by inheritance. A decree was passed for the plaintiff in that suit, and she retained possession of the zamindari and retained it until her death. She was succeeded by the present defendant. The plaintiff then brought this suit, alleging that the right to the zamindari had devolved upon her by inheritance on the death of the plaintiff in the former suit.

Held, (1) that the defendant's father was entitled to the zamindari, and not to a mere right of management.

from the Istimrar zamindar on the death of Dora Singha Tevar ?

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- (iii) Whether, as contended by the plaintiff, on the death of Kattama Natchiyar, the estate devolved upon defendant's father and the plaintiff as joint family property, and after the death of Dora Singha Tevar, the property devolved upon the plaintiff as survivor of the two grandsons ?
- (iv) Whether, as contended by the plaintiff, Dora Singha Tevar's possession was such as not to constitute him a fresh stock of descent, but he took the property only as manager by reason of the impartibility of the estate, subject to the right of the plaintiff to succeed to the enjoyment of the estate upon the death of Dora Singha Tevar ?
- (v) Whether, on the death of Dora Singha Tevar, the plaintiff is entitled to succeed to the zamindari in preference to the defendant by virtue of the plaintiff being the surviving grandson of the Istimrar zamindar and the defendant being only his great grandson ?
- (vi) Whether, as contended by the plaintiff, the rule of succession to the zamindari is that the eldest of a class succeeds, and that on his death the survivor of the class succeeds in preference to the male issue of such eldest member of the class ?
- (vii) Whether the plaintiff is estopped, by the decree in original suit No. 1 of 1887 from claiming the zamindari from the defendant who is the legal representative of Dora Singha Tevar, the senior of the grandsons of the Istimrar zamindar ?

As to the subject of the second issue, the defendant's contention was that it was virtually established in the former case that the succession should be traced from the last male issue of the plaintiff was accordingly estopped from claiming the zamindari by the mode of devolution. The Subordinate Court's decision was not maintainable on the ground that the suits were not identical, since in the former case the plaintiff was a female, and in the latter case the plaintiff was a male after the death.

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defendant's contention was that, inasmuch as the plaintiff did not set up in the former suit that he had a joint right to the zamindari along with the defendant's father, or a right of survivorship or succession on his death, the plaintiff was now estopped from setting up such a case. The Subordinate Judge similarly overruled this plea, on the ground that the averments now made by the plaintiff were not material to his defence in the former suit.

The Subordinate Judge held on the remaining issues that the plaintiff had not established his title to the zamindari and dismissed the suit.

The plaintiff preferred this appeal.

Parthasaradhi Ayyangar and *Rangachariar* for appellant.

Subramanya Ayyar, *Bashyam Ayyangar* and *Desikachariar* for respondent.

MUTTUSAMI AYYAR, J.—The contest in this appeal is as to the right of succession to the zamindari of Shivagunga. Dora Singha Tevar was the last male holder, respondent is his son and appellant is the son of Kattama Natchiyar, Dora Singha's predecessor. Appellant is related to the Istimir zamindar as daughter's son and respondent as the son of a senior daughter's son. The question for determination is whether, under the Mitakshara law, succession is to be traced from the last male holder or the Istimir zamindar. The first and third to sixth issues recorded in this case relate rather to the different grounds on which appellant presses his claim than to independent questions.

As regards the first issue, viz., whether succession is to be traced from the last male holder or his maternal grandfather, appellant's contention is that when a person succeeds to an obstructed heritage, that person is not, whether a male or female, a full owner. There is, however, no warrant for it in the Mitakshara.

General rule of Hindu law is that when a male heir succeeds or the former is as much full owner as the latter, the as stated by Manu in chapter LX, verse 187, that the inheritance belongs. The only recognition that when a female, such as a widow or her succession is a case of interest sapinda, on the authority, the death of such female, the all take the heritage. Introduction in the

Mitakshara of widow and daughter among heirs is explained in the decision of this Court in *Muttu Vaduganadha Tevar v. Dora Singha Tevar* (1). As for obstructed and unobstructed heritage (sapratibanda and apratibanda), the distinction is material only to the extent that, in the one case, the nearer male heir excludes the more remote, whilst in the other, the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derived from three lineal male descendants, such as son, grandson and great grandson, is the same, though among collateral male heirs, the *quantum* of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. Hence it is that the text of *Yajñavalkya*, cited in *Mitakshara*, chapter II, section 1, verses 2 and 3, premises the death of a male owner without male issue, and enumerates his heirs in the order in which they are entitled to succeed, adding that on failure of the first in the order in which they are enumerated, the next in order is the proper heir. Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed with this difference, viz., that when the last full owner leaves sons, grandsons and great grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same, and that they are all co-heirs within the meaning of the rule. The decision of the Subordinate Judge on the first issue is, therefore, correct.

The third issue is whether, upon the death of Kattama Natchiyar, the zamindari devolved upon Dora Singha Tevar and appellant as joint family property, and whether, upon the death of the former, it devolves upon the latter by right of survivorship. It is suggested for appellant, first, that it is joint family property; and, secondly, that his right of survivorship excludes respondent from succession. The right of survivorship, as recognized by the *Mitakshara*, presupposes two things, viz., a subsisting coparcener respect of the property in litigation, and the death of owner without *male issue*. In the case before Dora Singha Tevar's son, and even assuming common both to appellant and Dora Singha Tevar, survivorship can arise in appellant's favour, but it presupposes a common descent

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community of interest in the property in dispute, and as daughters are transferred by marriage to the gotras or the families of their husbands, neither can they nor their sons be said to be coparceners so as to constitute a joint Hindu family in the true sense of the expression. Further, to what extent an impartible estate can be treated as joint family property, though it vests in one of its members by the custom of primogeniture, and to what extent a right of survivorship can be deduced from impartibility was considered by this Court in *Naraganti Achammagaru v. Venkatachalapati Nayamivaru*(1), and the decision in that case rests on the view that, before succession can pass from one line of descent to another, the former must be extinct, and that the proper heir is not necessarily the coparcener nearest in blood to the original owner, but the nearest coparcener of the senior line. Again, how far it is joint family property as between father and son for the purpose of invalidating a mining lease granted by the former was considered in *Beresford v. Ramasubba*(2), and it was held in that case, on the authority of the decision of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(3), that, even as between real coparceners an impartible estate devolving in accordance with the custom of primogeniture is *not* joint family property for all purposes. The right of survivorship on which appellant insists was properly held by the Subordinate Judge not to subsist.

The fourth issue was raised with reference to the contention that Dora Singha Tevar's interest in the zamindari was only a qualified interest, and that it consisted only in the right of management subject to appellant's right to succeed to him on his death, and the Subordinate Judge was right in disallowing it also. In the first place, Dora Singha was owner and *not* a mere manager, and his ownership was that of a male sapinda and not a qualified ritage as in the case of a widow or daughter. The Smritis from his right of succession is deduced by the Mitakshara in section III, verse 6, are those of Vishnu and Manu. The regard to the obsequies of ancestors, daughter's son's sons" and the latter observes:— a daughter, whether formally ap- on a husband of an equal class,

“the maternal grandfather becomes the grand-sire of a son’s son; let that son give the funeral oblation.” The Smṛiti on which the Mitakshara rests the daughter’s succession is that of Vrihaspati, who says, “as a son, so does the daughter of a man proceed from his several limbs.” It is then clear that in the case of the daughter, the ground of succession is that she is her father’s sapinda, because she proceeds from his limbs like a son; but in the case of daughter’s son it consists in the union of blood relationship through the mother with that of sapinda relationship in its spiritual sense, as in that of a son’s son or the son of an appointed daughter under ancient Hindu law. Here I may also draw attention to the Vedic texts cited in Smṛiti Chandrika and to their effect as discussed in chapter IV, verses 4-8. Those texts show that there is a passage in the Taittiriya Veda to the effect that females and persons wanting in an organ or sense or member are incompetent to inherit, that accordingly Baudhayana says that females are incompetent to inherit, and that the author of the Smṛiti Chandrika considers that what they take is *not* dayam or pure heritage, but only an “amsom,” or an allotment, in the nature of a provision or a qualified heritage. Reading the foregoing passages together, it follows that, when the daughter succeeds, she takes the heritage as an amsom or as a provision for life with power of alienation on exceptional grounds, or, as it is usually put, as a qualified heritage; and that, as she succeeds solely by reason of blood relationship, her succession is constituted into a case of interposition between two consecutive male heirs who are both blood relations and sapindas in a spiritual sense. It is also clear, on the other hand, that, when the daughter’s son succeeds, he succeeds as a regular sapinda in the same way in which a son’s son or the son of an appointed daughter succeeds, that the Vedic text and the disability consequent upon it do not apply to him, that he inherits from his mother’s father, though after her death, and not from her, that he is a full owner like a son’s son or an appointed daughter’s son, and that, like every regular or male sapinda, he also becomes a fresh stock of descent when the right to inherit once vests in him. The appellant’s contention, which ignores this distinction between the daughter and the daughter’s son as heirs-at-law, cannot be supported.

As regards the fifth issue, it is sufficient to state that nearness or remoteness of relationship to the Istimrar zamindar is per-

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fectly immaterial. As observed by the Privy Council in *Neelkisto Deb Burmono v. Beerchunder Thakoor* (1) and by this Court in *Naraganti Achamma Garu v. Venkatachalapati Nayanivaru* (2) "it is "the nearest in blood to the last male holder, that is the proper "heir, and not the senior member of the whole group of agnates."

In connection with the sixth issue, it is argued for appellant that like daughters daughters' sons inherit as a class, and that as all the heirs in each class must be exhausted before the estate devolves on another class, appellant is a preferable heir by right of survivorship. This contention is again, as observed by the Subordinate Judge, clearly not tenable. It ignores the principle that, when by the custom of primogeniture, the senior male in a class of heirs excludes the others, the exclusion continues not only during his life, but so long as he leaves lineal heirs competent to succeed to him. If an impartible estate devolves on the eldest of three sons by the custom of primogeniture to the exclusion of the rest, the preference due to seniority of birth is not a mere personal privilege, but a heritable interest which descends to his lineal heirs as his representatives. The doctrine of representation as between the father and his three lineal descendants, consequent on the notion that he is reborn in them, obtains on each occasion the succession opens up and the eldest son's right to exclude his brother is continued to his lineal male heirs. It is then said that when an impartible estate devolves on the eldest of several daughters, the other daughters take by right of survivorship. Each daughter's succession is only a case of interposition, and as she dies, the next in seniority is her father's heir and thus inherits the estate as her, and not by right of survivorship as recognized by the Mitakshara.

As regards the second and seventh issues, I agree in the opinion of the Subordinate Judge that there is no estoppel in either case for the reasons assigned by him. As the appeal fails on the merits, it is not necessary to consider the eighth, ninth and tenth issues.

I would dismiss this appeal with costs.

BEST, J.—This is an appeal by the plaintiff against the Subordinate Judge's decree dismissing his suit for possession of the Zamindari of Shivaganga to which plaintiff claims to be entitled to succeed on the death of the late Zamindar Dora Singha Tevar,

(1) 12 M.L.A., 523.

(2) I.L.R., 4 Mad., 267.

in preference to the defendant, who is the son of the said Dora Singha Tevar.

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The Istimrar zamindar was Gouri Vallabha Tevar, who died in 1829. Thereupon, his brother Mutta Vaduga Tevar took possession, and he and his descendants retained the same till 1864, when Kattama Natchiyar, daughter of the Istimrar zamindar, recovered the same under the decree of the Privy Council, following on the judgment of their Lordships in *Kattama Natchiyar v. The Rajah of Shivagunga*(1). Kattama Natchiyar died in 1877, when a contest arose as to the right of succession between her son, the present plaintiff, and Dora Singha Tevar, the son of her elder sister (deceased) Vellai Natchiyar, which resulted in favour of the latter, on the ground that the estate taken by Kattama Natchiyar as a daughter was a limited estate, and that on her death it devolved not on her own heir, but on her father's heir, and that Dora Singha Tevar, as senior grandson, was that heir—*Muttu Vaduganatha Tevar v. Dora Singha Tevar*(2). Dora Singha Tevar succeeded, therefore, and held the zamindari till 1883, when he died.

Hence this suit, in which the plaintiff (appellant) seeks to get possession as grandson of the Istimrar zamindar and, therefore, more closely related to him than defendant, who is a *great* grandson.

The question, therefore, is whether, on the death of Dora Singha Tevar, the succession is to be traced from the Istimrar zamindar as contended by the plaintiff, or from Dora Singha Tevar himself as urged on behalf of the defendant. The Subordinate Judge has upheld the defendant's contention, and I am of opinion that he is right in so doing.

It is urged on behalf of the plaintiff that Dora Singha Tevar's possession was as manager of the estate by reason of its impartiality, and that the estate having been the joint family property of himself and plaintiff, the latter is entitled to the same by right of survivorship.

As was observed in the *Naraganti case*(3) at page 267 of the report:—"The impartiality of the subject does not necessitate the denial of the right of survivorship, and there are not wanting in the admitted rules which govern the enjoyment of

(1) 9 M.L.A., 543.

(2) L.R., 8 I.A., 99.

(3) I.L.R., 4 Mad., 250.

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“such property and the succession to it, *indicia* of co-ownership “and consequent survivorship.” But can the plaintiff be held to have been a co-owner of the zamindari with Dora Singha Tevar? for it is only in case of co-ownership that there can be a right of survivorship. As pointed out by the Subordinate Judge, plaintiff and Dora Singha Tevar are the sons of different fathers and consequently members of different Hindu families, and therefore not coparceners within the meaning of the Hindu law. The claim by right of survivorship has, therefore, been rightly rejected; and as the last male owner from whom the right of succession is to be traced is Dora Singha Tevar, the Subordinate Judge is right in holding that the son, the defendant, and not the plaintiff, is the person entitled to succeed to the zamindari.

This appeal fails, therefore, and is dismissed with costs

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAH MAN MULL AND ANOTHER (PLAINTIFFS),

APPELLANTS,

v.

KANAGASABAPATHI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 244, 294, 308, 622—Sale in execution—Purchase-money and judgment-debt set off against each other—Representative of decree-holder—Appeal—Revision.

One who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-money and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under Civil Procedure Code, s. 308, cancelling the sale and ordering a re-sale on the ground the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under Civil Procedure Code, s. 622 :

Held, (1) that the petitioner was the representative of the decree-holder within the meaning of Civil Procedure Code, s. 244, and might have preferred an appeal against the order sought to be revised ;

(2) that the petition for revision was accordingly not maintainable, although, under the circumstances above stated, the Court had no jurisdiction to make an order under Civil Procedure Code, s. 308.

* Letters Patent Appeal No. 37 of 1891.