nent settlement, or by any other sufficient means. And they distinctly declared that, unless plaintiff could make out a *primâ facie* case, that is a case in which he would be entitled to a decree if the defendant did not produce evidence, his suit should be dismissed.

In the present caseit appears from the schedule to the plaint that the land in dispute is surrounded by other lands held by the defendants for which rent is paid. This is a matter which should be taken into consideration in dealing with the case. If it be true, as stated in the plaint, that the land is so surrounded by ryotti lands of the defendants, it is some evidence to go before a Jury or Judge to show that the land forms part of the tenure of the defendants, and is not their lakheraj holding. But no decree can be passed adversely to the defendants on it, unless the Judge is of opinion that it establishes a *primâ facie* case of the nature already described.

The case will be remanded to the Subordinate Judge in order that he may decide whether the land belongs to the tenure of the defendants, or, as is asserted by them, is their lakheraj holding.

Costs will abide the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

UPENDRA NARAIN MYTI (PLAINTIFF) *v.* GOPEE NATH BERA AND OTHERS (DEFENDANTS.)*

1883 *March* 9.

Hindu Widow—Reversioner—Declaratory Decree—Waste by Hindu Widow—Compromise by Hindu Widow—Setting aside compromise—Joint Family—Separation—Partial Separation.

Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature.

The separation of one member of a joint Hindu family does not

* Appeal from Appellate Decree No. 339 of 1882, against the decree of F. W. Badcock, Esq., Officiating Judge of Midnapore, dated the 27th December 1881, reversing the decree of Baboo Jodu Nath Roy, First Subordinate Judge of that district, dated the 27th September 1880.

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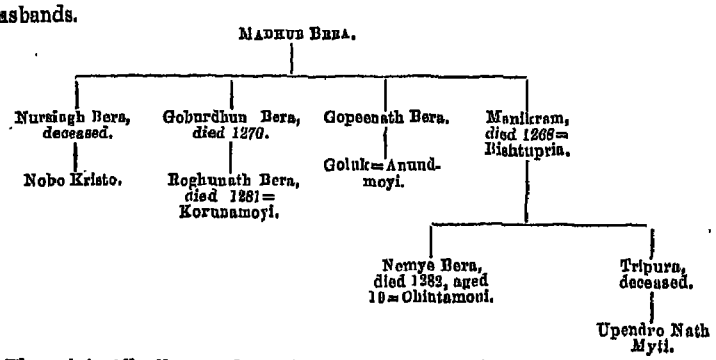
necessarily create a separation between the other members nor cause the general disruption of the family.

Radha Churn Dass v. *Kripa Sindhu Dass* (1), dissented from.

IN this case the judgment appealed from is as follows :—

The plaintiff brought a suit for declaration under Act I of 1877 to declare a certain deed of compromise executed by the defendants void as regards his rights as reversionary heir. He obtained a decree, against which the defendant has appealed. It appears that Madhub Bera died leaving four sons, who lived together as an undivided family till 1264 (1857). In that year, as the plaintiff alleges, Nursingh Bera separated himself, but the other three went on living as an undivided family till 1284 (1877). The defendants deny this, and say that the four brothers lived together till 1264, and then separated, and were never re-united.

In February 1878, Korunamoyi instituted a suit against Gopeenath and Chintamoni for the share of the whole property which came to her through her deceased husband Roghunath. This suit was compromised by the solehnama to which the plaintiff now objects. The defendant Gopeenath in the solehnama agrees to give Chintamoni 15 bighas of land and Korunamoyi 25 bighas, and Korunamoyi for herself, and Bishtupria as guardian of Chintamoni, agree to give up all rights to the property of their deceased husbands.



The plaintiff alleges that Gopeenath, in collusion with Bishtupria, executed the solehnama with the object of injuring his reversionary right to the property left by Nemye Bera. This appears to me to be an allegation of fraud on the part of Bishtupria, and part of the relief the plaintiff asks for is that the solehnama may be declared fraudulent.

The principal points raised in appeal are as follows : *First*.—The plaintiff is the next reversionary heir, and therefore cannot bring any suit. *Second*.—This is not a case where, in the exercise of sound discretion, a declaratory decree should be made. *Third*.—The plaintiff should have brought a suit for appointing a manager to the estate, and not having

(1) I. L. R., 5 Calc., 474.

done so, the provision in Act I of 1877, s. 42, precludes him from suing for a declaratory decree. *Fourth.*—The plaintiff alleges that Nursingh Bera separated in 1864. As no partial separation of a Hindu family can take place, the plaintiff should have proved that the remaining three brothers formally re-united. He has not done this, and therefore the family must be considered as divided. *Fifth.*—The lower Court's finding on the evidence that the plaintiff's account of the separation of the family was not correct.

As regards the first point, I have not been able to find any precise definition of the term reversionary heir, but it appears to me that the plaintiff is the heir, because on the death of Chintamoni and Bishtupria, he will be entitled to the property as the heir of Nemye. Even supposing, however, that he is not the next reversionary heir, I should, on the authority of the cases of *Shama Sundari Chowdrain* v. *Jumoona Chowdrain* (1), and *Retoo Raj Panday* v. *Lallje Panday* (2), consider that he had the right to institute a suit. It is quite true that in these two cases, the grounds on which a remote reversionary heir can sue are that the holder of the property has committed waste and fraud, and that the lower Court has not in this case found that Bishtupria acted fraudulently, but I think the nature of the compromise, supposing the plaintiff's account of the separation to be true, shews that Bishtupria must have acted fraudulently. If it is true, that in 1284 the family was joint, then Bishtupria could have claimed some 60 bighas, and abandoned all her claims. I think this can hardly be considered as a mere act of waste, and the plaintiff himself distinctly alleges it to be fraudulent. I, therefore, consider that the plaintiff was justified in bringing a suit, though whether he is entitled to a declaratory decree will be considered further on. The next point is that this is not a case in which the Court would, in the exercise of a sound discretion, grant a declaratory decree. The plaintiff is a minor and Chintamoni is also a minor, and it may, therefore, be reasonably supposed that many years may elapse before the plaintiff can inherit the property, and it is, of course, quite possible that he may not inherit at all. The case of *Hunsbutti Kerain* v. *Ishri Dutt Koer* (3) is the latest case that has been brought to my notice, and that lays down very clearly the cases where declaratory decrees should not be granted. The case of *Sri Narayan Mitter* v. *Krishna Sundari Dasi* (4) quoted in the above case, shows that the granting of such decrees is entirely within the discretion of the Court. The lower Court in its judgment says: "Her (Bishtupria's) assent is prejudicial to the plaintiff's cause which he may not be in a position to substantiate after all the evidence shall have been taken away or destroyed by lapse of time." From this it appears that the lower Court considered that a decree should be granted, because there is no power to entertain a suit to perpetuate evidence, but in the passage quoted at

(1) 24 W. R., 86.
(2) 24 W. R., 399.
(3) I. L. R., 5 Calc., 512.
(4) 11 B. L. R., 171.

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I. L. R., 5 Calc., p. 519, the Privy Council appear to have held that this is not a proper reason for making such decrees. In this case, indeed, as the separation, according to the plaintiff, took place so late as 1284, there is as yet certainly no ground for thinking that the evidence will be destroyed for some time. The inconvenience of granting such decrees is evident from the concluding part of the lower Court's order, where the plaintiff is declared to be entitled on the death of Chintamoni and Bishtupria, to a one-third share of some cattle and paddy. This part of the order is, I think, quite useless, as by the time the plaintiff inherits, the cattle and paddy will probably not be in existence; if they are, their value will have decreased. Under all the circumstances, I do not think that this is a case where a declaratory decree should be passed.

The next point is that the plaintiff could have brought a suit for the appointment of a manager, and that as he has not done so, he is not entitled to a declaratory decree. On the authority of the two cases previously quoted, *Shama Soondaree Chowdhrain* v. *Jumoona Chowdhrain* (1), and *Retoo Raj Pandey* v. *Lallyee Pandey* (2), I think the plaintiff might have brought such a suit.

The Subordinate Judge also appears to have been of the same opinion, as he apparently only abstained from appointing a manager, because the plaintiff had only asked for a declaratory decree, and had brought the suit on a stamped paper sufficient for that purpose only. The remarks of the Subordinate Judge on the seventh issue lead me to suppose that, had the plaintiff brought a suit for the appointment of a manager on a properly stamped paper, the lower Court would have given him a decree, appointing a manager. Whatever view, however, the lower Court might have taken of a suit for appointing a manager, it was, I think, quite within the power of the plaintiff to bring such a suit; and as he has omitted to do so, I do not think that the lower Court could make a declaratory decree. The terms of the proviso in s. 42 of Act I of 1877 are explicit, and do not leave the Court any option in the matter.

As regards the fourth point, the lower Court appears to have found that the plaintiff's account of the separation of Nursingh Bera in 1284 is true, and that a division of the property of the family took place then. If that is so, I think that the cases of *Ramhari Surma* v. *Tribhi Ram Surma* (3), and of *Radha Churn Das* v. *Kripa Sindhu Das* (4), shew that proof of subsequent reunion by agreement is necessary. It appears that the division of the joint property breaks up the family, and makes the usual presumption regarding members of a family living together fail, and that the party wishing to shew that members of a family who continued to live together, after such division, are joint, must adduce proof that the members by agreement have re-united themselves into a joint

(1) 24 W. R., 86.

(2) 24 W. R., 399.

(3) 7 B. L. R., 337: 15 W. R., 442.

(4) I. L. R., 5 Calc., 474.

family; and that mere proof of commensality is not sufficient. There is certainly no proof of any such agreement, and, therefore, the plaintiff's contention that the three other brothers continued to live together as a joint family, after Nursingh's separation, is not properly established.

The District Judge then reversed the decision of the Court of first instance and dismissed the plaintiff's suit with costs. The plaintiff appealed to the High Court.

Mr. *Twidale* and Mr. *Mendies* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Saroda Persad Roy* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—*Madhub Bera died leaving four sons, who admit*tedly formed a joint Hindu family. In 1264 Nursingh the eldest separated from his brothers. In 1878, Korunamoyi, the widow and heiress of the son of the second brother Goburdhun, sued the third son Gopeenath, the third brother, and Chintamoni, the widow and heiress of the son of the fourth brother Manikram (deceased), for her share of the family property. That suit ended in a solehnama or compromise under which Gopeenath, on the one hand, agreed to give up 25 bighas to Korunamoyi and 15 bighas to Chintamoni, while Korunamoyi for herself and Bishtupria, the mother-in-law and guardian of Chintamoni, on the other hand agreed to give up all rights to any family property of the brothers whom they represented.

The plaintiff, a minor, being the son of a daughter of the fourth son Manikram the fourth brother as reversionary heir after Chintamoni and Bishtupria Hindu widows having only a life interest, sues to have it declared that this solehnama was collusively obtained, and is therefore inoperative as against him, and that he is entitled on the death of these ladies to obtain a one-third share of the family estate held by the three brothers jointly after Nursingh had separated from them.

The District Judge in appeal has, in exercise of his discretion, refused to give plaintiff a declaratory decree, first, because, as he remarks many years may elapse before plaintiff can inherit the property, and it is, of course, quite possible that he may not

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inherit at all. He next seems to think that the object of giving a declaratory decree in a case of this description is to perpetuate evidence, and that this is not a valid ground for exercising the discretion vested in him by law. Lastly, he thinks that, owing to the perishable nature of the movable property claimed, a decree, which is not likely to be operative until that property has disappeared or altered in value, should not be passed.

It appears to us that the District Judge has not exercised a proper discretion in refusing to give plaintiff a declaratory decree, if he has established his right to set aside the compromise.

The perishable nature of some of the movable properties claimed, and the consequent improbability that they would all be in existence or in their present form when the plaintiff's right to inherit may accrue, is not a valid reason for refusing to set aside any deed or decree which interferes with his right as reversioner.

The District Judge has, however, proceeded to hold that the present suit is untenable, because the plaintiff has not sued for the appointment of a manager to take charge of his share of the family property in consequence of the waste committed by the widows. But, as has been already pointed out, this is not a suit to restrain the widow from committing waste, but to set aside a compromise which is, if at all, only voidable by the plaintiff.

Lastly, the District Judge, in concurrence with the first Court, has held as Nursingh the eldest of the four brothers separated in 1264, "a division of the family then took place;" that there is no proof of any agreement on the part of the other three brothers to re-unite; that mere proof of commensality is not sufficient; and that consequently the plaintiff's suit must fail on this ground also.

The first point then for our consideration is, whether the separation of one member of a joint Hindu family necessarily creates a separation between the other members, and causes the general disruption of that family.

If this be so, then it will be for us to determine whether any specific agreement between the other members is absolutely necessary for proof of their re-union, and whether it cannot be presumed from their subsequent conduct.

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On the first point we have been referred to the case of *Radha Churn Dass* v. *Kripa Sindhu Dass* (1), as an authority for deciding it in the affirmative.

On the other hand we have considered the observations of their Lordships of the Privy Council in the cases of *Rewan Persad* v. *Mussamut Radha Bibee* (2), and *Mussamut Cheetha* v. *Miheen Lall* (3), neither of which cases were laid before the Division Bench, which decided the case first mentioned. The judgment of their Lordships in the case of *Rewan Persad* (p. 168) is in the following terms:—

"We think that it may be admitted that the *primâ facie* presumption, where there are no circumstances to affect it, is that every Hindu family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of this case lead to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindu law which may have a bearing upon the conclusion to be drawn from the facts.

"First: We apprehend it to be undisputed that a division may be affected without instrument in writing. Secondly: That a division may be either total or partial. Thirdly: That a separation from commensality does not, as a necessary consequence, effect a division, or, at least, of the whole undivided property."

Moreover, we find their Lordships in the well known case of *Deen Dyal Lall* v. *Jugdeep Narain Singh* (4) again recognizing the continuance of the joint estate of a family after a partition so as to separate the share of one member. It was in that case held that, although a member of a joint family could not alienate his share in the family estate, the purchaser of his rights in execution of a decree against him, could, by insisting on a partition so as to definitively ascertain those rights, obtain possession of a distinct portion of that estate which represented them.

The judgment proceeds thus:

"It seems to their Lordships that the same principle may and

(1) I. L. R., 5 Calc., 474.
(2) 4 Moore's, I. A., 137
(3) 11 Moores'. I. A., 369 (See p. 380).
(4). L. R., 4 I. A., 247 (See. p. 255): S. C. I. L. R., 3 Calc., 198.

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ought to be applied to shares in a joint and undivided Hindu estate, and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded before the alienation of his share took place."

From these observations we understand that it was not disputed *in argument*, and it was accepted by their Lordships as a rule of Hindu law, that the separation of one member of a Hindu family does not in itself affect the position of the other members *inter se*. In the case of *Mussamut Cheetha* (1) their Lordships (p. 380) thus describe the state of the family of the parties to the suit:—

"The family originally consisted of three brothers—Shama Dass, Damodur Dass, and Kooŋj Kishore Dass. It is admitted on all hands that Shama Dass separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the appellant) that the two other brothers continued joint after the separation of Shama Dass; and, further, that for many purposes Damodur Dass and the respondent (being his nephew, the son of Kooŋj Kishore Dass) were members of a joint family at the time of Damodur Dass' death."

Speaking, therefore for myself, as one of the Judges who decided the case of *Radha Churn Dass*, I am of opinion that the point has been definitively decided by their Lordships of the Privy Council, and had these judgments been brought to my notice, my judgment in the case of *Radha Churn Dass* would have been otherwise. The case must, therefore, be remanded to the lower Appellate Court to determine on the merits, whether the compromise can be set aside. We allow no costs in this Court.

Case remanded.

(1) 11 Moore's I. A., 369.