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That being so, although Mr. *Colvin* has addressed us very ably in regard to the findings of fact of the learned Judge, I am of opinion that we cannot go behind those findings, and that upon them the learned Judge has properly held that the suit of the plaintiffs not having been brought within twelve years from the date when the defendant first obtained adverse possession, it must be dismissed, Lachman Singh having acquired a good prescriptive title thereby. I therefore dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

1888 *May* 9.

RAM LAL AND ANOTHER (DEFENDANTS) *v.* DEBI DAT AND ANOTHER (PLAINTIFFS).*

Hindu Law—Joint Hindu family—Evidence of separation—Definement of shares in ancestral property.

A four anna ancestral share in a zamindari village was owned by two brothers, in which the share of *H*, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs the descendants of the other brother. In the village records there has been a definement of shares followed by entries of separate interests in the revenue records, and since 1264 fasli the two plaintiffs have each been recorded as the owner of a one anna share and *H* of a two anna share thereof. The entire four anna share has been in the possession of mortgagees from the year 1844, excepting the sir lands of which H. held separately his own share, *viz.*, 10 bighas. On the 7th July, 1883, *H* executed a deed of gift of his two anna share in favor of the defendants, and caused mutation of names to be made in their favor surrendering to them at the same time possession of the sir land. *H* died on 21st January, 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs at law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and in appeal the District Judge affirmed the decree, holding that the four anna share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two anna share of which the defendants were the donees. On second appeal it was contended, that in as much as since 1844 there could have been no separate enjoyment of the four annas which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat* v. *Sukhmani Kuar* (1) was cited in support of the contention.

Held, that from evidence of definement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated.

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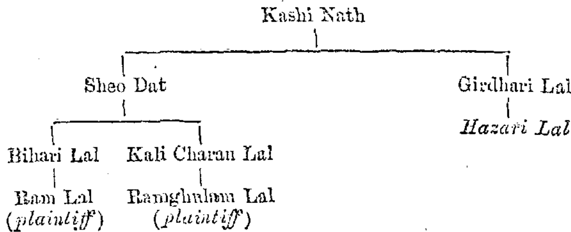
* Second appeal No. 2310 of 1886, from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 2nd August, 1886, confirming a decree of Maulvi Nasar-ulla Khan, Subordinate Judge of Jaunpur, dated the 11th August, 1884.

(1) I. L. R. 1 All. 437.

Ambika Dat v. *Sukhmani Kuar* (1), discussed.

THE following genealogical table explains the relationship of the plaintiffs in this case with Hazari Lal, deceased, whose estate was the subject-matter of dispute:—



Sheo Dat and Girdhari Lal owned a four anna share in a village called Takha. Hazari Lal's share in this four anna estate was one-half, the remaining half being the share of the plaintiffs.

On the 7th July, 1883, Hazari Lal executed a deed of gift of his share in favour of the defendants in this case. At this time the four anna share, but not the *sir* land belonging thereto, was in the possession of mortgagees, and had been so since 1844. Hazari Lal caused mutation of names to be recorded in favour of the defendants, surrendered possession of his *sir*-land, and died on the 21st January, 1884, leaving neither son, widow nor daughter. The plaintiffs were therefore his heirs under Hindu law. They brought this suit to cancel the deed of gift mentioned above, and for possession of the *sir*-land, 9 bighas odd. They alleged, amongst other things, that the four anna share was joint undivided property; that Hazari Lal lived in union with them; and that therefore the alienation was void under Hindu law. The defendants traversed all these allegations.

The Court of first instance dismissed the suit. The plaintiffs appealed to the District Judge. The District Judge dismissed the appeal. The first issue which he framed for determination was "whether Hazari Lal, at the time of the execution of the deed of gift, was in the separate possession of his share of the ancestral property." On this issue the Judge found as follows:—"In *Apporier* v. *Ramasubha Aiyan* (2), their Lordships of the Privy Council have ruled that when the members of an undivided family agree among themselves with regard to particular property that it

(1) I. L. R., 1, All., 437. (2) 11 Moo., I. A., 75.

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shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a certain and definite share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided, "division" having a twofold meaning, division of right and division of property. In *Adi Deo Narain Singh* (1) it was held that the plain principle deducible from the above ruling is, that in order to show separation it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy so to speak, and to convert it into a tenancy in common.

"In this case it is clear from the copies of village-record filed that there has been a definement of shares followed by entries of separate interests in the revenue-records. Since 1264 fasli Kali Charan has been recorded as the owner of a one anna share, Ram Lal of a one anna share, and Hazari Lal of a two annas share, the *jamá* payable by each being separately recorded, Kali Charan being the lambardar of the four annas share.

"The fact that there was a definement of shares between Kali Charan, Ram Lal, and Hazari Lal, followed by entries of separate interests in the revenue-records of the village, goes far towards proving separation of title and interests, but does not necessarily amount to such separation. It must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect.

"The oral evidence is, as usual, conflicting; the statement of the plaintiffs' witnesses that Hazari Lal and his cousin Kali Charan and nephew Ram Lal lived in commensality, and were joint owners of the undivided four annas share, and *sir*-lands being contradicted by the defendants' witnesses. It appears to me, however, to be

(1) I. L. R., 5, All., 532.

proved that Hazari Lal lived latterly in mauza Takha; that he died in the defendants' house in that village; that the funeral obsequies (*kirya karam*) were performed by the defendants; and that the plaintiffs lived in mauza Bhadi.

"The whole of the four anna share it seems has been for very many years in the possession of a mortgagee. The *sir*-lands, 20 bighas, were however, not mortgaged.

"The witnesses for the plaintiffs say that the *sir*-lands were jointly cultivated, partly home cultivation, and partly through *shikmis*. On the other hand, the witnesses for the defendants say that Hazari Lal held separately his own share of the *sir*-lands, the bighas 10 in suit. The Judge then referred to the oral and documentary evidence, and continued as follows:—

"It is urged on behalf of the plaintiffs that the four annas share was jointly mortgaged to Bhagwan Das, and that therefore the joint undivided nature of the property is thereby proved. The debt, however, which led to the mortgage was an old ancestral one, and as pointed out by the lower Court, the fact that the creditor took a joint mortgage of their property from the representatives of the original debtor or debtors does not *per se* prove that the property mortgaged was a joint and undivided one.

"Considering that the recorded definement of shares was accompanied by a separation and division of the *sir*-lands, as is proved by the revenue-records of 1264 and 1272 fasli; that Hazari Lal for some years before his death lived with the defendants in Takha, and not with the plaintiffs in Bhadi; that as stated by one of the plaintiffs' own witnesses he had ceased communicating with the plaintiffs two years prior to his death; that he died in Takha apart from the plaintiffs and that the "*kirya karam*" or funeral obsequies were not performed by the plaintiffs, I must hold that the decision of the lower Court is correct, that the four annas share was not joint and undivided property, and that Hazari Lal was in separate possession of the two annas share which was given by him to the defendants. The plaintiffs, his nephews, by Hindu law cannot therefore impeach the alienation, the property alienated being held in severalty."

The plaintiffs appealed to the High Court.

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RAM LAL v. DEBI DAT.

Hon'ble *T. Conlan*, Mr. *G. Gordon*, and Babu *Bishnu Chandra Moitro* for the appellants.

Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was an appeal from the decree of the District Judge of Jaunpur, who held on appeal that there had been separation in fact in this Hindu family. The defendants were grantees from one Hazari Lal. If there had not been a separation, the plaintiffs would be entitled to a decree. If there had been separation the gift to the defendants was unimpeachable. The Judge of Jaunpur appears to me to have correctly apprehended the law as to separation and to the inferences which may be drawn as to separation. The property in dispute was a two annas share out of a four annas share in the village. The four annas share had been since 1844 in the hands of mortgagees, who had held it under a *zarpeshgi* lease, which had been renewed from time to time. The last lease was granted on the 23rd July, 1871. We are informed that in consideration of such renewals further sums were borrowed. It has been contended before us that inasmuch as there could have been since 1844 no separate enjoyment of the four annas share of the mortgaged property, the evidence afforded by the separate registration could not prove actual separation. I may mention that there was the evidence of Hazari Lal, who said he had separated; that evidence, if believed, would be sufficient.

The point which has been pressed on us was based on a judgment of this Court in the case of *Ambika Dat* v. *Sukhmani Kuar* (1). Mr. Justice Turner in delivering the judgment of the Court said:—"The fact that there was a definement of shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property." It has been assumed in the argument on behalf of the

(1) I. L. R., 1, All., 437.

appellants that the meaning of that judgment is that in no case can separation be found unless there is evidence of a separate enjoyment of profits. We do not think that is the meaning of the judgment. In fact, in the passage quoted, the learned Judges say : " a definement of the shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation." From evidence of that kind, in our judgment, if there is nothing to explain it, separation as to the estate in respect of which there has been a definement of shares followed by entries of separate interests in the revenue-records may be inferred. If the case now before us had been before those learned Judges, they would probably have so worded their judgment that no one might infer that in all cases proof of separate enjoyment of profits was absolutely necessary. To hold that there could be no separation proved in the case of property in the hands of mortgagees unless proof could be given of separate enjoyment, would be to hold that a joint family whose sole property was in the hands of mortgagees could not, during the currency of the mortgage, effect or prove separation. We think that the learned Judges in the case to which we have referred were only dealing with the case before them, and did not intend to lay down rules of universal and exclusive application. This is a second appeal. The Judge in our opinion has shown by his judgment that he perfectly understood the law. There was documentary and oral evidence before him to prove the separation, and we cannot in second appeal question the findings of fact: we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1888
May, 10.

KANHIA (PLAINTIFF) *v.* MAHIN LAL (DEFENDANT).*

Hindu widow—Gift of immoveable property by husband—Life-interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.

The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favor of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclu-

* Second Appeal No. 42 of 1887 from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 25th November, 1886, reversing a decree of Babu Baij Nath, Munsif of Agra, dated the 8th April, 1886.