

PRIVY COUNCIL.

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1890
July 8th.

RAM CHARAN, APPELLANT v. DEBI DIN AND OTHERS, RESPONDENTS.

[On appeal from the High Court for the North-Western Provinces.]

Hindu law—Evidence of partition of joint family—Presumption.

In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family.

APPEAL from a decree (3rd July 1885) of the High Court, affirming a decree (14th July 1881) of the Subordinate Judge of Cawnpur.

The plaintiff claimed a one-half share of joint family property, suing his only and elder brother, the first and principal defendant, with whom two sons, a grandson, and a deceased son's widow, were joined as co-defendants interested in the subject-matter. The plaint (29th July 1880) alleged that both brothers had jointly succeeded to the estate of their father, Jian, who died about the year 1828, consisting of an eight-anna share in mauza Bibrapur, and a smaller share in mauza Bakothi, besides household and other property: that the brothers continued joint, trading with the ancestral funds: and that about thirty-eight years before this suit their father's brother, Nayan, who had survived, was separated off. It was stated in the plaint that the joint property comprised shares in ancestral villages in the Cawnpur and Farrukhabad districts, which stood in the Collectorate books in the names of the two brothers, Umrao Singh, the plaintiff, and Debi Din, the first defendant, as joint proprietors; other shares in other villages were entered in their names separately; and shares in villages had been purchased out of the joint family funds, in the names, respectively, of Beni

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Madho, son of Debi Din, and of Ramcharn, son of Umrao Singh; also other shares had been entered in the name of Mussammat Pem Kuar, widow of Beni Madho, and in the name of Bhima, son of Debi Din, subsequently to Beni Madho's death. Shares in villages purchased out of the joint family funds, had been recorded in the names of Pem Kuar and Ganga Sahai, after a purchase at a sale upon a decree obtained by Beni Madho in his lifetime. Also were claimed shares in gardens, groves, indigo factories, debts, and decreed debts, jewels, and furniture; the whole being valued at Rs. 1,68,811.

The plaintiff's case was that the brothers remained joint in estate, and that the parties were in possession of all the villages, and of the profits of the joint trading concerns, including an indigo factory, which profits were applied to the family expenditure, until the death of Beni Madho, the eldest son of Debi Din, on the 19th June 1876, when his father caused the name of Pem Kuar, the widow, and the name of Ganga Sahai, minor son of Bhima, another of Debi Din's sons, to be entered as proprietors of some villages, remaining himself in possession: that upon this followed disputes, and separate living, dating from the 16th October 1877, when the cause of action accrued: and that as all the property had been acquired while the family was joint, the plaintiff was entitled to a decree for one half of the entirety.

The defence of the defendant, Debi Din, mainly was that about ten years after the death of their father, which had occurred as the plaintiff stated, the brothers separated, each taking his half share; and that no part of the property in suit had been acquired by means of the ancestral stock or its profits, but by his, Debi Din's, own personal exertions, each brother carrying on business separately.

The Subordinate Judge found that Jian having died at the date alleged, left the property stated, and that plaintiff was in undisputed possession of a moiety thereof: but that after Nayan's separation, admitted by both parties to have occurred about thirty-eight years before this suit, the family no longer remained joint; "and although there was no division of the ancestral property by metes and bounds, the members separately appropriated and enjoyed the pro-

fits : they carried on business separately, and all their concerns were separate ; each party having exclusive possession of the property personally acquired by him ; and the interest of any party in any transaction in which he was admitted as a partner, was limited to the amount of money contributed by him."

The Subordinate Judge also found that the plaintiff was at one time employed as a jamadar in the opium factory at Bibiapur, and subsequently traded in grain ; and that he made smaller profits than did his elder brother, who traded in cotton and indigo seed, and who carried on business at Cawnpur with the late Mr. Hugh Maxwell, an indigo-planter, through whom he made a large fortune.

The lower Court observed : " Moreover, it is neither alleged nor proved that the plaintiff shared in the profits of the estates held in mortgage or purchased in the name of the first defendant or his children within twelve years before his cause of action, while it is shown that he received profits of mauza Gauri and Musahibpur held by him exclusively and of a 4-anna share in Asalatganj and Bachitbhartu in which, besides Beni Madho, other parties unconnected with the family were shareholders. As the plaintiff used to receive no profits from those estates in which the names of the second and fourth defendants were substituted in the place of Beni Madho's it did not affect his position, and if the plaintiff's possession was not affected by these paper proceedings he could have no cause of action. '

" Moreover, from the very fact of the plaintiff having in a former suit sued for possession of the property acquired in the name of first defendant and his children, it is shown that he did not hold joint possession of those properties on the date of his cause of action (16th October 1877), for had he been in possession, he would have sued merely for establishment of his right and maintenance of his possession as an equal sharer, and as he has not in the present or former petition of plaint mentioned the date on, and circumstances under which he lost such possession, or was excluded from joint family property, his plaint does not disclose sufficient cause of action. The lower Court also found that the suit was barred by

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limitation, observing: "The plaintiff has not proved that the property acquired in the name of the first defendant and his children was joint family property in the profits of which he participated within twelve years before his cause of action. The suit is therefore barred by lapse of time." The suit was dismissed.

On the plaintiff's appeal, the High Court, after a remand for further evidence on the point whether Debi Din had been either personally, or by authority given by him to sign khewats, a party thereto, maintained the judgment of the Court of first instance. The Judges (BRODHURST and TYRRELL, JJ.) pointed out that there was no evidence of jointness afforded by the revenue records, or that the plaintiff had ever interfered in villages bought in the names of the defendants, or conversely; and that, had it been otherwise, it would have been easy for the plaintiff to produce accounts, or other similar evidence, to show payments made by him to the defendants, or by them to him, for these estates. Nayan and the separated members of the family occupied the same building after their undeniable separation for some years, and that partition was not more formal, or more certain in its character, than this partition alleged by the defendants; and yet it was a fact.

The Judges then concluded in the terms quoted in their Lordship's judgment, concurring in the finding of the Court below.

They added the following to the finding of the fact of previous partition, on which their Lordship's judgment proceeded:—

"We think that the Subordinate Judge has rightly found that the parties to the suit have realized and appropriated the rents, and have continuously been in adverse proprietary possession of the properties purchased in their respective names, and that the plaintiff has not, within twelve years of the institution of his suit, been in possession of the properties which he sues to obtain.

Umrao Singh having preferred the present appeal, was now represented by Ramcharan, his son.

Mr. C. W. Arakoon, for the appellant, argued that the burden of proof had been wrongly laid in this case upon the plaintiff, it having

been incumbent on the defendants to establish the separation alleged by them, so as to rebut the presumption of Hindu law that the family had continued to be joint. The defendants had not proved their case. He referred to the application of the presumption in particular cases, citing *Bholanath Mahta v. Ajudhia Persad Sookul*, (1), and *Gobind Chunder Mookerjee v. Doorga Persad Baboo* (2).

The respondents did not appear. Their Lordship's judgment was delivered by Sir R. Couch.

SIR R. COUCH.—THE plaintiff in this suit, the late Umrao Singh, who is now represented by the appellant, and the defendant, Debi Din, are the sons of one Jian, who had a brother named Nayan. The plaintiff asked in his plaint for a partition of the property, which he alleged was joint family property, part of it having come to the brothers from their father Jian, and another part of it having been acquired after the death of the father, and in such a manner as to be joint family property. The defence was that there had been a partition subsequently to the death of Jian. There had been a previous partition between Jian and his brother of the property which came to them from their father, but that is not material. The real question was, whether there had been a partition between the plaintiff and the defendant, Debi Din. The issue was: "Did plaintiff and first defendant separate after the demise of their father, or did they continue to live in joint partnership until 16th October 1877, and hold joint possession of all ancestral property, or was the property acquired with the ancestral stock while they lived as members of a joint family?" The Subordinate Judge in his judgment says: "From the evidence of the defendants' witnesses, and the tenor of the letters of the parties produced in this case, it is shown that the parties had separate concerns, and each received the profit due to his share in respect to the villages in which his own or his son's name was recorded as proprietor or mortgagee, separately, and for his exclusive use." This is a finding that, as alleged by the defendants, there had been a separation, and that each

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of the parties, although no separation had been made by metes and bounds, had had separate enjoyment of his share of the property. When the case came before the High Court on appeal the finding of the High Court on the question was: "Having very carefully considered the evidence and the arguments of the learned counsel and pleaders on either side, we have arrived at the conclusion that no sufficient reason for disturbing the Judgment of the able and experienced Subordinate Judge has been shown; on the contrary, we agree with the lower Court that it is proved that the ancestral property was but of small value; that the two brothers made a partition of their ancestral property though they continued to live under the same roof; that Debi Din engaged in business on a much larger scale than did Umrao, who was in the service of the Government as a jamadar in the Opium Department; that the two brothers sometimes made purchases separately and sometimes jointly with their children or with strangers, but in all joint transactions the interest of each purchaser was limited to the amount contributed by him." This again is a definite finding that a partition had been made between the two brothers. It has been contended on the part of the appellant that the onus of proof had been improperly put upon the plaintiff to show that the family was joint. It does not appear from the judgments that the onus was so put upon the plaintiff. The case was fully gone into; the evidence offered by either party was received, and the whole of it was considered by both the lower Courts. It is not shown in any way that there has been any error in law in putting the onus of proof upon the plaintiff. There are two concurrent judgments of the lower Courts upon the question of fact, and there is no ground for the present appeal.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. As the respondent does not appear there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. T. L. Wilson and Co.*