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and stated substantially that cultivation begins in the month of Pous. In the grounds of appeal filed in the lower Appellate Court, the plaintiff admitted that cultivation begins in the months of Magh and Falgun, and that those are the months for letting out. It is admitted that there is no evidence on the record to throw further light on the question. Under those circumstances, we think that it would be impossible to hold that a two months' notice given on the 26th Pous, and ending the 26th Falgun, could be a reasonable notice to the defendant for him to turn out of that holding in time to allow somebody else to come in, and cultivate in the month of Magh, or in time to enable the defendant to have a reasonable chance of obtaining some other holding before cultivation begins. We think, therefore, that on this ground, although not on the grounds stated by the lower Courts (in which we are unable to agree) the notice is not a reasonable notice.

The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Beverley.

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June 15.

TEJ PROTAP SINGH (DEFENDANT) *v.* CHAMPA KALEE KOER, WIDOW OF AMAR PERTAP SINGH (PLAINTIFF.)*

Hindu Law, Joint family—Mitakshara law—Separation of joint-family, how effected—Agreement for partition, Effect of—Right of survivorship.

Two brothers, members of a joint Mitakshara family, executed an *ikrarnama* (agreement) whereby, after reciting that the declarants had remained joint and undivided, and in commensality up to a certain date, and that portions of their properties, both moveable and immoveable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf.

Held, that this agreement of itself amounted to a separation of the brothers as a joint family, and extinguished all rights of survivorship between them.

Sheo Doyal Tewaree v. *Judoonath Tewaree* (1), and *Babaji Parshram* v. *Kashibai* (2) distinguished.

Ambika Dat v. *Sukhmani Kuar* (3) commented upon.

* Appeal from Original Decree No. 89 of 1884, against the decree of Baboo Abinash Chunder Mitter, Rai Bahadur, Second Subordinate Judge of Mozufferpore, dated the 29th of March 1884.

(1) 9 W. R., 61. (2) I. L. R., 4 Bom., 157.
(3) I. L. R., 1 All., 437.

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THIS was a suit by a Hindu widow for recovery of her husband's share in ancestral and self-acquired properties, on the allegation that her husband was separate in food and estate from his brother (the defendant) at the time of his death. Among the evidence there was an *ikrarnama* which purported to have been executed by the two brothers, and the material portion of it ran as follows: "We, the declarants, remained joint and undivided, and in commensality up to 3rd Kartic 1287 F. S. From the 4th Kartic aforesaid we separated in mess, (and in everything) and we have got the household furniture and moveable properties, that is brass and silver utensils, as well as silver and gold articles and woollen clothing, &c., and brick and mud-built houses divided (between ourselves) through the medium of Krishna Bullubh Ojha . . . . and we have had the house and courtyard in front of the door and land at the back of the house, and *filkhana* and stable partitioned, through the mediation of Babu Suraj Perkash Singh. . . . . Now it is necessary and desirable to have the detached pieces of land and mouzah Jitpore, &c., and other mouzah appertaining to the districts of Chumparun, Sarun, and Tirhoot, all the immoveable properties, and portion of the moveable properties, which have been left to be partitioned, and elephants, &c., ... it is impossible to effect partition and division unless arbitrators are appointed by us, the declarants. Of our own accord and free will, therefore, we, the declarants, do appoint Babu Suraj Perkash Singh and Babu Raghubans Singh as arbitrators."

The material issue in the suit was, whether the plaintiff's husband had been separate from his brothers.

The Subordinate Judge observed that in his view the *ikrarnama* furnished sufficient evidence of separation, and that the separation of title and interest was quite sufficient for the purpose of separation of a joint-family, though no actual division by metes and bounds was made. The intention of persons that their condition as co-parceners should cease was sufficient to establish partition. Under the circumstances the Subordinate Judge held that the defendant was not entitled to succeed to his brother's estate, and decreed the plaintiff's claim.

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On appeal by the defendant to the High Court it was contended that the *ikrarnama* (agreement) between the brothers did not operate as a separation of the joint-family.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Dwarikanath Chuckerbutty* for appellant.

Baboo *Hem Chunder Banerji*, Baboo *Abinash Chunder Banerji* and Baboo *Pran Nath Pundit* for respondent.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was delivered by

WILSON, J.—This is a suit brought by the plaintiff, a Hindu widow, to recover her husband's property in the capacity of heir.

The defendant is the only brother of the deceased.

The two brothers, undoubtedly at one time, were the members of a joint Hindu family, governed by the Mitakshara law. If the brothers at the time of the death of the deceased were separate, the plaintiff, his widow, is his heir, and is entitled to recover. If at that date the two brothers were joint, then the widow is not entitled to recover as heir, but the whole property survived to the defendant. And the sole question to be decided is, whether the two brothers were joint or separate at the date of the death of the plaintiff's husband.

There is no question that, down to the early part of the month of Kartick 1287, which would correspond to about the middle of November 1879, the two brothers were joint. But soon after that, on the 18th February 1880, a document was executed by the two brothers. That document commences thus: "Whereas we, the declarants, remained joint and undivided and in commensality up to 3rd Kartick 1287, F. S. From 4th Kartick, aforesaid, we separated in mess (and in everything), and we have got the household furniture and moveable properties, that is brass and silver utensils, as well as silver and gold articles and woollen clothing, &c., and brick and mud-built houses, divided (between ourselves) through the medium of Krishna Bullubh Ojha, inhabitant and part proprietor of mouzah Talebpore, pergunnah Mahsi, and we have had the house and *foolwari*, and courtyard in front of the door, and land on the back of the

house and *fillchana* and stable, &c., partitioned through the medium of Babu Suraj Perkash Singh, our full uncle on the 30th Pous of the present year." Thus they began by asserting that they had separated on a certain date. And then they go on to say that they have divided certain portions of the joint property, and then they go on to deal with the properties which had still to be partitioned, and they say: "It is impossible to effect partition and division aforesaid, and settlement of the matters above adverted to, unless arbitrators are appointed by us, the declarants." And then they go on to appoint Babu Suraj Perkash Singh, Babu Raghubans Narain Singh and Krishna Bullubh Ojha as arbitrators, and "declare and give in writing that the aforesaid arbitrators shall take down our statement regarding our claims, and inspect the list of the things and properties, and with good faith and honesty settle the matters and divide the properties in equal moieties by casting lots and give an award. To the award and the decision, and partition of the arbitrators aforesaid, we and our heirs and representatives have not, nor shall have in any way, any objection and dispute to make." That document was registered a few days afterwards, namely on the 20th February 1880.

Shortly before that document was executed on the 7th November, which is considerably after the date on which it is stated in the deed that the brothers separated, another document, *viz.*, a power-of-attorney, was executed by the defendant, the elder brother, in favour of his own son. This was a general power-of-attorney of the usual kind, and the defendant himself says that it was in the place of a previous power-of-attorney, whereby similar power was given to the younger brother, the plaintiff's husband. Now that is in accordance with the idea of separation and partition.

If those documents stand alone, it is quite clear that the parties made up their minds to separate, and that they considered that part of the property had been partitioned and held in severalty, and intended to partition the rest. They would thus be conclusive in favour of the plaintiff. How is that met? It is met by saying that shortly after that document was executed, their uncle Suraj Perkash Singh mentioned in the deed, came

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from his own home, which is about twenty *koses* distant, to the home of these two brothers, that he heard of a quarrel having arisen between them, and that he was told not of the partition deed, but of the *mookhtarnama* which had given offence to the younger brother. He says he adjusted the quarrel between the two brothers, the *mookhtarnama* was abandoned and given over to the younger brother, the quarrel was made up, and they went on the same friendly terms as before. So while they were making him their confidant, they never told him of this partition deed at all.

Another witness called was one of the arbitrators mentioned in that deed, Krishna Bullubh Ojha. He says that he never heard of any deed of that nature, never heard that there had been any partition contemplated; that he was never asked to arbitrate, and never acted as an arbitrator. The Judge of the Court below has given, we think, satisfactory reasons for rejecting this evidence. In addition to these, the principal witness is the defendant himself, whose evidence in many respects is unsatisfactory.

On the other hand, there is a certain amount of oral evidence, not perhaps of a very valuable kind. But there is evidence of an indisputable character, and it is this: Long after this partition deed had been executed, and long after the time when it is said that the brothers had made up their quarrel, and had begun again to live on friendly terms together in commensality and in joint estate, we find both the brothers taking active steps to carry out the partition. We find that in July 1880, the elder brother, the defendant himself, made an application to have his name separately registered in the account of revenue with regard to his individual share in mouzah Bazidpore, and that application is the more important, because we see from the application itself that the joint share of the two brothers, two annas, had already been partitioned from the remaining fourteen annas, and what he asks for is the separation of one anna share, on the ground that difficulties have arisen in paying revenue together with his co-sharers, and there is apprehension about the property being put up to sale in consequence of default in payment of revenue by his co-sharers.

The younger brother also took steps to carry out the partition,

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because we find that on the 6th January 1881 he made an application for partition of his own individual share of mouzah Saguni, &c., his share being two annas, out of the whole sixteen annas, and two annas out of the remaining fourteen annas, being put down as the share of his brother Tej Protap Singh. After the death of the younger brother, those proceedings were referred to again. We find that the defendant petitioned on the 21st August 1882 for a postponement of the proceedings, and an order was made accordingly. Some further steps were taken, and ultimately the proceedings were abandoned. We find, therefore, that both the brothers, long after the time when it is said that they had made up their quarrel, and one brother certainly down to the death of the deceased, took active steps to partition. There is therefore satisfactory, and indeed overwhelming, evidence on the one side, as against the extremely unsatisfactory oral evidence given on the other.

It follows, therefore, that there was this agreement for partition, that the parties never abandoned it, and that they continued to take steps to carry out partition. The lower Court has arrived at a conclusion on the facts which appears to us to be entirely correct.

But then a question of law was argued before us: it was said that an agreement of this nature for partition and separation does not operate as a separation, unless it has been carried into effect by actual partition and actual enjoyment in severalty by the shareholders of their separated properties. We think that that contention in law is not sound. The most important authority on the subject by which we are bound is the well-known case of *Appovier* v. *Rama Subba Aiyan* (1). The law is thus laid down at pages 89 and 90.: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the Collector or Receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an

(1) 11 Moore's I. A., 75.

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undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it 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 definite and certain 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."

The same matter was considered in two later cases before the same tribunal. One is *Joy Narain Giri* v. *Girish Chunder Myti* (1). That was a case not upon an agreement but upon a decree, and the law is thus laid down at page 232: "It appears to their Lordships that the decree which has been read is in effect to give to Shib Pershad Giri a separate share of the property of the grandfather. It gives him in terms possession of the eight annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation, that is, from the time when he left the house in which he had been living with his cousin, and it gives him also a half of the personal property. That being so their Lordships are of opinion that, although the suit is not actually in terms for a partition, yet that the decree does effect a partition at all events of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appovier* v. *Rama Subba Aiyan* (2)."

In a still later case, *Chidambaram Chettiar* v. *Gauri Nachiar* (3) the same tribunal, in dealing with a decree of the nature of a partition decree, said this (page 181): "For these reasons their Lordships are of opinion that the judgment of the 24th of August 1871 must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from

(1) L. R., 5 Ind. Ap., 228 : I. L. R., 4 Calc., 434.
(2) 11 Moore's I. A., 75.
(3) L. R., 6 Ind. Ap., 177 : I. L. R., 2 Mad., 83.

that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier* v. *Rama Subba Aiyan* (1)."

Now, these authorities seem to us to establish this, that an agreement for separation and partition, or a decree for separation and partition, if according to its terms it purports to be an agreement or a decree for present separation and present division in interest and right, operates to make the parties from that time separate, although the actual partition by metes and bounds and separate possession and enjoyment be postponed until the agreement or the decree is fully carried into effect. Now, in the present case, we feel no hesitation about the construction of the agreement. It is an agreement asserting a past separation —a separation actually in effect at the time of the deed, and a division of rights at the time of the deed, and providing for giving effect to this by a subsequent partition of so much of the property as had not been divided.

There are certain authorities which have been cited on the other side. The first in date is the case of *Sheo Doyal Tewaree* v. *Judoo Nath Tewaree* (2). The judgment was delivered by Dwarka Nath Mitter, J., and we see no inconsistency between that case and the view we take in the present case. The subject dealt with in that judgment was the interest which a mother or grandmother takes under a partition between her sons or grandsons.

In such a case the mother or grandmother has no vested title so long as her sons or grandsons are joint. She acquires her title only by virtue of partition. And, as we understand that judgment, it decides no more than this, that in order to complete the title of the mother or grandmother which she acquires by partition, the partition must be completed, that there must be not only a decree for partition, or an agreement for partition, but a decree or an agreement carried into effect.

The second case is the case of *Babaji Parshram* v. *Kashibai* (3). In that case there had been a decree for partition, and it was not carried into effect; and the learned Judges held that the effect was not a present separation, but they came to that conclu-

(1) 11 Moore's I. A. 75. (2) 9 W. R., 61. (3) I. L. R., 4 Bom., 157.

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sion on the construction of the decree. They regarded it, not as a decree intended to create a present separation, but as a decree which contemplated a partition, and that when the partition was carried out, separation should result. Therefore the view which the learned Judges took in that case is not inconsistent with the view we take in this case.

There was one more case cited, the case of *Ambica Dal* v. *Sukhmani Kuar* (1). In that case the defendants asserted separation; and what Turner, J., says is this: "It is for the defendants to make out a sufficient case showing partition, but with the exception of the fact that there was a quarrel between Maneshar Ram and Dhaneshar Ram in 1854, and that they then defined their interests in the property which they then held, and which at their deaths came to be recorded in the same way in their son's names, there is really no reliable evidence. There is nothing definite to show the very important fact that the definement of shares was ever followed by separate enjoyment of profits.

"The fact that there was a definement of shares followed by entries of separate interests in the revenue records in some estates 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 shareholders to separate their interests, and that the intention was carried into effect."

Now that language taken alone might possibly leave the impression that it was necessary to create a separation that the partition contemplated should first be actually carried into effect. If that were so it appears to us that the language would be scarcely consistent with the decisions of the Privy Council by which we are bound. In that case unfortunately the report does not state what the nature of the agreement was with which the Court had to deal. And we think that we must assume that it was an agreement of such a nature that it did not clearly and unmistakably declare an intention of present separation. We think, therefore, that in point of law, as well as in point of fact, the decision of the Court below is right, and that this appeal must be dismissed with costs.

Appeal dismissed.

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