1895

IN THE MATTER OF RAJENDRO NATH MUKERJI.

law. The case in the Court of Appeal in England does not throw, in our opinion, any light on the question before us.

We cannot in this case question the propriety in law or in fact of the conviction of the Court of Session, which has been maintained by this Court on appeal. It is, however, incumbent on us, under section 8 of our Letters Patent, to consider whether there exists reasonable cause for removing or suspending from practice the vakil who has been convicted, and for that purpose it is necessary for us to ascertain, as it is not admitted, the degree of culpability involved in the acts which constituted the offence of which he has been convicted.

We hold accordingly that Mr. *Porter* is not precluded from showing, if he can, that the conduct of his client in the matter was not such as to render him an unfit person to be retained on the roll of vakils of this Court.

[The Court then went on to consider the degree of culpability indicated by the conduct of the vakil which led to the conviction above referred to, and in the end passed an order striking him off the roll of vakils of the Court.]

APPELLATE CIVIL.

1896
January 9.

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

GAJENDAR SINGH (PLAINTIFF) *v.* SARDAR SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Joint Hindu family—Evidence of separation—Shares separately recorded in village papers—Separate purchases by individual members of family out of joint family funds.

Where there has existed a joint Hindu family possessed as such of immovable property, the presumption is that until the contrary is shown such family will continue to be joint.

The fact that in the revenue and village papers individual members of a Hindu family once admittedly joint are recorded as holding each a certain specified portion of property is not, standing by itself, sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immovable property have been made from time to time in the names of individual members of the family,

* First Appeal No. 56 of 1894 from a decree of Pandit Raj Nath, Sahib, Subordinate Judge of Moradabad, dated the 16th November 1893.

and that the property as purchased was recorded in each case in the name of the nominal assignee.

THE facts of this case are very fully stated in the judgment of the Court.

Messrs. *T. Conlan* and *Abdul Majid* and Munshi *Ram Prasad* for the appellant.

Pandit *Sundar Lal* for the respondents.

EDGE, C.J., and BURKITT, J.—This is a first appeal from a decree of the Subordinate Judge of Moradabad dismissing the plaintiff's suit. The plaintiff, to put the case shortly, brought his suit against his cousin Sardar Singh, Musammat Mewa Kuar, the step grandmother of Sardar Singh, and Musammat Sundar, who was the kept woman of Baldeo Singh, the grandfather of Sardar Singh. He sought possession of the property mentioned in the plaint on the ground that the family to which he and Baldeo Singh, the grandfather of the defendant Sardar Singh, belonged was a joint Hindu family, and on the further ground that the property in question was the joint property of that family, of which family, if it was a joint family, he was the sole surviving male member. He sought to have it decided that certain gifts, a will and an agreement mentioned in the plaint, which were made by Baldeo Singh, were void as against him, the plaintiff. The defence to the suit was that all the descendants of one Chandan Singh, the ancestor, had separated many years ago, in fact, according to the defence, prior to 1836, and that the properties sought to be recovered by the plaintiff were not joint family property, but were properties, some of which had come to Baldeo Singh as a separated Hindu, others of which had been acquired by him as a separated Hindu, and the remainder of which had been purchased by Baldeo Singh as a separated Hindu for and in the name of Sardar Singh. If that defence of separation were made out, there was an end of the suit.

We are relieved from deciding in our judgment the issues between the plaintiff and Sardar Singh. They have filed an agreement which puts an end to this suit and appeal, so far as they are mutually concerned, and which agreement is to be embodied in our

1895

GAJENDAR SINGH v. SARDAR SINGH.

decree, and as between them we decree in accordance with the agreement. We may say that, although we hold a very strong opinion on the merits of the suit, the agreement which has been come to between the plaintiff and Sardar Singh, his cousin, is, in our opinion, a very proper and equitable agreement between near relations, and certainly does credit to the plaintiff in this case and to the advisers on both sides. It avoids any chance of future litigation and leaves these close relations, we hope, on good terms with one another.

Musammat Mewa Kuar died during the pendency of the suit and any interest she had died with her.

Musammat Sundar, the third defendant, is still living. The decree below was in her favor, so far as she was concerned. She is a respondent to this appeal. She is not a party to the agreement between the plaintiff and Sardar Singh. It consequently becomes necessary for us to decide this appeal on the merits as between the plaintiff and Musammat Sundar. Musammat Sundar's title depends on the alleged will, and further on the question whether or not the property left to her by that will was joint family property. If it was joint family property, the testator had no disposing power and his will passed nothing.

As we have said, Chandan Singh was the ancestor of the plaintiff and of the defendant Sardar Singh. When he died is not known, or at any rate is not proved. He left five sons. Hamir Singh, the eldest son, died in 1856 without issue, but leaving a widow, Sheo Kuar, surviving him; Himanchal Singh, the second son, died in 1859, leaving a widow surviving him, Musammat Mohan Kuar, and a daughter, Mulo Kuar, who died during the pendency of this suit; Mahtab Singh, the third son, died in 1863, leaving surviving him his widow, Sahib Kuar, who died in 1886, and five daughters, two of whom had each three sons living; Randhir Singh, the fourth son, died in 1836, leaving Baldeo Singh surviving him. Baldeo Singh died on the 27th of April 1892. He left surviving him his widow, Mewa Kuar, who died during the pendency of the suit. Baldeo Singh also left surviving him his daughter, Gulab Kuar,

by another wife. Gulab Kuar was the mother of Sardar Singh, the defendant. Ugar Singh, the fifth and youngest son, died on the 21st of June 1874, and left surviving him his widow and an only son, Gajendar Singh, the plaintiff in this suit. It is necessary to state these facts for a clear conception of how wrong in our opinion the Subordinate Judge went in the conclusions at which he arrived.

It is well-established law in these Provinces that a Hindu and the sons lawfully born to him constitute, until separated, a joint Hindu family, and that the ancestral property, and all property acquired, of which the ancestral property is the source, constitute joint family property of such family. It is also well-understood law in these Provinces that, given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father. It is also the law as understood in these Provinces that in a Hindu joint family the surviving male members of the family exclude in law from the inheritance widows, daughters and daughter's sons, who are entitled to maintenance only out of the joint family property. It is also well-established law in these Provinces that the widow, the daughter and the daughter's son of a separated Hindu exclude from the inheritance to the separated Hindu, brothers, nephews and other relations separated from the separated Hindu. Now these propositions of law should have been understood by the Subordinate Judge, and if he had borne them in mind and applied them to the consideration of this case, he could not, in our opinion, have come to the conclusion which he did, that the five sons of Chandan had separated and ceased to be members of a joint Hindu family. Further, in our opinion, the Subordinate Judge could not have come to the conclusion at which he arrived if the arguments in the case before him had directed his attention to a number of *wajib-ul-arzes* which are on the record, to the cross-examination of several of the witnesses upon whom he relied, and if he had had experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares, and also if he had known, as indeed he

1895

GAJENDAR SINGH v. SARDAR SINGH.

ought to have known, as a Judge in these provinces, that a definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated.

The plaintiff's case is a straightforward one, and in our opinion is consistent with the documentary evidence on the record and with the evidence given in cross-examination by many of the witnesses called on behalf of the defendants. What is the case attempted to be proved on behalf of the defendants? It is a case which violates many of the leading principles of law to which we have referred, and which is absolutely inconsistent with any devolution of property amongst separated Hindus. If the brothers had separated, or if even in fact Randhir Singh or his son Baldeo Singh had separated from the other members of the family prior to 1856, the devolution of the property sworn to by the witnesses for the defendants and accepted as correct by the Subordinate Judge could not, upon any principle of Hindu law, have taken place. Hamir Singh, the eldest brother, died in 1856. It is the case of the defendants that the interest of Hamir came to the four surviving members of the family, Himanchal Singh, Mahtab Singh, Baldeo the son of Randhir Singh, and Ugar Singh. That would have been the natural and legal devolution if the family in 1856 had been a joint Hindu family. Hamir's interest did in fact devolve on these four surviving members of the family. If these brothers had been separated Hindus, Hamir Singh's widow, Sheo Kuar, would have taken in law and in fact a Hindu widow's estate in Hamir Singh's property. She took nothing of the kind. If the family was separate, Baldeo Singh would have taken nothing. On the death of Hamir Singh, if he left a widow, or on the death of the widow whom he left, Baldeo Singh would have been excluded according to Hindu law from any succession to Hamir Singh, as his uncles

Himanchal, Mahtab and Ugar would exclude him. We pass over for the moment what is said to have taken place on the death of Himanchal Singh in 1859, and we come to a later date, *viz.*, 1863, when the third brother, Mahtab Singh, died. It is undisputed, and it is proved beyond doubt, that upon Mahtab Singh's death his interest devolved upon his nephew Baldeo Singh and upon Ugar Singh, his brother, who were the surviving male members of the joint family, if it was a joint family. If the family was joint, Mahtab Singh's interest undoubtedly, according to Hindu law, must have devolved, as it did in fact, on his nephew Baldeo Singh and his brother Ugar Singh. If the family had separated even shortly before 1863, Baldeo Singh and Ugar Singh would have taken not one trace of an interest in the property of Mahtab Singh. Mahtab Singh's widow would have taken a widow's interest in the property of Mahtab, and would have held that interest until her death in 1887. Mahtab's property would then have devolved upon any surviving daughter of his and ultimately on his grandsons, but all these parties were, without question and without raising any claim, excluded from inheritance in 1863 to Mahtab Singh's interest.

The devolution of interest on the death of Hamir Singh in 1856, and on the death of Mahtab Singh in 1863, can only be accounted for on the ground of the family having been and having continued to be joint, and of the property or shares entered in the names of Hamir Singh and Mahtab Singh in revenue and village papers having been joint family property. The facts as to the devolution of interest on the death of Hamir Singh and Mahtab Singh are common ground. It is admitted on both sides that the devolution was as we have said, and if the Subordinate Judge's attention had only been drawn to the cross-examination of many of the defendant's witnesses, he would have seen that the devolution of interest on the deaths of Hamir Singh and Mahtab Singh was absolutely inconsistent and irreconcilable with the defendant's case that the five sons of Chandan Singh had separated.

We shall now refer to what happened on the death of Himanchal Singh in 1859. It is said on behalf of the defendants that

1895

GAJENDAR SINGH v. SARDAR SINGH.

Himanchal Singh's property devolved exclusively upon Baldeo Singh. There is in the very nature of the case the strongest reason to doubt the accuracy of that statement. It may very well appear, and does, from the revenue and village papers, that Baldeo Singh's name was entered in those papers as that of the successor in title to the share or interest in the property before then recorded in the name of Himanchal Singh. The Subordinate Judge ought to have known, if he has had many of these cases before him, that it is not at all uncommon in these Provinces for the property of a joint Hindu family to be recorded in revenue and village papers sometimes in the name of one member of the family, sometimes in the name of another; sometimes in the name of the managing member, sometimes in the name of a junior member of the family—and that without any separation having in fact taken place. The Subordinate Judge ought also to have known that in a joint Hindu family it not uncommonly happens in these Provinces that when property is acquired from the resources of a joint Hindu family the purchase is made in the name of one member of the family, not as his exclusive property, but really on behalf of the family of which he is a member, and that entries in revenue and village papers consequent upon such assignments of interest, as a rule, are made in the name of the nominal assignee. The Subordinate Judge should have known and borne in mind these common facts in deciding this case, and in considering the evidence according to which, if it were accurate, the interest of Himanchal Singh, on his death, devolved exclusively on Baldeo Singh. If the family was separate, as the defendant's case is that it was, neither Baldeo Singh nor Mahtab Singh nor Ugar Singh could have taken anything other than a reversionary interest in Himanchal Singh's property as a separated Hindu until the death of Himanchal Singh's widow, and until the death of his daughter Mulo Kuar, Mulo Kuar having lived until after the commencement of this suit; so that, even with regard to the devolution of Himanchal Singh's interest, the case attempted to be set up by the defendants is absolutely irreconcilable with the principles of Hindu law as they are followed in these Provinces.

It might be impossible, owing to the deaths of Baldeo Singh and Ugar Singh, to know exactly why it was that Baldeo Singh's name apparently was entered in the revenue and village papers in respect of the property standing in the name of Himanchal Singh. It would appear to have been the custom in this family, as it has been in others, to enter the names of different members of the family in respect of different portions of the family property. The result is that the evidence on both sides as to the devolution of the interest of Hamir Singh and of Himanchal Singh and of Mahtab Singh is irreconcilable with the idea of a separated family and is consistent only with the presumption that this family remained and continued to be joint.

There are other considerations which lead us to the same conclusion. Ugar Singh died in 1874. The plaintiff, who was his son, was a minor of tender years—some four years old—at that time. Baldeo Singh acted as the guardian of his minor cousin, the plaintiff. He obtained a certificate of guardianship, and from that fact the Subordinate Judge draws the inference that Baldeo and the plaintiff were separate. The Subordinate Judge had either never heard or had forgotten that it had been decided prior to 1874 by the High Court of these provinces that it was a proper and legal act for a member of a joint Hindu family to take out a certificate of guardianship of the person and interest of a minor member of that family. It was believed to be the law that such certificate was required. In fact, as we understand the law, the taking out of such a certificate was not necessary; but that view of the law has been adopted only recently by the High Court at Calcutta, the High Court at Bombay and by this Court. At any rate, the chances are that any one advising Baldeo Singh would have advised him that he should apply for and obtain a certificate of guardianship for his minor cousin, and that although the family was joint.

In 1282, 1283 and 1284 Fasli a settlement was proceeding. It was the usual thirty years' settlement. One of the most important documents in the settlement of a village is the *wajib-ul-arz*, which contains a statement of the custom or of the agreement come

1895

GAJENDAR SINGH v. SARDAR SINGH.

to by the proprietors as to the custom to be observed in the village. At the time of the settlement the two surviving members of this joint family were Baldeo Singh and his minor cousin, the present plaintiff, for whom Baldeo Singh was acting as guardian. Now in a large number of *wajib-ul-arzes*, some twelve or more, which were made at that settlement and which are on the record, there are clauses in which it is positively stated that in the villages referred to in those *wajib-ul-arzes* there was no division of profits and losses because the proprietors were in commensality. These *wajib-ul-arzes* to which we refer were *wajib-ul-arzes* which related to villages in which the proprietary right was vested at the time of the settlement in Baldeo Singh and his minor cousin, the present plaintiff, as appears from *khewats* which are upon the record. These entries in these *wajib-ul-arzes* are entirely inconsistent with the defendant's case that the *defendant* and Baldeo Singh were separate. Such an entry as to commensality would never have been made by a member of a separated family, and we know from the evidence on the record that these *wajib-ul-arzes* were prepared with the knowledge and cognizance of Baldeo Singh and his agents; and in fact these statements must have been made at the instance of Baldeo Singh. There are some *wajib-ul-arzes* of that settlement relating to some of the properties in dispute here which contain statements that profits and losses were divided by the proprietors. So far as we can ascertain, there is only one of such *wajib-ul-arzes* which relates to a village in which the sole proprietors at the date of settlement were Baldeo Singh and the present plaintiff. Some of these *wajib-ul-arzes* undoubtedly related to villages in which there were as co-proprietors persons of a different caste, of a different religion and in no way related to Baldeo Singh and the present plaintiff, and in these cases the *wajib-ul-arz* also would necessarily state that profits and losses were divided amongst the proprietors. There is, again, a third class of *wajib-ul-arz*, certainly one, perhaps more, in which the proprietors of one *patti* of the village were members of this joint family and the proprietors of another *patti* of the village

were strangers *inter se*, and in that class it is stated with great precision that the members of this family in their *patti* do not divide profits or losses by reason of commensality, while as to the proprietors of the other *patti* it is stated that they do divide profits and losses. In our opinion, drawing all reasonable references from the *wajib-ul-arzes*, and considering them with reference as to who were at or about the time of the settlement proprietors in the village or in the *patti*, we can only come to the conclusion that Baldeo Singh at that time admitted in these public documents that the family to which he and the present plaintiff belonged was joint. There is no doubt in our minds that after the time of that settlement Baldeo Singh, in order to provide for his grandson Sardar Singh and to advance him in the world, began, whilst he was guardian of his minor cousin, the present plaintiff, to prepare evidence which might subsequently be put forward, as it has been, to indicate a separation in the family. During Ugar Singh's lifetime there is absolutely nothing that we can see which is inconsistent with the family being joint. There are, however, indications, the result of things done by Baldeo Singh or his karindas, whilst he was acting as guardian for the present plaintiff, which, although standing alone they are not strong, certainly hint at a separation, and there are further indications that Baldeo Singh was, during the minority of the present plaintiff, laying the ground for a subsequent claim to be entitled to a larger share in some of these villages than the plaintiff. It must be borne in mind in looking at anything which took place between 1874, when Ugar Singh died, and 1889, when the present plaintiff came of age, that during that period Baldeo Singh was the master of the situation, and that there was no one to protect the interest of the present plaintiff effectively except Baldeo Singh, his guardian. In our opinion Baldeo Singh betrayed his trust as far as he could. We cannot regard anything unfavorable to the plaintiff which was done by or at the instance of Baldeo Singh during the plaintiff's minority as of any weight in the determination of this suit; but, on the other hand, we are entitled to regard all these acts of Baldeo Singh which were adverse to the

1895

GAJENDAR SINGH v. SARDAR SINGH.

theory of a separated family and contrary to the interests of Sardar Singh, whose interests he was seeking to promote, as of the very greatest importance as showing what the true facts were. In this view we find the documentary evidence as to what took place after the death of Ugar Singh and during the minority of the present plaintiff affords the strongest presumption, in fact proof, that Baldeo and the present plaintiff were joint. It is not pretended by the defendants that a separation of their pleadings took place in recent years. The separation took place prior to the death of Randhir Singh in 1836. They tried to prove that the family was separated from that time down to the present. It was never pretended by the defendants that a separation had first taken place between Baldeo Singh and his minor ward. Such a separation taking place between a guardian and his ward in a joint Hindu family and adversely to the interests of the ward would naturally be scouted by any Court of justice.

Now, in conclusion, we have only to refer to a few of the remarks of the Subordinate Judge. We have indicated that in our judgment the Subordinate Judge has misunderstood the evidence; possibly through no fault of his; possibly through the time at his disposal for the arguments in this case being short. The arguments before this Court have taken eight days. Before the Subordinate Judge they took two days, and he had before him a large mass of evidence, to many important points in which it is evident that his attention was not directed.

The first observation to which we refer is that which imputes practically to the plaintiff that he stole the account books of the estate. If the Subordinate Judge had given careful attention to the evidence, he would have found that it was impossible for the plaintiff to steals these account books. He would have found that when the documents in the outer office came to the number from time to time of fifteen or twenty sheets they were removed into the *zanana* apartment of Baldeo Singh's house and were kept there. The documents which the plaintiff took, and was entitled to take, as a member of this joint Hindu family for his information from

the office, were what we may call the granary accounts; that is to say, the accounts of wheat, seed, oil and other matters brought into the joint storehouse for the consumption of the family, the servants and the horses, and showing how they were distributed from day to day. There was no pretext for holding, as the Subordinate Judge did, that the plaintiff secretly took the accounts. The only accounts which the plaintiff took away were taken openly. It is ridiculous to suggest that the plaintiff had any opportunity or could have taken the estate accounts without every one being well aware of it. The mass of estate accounts which must have accumulated and been in existence in the *zanana* apartments of Baldeo Singh relating to the management, profits, losses, rent, &c., of the numerous villages belonging to this estate must have been such that it would not be too much to say that one man could not remove them, but that it would have required a cart or two to carry away the accounts of all those years.

The Subordinate Judge in our opinion put an entirely wrong construction on the evidence relating to the petitions of the 13th of September 1883, and the 16th of April 1892. The Subordinate Judge does not believe the plaintiff as to his evidence that he had not authorised the petition of the 16th of April 1892. He considers that the plaintiff in that respect is contradicted by the evidence of Maulvi Ibadat-ullah. In our opinion there is no contradiction. Ibadat-ullah stated that he had, on instructions of a karinda of the plaintiff and some one who accompanied him, filed that application. It is not certain whether that karinda was not also the karinda of Baldeo Singh. However, that matter is immaterial. Ibadat-ullah says that subsequently to the 16th of April 1892 the plaintiff sent for him and asked him, as we read the evidence, if he had filed a petition on his behalf, and what had been done on it, and told him to withdraw it. That does not lead us to the inference that the plaintiff had authorised the filing of that petition, and we are fortified in that conclusion by the evidence given in cross-examination by Sardar Singh, the principal defendant in this suit. He said:—"Baldeo Singh did not cause any application

1895

GAJENDAR SINGH v. SARDAR SINGH.

to be filed, but the karindas who had the management in their hands used to file applications after having them drafted. The karindas used to watch and conduct the Court proceedings as they liked without the permission of Baldeo Singh." That shows that, at least so far as the elder member of the family, Baldeo Singh, was concerned, his karindas were in the habit of filing applications without consulting him at all. That evidence of Sardar Singh is consistent also with the statements in the evidence of the present plaintiff as to certain petitions for partition which had been filed.

There is a good deal in the judgment of the Subordinate Judge upon which comment adverse to his conclusions might be made. He did not, in our opinion, correctly weigh the evidence, even if he read the whole of it, which we doubt—we refer to the documentary evidence—and we entirely fail to understand how he could have come to the conclusion that, on a reference to the whole deposition of the plaintiff, it could be inferred that Ugar Singh, Baldeo Singh and other ancestors were separate and not joint. In our opinion the plaintiff gave his evidence honestly, truthfully and straightforwardly.

We find that the five sons of Chandan Singh continued to be joint during their lives, and the survivors continued to be joint during their lives; that Baldeo Singh and the plaintiff were joint; that the property in question in this suit was joint family property, and that Baldeo Singh had no power to dispose of that property or any part of it by will. As between the plaintiff and Musammat Sundar, she took nothing, and we allow the appeal and set aside the decree of the Court below, and decree the plaintiff's claim for possession as against Musammat Sundar. It would be useless to decree costs as against Musammat Sundar, and we accordingly make no order as to costs as between these parties. The plaintiff does not press for a decree as to *mesne* profits as against Musammat Sundar, so we make no decree as to *mesne* profits. As we have already said, the decree as between the plaintiff and Sardar Singh will be in the terms of the agreement filed in Court yesterday.

Appeal decreed.