APPELLATE CIVIL.

1909.
May 14.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Griffin.
GOVIND CHANDRA DAS (PLAINTIFF) *v.* RADHA KRISTO DAS AND OTHERS (DEFENDANTS).*

Hindu Law—Dayabhaga—Parties governed by the Dayabhaga migrating to the United Provinces—What law applicable—Joint family property under Dayabhaga—Burden of proof—Benami transaction.

A Hindu family originally governed by the *Dayabhaga* school of Hindu law which had migrated into another province is persumed to have carried with it the customs and the law of that school. The presumption, however, is rebuttable, and the *onus* lies on the person alleging it. The presumption of the *Mitakshara* that acquisitions made in the names of individual members while the family remains joint are joint property is not applicable to a joint family under the *Dayabhaga* school. It is incumbent on a person governed by that school to prove the existence of an original nucleus with the aid of which the property sought to be partitioned has been increased and amplified. *Sarada Prosad Ray* v. *Mahananda Roy* (1) followed.

THE facts of this case are fully set out in the judgment.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*,) and Munshi *Haribans Sahai*, for the appellant.

Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents.

KNOX, A., C. J. and GRIFFIN, J.—The appellant in this appeal is one Gobind Chandra Das. In the plaint he states that he and the defendants are members of a joint Hindu family of which Radha Kristo Das the eldest brother is the head and managing member. Gobind Chandra Das and Radha Kristo Das are brothers; the remaining defendants are the sons of Radha Kristo Das. He states that the immoveable property scheduled in the plaint had been purchased by the defendant No. 1 with family funds left by the ancestors, that the parties are in joint possession and he asks that he might be put in possession of a half share of the property. In addition he also sets out in the schedule attached to the plaint a great quantity of moveable property, cash, ornaments, bonds and other household articles, all of which

* First Appeal No. 267 of 1907 from a decree of Mohan Lal Hukku, Officiating Subordinate Judge of Allahabad, dated the 24th of September 1907.

(1) I. L. R., 31 Calc., 448.

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according to him are in the joint possession of the members of the joint family and he asks to be put in possession of a half share of the moveable property also. The defendants put in a joint defence in which they state that they are not members of a joint Hindu family, that there is no joint property and that the properties claimed are all the self-acquired properties of the defendant Radha Kristo Das. The court below found that the plaintiff had not proved that the properties in dispute were the joint ancestral properties of the family or that they had been acquired by the plaintiff and Radha Kristo Das jointly. It also found that there was no proof that there was originally any joint stock of the family or that Radha Kristo Das threw his own earnings and savings into the joint stock. On the contrary it found that the properties in dispute were the self-acquired properties of Radha Kristo Das and dimissed the suit. These findings are attacked in appeal here. Out of the six pleas contained in the memorandum of appeal, the 2nd and 6th were not argued. It was now contended that the lower court had erred in law in holding that the burden of proof lay on the plaintiff; secondly, that the documentary evidence on the record showed beyond doubt that the properties in dispute were the joint properties of the parties; thirdly, that the evidence established that there was a nucleus of ancestral property, and lastly that Radha Kristo Das had utterly failed to show that the properties in dispute were his separate acquisition. The learned vakil who appeared for the appellant did not make any reference to the particular school of law under which the family lived. He argued as though the case before us was a case in which we had to apply the law contained in the *Mitakshara*, but this was at once challenged by the learned advocate for the respondents. He maintained that as the family admittedly came from Lower Bengal and the father of the plaintiff and defendant No. 1 had emigrated from Murshidabad, somewhere in the late forties and had settled first at Bindraban, then at Agra and last at Allahabad, it must be held in the absence of evidence to the contrary that the family which was originally governed by the *Dayabhaga* school of law, had carried their personal law with them and were still bound by it. He referred us to the observations of

their Lordships of the Privy Council in *Surendro Nath Roy* v. *Musammat Heeramonee Burmoneah* (1), in which their Lordships observe that as "orientals are commonly tenacious of their usages, and customs, and more especially of their family and religious observances, therefore on the ordinary principles of viewing evidence a continuance of this state of things is presumable and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation." The case quoted is undoubtedly a strong one because there was evidence on that record showing that the family which was originally a family governed by the *Mitakshara* law had migrated to Lower Bengal attended by priests of their own persuasion, but this is not the only case to be found. There is the case *Ram Bromo* v. *Kaminee Soonduree Dossee* (2). One of the learned Judges who decided that case was Mr. Justice Shamblu Nath Pandit, an eminent authority on Hindu law. The learned Judges held that it was to be presumed that a Hindu family migrating to Bengal from the North-Western Provinces or *vice versa* imports its own customs and law as regulating the succession and ceremonies in the family. A more recent case is the case of *Parbati Kumari Debi* v. *Jagdis Chandra Dhabhal* (3). In this case the family had migrated from these provinces and had settled down in the jungle mahal of Midnapore. Their Lordships of the Privy Council again alluding to the tenacity with which customs in Hindu families live even under the strain of migration, and that they had been repeatedly recognised continue. "The presumption therefore is that the family continued to observe the *Mitakshara* and it remains to see whether the contrary has been proved."

On behalf of the appellant we were referred to the case of *Ram Das and others* v. *Chandra Dassia* (4), as an authority for holding that members of the Hindu religion are governed by the school of law in force in the locality where they reside, but we do not think that the case helps the appellant. In the case cited, the parties were admittedly Rajbawsis and not Hindus originally. There was nothing to show, in the first instance, that they were governed by any particular school of law. Both the courts found

(1) 12 M. I. A., 81.
(2) 6 W. R., 295.
(3) (1903) I. L. R., 29 Calc., 483.
(4) (1892) I. L. R., 20 Calc., 409.

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that the evidence as to the particular system they had adopted was too vague and unsatisfactory to be acted upon, and in the absence of trustworthy evidence they held that the family was governed by the school of law which prevailed in the part of the country where they resided. Indeed, in that particular case, their Lordships were careful to add that if the family had been governed generally by Hindu law, the case would have been different.

We therefore think that in this case we may safely start with the presumption that the family before us is one which even under the strain of migration had retained the customs of and law of the *Dayabhaga* School.

This presumption of law like all other presumptions of law may be rebutted, but the burden of rebutting the presumption rests on the plaintiff, and we cannot find in the evidence that he has made any attempt to rebut it. On the contrary the fact, though we do not lay any great stress upon it, that he claims a larger portion than he would be entitled to under the *Mitakshara* law points to the inference that the family is not governed by the *Mitakshara* law.

Holding then as we do that the family is one governed by the *Dayabhaga* law, we agree with what was said by the learned Judges of the Calcutta High Court in *Sarada Prosad Ray* v. *Mahananda Ray* (1),* that the presumption of law that, while the Hindu family remained joint, all property including acquisitions made in the names of individual members is joint property, does not apply to the case of joint family governed by the *Dayabhaga*. If a person subject to the *Dayabhaga* law desires to prove that a property acquired during the time that the family was living as a joint Hindu family, is joint property, it is incumbent on him to prove that there was an original nucleus of joint property, with the aid of which the property sought to be partitioned has been increased and amplified. The attempt made by the appellant to prove that there was a nucleus, shows that the appellant or his advisors were conscious of the burden that lay on them. We have been taken through the evidence and we agree with the lower court that it is of a very unsatisfactory nature. We

(1) (1904) I. L. R., 31 Calc., 448.

* [*See Ramanath* v. *Kusum Kamini*, 4 C. L. J., 56 at 61—Ed.]

think that the story of the finding of the gold mohurs and their being made over to the defendant Radha Kristo Das is mythical. The father of the family, as the evidence shows, was a poor struggling weaver just able to make enough for himself and his family, no more. We get no clear reliable evidence of any large sum which could have formed the nucleus out of which the property now claimed has sprung. It is not till we get down to the time when Radha Kristo Das was earning his livelihood, that we come upon reliable evidence of sums of money being amassed. While they were being amassed, it is clear that they stood in deposit under the sole name and power of Radha Kristo Das. All the evidence shows that these monies were acquired by his exertions.

The plaintiff himself admits that he does no and did no business and earned nothing of his own. We agree with the court below that the burden of proving that there was a nucleus of ancestral property lay on the plaintiff and that he has failed to support it. We therefore decide the first and fifth pleas in the memorandum of appeal against the plaintiff.

This too practically disposes of the 4th plea in appeal. It was not for the defendant to show that the property in dispute was his self-acquisition. The appellant has not produced anything sufficient to throw upon Radha Kristo Das the burden of rebutting it. We decide this plea also against the appellant.

The mainstay of the case for the appellant and that upon which the learned vakil who appeared for him laid the greatest stress was that from 1892 onwards there were several fixed deposits and accounts in the Allahabad Bank and in another Bank which ran in the names of the plaintiff and Radha Kristo Das payable to both, either, or survivor. We agree with the view taken by the lower court as to the effect of the evidence. The mere fact that these funds stood in the joint names of the appellant and Radha Kristo Das, does not in our opinion show anything more than this was done for the sake of convenience. The custom of *Ism-farzi* transactions is so common in this country and so many are the reasons for which it is adopted that the mere fact standing by itself is far from proving that Radha Kristo Das had any intent that the property should be dealt

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with as joint family property. There is no doubt that Radha Kristo Das did accumulate large sums of money in a short space of time and that may have been the reason why he preferred that in the event of any enquiries, these monies should be beyond the reach of pursuit. We do not find any evidence on the record which satisfies us beyond doubt that the properties in dispute are the joint properties of the parties. This disposes of all the pleas taken in appeal. The appeal is dismissed with costs.

Appeal dismissed.

1909
May 18.

Before Mr. Justice Richards and Mr. Justice Alston.

RANJIT KHAN AND ANOTHER (DEFENDANTS) *v.* RAMDHAN SINGH AND OTHERS (PLAINTIFFS.)*

Mortgage—Redemption—Clog on the equity of—Further advances on old security—Stipulation to the effect that the later advance will be paid at redemption of earlier mortgage.

Where in a suit for redemption the mortgagee set up five other later bonds and claimed that before redemption of the original mortgage could be effected those bonds should also be redeemed, *held* that as the bonds created charges on the property and there was a special stipulation that they should be paid off before the mortgage was redeemed, the claim was a good one.

Held also that such a stipulation was not a clog or fetter on the equity of redemption. *Allu Khan* v. *Roshan Khan* (1), *Muhammad Abdul Hamid* v. *Jairaj Mal* (2), *Bhikam Singh* v. *Shankar Dayal* (3), *Sheo Shankar* v. *Parma Mahton* (4), *Rugad Singh* v. *Sat Narain Singh* (5), *Khuda Baksh* v. *Alimunnisa* (6), *Tajjoo Bibi* v. *Bhagwan Prasad* (7), *Bhartu* v. *Dalip* (8), *Dorasami* v. *Venkata Seshayyar* (9), and *Noakes* v. *Rice* (10), referred to.

THE facts of this case are as follows :—

One Ahmadullah made a usufructuary mortgage of certain zamindari property to defendants 1 to 3, and Umrao Khan, ancestor of defendants 4 and 5 on 17th May 1873. It was stipulated that the mortgage was to be redeemed on payment of the mortgage money in a lump sum at the commencement of a year. On July 2nd 1907 the plaintiff, who had purchased the equity of redemption, deposited the mortgage-money under section 83,

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* Second Appeal No. 556 of 1908 from a decree of L. Stuart, District Judge of Meerut, dated the 12th of March 1908 confirming a decree of Hari Har Lal, Munsif of Ghaziabad, dated the 21st of January 1908.

(1) (1881) I. L. R, 4 All., 85.
(2) Weekly Notes, 1906, p. 267.
(3) (1909) 6 A. L. J. R., 255.
(4) Weekly Notes, 1904, p 123.
(5) Weekly Notes, 1904, p. 208.
(6) Weekly Notes, 1904, p. 273.
(7) (1893) I. L. R., 16 All., 295.
(8) Weekly Notes. 1906, p. 278.
(9) (1901) I. L. R., 25 Mad., 115.
(10) (1902) L. R., A. C., 24.