1911

EMPEROR v. MASIT.

He argued that this section of the Indian Penal Code may fairly be supposed to have been framed upon the kindred English law to be found in 52 Geo. III, Chapter 155, section 12, also 23 and 24 Victoria, Chapter 39. The case of *Vijiaraghava Chariar* v. *Emperor* (1) and the case to be found in 3 Indian Cases, 981, were also cited and have been fully considered by us.

We have no reason to suppose that the English law is any guide. The words of section 296 are quite clear. As regards the Madras case we agree with what was said by Mr. Justice BENSON.

We are satisfied that the carrying of these flags to the temple was considered by the Lodhas as the performance of a religious ceremony. They had applied to the public authorities and had got permission to carry the flags through the public streets. The assembly which was engaged in the carrying of these flags was an assembly lawfully engaged in the performance of a religious ceremony.

This being so, we see no reason for interfering, the sentence does not appear to us on the findings, to be excessive. We dismiss the application.

Application dismissed.

APPELLATE CIVIL.

1911
August 7.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

INDAR SEN SINGH (DEFENDANT) *v.* HARPAL SINGH (PLAINTIFF.) *

Hindu law—Mitakshara—Impartible property—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property.

Where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family, who gets maintenance from the person holding the impartible estate, succeeds upon his death to the estate by right of survivorship.

Whatever may be the powers of alienation of the holder of an impartible estate, the succession to it is governed not by the rule which applies to separate property but by the rule of survivorship. Therefore the person who succeeds to

* First Appeal No. 406 of 1909 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 15th of September, 1909.

(1) (1902) I. L. R., 26 Mad., 554.

1911

INDAR SEN SINGH. v. HARPAL SINGH.

the estate does not do so as the heir or legal representative of his predecessor and the estate cannot be regarded as the assets of the last previous holder.

Harpal Singh v. *Bishan Singh* (1) followed. *Raja of Kalahasti* v. *Achigadu* (2) and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (3) dissented from.

THE suit out of which this appeal arose related to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which was admittedly an impartible estate held by a single person who succeeded to it according to the rule of primogeniture. Before the estate came to the plaintiff to this suit it was held by one Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death. His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate. The suit was compromised, and a decree was passed in accordance with the compromise. Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904. Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh and others, for possession of the estate. She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by the High Court on the 29th of May, 1908. See I. L. R., 30 All., 207.

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous attempts to execute it. After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree on the 4th of September, 1906, against Thakurain Lekhraj Kunwar, his widow, and on the 24th of March, 1907, caused the fifteen villages now in dispute to be attached. As the property was ancestral, the decree was transferred to the Collector for execution. That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years. Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered

(1) (1909 6 A. L. J., 753. (2) (1905) I. L. R., 30 Mad., 454.
(3) (1909) I. L. R., 32 Mad., 429.

possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908. Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant. The Court of first instance (Subordinate Judge of Jaunpur) decreed the plaintiff's suit. The defendant thereupon appealed to the High Court.

Mr. *W. K. Porter* (for Mr. *B. E. O'Conor*) and Maulvi *Ghulam Mujtaba*, for the appellant:

The court below has erred in treating the property in dispute as joint family property. To impartible estates the doctrines applicable to a joint Hindu family only apply so far as their use is necessary to ascertain who the heir is. Such property is not really joint property and does not pass to the heir by survivorship, but by succession. The property must be deemed to be assets in the hands of the present holder. The hypothesis of the property being joint was applied simply to ascertain the heir. The idea was to keep women out. If there were a right of survivorship, it would mean that a person would acquire an interest in the property at birth, but this was not the case. Reference was made to *Doorga Persad Singh* v. *Doorga Konwari* (1), *Kamakshi Ammal* v. *Chakrapany Chettiar* (2), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (3). A joint property carried with it a right to partition and a disability as to alienation: neither element was present in an impartible estate.

The Hon'ble Pandit *Sundar Lal* (Dr. *Satish Chandra Banerji* with him), for the respondent:—

The estate is a joint estate in which each person as he is born, acquires an interest; only the mode of enjoyment is different. One man keeps the bulk of the estate and the others only get maintenance. The estate is joint under the *Mitakshara* law, only the shares are different. The Privy Council have laid down that such an estate is not the separate estate of the Raja. The ordinary law of partible estate applies with such variations as may

(1) (1879) I. L. R., 4 Calc., 190. (2) (1907) I. L. R., 30 Mad., 452.
(3) (1909) I. L. R., 32 Mad., 429.

1911

INDAR SEN SINGH v. HARPAL SINGH.

have sprung up owing to custom. The incidents of inheritance are the same. The Privy Council have only given the holder the right to alienate. In other respects the incidents are the same as those of joint family property. In *Doorga Persad Singh* v. *Doorga Konwari* (1) all that they held was that an impartible estate was impressed with the character of a joint family property, only it carried a right of alienation with it; *Raja Rup Singh* v. *Rani Baisni* (2). Again no succession certificate was necessary in case of an impartible estate, because it was a case of survivorship. The estate passed to us by survivorship and was not the last holder's assets in our hand.

Mr. *W. K. Porter*, in reply:

RICHARDS, C. J., and BANERJI, J.—The suit out of which this appeal has arisen relates to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which is admittedly an impartible estate held by a single person, who succeeds to it according to the rule of primogeniture. Before the estate came to the plaintiff to this suit it was held by Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death. His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate. The suit was compromised, and a decree was passed in accordance with the compromise. Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904. Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh, and others for possession of the estate. She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by this Court on the 29th of May, 1908. The judgement of this Court is reported in I. L. R., 30 All., 407. An appeal from the decree of this Court is, we understand, now pending in the Privy Council.*

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous

* The decision of the High Court was affirmed by the Judicial Committee on the 22nd November, 1911. *Vide supra*, p. 65.

(1) (1879) I. L. R., 4 Calc., 190. (2) (1885) I. L. R., 7 All., 10.

attempts to execute it. After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree on the 4th of September, 1906, against Thakurani Lekhraj Kunwar, his widow, and on the 24th of March, 1907, caused the fifteen villages now in dispute to be attached. As the property was ancestral, the decree was transferred to the Collector for execution. That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years. Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908. Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant.

The plaintiff asserts that as the estate is impartible, it must be deemed to be joint family property, although it was to be held for the time being by one of the members of the family; that although in the previous litigation it was held that it vested in Sheopal Singh, he had no absolute interest in it; that upon his death it passed to the plaintiff by right of survivorship, and that it is not liable to attachment in execution of a decree obtained against him in his personal capacity. The plaintiff also urges that as he was not made a party to the proceedings relating to the execution of the said decree, the lease granted to the defendant is not binding on him.

The defendant appellant, on the other hand, contends that the property in suit must be considered to be the assets of Sheopal Singh; that it was therefore liable to attachment and the lease granted to the defendant is valid, and that as the term of the lease has not yet expired, the plaintiff is not entitled to obtain possession.

The court below has overruled these contentions and decreed the claim, relying mainly on the decision of this Court in *Harpal Singh* v. *Bishan Singh* (1). In that case another

(1) (1909) 6 A. L. J., 753.

1911

INDAR SEN SINGH v. HARPAL SINGH.

creditor of Sheopal Singh, who held a money decree against him, applied, after his death, for execution of the decree against the present plaintiff Harpal Singh. It was held by us that Harpal Singh succeeded to the estate by right of survivorship and not as heir or legal representative of Sheopal Singh holding his assets and that the estate in the hands of Harpal Singh could not be proceeded against by the creditor of Sheopal Singh as his assets.

The learned counsel for the appellant, whilst admitting that this ruling is fatal to his appeal, has asked us to reconsider it in the light of the judgements of the Madras High Court in *Raja of Kalahasti* v. *Achigadu* (1) and *Zamindar of Karvetnagar* v. *The Trustee of Tirumalai* (2), which undoubtedly support his contention. After carefully considering these rulings and the decisions of their Lordships of the Privy Council on the point we see no reason to alter the opinion we expressed in *Harpal Singh* v. *Bishan Singh*, referred to above.

In *Katama Natchiar* v. *Raja of Shivagunga* (3) their Lordships of the Privy Council, referring to an impartible estate capable of enjoyment by only one member of the family at a time, held that "the rule of succession to it is that of the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject. Hence, if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, one of the nephews was entitled to succeed to it." They accordingly applied the rule of survivorship in declaring who was the next heir to the estate. Following this ruling their Lordships held, in *Doorga Persad Singh* v. *Doorga Konwari* (4) that "the impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate." To the same effect is the ruling of their Lordships in *Raja Rup Singh* v. *Rani Baisni* (5) where they held that "impartible ancestral estate is not,

(1) (1905) I. L. R., 30 Mad., 454.
(2) (1908) I. L. R., 32 Mad., 429.
(3) (1863) 8 Moo., I. A., 539.
(4) (1879) I. L. R., 4 Calc., 190.
(5) (1885) I. L. R., 7 All., 1.

merely by reason of its being impartible, the separate estate of the single member of the undivided family on whom it devolves." In the case of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (1) SIR JAMES COLVILE, in delivering the judgement of their Lordships said that "the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate." It is unnecessary to quote other decisions of their Lordships. The result of these decisions is that where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate, and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds to the estate by right of survivorship.

It is said that this rule was departed from in the case of *Sartaj Kuari* v. *Deoraj Kuari* (2), in which it was held that the holder of an estate impartible by custom and descending by primogeniture is competent, in the absence of a custom as to inalienability, to make a gift of a part of the estate. This power was extended in the Pittapur case (3) to a will made by the holder of an impartible estate. The contention of the learned counsel for the appellant is, and this seems to be the opinion of the learned Judges of the Madras High Court who decided the later cases referred to in an earlier part of this judgement, that the logical result of the decisions of their Lordships of the Privy Council in the two cases mentioned above is that the estate in the hands of the holder of it is separate estate. Even if it be assumed that this is so, it is manifest from the judgements of their Lordships that they left untouched the question of succession to the estate. In both the cases their Lordships only considered the question of the alienability of the estate. In *Sartaj Kuari* v. *Deoraj Kuari* the suit was brought by the son of the Raja who was in possession of the estate to set aside a gift made by him in favour of his junior wife. It was held that there is not such co-parcenary in an estate impartible by custom as, under

(1) (1870) 13 Moo., I. A., 333. (2) (1888) I. L. R., 10 All., 272.
(3) (1889) I. L. R., 22 Mad., 383.

1911

INDAR SEN SINGH v. HARPAL SINGH.

the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth. SIR RICHARD COUCH who delivered the judgement of their Lordships, observed (p. 286):— "Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist." Their Lordships were considering the power of a son to question an alienation by his father of part of the impartible estate and they held that he had no such power. "The reason" they say, "for the restraint upon alienation under the law of the Mitakshara, is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons." And they held that the property in the fraternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordship's opinion, so connected with the right to a partition that it does not exist where there is no right to it." Holding this view, they observed that, "as by custom the eldest son succeeds to the whole estate on the death of his father, it is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership which is a restraint upon alienation." As we have said above, the sole question which their Lordships considered in that case was the question of the alienability of the estate, and they held that there was no such joint ownership as would be a restraint upon alienation. They did not hold that the property is the separate absolute property of the holder of it and that the succession to it is to be regulated by the rule relating to the descent of separate property. In the case mentioned above, *Sartaj Kuari* v. *Deoraj Kuari*, this Court held that the property must be regarded as joint family property governed by the rules of the law of the Mitakshara save so far as the family custom or usage superseded these rules. It is difficult to see what objection could be taken to this view of the position, having regard to the presumption of Hindu law and the decided cases. This Court considered that the custom prevailing in the family did not authorize an alienation of the kind complained of by the plaintiff in the suit, which was admittedly in contravention of the rules

of Hindu law. It was no doubt a necessary incident to the custom proved that the junior members of the family could not claim partition, and their Lordships considered that it followed that they could not challenge an alienation made by the *gaddi-nashin*, and this seems to have been the ground of their decision. We do not, however, think that they decided or intended to decide that the view taken by this Court, viz., that the property was joint family property subject to the necessary incidents of the prevailing custom, was incorrect.

As held in previous cases. the property would devolve on the person who would have been entitled to succeed, if it were partible property, and this rule was not, as it seems to us, abrogated. In the case of *Jogendro Bhupati* v. *Nityanand Man Singh* (1), which was decided after the decision of *Sartaj Kuari's* case and in which that case was cited in the argument, their Lordships observed:—"The fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is what would be the right of succession supposing instead of being an impartible estate it were a partible one." Holding this view their Lordships applied the rule of survivorship. It is noticeable that the judgement in this case also was delivered by SIR RICHARD COUCH, and he referred to the decision of their Lordships in the Shivagunga case. There can be no doubt, upon the authorities, that whatever may be the powers of alienation of the holder of an impartible estate the succession to it is governed, not by the rule which applies to separate property, but by the rule of survivorship. Therefore the person who succeeds to the estate does not do so as the heir or legal representative of his predecessor and cannot be said to hold his assets.

This was the view we held in the case of *Harpal Singh* v. *Bishan Singh* (2), and for the reasons stated above we adhere to that view. It is in consonance with the ruling of the Calcutta High Court in *Kali Krishna Sarkar* v. *Raghunath Deb* (3),

(1) (1890) I. L. R., 18 Calc., 151. (2) (1909) 6 A. L. J., 753.
(3) (1903) I. L. R., 31 Calc., 224.

1911

INDAR SEN SINGH v. HARPAL SINGH.

and with that of the Madras High Court in *Nachiappa Chettiar* v. *Chinnayasami Naicker* (1) decided by MOORE and SANKARAN NAIR, JJ., with which we are in full accord, and we are unable, with great respect, to agree with the later decisions of that court. The property in dispute having passed to the plaintiff, Harpal Singh, by right of survivorship and not as heir or legal representative of Sheopal Singh, cannot be regarded as the assets of the latter and was not liable to attachment in execution of the decree obtained against him by Dilraj Kunwar. The lease held by the defendant appellant is therefore void as against the plaintiff, and the appellant is not entitled to continue in possession by virtue of it.

We are further of opinion, in concurrence with the court below, that the aforesaid lease is not binding on the plaintiff, inasmuch as he was not a party to the execution proceedings, in which it was granted by the Collector. According to the decision of this Court in the suit between Thakurain Lekhraj Kunwar and Harpal Singh to which we have already referred, the latter was entitled to the Singraman estate after the death of Sheopal Singh. Therefore, if the decree-holder wished to proceed against any part of that estate, she ought to have made the plaintiff, Harpal Singh, a party to the execution proceedings. As those proceedings were held against Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, who has been declared to have no interest in the estate, they are not binding on the plaintiff. According to the principle of the ruling of the Privy Council in *Malikarjun* v. *Narhari* (2) the lease granted in those proceedings is voidable as against the plaintiff and he is entitled to avoid it, as he seeks to do, in this suit.

For these reasons we are of opinion that the decree of the court below is right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1906) I. L. R., 29 Mad., 453. (2) (1903) I. L. R., 25 Bom., 337.