APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

BADRI NATH AND ANOTHER (DEFENDANTS-APPELLANTS) v. HARDEO (PLAINTIFF-RESPONDENT).* 1929 *December*, 9.

Hindu Law—Succession—Separation of some of the sons from father, other sons remaining joint—Self-acquired property of father—Separated son's right to succeed to the property acquired by the father after his separation.

Held, that in the case of property acquired by a Hindu father after his separation from some of his sons, the sons who had separated from him will be entitled to share along with the sons who may be living jointly with him, for it is well settled now that a member of a joint Hindu family is at liberty in his lifetime to make any alienation of his self-acquired property he may think fit and that on his death such property is not governed by the rule of survivorship, but is governed by the general rules of inheritance according to which all sons of the deceased should succeed in equal shares irrespective of any consideration of their being united or separate.

Where, therefore, the plaintiff had separated from his father in the latter's lifetime he had an equal right with his other brothers to a share in the trees in dispute which were planted by the father after the plaintiff's separation. *Fakirappa* v. *Yellappa* (1), and *Nana Tawker* v. *Ramchandra Tawker* (2), distinguished. *Kunwar Bahadur* v. *Madho Prasad* (3), *Katama Natchier* v. *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* (4), *Rao Balwant Singh* v. *Rani Kishori* (5), *Marudayi* v. *Doraisami Karambian* (6), and *Vairayan Chettiar* v. *Srinivasachariar* (7), relied on.

Mr. *R. P. Varma* for Mr. *R. B. Lal*, for the appellants.

Mr. *S. N. Srivastava* for Mr. *Radha Krishna*, for the respondent.

*Second Civil Appeal No. 101 of 1929 against the decree of Syed Ali Hamid, Subordinate Judge of Bara Banki, dated the 15th of December, 1928, reversing the decree of Babu Shiva Charan, Munsif, Ramsanehighat, district Bara Banki, dated the 30th of August, 1928, dismissing the suit.

(1) (1896) I.L.R., 22 Bom., 101. (2) (1903) I.L.R., 32 Mad., 377.
(3) (1918) 17 A.L.J., 151. (4) (1864) 9 M.I.A., 543.
(5) (1897) L.R., 25 I.A., 54. (6) (1907) I.L.R., 30 Mad., 348.
(7) (1921) I.L.R., 44 Mad., 499.

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STUART, C. J. and SRIVASTAVA, J. :—This second appeal, though it arises out of a suit relating to property of trifling value, involves an important question of law and one not altogether free from difficulty.

The facts are these: The plaintiff instituted the suit against his brother defendant No. 1 for a declaration that he was the owner of a half share in two *kathal* trees which had been planted by and belonged to his father Sri Gopal. In the alternative he claimed that if he be found to be out of possession then a decree for possession be passed in his favour. Defendant No. 2, the wife of defendant No. 1, was also impleaded. The defendants pleaded in reply that Sri Gopal had six sons of whom plaintiff was born of the first wife and defendant No. 1 and four other sons by the second wife. They alleged that the plaintiff and his mother separated from Sri Gopal about forty years ago and that the defendant No. 1 and his brothers continued to remain joint with their father. Their case about the two *kathal* trees was that they had been planted by one of the brothers of defendant No. 1 named Mahadeo, that Mahadeo and his four brothers remained in possession of the trees and that defendant No. 1 who was the last survivor of all the five brothers was in possession of the said trees when he sold them to one Aharwa Din in 1916 from whom the trees were re-purchased by his wife defendant No. 2 who was in possession of them.

The learned Munsif who tried the suit held that the plaintiff had failed to prove that the trees in question belonged to Sri Gopal and that the plaintiff had a half share therein. He accordingly dismissed the suit. On appeal the learned Subordinate Judge has found that the plaintiff had separated from his father in mess and residence, but there was no partition of any joint family property between him and his father because the father was

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not possessed of any property at that time. He has further found that the trees in suit had been planted by Sri Gopal after the separation of the plaintiff and were the self-acquired property of Sri Gopal. Having arrived at these findings and relying on the case of *Kunwar Bahadur* v. *Madho Prasad* (1) he held that the plaintiff, though a separated son, was entitled to a share along with the sons who were living jointly with the father in the self-acquired property of the father. He, therefore, came to the conclusion that the plaintiff was entitled to a one-sixth share in the trees in suit and gave him a decree to that extent.

The learned counsel for both parties have accepted before us the correctness of the findings of fact arrived at by the lower appellate court. The only point urged on behalf of the defendants-appellants is that the plaintiff having separated from his father was not entitled to any share in the self-acquired property of Sri Gopal. The learned counsel for the appellants has questioned the correctness of the decision of the Allahabad High Court in *Kunwar Bahadur* v. *Madho Prasad* (1) and has relied upon the decision of the Bombay High Court in *Fakirappa* v. *Yellappa* (2) and of the Madras High Court in *Nana Tawker* v. *Ramachandra Tawker* (3) in support of his contention. We are of opinion that in a case like the present the sons who have remained united with the father cannot claim any preference as against the son who had previously separated, as regards succession to the self-acquired property of the father. It cannot be denied that the rule of survivorship applies only to joint family property. Nor can it be disputed that a member of a joint Hindu family can possess separate property which he can deal with as he likes. His sons have no interest in such property and cannot claim any partition of it, and on his death such separate self-acquired property passes by

(1) (1918) 17 A.L.J., 151. (2) (1896) I.L.R., 22 Bom., 101.
(3) (1908) I.L.R., 32 Mad., 377.

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succession to his heirs and not to the surviving co-parceners. In *Katama Natchier* v. *Srimut Rajah Moottoo Vijaya Raganadha Boodha Gooroo Saamy Periya Odaya Taver* (1) their Lordships of the Judicial Committee at page 615 observed as follows :—

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> "According to the principles of Hindoo Law, there is coparcenaryship between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to any superior right of the coparceners in the undivided property."

In *Rao Balwant Singh* v. *Rani Kishori* (2) Lord HOBHOUSE in delivering the judgment of their Lordships of the Judicial Committee discussed the conflicting texts of the *Mitakshara* as regards the father's powers of disposition and the control allowed to his sons in the matter of self-acquired immoveable property and ultimately came to the conclusion that the father of an undivided Hindu family subject to the *Mitakshara* has full power of disposition with regard to his self-acquired immoveable property. We, therefore, consider it now to be well settled that a member of a joint Hindu family is at liberty in his

(1) (1864) 9 M.I.A., 543. (2) (1897) L.R., 25 I.A., 54.

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lifetime to make any alienation of his self-acquired property he may think fit and that on his death such property is not governed by the rule of survivorship. If the rule of survivorship does not apply to self-acquired property then the question arises on what other ground can the sons who remain united with the father claim preference, as against the sons who have previously separated, regarding succession to such property. The cardinal rule of Hindu Law embodied in the well-known text of *Bauddhayana* is that "male issue of the body being in existence, the wealth goes to them." The *Mitakshara*, chapter 1, section 6, paragraph 16 is as follows :

> "So, among brethren, dividing the allotment of their parents who were separated from them after the demise of those parents (as may be done by the brothers, if there be no son born subsequently to the original partition) what had been given by the father and mother to each of them, belongs severally to each, and is shared by no other."

This shows that partition does not destroy the right of inheritance. As remarked in *Marudayi* v. *Doraisami Karambian* (1) partition does not annul the filial relation nor the right of succession incidental to such relation. We, therefore, think that in the absence of any text to the contrary self-acquired property is not subject to the rights of survivorship but is governed by the general rules of inheritance according to which all sons of the deceased should succeed in equal shares irrespective of any consideration of their being united or separate. Speaking with all respect it seems to us that these basic principles have not always been clearly kept in view and confusion has sometimes arisen by mixing up the rules relating to different though allied subjects. For instance the *Mitakshara* lays down specific rules as regards rights of sons born after partition and as regards devolution of a share

(1) (1907) I.L.R., 30 Mad., 348.

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acquired by the father on a partition between himself and his sons. These rules, however, can afford no guidance in determining the rights of succession in the case of property like that in dispute in the present case which was acquired by the father after the separation. We have been unable to discover any text in the *Mitakshara* which may exclude a separated son from inheritance as regards such self-acquired property. The only text we have come across and which we notice has sometimes been relied upon in support of the contrary view is that contained in *Mitakshara*, chapter 1, section 6, paragraph 4. This section is headed "Rights of a posthumous son and of one born after partition." Paragraph 4 is to the following effect :—

> "The same rule is propounded by Manu : 'A son, born after a division, shall alone take the parental wealth.' The term parental (*pitryam*) must be here interpreted 'appertaining to both father and mother :' for it is ordained, that 'a son, born before partition has no claim on the wealth of his parents; nor one, begotten after it, on that of his brother.' "

This should be read with the next paragraph which contains an exposition of it. Paragraph 5 runs as follows :—

> "The meaning of the text is this : one, born previously to the distribution of the estate, has no property in the share allotted to his father and mother who are separated (from their elder children); nor is one born of parents separated (from their children), a proprietor of his brother's allotment."

It seems to us clear from the above that the separated son is excluded only as regards property allotted to the father on partition. The case here is obviously quite different.

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Now let us examine the cases relied upon by the learned counsel for the defendants-appellants. In *Fakirapa* v. *Yellappa* (1) it was held that as between united sons and separated grandson, the succession on the grandfather's death to the property, both ancestral and self-acquired, left by him goes in preference, according to Hindu Law, to the united sons. Mr. Justice RANADE referring to the Shivagunga case remarked :—

> "The appellant relies on this ruling chiefly because it speaks of the right of the male issue to succeed to such self-acquired property, but it is clear from the context that the male issue here spoken of does not refer to separated sons so much as those sons who are in union with their deceased father."

With the utmost respect for the learned Judge, we would venture to say that we fail to find anything in the context to exclude separated sons from the category of male issue. Then the learned Judge has relied upon the authority of two passages from West and Buhler's Hindu Law. One of them is :—

> "Sons separated cannot claim any portion of their father's property which he acquired after division . . . . . This property goes to his after-born son . . . . . along with the father's separated share of joint property."

The rule referred to here relates to the rights of after-born sons and, as mentioned before, has, in our opinion no application to the present case. The second passage cited runs as follows :—

> "Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him or were born after separation." (West and Buhler, 4th edition, 64.)

(1) (1896) I.L.R., 22 Bom., 101.

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In the new edition of West and Buhler from which we have made the above quotation reference is made in the footnote to *Mitakshara*, chapter 1, section 2, paragraphs 1 and 5 as authority for it. We have only to quote these paragraphs to show that they have no relevancy to the matter under consideration :—

> "1. At what time, by whom, and how, partition may be made, will be next considered. Explaining those points, the author says : 'When the father makes a partition, let him separate his sons (from himself) at his pleasure and either (dismiss) the eldest with the best share or (if he choose) all may be equal sharers.' "
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> "5. The term 'either' (section 1) is relative to the subsequent alternative 'or all may be equal sharers.' That is, all, namely the eldest and the rest, should be made partakers of equal portions."

Mr. Justice JARDINE, the other Judge who was a party to the decision, also referred to certain considerations of inconvenience which would arise if a separated son is allowed a share in the self-acquired property. The considerations mentioned do not appeal to us and cannot in any case be allowed to overrule the law. In *Nana Tawker* v. *Ramachandra Tawker* (1) it was held that under the law of the *Mitakshara*, on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father. In the course of their judgment their Lordships remarked :—

> "The succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than

(1) (1908) I.L.R., 32 Mad., 377.

by inheritance and he who took by survivorship would exclude those, such as divided sons, who could only take in any case by inheritance."

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This view seems to be based upon the dictum contained in chapter 1, section 1, paragraph 27 of the *Mitakshara* that the son has an interest by birth in the property of the father, whether ancestral or self-acquired. As pointed out by their Lordships of the Privy Council in *Balwant Singh* v. *Rani Kishori* (1) this text is in conflict with the provisions of chapter 1, section 5, clauses 9 and 10 of the *Mitakshara* and in our opinion in the face of the pronouncement of their Lordships of the Judicial Committee in the Shivagunga case and in the case just mentioned, it is no longer possible to apply the rule of survivorship to such property. We might also point out that the full Bench of the Madras High Court in *Vairayan Chettiar* v. *Srinivasachariar* (2) has dissented from the view as regards succession in respect of the self-acquired property being governed by the rule of survivorship.

On the contrary we have the decision of RICHARDS, C. J., and BANERJI, J. in *Kunwar Bahadur* v. *Madho Prasad* (3) in which it was held that in the self-acquired property of a Hindu father, sons who are living separate from him will be entitled to share along with the sons who may be living jointly with him. We are in full agreement with this view.

For the above reasons we hold that the plaintiff, though he separated from his father in the latter's lifetime, has an equal right with his other brothers to a share in the trees in dispute which were planted by the father after the plaintiff's separation. The lower appellate court is, therefore, right in holding the plaintiff entitled to a one-sixth share in the trees in question. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1897) L.R., 25 I.A., 54. (2) (1921) I.L.R., 44 Mad., 499.
(3) (1918) 17 A.L.J., 151.