APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Bisheshwar Nath Srivastava.

MUSAMMAT LAKHPATI (DEFENDANT-APPELLANT) v. PARMESHWAR MISRA AND OTHERS (PLAINTIFFS-RESPONDENTS)*. 1929 December. 4.

Hindu Law—Joint Hindu family—Succession—Self-acquired property of father—Devolution of self-acquired property of father on sons forming joint Hindu family—Death of one of the sons—Property of the deceased son, whether devolves on widow or the surviving brothers.

The two tests to be applied for determining whether a particular property is co-parcenary property subject to the right of survivorship or not are community of interest and unity of possession.

The self-acquired property of a Hindu father on his death devolves upon his sons not by right of survivorship but according to the ordinary law of inheritance. But if when the property devolves on them the sons are members of a joint Hindu family they have a common interest and a common possession and so it would follow that on the death of one of them his interest would not devolve on his widow but would go to his surviving brothers. *Katama Natchier* v. *Srimut Raja Moottoo Vijaya Ragandha Bodha Gooroo Sawmy Periya Odaya Taver* (1), *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh* (2), and *Raja Chelikani Venkayyamma Garu v. Raja Chelikani Venkatarama Nayyamma* (3), relied on.

Mr. *Khaliquzzaman*, for the appellant.

Mr. *Hyder Husain*, for the respondents.

HASAN and SRIVASTAVA, JJ.:—This is a defendant's appeal arising out of a declaratory suit. The plaintiffs-respondents are the five sons of one

*Second Civil Appeal No. 199 of 1929, against the decree of Pandit Krishna Nand Pande, Subordinate Judge of Sultanpur, dated the 23rd of March, 1929, modifying the decree of Pandit Shiam Manohar Tewari, Munsif of Musafirkhana, at Sultanpur, dated the 12th of January, 1929.

(1) (1864) 9 M.I.A., 543. (2) (1890) L.R., 17 I.A., 128.
(3) (1902) L.R., 29 I.A., 156.

1929

MUSAMMAT LAKHPATI v. PARMESHWAR MISRA.

Hasan and Srivastava, JJ.

Balbhaddar. This Balbhaddar had two other sons, both of whom died issueless. Lakhpati the defendant-appellant, is the widow of the one of these sons named Bhikhi. The plaintiffs' case was that the property in suit was the self-acquired property of their father inasmuch as he had got it under a will from one Jagannath, that Bhikhi had pre-deceased his father and that on Balbhaddar's death the plaintiffs had mutation effected in respect of a one-seventh share of the property in the defendant's favour merely for her consolation. They claimed that they were in possession of the entire property but as the defendant, on the strength of the mutation which was effected in her favour, had obtained a decree for profits for the years 1333 Fasli and 1334 Fasli against them, they asked for a declaration that they were the owners of the property in suit, and that the defendant had no right whatsoever therein. They had also asked for a relief in respect of the amount decreed by the Revenue Court for profits, but it is not necessary to make any reference to it as it is no longer in controversy between the parties.

The Munsif who tried the suit found that the property was the self-acquired property of Balbhaddar, that Bhikhi survived his father Balbhaddar and that the defendant was entitled as of right to mutation in respect of the share in suit as heir of her husband. He accordingly dismissed the suit. On appeal the learned Subordinate Judge has, in agreement with the trial court, found that the property was the self-acquired property of Balbhaddar and that the plaintiffs had failed to prove that Bhikhi had pre-deceased his father. He, however, held that Bhikhi and his brothers must be presumed to have formed a joint Hindu family, and the property inherited by them must be deemed to be ancestral joint family property subject to the right of survivorship in the hands of Bhikhi and his brothers. He has, therefore, held that the defendant had no title

1929

MUSAMMAT LAKHPATI v. PARMESHWAR MISRA.

to the property and has given the plaintiffs a declaration to the effect that they are the proprietors of the property in suit.

The only contention urged in appeal is that the property in suit had devolved upon the plaintiffs and Bhikhi by right of inheritance and that it was not joint family property in his hands. It was argued that on Bhikhi's death their share devolved upon the defendant-appellant and could not pass on to the plaintiffs by right of survivorship. We are unable to accede to this argument. Both the parties are agreed before us that the property in suit was the self-acquired property of Balbhaddar and that all his sons formed members of a joint Hindu family. The question, therefore is whether the sons succeded to the property as joint tenants or as tenants in common. In *Katama Natchier* v. *Srimut Raja Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* (1), their Lordships of the Judicial Committee remarked as follows :—

Hasan and Srivastava, JJ.

> "According to the principles of Hindoo law there is co-parcenaryship 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."

Thus it will appear that the two tests applied for determining whether a particular property was co-parcenary property subject to the right of survivorship or not, were community of interest and unity of possession. The property in the hands of Balbhaddar was, no doubt, his self-acquired property. It is also

(1) (1864) 9 M. I. A., 543.

1929

MUSAMMAT LAKHPATI v. PARMESHWAR MISRA.

Hasan and Srivastava, JJ.

true that on his death it devolved upon his sons not by right of survivorship but according to the ordinary law of inheritance. Now what was the character of the property when it had come into their hands? Admittedly they were members of a joint Hindu family and therefore when the property devolved on them they had a common interest and a common possession. This being so it would follow that on the death of Bhikhi his interest would not devolve on his widow, but would go to his surviving brothers. In *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Munsingh* (1), one Raja Upendra Bhupati who was the owner of an impartible *raj*, died leaving a son Nand Kishore by his Rani Nilmoni, a son by a woman called Rambha, the plaintiff, and a third son. Raja Upendra was succeeded by his legitimate son, Nand Kishore. Nand Kishore died leaving no son but leaving three widows and a daughter. The plaintiff claimed to succeed to Nand Kishore. It was found that the plaintiff's mother was not the lawful wife of Raja Upendra Bhupati and that the plaintiff must be treated as his illegitimate son. It was also found that Raja Upendra and his family were Sudras. It was held by their Lordships of the Judicial Committee that the plaintiff was entitled under the *Mitakshara* Law to succeed by survivorship. It may be mentioned, as was expressly remarked by their Lordships in the course of their judgment, that the fact of the *raj* being impartible did not affect the rule of succession as the matter was to be determined with reference to the rules which governed succession to a partible estate. In *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkatarama Nayyamma* (2), one Venkat Rao died leaving property which was his own separate property. He left a widow and a daughter. The daughter died leaving two sons. One of these sons of the daughter died leaving a widow. The

(1) (1890) L.R., 17 I.A., 128. (2) (1902) L.R., 29 I.A., 156.

question which arose for determination in the case was whether the property descended on the death of Venkat Rao's daughter to her two sons "jointly with benefit of survivorship or jointly or in common without benefit of survivorship." Their Lordships of the Judicial Committee referred to the observations made in the Shivagunga case which we have quoted above, and applying them to the case before them came to the conclusion that the two sons of the daughter succeeded to the estate jointly with benefit of survivorship and remarked that "in the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance." It is not necessary for us to enter into a discussion as regards the true import of the word "ancestral" in the passage just quoted which has given rise to a sharp conflict of opinion in the courts in this country. Whether their Lordships have used the word in its technical sense or otherwise, there can be no gainsaying the fact that the property was held to be subject to the incident of survivorship. The position seems to us to be very much stronger in the case of property inherited by the sons from their father. We, therefore, hold that on the death of Bhikhi his share in the property passed by survivorship to the plaintiffs and the lower appellate court is right in declaring the plaintiffs to be the proprietors of the property in suit.

We find from the defendants' written statement that she had set up an alternative case to the effect that the property in suit was in any case liable for her maintenance and that she was entitled to remain in possession of it as a maintenance holder. The fourth issue was framed by the trial court in regard to this matter and was to the following effect :—

> "Is the defendant entitled to retain possession of the one-seventh share as maintenance holder as alleged?"

1929

MUSAMMAT LAKHPATI v. PARMESHWAR MISRA

The trial court having found that she was entitled to hold the property as the widow of her husband did not consider it necessary to record any finding on this issue. The learned Subordinate Judge seems to have overlooked it and decided the case without arriving at any finding on this question. We do not consider it necessary to remand the case for a finding on this issue as the material on the record is quite sufficient to enable us to decide the matter. Paragraph 7 of the plaint shows that the defendant in her suit for profits for 1333 Fasli and 1334 Fasli had obtained a decree for Rs. 16-8-3 against the plaintiffs. The counsel for both parties have admitted before us that the profits of the one-seventh share of the property did not exceed Rs. 16 per annum. Thus the income of the entire share in suit can hardly afford adequate maintenance. The plaintiffs do not deny that they are legally liable to provide for the maintenance of the defendant. Under the circumstances we think that the most equitable and convenient arrangement would be that she be allowed to retain possession of the one-seventh share mutated in her name in lieu of maintenance.

Hasan and Srivastava, JJ.

We, therefore, modify the decree of the lower court by making a declaration to the effect that the plaintiffs are the owners of the land in suit and that the defendant is entitled to hold possession of it for her lifetime in lieu of maintenance. We make no order as to costs.

Decree modified.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Bisheshwar Nath Srivastava.

MUNESHWARENDRA NATH, MINOR, UNDER GUARDIANSHIP OF MATA PRASAD AND OTHERS DEFENDANTS (APPELLANTS) *v.* RAM DIN, PLAINTIFF, AND ANOTHER DEFENDANT (RESPONDENTS).* 1929 *December,* 6.

Hindu Law—Joint Hindu family—Debt of Hindu father—Business started by Hindu father—Mortgage by Hindu father of ancestral joint family property for investing money in a business started by him—Alienation, if for "benefit of the estate"—Mortgagee's right to recover money from the family estate.

Where a member of a joint Hindu family consisting of his brothers, himself and of their descendants, started a business in cloth on his own account without the concurrence of the other members of the family some of whom being minors were incompetent to accord consent, or he had started or continued the same business after he had separated from his brother, and mortgaged the ancestral joint family property of his and his sons for the purpose of investing money in that business, *held*, that the alienation was not made for the benefit of the estate and that the mortgagor was not entitled to recover his money out of the family estate. *Hunooman Pershad Pandey* v. *Musammat Babooee Munraj Koonweree* (1), *Palaniappa Chetty* v. *Deivasikamony Pandara* (2), and *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (3), followed. *Niamat Rai* v. *Din Dayal* (4), distinguished. *Inspector Singh* v. *Kharak Singh* (5), *Ragho v. Taga Ekoba* (6), *Tadibulli Tammireddi* v. *Tadibulli Gangireddi* (7), and *Biswanath Singh* v. *The Kayastha Trading and Banking Corporation Ltd.* (8), referred to.

Messrs. *Radha Krishna*, *Ali Zaheer*, *Hargobind Dayal* and *Raghubar Dayal Bajpai*, for the appellants.

Messrs. *M. Wasim* and *Khaliq-uz-zaman*, for the respondents.

*First Civil Appeal No. 34 of 1929, against the decree of S. Khurshed Husain, Subordinate Judge of Hardoi, dated the 19th of December, 1928, decreeing the plaintiff's claim.

(1) (1856) 6 M.I.A., 393.
(2) (1917) L.R., 44 I.A., 147.
(3) (1922) L. R., 49 I.A., 108.
(4) (1927) L.R., 54 I.A., 211.
(5) (1928) I.L.R., 50 All., 776.
(6) (1928) I.L.R., 53 Bom., 419.
(7) (1921) I.L.R., 45 Mad., 281.
(8) (1928) I.L.R., 8 Pat., 450.

1929

MUNESHWARENDRA NATH v. RAM DIN.

HASAN and SRIVASTAVA, JJ. :—This is an appeal by three defendants in a suit from the decree of the Subordinate Judge of Hardoi, dated the 19th of December, 1928.

Lokeshwar Indar Nath, defendant No. 1, borrowed from the plaintiff, Ramdin, a sum of Rs. 4,000 on the 15th of May, 1922, and charged a certain share in the village of Urli, pargana Sarra Shumali, in the district of Hardoi, as security for its repayment. The mortgage carried interest at the rate of 1 per cent. per mensem and was evidenced by a deed of that date executed by Lokeshwar Indar Nath. The mortgagor agreed to repay the mortgage money within four years. The suit, out of which this appeal arises, was instituted for the purpose of recovering the mortgage-money due on the deed just now mentioned by sale of the mortgaged property.

There were several defendants to the suit but we are concerned in the present appeal with only three of them, Muneshwar Indar Nath, Sureshwar Indar Nath and Jaideo Singh. The first two mentioned are the sons of the mortgagor and Jaideo Singh is the son of Hanoman Singh, brother of Lokeshwar Indar Nath. The defence raised by these defendants is that the property charged for the repayment of the borrowed money was not liable for the reason, that it was joint family property and that the debt was incurred by Lokeshwar Indar Nath without any legal necessity. There was some controversy between the parties in the trial court on the question as to whether on the date of the mortgage in suit Lokeshwar Indar Nath and his sons on one side and Hanoman Prasad and his sons on the other constituted one joint Hindu family or two different branches of the same family. The trial court has held that the two brothers with their respective issue had separated before the mortgage in suit. The finding was not accepted before us by the learned counsel who argued the appeal on behalf of the appellants, but we hold that the finding is correct on merits.

There was one more matter in controversy between the parties in the trial court and it was on the question as to whether any of the sons of Lokeshwar Indar Nath was born before the mortgage in suit was executed. The plaintiff's case was that there were no sons of Lokeshwar Indar Nath in existence on that date. The trial court on this question has found that there were two sons of Lokeshwar Indar Nath in existence on that date. One of them has died and the other is defendant No. 4, Muneshwar Indar Nath, one of the appellants before us. At the hearing of the appeal in this Court the learned counsel for the plaintiff accepted this finding. This controversy must therefore also be taken to have been set at rest.

The situation on the findings recorded above is, therefore this, that on the date of the mortgage in suit Lokeshwar Indar Nath and his two sons, Muneshwar Indar Nath and one since dead, both minors constituted a joint Hindu family and that the zamindari share, which was hypothecated by Lokeshwar Indar Nath as a security for the repayment of the loan of Rs. 4,000, was ancestral joint family property. The validity of the defence that the money, for which the suit has been laid, was borrowed without any legal necessity is, therefore, the main question in the case. The learned Subordinate Judge has answered this question against the defendants. His answer is challenged in appeal before us. The facts on which this defence rests are agreed to up to a certain extent. It is agreed that the sum of Rs. 4,000 was borrowed by Lokeshwar Indar Nath for the purpose of opening a new cloth shop. It is also agreed that there was no ancestral business of this nature in the family. The serious controversy in respect of this part of the case between the parties is as to the exact time when the business in cloth was commenced by Lokeshwar Indar Nath. Having regard to certain pieces of oral testimony, which is not in our opinion definite, the learned

1929

MUNESH-WARENDRA NATH v. RAM DIN.

Hasan and Srivastava, JJ.

Subordinate Judge thinks that Lokeshwar Indar Nath started dealing in cloth at a very early age probably when he was only 10 or 11 years old and the loan incurred under the mortgage in suit was incurred for the purpose of expanding the same business. On these premises alone the learned Subordinate Judge holds as a proposition of law that the mortgage is binding on the sons of Lokeshwar Indar Nath. Having regard to the view which we have formed on the question in dispute between the parties it is not necessary for us to examine the evidence with any exaggerated scrutiny. We are of opinion that the true view of the facts as disclosed by trustworthy evidence is that Lokeshwar Indar Nath started this business of dealing in cloth after he had separated with his sons from his brother, Hanoman Prasad, and that the business began with the opening of the shop for which purpose he borrowed the money in suit. This view of facts is supported by documentary evidence on which the plaintiff himself relies. It is further supported by the recitals in the deed of mortgage of the 15th of May, 1922. It is also supported by the plaintiff's pleadings in the case. To this state of facts, therefore, we have to apply the law.

We are prepared to assume without deciding the argument advanced by the learned counsel for the plaintiff that Lokeshwar Indar Nath initiated the business in dealing with cloth while he and his brother, Hanoman Prasad, and their descendants constituted a joint Hindu family. In advancing this argument the learned counsel very rightly did not claim that Hanoman Prasad in any manner participated in this business or accepted it as a family concern.

The position on facts is therefore this. Lokeshwar Indar Nath, who was a member of a joint Hindu family consisting of his brother, Hanoman Prasad, himself and of their descendants, started the business in cloth on his own account without the concurrence of the other

1929

MUNESHWARENDRA NATH v. RAM DIN.

members of the family, some of whom being minors were incompetent to accord consent; or he had started or continued the same business after he had separated from his brother, Hanoman Prasad, and alienated the ancestral joint family property of his and his sons for the purpose of investing money in that business. We have already said that Lokeshwar Indar Nath's sons are still minors. They could not, therefore, give their consent either to the commencement or to the continuance of this business.

Hasan and Srivastava, JJ.

Having determined the facts as stated above, it now remains to consider the rights of the plaintiff and of the defendants-appellants, minor sons of Lokeshwar Indar Nath. In the leading case of *Hunooman Parshad Pandey* v. *Musammat Babooee Munraj Koonweree* (1), their Lordships of the Judicial Committee stated the general "principle" in the following words: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate . . . The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." It is agreed that the case before us is not a "case of need." The only question therefore is as to whether the mortgage in question was "for the benefit of the estate." That it might have been so had the business been ancestral and devolved upon the survivors with the ancestral estate or had it been undertaken with the concurrence of the entire body of the family need not be decided. That aspect of the question does not arise in the present case and if it does not arise we can find no circumstance which can be construed to justify the view that the mortgage in question was made in order to benefit the estate. The phrase "benefit to the estate" was considered in the case of *Palaniappa Chetty* v. *Deivasikamony Pandara* (2), by their Lordships of the Judicial Committee. After noting

(1) (1856) 6 M.I.A., 393. (2) (1917) L.R., 44 I.A., 147.

1929

MUNESHWARENDRA NATH v. RAM DIN.

Hasan and Srivastava, JJ.

and analysing several previous decisions of the committee Lord ATKINSON said: "No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation. these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not." True the passage quoted above does not prescribe an exhaustive definition of things to be included under the description "benefit to the estate," but clearly so far as it goes the case before us does not fall within it. The mortgage was not made for the preservation of the estate from extinction, for the defence against hostile litigation affecting the family estate, for the protection of it or portions from injury or any deterioration whatsover. The family is a family of Hindu zamindars maintaining itself solely by the income of the zamindari property which, according to the evidence on the record, amounted to nearly Rs. 1,200 a year as the share of Lokeshwar Indar Nath and it was a small family consisting of Lokeshwar Indar Nath and his two sons, one of whom was about 2 years and 4 months old (since dead) and the other about 25 years old on the date of the mortgage in suit and the wife of Lokeshwar Indar Nath. There is no evidence on the record to suggest that Lokeshwar Indar Nath was put to any strain as to the means of the family subsistence and, therefore, he entered into the cloth business for the purpose of augmenting them. In the case of *Niamat Rai* v. *Din Dayal* (1), their Lordships of the Judicial Committee held that: "Where there is joint family business, the manager . . . has authority to raise money not only

(1) (1927) L.R., 54 I.A., 211.

1929

MUNESHWARENDRA NATH v. RAM DIN.

Hasan and Srivastava, JJ.

for the payment of debt, but also for the purpose of carrying on the business." This view of law is inapplicable to the present case for the simple reason that the business was not a "joint family business" but it was started and continued by Lokeshwar Indar Nath as his own and personal concern. It might be that when the business first commenced Lokeshwar Indar Nath had drawn to some extent on the family purse, but that could not make the business a business of the joint family in the circumstances of this case. It seems to us that the decision of their Lordships of the Judicial Committee in the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1), is decisive on the point under consideration. In that case it was found as a matter of fact that the money in suit was borrowed exclusively for the purposes of a particular business and that this business was neither ancestral nor the extension of the ancestral business. Their Lordships observed: "These findings must now be deemed conclusive, and this strikes at the very root of the case made by the plaintiffs in the first court. The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a *karta* to impose on a minor coparcener the risks and liabilities of a new business started by himself, is fully discussed by both courts, and their Lordships agreeing with the conclusion at which they have arrived on this point, do not deem it necessary to enter on a further discussion of this aspect of the case."

The learned counsel for the appellants also cited the following cases in support of the appeal: *Inspector Singh* v. *Kharak Singh* (2); *Ragho* v. *Taga Ekoba* (3);

(1) (1922) L.R., 49 I.A., 108. (2) (1928) I.L.R., 50 All., 776.
(3) (1928) I.L.R., 53 Bom., 419.

1929

MUNESHWARENDRA NATH v. RAM DIN

Tadibulli Tammireddi v. *Tadibulli Gangireddi* (1) and *Biswanath Singh* v. *The Kayastha Trading and Banking Corporation Ltd.* (2). The view, which we have taken in the present case, is consistent with the view adopted in the cases just now mentioned.

Hasan and Srivastava, JJ.

The learned counsel for the plaintiff-respondent contended that in case it was held that the plaintiff was not entitled to a decree for sale of the mortgaged property he was entitled to a personal decree against the borrower, Lokeshwar Indar Nath. We are of opinion that the contention must be allowed. There is no bar of limitation to such a decree and the deed of mortgage of the 15th of May, 1922, clearly contains a personal covenant on the part of Lokeshwar Indar Nath to repay the loan.

We accordingly allow this appeal, set aside the decree of the lower court and dismiss the plaintiff's suit as against the appellants, Muneshwar Indar Nath, Sureshwar Indar Nath and Jaideo Singh, with costs in both courts; but we grant a decree in favour of the plaintiff against Lokeshwar Indar Nath personally for the sum of money claimed in the plaint with costs in both courts. The other defendants will bear their own costs in both courts and shall not pay any costs to the plaintiff.

Appeal allowed.

(1) (1921) I.L.R., 45 Mad., 281. (2) (1928) I.L.R., 8 Pat., 450.