Patent appeals and there being no other law under which they can be levied such appeals must be accepted without court-fees. I feel convinced, however, that it was never intended that Letters Patent appeals should be filed without court-fees and I would suggest that the matter be brought to the attention of the legislature.

APPELLATE CIVIL.

Before Das and Adami, J.J.

1922.

Feb. 16.

RAJA SRI SRI SHIVA PRASAD SINGH

v.

BENI MADHAB CHOWDHURY.*

Impartible Estate—succession to, by survivorship—application by successor for personal decree, whether succession certificate is necessary—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXIV, rule* 6—*Lease—provision for personal liability of lessee for rent, and certain properties specified as security, whether creates a mortgage or a charge—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 58.

A person who succeeds to an impartible estate by survivorship is entitled to maintain an application under Order XXXIV, rule 6, of the Code of Civil Procedure, 1908, although he has not obtained a succession certificate.

Shyam Lal Singh v. *Raja Bijay Narain Kunda Bahadur*(1), *Katama Natchier* v. *Srimut Raja Moottoo Vijaya Raganadha Bodhu Gooroo Sawmy Periya Odaya Taver*(2), *Naraganti Achammagaru* v. *Venkataohlapati Nayanivaru*(3), *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(4), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(5) and *Baijnath Prasad Singh* v. *Tej Bali Singh*(6), referred to.

* Appeal from Original Decree No. 69 of 1919, from an order of Babu Brojendra Kumar Ghose, Subordinate Judge of Dhanbad, dated the 20th January, 1919.

(1) (1917) 2 Pat. L. J. 136 (F. B.)

(2) (1861-64) 9 M. I. A. 543.

(3) (1882) I. L. R. 4 Mad. 250.

(4) (1887-88) L. R. 15 I. A. 51; I. L. R. 10 All. 272.

(5) (1867-69) 12 M. I. A. 523.

(6) (1921) I. L. R. 43 All. 288; L. R. 48 I. A. 195.

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A lease under which the lessor is entitled to rent from the lessee and which provides that the lessee shall be personally liable for payment of the rent, and that certain specified properties shall be regarded as security for the payment and shall not be transferred by the lessee while the rent remains unpaid to the lessor, does not create a mortgage of the security properties but merely a charge on them.

Dalip Singh v. *Bahadur Ram*(1) and *Anand Ram Marwari* v. *Dhanpat Singh*(2), followed.

Appeal by the applicant.

The facts of the case material to this report are stated in the judgment of Das, J.

Noresh Chandra Sinha and *Saktikanta Bhattacharjee*, for the appellant.

Susil Madhab Mullick and *Norendra Nath Sen*, for the respondents.

DAS, J.—Two questions have been raised in this appeal; *first*, whether the appellant who applied for a decree as against the respondent under Order XXXIV, rule 6, of the Code could maintain the application without a succession certificate, and, *secondly*, whether the document upon which the appellant relies operated merely as a charge, and, if so, whether the appellant was entitled to a decree under Order XXXIV, rule 6, of the Code.

The facts are these:—Raja Durga Prosad Singh of Jheria brought a suit for royalty in respect of certain coal lands. He obtained a decree and the properties were sold on the 17th September, 1915. The sale did not satisfy the claim of Raja Durga Prosad as against the respondent and there still remained a sum of Rs. 4,175 due to Raja Durga Prosad. Raja Durga Prosad, it appears, died after the sale of the properties and the present appellant has succeeded to the Raj by survivorship. On the 15th July, 1918, the appellant presented an application under Order XXXIV, rule 6, for recovery of the sum of Rs. 4,175 from the respondent. The learned Subordinate Judge being of

(1) (1912) I. L. R. 34 All. 446. (2) (1916) 1 Pat. L. J. 563.

opinion that the appellant could not maintain the application without a succession certificate, has dismissed the claim of the appellant

I am of opinion that the decision of the learned Subordinate Judge on this point cannot be supported. Admittedly the appellant has succeeded to the Jheria Raj by right of survivorship; but it was urged on behalf of the appellant that the estate being impartible the appellant could only have taken the estate by inheritance although he was selected as such successor by the application of the rule of survivorship. In support of his argument Mr. *S. M. Mullick* relied upon the decision of this Court in the case of *Shyam Lal Singh* v. *Raja Bijay N. Kunda Bahadur*(1). I will consider this case in a moment: but it is necessary to point out that the law on the subject has been discussed very fully and elaborately by the Judicial Committee in the recent case of *Baijnath Prashad Singh* v. *Tej Bali Singh*(2). On an exhaustive review of all the decisions, starting with what is known as the *Shivagunga* case(3), their Lordships came to the conclusion that the question of how to select the head of the family in a joint family is part of the general law. In the course of their judgment, their Lordships said as follows: "That the custom of impartibility does not touch it," that is to say, touch the question of how to select the head of the family in a joint family, "is shown by the long list of authorities above cited, and there is, in their Lordships' view, no necessary logical deduction from the decisions in the Sartaj Kuari and the second Pittapur cases which forces them to an opposite conclusion". Their Lordships quoted with approval the decision in the case of *Naraganti Achammagru* v. *Nayanivaru*(4) where the proposition was laid down in the following words: "Where property is held in coparcenary by a joint Hindu family, there are

(1) (1917) 2 Pat. L. J. 136 (F. B.)

(2) (1921) I. L. R. 43 All. 228; L. R. 48 I. A. 195.

(3) (1861-64) 9 M. I. A. 543.

(4) (1882) I. L. R. 4 Mad. 250.

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DAS, J.

ordinarily three rights vested in coparceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment, and the right of partition as the right of an undivided coparcener, are from the nature of the property incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that right remains". Reviewing all the decisions of the Judicial Committee up to Sartaj Kuari's case, their Lordships laid down three broad propositions :—

"1. The fact that a *raj* is impartible does not make it separate or self-acquired property.

2. A *raj*, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

3. If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, *i.e.*, the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the *raj* without the others sharing it".

Their Lordships then discussed the case of *Sartaj Kuari* v. *Deoraj Kuari*(1) and said that what was actually decided in *Sartaj Kuari's* case(1) was that in an impartible *raj* there was no restriction on the power of alienation by the member of the family who was on the *gaddi* and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. Their Lordships reviewed the cases subsequent to *Sartaj Kuari's* case(1) and came to the conclusion that the rules laid down in the earlier cases on the question

(1) (1887-88) I. L. R. 10 All. 272; L. R. 15 I. A. 51.

of succession have not been touched by *Sartaj Kwari's* case(1). They thought that the key-note of the position was what was laid down in the *Tipperah* case(2), *viz.*, "when a custom is found to exist, it supersedes the general law, which, however, still regulates all beyond the custom." Basing their decision on the passage which has just been cited, they came to the conclusion that the selection of the person entitled to succeed is governed by the general law of the land but that when the selection is made he holds the *raj* by virtue of the custom which prevents the others sharing it.

In my opinion the latest decision of the Judicial Committee completely negatives the arguments which have been advanced before us. But it was urged that we are conclusively bound by the decision of the Full Bench of this Court in the case of *Shyam Lal Singh* v. *Raja Bijay N. Kunda Bahadur*(3). In that case the late Chief Justice of this Court, with the concurrence of Chapman and Roe J.J., came to the conclusion that there was no right to succeed by survivorship in an impartible estate. Chamier, C. J., in delivering the leading judgment, said as follows: "all that their Lordships of the Privy Council have all along intended to lay down is that for the purposes of ascertaining the person entitled to succeed to an impartible estate you must have resort to the rule which would have governed the succession if the estate had remained partible". In my opinion it is impossible to uphold this view having regard to the decision of the Judicial Committee in the case of *Baijnath Prashad Singh*(4). It is unnecessary to decide whether that case was rightly or wrongly decided inasmuch as the question of succession was not raised in that case and all that was involved was the question whether any portion of the property in the hands of a holder of an impartible *raj* could be regarded as assets which the creditor could seize in execution of

(1) (1887-88) I. L. R. 10 All. 272: L. R. 15 I. A. 51.
(2) (1867-69) 12 M. I. A. 523. (3) (1917) 2 Pat. I. J. 136 (F. B.)
(4) (1921) I. L. R. 43 All. 228; L. R. 48 I. A. 195.

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a decree obtained against his predecessor in title. We are in this case not concerned with that question. If we were, we would be bound to follow the decision of the Judicial Committee which lays down in express terms that the question of selection of the successor is governed by the general law of the land and not by custom; but that when the selection is made he holds the property by custom which prevents others sharing in it. In my opinion the appellant took the impartible estate by survivorship and it was not necessary for him to obtain a succession certificate as a condition for the maintainability of the application.

So far as the other question is concerned, the view of the learned Subordinate Judge was in favour of the appellant. But Mr. *Susil Madhab Mullick* on behalf of the respondent has urged before us that the appellant was not entitled to maintain an application under Order XXXIV, rule 6, inasmuch as the document upon which the appellant relies created a charge and not a mortgage within the meaning of the term as defined in section 58 of the Transfer of Property Act. The clause in the document upon which reliance is placed runs as follows :—

" This settled coal land, mines, coal raised by me, machinaries, tools, bungalow, edifices coolie-shed erected by me as well as all other movables and immovables shall ever be regarded as a security for the payment of the rent and cesses due, together with interest thereon due to you. I shall not be competent to transfer the said property by the sale, gift, or remove the same, so long as the rent, etc., due to you will remain unpaid. If it is done so, it shall not be accepted ".

Now the broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. The line of division in England between a charge and a mortgage is a very clear one; but in this country the division is not so well-marked. It has been pointed out that there is very little difference, if any, between a charge and a simple mortgage as defined in section 58

of the Transfer of Property Act; and that, in a simple mortgage, the interest transferred is the right to have the property sold. If that be so, it becomes a question of some nicety to distinguish between a simple mortgage and a charge. In the case of *Dalip Singh* v. *Bahadur Ram*(1) the late Chief Justice of this Court, then Mr. Justice Chamier, laid down the three essentials constituting a simple mortgage as follows: "In order that there may be a simple mortgage, there must be (*a*) a transfer of an interest in specific immovable property, (*b*) a personal undertaking by the mortgagor to pay the mortgage money, and (*c*) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold". This case was followed by this Court in the case of *Anand Ram Marwari* v. *Dhanpat Singh*(2). Now in the present case the conditions (*b*) and (*c*) have been fulfilled; but there is no express transfer of an interest in the property. In the case already cited, Chamier J. said as follows: "In a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred then the requirements of condition (*a*) are satisfied". In my opinion the decision in *Dalip Singh* v. *Bahadur Ram*(1) followed as it has been by this Court in *Anand Ram Marwari* v. *Dhanpat Singh*(2) governs the present case. It may be pointed out that the word used in the Bengalee document is '*bandhak*' which undoubtedly implies a mortgage. I am of opinion that the contention of Mr. *S. M. Mullick* on this point must be overruled.

I would allow the appeal, set aside the order of the learned Judge in the Court below and remand the case to that Court for decision as to the sum of money

(1) (1912) I. L. R. 34 All. 446. (2) (1916) 1 Pat. L. J. 563.

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for which the plaintiff is entitled to a decree. The appellant is entitled to the costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Subordinate Judge.

ADAMI J.—I agree.

Order set aside.

APPELLATE CIVIL.

Before Coutts and Ross, J.J.

BALGOBIND MANDAR

v.

DWARKA PRASAD.*

1922.

Feb. 20.

Tenants in Common—Suit by one against the others for joint possession, maintainability of—Tenancy, whether can be created by grant of receipt by landlords' tahsildar—person in undisturbed possession for several years, whether landlord can deny tenancy.

Where a tenant has been inducted on to the land by the 12-annas proprietors, as such part proprietors and not as, or on behalf of the entire body of landlords, the 4-annas proprietors are entitled to maintain a suit for joint possession.

Watson and Company v. *Ramchand Dutt*(1), *Madan Mohun Shaha* v. *Rajab Ali*(2) and *Dakhyayani Debi* v. *Mana Raut*(3) distinguished.

Sat Narayan Singh v. *Awani Prosad*(4), followed.

Radha Prosad Wasti v. *Esuf*(5), referred to.

The mere fact that the landlord's *tahsildar* has granted a receipt for rent is not sufficient to create the relation of landlord and tenant between the proprietor and the grantee of the receipt.

* Appeal from Original Decree No. 174 of 1919, from a decision of Babu Amarnath Chatterji, Subordinate Judge of Bhagalpur, dated the 2nd April, 1919.

(1) (1891) I. L. R. 18 Cal. 10.
(2) (1901) I. L. R. 28 Cal. 223.
(3) (1919) 19 Cal. L. J. 113.
(4) (1919) 51 Ind. Cas. 31.
(5) (1881) I. L. R. 7 Cal. 414.