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JADAB CHANDRA PODDAR v. RAMESHWAR MARWARI.

WORT, J.

and, therefore, the decision of the lower Court is right and the appeal must be dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1929.

May, 8, 10.

Before Wort and James, JJ.

SRIRAM PANDE MINOR

v.

HARICHARAN PANDE*

Hindu Law—Mitakshara School—partition between sons and step-grand-son—step-grand-mother whether entitled to a share equal to the other parties.

On a partition between the sons and a step-grand-son governed by the Mitakshara school of Hindu Law, the step-grand-mother is entitled to share equally with them.

Har Narain v. *Bishambhar Nath*(1) and *Purna Chandra* v. *Sarojini*(2), followed.

Srimati Hemangini Dasi v. *Kedarnath Kudu Chowdhry*(3) and *Shco Narain* v. *Janki Parshad*(4), distinguished.

Appeal by the defendant.

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

S. C. Mazumdar, for the appellant.

Susil Madhab Mullick and *Bajrang Sahay*, for the respondent.

* Appeal from Appellate Decree no. 1446 of 1926, from a decision of Babu Narendra Lal Bose, Subordinate Judge of Manbhum, dated the 21st May, 1926, reversing a decision of Babu Ram Prasad Ghosal, Munsif at Purulia, dated the 6th June, 1925.

(1) (1916) I. L. R. 38 All. 83.
(2) (1904) I. L. R. 31 Cal. 1065.
(3) (1888-89) 16 I. A. 115.
(4) (1912) 9 All. L. J. 749.

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WORT, J.—This appeal arises out of a suit by the plaintiffs in which they claimed a decree for recovery of possession of over five shares out of six shares in the property which was set out in the schedule of the plaint by demarcating the same or in the alternative they pray for a decree for possession of the entire share in schedule Ka property and so on.

The facts of the case in so far as it is necessary to state are as follows. The plaintiffs, excepting plaintiff no. 5, were the sons of one Hiran Pande, the defendant's father being the son by his first wife and the plaintiffs nos. 1 to 4 being the sons by his second wife and the plaintiff no. 5 being the mother of the plaintiffs. In this connection it is necessary to state that there was another son one Janaki Pande, who is now dead. The plaintiffs' case was that in the year 1913 with respect to these properties there commenced a partition suit, which suit was alternatively withdrawn with leave to institute a fresh suit, and thereafter by an arrangement the brothers separated and divided the properties according to certain shares by which the plaintiffs were to obtain five-sixths and the defendant one-sixth of the property in suit.

The defendant's case was that no such arrangement as the plaintiffs alleged had taken place but in fact there had been a separation and partition of the properties immediately after Hiran Pande married his second wife. The result of that was, of course, that the defendant, in the circumstances, would be entitled to half of the properties instead of one-sixth as the plaintiffs alleged.

The main objection to the judgment of the appellate Court, which decided that the plaintiffs are entitled to their decree for five-sixths share of the property, is that the learned Judge has made out an entirely new case on behalf of the plaintiffs; that, at any rate, was the argument which was advanced to us in the first place when this case was opened.

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It was pointed out by the learned Advocate on behalf of the defendant-appellant that the plaintiffs have failed in both Courts to prove the allegations which were set out in paragraph 3 of the plaint which were to the effect that this separation and division of property had taken place by agreement between the parties at some date subsequent to 1913, and that, in determining the issues which were before the appellate Court, the learned Judge has in addition placed the onus upon the defendant to show that the partition he alleges in his written statement, that is the partition between Hiran Pande and Rakhal, had taken place at the time that Hiran Pande married his second wife. In those circumstances, it is necessary to see exactly what the issues were and how the case shaped itself before the two Courts below. Undoubtedly, in the first place, this was ancestral property. The plaintiffs, as I have already indicated, set up a definite partition at some date subsequent to 1913. Let us assume for the sake of argument, as was the case, that the plaintiffs failed to establish that particular case which was set out in their plaint: the result would be that the plaintiffs with the defendant were members of a joint family which has been found to be a fact—a joint Hindu family governed by the Mitakshara school of law—and that they were in possession jointly of the ancestral property. In those circumstances, undoubtedly in this suit or in any other suit they would be entitled, if they claimed it, to partition of those properties. It is pointed out by Mr. S. M. Mullick on behalf of the respondents that that in fact is their alternative claim. The learned Advocate on behalf of the appellant, however, states that as the plaintiffs have failed to prove the particular case which they set out in their plaint and that as they have shown nowhere that the properties were joint, the condition precedent to their obtaining the claim which they make in their plaint does not exist; therefore their suit must fail. In my judgment it is an entirely erroneous view to take of the position

in this case. It must be admitted that this was ancestral joint property and, as I have already stated, the plaintiffs were, therefore, entitled in the suit to a decree for partition. As against that the defendant says that the property was not joint but that in some year prior to 1914 the property had been partitioned as between the parties and the onus was on him to show that. If he had succeeded in that, it would have been necessary to dismiss the plaintiffs' suit. But in that averment he has failed and what has in fact happened is that the appellate Court has come to the conclusion that such separation as has taken place was not in effect a partition of the properties but was merely a division of the properties by which the father Hiran Pande was to enjoy half for the purposes of the maintenance and for that purpose only. The learned Subordinate Judge also comes to the conclusion that this division did not take place at the time alleged by the defendant but took place at some time after the plaintiffs 1 to 4 were born. In those circumstances it seems to me that there can be no suggestion that the learned Judge is wrong in coming to the conclusion at which he has arrived. The questions which were before him were largely of fact and he has come to a conclusion on evidence, and with those findings it is not within our jurisdiction to interfere.

The argument which the learned Advocate further advances and for which he quotes certain authorities is to the effect that once it is shown that there was separation which the learned Subordinate Judge has found, then the presumption of the joint family property ceases to exist. The authorities which the learned Advocate quotes, however, do not support the contention which he endeavours to make out. They were largely cases in which the question was whether a property in dispute was separately acquired property or whether it was joint family property. One of the cases upon which he strongly relies is *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1).

(1) (1909) I. L. R. 32 Mad. 191.

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This case was a suit for partition in which it was shown that a part at any rate of the property had been divided and it was decided that where there was such a partial partition the presumption arises that there has been an entire partition both with reference to rights and properties. In this case, however, no such presumption can arise as there was no partition other than the ones which have been alleged by the plaintiffs and the defendant and which they had to a very large extent failed to prove.

There is one passage in the course of the judgment of the learned Subordinate Judge in which he refers to the evidence before the Settlement Officer and upon that he partially relies in order to come to the conclusion that the separation to which I have referred took place after the birth of some of the plaintiffs. Now, quite clearly the evidence, if such it may be called, was not admissible for the purposes for which the learned Subordinate Judge used it. But it is also abundantly clear that there was other evidence upon which he arrived at that conclusion; and, therefore, that finding of fact which is so material to the determination of this case cannot be affected.

The only question remaining is whether the plaintiffs, that is to say the plaintiffs 1 to 5, are entitled to the five-sixths of the property which the decree of the learned Subordinate Judge gives or whether the property is to be divided into five parts and that these five plaintiffs are to enjoy between them four-fifths only, the position, as I have already stated, being that plaintiff no. 5 is the grand-mother of the defendant and mother of the first four plaintiffs. It is argued that four-fifths is a proper proportion to be divided among the plaintiffs and the decision in *Srimati Hemangini Dasi* v. *Kedarnath Kudu Chowdhry*(1) is relied upon. That case decides when there was a partition the mother is entitled to maintenance against a share allotted to her own son

(1) (1888-89) 16 I. A. 115.

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or sons and has no claim against the shares of her step-sons. But it is to be noticed, and it is clearly stated in the case, that the parties to that suit were governed by the Bengal School of law. Admittedly this case is a case of Mitakshara School and we are referred to a passage in Mayne's Hindu Law and Usage, 9th Edition at page 692, where, after discussion of the position so far as Mitakshara family is concerned, he states:

"It is admitted that the Mitakshara recognized the right of step-mothers to a partition with their sons"

and Mr. Mayne then goes on to refer to the case of *Har Narain* v. *Bushambhar Nath*(1). That undoubtedly is a clear authority for the proposition that the step-grand-mother being the mother of the four plaintiffs is entitled to share equally with the other parties to the suit. But it is further argued that whereas in this case the plaintiff no. 5 is in fact the grand-mother or step-grand-mother of one of the parties, the rule laid down in the case to which I have just referred no longer prevails and for that proposition the case of *Sheo Narain* v. *Janki Prashad*(2) is relied upon. But it is to be noticed that in that case there was a suit by the sons against the father and there, as I have already indicated, the grand-mother had no right to participate to the same extent as the other parties to the suit. But in a note in Mr. Mayne's book he states:

"Where a petition takes place among great-grandsons only, it is said that the great-grand-mother has no right to a share. But if a son be one of the partitioning parties with great-grand-sons by another son she would take a son's share. And if a grandson and great-grand-son divide, she would take a grand-son's share."

The case relied upon for that statement of law is *Purna Chandra* v. *Sarojini*(3). It is to be noted there, however, that it is a case of a family governed by the Bengal School; but, in my judgment, that does not affect the matter because, we have seen by

(1) (1916) I. L. R. 38 All. 83. (2) (1912) 9 All. L. J. 749.
(3) (1904) I. L. R. 31 Cal. 1065.

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the authorities to which I have referred, if I may put it in that way, the Bengal School is less generous than the Mitakshara School. But even so the present law recognizes the right which the plaintiff no. 5 claims in this case. In my judgment the learned Subordinate Judge was, therefore, right in coming to the conclusion that the plaintiffs were entitled to five-sixths of the property.

In those circumstances, the judgment of the learned Subordinate Judge ought to be affirmed and the appeal dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Terrell, C.J., and Rowland, J.

1929.

June, 24.

PICHIT LAL MISSER

v.

KING-EMPEROR.*

Penal Code, 1860 (Act XLV of 1860), section 186—Income-tax demand—certificate procedure—warrant of distress—attachment of property—property entrusted to surety—warrant for realisation of dues—attachment of other property—obstruction.

An assessee having failed to pay the amount demanded from him on account of Income-tax a certificate was issued and a distress warrant was served through a peon who attached a bullock belonging to the assessee. This was left

*Criminal Revision no. 275 of 1929, against an order of M. A. Majid, Magistrate, first class, of Monghyr, with appellate powers, dated the 15th February, 1929, modifying an order of Babu Nalinindra Lal Bose, Deputy Magistrate, 2nd class, of Monghyr, dated the 19th January, 1929.