on the merits and this point was not taken by the learned advocate for the respondents, we pass no order as to costs.

1928

ARJUNA IYER
*v.*
OFFICIAL ASSIGNEE, RANGOON, AND ONE.

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## APPELLATE CIVIL.

*Before Mr. Justice Pratt, Mr. Justice Carr and Mr. Justice Das.*

1928

*Mar.* 21.

## RAGHUBARDAYAL
*v.*
## RAMDULARE.*

*Hindu Law—Personal law of Hindus applicable wherever a Hindu settles—Joint-Hindu family system, presumption in favour of—Separation or partition, proof of—No presumption of separation or partition, because father and son live continuously in Burma and India respectively.*

*Held*, that the Hindu law is the personal law of the Hindus and governs them wherever they may be so long as they remain Hindus. The joint-Hindu family system is a part and parcel of such law. A joint-Hindu family remains joint until there has been an intentional act of severance. It is a presumption of Hindu law that the relations that may naturally be members of a joint-Hindu family are joint ; anyone alleging separation must prove that fact.

Where a Hindu father came to Burma many years ago and with one son lived in Burma continuously until his death, except for very occasional visits to his ancestral home in India, and had the bulk of his property in Burma, and another son all along remained in India and never saw his father except on those occasional visits, *held* that the presumption was that the father and both his sons were members of a joint-Hindu family, and that the above facts did not prove any separation between them or partition of the joint property.

*Nana Tawker* v. *Ramachandra Tawker*, 32 Mad. 377—*referred to.*

*Mayne's Hindu Law* (9th Ed.), pp. 343, 345 , *Dr. Gour's Hindu Code* (2nd Ed.), s. 134, paragraph 1473 ; *Sastri's Hindu Law* (6th Ed.), pp.455, 458—*referred to.*

*A. C. Mukerjee* for the appellant.

*Sanyal* for the respondent.

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* Civil First Appeal No. 62 of 1927 (Mandalay) against the judgment of the District Court of Lower Chindwin in Civil Regular Suit No. 2 of 1924.

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RAGHUBAR-DAYAL v. RAMDULARE.

PRATT, J.

*Feb.* 30.

PRATT, J.—Plaintiff Ramdnlare, son of Badri Tewari by his first wife, sued Raghubardayal, son of Badri Tewari by his second wife, for partition of his father's estate.

Plaintiff's case was that he, his father and defendant formed a joint family and that on his father's death he was entitled to one-half share of the estate.

Defendant denied that plaintiff was a member of the joint family.

The District Court found that plaintiff was not a member of a joint family with his father and defendant. The learned Judge was of opinion that the fact that the deceased lived in Burma with defendant, whilst plaintiff lived in India and had apparently nothing to do with the deceased and defendant, except for a single meeting with his father, for 15 years, was incompatible with their being members of a joint family.

The Judge also found, however, that although defendant was brought to Burma by his father, when quite young, there was no presumption in Burma that they were members of a joint family.

As regards the second point I think there is no doubt that the finding of the Trial Court was wrong.

The mere fact that defendant applied for the administration of the whole of his father's estate, and not for half only, does not indicate in any way that defendant did not regard himself as forming a joint family with his father, which was the view taken by the District Court. On the contrary, if defendant and his father were joint and plaintiff was separate, defendant would naturally apply for Letters-of-Administration to the whole estate.

The evidence in the case is very meagre, but it is clear that the father Badri came to Burma and resided there for some 32 years before his death.

This is admitted by plaintiff. At Mônywa he acquired practically the whole of the suit property, and it is only the self-acquired property in Burma that is really in dispute. Defendant lived with his brother (deceased) and his father at Mônywa.

There is no reason to doubt that defendant and his father lived together for 15 years in Burma from the time defendant was a boy of 12 or 13.

There is evidence that defendant and his deceased brother worked the lands at Mônywa with their father. Defendant alleges that the lands were the jointly acquired property of his father and himself, but it must be taken as established that the Mônywa property was the self-acquired property of their father.

When Hindus come to Burma they bring their personal law with them, and on the facts in evidence there can be no doubt that defendant and his father were members of a joint family at the time of Badri's death.

It remains to be decided whether the finding that plaintiff was not a member of a joint family with his father is correct.

Plaintiff admitted that his father lived in Burma for 32 years and that he had not seen him for ten years before his death.

On his own evidence he can only have met his father in India on two or three occasions.

It seems clear that there was no joint property left in India. The house and pair of bullocks valued in all at Rs. 180 set forth in the schedule are not proved to have been the joint property of plaintiff and his father.

His cousin Jaganath, the only witness adduced by plaintiff, gave no evidence as to the existence of joint family property in India.

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He admitted that deceased Badri had lived in Burma ever since he (witness) was born and only returned to India once about 23 years before the date of the suit.

In view of his statement that Badri came back to India, when the witness was 3 or 4 years old, and no other visit is mentioned by him, his statement that he had seen Badri living with his two wives in India is difficult to credit. If he did remember seeing them, his memory is above normal.

There is on the record no trustworthy evidence that plaintiff maintained filial relations with his father after the latter settled in Burma.

No doubt every Hindu is born as a member of an undivided family and the presumption ordinarily is that members of a Hindu family are joint unless the contrary is established (*vide* Mayne's Hindu Law, 9th edition, page 343). Separate residence and cesser of commensality are not conclusive proof that there has been a partition. The question of the circumstances, which gave rise to a presumption of separation, is discussed in some detail in Sastri's Hindu Law at page 410 of the 5th edition.

It is there laid down that the principal thing to be regarded is the separation or jointness in estate and the criterion or test of the jointness in estate is the common chest for keeping the income of the joint property, but even this is not a conclusive test. The fact that the deceased brought his sons by one wife to Burma, that he did not bring plaintiff the son by his other wife, and that plaintiff did not at majority or at any time join his father in Burma in my opinion justifies the presumption that plaintiff was separate and was not a member of a joint family with his father after the latter came to this province.

The Madras case of *Nana Tawker* v. *Ramchandra Tawker* (1), is an authority for holding that, under the Mitakshara Law, on the death of the father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son although the division took place after the acquisition of such property by the father.

Similarly in the present case the father left a wife and son in India and took up his residence in Burma, where he acquired a separate estate. The sons by one wife joined him and remained members of a joint family.

The son by the other wife, plaintiff, never joined his father and maintained no relations with him. Under the circumstances the undivided son would exclude the son who had separated and ceased to be a member of the joint family.

I would hold that plaintiff has no right to a share in his father's self-acquired property, allow the appeal and dismiss the suit with costs in both Courts.

CARR, J.—The facts of this case are fully set out in the judgment of my learned brother Pratt, and it is not necessary to repeat them here.

I think there can be no doubt that the District Judge was wrong in finding that the defendant-appellant and his father were not members of a joint-Hindu family. He says in his judgment that it is common for Hindus leaving India and settling down in Burma to allow to fall into disuse a great many customs which would govern them if they had remained in India. This is a very questionable proposition in every respect and, as regards the joint-Hindu family system, it is undoubtedly wrong.

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That system is a creation not of mere custom but of the actual Hindu law. That law is the personal law of the Hindus and governs them wherever they may be so long as they remain Hindus.

In my opinion he is also wrong in finding that the plaintiff was not joint with his father. Mayne's Hindu Law (9th edition), page 343, points out that the presumption is that the members of the Hindu family are living in a state of union, unless the contrary is established. On page 345 he says: "Now in every part of India where the Mitakshara prevails the position of an undivided family is exactly the same, except that within certain limits each male member has a right to claim a partition, if he likes. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession."

The Madras case of *Nana Tawker* v. *Ramachandra Tawker* (1) has been quoted as authority for the proposition that, when one son is divided from his father, an undivided son takes the father's self-acquired property to the exclusion of the divided son. That proposition may be accepted, but on page 381 of the report the following occurs :—"But the dictum of the Mitakshara contained in clause 27 of section 1 of chapter I and in clause 10 of section V of the same chapter that the son has a right by birth in the property of the father whether ancestral or self-acquired does not appear to have been dissented from in any reported case. This being so, the succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance, and he who took by survivorship would

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exclude those, such as divided sons who could only take in any case by inheritance."

The proposition that a Hindu by birth acquires an interest in the property of his father, whether ancestral or self-acquired, seems to be supported by all the text-books on the subject, and I can find no authority controverting it.

The position, therefore, is that both the plaintiff and the defendant were members of a joint-Hindu family along with their father, and the presumption is that they remained so until the father's death, unless the contrary has been proved. It is sought to establish the contrary in this case by mere presumption from the facts that the father came to Burma many years ago and lived here continuously until his death, except for very occasional visits to his ancestral home in India : and that the son, the present respondent, all along remained in India and never saw his father except on those occasional visits.

In my opinion these facts do not justify the presumption of separation. Dr. Gour in his "Hindu Code" (second edition), section 134, lays down that "partition is the intentional severance of co-parcenary interests by members of a joint family." In paragraph 1473 of the second edition he says: "Such severance must be to determine the joint status, thus distinguishing partition from a mere family arrangement for convenience of management of possession. The severance may be of title, status, or possession but it must be with the intention to effect a severance." This appears to me to state accurately the position, which, as I understand it, is that a joint-Hindu family remains joint until there has been an intentional act of severance, and, in my opinion, the facts relied upon in this case are not sufficient to establish any intentional severance.

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It is a matter of common knowledge that large numbers of Hindus come to Burma and remain here for many years, often until they die, and, in the meantime, pay only occasional visits to their native country; and I do not think that the mere fact that the deceased, Badri Tewari, acted in the same way is sufficient to show an intention, either on his part or on the part of his son, the plaintiff, that there should be a severance of the joint family.

My learned brother has referred to Sastri's Hindu Law and the circumstances set out by him as giving rise to a presumption of separation. These are to be found in the sixth edition, beginning at page 455; but on page 458, under the head "Presumptions," the learned author points out that: "The joint family system is the normal condition of Hindu society. Hence having regard to this peculiar feature of social organization, certain *presumptions* arise, which form a part of the Law of Evidence, and are only indicated here."

The first of these presumptions is that "the relations that may naturally be members of a joint family are joint; anyone alleging separation must prove that fact." He refers to a decision of the Judicial Committee of the Privy Council in support of his statement of the existence of this presumption.

In my opinion, therefore, both the plaintiff and the defendant were members of a joint family with their father, and on his death they became entitled to equal interests in his self-acquired property which passes to them by survivorship. Essentially, therefore, this suit is one for partition of a joint family estate in which the plaintiff and the defendant are each entitled to a one-half share.

I would, therefore, though for different reasons, confirm the decision of the District Judge and dismiss this appeal with costs.

DAS, J.—This appeal was heard by my brothers Pratt and Carr, who differed in their judgments and the appeal was heard by me as a third Judge.

I must say that I agree with the judgment of my brother Carr in this case.

The presumption under Hindu Law is that a father and son are joint and unless it is proved that they are separated it must be held that they are still joint.

In this case no attempt has been made to prove that the father and son ever separated or that there was partition between the father and son. The mere fact that the son lived in the country and that the father came away to, and stayed in Burma does not prove the partition or separation between the father and son.

I therefore agree with my brother Carr in dismissing the appeal for the reasons given by him in his judgment.