1927

TEJA SINGH v. THE CROWN.

BROADWAY J.

reliance principally on *Ishan Chandra* v. *Dina Nath* (1), *Hari Chand* v. *Crown* (2), *Batakala Pottiavadu* (3) and *Chiraman* v. *Ram Lal* (4). A reference to section 522 appears to me to support the contention advanced by the learned counsel. There is no finding by the District Magistrate that any force was used by Teja Singh and therefore it seems to me that the order passed under section 522 of the Criminal Procedure Code was without jurisdiction. I, therefore, set it aside.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Agha Haidar.

1927

Oct. 12.

HIRA SINGH (PLAINTIFF) Appellant

versus

Mst. MANGLAN AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 2771 of 1923.

Hindu Law—Mitakshara—*joint family—separation of one co-parcener—effect of—presumption of complete separation—Re-union of remaining co-parceners—Second Appeal—High Court not bound by finding of fact based upon erroneous view of the law.*

One A. died leaving a widow X. and three sons B. C. and D. who constituted a joint family governed by the law of the *Mitakshara*. A document described as a *farighkhati* was subsequently executed whereby D. was shewn to have separated from the joint family with his one-fourth share in the family property and in which the shares of B. C. and X. in the remaining three-fourths share in the property were indicated ; and gave them liberty to keep the *corpus* of the property either whole or in separate shares.

(1) (1900) I. L. R. 27 Cal. 174.
(2) 16 P. R. (Cr.) 1919.
(3) (1903) I. L. R. 26 Mad. 49.
(4) (1903) I. L. R. 25 All. 341.

1927

HIRA SINGH
v.
MST. MANGLAN.

Held, that there is no presumption that when one co-parcener separates from his family, the remainder of the co-parceners remain joint; and that the effect of the *farighkhati* was to cause a separation in estate and interest between all the co-parceners, in the absence of proof that the remaining members of the joint family agreed to remain united or to re-unite.

Balkishan Das v. *Ram Narain Sahu* (1); *Balabux* v. *Rakhmabai* (2), and *Syed Kasam* v. *Jorawar Singh* (3), followed.

Palani Ammal v. *Muthurenkatachala Moniagar* (4), distinguished.

Appovier v. *Rama Subba Aiyyar* (5), referred to.

Held also, that in view of the elementary principle of the *Mitakshara* Law that a member of a joint Hindu family once separated can re-unite only with his father, brother or paternal uncle but not with any other relation, a finding of fact to the effect that B. C. and the widow X. remained joint (having re-united), being based upon an erroneous view of law, was not binding upon the High Court in second appeal.

Second appeal from the decree of W. deM. Malan, Esquire, District Judge, Amritsar, dated the 4th June 1923, reversing that of Lala *Prabhu Dayal, Senior Subordinate Judge, Amritsar, dated the 1st May 1922, and dismissing the plaintiff's suit.*

BADRI DAS, for Appellant.

G. C. NARANG and J. G. SETHI, for Respondents.

JUDGMENT.

AGHA HAIDAR J.—This is a plaintiff's appeal which arises out of a suit for partition. It was originally instituted by a lady named *Mussammat* Aso. While the appeal was pending in the lower appellate Court, *Mussammat* Aso died and her son Hira Singh

AGHA HAIDAR J.

(1) (1903) I.L.R. 30 Cal. 738 (P.C.). (3) (1923) I.L.R. 50 Cal. 84 (P.C.).
(2) (1903) I.L.R. 30 Cal. 725 (P.C.). (4) (1925) I.L.R. 48 Mad. 254 (P.C.).
(5) (1866) 11 Moo. I. A. 75.

1927

HIRA SINGH v. MST. MANGLAN.

AGHA HAIDAR J.

was brought on the record as her legal representative. In order to understand the controversy in suit it is necessary to bear in mind the following narrative of facts.

One Gulab Singh was the husband of *Mussammat* Aso. He died many years ago, leaving him surviving his widow, *Mussammat* Aso and three sons by her, namely, Nikka Singh, Ganesha Singh and Hira Singh. The sons constituted a joint Hindu family governed by the law of *Mitakshara*. On the 1st of December 1884 it appears that Hira Singh separated from the family and a one-fourth share of the family property was allotted to him. He executed a document called *farighkhati*. In that document the fact of his separation is mentioned and it is further recited that the family property having been divided into four equal shares, Hira Singh had separated with his one-fourth share and had no concern left with the family property, that the remaining three-fourths share of the property was left with Ganesha Singh, Nikka Singh and their mother *Mussammat* Aso, and that it would be competent to them to keep the *corpus* of the property either whole or in separated shares and that they were owners of their respective shares (*aur namburdgan apne apne hisse ke mukhtar hain*). It appears that the family property was not divided by metes and bounds and Ganesha Singh, Nikka Singh and their mother *Mussammat* Aso continued to live together. Nikka Singh died in 1900. In 1917 Ganesha Singh made a will in favour of defendants Nos. 1 and 2, his daughters. Soon after making this will, Ganesha Singh died. In 1918 *Mussammat* Aso instituted the present suit in the Court of the learned Senior Subordinate Judge, Amritsar. She claimed two-thirds share in the whole of the family proper-

ty—one-third as her own share which she got as a result of the partition of 1884 and another one-third as the heir of Nikka Singh, her deceased son.

It is important to note the defence which was set up by the defendants in the present suit. Their main defence was that the suit was barred by limitation, that their father Ganesha Singh was the sole owner of the whole property moveable and immoveable, in which neither Nikka Singh nor the plaintiff had any share, that there was no property which jointly belonged to the plaintiff, Nikka Singh and Ganesha Singh and that the *farighkhati* of 1884 didnot confer any rights upon the plaintiff. The trial Court decreed the plaintiff's claim as regards the immoveable property in suit but as regards the family business it held that the suit was time-barred. The defendants preferred an appeal to the learned District Judge and theplaintiff filed cross-objections. The learned District Judge dismissed the plaintiff's suit *in toto* on two grounds which shall be discussed later on. Hira Singh, the legal representative of *Mussammat* Aso, has filed the present second appeal.

It may be stated at the outset that Mr. Badri Das, the learned counsel for the appellant, intimated to the Court that he was not prepared to press his claim as regards the business carried on by the firm of Ganesha Singh and Gulab Singh.

The first ground for dismissing the plaintiff's suit is contained in the following sentence which is to be found in the judgment of the learned Judge of the lower appellate Court :—

"The first point urged by defendants' counsel is that the *farighkhati* of 1884 did not affect the joint nature of the rest of the family property. Ganesha

1927

HIRA SINGH
v.
MST. MANGLAN.

SHA HAIDAR J.

Singh in a previous case stated on 15th January, 1916, that by the *farighkhati* of 1884 the entire property was divided into four portions. Hira Singh's portion being separated off while the portions of *the other three*, namely, Ganesha Singh, Hira Singh and *Mussammat* Aso remained joint. This being so, I consider that defendants' counsel is right in arguing that *Mussammat* Aso was not justified in suing for partition."

I may observe here that it is difficult to conceive a more confused and unsatisfactory finding. It appears to be a very unsatisfactory finding of fact which proceeds upon an even more unsatisfactory conception of a question of Hindu law. The *farighkhati*, as already stated, while recording the separation of Hira Singh from the joint family, clearly indicates the shares of Ganesha Singh, Nikka Singh and their mother *Mussammat* Aso. A persual of this document brings the present case clearly within the principle of law as laid down by their Lordships of the Privy Council in *Balkishen Das* v. *Ram Narain Sahu* (1). In that case their Lordships of the Privy Council observe that where an *ikrarnama* executed by a member of a joint Hindu family stated in clear terms that the defined shares in the whole joint family property had been allotted to the co-parceners and also gave them liberty either to live together or to separate their own business, the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. In this view of the law there cannot be any doubt that there was a separation among all the members of the family and their mother

(1) (1903) I. L. R. 30 Cal. 738 (P.C.).

as a result of the *farighkhati* transaction. In *Balabux* v. *Rukhmabai* (1) their Lordships of the Privy Council laid down that there is no presumption when one co-parcener separates from the others that the latter remain united. They further observed that an agreement among the remaining members of a joint family to remain united or to re-unite must be proved like any other question of fact. In *Syed Kasam* v. *Jorawar Singh* (2) their Lordships of the Privy Council have summarised the law on the subject in the following words :—

"It is settled law that in the case of a joint Hindu family subject to the law of *Mitakshara* a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place."

All the leading Privy Council cases are quoted by their Lordships in support of this proposition. In view of these authorities there cannot be any doubt that after the year 1884 and by virtue of the deed of *farighkhati* already mentioned, there was a complete disruption of the joint family and after the separation of Hira Singh's share Ganesha Singh, Nikka Singh and their mother, though living together, were in reality holding their shares in the eye of law separately. The learned Judge of the lower appellate Court says that Ganesha Singh in a previous suit on the 15th of January, 1916, stated that by the *farighkhati* of 1884 the entire property was *divided into four portions*, Hira Singh's portion being separated off while *the portions of the other three*, namely, Ganesha Singh, Nikka Singh and *Mussammat* Aso *re-*

(1) (1903) I.L.R. 30 Cal. 725 (P.C.). (2) (1923) I.L.R. 50 Cal. 84 (P.C.).

1927

HIRA SINGH v. MST. MANGLAN.

AGHA HAIDAR J.

mained joint. The learned Judge of the trial Court at the bottom of page 5 of the printed paper book has observed that " in the present case there is no evidence of it (re-union). That it is not a case of survivorship is clearly proved from the fact that it is not pleaded in the present case." Re-union has neither been alleged nor proved by the defendants. It becomes exceedingly difficult to understand what the learned Judge meant by saying that *Mussammat* Aso *remained joint*. If he meant that the property was not divided by metes and bounds he is perfectly right because this is the plaintiff's case. If the learned Judge was thinking of a re-union and even assuming that such a line of reasoning was open to him on the pleadings, he would be confronted with the elementary principle of Hindu law of the *Mitakshara* school that a member of a joint Hindu family once separated can re-unite only with his father, brother or paternal uncle but not with any other relation. And it is hardly necessary to solemnly lay down that a mother is not a member of the co-parcenary body constituting a joint Hindu family. She is only entitled to maintenance while the joint status of the family continues and it is only when one of her sons brings a suit for partition that she is entitled to claim a share in the family property. It comes to this that the finding of the learned Judge that " *Mussammat* Aso *remained joint* " if he meant to hold that the family re-united and renewed its joint status, is a finding based upon an erroneous view of law and does not amount to such a finding of fact as would be binding upon this Court in second appeal.

On behalf of the respondents the attention of the Court was directed to a case reported as *Palani Am-*

mal v. *Muthuvenkatachala Moniagar* (1). This was a suit for partition and the defence of the defendant-appellant was that the members of the family had already separated long ago. In this case their Lordships observed at page 259: "In the present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated and that the property sought to be partitioned is partible." Their Lordships tested the findings of the Courts below by construing certain documents in order to draw legitimate inferences as to the intentions of the parties to the said documents and in the end accepted the findings of fact arrived at by the Courts in India. As a result of those findings the decree of the High Court was affirmed and the defendant's appeal was dismissed. In this view of the case the observation at pages 257-58 of the Report are more or less in the nature of *obiter dicta*. It may be noted however that *Appovier* v. *Rama Subba Aiyar* (2) and *Balabux* v. *Rakhmabai* (3) are quoted in the judgment of their Lordships.

The learned Judge of the lower appellate Court has further observed that the plaintiff, in paragraph 3 of the plaint, states in so many words that after the *farighkhati* she and Nikka Singh and Ganesha Singh remained joint. I have read the original plaint very carefully and in my humble judgment the plaintiff clearly alleges partition and allotment of shares to Nikka Singh, Ganesha Singh and herself after Hira Singh had gone out of the family with his share. It is true that she speaks of the property being joint (*mushtarik*) but what she really meant was that though the shares had been divided and specified

(1) (1925) I. L. R. 48 Mad. 254 (P.C.) (2) (1866) 11 Moo. I. A. 75.
(3) (1903) I. L. R. 30 Cal. 725 (P.C.).

1927

HIRA SINGH
v.
MST. MANGLAN.

AGHA HAIDAR J.

the *corpus* of the property had remained whole. I therefore find myself unable to agree with the findings of the lower appellate Court on this part of the case.

The second ground on which the learned Judge of the lower appellate Court has found against the plaintiff is that she was stopped from putting forward her present claim. He refers to certain statements made by *Mussammat* Aso as a witness in a previous litigation between Ganesha Singh and his brother Hira Singh. Those statements were found to be false by the appellate Court in that case. The lady was no party to that suit and the learned counsel for the respondents totally failed even to formulate his case as to how the lady could be estopped by anything which she might have said as a witness in the previous litigation when she was, apparently, supporting Ganesha Singh, the predecessor of the defendants in his claim against his brother Hira Singh. This finding of the lower appellate Court also cannot be accepted. The suit having been disposed of by the lower appellate Court on these two points and the other question arising in the suit not having been disposed of by that Court, the case will have to be remanded for trial on the merits.

I would accordingly allow the appeal, set aside the decree of the Court below and remand the case under Order XLI, rule 23 of the Civil Procedure Code. Costs here and hereafter would abide the event. The appellant will be entitled to a refund of the court-fee that he paid on the memorandum of appeal.

BROADWAY J.

BROADWAY J.—I agree to the order proposed.

N. F. E.

Appeal accepted.
Case remanded.