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not of course bind the parties to the present suit, but they go a long way to show the prevalence of the custom among families having a common origin and settled in the same part of the country.

Lastly, the High Court relied on the precedence conferred or marked by the titles of honour given to the sons of the reigning Raja in order of seniority—a precedence which would naturally be attached to the lines of descent traced from them.

All these various considerations point in one direction, and in one direction only.

The principal argument on behalf of the appellant, apart from the obvious argument that no one of these considerations would be sufficient of itself, was founded on a statement or return made in answer to an official requisition on a printed form by the grandfather of the last owner, Chitreswar II, when he was the ruling Raja. Their Lordships think that the learned Judges of the High Court were right in treating this as an important document and also in declining to accept it as laying down any positive rule of succession in the family. It is a clear statement of succession as regards the Raja's own sons. In dealing with more remote relations the Raja does not seem to have arranged the members of his family in any intelligible order of succession: he puts a person who was one generation distant from him before a person who was two generations distant, but immediately afterwards he puts a person who was four generations distant before two persons only two generations distant. And indeed the heading of the column in which the relationship of these persons is stated does not seem to require that the names entered therein should be arranged according to their order of succession to the estate. The heading simply requires that there should be written "how many sons, how many brothers and brothers' sons the zemindar has, and [355] amongst them who are near and who are remote, and by how many generations remote with particulars."

Their Lordships therefore, agreeing with the High Court, will humbly recommend to His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the first respondent, who alone defended this appeal.

*Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent, Satrughan Dhal: *Miller, Smith and Bell.*

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## APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E. Chief Justice, and Mr. Justice Banerjee.*

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NUND KISHORE LAL *v.* KANEE RAM TEWARY.* [10th Jan., 1902.]

***Transfer of Property Act (IV of 1882), s. 6. cl. (a)—Hindu reversioners contingent right—Mortgage of such right, validity of.***

**The interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged by the reversioner.**

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* Appeal from Original Decree No. 284 of 1900, against the decree of Babu Nepal Chunder Bose, Subordinate Judge of Ranchi, dated the 28th of June 1900.

*Brahmdeo Narayan* v. *Harjan Singh* (1) overruled by *Sham Sunder Lal* v. *Achkan Kunwar* (2).

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THE defendants Nund Kishore Lal and others, Nos. 5, 6 and 7, appealed to the High Court.

The suit was instituted for the recovery of Rs. 9,732 for principal and interest due on a deed of mortgage executed by the defendant No. 1 in favour of the plaintiffs on the 16th day of August 1890 by the sale of the properties mortgaged, which consisted of an entire mauza, called Tutlo, and an eight annas' share in mauza Atakora. The mortgagor himself did not defend the suit, but subsequent purchasers from him, *i.e.*, subsequent to [356] the date of the mortgage, defended the suit, alleging that the execution of the mortgage had not been proved, and also contending that the mortgaged properties belonged to one Mussummat Brojomoni Koer and were in her possession ; the mortgagor had no vested right in them, nor was he in possession of them : he had a mere contingent right in expectancy, which he could not legally mortgage or transfer to any person. The Court below decided in favour of the plaintiff and passed an ordinary mortgage decree. On appeal several points were raised, but the one material for the purpose of this report was that, having regard to the provisions of s. 6 of the Transfer of Property Act and to the decision of their Lordships in the Privy Counsel in the case of *Sham Sunder Lal* v. *Achhan Kunwar* (3), a mortgage of the reversionary interest of the mortgagor expectant upon the death of a Hindu widow cannot be valid.

Dr. *Rash Behari Ghose* and Babu *Jogesh Chunder Dey* for the appellants.

Babu *Karuna Sindhu Mukerji* and Babu *Lal Mohun Ganguli* for the respondents.

MACLEAN, C. J. This is a suit by a mortgagee to enforce a mortgage for Rs. 3,000, and the suit is defended, not by the mortgagor himself, but by a subsequent purchaser from him, that is to say, subsequent in point of date to the mortgage. The properties mortgaged were an entire mauza called Tutlo, and an eight annas' share in a mauza called Atakora, and the mortgage is dated the 16th of August 1890. The Court below has decided in favour of the plaintiff, the mortgagee ; and although our attention has not been directed to the precise terms of the decree passed, it was, I take it, an ordinary mortgage decree.

The mortgagor, as I have stated, has not defended the suit, but the purchaser has, and he is the present appellant, and various points have been raised by him in support of his present appeal. His first point is that the execution of the mortgage has not been properly proved ; secondly, that as regards mauza Atakora, in which the mortgagor had in possession an eight [357] annas' share only, the objection is taken that as this was ancestral property, governed by the school of Mitakshara law, no legal necessity had been shown necessitating the mortgage of this moiety. A third point was that as regards Atakora, the mortgagor was entitled to one-half of the property in possession and to the other half in reversion expectant on the death of a Hindu widow, Mussammat Brojomoni Koer, whom I will call Mussammat, and that the half-share mortgaged was not the share to which he was entitled in possession, but the share to which he was entitled in reversion. The last point, which

(1) (1898) I. L. R. 25 Cal. 778.
(2) (1898) L. R. 25 I. A. 186.
(3) (1898) L. R. 25 I. A. 183.

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is the most important, is that the mortgage of Tutlo was the mortgage of a reversionary interest expectant upon the death of a Hindu widow, and that according to Hindu law the mortgagor had no power to create a valid and effectual mortgage of this reversionary interest.

I will now deal with these points *seriatim*. First, as to the execution of the mortgage not having been duly proved. The objection is that the witness, who was called to speak to the execution of the mortgage, one Dwarka Nath Misser, whose evidence will be found at p. 10 of the Paper Book, did not say that the mortgage was attested by two witnesses, as it was bound to be, having regard to s. 59 of the Transfer of Property Act. But it has not been, nor do I think it could have been, successfully contested that, having regard to s. 68 of the Evidence Act, the document has not been properly proved. The document was no doubt required by law to be attested by two witnesses, and on the face of it it is attested by three. Its due execution has not been denied in any of the written statements, for the defence was, not that the deed had not been executed, but that the execution of the deed had been brought about by the fraud of the plaintiffs. The execution of the mortgage has, in fact, never been challenged, and I think it has been sufficiently proved, within the meaning of s. 68 of the Evidence Act, and I may point out that the objection now raised is not raised in the grounds of appeal, for the objection raised in the grounds of appeal was that the mortgage had not been proved according to law. The objection is of a technical character, and I think we may fairly tie down the appellant on this point to the grounds of **[358]** appeal in relation to it. The mortgage, then, has been duly proved.

I now pass to the question of whether, in regard to the moiety of Atakora, which was mortgaged, it has been shown that legal necessity for the mortgage has been made out. The answer to this is that this point has never been raised before, and we have no materials before us to enable us to decide this, which is a perfectly new point raised now for the first time on appeal.

Then arises the question, whether it was the moiety in possession or the moiety in reversion of mauza Atakora, which was included in the mortgage, and the decision of that point depends upon the construction of the mortgage deed itself. When we look at that deed, I do not think there can be any reasonable doubt as to what was mortgaged. The deed says—"I mortgage and hypothecate all my present and future rights and those of my heirs in the entire mauza Tutlo" * * * "and one-half of mauza Atakora * * * , which is in my possession." We are told that this is not quite an accurate translation, namely, the words "in my possession," and that it ought to be, "being in my possession;" but that in substance makes no difference. I think no real question of construction can arise upon this language. It is reasonably clear that the mortgagor intended to mortgage and did mortgage, not his reversionary half, but the half which was at the time in his own possession.

I now come to the last, and, as I have said, the most important point in the case, namely, whether the interest of the mortgagor, assuming for the moment that it was a reversionary interest expectant upon the death of Mussammat, a Hindu widow, could be validly mortgaged. Now, if it had been substantiated that it was such a reversionary interest, I think that the opinion of their Lordships of the Judicial Committee, expressed

in the case of *Sham Sundar Lal* v. *Achham Kumar* (1), must be taken to have overruled the decision of a Division Bench of this Court in the case of *Brahmadeo Narayan* v. *Harjan Singh* (2). In the latter case, which was decided on the 25th February 1898, it was held that the interest of a Hindu reversioner expectant upon the death of a Hindu widow does not come within the [359] terms of cl. (*a*) of s. 6 of the Transfer of Property Act; but in the Privy Council case, in which the decision was a few months later, namely, in June 1898, we find this expression of opinion by their Lordships:—"In 1877 neither Achhan Kumar nor Enayat Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Enayat Singh was equally incompetent to do so, though the deed purports to bind future rights."

I do not see how the decision of this Court, to which I have referred, can stand in the face of the above expression of opinion by the Judicial Committee. A difficulty, however, arises in this case from the fact that the appellant has not substantiated that the interest of Mussummat was the interest of a Hindu widow, or, in other words, that the interest of the mortgagor was a reversionary interest expectant on the death of a Hindu widow. It has been assumed in the Court below that such was the case, and undoubtedly the argument proceeded upon that footing; and, if such had been the case, I for my part do not think that upon this point the decision of the Court below could have been sustained. But, when we look a little more narrowly into the evidence, we find that the assumption is not well founded. Looking at the parol evidence bearing upon this point, if it had stood alone I should not have been disposed to attach very much importance to it. It would appear from that evidence that Mussummat, who was the aunt of the mortgagor, was not in possession of village Tutlo as a Hindu widow, but that by some arrangement with the mortgagor, the terms of which have not been disclosed, she was holding it for her maintenance. Further, it appears from a document, which the appellant himself has put in, a decree dated 18th December 1834, that a suit had been instituted by the late husband of Mussummat claiming certain interest (amongst others) in mauza Tutlo and mauza Atakora, and we find that this suit was compromised, and in the petition of compromise, which is set out in the decree at p. 35 of the present Paper Book, we find this statement by the very plaintiff himself: "I, the plaintiff, filed this pauper suit with a claim for recovery of [360] possession of one-half share out of the entire mauza Bhargaon, Dhara Tutlo * * * against the defendants, the mother and guardian of Kripalnath Tewari"—who was a minor and the father of the present mortgagor. "Accordingly I have received by partition one-half of mauza Atakora, after excluding the *majhas* land in my share to the extent of two *kearies* of land. I have got divided from the defendants and Kripalnath Tewari the rest of the lands in the said mauza half and half, together with the jalkar, bankar, wells, tanks, etc., and brought the same in my possession and use. In this way I have no claim subsisting in respect of the share in any other mauza and its produce. Therefore, on mutual compromise, a deed of compromise is filed." And it was upon the footing of this compromise that the husband of Mussummat was declared entitled not to any portion of Tutlo, but to a one-half share only of Atakora, and this gives considerable colour to the case of the

(1) (1898) L. R. 25 I. A. 183. (2) (1898) I. L. R. 25 Cal. 778.

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plaintiffs that Mussummat was never in the position of a Hindu widow as regards Tutlo, for the effect of the decree in the above suit, based upon the compromise, is that the claim to Tutlo by Mussummat's husband was then and there given up absolutely. It may of course be that since 1834, the date of that decree, Tutlo in some way or other became the property of Mussummat's husband and was so at his death. But as to this we are absolutely in the dark. It would therefore appear that the case in the Court below has been argued and decided upon a false premise, namely, that Mussummat was as regards mauza Tutlo in possession at the date of the mortgage as the widow of her deceased husband. On the evidence this has not been substantiated, and we do not know under what title or arrangement Mussummat was in possession of this mauza at the date of the mortgage. We think that as upon this part of the case the argument and the decision of the Court below proceeded apparently upon an erroneous basis of fact, we ought to remand the case, as the appellant desires it, to have the real facts ascertained, and by the expression "real facts" I mean what was the interest of Mussummat and in what character she was in possession of mauza Tutlo at the date of the mortgage. It has not been [361] disputed that the burden lies upon the present appellant, who sets up that the mortgagor had only a reversionary interest in the property mortgaged expectant on the death of a Hindu widow, to make out that case. Upon this point, then there must be a remand upon the lines I have indicated. If the Court should find that at the date of the mortgage the mortgagor had only a reversionary interest expectant on the death of a Hindu widow, we are of opinion that the mortgagor was not, having regard to the opinion of the Privy Council, in a position to effect a vaild mortgage of it.

There are one or two points raised by the respondent to which I ought to make a brief allusion. It was contended that inasmuch as after the date of the mortgage the mortgagor upon the death of Mussummat came into possession of mauza Tutlo, the case fell within the first portion of s. 43 of the Transfer of Property Act. But even if that be so, if the case did fall within the earlier portion of that section, we think that, as in this case the present appellant was a transferee in good faith and for consideration without any notice of the existence of the option referred to in the section that section would not assist the present respondent.

Then it is said that the purchaser, the present appellant, bought nothing under the execution sale at which he purchased or at any rate that he did not purchase the interest of the mortgagor, but only the interest of Mussummat. But if we look at the sale certificate, we find that, what he is certified to have purchased, was the entire mauza Tutlo.

I do not think, in the face of this certificate, that the respondent's contention on this point can prevail. I have now disposed of the various points which have been raised, and there must be a remand which I have indicated. The decree as to the mortgage of the moiety of Atakora is not interfered with and will stand. As to the costs, inasmuch as the appeal has failed as regards mauza Atakora, the respondent is entitled to proportionate costs, and to save further enquiry, and at the request of the respondent, we fix them at one-half. The costs of this appeal in regard to the mortgage of mauza Tutlo will abide the result of the remand.

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[362] BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to the question whether a mortgage of the reversionary interest of the mortgagor expectant upon the death of a Hindu widow can be valid.

The Court below, relying upon the case of *Brahmadeo Narayan* v. *Harjan Singh* (1), has answered that question in the affirmative. On appeal it is contended for the appellant that the question ought to be answered in the negative, having regard to the provisions of s. 6 of the Transfer of Property Act, and that the case relied upon by the Court below must be taken to have been overruled, in effect, by the decision of the Privy Council in the case of *Sham Sundar Lal* v. *Achhan Kunwar* (2). On the other hand, it is argued for the respondent that as the decision of the Privy Council just mentioned makes no reference to the provisions of the Transfer of Property Act, and as the two mortgages under consideration in that case were executed before that Act came into operation it could not be said that that case has the effect of overruling the case of *Brahmadeo Narayan* v. *Harjan Singh* (1), relied upon by the Court below.

The case of *Brahmadeo Narayan* v. *Harjan Singh* (1) is no doubt a case in point; and, if it has not been overruled by the decision of the Privy Council, then we are bound to follow it, unless we think it fit to refer the question to a Full Bench. I am of opinion that that case must be taken to have been overruled in effect by the decision of the Privy Council in the case of *Sham Sundar Lal* v. *Achhan Singh* (2). It is true that the two mortgages which their Lordships of the Judicial Committee had to consider in that case were executed before the Transfer of Property Act came into operation, and their Lordships' decision is not based upon the construction of s. 6 of that Act; but having regard to the grounds of their Lordships' decision and to the grounds of the decision of this Court in the case of *Brahmadeo Narayan* v. *Harjan Singh* (1), we must hold that this latter case has in effect been overruled by the decision of the Privy Council. For this is what their Lordships say: "At the date of the bond of 1877 Halas Kuar as the heir of Khairati Lal was the owner of his estate, but with a restricted power [363] of alienation. Achhan Kunwar was next in succession, and would if she survived her mother, become her father's heir and take the estate subject to the same restriction. Enayat Singh was one of the two male heirs next in succession to the restricted estate, who would be full owners in the event of their surviving their grandmother and mother. Enayat was, moreover, a minor. At the date of the bond of 1881 Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation, and Enayat Singh was one of the heirs-apparent. At both dates Enayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Enayat Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests, nor does the deed apply to any, but rights in possession; and in 1881 Enayat Singh was equally incompetent to do so, though the deed purports to bind future rights.

This shows that in the opinion of their Lordships the interest of a Hindu reversioner expectant upon the death of a Hindu female could not be validly mortgaged by the reversioner; and as the decision of this

(1) (1898) I. L. R. 25 Cal. 778. (2) (1898) L. R. 25 I. A. 188.

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Court in the case of *Brahmadeo Narayan* v. *Harjan Singh* (1) is based upon an opposite view of the law, it must be taken to have been overruled by the decision of the Privy Council.

*Case remanded.*

29 C. 363.

## APPELLATE CIVIL.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

MANI CHANDER CHAKERBUTTY *v.* BAIKANTA NATH BISWAS.*

[31st January, 1902.]

***Easement, right of—Whether a tenant having permanent interest on the land could acquire such right in other land of his lessor—Osat Taluqdar.***

**A tenant of land, even having a permanent right of tenancy on the land cannot acquire an easement by prescription in other land of his lessor.**

**[364]** ***Udit Singh*** **v.** ***Kashi Ram*** **(2) and** ***Jeenab Ali*** **v.** ***Allabuddin*** **(3), referred to.**

THE plaintiffs Mani Chander Chakerbutty and others appealed to the High Court.

This appeal arose out of an action brought by the plaintiffs for declaration of a boundary between the *debuttur* land of the plaintiffs and the *osat taluki* land of the defendants, and also for a perpetual injunction restraining the defendants from entrenching upon the plaintiffs' land and tank. The allegation of the plaintiffs was that there was an idol called *Shibsundari Thakurani*, and it owned certain *debuttur* land situated within the limits of Barisal Municipality. The *debuttur* tenure comprised, amongst others, two plots of land, of which one (*i.e.*, plot No. 2) formed the *osat taluq* of the defendants, subordinate to the *debuttur* tenure, and the other was possessed by the plaintiffs as *shebaits* of the idol; that these two plots of land were adjoining each other, and a dispute arose between the plaintiffs and the defendants about the eastern boundary of plot No. 2; the plaintiffs asked the defendants to settle the matter by arbitration, which the latter refused to do; the defendants had twice caught fish in the tank situate in plaintiffs' land, for which a criminal action was brought, which was dismissed and hence the present suit was brought for a determination of the boundary between the plaintiffs' and the defendants' land. Some of the defendants, *inter alia*, pleaded that the plaintiffs not being in possession of the tank within twelve years before the institution of the suit, their claim was barred by limitation; that the suit was not maintainable in the form in which it was brought; that the disputed land was not *debuttur*, and that the plaintiffs were not the *shebaits*. In the written statement the defendants did not claim any right of easement, but the Munsif framed an issue, whether the defendants, Nos. 1 to 5 had any prescriptive right by user in the enjoyment of the water, fish, and earth of the tank in dispute. The Munsif, holding that, inasmuch as a tenant could not acquire a right of easement against his landlord, the defendants' claim of right of easement was not tenable,

* Appeal from Appellate Decree No. 1874 of 1899, against the decree of Babu Chandi Charan Sen, Subordinate Judge of Backergunge, dated the 28th of June 1899, modifying the decree of Babu Ambica Charan Dutt, Munsif of Barisal, dated the 4th of May 1898.

(1) (1898) I. L. R. 25 Cal. 778.
(2) (1892) I. L. R. 14 All. 885.
(3) (1896) 1 C. W. N. 151.