

31 C. 224.

[224] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Mitra.

KALI KRISHNA SARKAR v. RAGHUNATH DEB.*

[3rd September, 1903].

Hindu Law—Mitakshara Family—Succession—Impartible estate—Survivorship—Civil Procedure Code (Act XIV of 1882), s. 234—Execution of decree—Representative of deceased person—Assets.

The rule of succession to an impartible estate is that of the general Hindu law which governs the succession to a partible estate with such qualifications only as flow from the impartible character of the property.

Katama Natchier v. Raja of Shivagunga (1) and *Jogendra Bhupati Hurrochundra Mahapatra v. Nilayanand Man Singh* (2), followed.

Sartaj Kuari v. Deoraj Kuari (3) and *Venkata Surya Mahipati Ramkrishna v. Court of Wards* (4), distinguished.

The interest which a deceased member of a Mitakshara family had in an impartible Raj as proprietor, is not assets in the hands of his successor; and proceedings under s. 234 of the Code of Civil Procedure cannot be taken against the latter as representative of the deceased.

Juga Lal Chaudhuri v. Audh Behari Prosad Singh (5), followed.

Ram Das Marwari v. Tekit Braja Behari Singh (6), followed.

[Ref. 32 Cal. 153=9 C. W. N. 330; 34 Cal. 642 F. B.=5 C. L. J. 491=11 C. W. N. 593=2 M. L. T. 207; 33 Mad. 429=19 M. L. J. 401=2 I. O. 18; 6 A. L. J. 758; 38 Cal. 182; 23 M. L. J. 79=12 M. L. T. 245=1912 (1) M. W. N. 790=15 I. O. 412; Expl. 5 C. L. J. 80=11 C. W. N. 163; Dist. 33 Cal. 676=3 C. L. J. 131; Diss. 30 Mad. 454; Not. foll. 1 N. L. R. 173; Foll. 8 A. L. J. 1251; 12 I. O. 915; Appr. 34 All. 79.]

APPEAL by the decree-holder, Kali Krishna Sarkar, the opposite party.

Raja Dibya Singh Deb was the proprietor of the impartible Raj of Patia in Orissa. The decree-holder held a mortgage decree against him, in execution of which the mortgaged property was sold. The decree-holder then applied for a decree for the balance of the mortgage debt under s. 90 of the Transfer of Property Act, and obtained the decree on the 30th March, 1899. Dibya Singh died on the 10th November 1899, and his brother, Raja Raghunath Deb, succeeded to the Raj. The decree-holder did not execute the personal decree as long as Dibya Singh was alive. [225] The present application for execution was made on the 14th May 1902, against Raja Raghunath Deb, the present judgment-debtor-objector, who was described as "brother-successor of the late Raja Dibya Singh Deb, who has been substituted in the place of the deceased defendant." The judgment-debtor objected that he having according to the principle of survivorship, obtained the ancestral properties, he was absolute proprietor of the same in his own right; that the rights and interests of the late Raja had become extinguished by his death; and that accordingly the said properties could not be attached and sold for the satisfaction of the debt due under a decree obtained against the deceased Raja.

* Appeal from Order No. 95 of 1903, against the order of Abdul Bari, Subordinate Judge of Cuttack, dated Nov. 14, 1902.

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| (1) (1863) 9 Moo. I. A. 539; 2 W. R. (P. C.) 31. | 15 I. A. 51. |
| (2) (1890) I. L. R. 18 Cal. 151; L. R. 17 I. A. 128. | (4) (1899) I. L. R. 22 Mad. 338; L. R. 26 I. A. 33. |
| (3) (1883) I. L. R. 10 All. 272; L. R. | (5) (1900) 6 C. W. N. 228. |
| | (6) (1902) 6 C. W. N. 379. |

1903
SEP. 3.
—
APPELLATE
CIVIL.
—

31 C. 224.

The Subordinate Judge held that the Patia Raj in the hands of the present owner could not be called assets of the deceased Raja, and that consequently the decree could not be executed against the Raj properties in the hands of the present Raja. The application for execution was accordingly rejected.

Mr. R. Mitra, Babu Karuna Sindhu Mukerjee and Babu Samatul Chandra Dutt for the appellant.

Dr. Rash Behary Ghose, Babu Gopal Chandra Sarkar and Babu Manomohan Dutt for the respondent.

RAMPINI AND MITRA, JJ. Killa Patia is an impartible estate in Orissa. The Raj family is governed by the Mitakshara law. Raja. Dibya Singh was lately the proprietor. He mortgaged a part of the estate to the present appellant. The appellant got a decree on the mortgage on the 29th August 1895, caused a sale of the mortgaged property, and succeeded in realizing a portion of the debt. For the balance he applied under section 90 of the Transfer of Property Act and obtained a personal decree against the mortgagor, Raja Dibya Singh. Raja Dibya Singh died, and the Raj came to be in the possession of his brother, Sri Raja Raghunath, the present respondent. Raja Dibya Singh left him surviving a widow and a daughter; but as the family was governed by the Mitakshara law, they were superseded by the surviving brother, as the property was ancestral.

The application for execution out of which the present appeal has arisen was presented on the 14th May 1902, and by it [226] the decree-holder sought to levy execution by sale of the Raj properties now in the possession of Raja Raghunath. The latter contested the right of the decree-holder on the ground that he was not the legal representative of the deceased debtor, and that he came into possession of the estate and effects which had been in possession of the deceased by right of survivorship according to Mitakshara law.

The Subordinate Judge accepted these contentions and dismissed the application for execution, and hence this appeal by the decree-holder.

It is contended that though Raja Raghunath has come into possession of the Raj as a surviving brother, still he is a legal representative of the deceased as the Raj is impartible. The learned counsel for the appellant has relied upon *Sartaj Kuari v. Deoraj Kuari* (1) and *Venkata Surya Mahipati Ramkrishna Rao v. Court of Wards* (2) in support of his contention. But both these cases referred to the power of a next taker of an impartible Raj to question the validity of alienations made by his predecessor. They do not directly touch the question of the mode of descent and the incidents thereof to such estates.

In *Katama Natchier v. Raja of Shivagunga* (3), generally known as the *Shivagunga case*, the Judicial Committee of the Privy Council applied the principle of survivorship in the descent of the impartible estate then in dispute, as the Raj family was governed by the Mitakshara law. Lord Justice Turner observed:—"The zamindari is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But the rule of succession to it is that of the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject.

(1) (1888) I. L. R. 10 All. 272; L. R. 26 I. A. 83.

15 I. A. 51.

(3) (1868) 9 Moo. I. A. 539; 2 W. R.

(2) (1899) I. L. R. 22 Mad. 388; L. R. (P. C.) 31.

Hence if the zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, one of the nephews was entitled to succeed to it." The eldest surviving co-parcener was accordingly held entitled to succeed to the Raj by the law of survivorship. The same rule of Hindu law was applied in the [227] succession to Killa Sukinda, an estate similarly situated as Killa Patia, in the case of *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanund Man Singh* (1). Sir Richard Couch, in delivering the judgment of the Judicial Committee, said:—"According to the decision in the *Shivagunga* case, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rule which governs the succession to a partible estate is to be looked to."

1903
SEP. 2.
—
APPELLATE
CIVIL.
—
31 C. 224.

It is conceded that the respondent has succeeded to the Patia Raj by virtue of the law of survivorship. We do not therefore see why the incidents of survivorship as to partible estates should not apply to an impartible estate. The Raj now in the possession of the respondent is no longer assets of the deceased, neither is he the legal representative of the deceased.

In *Juga Lal Chaudhuri v. Audk Behari Prasad Singh* (2), it was held that the interest which a deceased member of a Mitakshara family had in the family property is not assets in the hands of the surviving members, and proceedings under section 234, Civil Procedure Code, cannot be taken against them. If, as has been held by the Judicial Committee, the rule of succession as to partible and impartible estates be the same, we see no reason why in a case of an impartible estate the successor should be held to hold the estate as assets of the deceased.

In *Ram Das Marwari v. Tekait Braja Behari Singh* (3) a different view was taken, but it does not appear that the attention of the Court was drawn to the principle of survivorship enunciated in the *Shivagunga* (4) and the *Killa Sukinda* (1) cases. Having regard to these decisions of the Judicial Committee, we do not think it necessary to refer the matter to a Full Bench.

We are, therefore, of opinion that the decision of the Subordinate Judge is right, and we accordingly dismiss this appeal with costs.

Appeal dismissed.

31 C. 228.

[228] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Pargiter.

KRISHNA PRASAD ROY v. BIPIN BEHARI ROY.*
[2nd September, 1903.]

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 11—Claim to attached property—Suit to establish right to attached property—Civil Procedure Code (Act XIV of 1882), ss. 278, 281, 283.

* Appeal from Order No. 300 of 1902, against the order of Tara Charan Sen, Subordinate Judge of Tipperah, dated May 31, 1902, reversing the order of Debendra Prasad Bagchi, Munsif of Brahmanbaria, dated July 31, 1901.

(1) (1890) I. L. R. 18 Cal. 151;

(3) (1902) 6 C. W. N. 879.

L. R. 17 I. A. 128.

(4) (1868) 9 Moo. I. A. 589;

(2) (1900) 6 C. W. N. 228.

2 W. R. (P. O.) 31.