

PRIVY COUNCIL.

P. C.*
1878
Nov. 19.

JOY NARAIN GIRI (PLAINTIFF) v. GIRISH CHUNDER MYTI AND
OTHERS (DEFENDANTS).

AND
JOY NARAIN GIRI (JUDGMENT-DEBTOR) v. GIRISH CHUNDER MYTI
(DECREE-HOLDER).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Joint Estate—Partition.

Although a suit by a member of a joint Hindu family against his co-sharers for a separate share of the joint estate be not in terms a suit for partition, yet, if it appear that the intention of the plaintiff was to obtain the share which he would be entitled to on a separation, and the decree passed in the suit assigns him that share, such decree does in fact effect a partition, at all events, of rights, which, under the doctrine laid down in the case of *Appovier v. Rama Subba Aiyar* (1), is effectual to destroy the joint estate.

THIS was a consolidated appeal from a judgment of a Division Bench of the Calcutta High Court, dated the 25th April 1876 (2), and from two several decrees based thereon, one of which affirmed a judgment of the Zilla Court of Midnapore dated the 29th July 1874, and the other of which affirmed an order of the same Court passed on the 27th July of the same year.

The question raised by the appeal was as to whether the separation in estate of a joint Hindu family had been established as the result of litigation instituted by a member of the family who died while an appeal against a decree given in his favour was pending. The facts of the case are set forth in their Lordships' judgment.

Mr. Cowie, Q.C., and Mr. J. Graham for the appellants contended, that the object of the suit brought by the deceased was not to effect a partition, but merely to have his joint right in the family property declared; and that the decree pronounced in the suit had merely that effect, and did not operate as a partition. The following cases were referred to:—*Appovier v. Rama*

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 11 Moore's I. A., 75.

(2) 25 W. R. 355.

Subba Aiyar (1), *Shéo Dyal Tewaree v. Judoonath Tewaree* (2),
Mussamut Vato Koer v. Rowshun Singh (3), *Debee Pershad v.*
Phool Koerce (4), and *In re Mussamut Phuljhari Koer* (5).

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The respondent did not appear.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—The facts necessary to the understanding of this case are as follows:—Joy Narain Giri and Shibpershad Giri were grandsons of Nund Kishore Giri; they were joint in estate, and between them had the whole interest in the estate inherited from their grandfather. Shibpershad Giri, in consequence of his cousin Joy Narain refusing to allow him any participation in this joint estate, left the house in which they had jointly resided, went to reside with the husband of his sister, and had to maintain himself for some time by monies which he borrowed. Under these circumstances he brought an action against Joy Narain, in which he alleged that Joy Narain had expelled him from the joint family, and that he sued to recover possession of his eight annas share of all the joint properties, both real and personal, with mesne profits and interest from the date of dispossession. In that suit he obtained a decree, the material part of which is in these terms:—"The Court orders that the half of the various properties which, as stated above, are in the possession of Joy Narain be decreed to the plaintiff; that the date of separation from commensality is to be reckoned from the month of By-sack of the year 1272, and that from that date to the date of obtaining possession he is to get the mesne profits of the immoveable properties according to what will be ascertained in execution of decree; that with regard to the household chattels, &c., the plaintiff is to obtain half of what the defendant has admitted; that the plaintiff is to obtain half of the proceeds of the pledged properties which are sold for the realization of the Government rent, as well as half of the

(1) 11 Moore's I. A., 75.

(3) 8 W. R., 82.

(2) 9 W. R., 61.

(4) 12 W. R., 510.

(5) 8 B. L. R., 385.

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“ amounts of the decrees realized from the month of Bysack
 “ 1272; that the plaintiff is to obtain half of the proceeds of
 “ 12 solees and 4 bissees of paddy at the rate of Rs. 26 per
 “ bissee, and that he is to obtain half of all the properties men-
 “ tioned in the said decree.”

From that decree of the Subordinate Court there was an appeal to the High Court of Calcutta, which confirmed the decree. After the confirmation of that decree by the High Court, and pending an appeal by Joy Narain to Her Majesty in Council, Shibpershad Giri died; and thereupon Joy Narain applied for his widow to be substituted for him in the suit as respondent in the appeal. The Courts in India, however, gave effect to a will—which had been made by Shibpershad Giri some short time probably before his death—in which he gave all his property to Girish Chunder Myti, the son of his sister, and made Myti the respondent. The appeal came on in 1873 before Her Majesty in Council, whereupon Her Majesty, by the advice of this Board, affirmed the decree of the High Court of Calcutta. Upon this, Joy Narain commenced the present suit, in which in effect he alleges that he and Shibpershad Giri having been joint in estate, and there having been no separation between them, the decree enured for his benefit, and that he, as the heir of Shibpershad Giri, was entitled to the whole of the joint property; there was also an alternative prayer that if that were not so he might be appointed as manager; and he sought, among other things, to set aside the will of Shibpershad Giri. Pending this present suit, Girish Chunder Myti, who, as substituted respondent, had obtained the judgment of this Board affirming the decree in the previous suit, applied for execution of that decree in 1874; whereupon Joy Narain objected upon the ground which he raises in this suit,—namely, that the former suit really enured for his benefit, and that Girish Chunder Myti took no right under it; he also alleged, among other objections, the pendency of the suit which he had already brought. The Courts in India allowed Girish Chunder Myti to execute the decree; and the second appeal, which we have now before us, is from the order of the High Court allowing the execution of that decree.

It appears manifest from this statement of the case that the questions in both appeals are substantially the same. The real question in the cause is, whether there was a separation of estate between Joy Narain and Shibpershad Giri.

Their Lordships regard the conduct of Shibpershad Giri, when he left the house in which both he and Joy Narain Giri lived, and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance, as well as his making a will, as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to Shibpershad Giri a separate share of the property of the grandfather. It gives him in terms possession of the eight annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin,—and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms for partition, yet that the decree does effect a partition, at all events, of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appovier v. Rama Subba Aiyar* (1).

Their Lordships think it necessary to say that they do not regard their decision in this case as conflicting with a case which has been called to their attention, of *Debee Pershad v. Phool Koeree* (2). The suit in that case is described by Mr. Justice Kemp as a suit by Debee Pershad for a declaration of his right to a share in the estate of his grandfather Deen Dyal. Such a suit would not be inconsistent with an intention on the part of Debee Pershad to obtain a declaration of his being entitled to a

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joint interest in a joint estate; but here, for reasons already given, their Lordships regard the plaint as of a totally different character, indicating a distinct intention, to which effect is given by the judgment, of obtaining a separation of estate, and as regards both the real and personal property.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and they will humbly advise Her Majesty that that judgment be affirmed, and that both appeals be dismissed.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins and Lattey.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

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 July 15.

LAILLEY AND OTHERS (PLAINTIFFS) v. GUNNESS CHUNDER
 SAHOO (ONE OF THE DEFENDANTS).*

Sale of Under-tenure—Mortgagee—Right to Notice.

The right, title, and interest of *A* in a certain under-tenure was sold in execution of a decree for rent obtained against him by *B*, and purchased by *B* himself. *B* at the time held another decree against *A* for arrears of rent for the same under-tenure. *C*, to whom *A* had previously mortgaged the under-tenure, thereupon having foreclosed the mortgage, instituted a suit for possession against *A* and *B*, and obtained a decree for possession.

After this decree, but before *C* got actual possession, *B* caused the under-tenure to be sold in execution of his other decree against *A*, and again became himself the purchaser. *C* having shortly afterwards obtained possession under his decree was dispossessed by *B*, who took possession through the Court under his second purchase. *C* thereupon instituted proceedings under s. 269, Act VIII of 1859, in which he was successful, and consequently regained possession. In a suit brought by *B* to set aside those proceedings, and for adjudi-

* Special Appeal, No. 1406 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 17th of March 1877, modifying the decree of Baboo Jadoo Nath Roy, Subordinate Judge of that district, dated the 9th of December 1876.