APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

RAGHUBANUND DOSS AND OTHERS (DEFENDANTS) *v.* SADHU CHURN DOSS (PLAINTIFF).*

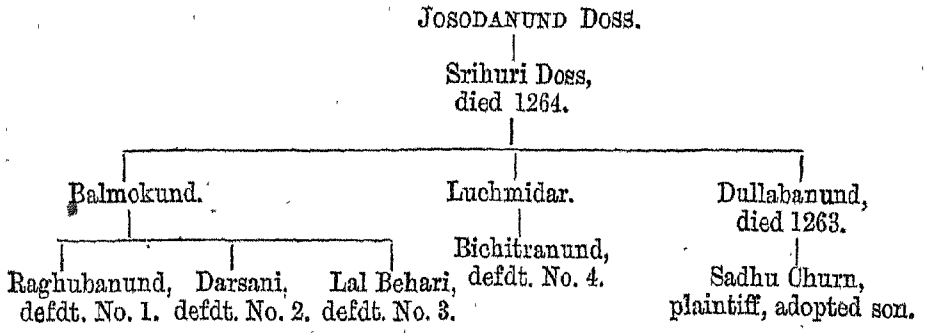
1878
June 13 & 14
&
Aug. 22.

Hindu Law—Share of an Adopted Son of a Natural Son on Partition in a Mitakshara Family—Intention as to Joint or Several Ownership.

On partition in a Mitakshara family an adopted son and the adopted son of a natural son stand exactly in the same position, and each takes only the share proper of an adopted son,—*i. e.*, half of the share which he would have taken had he been a natural son. The fact that such an adopted son, a member of a Mitakshara family, becomes upon adoption a joint owner of the family property, will not prevent the operation of the rule.

No right vests in any member of a joint Hindu family to a specific share in the family property, until some act has been done which has the effect of turning the joint ownership into a several ownership. This may be done by signification of intention. It is by such signification of intention taking place, having the effect of making the share of each member both several and defined, that a member of a joint Hindu family is enabled to dispose of his own share by sale whilst the family remains joint.

THE plaintiff, the natural son of one Balmokund, but adopted by his uncle, one Dullabanund, brought this suit to recover his share in the joint family property. The following is the genealogical tree of the family:



The plaintiff alleged that his adoptive father died in the year 1263 (1856), pre-deceasing by one year his (Dullabanund's) father Srihuri Doss; and that, after the death of his adoptive

* Special Appeal, No. 2545 of 1877, from a decree of W. Macpherson, Esq., Judge of Cuttack, dated 17th August 1877, affirming the decree of W. Wright, Esq., Subordinate Judge, dated 31st December 1873.

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father, he, the plaintiff, being a minor, was brought up by his grandfather, and after the death of his grandfather, the whole family continued to live jointly together: that, on his attaining majority in the year 1278 (1871), he demanded a partition of the family property, but the defendants refused to comply with his request, and in the year 1280 (1873) ousted him entirely from the property.

The defendants contended, that the plaintiff's adoptive father had no interest in the property in dispute, as he had never been in possession; and that, moreover, he had separated from the family in the year 1258 (1851), and taken as his share 12½ mans of land, and that as the plaintiff had not been in joint possession or recovered anything on account of the property for more than twelve years previous to the institution of the present suit, the suit was, therefore, barred by limitation; they further put forward an alleged family custom, that primogeniture had always been recognised amongst them, and that, therefore, the plaintiff, if entitled to anything, was only entitled to maintenance.

The lower Court found that the suit was not barred, inasmuch as the plaintiff's right to a share in the properties in question only accrued to him on the death of his grandfather Srihuri, and as that event happened during his minority, he, under ss. 3 and 7 of Act IX of 1871, was able to sue at any time before he attained the age of 21; that the alleged custom of primogeniture had not been proved, inasmuch as there was no proof that the ancestral property was acquired by the family prior to Josodanund's time, that since his death there had only been two successors, and that therefore the plaintiff was entitled to one-third share in the properties claimed by him.

The defendants appealed to the Judge of Cuttack, who, after stating that the onus of proving that the separation of the plaintiff's father from the rest of the family had taken place in the year 1258 (1851) was upon the defendants, and that they had failed to do so, held that, under cl. 127 of sched. ii of Act IX of 1871, the plaintiff's suit had been brought within time, and that, under the Mitakshara law, an adopted son was fully entitled to represent his father and take his share. He therefore dismissed the appeal.

The defendants appealed to the High Court.

Baboo *Mohendro Lal Mitter* for the appellants. — The plaintiff being only an adopted son is only entitled to a one-sixth share in the property, the remaining five-sixths being divisible between the sons of Balmokund and Luchmidar. In the Dattaka Chandrika, sec. v, paras. 24 and 25, the translation by Mr. Sutherland of para. 24 is incomplete: before the words "where such son may not exist," the following sentence should be inserted, "the adopted son of the said description obtains his due share, and in the event of the ancestors having other sons, a grandson by adoption, whose father is dead, obtains the share of an adopted son." These two paragraphs lay down the rule that, upon partition, an adopted son and the adopted son of a natural son stand exactly in the same position, and that each takes only the share proper of an adopted son,—*i. e.*, half of the share which he would have taken had he been a natural son.

Baboo *Srinath Das* for the respondent.—The rule mentioned by the appellants does not apply to a family governed by Mitakshara law, because in a Mitakshara family a son's interest vests as soon as he is born, so that the father of the plaintiff in this case had a vested interest to which, upon adoption, the plaintiff succeeded; he is therefore entitled to his father's one-third share. It is laid down that a grandson takes by right of representation—*Debi Pershad* v. *Thakur Dial* (1). Under the Mitakshara law a right accrues at birth. [MARKBY, J.—What right?] A right to share in the property. [MARKBY, J.—But the share is undefined, and therefore your argument fails.]

Baboo *Mohendro Lal Mitter* in reply.—In the Full Bench ruling no question arose as to distribution; there can be no distinction drawn between a distribution in a family governed by Mitakshara law and a distribution in a family governed by the Dayabhaga.

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The following judgments were delivered:—

MARKBY, J.—The only question which remains to be decided in this case is one of Hindu law,—namely, to what share in the family property is the plaintiff entitled.

The common ancestor of the family is one Srihuri Doss, who had three sons, Balmokund, Luchmidar, and Dullubanund. The plaintiff is one of the sons of Balmokund, but he was adopted by Dullubanund, who died in the lifetime of Srihuri. The defendants are the other sons of Balmokund, and the son of Luchmidar. The plaintiff has established his right to recover a share in the family property, but while he claims one-third just as if he were a natural son of his father, the defendants say, that, as an adopted son, he is only entitled to one-sixth, the remaining five-sixths being equally divided between the sons of Balmokund and Luchmidar.

I have had some doubt whether this question should have been raised at all in the present suit; and whether, it not being alleged that the family had separated, a suit by one member against the other members for a specific share will lie. But no objection of this kind has been raised in the Courts below or in this Court. I think, therefore, that we must take it to be the understanding of all the parties to this suit that, though there has been no actual division, the plaintiff now holds a specific share of the family property to which he may be entitled in severalty. It is upon that understanding alone that the plaintiff can obtain the decree which he asks.

The authorities to which we have been referred upon the question which we are now to determine are the Mitakshara, ch. i, part ii, v. 25, and the Dattaka Chandrika, sec. v, paras. 24, 25. The decision turns upon the right understanding of the latter text.

After stating various conflicting opinions, the author of the Dattaka Chandrika sums up the law in the 24th paragraph. But as pointed out by Baboo Shama Churn in his Vyavastha Darpana, 2nd edition, p. 974, the translation of that paragraph by Mr. Sutherland is incomplete. It should stand thus:—

24. "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed

to the estate of a brother or other kinsman, *the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son.* Where such son may not exist, the adopted son takes the whole estate even." The words in italics are omitted by Mr. Sutherland.

There is no dispute between the parties to this appeal that this emendation of Mr. Sutherland's translation ought to be made.

Paragraph 25 is as follows:—"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son: therefore a grandson who is an adopted son, may [in all cases] inherit an equal share even with an uncle. This must not be alleged [as a general rule]. For there would be this discrepancy: where the father of the grandson were an adopted son, he would receive a fourth share: but the grandson, if he were such son [of him] would receive an equal share (with an uncle in the heritage of the grandfather.) And accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (*viz.*, the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great grandson also." The words, *viz.*, "the adopted son of one adopted" do not occur in the original. But even if we strike out these words, and take the two paragraphs according to their more correct version, they clearly enunciate that, upon partition, an adopted son and the adopted son of a natural son stand exactly in the same position, and that each takes only the share proper for an adopted son,—*i. e.*, half of the share which he would have taken had he been a natural son.

So far, indeed, there has been little dispute. But the plaintiff argues that this rule is not applicable to a family governed by the Mitakshara law.

This argument, which was successful in the Court below, is based upon the following reasoning. It is said that in a

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Mitkashara family the son's interest vests as soon as he is born; that the father of the plaintiff, therefore, had a vested right, to which, upon adoption, the plaintiff succeeded.

The fallacy in this argument appears to me to be in a confusion between a vested right to joint ownership of the family property, and a vested right to a specific share therein. As I understand the Hindu law, no right vested in the plaintiff's father to any specific share. No right vests in any member of the family to a specific share until some act has been done which has the effect of turning the joint ownership into several ownership. This may be done by a mere signification of intention, and when a signification of intention has once taken place which has this effect, the share of each member becomes at the same moment both several and defined. It is, as I understand the law, this signification of intention, producing concurrently these two results, which enables a member of a joint Hindu family to dispose of his share by sale whilst the family still remains joint, which he can do certainly in some districts of India, possibly in all. The change which thus takes place is that which Lord Westbury in *Appovier's case* (1) likens to the change of joint tenancy to tenancy-in-common under the English law. It has its origin in the power of each member of a family to demand a partition at any moment, and the inability of the family to retain any member in joint ownership longer than he may desire.

This view of the position of the member of an undivided Hindu family is, I believe, in accordance with that taken by the High Court of Allahabad, where the Court clearly seems to consider that the interest of a member of an undivided family is not a specific share—*Debi Pershad* v. *Thakur Dial* (2).

I do not, indeed, see how it is possible to deny that the principle of representation is combined to some extent with the principle of survivorship in the law of inheritance which governs a Hindu family; and it is this combination which renders the task of ascertaining the rights of each member upon partition so extremely difficult. I feel, no doubt, however, that

(1) 11 Moore's I. A., 75. (2) I. L. R., 1 All., 105.

in this particular case the plaintiff's father had no vested interest in any specific share, and that the plaintiff himself had no such vested interest until the event happened, which this suit assumes now to have happened, but at a later period, namely, that from being a joint owner, the plaintiff became what in English phraseology would be called a tenant-in-common. I see nothing, therefore, in the fact, that the plaintiff as member of a Mitakshara family became, upon adoption, a joint owner of the family property, to prevent the operation of the general rule that as an adopted son he will take upon partition only the half of what he would have taken had he been a natural son,—that is to say, one-sixth.

The result is, that the decision of the Courts below will be modified, and the plaintiff will recover a decree for one-sixth only, with costs in proportion.

PRINSEP, J.—I am also of opinion that the adopted grandson can inherit only one-half of that which his adoptive father would have inherited had he survived his own father, the family being joint under the Mitakshara law, and the adopted grandson having uncles (brothers of his adoptive father). There can be no doubt, and indeed it is not disputed in this case, that there are portions of the Dattaka Chandrika which have been omitted in Mr. Sutherland's translation, and which clearly establish this point. It is unnecessary for me to do more than to state that these omissions have been supplied in the judgment just delivered by Mr. Justice Markby.

The objection raised to the application of the rule to a joint family living under the Mitakshara law cannot prevail. Mr. Macnaghten, almost at the commencement of the first chapter of the Principles of Hindu Law, thus expresses himself:—"The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists. It seems sufficient here to inquire into the nature of that property which is created by birth, for to this source must be traced all the impediments which exist to alienation; a man without heirs having an absolute and uncontrolled dominion over his property

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by whatever means acquired. That an indefeasible, inchoate right is created by birth seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle,—that is, by the death of the owner (natural or civil), or his voluntary abandonment. In ancestral real property the right is always limited; and the sons, grandsons, and great grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself: so much so, that he is not at liberty to alienate it except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another." The text of the Mitakshara itself bears out this opinion. See chap. i, sec. 1, paras. 17, 18, 22; and the judgment of the Full Bench of the Allahabad High Court in the case of *Debi Pershad* v. *Thakur Dial* (1) states the law correctly in the following passage:—"The consequence of the doctrine that a right in the paternal ancestral estate is acquired by birth is, that there is in fact no devolution of the property from one owner to another, but that as each son comes into being, he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition, and have issue, his son or grandson would take by substitution, and which, if he dies before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable. An ascertainment of the rights of the several members of the family is effected by partition, and consequently the rules regulating partition in every Hindu work on inheritance take the place of rules regulating the descent of property from an owner leaving issue. Unless there

(1) I. L. R., 1 All., 105.

is a plain direction to the contrary, rules of partition from their very nature operate at the time when the partition is made. Unless it is expressly declared that the ascertainment of shares is to be made at an earlier period, it must be assumed they are to be ascertained at the time partition is made. Seeing that a son in the undivided family is a co-owner, having acquired his right by birth, there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained, than in fixing the date of a son's death as that period: and if shares are not ascertained until the period of distribution, if, until that time, no one can declare he has any share in the common property, it accounts for the circumstance that in none of the treatises on Hindu law which have been brought to our notice is there any rule declaring what is to be done with the interest, (it can hardly be called a share), in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken had he survived partition."

In the present case, though the question as to the exact share to which the adopted grandson would be entitled on partition has been argued, that point does not, strictly speaking, arise, since the dispute is whether the claimant, plaintiff, is entitled to succeed to a participation in the joint estate at all. It is, however, desirable to save further litigation by deciding this point as it has been raised before us, and the parties if they cannot continue to live jointly, will thus have the means of making a partition of the ancestral estate.

Decree varied.