

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

BHIMUL DOSS, *alias* LALL BABOO (ONE OF THE DEFENDANTS)
v. CHOONEE LALL (PLAINTIFF).*

1877
April 10.

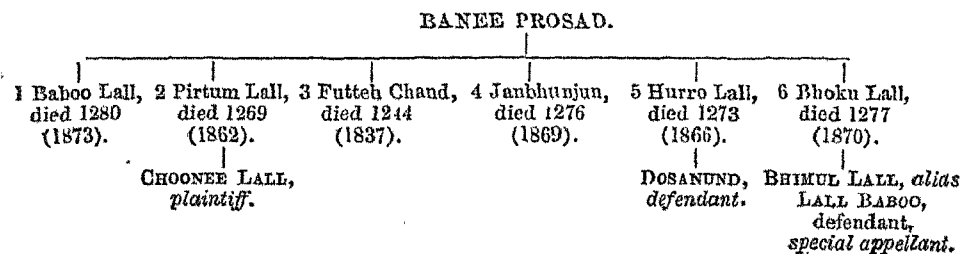
Hindu Law—Inheritance—Brother—Nephew—Mitakshara—Joint undivided Family.

Where, in an undivided Hindu family living under the Mitakshara law, a person dies without leaving issue, but leaving a brother, and a nephew the son of a predeceased brother, the latter is not excluded from succession by the former.

Debi Parshad v. Thakur Dial (1) followed.

THIS case was referred by Garth, C. J., and Mitter, J., to a Full Bench in the following order of reference:—

GARTH, C. J.—The plaintiff and the defendant, special appellant, are related to each other as first cousins, and the following family tree will materially assist the Court in understanding the question of law raised between them:—



The plaintiff's case is this. The six sons of Banee Prosad lived as members of a joint Hindu family till the death of the fourth son, Janbhunjun Doss, which took place in 1276 (1869); Baboo Lall, Futteh Chand, and Janbhunjun died without issue, and upon these facts the plaintiff contends that he is entitled to one-third share of the family property.

* Special Appeal, No. 770 of 1875, against a decree of A. J. Elliot, Esq., Judge of Zilla Shahabad, dated the 18th of February, 1875, affirming a decree of Moulvi Mahomed Nurul Hossein, Munsif, Subordinate Judge of that district, dated the 21st of September, 1874.

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

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The respective years of death of the several sons of Bauee Prosad as given in the above tree being not disputed, the defendant, special appellant, contends that the plaintiff's father, Pirtum Lall, having predeceased Janbhunjun, the plaintiff is not entitled to the one-third share of the family property which he claims. The date of separation was disputed in the Courts below, but it has been found as a fact that it took place after the death of Janbhunjun. The defendant, special appellant, contends that, on the death of Janbhunjun, his interest in the joint family property devolved upon the surviving brothers Baboo Lall and Bhoku Lall alone, to the exclusion of the plaintiff and Dosanund, sons of Pirtum Lall and Hurro Lall, who had predeceased Janbhunjun.

The contention of the plaintiff on the other hand is, that, on Janbhunjun's death, his interest in the joint family property passed to all the surviving members of the joint family. This contention is supported by a Full Bench decision of the Allahabad High Court in the case of *Debi Parshad v. Thakur Dial* (1), and also apparently by an important passage which occurs in the judgment of the Privy Council in the well-known Shivagunga case, upon which the above Full Bench decision appears mainly to be founded.

We entertain grave doubts whether the passage in the judgment of the Privy Council justifies the decision of the Allahabad High Court, and whether that passage is in accordance with the Mitakshara law; and as the question raised is one of great importance, and of very general application, we think it right to refer it to a Full Bench.

The question referred is, whether, in an undivided Hindu family governed by the Mitakshara law, if a brother dies leaving no issue, but leaving brothers and orphan nephews, who are members of the joint family, his interest in the family property passes on his death to his surviving brothers alone, or to all the surviving members of the joint family; and in case of a partition is that the principle according to which the respective shares of the persons entitled to succeed to that interest are to be apportioned?

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

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Chowdry. — The simple question is, in a joint Mitakshara family, the preferable heir to the estate of a yabhaga, no doubt, a brother would be. In the present case is to be regulated by the law which govern inheritance, the brother being the preferable heir would be preferred; the Mitakshara law (Sections 5—9) specially provides for the succession in preference to nephews. Those provisions are applicable to joint and separate property. The Allahabad High Court has restricted their application to separate property, relying apparently on the case of *Katama Natchiar v. Shivagunga* (1). That case, however, does not support the position taken up by the Allahabad Full Bench. On the contrary, it supports the present contention that the law is the same, whether the property be joint or separate. The order of descent both in cases of a divided as well as an undivided family. No doubt, the Judicial Committee say that property obtained by partition comes within the category of acquired property, and acquires a separate character. But it cannot be argued on that basis that joint property which has not been subjected to partition would follow a different order of succession from property which has acquired a separate character by partition. Unless it is made out positively that there is something in the law itself by which a separate order of succession is provided for joint property, it is submitted that it should follow the same rules as in cases of separate property. The following cases were also cited: *Chowdry Chintamun Sing v. Mussamut Nowlukho Konwari* (2), *Mussamut Golab Koonwur v. The Collector of Benares* (3), *Tara Chand Ghose v. Pudum Lochun Ghose* (4), *Rajkishore Lahoory v. Gobind Chunder Lahoory* (5).

(1) 9 Moore's I. A., 539.

(3) 4 Moore's I. A., 246.

(2) L. R., 2 Ind. App., 263; S. C.,

(4) 5 W. R., 249.

I. L. R., 1 Cal., 153.

(5) I. L. R., 1 Cal., 27.

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Mr. C. Gregory for the respondent in the case of *Debi Parshad v. Tho* settled the question, that, in a under the Mitakshara, the sons representation the inheritance w taken in the estate of their uncle, distribution. The case of *Duljeet* also supports this position ; see also 2

Baboo *Mohesh Chunder Chowdry* in r

The following opinion was delivered by

GARTH, C. J.—This case raises precisely which was decided by a Full Bench of the Court in the case of *Debi Parshad v. Thakur D.* feel bound, having regard to the weight of authori. in accordance with that decision, that, under the ci stated in the case, the interest of the deceased brothe family property ought, in the event of a partition, to be between his nephew and his two brothers in equal shares

This point was distinctly decided by the Sudder De Adawlut in the year 1802 in the case of *Duljeet Sing v. Sheo. nook Sing* (2), and Mr. Colebrooke was one of the Judges w. decided it. The same rule has been laid down since by other authorities, and is recognized by the Lords of the Privy Council in the case of *Katama Natchiar v. the Raja of Shiva-gunga* (3).

We do not find any authority conflicting expressly with those decisions ; and we are, therefore, of opinion that the judgment of the Lower Court is right, and that this special appeal should be dismissed with costs.

Appeal dismissed.

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

(2) 1 Sel. Rep., 59.

(3) 9 Moore's I. A., 539, at p. 611.