CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Coxe.

SATO KOER
v.
GOPAL SAHU.*

1907
July 8.

Hindu Law—Mitakshara—Survivorship—Inheritance—Succession (Property Protection) Act (XIX of 1841)—District Judge, jurisdiction of—Irregularity—High Court, revisional powers of.

A Hindu governed by the Mitakshara Law died leaving him surviving a widow, a daughter by a previous wife, and two brothers. On his death the brothers applied under Act XIX of 1841 to the District Judge for the delivery of possession of the deceased's property on the ground that it formed part of the property in the joint names of their deceased brother and themselves. The District Judge granted their application. The widow contested this claim, and now applied to the High Court to have the order of the District Judge set aside:—

Held, that on the death of a member of a Hindu family governed by Mitakshara, there is only an accession to his property by the other members by survivorship, and no succession by inheritance; and that the provisions of Act XIX of 1841 had no application to the present case; and the District Judge should not have taken any action under this Act but have left the parties to seek their remedy by a proper suit for establishment of their title.

Jusoda Koonwar v. *Gouree Bujnath Pershad* (1) followed.

Held, further, that the District Judge acted in the present case (supposing him to have jurisdiction to hear the application) illegally and with material irregularity; and that the petitioner was prejudiced thereby.

Held, also, that the High Court had full jurisdiction in revision to set aside the order of the District Judge.

Fulchand v. *Kismesh Koer*(2) and *Abdul Rahiman* v. *Kutti Ahmed*(3) referred to.

RULE granted to Musammat Sato Koer, the objector.

One Narain Ram died on the 4th April 1907, leaving him surviving his widow Musammat Sato Koer, a daughter by his first wife, and two brothers Gopal Sahu and Sahadeo Ram. Both Gopal Sahu and Sahadeo Ram set up their claim in opposition

* Civil Rule No. 1830 of 1907.

(1) (1866) 6 W. R. (Mis.) 53. (2) (1900) 4 C. W. N., Notes, ccxvi.
(3) (1886) I. L. R. 10 Mad. 68.

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to that of the widow and the daughter to the property of Narain Ram on the ground of its being part of the property in the joint names of their deceased brother and themselves. On an application having been made by the brother for possession under Act XIX of 1841, and some income-tax returns having been put in with the application, the District Judge of Gaya, without any further evidence, passed an order entitling the applicants to possession of the property. Thereupon, the widow, Sato Koer, moved the High Court and obtained this Rule on the opposite party to show cause why the order passed by the District Judge should not be set aside.

Babu Golap Chanara Sircar (*Babu Surendra Nath Ghosal* with him), for the petitioner. Act XIX of 1841 does not apply to the case of a joint family governed by the Mitakshara law; it is applicable to cases where there is succession by inheritance. In the present case the widow and the daughter take in preference to the brothers, and are preferential heirs: see Mayne's Hindu Law, 7th edition, page 333. The order of the District Judge was illegal and without jurisdiction; and he has not acted under s. 3 of Act XIX of 1841, which he ought to have done: see *Fulchand* v. *Kismesh Koer*(1), *Papamma* v. *The Collector of Godavari* (2), *Abdul Rahiman* v. *Kutti Ahmed*(3).

Babu Umakali Mookerjee (*Babu Jogesh Chandra Dey* with him), for the opposite party, *contra*.

Cur. adv. vult.

BRETT AND COXE JJ. The present petitioner is the widow of one Narain Ram who died on the 4th April 1907 leaving her as his widow, she being his second wife, and a daughter by his first wife.

On the 20th April 1907 Gopal Sahu and Sahadeo Ram, brothers of Narain Ram, put in an application under Act XIX of 1841 alleging that they were members of a joint Hindu family

(1) (1900) 4 C. W. N., Notes, ccxvi. (2) (1889) I. L. R. 12 Mad. 341.
(3) (1886) I. L. R. 10 Mad. 68.

under the Mitakshara law with Narain Ram, that on his death all the joint property devolved by survivorship on them as members of the joint family, that the widow had no right to the property, and that the property was in danger of being wasted by her in collusion with her relations. They therefore prayed for an order declaring their title to the property and directing that possession of the same should be delivered to them on their furnishing security in the sum of Rs. 5,000. They also asked for an order that an inventory should be taken. An inventory was taken by the order of the District Judge by his Nazir, and a citation under section 4 of the Act was issued to the widow.

The widow appeared and denied the right of the applicants to the property left by her husband. She alleged that it descended by inheritance to her and her husband's daughter, that her husband was not a member of a joint Hindu family with his brothers, and that he had separated from them some 20 years before his death.

The main point in dispute between the parties, therefore, was whether Ram Narain at the time of his death was a member of a joint family governed by the Mitakshara law with his two brothers. The District Judge, however, refused to allow the widow to adduce evidence on this point, and declined himself to go fully into the question whether there was a separation of the three brothers or not, because that would have amounted on his part to trying the regular suit which might afterwards be brought by one or other of the parties, and it would also frustrate the object of the Act, which demands a speedy and summary decision.

On the written application of the brothers and some income tax returns which they put in, and without examining the brothers or any witnesses on their behalf, the District Judge on the 5th June 1907 passed an order declaring the applicants to be entitled to possession of the property left by the deceased.

On the 13th June last the present petitioner applied to this Court and obtained a Rule on the opposite party to show cause why the order passed by the District Judge purporting to be one under Act XIX of 1841 should not be set aside.

In support of the Rule it has been contended that the District Judge in passing the order which he has passed has exercised a

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jurisdiction not vested in him by law, and has acted in the exercise of his jurisdiction illegally and with material irregularity. In the first place it has been argued that the provisions of Act XIX of 1841 cannot apply to the case of a family governed by the Mitakshara law. Section 1 of the Act provides that whenever a person dies leaving property, moveable or immoveable, it shall be lawful for any person claiming a right by succession thereto or to any portion thereof, to make application to the Judge of the Court of the District where any part of the property is found or situate for relief, either after actual possession by another person or when forcible means of seizing possession are apprehended. It is argued that on the death of a member of a Hindu family governed by the Mitakshara law the other members take the property left by the deceased by survivorship and not by succession. There is in fact no passing of the property from the deceased to anybody else; there is only an accession to the property of the survivors and no succession by inheritance. It is pointed out that in the present case if there could be held to be any succession at all it would be succession by the widow and daughter as heirs, who would have succeeded by inheritance. In our opinion this contention is sound and in the present case the Act cannot be taken to have any application.

Further, we think that this was not a case in which under any circumstances the Act should have been applied, and in support of this view we would refer to the case of *Jusoda Koonwar* v. *Babu Gouree Byjnath Pershad*(1), which was decided so long ago as 1866, and in which the learned Judges expressed opinions on a case almost identical with the present with which we entirely agree. We hold that the present case was not one in which the District Judge should have taken any action under Act XIX of 1841, but should have left the parties to seek their remedy by a proper suit for establishment of their title. It was not a case, as contemplated by the Act, in which the widow had taken possession upon any pretended claim of right or by force or fraud. Further, we may observe that there is no finding arrived at by the District Judge that the applicants would have been

(1) (1866) 6 W. R. (Mis.) 53.

materially prejudiced by being compelled to bring a regular suit to establish their title.

The learned Judges who decided the case of *Jusoda Koonwar* v. *Babu Gouree Byjnath Pershad*(1) were of opinion that they were unable to interfere in that case as they could not hold that the Judge had exercised a jurisdiction not vested in him by law, after the widow had appeared and had submitted to the jurisdiction. We may, however, observe that Act XIX of 1841 empowers a District Judge to interfere with the ordinary rights of parties by means of a summary procedure, and that the view which has always been adopted by this Court with reference to other similar Acts, or provisions of Acts of a similar nature, must be taken to apply to proceedings taken under its provisions, that is to say, that before it can be held that a Court has jurisdiction it must be found that the provisions of law have been strictly complied with. In the present case we find that the applicants were not examined in support of their application, as we think is clearly contemplated by the provisions of section 3 of the Act, nor were any witnesses examined to support their case. The present petitioner also was not allowed to examine her witnesses to disprove the most important allegation in the application, namely, that Narain Ram was joint with his brothers when he died,—a finding on that allegation in favour of the applicants being essential to give the Court jurisdiction to pass the order on the application. It is an elementary principle of law that no order can be passed against a person without allowing him to be heard and to adduce evidence in his defence. The reasons which the District Judge has given for refusing to examine the witnesses for the petitioner in the present case do not in our opinion appear to be sufficient to warrant a departure from this principle. In our opinion, therefore, the District Judge has acted in the exercise of his jurisdiction, supposing him to have had jurisdiction to hear the present application, illegally and with material irregularity, and the petitioner was prejudiced thereby. His order therefore, as it stands, cannot be maintained. We think that this is not a case which under any circumstances we ought to send back to the District Judge in order that he may record the evidence which

(1) (1866) 6 W. R. (Mis.) 53.

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the petitioner desired to produce. We think the proper course to follow is to make the Rule absolute and to set aside the order of the District Judge.

We may further observe that in the cases of *Fulchand* v. *Kismesh Koer*(1) and *Abdul Rahiman* v. *Kutti Ahmed*(2), the learned Judges appear to have had no hesitation in interfering on the ground that the provisions of Act XIX of 1841 had not been strictly complied with. We are of opinion, therefore, that in the present case we have full jurisdiction in revision to set aside the order of the District Judge. The result, therefore, is that we make the Rule absolute and set aside the order.

Rule absolute.

O. M.

(1) (1900) 4 C. W. N., Notes, ccxvi. (2) (1886) I. L. R. 10 Mad. 68.