

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chowdhry Ganesh Dutt Thakoor and Others v. Mussunmat Jewach Thakoorain, from the High Court of Judicature at Fort William, in Bengal ; delivered the 12th November 1903.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

This suit was brought by the Respondent, Jewach Thakoorain, the widow of one Balmukund Thakoor, to determine her rights under a partition of family property which she alleged had taken place in her husband's lifetime, and for such relief as she might be found entitled to under the circumstances of the case. The Defendants were the three surviving brothers of her husband, Ganesh Dutt Thakoor, Raja Thakoor and Chhedi Thakoor; Niterbati Thakoorain, the wife of Chhedi Thakoor, in whose name one of the properties alleged to belong to the family had been purchased; and Harakhbati Thakoorain, the mother of the four brothers, who would be entitled to a share on the partition, if proved. All the parties are Brahmins of Tirhoot, and the law which governs the case is the Mitakshara law, as modified in its application in Bengal.

Chowdhry Raja Thakoor died on the 7th October 1902, and by an Order of His Majesty in Council dated the 28th day of March 1903,

Chowdhry Manindra Narayan Thakoor was substituted in his place.

It is common ground that the four brothers, at any rate up to the Fusli year 1290, formed an undivided Hindu family. They were Zemindars, owning considerable interests in land, and in addition carried on a mahajuni or money-lending business of a profitable character.

The Plaintiff's case is that her husband, Balmukund, separated from his brothers in Fusli 1290; that a partition of household goods and zeraif lands took place in that year; that a further partition of the zemindari and mahajuni properties took place in Fusli 1295; and that Balmukund died while the actual division of these assets was in progress. She further alleges that, after her husband's death, the brothers invited her to the family house, and took advantage of her absence from her own house to demolish it, and possess themselves of the entire family property. Some months later, when she went to visit her father, she discovered what had taken place, and instituted legal proceedings. These allegations are, as may be supposed, denied by the Defendants.

The evidence on both sides is very voluminous, very conflicting, and for the most part unsatisfactory. But both Courts in India concur in finding that Balmukund, in Fusli 1290, built a house for himself and went to live in it with his family. He thus became separate from his brothers in food and residence. This fact lends probability to the evidence that at the same time a partition took place of household furniture and other moveable property of a similar character.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive (*Mussumat Anundee Koonwur v. Khedoo Lal*, 14 Moo I.A. 412). It is therefore

necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

It is alleged by the Plaintiff's witnesses that, at the time Balmukund took up his abode in a separate house, a division of zeraït lands was made; and in support of this allegation, Exhibit 16, which purports to be a list of the zeraït lands so divided, was produced. This document was discredited by the Subordinate Judge, but accepted by the High Court. In their Lordships' opinion, it is of such doubtful authenticity that they think it safer not to rely on it, at any rate as a correct statement of zeraït lands in the possession of the joint family in Fusli 1290.

Five years later, in Fusli 1295, the Plaintiff alleges that the zemindari and mahajuni properties were divided. Here again the evidence is conflicting; but it may be observed that only one of the three surviving brothers was called to support the case put forward on their behalf; that both Courts in India discredited the evidence of Raja Thakoor, the brother who was called; and that two important witnesses, Jibi Jha and Rajib Nain, were not examined. Upon the evidence as it stood, the Subordinate Judge found that no partition in Fusli 1295 was proved; while the High Court found that "the separation which had begun in part in 1290 was effectually completed . . . in 1295, and that not in respect of some properties only, but in respect of all."

The entire evidence on the record was very minutely dissected by the learned Counsel who appeared before their Lordships in this Appeal, and in the result they have come to the conclusion that it is not their duty to advise His Majesty that the carefully considered judgment of the High Court upon the main question at issue should be

set aside. In coming to this conclusion they have been influenced by the circumstance that there is no dispute as to five facts which, in their opinion, tend to corroborate the story told by the Plaintiff's witnesses.

1. It is admitted that of 65 revenue paying estates belonging to the family, payment of revenue of 19 was made separately after Fusli 1295, viz., one-fourth in the name of Balmukund, and three-fourths in the name of his three brothers.

2. It is admitted that of a sum of Rs. 35,004.1 recovered in 1295 under a decree obtained by the family firm against one Gholam Mahomed, three-fourths were credited to the three brothers, and one-fourth to Balmukund.

3. It is admitted that the rent payable by the Ather Indigo Factory to the family under a lease of certain villages, was paid in 1295, as to three-fourths to the three brothers and as to one-fourth to Balmukund, and that after Balmukund's death, one payment of one-fourth of the rent was made to his widow, and then stopped upon an indemnity being given to the Factory by the brothers against any claim that might thereafter be advanced by the widow.

4. It is admitted that in 1295, an estate was purchased out of the family funds in the name of the four brothers, "in equal shares."

5. It is undisputed that in a suit brought to recover a debt due to the family, shortly after Balmukund's death, one of the brothers claimed to sue "as heir and adopted son" of Balmukund, a claim entirely inconsistent with the theory of survivorship in an undivided Hindu family.

These facts give material support to the case made on behalf of the Plaintiff, however unconvincing the oral evidence might have been, had it stood alone. It was the case of neither party that there was a partial separation, that is, a separation in respect of certain properties only;

and their Lordships consequently agree with the finding of the High Court that the Plaintiff, as heir to Balmukund, is entitled to succeed to his share in the family property as it existed at the time of his death, or has been subsequently increased by employment of the family funds.

The amount of this share is the next question to be determined. There is no doubt that, according to the law in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth. She may, of course, acquiesce in the division of the property between her sons without claiming any share for herself; but there is no evidence of any such acquiescence in this case. On the contrary, she claims her share in the written statement which she has filed in this suit, and denies all knowledge of any partition having taken place between her sons. Under these circumstances the learned Subordinate Judge held that Balmukund's share was one-fifth and not one-fourth. The Judges of the High Court apparently considered that acquiescence on the part of the mother was established, and awarded one-fourth to the Plaintiff. But their Lordships have not been referred to, nor have they been able to discover, any evidence of acquiescence except a vague statement by the Plaintiff that no share was assigned to the mother "because she did not make any objection." Under these circumstances their Lordships agree with the Subordinate Judge that the mother's claim must be allowed, and the Decree of the High Court varied accordingly.

It was contended by Mr. Bonnerjee that the omission to reserve a share for the mother rendered the partition invalid; and in support of

this contention he relied on the case of *Krishnabai v. Khangowda* (I. L. R. 18 Bom. 197), in which it was decided that a partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor. So here, their Lordships recognize that the mother is not bound by a partition to which it is not shown she ever assented; and the suit being one for a declaration of rights under the partition, in which all the parties interested are represented, and in which the mother claims her share, their Lordships have felt no difficulty in giving effect to her claim in the Order which they will humbly advise His Majesty to make upon this Appeal.

Mr. Bonnerjee also contended that the suit as framed was not maintainable under the provisions of Sect. 44, Rule A of the Code of Civil Procedure. The Rule is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immoveable and moveable property, if the cause of action is the same in respect of both (*Giyana Sambandha Pandara v. Kandasami Tambiran*, I. L. R. 10 Mad. 375 at p. 506). Here the cause of action arose in the refusal of the three male Defendants to recognize the right of the widow to succeed to her deceased husband's share in the family property under a partition which had not been completed by actual division at the time of her husband's death; and it would be a denial of justice to hold that in a suit upon such a cause of action relief could not be given in respect to moveable as well as immoveable property. It follows that the claim as regards the moveable property cannot be held to be barred by limitation.

In their Lordships' opinion the Decree of the High Court must be varied so as to include a declaration that the Defendant Mussummat

Haraklbati Thakoorain is entitled to one-fifth share of the family property and that the Respondent Mussummat Jewach Thakoorain is likewise entitled as heir to her husband to one-fifth share in the said property; and subject to this declaration, unless the parties shall come to an equitable arrangement approved by the Court, the suit should be remanded to the Subordinate Judge to inquire what was due to the estate of Chowdhry Balmukund Thakoor in respect of his share at the time of his death, and what have been the subsequent accretions thereto from the employment of the family funds, and for that purpose to take the usual accounts, including the accounts of the family business, and to order that the costs of the enquiry and of taking the accounts and of the partition be paid out of the estate.

Their Lordships will humbly advise His Majesty to make an Order remanding the suit to the effect and containing the directions above stated. The Appellants Chowdhry Ganesh Dutt Thakoor, Chowdhry Manindra Narayan Thakoor, and Chowdhry Chheddi Thakoor must pay the Respondent's costs of this Appeal.

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