Privy Council Appeal No. 76 of 1914.

Musammat Girja Bai - - - - - *Appellant.*

v.

Sadashiv Dhundiraj and others - - - *Respondents.*

Same - - - - - - - *Appellant.*

v.

Same - - - - - - - *Respondents.*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES, INDIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MAY, 1916.

Present at the Hearing:

LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October, 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain a declaration of his right to a one-third share in certain movable and immovable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June, 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from the joint family. If he was, his share would be inherited by his widow Girja Bai, the appellant; if not, the defendants, respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the plaintiff in this suit; two, Damoodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj, the first defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are defendants in this action. Jageswar, another brother, died in 1906 without leaving any male issue. Thus, on the 21st October, 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parseoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bahi-khattas* (account-books) were opened in their respective names. The plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint family; that he had communicated his intention to the defendants; and had, on the 1st October, 1908, served a registered notice on the first defendant, "the manager of the joint family," and "as the defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October, 1908, when he demanded partition and his one-third share.

The defendants admitted the plaintiff's claim, and added that in answer to the registered notice, the first defendant had stated that he had no objection to a division of the estate which "should be made by private persons without going to Courts." They further urged that as they were willing to divide the estate, the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the defendants and the filing of their written statement appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say:—

"The defendants entered appearance on the 15th February, 1909, and on the 9th March, 1909, it was admitted on their behalf that the plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain movables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May, 1909. On that date the case was put off to the 10th May, 1909, at the instance of the defendants, who sought a compromise. Then there was a further adjournment to the 20th June, 1909, upon the ground that the illness of defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June, 1909, his widow, Girja Bai, the present appellant, applied for substitution as the heir and legal representative of her deceased husband, and then the contest began. The defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January, 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the appellant. The case then proceeded to trial, and on the 8th April, 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The defendants appealed to the Judicial Commissioners' Court both from the order of the 23rd January, 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate and learned judgment have upheld the defendants' contentions; in substance the conclusion at which they have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakhshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:—

"The defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a co-parcenary interest is not the same thing as even a passive consent to the severance of that interest; much less is it tantamount to an agreement to divide. The defendants never denied the title of Harihar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circumstances, the only compromise (once the share of Harihar and the estate to be divided had been admitted), which defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Harihar had finally decided to sever his estate, and had demanded that this should be done."

And again:—

"It remains therefore to decide, whether, as claimed by the plaintiff, Harihar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy in common, so as to destroy the defendants' right of survivorship therein; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the

plaintiff must succeed. If, on the other hand, agreement between all the co-parceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgment.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated, Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 14th February, 1902, Harihar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the joint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first defendant's separate names.

Jageswar died in 1906, and on the 1st October, 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the 19th October the defendant sends a reply through a pleader; he first tries to persuade Harihar to abandon his intention of getting the joint estate divided, and then goes on to say: "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply, brought his suit three days after the defendant's letter. Written statements were filed on the 15th February, 1909, and on the 9th March following the District Judge recorded the following additional statement, as he calls it, by the defendants' pleader: "The defendants do not deny the plaintiff's right to claim one-third share in the joint family, both movable and immovable. The plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the plaintiff's right to claim partition nor the extent of his share is denied, he says: "Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March, 1908, the parties were of one mind on the question of partition. The plaintiff demanded a division of the joint family property. The defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the plaintiff's demand on the part of the defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows :—

"Rao Bahadur Bapurao Dada, a well-known pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October, 1908; that he persisted in his demand for a share; and that, his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation; but finding him disinclined to do so, because he was engaged in mediating to bring about a compromise, Harihar had the plaint presented by another legal adviser, leaving Mr. Bapurao Dada to appear for the defendants."

And they go on to say—

"Upon these facts we have no hesitation in coming to the conclusions:—

"1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain* v. *Ikbal Narain* (L. R. 40, I. A. 40), the rule of law applicable to cases of separation from the joint undivided family was laid down by their Lordships in the following terms :—

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October, 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj Narain* v. *Ikbal Narain*.

In the Hindu law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's Case*, both "division of title and division of property." In the *Mitakshara*, Vijnaneswara defines the word *vibhaga* which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viromitrodaya* the meaning of this passage: he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's translation, chap. I, sec. 36): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." The *Viromitrodaya* is a commentary on the *Mitakshara*, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the *Mitakshara* is it stated that agreement between all the co-parceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the *Viromitrodaya* (chap. II, sec. xxiii). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha the author of the *Vyavahara Mayukha* (chap. IV, sec. iii, Mandlik's translation, p. 38), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same." The *Saraswati-Vilasa* gives expression to the same view. After quoting the definitions of various earlier writers, it says: "from this it is known that without any formality partition can be effected by mere intention;" (Sutler's translation of Hindu Law Books on Inheritance, p. 122). Their Lordships are aware that the *Vyavahara Mayukha* is not recognised as an authority in the Benares school; they refer, however, to the dictum of Nilkantha as showing the general conception of

Hindoo legists on the subject of severance from jointness. But the following gloss in the *Viromitrodaya* appears to their Lordships conclusive on the rule of law under the *Mitakshara*: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see sec. 23A), "whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction," (chap. II, sec. xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

In *Madho Pershad* v. *Mehrban Sing* (L.R. 17, I.A. 194, 196), Lord Watson delivering the judgment of this Board, declared in explicit terms, the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of several members of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer to the language used by that distinguished Hindu Judge, Mr. Justice

Dwarkanath Mitter, in *Deo Bunsee Koer* v. *Dwarkanath*, a *Mitakshara* case (10 Sutherland's Weekly Reporter, 273):—

"Now it is a settled doctrine of the Hindu law," said that learned Judge, "that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, viz., the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods: by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Appovier* v. *Rama Subha Aiyan* (11 Moore's, I.A. 75) this Board had to deal with an argument based on a similar notion that a deed of division between the members of an undivided family "which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu law," he proceeds thus:

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

And in another place, he adds, "it is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in this joint property did not spring from the deed or the agreement of the parties to which it gave expression; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri* v. *Grish Chunder Mytee* (L.R. 5, I.A. 228), their Lordships regarded the conduct of one of the two co-sharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a will, as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who it was alleged had separated himself, and not from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the Judicial Committee in *Appovier's Case*, Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Mussamat Vato Koer* v. *Rowshun Singh* (8 Sutherland's Weekly Reporter, 82), a case governed by the law of the *Mitakshara*, expressed himself thus on this question of separation :—

> "Taking then the admitted facts of the case before us, we find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his co-parceners

Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The respondents must pay the costs of this appeal and of the appeals in the Judicial Commissioner's Court. And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MUSAMMAT GIRJA BAI

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SADASHIV DHUNDIRAJ AND OTHERS.

SAME

v.

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DELIVERED BY MR. AMEER ALI.

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