Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raja Jogendra Bhupati Hurri Chundun Mahapatra (a minor under guardianship) and others v. *Nityanund Mansingh and another, from the High Court of Judicature, at Fort William, in Bengal; delivered May 1st*, 1890.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

THE Plaintiff in this case sued to establish his title to the Raj and Zemindari of Killa Sukinda in the district of Cuttack. The Plaintiff's father, Raja Upendra Bhupati, died on the 23rd October 1857, leaving a son, Nundkishore, by his Rani Nilmoni; a son by a woman called Rambha, the Plaintiff; and a third son, Abhin Roy Singh, by a woman called Asili. He was succeeded in the Raj by his legitimate son Nundkishore. Nundkishore died on the 5th March 1878, leaving no son, but leaving three widows—Ranis—and a daughter by one of them. The Plaintiff claimed to succeed to Nundkishore on the allegation that his mother was the lawful phoolbibahi wife of Upendra. It has been found by the subordinate judge and by the High Court that his mother Rambha was not the lawful wife as alleged by the Plaintiff, and that the Plaintiff must be treated as the illegitimate son of Upendra. It has also been found that Raja Upendra and his family were Sudras.

On these facts the question which has been argued before their Lordships arises, viz., whether

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according to the rules of Hindoo law, having regard to the fact, which was admitted, that the law of the Mitakshara is applicable, the Plaintiff is entitled by right of survivorship to succeed to the Raj upon the death of his half-brother Nundkishore, the legitimate son.

Now it may be well first to dispose of a point arising out of the fact that this is an impartible Raj, which it is admitted to be. According to the decision in the *Shivagunga* case, which, as their Lordships understand, is not now disputed, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one ?

The case was decided in the Plaintiff's favour by the subordinate judge and there was an Appeal to the High Court, in which the learned judges of the High Court, after noticing certain decisions that had been quoted, held on the authority of the case of *Sadu* v. *Baiza and Genu*, decided by the Bombay High Court and reported in Indian Law Reports, 4th Bombay Series, page 37—that the Plaintiff was entitled to succeed to the Raj.

The case in the Bombay High Court appears to have been very similar to the present. There the two sons, the legitimate and the illegitimate, survived the father, and upon the death of the legitimate son the question was whether the illegitimate son was entitled to succeed to the whole of the estate. The Mitakshara in Chapter I., section 12, deals with the rights of a son by a female slave in the case of Sudras which is the present case, and the first verse is :—" Even a " son begotten by a Sudra on a female slave

" may take a share by the father's choice. But " if the father be dead, the brethren should make " him partaker of the moiety of a share, and " one who has no brothers, may inherit the " whole property in default of daughter's sons." The second verse is:—" The son begotten by a " Sudra on a female slave obtains a share by " the father's choice, or at his pleasure. But " after [the demise of] the father, if there be " sons of a wedded wife, let these brothers allow " the son of the female slave to participate for " half a share; that is, let them give him half " (as much as is the amount of one brother's) " allotment. However, should there be no sons " of a wedded wife, the son of the female slave " takes the whole estate, provided there be no " daughters of a wife, nor sons of daughters. " But if there be such, the son of the female " slave participates for half a share only." Now it is observable that the first verse shows that during the lifetime of the father, the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that " if the " father be dead the brethren should make him " partaker of the moiety of a share." So in the second verse the words are that the brothers are to allow him to participate for half a share, and later on there is the same expression :—" The son " of the female slave participates for half a share " only." The learned Chief Justice of the Bombay High Court notices these passages, and after observing that the Mitakshara makes no special provision for the case of the death either of the legitimate or of the illegitimate son after the death of their father and before partition, he says:—" But the effect of what he has said " being, as we think, to create a co-parcenery

" between the son of the wedded wife and the " son of the female slave, we understand him " as tacitly leaving such a case to the ordinary " rule of survivorship incidental to a co-parcenery, " and that accordingly the survivor would take " the whole if the other died without leaving " male issue." It appears that in the course of the argument the question was put to the learned counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived, and it was apparently admitted, that in such a case the legitimate son would take the share of the illegitimate son by survivorship. If that be so, their Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right —in the one case a right by survivorship, and in the other, no right by survivorship. There is not only the judgment of the Chief Justice, and two other judges of the High Court of Bombay, but the case came before them by appeal, there being a difference of opinion between the two judges before whom it came in the first instance, and one of those learned judges was a Hindoo, Mr. Justice Nanabhai Haridas, who carefully examined the authorities, and came to the same conclusion. It is not necessary to quote more of his judgment than this passage: "I would therefore hold that the Plaintiff " and Mahadu, being male members of an " undivided Hindoo family, governed by the " Mitakshara law, the former"—that is the illegitimate son—" upon Mahadu's death without " male issue, became entitled to the whole of " the immoveable property of that family, there " being no question about any moveable " property in this special appeal." Therefore

their Lordships have before them the well considered judgment of the High Court of Bombay upon this question, as well as that of the High Court at Calcutta, and it appears to them that the learned judges of those Courts put a right construction upon the law as stated in Mitakshara.

Their Lordships are of opinion in the present case that the Plaintiff was entitled to succeed to the Raj by virtue of survivorship, and that the judgment of both the lower courts should be affirmed. They will therefore humbly advise Her Majesty to dismiss the appeal. The Appellants will pay the costs of it.