Privy Council Appeal No. 78 *of* 1923.

Allahabad Appeal No. 39 *of* 1921.

Jag Prasad Rai and another - - - - - *Appellants*

v.

Musammat Singari - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1924.

Present at the Hearing:

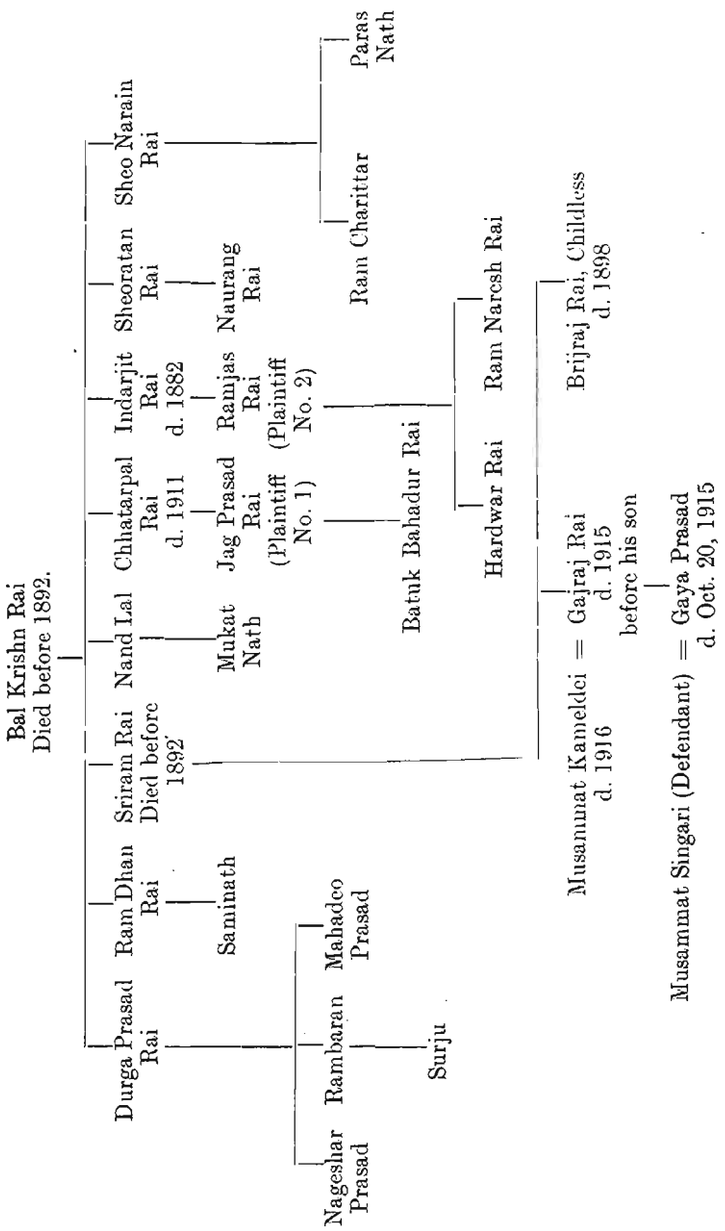
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the plaintiffs from a decree of the High Court at Allahabad, dated the 13th July, 1921, which reversed a decree of an Additional Subordinate Judge of Gorakhpur, dated the 24th April, 1918.

The family to which the parties to the suit belonged is a Hindu family which is governed by the law of the Mitakshara. The following pedigree shows how the parties to the suit are connected with each other, but in reading the pedigree as printed, it must be read from the right of the reader to his left. Sheo

Narain was the eldest son of Bal Krishn Rai and of his seven younger brothers, Durga Prasad was the youngest.



The suit in which this appeal has arisen was brought by Jag Prasad and Ram Jas Rai against Musammat Singari, the widow of Gaya Prasad, who died childless, for possession, or a declaration that the plaintiffs are entitled to the possession of property of which Gaya Prasad died possessed on the allegation that they and Gaya Prasad were, when he died, members of a joint Mitakshara family.

Bal Krishn had eight sons who are shown in the pedigree, and he with his eight sons, when they were all living, constituted a Mitakshara joint family. The family was possessed of several villages and other property. The family lived at Sonchiraiya, which was the principal ancestral village. Their Lordships do not know when Bal Krishn died, but he died several years before 1892. Indarjit, who was the third son, died in 1882.

Sriram, Ram Dhan and Durga Prasad, who were the sixth, seventh and eighth sons, died before 1892. All the eight sons had married and had a son or sons who were living in 1892. In 1892 the family agreed that Sheo Narain, who was the eldest son of Bal Krishn, should partition the joint family property into eight equal shares. The intention of such a partition obviously was that there should be a separation of the family into eight families, each representing one of the eight sons of Bal Krishn and his descendant or descendants and joint within itself. In their Lordships' opinion the effect of that agreement was that the previous joint family separated into eight families. Thereupon Sheo Narain in 1892 partitioned the joint property into eight shares. The parties to the agreement were not satisfied that the eight shares into which Sheo Narain had partitioned the property were equal in value, and on the 3rd January, 1895, the following persons, describing themselves as Nand Lal Rai, Chhatarpal Rai and Sheo Ratan Rai, sons of Bal Krishn Rai deceased; Nageshar Prasad Rai, Rambaran Rai and Mahadeo Prasad Rai, sons of Durga Rai, deceased; Brijraj Rai and Gajraj Rai, sons of Sri Ram Rai, deceased; Shami Nath Rai, son of Ramdhan Rai, deceased; and Ram Jas Rai, son of Indarjit Rai, deceased, appointed three arbitrators to make the partition in eight equal shares of the property in Sudar tahsil, district of Gorakhpur, and other tahsils.

One of the three arbitrators died before an award was made and thereafter the co-sharers who were parties to the agreement of the 3rd January, 1895, executed on the 18th February, 1896, an agreement by which they appointed the two surviving arbitrators and another man in the place of the deceased arbitrator, as arbitrators to partition the property in eight equal shares. The agreement of the 18th February, 1896, contained the following authority and directions to the arbitrators :—

> "The said arbitrators becoming unanimous should conscientiously take down the evidence on oath of each party on every point, examine the quality of every land on the spot, and at their pleasure amend or not amend the map and the lots prepared by Sheo Narain Rai, arbitrator. The arbitrators should in the lot which they may form include bonds, mortgage-deeds, decrees, cows, bullocks, etc., the property of all sorts in the districts of Azamgarh and Gorakhpur and Nepal *ilaqa* (which has been omitted) equalising the value. The arbitrators should separate the share of all the 8 persons. Each party will be liable for payment of revenue of the share which will be allotted to him in a particular village. If any bond or any property is found to be the exclusive property of any party, his statement may be taken down on oath and the same may not be partitioned. The arbitrators should mark out the land forming the share of each party. Each party is at liberty to carry on his business either separately or jointly. Whatever may be the decision of the arbitrators about all sorts of expenses shall be valid. The parties would accept the award of the arbitrators unanimously arrived at on the points mentioned above, and no party shall deviate from it, but if any party deviates, his objection shall not be entertainable by the court. The arbitrators are competent in every way to do what they like. All of us, the executants, shall be bound by the award which all the three

arbitrators will make unanimously. The arbitrators should allot equally unculturable and *dihat* lands and fruit and timber trees of all sorts to each co-sharer. They are at liberty to alter or uphold the lots mentioned above. They should make *chaks* of productive and unproductive lands equalising their value. As regards the lots to be prepared by the present arbitrators, all of us, the executants, agree that if, on account of any previous act, the whole or part of the lot of any party be disturbed in some way, all of us, the executants, shall be responsible therefor and shall make it up from our respective share. As regards the rights of all of us, the holders of 8 *thoks*, whatever the arbitrators will determine and record, the same shall be accepted by us. We, the executants, representing the 8 *thoks*, shall accept whatever the award the arbitrators will make unanimously about the property of all sorts belonging to us. Nobody will raise any objection, and if he raises any, it shall not be entertainable by this court. Hence we have executed this agreement so that it may be of use in time of need.

"Dated 18th February, 1896."

Their Lordships would infer from that agreement that the parties to it or some of them had, although the family had separated, been carrying on some business jointly as partners.

Before the arbitrators made their award, Sheo Narain and his brother Nand Lal had agreed to re-unite together, and they made an application to the arbitrators that two shares should be dealt with in the award as one undivided share. Their Lordships quote paragraph 5 of the award which was made as showing what that application was. It is as follows :—

"(5) Out of the holders of 8 lots, Sheo Narain Rai, the former arbitrator, prepared a lot in his name and another in that of Nand Lal Rai separately and gave different colours in the map in accordance therewith. Now both these persons apply and make statement on oath that both of them are joint in the entire business connected with the village and court and are joint in mess, that a single lot of the entire moveable and immoveable property may be drawn up for both of them at the time of partition or that both the lots may be joined in one and represented by one colour, and that subsequently both of them, or their heirs, will get the entire moveable and immoveable family property partitioned half and half either by mutual consent or through court, when they will choose to do so. Hence, as desired by both the persons, their lots were joined in one, but they will be represented by former colours."

In compliance with that application the arbitrators allotted to Sheo Narain and Nand Lal two out of the eight shares which they partitioned to Sheo Narain and Nand Lal as one joint share. The arbitrators made their award on the 19th December, 1896.

The High Court and the Subordinate Judge came to concurrent findings, that the award effected a separation of the joint family. In their Lordships' opinion the joint family had separated when they agreed in 1892 that Sheo Narain should partition the joint property in eight shares, and that there was no agreement between the coparceners to continue to be a joint family. The question thus arises whether Chhatarpal, his son Jag Prasad and Ramjas, ever agreed with Gajraj Rai and his son Gaya Prasad to re-unite as a joint family. It has been contended on behalf

of the plaintiffs' appellants that those persons did agree to reunite, and that they had agreed to reunite before the arbitrators made their award. If there was a reuniting it was for the plaintiffs to prove it.

In *Balabux Ladhuram* v. *Rukhmabai*, L.R. 30, I.A. 130, it was distinctly held by the Board that when co-parceners in a Mitakshara family had separated an agreement to reunite must be proved like any other fact, and that, if not proved, they remain separate. Some doubts were entertained as to the effect of that decision and it was contended in *Hari Bakhsh* v. *Babu Lal*, L.R. 51, I.A. 163, that it meant that when brothers who were co-parceners separated their separation necessarily involved that the sons of one of those brothers had separated from each other. In *Hari Bakhsh* v. *Babu Lal* the Board disposed of that contention and pointed out what Lord Davey meant by the judgment of the Board which he delivered in *Balabux Ladhuram* v. *Rukhmabai* as to a reuniting of a separated family.

It was contended by the plaintiffs before the Subordinate Judge, the High Court and this Board that a similar application to that which was successfully made to the arbitrators by Sheo Narain and Nand Lal was made to the arbitrators by Chhatarpal, Ramjas, Brijraj and Gujraj Rai to have three shares allotted to them jointly on the ground that they had reunited, but that the arbitrators had not acceded to their application as Gujraj had not appeared before them to join in the application. If it had been the fact that they had reunited and that they had made the application they could have applied to the Court when the award came before the Court to be filed as a decree to send the award back to the arbitrators so that they might make it comply with the agreement of the parties. No such application was made to the Court. The Subordinate Judge stated in his judgment :—

> " I do not consider it is at all unlikely that such a request was made (to the arbitrators) and Gujraj being absent and his personal consent deemed necessary by the arbitrators in a matter of this kind, the request might have been discarded."

The Subordinate Judge did not find that any such request was, in fact, made to the arbitrators. One of the arbitrators was alive when the suit was being disposed of by the Subordinate Judge and might have been able to remember whether such an important application was made to them or not. Ramjas, who is a plaintiff in this suit, swore that the application had been made to the arbitrators. The High Court did not believe him or that any such application had been made to the arbitrators. The learned Judges of the High Court on this question also said :—

> " Further, when about a month later (then the date of the award), namely, on 15th January, 1897, all the parties attended at the Court of the Subordinate Judge to have the award made a decree of Court, no request was made to the Court that the decree should formally modify the award by

> grouping together into one lot the shares of Chhatarpal Rai, Ram Jas Rai and the brothers, Brijraj Rai and Gajraj Rai. Such an application (if there had, in fact, been a reunion) would not have been a contentious matter to which any of the owners of the other shares would have raised an objection."

The plaintiffs also relied upon the evidence of one Sukh Mangal that such an application had been made to the arbitrators; he swore that in his presence Gajraj asked Brijraj and Chhatarpal if the three lots (shares) had been joint, and that they replied "owing to your illness the three lots had not been made joint," and that Gajraj then said: "we will live jointly as heretofore" and that Brijraj and Chhatarpal agreed to do so. The High Court did not believe the evidence of Sukh Mangal nor do their Lordships believe it, and they do not believe that any such application was made to the arbitrators. That was all the parol evidence upon which the plaintiffs relied to prove that after separation Chhatarpal, Ramjas and Brijraj and Gajraj had agreed to reunite. Swami Nath, the son of Ram Das, who attended the arbitrators when they went to the villages, swore that whereas Nand Lal and Sheo Narain did ask the arbitrators to make one joint lot of their shares, neither Chhatarpal, Ram Jas, Gajraj nor Brijraj ever made such a request. The High Court believed the evidence of Swami Nath, as do their Lordships.

Their Lordships will now consider the other documentary evidence, but before doing so they may state that on the evidence in the record they have come to the conclusion that the members of the family who had moved from Sonchiraiya to Shikargarh and had lived there in one house, carried on business as partners, but not as coparceners of a joint family, as moneylenders and in the cultivation of sir and khudkasht lands, and they may observe that entries in khewats and other similar village papers showing that the shares of co-owners have been specified, afford by themselves no proof that the owners were members of a joint Mitakshara family or had separated. *See Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal*, L.R. 27, I.A. 39, which was an appeal from the Central Provinces; and *Nageshar Bakhsh Singh* v. *Ganesha*, L.R. 47, I.A. 57, which was an appeal from Oudh. Their Lordships will also observe that in their opinion payments jointly of Government Revenue, Taxes, Income Tax and such like payments do not by themselves indicate that the parties making such payments were joint or separate; the parties may have been carrying on business as partners and not as Hindu co-parceners. For the same reason the fact that money had been lent on mortgages, or had been applied in the purchase of property, does not by itself indicate that the money was or was not the separate money of Hindu coparceners. The books of account of a joint family would, if produced, show whether the moneys or payments had been advanced or paid from a joint Hindu family fund or from

a partnership fund. The fact that two or more Hindus had a banking account does not by itself prove that the moneys received by the bank were moneys of a Hindu joint family or of Hindus who were partners in farming or other business. Not one of the documents in this case which has been brought to the attention of their Lordships, proves either that the moneys mentioned were or were not the moneys of a joint Hindu family. The books of account of the joint family, if Chhatarpal, Jag Prasad, Ramjas, Brijraj, Gajraj were after the separation of 1892 members of a joint family, have not been produced, and it was necessary for the plaintiffs' case that they should have been produced and put in evidence. The books of account would have shown whether the accounts, which must have been kept, were the accounts of a joint family or of a partnership. The non-production of any of those books of account has not been satisfactorily explained by or on behalf of the plaintiffs, and their Lordships draw the inference that if they were produced they would not support the case of the plaintiffs.

Their Lordships will now refer to two documents on the record which, in their opinion, afford crucial evidence that the case of the plaintiffs is a false case, and that there never was a reuniting after 1892 of Chhatarpal and Ramjas with Brijraj and Gajraj. Their Lordships may here observe that the Subordinate Judge in his judgment did not attempt to explain the importance of these documents or the non-production of account books which must have been kept, whether the plaintiffs and Brijraj and Gajraj were or were not co-parceners.

The first of the documents to which their Lordships now refer is a petition of the 6th December, 1902, for the correction of the khewat of the village Naikot, which was one of the villages, which was partitioned by the award of 1896. That petition was presented by Ramjas and he made as opposite parties to it Nageshar Prasad, Ram Dhan, Mahadeo Prasad, Swami Nath, Naurang Rai, Mukut Nath, Ram Charittar for himself and as guardian of his brother Paras Nath, Gajraj and Chhatarpal. In that petition Ramjas said :—

> " Application for correction of the ' khewat ' relating to ' mauza ' Naikot, ' tappa ' Marchwar, ' pargana ' Binaikpur, under section 133, Act No. 3 of 1901.
>
> " The petitioner begs to state as follows :—
>
> 1. The parties belong to one and the same family. The entire property was partitioned by arbitration. Under the partition made by the arbitration, which was given effect to by the civil court, no share in ' mauza ' Naikot aforesaid was allotted to opposite party No. 1, while the following shares were allotted to the petitioner and to opposite party No. 2, in support of which the ' goshwara ' statement prepared by the arbitrators is filed.
>
> " 2. Every co-sharer has entered into possession of his lot allotted to him by the arbitrators ; but it has not been given effect to in the

public papers up till now. It is, therefore, hereby prayed that the following corrections may be made in the ' khewat ' :—

Names of sharers.	Amount of share.
Ram Jas Rai	1 anna 2 pies and 12 chhatanks.
Swami Nath Rai	1 anna 6 pies and 2 chhatanks.
Dudh Nath, Naurang, Maheshwari Rai, sons and heirs of Shiva Ratan Rai, deceased	1 anna 4 pies and 4 chhatanks.
Mukut Nath Rai, son and heir of Nand Lal Rai, deceased, Ram Charittar Rai and Paras Nath Rai, sons and heirs of Shiva Narain Rai, deceased	1 anna 5 pies and 9 chhatanks.
Gajraj Rai for self and heir of Brijraj Rai, deceased	1 anna 2 pies and 12 chhatanks.
Chhatarpal Rai	1 anna 2 pies and 9 chhatanks."

Ram Jas signed that petition on the 6th December, 1902, and he made at the foot of the petition the following declaration, which he also signed :—

> " I declare that the particulars set forth in this petition are true."

Their Lordships assume that the petition of the 6th December, 1902, of Ram Jas was presented to the Collector of the District or to some Revenue official under him and it appears not to have been complied with, and on the 19th September, 1907, Chhatarpal presented to the Revenue official of the District a similar petition for the correction of the khewat of Mauza Naikot, and he made as opposite parties to it Gajraj, Ram Jas, Mukut Nath, Ram Charittar for himself and as guardian of Paras Nath, a minor, Naurang Rai, Nageshwar Prasad, Mahadio Prasad and Sarja Prasad. In that petition Chhatarpal said :—

" 1. The parties held an ancestral eight-anna share in the said share and were in possession of the same as the members of a joint Hindu family.

" 2. Subsequently, a partition was made by arbitration, and under the arbitration award confirmed by the civil court, the shares in the said ancestral eight-anna share were allotted to each of the co-sharers as per specification given below.

" 3. Under the arbitration award, every co-sharer is in possession of his share. Corrections in the ' khewat ' relating to other villages have already been made ; but the corrections in the ' khewat,' relating to this village, have not been made with reference to the said award. It is, therefore, hereby prayed that corrections may be made in the ' khewat ' with reference to the arbitration award."

NOTE.—Gajraj Rai, Jag Prasad Rai, and Ram Jas Rai have purchased from Swami Nath under a registered sale-deed, the one anna 6 pie 2 chhatank share which was allotted to him under the partition award. They shall make a separate application for mutation of names in respect of that share.

Specification of shares in respect of which amended entries are to be made in the ' khewat ' with reference to the arbitration award :—

Names of co-sharers.	Amount of shares to be entered against the names of the co-sharers with reference to the arbitration award.
Naurang Rai and Musammat Salhanta, heirs of Shiva Ratan Rai (?) deceased	1 anna 4 pies and 4 chhatanks.
Gajraj Rai	1 anna 2 pies and 12 chhatanks.
Chhatarpal Rai, petitioner	1 anna 2 pies and 9 chhatanks.
Ram Jas Rai	1 anna 2 pies and 12 chhatanks.
Mukut Nath Rai and Ram Chharittar Rai for self and as the guardian of Paras Nath Rai, minor, heirs of Shiva Narayan Rai and Nand Lal Rai	1 anna 5 pies and 9 chhatanks."

Jag Prasad, as the son and general attorney of Chhatarpal, signed Chhatarpal's name to a declaration at the foot of the petition that the particulars set forth in the application were true.

Having regard to those petitions of 1902 and 1907. and to the attempted specification of shares by Sheo Narain in 1892, and to the award of 1896, there cannot be the least doubt that the joint family which descended from Bal Kishn separated into eight families, two of which, Jai Narain's and Nand Lal's, re-united before the award was made.

It is true that the plaint of the 11th February, 1902, of Gajraj, Chhatarpal and Ram Jas (Exhibit 7), if it stood alone and could not be explained, would afford strong evidence that Gajraj, Chhatarpal and Ram Jas constituted a joint family of which Brijraj was a member. But in 1892 the joint family, which then existed without doubt, had separated and Chhatarpal, Gajraj and Ram Jas were not re-united as a joint family. Possibly the explanation is that the statement that the plaintiffs in that suit were joint with Brijraj was the work of the pleader who prepared the plaint as the easiest way of explaining how those plaintiffs had a right of suit on a hypothecation bond which had been given in favour of Brijraj alone in 1897.

The statement in the plaint of the suit for malicious prosecution which Ram Jas, Jag Prasad and Gajraj brought in 1912 that they " are members of a joint family," which has jointly paid Rs. 900 as Revenue and Rs. 65 as Income Tax, their Lordships also consider to be worthless in face of the crucial documents to which they have referred.

The conclusion at which their Lordships have arrived is that the decree of the High Court of the 13th July, 1921, dismissing the suit of the plaintiffs with costs, was right and that this appeal should be dismissed with costs, and they will accordingly humbly so advise His Majesty.

In the Privy Council.

JAG PRASAD RAI AND ANOTHER

v.

MUSAMMAT SINGARI.

DELIVERED BY SIR JOHN EDGE.

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