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the Sri Badrinath Temple Act. The other prayer of the plaintiffs is rejected.

As the appeal succeeds in part and as it raised questions of general importance with regard to which there were longstanding disputes between the parties, we think that the proper order should be to direct each party to bear his own costs in all the Courts. The costs of the defendant shall come out of the temple funds.

Appeal allowed in part.

Agent for the appellants : *C. P. Lal.*

Agent for the respondent : *S. S. Sukla.*

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May 16.

GUR NARAIN DAS AND ANOTHER

v.

GUR TAHAL DAS AND OTHERS

[SAIYID FAZL ALI and VIVIAN BOSE JJ.]

Hindu law—Illegitimate son of Sudra—Right to demand partition of separate property of father.

Under Hindu law, though an illegimate son of a Sudra cannot enforce partition during his father's lifetime, he can enforce partition after his father's death if the father was separate from his collaterals and has left separate property and legitimate sons.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 104 of 1950.

Appeal from a judgment and decree dated the 9th April, 1947, of the High Court of Judicature at Patna (Manohar Lal and Mukherjee JJ.) in First Appeal No. 68 of 1944 arising out of judgment and decree dated the 23rd December, 1943, of the Court of the First Additional Subordinate Judge, Gaya, in Suit No. 4 of 1941.

Gurbachan Singh (*Manohar Lal Sachdev,* with him) for the appellants.

S. B. Jathar for the legal representative of respondent No. 4.

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1952. May 16. The Judgment of the Court was delivered by

FAZL ALI J.—This appeal arises out of a suit for partition which was dismissed by the trial court but was decreed by the High Court of Patna on appeal. The material facts of the case are briefly as follows :—

One Rambilas Das had 2 sons, Budparkash Das and Nandkishore Das. Nandkishore Das had several sons, the plaintiffs, Gurtahl Das being one of his illegitimate sons. The present suit was brought by Gurtahl Das against 4 persons, namely, Gurnarayan Das and Jai Narayan Das, sons of Nandkishore Das, Shibtahl Das who was alleged to be one of the illegitimate sons of Nandkishore Das, and Mst. Rambholi Kuer, wife of Nanaksharan Das, one of the sons of Nandkishore Das. Another person, Kuldip Das, who was the daughter's son of Nandkishore's brother, Budparkash Das, intervened in the suit after its institution and was impleaded as the fifth defendant. After the death of the second defendant, Jai Narayan Das, his wife, Surat Kuer, was brought on record.

The plaintiff's case was that Budparkash Das and Nandkishore Das formed a joint Hindu family, and that Budparkash Das died without any male issue in a state of jointness with his brother, Nandkishore, with the result that the entire joint family property devolved on him. Subsequently, disputes arose regarding the management and enjoyment of the properties among the plaintiff and the defendants, which compelled the plaintiff to institute the present suit for partition. The plaintiff alleged that the parties were Sudras and belonged to the Nanak Shai sect of Fakirs, and that he and the third defendant, Shibtahl Das, were dasiputras of Nandkishore Das by a concubine, and Jai Narayan Das and Gurnarayan Das were also dasiputras of Nandkishore by another concubine.

The suit was contested mainly by the first defendant Gurnarayan Das and Mst. Surat Kuer, on the following pleas:—firstly, that the suit was not maintainable as a suit for partition, because the plaintiff was never

in possession of the properties of which he claimed partition, secondly that the family of the defendants were not Sudras but Dwijas and an illegitimate son could not sue for partition, thirdly that the defendants did not form a jont Hindu family with the plaintiff and Shibtahl Das, fourthly that Mst. Rambholi Kuer was not the widow of Nanaksharan Das, and fifthly that the plaintiff and Shibtahl Das were not sons of Nandkishore Das. The case of Mst. Rambholi Kuer was that the parties were Dwijas and not Sudras, and defendant No. 5, Kuldip Das, pleaded to the same effect and further alleged that Budparkash Das was separate from Nandkishore Das, that although they did not divide the properties by metes and bounds, they used to divide the produce half and half, and that he was in possession of his share of the properties as the daughter's son of Budparkash Das and they could not be made the subject of partition. Shibtahl Das supported the claim of the plaintiff.

The trial court dismissed the suit, holding, among other things, (1) that the plaintiff not being in joint possession of any of the properties, the suit for partition was not maintainable, (2) that the parties were Sudras, (3) that Budparkash Das and Nandkishore Das were joint and not separate, (4) that the plaintiff had no cause of action, and (5) that Shibtahl Das had not proved that he was the son of Nandkishore, Against the decision of the trial court, the plaintiff preferred an appeal to the High Court at Patna, and Kuldip Das filed a cross-objection contesting the finding that Budparkash was joint with his brother, Nandkishore. The High Court reversed the decision of the trial court and held (1) that the parties were Sudras and not Dwijas, (2) that Budparkash died in a state of separation from his brother, Nandkishore, and (3) that no suit for declaration of title was necessary and the plaintiff's failure to pay sufficient court-fee should not stand in the way of suitable relief being granted to him. Both the High Court and the trial court found that defendants Nos. 1 and 2, Gurnarayan Das and

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Jai Narayan Das, were the legitimate sons of Nandkishore Das. On the above findings, the High Court passed a preliminary decree directing that separate allotments of the properties should be made to the plaintiff and the defendants excepting Shibtahl Das.

It was contended before us on behalf of the first appellant that the finding of the courts below that the parties were Sudras was not correct and should be set aside. This contention must however fail, since we find no good reason for departing from the well-established practice of this court of not disturbing concurrent finding of the trial court and the first appellate court. In the present case, the finding that the parties are Sudras is largely based on the oral evidence, and the learned Judges of the High Court in arriving at their conclusion have not overlooked the tests which have been laid down in a series of authoritative decisions for determining the question whether a person belongs to the regenerate community or to the Sudra community.

The next question which was very seriously debated before us was whether Budparkash Das and Nandkishore Das were joint or separate. On this question, the two courts below have expressed conflicting views, but on a careful consideration of the evidence before us, we are inclined to agree with the learned Judges of the High Court, who after reviewing the entire evidence have come to the conclusion that Budparkash Das died in a state of separation from Nandkishore. It will be material to quote here the following extract from the judgment of the trial judge in which he sums up the evidence on this question :—

"From the oral evidence on the record, this much is quite clear that Budparkash lived in a separate house and used to get crops. This defendant (defendant No. 5 Kuldip Das) has also filed Exhibit B(2) chaukidari receipt for 1936 (Register No. 283) and Exhibit C 1 (copy of Assessment Register showing No. 284 in the name of Budparkash) which may go to show that possibly Budparkash was paying separate chowkidari tax. The defendant No. 5 has also filed some

letters marked A-1, A-5, A-4, A-6, A-10 and A-12, which not only show that this defendant is related to the defendants' family, but also that grains and money were offered to him from time to time. But none of these documents clearly show that there had been partition between Budparkash and Nandkishore or that the defendant No. 5 ever came in possession over any property, as being the heir of Budparkash. Of course there is some oral evidence to support him. But I do not think, on considering and weighing the evidence that separation of Budparkash from Nandkishore has been proved. The learned pleader for the defendant No. 5 has urged that the circumstances considered in the light of the ruling reported in Behar Report, Vol. 4 (1937-38) Privy Council at p. 302, would support the defendant's case as there was defined share of Budparkash and Nandkishore in the Khatyan (exts. G1 and G2). I am not prepared to agree with the learned pleader on this point, as there is not a scrap of paper to show that Budparkash or even after him Kuldip Das separately appropriated the usufruct of any property, or ever Budparkash showed any intention of separation, I expect that if Budparkash had separated, at least on his death the defendant No. 5 would have maintained an account book of his income from the properties in dispute, specially as he lived at a distant place. He does not appear to have ever cared to look after the property or demand accounts from his alleged co-sharers."

This summary of the evidence shows firstly, that the two brothers lived in separate houses, secondly, that they paid separate chaukidari taxes, and thirdly, that Budparkash used to get grains and money from Nandkishore from time to time. The trial judge has also observed that the khatyans, exhibits G 1 and G 2 record the defined shares of the two brothers, but the printed record shows that exhibits G 1 and G 2 are mere rent-receipts. As the khatyan was not printed, we sent for the original record and found that the entries in the khatyan, which are exhibits F 1 and

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F 2, have been correctly noted in the judgment of the trial court. It seems to us therefore that the findings which we have set out give greater support to the oral evidence adduced on behalf of defendant No. 5 than to the evidence adduced by the other parties, and that being so, we think that the finding of the High Court must be upheld. We were greatly impressed by several letters of exhibit-A series, which have been found to be genuine by both the courts below. The genuineness of the letters was attacked before us, but we find no good reason for reversing the findings of the trial judge and the High Court. In one of these letters exhibit A-10, Nandkishore Das writing to Kuldip on the 12th June, 1934, states that he was sending 25 maunds of rice, 7 maunds of khesari and rupees seventy-five and then adds: "I have got with me all the accounts written, which will be explained when you will come and you will render a just account of your share when you come". In another letter, exhibit A-12, which was written by Nandkishore to Kuldip on the 15th October, 1936, the former states : "I wrote to you several times to adjust account of your share, but you did not do so up till now. I write to you to come and examine the account of your share. I have not got money now. If you have got time, then come for a day and have the account adjusted and take what may be found due to you". It seems to us that if the parties were really joint in the legal sense of the term, there was no question of examining the accounts and adjusting them and there would have been no reference to the share of Kuldip in the produce or the money collected. The proper conclusion to be arrived at is, as the witnesses for defendant No. 5 have stated, that though there was no partition by metes and bounds, the two brothers were divided in status and enjoyed the usufruct of the properties according to their respective shares Several witnesses were examined on behalf of defendant No. 5, who have stated from their personal knowledge that the two brothers lived in separate houses, were separate in mess and the produce

was divided between them half and half. It seems to us that the finding of the High Court as to the separation of the two brothers must be upheld.

The third contention urged on behalf of the appellants relates to the question whether the plaintiff is entitled only to maintenance or to a share in the properties left by Nandkishore Das. The rights of an illegitimate son of a Sudra are considered in Mitakshara, Ch. 1, S. 12, which is headed "Rights of a son by a female slave, in the case of a Sudra's estate". This text was fully considered by the Privy Council in *Vellaiyappa* v. *Natarajan*(1) and the conclusions derived therefrom were summarized as follows:—

"Their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but is entitled as a member of the family to maintenance out of that property."

This statement of the law, with which we agree, may be supplemented by three other well-settled principles, these being firstly, that the illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's lifetime; secondly, that on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son(s); and thirdly, that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son.

(1) A.I.R. 1931 P.C. 294.

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It seems to us that the second proposition enunciated above follows from the following passage in the Mitakshara text:—

"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."

If therefore the illegitimate son is a coparcener with the legitimate son of his father, it must necessarily follow that he is entitled to demand partition against the legitimate son. There can be no doubt that though the illegitimate son cannot enforce partition during the father's lifetime and though he is not entitled to demand partition where the father has left no separate property and no legitimate son but was joint with his collaterals, he can enforce partition in a case like the present, where the father was separate from his collaterals and has left separate property and legitimate sons.

The last point put forward on behaif of the appellants was that the plaintiff not being in possession of the properties which are the subject of the suit, he cannot maintain a suit for partition. This contention cannot prevail, because the plaintiff is undoubtedly a cosharer in the properties and unless exclusion and ouster are pleaded and proved, which is not the case here, is entitled to partition.

Thus, all the points urged on behalf of the appellants fail, but, in one respect, the decree of the High Court must be modified. To appreciate this, reference will have to be made to the following statements made by defendant No. 5 in paragraphs 8 and 11 of his written statement :

"8. That this defendant holds moiety share in jagir and kasht lands. Mahanth Budh Parkash Das was living separately in the northern house allotted to him and the southern portion was allotted to the thakhta of Nandkishore Das, the smallest house divided into 2 havelis.

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11. That this defendant has nothing to do with the eight annas interest in the properties given in schedule under than C and D relating to jagir and kasht lands, which rightfully belonged to Nandkishore Das and has no concern with the properties noted in those schedules."

Paragraph 11 is rather ambiguously worded, but it was conceded before us by the counsel for defendant No. 5 that the latter had no claim to any interest in the properties set out in schedules other than schedules C and D. Such being the purport of paragraphs 8 and 11, the decree should provide that defendant No. 5 will be entitled only to a share in the properties set out in schedules C and D and will have no share in the properties set out in the other schedules. Subject to this modification, the decree of the High Court is affirmed, and this appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

Agent for the appellants: *Naunit Lal.*

Agent for the legal representative of 4th respondent: *R. N. Sachthey.*

THE STATE OF BOMBAY

v.

VIRKUMAR GULABCHAND SHAH

1952.

May, 27.

[SAIYID FAZL ALI and VIVIAN BOSE JJ.]

Essential Supplies (Temporary Powers) Act (XXIV of 1946), ss. 2(a), 17(2)—Spices (Forward Contracts Prohibition) Order, 1946, cls. 2, 3—Turmeric, whether "foodstuff"—Meaning of "foodstuff".

The term "foodstuff" is ambiguous. In one sense it has a narrow meaning and is limited to articles which are eaten as food for purposes of nutrition and nourishment and so would exclude condiments and spices such as yeast, salt, pepper, baking powder and turmeric. In a wider sense it includes everything that goes into the preparation of food proper (as understood in the narrow sense) to make it more palatable and digestible. Whether the term is used in a particular statute in its wider or narrower sense cannot be answered in the abstract