

The petitioner appealed to the High Court.

Pandit *Nand Lal*, for appellant.

Babu *Aprokash Chander Mukerji*, for respondent.

ORDER.—We consider that this application can be entertained under the terms of s. 1, Act IX of 1861, and we reverse the Judge's order, and direct him to enquire into the application and pass an order according to law. The costs will abide the result.

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 NEHALO
v.
NEWAL.

 APPELLATE CIVIL.

 1877
May 18.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BALLABH DAS (PLAINTIFF) v. SUNDER DAS AND OTHERS (DEFENDANTS)*

Hindu Law—Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser—Assent of co-parceners no longer necessary to constitute valid gift.

The introduction of a stranger in blood, as auction-purchaser of a portion of the rights and interests of an undivided Hindu family, breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property: and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchaser, is not invalid by reason of the principle of Hindu law which requires the assent of co-parceners in an undivided Hindu family, to give validity to such a gift.

THIS was a suit for partition and possession of half a garden with joint possession over half a well and for the maintenance of possession over eight biswas of *lakhraon* land (*i. e.*, planted with trees affording shade to roads). The whole of the above property belonged originally in equal shares to Birj Das and Brindaban Das (defendants Nos. 2 and 3) on the one side, and to Jumna Das and Har Gobind Das on the other, as their ancestral property. In April, 1866, Sunder Das, defendant No. 1, became the purchaser at an auction-sale of the half share of Jumna Das and Har Gobind Das and obtained possession under the said sale of half the garden and well. In January, 1874, Birj Das and Brindaban Das made a verbal gift of their share of the property to the plaintiff who

* Special Appeal, No 1129 of 1876, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 21st June, 1876, reversing a decree of Babu Pramoda Charn Banerji, Munsif of Benares, dated the 21st December, 1873.

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applied for a mutation of names in his favour; the Commissioner rejected this application, whereupon Sunder Das took possession of the whole garden, hence the suit. Among other defences set up by Sunder Das was this, *viz.*, that the gift was invalid, the property being ancestral and undivided. The Munsif gave the plaintiff a decree. On appeal by Sunder Das, defendant, the Officiating Judge, relying on Elberling on Inheritance, para. 281, p. 132, and Macnaghten's Principles of Hindu Law, vol. 2, p. 224, ruled that a gift of any portion of joint ancestral property without prior division, and in the absence of the assent of all the co-sharers is invalid under Hindu law, and on this ground he dismissed the suit. The plaintiff appealed to the High Court, and the principal ground of his appeal was that by the auction-sale of a portion of the property to a stranger the joint and undivided character of the property ceased, and that accordingly the principle of Hindu law on which the Judge relied was inapplicable to the case.

The *Senior Government Pleader* (Lala Juala Prasad), for appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for respondents.

The judgment of the High Court after stating the facts proceeded as follows :—

We are of opinion that the Judge has not properly considered the effect of the auction-purchase of the respondent on the constitution of the joint family and the joint property; that purchase by introducing a stranger as owner of the rights and interests of two of the members of the original undivided Hindu family broke up the constitution of the family as an undivided Hindu family. The joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connexion among its members by blood, relationship, adoption, and marriage. Property held in such co-parcenership will be joint family property, the introduction of strangers in blood by auction-purchase necessarily breaks up the family relation.

Sir J. Strange writing of the joint family says "in the property *thus descended* so long as they remain undivided the family possesses a community of interest;" and the context shows that a descent of heirs is meant.

We may refer also to a passage in West and Buhler, Part II, ii, and the rules under which partition which operates in respect of the undivided family takes place, show that an undivided family is constituted in the sense indicated.

The gift to the plaintiff is therefore not invalid on the ground held by the Judge. (The Court then went on to remand the case for the trial of the other issues raised by the defence.)

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APPELLATE CIVIL.

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May 28.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GIRDHARI AND OTHERS (PLAINTIFFS) v. SHEORAJ AND OTHERS (DEFENDANTS).*

Act VIII of 1859, ss. 5, 13—Account of sums realized on collective mortgage of lands in separate districts—Decree for redemption of lands within jurisdiction not barred by Regulation VII of 1825, because based on such account.

In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from all the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage-debt, gave the plaintiff the decree sought; the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. *Held* that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction, notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja.

The facts of the case and the manner in which it was dealt with by the lower Courts are sufficiently stated in the judgment.

Munshi Hanuman Prasad and Pandit Ajudhia Nath, for appellant.

The Senior Government Pleader (Lala Juala Prasad) and Lala Lalta Prasad, for respondents.

JUDGMENT.—The subject of the mortgage to which this suit refers is land situated in the district of Mirzapur, and land in par-

* Special Appeal, No. 1342 of 1876, from a decree of J. W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 24th August, 1876, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Mirzapur, dated the 5th May, 1876.