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1906
November
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1907
February 8.

PRIVY COUNCIL.

LAL BAHADUR AND OTHERS (PLAINTIFFS) *v.* KANHAIYA LAL (DEFENDANT).

[On appeal from the High Court at Allahabad]

Hindu law—Joint family—Presumption and onus of proof as to whether property is ancestral or self-acquired—Nucleus of ancestral property—Property purchased while living jointly—Will disposing of ancestral property—Invalidity of—.

A Hindu, the head of a joint family governed by the Mitakshara law, left property which on his death in 1849 passed to his three sons, who remained joint until 1866 when they came to a partition amongst themselves. There was nothing to show that any of them then had any separate property. At that time one of them had two sons and another son was born to him after the partition. The father and these three sons lived together jointly and acquired other property. The father died in 1894 leaving a will by which he gave a small allowance and a residence to each of his younger sons, and left all the rest of his property to his eldest son describing it as his self-acquired property. In a suit brought by the two younger sons against their brother to set aside the will, the validity of which depended on the question whether the property was ancestral or self-acquired, the Judicial Committee (reversing the decision of the High Court) held that the share taken on partition by the father of the plaintiffs and defendant was ancestral property in which from their birth his sons acquired an interest; that there thus being a nucleus of ancestral property the onus was on the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds; that such onus had not been discharged; that on the contrary the evidence showed that there was a common stock of the whole family into which each member voluntarily threw what he might otherwise have claimed as self-acquired and that the property purchased by, or with the assistance of, the joint funds was joint property, and did not belong to any particular member of the family. There was therefore no self-acquired property, and the will was consequently inoperative to defeat the claim of the younger sons to a share in the family estate.

APPEAL from a judgment and decree (December 21st, 190.) of the High Court at Allahabad which varied and substantially reversed a decree (March 30th, 1898) of the Subordinate Judge of Bareilly.

The parties to the suit out of which this appeal arose were brothers, the sons of one Durga Prasad, who died on the 6th April 1894. Durga Prasad was one of the three sons of one Gobind Ram,

Present:—Lord DAVEY, Lord ROBERTSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

who was a patwari, or village accountant, the other two sons being Jwala Prasad and Hazari Lal. Gobind Ram died in 1849, at which time Durga Prasad was a student in Bareilly College, aged about 20, his younger brothers being about 18 and 11, respectively. In 1852 Durga Prasad entered the service of Government and after holding various offices in the Education Department became ultimately an inspector of schools on a salary of Rs. 750 a month. He retired in 1885 on a pension of Rs. 4,000 a year which he enjoyed until his death in 1894.

Durga Prasad left two wills, one made on the 3rd April and the other on the 11th December 1893. By the later will he fixed for each of the plaintiffs an allowance of Rs. 35 a month and gave to each of them a house for residence: the remainder of his property, movable and immovable, he bequeathed to his eldest son, the defendant. The will recited that all the property constituting the estate of Durga Prasad was his self-acquired property, and it set forth the reasons for the unequal distribution under it. Administration with the will annexed was granted to the defendant, and the objections to the grant raised by the plaintiffs on the grounds that the will was not genuine, and that if genuine it was made under undue influence, were disallowed; and the plaintiffs brought the present suit for a declaration that the two wills made by Durga Prasad were "opposed to Hindu Law, invalid and void," and that Durga Prasad was not competent to make them.

The plaintiffs in the plaint alleged that Gobind Ram possessed ancestral zamindari property and carried on money lending and left at his death property and cash to the extent of Rs. 35,000; that after his death considerable immovable property was purchased by his sons with funds left by him; that in 1866, the three sons divided the property and each took separate possession of his share; that the income arising from Durga Prasad's share was Rs. 400 a year; that this income was kept in deposit and was invested in money-lending; that the funds which thus accumulated were credited in the firm of Lachmi Narain at Bareilly; and that property was purchased, and additions were made to the ancestral property with the help of those funds. They say that all the property thus acquired was ancestral joint property

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in which Durga Prasad's sons acquired a joint interest with him, and that according to Hindu Law he was not competent to divide the property unequally under his will, without the consent of all the co-sharers.

The defendant, on the other hand, alleged that Gobind Ram left no funds or immovable property, and that the whole of the property in suit was acquired by Durga Prasad himself with the savings from his income.

The Subordinate Judge held in the evidence that Gobind Ram left property worth Rs. 20,000 or Rs. 25,000; that shares in two villages were purchased after his death with funds left by him; that Durga Prasad's share of the ancestral property yielded an income of Rs. 425 a year; that with the accumulations of this income other property was bought; that Durga Prasad threw into the common stock any property which he may have acquired separately, and that the whole of the property which existed at the time of his death was joint family property belonging to himself and his three sons.

As a result of these findings the Subordinate Judge held that the wills were invalid and void according to Hindu law, and made a decree in favour of the plaintiffs.

On appeal the High Court (BANERJI and AIKMAN, JJ.) delivered separate judgments, the result of which was to vary considerably the decision of the Subordinate Judge.

BANERJI J, said :—

"The principal questions we have to determine in this appeal are, firstly, whether Gobind Ram left any and what property, and secondly, whether the property in suit or any portion thereof is the self-acquired property of Durga Prasad. We shall also have to consider the further question whether Durga Prasad threw any of his self-acquisitions into the common stock."

After discussing at length the evidence on the first point he came to the conclusion that—

"I am unable to concur with the opinion of the Court below that the oral evidence proves that Gobind Ram died possessed of property of considerable value."

As to the second point he said :—

"Both parties agree that after the death of Gobind Ram his three sons, Durga Prasad, Jwala Prasad and Hazari Lal lived jointly as members of a joint Hindu family until a partition of the joint property was effected on

the 24th April 1866. At that time the following items of immovable property were owned by the three brothers :—

(1) Sagalpur	... ...	3 biswas and odd.
(2) Fatehpur	... ...	17 biswas and odd.
(3) Abhairajpur	... ...	15 biswas.
(4) Milak land in Karampur	... ...	20 bighas.
(5) Milak land in Bohit	... ...	5 bighas.
(6) Grove in Salehnagar	... ...	6 bighas and odd.
(7) Dwelling house.		

The last two items were admittedly ancestral. Sagalpur, Fatehpur and the land in Karampur have been proved to have been acquired by the three brothers in 1851, or about that time. Sagalpur was purchased for Rs. 1,555 under sale-deed dated 3rd March 1851, and Fatehpur, by sale-deed dated 17th August 1851, for Rs. 1,605. The value of the land in Karampur is stated in the plaint to be Rs. 125 and there is nothing to prove the contrary. There is no evidence whatever to prove by whom the remaining items of property were acquired and when. It is contended that in the absence of evidence showing the source from which came the purchase money for the acquisition of these properties they must be presumed to be either ancestral property or property acquired with ancestral funds. With this contention I am unable to agree. The property was undoubtedly the property of the three brothers who formed a joint family, but, as rightly observed by Mr. Mayne (Hindu Law, 6th edition, p. 338), "property may be joint property without having been ancestral," and I am not aware of any presumption in Hindu Law that joint property must be deemed to be ancestral unless the contrary is shown. I agree with Farran, J., that "if in order that the plaintiffs should succeed in their suit it be necessary that the property . . . should be held to have been . . . ancestral property, it lies upon the plaintiffs to prove in some way or other that it was ancestral . . . . There is no presumption in Hindu Law upon the point which they can invoke in their favour." *Nanabhai Ganpat Rao* v. *Achratbai* (1). This view was approved by Sargent, C. J., and Bayley, J., in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (2) and we have not been referred to any authority in which a different opinion was held. The plaintiffs have not, in my judgment, given any credible evidence which proves that the property was acquired with ancestral funds. The learned Subordinate Judge says that as the sons of Gobind Ram had no income before 1852, it may be presumed that Sagalpur and Fatehpur were purchased by the three brothers with ancestral funds. This observation would have had considerable force had it been shown that there were ancestral funds with which the purchases could have been made, but there is no evidence worth the name on the point. Further, it is not strictly correct to say that the brothers had no income. Hazari Lal was, it is true, very young, but Jwala Prasad was holding the office of patwari. It is possible, and it is not improbable, that he and Durga Prasad raised money for the purpose of making the purchases. Durga Prasad was at the time about 22 years of age. He had received education

(1) (1886) I. L. R., 12 Bom., 123, at p. 131. (2) (1889) I. L. R., 13 Bom., 534.

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at the Bareilly College of a kind much superior to that generally obtained in those days by the son of a village accountant and expected to enter the service of Government, as he did about eighteen months later on a salary of Rs. 70 a month, not a very small sum in those days. He and Jwala Prasad were therefore in a position to borrow money for acquiring property. It must be admitted that there is no evidence that money was actually borrowed, but this is not to be wondered at having regard to the difficulty of obtaining such evidence after the lapse of nearly fifty years. There is, however, no *a priori* improbability as to the brothers having, as suggested, raised money on their own account for the purchase of property. Anyhow it was for the plaintiffs to prove the existence of ancestral funds and this they have failed to do. In the recent case of *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (3) their Lordships of the Privy Council affirmed the rule that "he who claims property through some other person must show the property to have been vested in that person." In this case the plaintiffs claim the property which their father possessed at the time of partition in 1866 on the ground that part of it was vested in Gobind Ram and the remainder was acquired with funds left by Gobind Ram. Upon the principle laid down by the Privy Council it was for them to establish their allegation, to use the words of Farran, J., "in some way or other." The dwelling house and the one-third share in the grove in Salehnagar yielded no income, and except the oral evidence which, as stated above, I consider to be untrustworthy, there is nothing to support the plaintiffs' allegations in regard to the rest of the property. The existence of an ancestral nucleus for the acquisition of other property has not, therefore, been established.

Even if it be assumed that the seven items of property mentioned above are either property left by Gobind Ram or property acquired with funds which belonged to him, I am of opinion that it has been satisfactorily shown that the income arising therefrom was wholly insufficient to form the nucleus for the subsequent acquisitions."

After referring to the expenses which had to be paid out of the income of Durga Prasad before it was available for further acquisitions he said:

"All these expenses could hardly be covered by the income of the property which he owned at the time of the partition; so that nothing went into his pocket which he could accumulate and employ in purchasing other property. In this respect the present suit closely resembles the case of *Lakshman Mayaram* v. *Jamnabai* (4). As in that case so in this the income from property which we may assume to be ancestral could not have formed the source from which was derived any part of the purchase money of the property acquired after partition, and therefore there was no nucleus of ancestral funds for the acquisition of that property.

From the above it follows that the property acquired after the partition of 1866 must have been acquired by Durga Prasad without the aid of ancestral

(3) (1899) I. L. R., 26 Calc., 871: L. R., 26 I. A., 226. (4) (1882) I. L. R., 6 Bom., 225.

funds and with his own separate earnings. There is, moreover, ample and satisfactory evidence which proves that the income of the property which existed before partition was not at all employed in the purchase of the property subsequently acquired. This evidence is afforded by the accounts of the firm of Jado Rai, Baldeo Prasad, which the plaintiffs have caused to be produced."

After examining and considering the accounts he said:—

"The conclusion at which I have arrived is that it has not been proved that there was any nucleus of ancestral property, and that it has been established on the contrary that the acquisitions made by Durga Prasad were made with his separate funds and without the aid of ancestral funds.

"The Court below has held that the separate acquisitions of Durga Prasad were thrown by him into the common stock and that they therefore formed the joint property of himself and his sons. This, it may be observed, was not the case set up by the plaintiffs in their plaint, but has been spelt out for them by the learned Subordinate Judge. No doubt, as Mr. Mayne says (p. 339, 6th edition) 'property which was originally self-acquired may become joint property, if it has been voluntarily thrown by the owner into the joint stock,' but he points out that 'to create such a new title, however, a clear intention to waive the separate rights of the owner must be established.' What is there in this case to show that Durga Prasad ever intended to waive his separate rights and to declare the whole of his property to be the joint property of himself and his sons? The only circumstance to which the Court below refers as indicating his intention is that he did not keep the income from the property separate from his salary, but 'amalgamated them into one general fund.' This certainly is not sufficient evidence of his intention to create a new title in his sons which they did not originally possess. The whole of Durga Prasad's conduct towards the plaintiffs, the feeling of displeasure and dissatisfaction which he entertained for them, negatived the existence of such an intention. This is not a case of the blending of separate property with joint property or of separate funds with joint funds, and I am unable to agree with the view of the Court below on the point.

"In my judgment the plaintiffs have failed to substantiate their claim except as to the grove in Salehnagar and the dwelling house called the 'dewankhana,' both of which are ancestral property. As to these two items of property the will of Durga Prasad cannot have any operation so as to deprive the plaintiffs of their vested interest in them. To this extent the decree of the Court below should, I think, be sustained, but the remainder of the claim must be dismissed, the appeal allowed and the decree of the Court below set aside."

AIKMAN, J., said:—

"I concur generally in the judgment which has just been delivered by my learned brother. In addition, however, to the items of property in respect of which he would sustain the decree of the lower Court, I would sustain that decree in respect of two other items, namely, the shares in Fatehpur and Sagalpur (items 6 and 7 in the first schedule attached to the plaint). These

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shares were purchased two years after the death of Gobind Ram by his three sons, who were then aged twenty-two, twenty and thirteen years, respectively. At the time of the purchase Durga Prasad had not entered Government employment. It is true that the second son, Jwala Prasad, was at the time a patwari, but his pay as such would not at the outside be more than Rs. 10 a month. I consider it in the highest degree improbable that these youths could raise money by borrowing for the purchase of these properties. I have no hesitation in saying that Hazari Lal has grossly exaggerated the amount of the property left by his father, but I believe that the father did leave enough to enable his sons to make the purchase referred to above. As has been shown by my learned colleague, the income of these two properties was not sufficient to form a nucleus for the acquisition of the other properties, which I agree in finding were acquired by Durga Prasad from his own savings."

The result of the decree of the appellate Court was by upholding the will of Durga Prasad of the 11th December 1883 to deprive the plaintiffs of all the property in suit except their shares in the grove in Salehnagar, the "Dewankhana," Fatehpur and Sagalpur.

On this appeal *W. A. Raikes* for the appellants contended that the High Court had wrongly placed the *onus* of proof on the appellants. As the family was a joint Hindu family and admittedly possessed of some ancestral property, the presumption was that the properties were all joint, and it was for the respondent to prove his contention that the properties in suit had been purchased by self-acquired funds. Reference was made to *Dhurm Dass Pandey* v. *Shama Soondri Dibiah* (1); and *Gopee Krist Gossain* v. *Ganga Persaud Gossain* (2). If there was only a nucleus of ancestral property that was all that was necessary, and it was shown by the evidence that there was a considerable amount of ancestral property. Such of the ancestral property as descended to Durga Prasad by inheritance, and any property purchased with ancestral funds, or the income of such ancestral property became joint property which vested in his sons at their birth, and which Durga Prasad was incompetent to deal with by alienation or by will without his son's consent. He could not therefore give it to one to the exclusion of the others unless the latter agreed to its being so dealt with. Here, it was submitted, the ancestral property contributed in a material degree to the acquisition of the funds with which the other properties were purchased, so that the

(1) (1843) 3 Moore's I. A. 229 (240). (2) (1854) 6 Moore's I. A. 53.

properties so acquired became joint property. *Rampershad Tewarry* v. *Sheo Churn Dass* (1); and *Luximon Row Sudasew* v. *Mullar Row Bajee* (2) were referred to. The augmentation or improvement of the joint property by one member with the aid of joint funds would make such augmentation or improvement joint property. Reference was made to *Guruchurn Doss* v. *Golukmonee Dossee* (3) and *Lakshman Mayaram* v. *Jamnabai* (4). As to the gains made by a member of a joint family who has received education out of the joint funds *Durvasula Gangadharudu* v. *Durvasula Narasammah* (5) was cited showing that such gains became joint and inalienable. There was only one account kept of all the funds, which showed that Durga Prasad mixed what would otherwise have been his self-acquired funds with the joint funds, and by so doing made them joint.

G. E. A. Ross for the respondent contended that the property in suit was the self-acquired property of Durga Prasad, and was not acquired by the use of joint ancestral funds. The evidence showed, and the High Court had rightly found, that Gobind Ram left but very little ancestral property, and that the income of Durga Prasad's share of it was quite insufficient, after meeting the expenses of his family, to enable Durga Prasad to acquire the properties now in suit. It was also proved that Durga Prasad had a considerable income of his own from which he could have acquired such properties, and after the admitted partition of Durga Prasad and his brothers the presumption was that he did so acquire them, and the onus had been rightly placed on the appellants to show they were acquired by joint funds. It was contended on the findings of the High Court, which, it was submitted, were correct, that there was no nucleus of ancestral property from which other properties could have been purchased, and that it was conclusively shown that Durga Prasad had purchased them with his self-acquired funds. "Nucleus" of ancestral property meant income of ancestral property, and there was never sufficient of such income to purchase the properties now in dispute. Reference was made to Mayne's Hindu Law, 7th edition, page 348 and the same authority, page 343, paragraph 275, 6th edition, page 333. Durga Prasad was

(1) (1866) 10 Moore's I. A. 490 (505).
(2) (1831) 2 Knapp, P. C. 60.
(3) (1843) 1 Fulton, 165 (174).
(4) (1882) I. L. R., 6 Bom., 225.
(5) (1872) 7 Mad., H. C., 47.

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therefore entitled to dispose of the property in suit (other than that excepted in the decree of the High Court), and his will was valid.

Raikes replied.

1907, *February 8th.*—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

The litigation in this case began between three brothers, sons of one Durga Prasad, two of whom, named Lal Bahadur and Jagdamba Prasad, brought a suit against their elder brother, Kanhaiya Lal, the present respondent, to set aside a will made by their father, which they contended was invalid and void according to Hindu law. Jagdamba Prasad has died since the institution of the suit, and his minor sons represent his interest in this appeal.

Durga Prasad was one of the three sons of one Gobind Ram, and it is admitted that he separated from his two brothers, Jwala Prasad and Hazari Lal, in 1866. Up to that time the three brothers had formed a joint Hindu family; but a complete partition of the family property, whatever it was, was then made between them. At the date of the partition, two of Durga Prasad's sons, Kanhaiya Lal and Lal Bahadur, were living; the third son, Jagdamba Prasad, was born subsequently.

The most important question which their Lordships have had to consider, has been, how much (if any) of the property then partitioned was ancestral; and this depends upon how much property was left by Gobind Ram at the time of his death in 1849. For the respondent it was at one time contended that "he left no funds or immovable property;" but that contention has since been abandoned. In the High Court, Banerji J., found that the only immovable property left by him was a grove in Salehnagar, which is valued at Rs. 666 in the plaint, and a dewankhana, which, it is admitted, was awarded to Durga Prasad at the time of the partition. But Aikman, J., while concurring generally with the judgment of Banerji, J., held that certain estates known as Fatehpur and Sagalpur must also be treated as having descended from Gobind Ram. And at the hearing before their Lordships, the learned Counsel for the respondent admitted that a third estate, named Abhairajpur, must be taken as standing on the same

footing as the two awarded by Aikman, J. There is therefore no doubt that these five properties at least were inherited from Gobind Ram.

There is evidence that he had other properties also. A witness called on behalf of the respondent, named Bhairon Prasad, who is quite unconnected with the family, but [illegible]tive of the banking firm by which Gobind Ram was employed, says that he used to see Gobind Ram. "He was a *patwari* (of several [illegible]ages), and a *karinda* (agent) of Chaudhri Naubat Ram," the [illegible]ss' uncle. "He used to come to Chaudhri Saheb's house." "He was worth twenty or twenty-four thousand rupees." As this witness was 21 years of age at the time of Gobind Ram's death, and was in the habit of sitting daily at his uncle's place of business, he would have the means of knowing something about the persons employed in his uncle's firm, though he might not be minutely acquainted with their affairs, and their Lordships see no reason for discrediting his testimony. It tends to confirm the evidence of Hazari Lal, who values his father's estate at forty-thousand rupees, and says that besides immovable property he had mortgages and monetary dealings which, after his death, were gradually realized in cash by his sons. Hazari Lal's evidence was disbelieved on some points by Banerji, J., but after making every allowance for exaggeration on his part, their Lordships cannot but come to the conclusion that Gobind Rani left considerable property both in land and securities for money.

This conclusion is supported by the circumstances of his family at and immediately after his death. It is conceded that he and his three sons constituted a joint Hindu family. When he died in 1849, his son Durga Prasad was about 20 years of age and a student at Bareilly College; Jwala Prasad was 17 or 18 years of age; and Hazari Lal 10 or 11. All three were maintained and educated at their father's expense. No one of them was in any employment until October 1852, when Durga Prasad, then a first-class student at the Bareilly College, was appointed Officiating Visitor of the Bareilly District, on a pay of Rs. 70 per month. For about three years, therefore, the three brothers had been living on funds which they had not earned; and as they had also, in 1851, purchased the two estates of Fatehpur

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and Sagalpur, to which reference has already been made, for Rs. 1,605 and Rs. 1,550, respectively, it is tolerably clear that the money for these purchases must have been provided from funds left by their father. Abhairajpur was still more valuable, as in 1870 it was leased, together with Fatehpur and a fraction of Sagalpur, at a jama of Rs. 1,300 per annum. There is evidence also that Gobind Ram had lands in Kunja and other villages; and it is certain that besides the dewankhana already mentioned he left several houses in Bareilly, which are still in possession of members of the family. There were also debts due to, and mortgages held by, him.

The property left by Gobind Ram, with its accretions, was held jointly by his three sons from the time of his death in 1849 until 1866. In that year a partition of the joint estates was made between the three brothers, and there is no suggestion that, at that time, any of them had any separate estate. The share then taken by Durga Prasad was undoubtedly ancestral property, as between him and his sons, who from the moment of their birth acquired an interest in it. And as after the partition he and his sons lived together as a joint Hindu family until the time of his death in 1894, it is clear that he had no right to dispose by will of, at all events, this part of his property.

But it was contended that any property acquired by Durga Prasad after the partition was acquired by him "without the aid of ancestral funds, and with his own separate earnings," and that he therefore had the right to dispose of it as self-acquired property. This argument derives support from the fact that, after entering the service of Government in 1852, Durga Prasad held various offices in the Education Department. In 1858 he was a Head Clerk in the English office, with a salary of Rs. 150 per month; in 1862 he was a head master on a salary of Rs. 200 a month; in 1866 he was appointed a Junior Inspector of Schools on Rs. 300 per month, and eventually he became an Inspector of Schools on a salary of Rs. 750 per month. In 1885, he retired on a pension of Rs. 4,000 a year. During the latter years of his life, therefore, he was in a position to save a fair portion of his income. But what are the circumstances of the case? It is admitted that Durga Prasad and his sons lived together as a joint Hindu family, and

it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was therefore on the respondent to prove that his subsequently acquired property was his separate estate. How has the onus been discharged? The most reliable evidence on the point is that contained in the books of Lachmi Narain, a native banker of Bareilly, with whose firm Durga Prasad kept an account from 1866, the year of the partition, until 1884, when it was closed. These books were produced on behalf of the appellant, and the clerk who produced them said:—"I knew Durga Prasad. He had an account with the firm. The income from villages and pay used to be deposited. There was but one account." So far as their Lordships are able to form an opinion, this appears to be a correct description, and it was not controverted by the learned counsel for the respondent. The entries show that properties of considerable value were from time to time purchased by Durga Prasad, and that he did not in any way descriminate between the sources of his income, but blended them all in one general account. There is oral evidence, also, that his sons when they became of age to earn their own living, gave the pay which they received to their father, with whom they lived and by whom they were supported. This is strong evidence that there was but one common stock of the whole family, into which each member of the family threw what he might otherwise have claimed as self-acquired; and that the property purchased by, or with the assistance of, the joint funds, was joint property of the family, and not of any particular member of it.

In the last year of his life Durga Prasad became dissatisfied with the conduct of his two younger sons, and made and registered a will, dated 3rd April 1893, by which, in effect, he divided the family property, which he treated as having been "exclusively acquired" by himself, in unequal shares between his three sons. By a subsequent will, dated 11th December 1893, which practically revoked the former will, and the execution of which is not now contested, he gave an allowance of Rs. 35 per month, and a dwelling-house to each of his two younger sons, and left the whole of his remaining property to his eldest son, the present respondent. In this will no particulars of his property are given, but it purports to deal with "all the movable and immovable properties which

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will constitute my estate on my death and which are my self-acquired properties."

In the view which their Lordships take of this case, there were no properties of Durga Prasad at the time of his death which, according to Hindu law, could be classified as self-acquired, and the will is therefore inoperative to defeat the claim of the younger sons to a share in the family estate. They will therefore humbly advise His Majesty that the appeal ought to be allowed and the judgment of the High Court reversed with costs, and that the decree of the Subordinate Judge of Bareilly, dated 30th March 1898, ought to be confirmed. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants :—*T. C. Summerhays & Son.*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

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November 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PREONATH MUKERJI (PLAINTIFF) *v.* BISHNATH PRASAD (DEFENDANT).*

Civil Procedure Code, section 43—*Suit for fees for medical attendance —Fees partly secured by a promissory note—Separate suits upon the promissory note and for the unsecured balance—Latter suit barred.*

A, a doctor, agreed with *B* to accompany *B* to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B* gave *A* a promissory note for Rs. 700, representing seven days' fees. *B*, who was a vakil, also promised to assist A professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued B's son upon the promissory note first, and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares. *Held* that the second suit was barred by the provisions of section 43 of the Code of Civil Procedure so far as the fees for attendance at Hardwar were concerned, though not in respect of the other fees claimed.

IN this case the plaintiff had been the medical attendant of the father of the defendant. The plaintiff alleged that in June

* Second Appeal No. 705 of 1905, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 6th of June 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 13th of February 1905.