APPELLATE CRIMINAL.

1908
April 29.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR *v.* MATA PRASAD.*

Criminal Procedure Code, sections 234, 235—*Charge—Misjoinder of charges—Illegality.*

An accused person was charged with and tried for, first, three separate acts of criminal misappropriation committed within a year, and, secondly, two separate offences of forgery with intent to conceal two of such acts of criminal misappropriation. *Held* that this was an illegality not covered by the provisions of section 537 of the Code of Criminal Procedure.

THIS was a point referred by Griffin, J., to a Division Bench. The circumstances out of which the question arose appear from the referring order.

Mr. *M. L. Agarwala*, for the appellant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

GRIFFIN, J.—The appellant in this case has been convicted in one and the same trial on three charges of criminal misappropriation and on two charges of forgery to cover up two items said to have been embezzled. He has been sentenced in the aggregate to 6 years on the charges under section 409, Indian Penal Code, and to 8 years under section 467, Indian Penal Code.

It is contended on his behalf that the trial of the accused was bad, inasmuch as there has been an illegal joinder of charges. I am referred to the rulings in *Subrahmania Ayyar* v. *King-Emperor* (1), *Kasi Viswanathan* v. *King-Emperor* (2) and *Manavala Chetty* v *Emperor* (3).

The point is one that does not appear to have come before this Court. At least I have not been referred to any ruling bearing upon it. It is one of some importance, and I think should be decided by a Bench of two Judges. I accordingly refer the point to a Division Bench.

On this reference the following order was passed.

KNOX and AIKMAN, JJ.—We think that the first plea taken in the petition of appeal must be sustained. The appellant was

* Criminal Appeal No. 46 of 1908 against an order of W. R. G. Moir, Additional Sessions Judge of Gorakhpur, dated the 20th November 1907.

(1) (1901) I. L. R., 25 Mad., 61. (2) (1907) I. L. R., 30 Mad., 328.
(3) (1906) I. L. R., 29 Mad., 569.

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charged with three separate acts of criminal misappropriation committed within one year. He was also charged with having committed two separate offences of forgery. All these five offences were tried together at one and the same trial. The joint trial of these five offences cannot be supported by any provision contained in the Code of Criminal Procedure. The series of acts charged do not form the same transaction.

We therefore set aside the conviction and order new trials on charges framed in accordance with law. The three acts of criminal misappropriation may form the subject of one trial. Evidence of forgeries may be given in support of the charges of misappropriation. If it is desired to try the accused for the forgeries that must form the subject of a separate trial.

APPELLATE CIVIL.

1908
May 1.

[Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

HIMMAT BAHADUR AND ANOTHER (PLAINTIFFS) *v.* BHAWANI KUNWAR AND ANOTHER (DEFENDANTS).*

Hindu law—Hindu widow—Payment by wife of husband's debts during his lifetime—Voluntary payment—Joint Hindu family—Sale of property belonging to one member of a joint family—Separation—Sale set aside—Rights of persons entitled to such property after separation.

Held that the payment by the wife of a separated Hindu of her husband's debts during his lifetime must be considered in the absence of evidence to the contrary as a voluntary payment, and will not support an alienation by the widow after her husband's death of the estate which has descended to her from him.

Held also that the members of a joint Hindu family must be regarded, so far as concerns the dealings of the family with persons outside it, as but one juristic person.

The managing member of a joint Hindu family sold a property exclusively belonging to one member of the joint family, and the proceeds of the sale were brought into the common purse for the benefit of the family. *Held* that on the sale of that property being set aside after the separation of that member, he could recover the whole property on payment of the whole purchase money, but that he could not claim to have it by paying only a share of the purchase money proportionate to his share in the joint family property

* First Appeal No. 243 of 1905 from a decree of Madho Das, Subordinate Judge of Shahjahanpur, dated the 11th of August 1905.

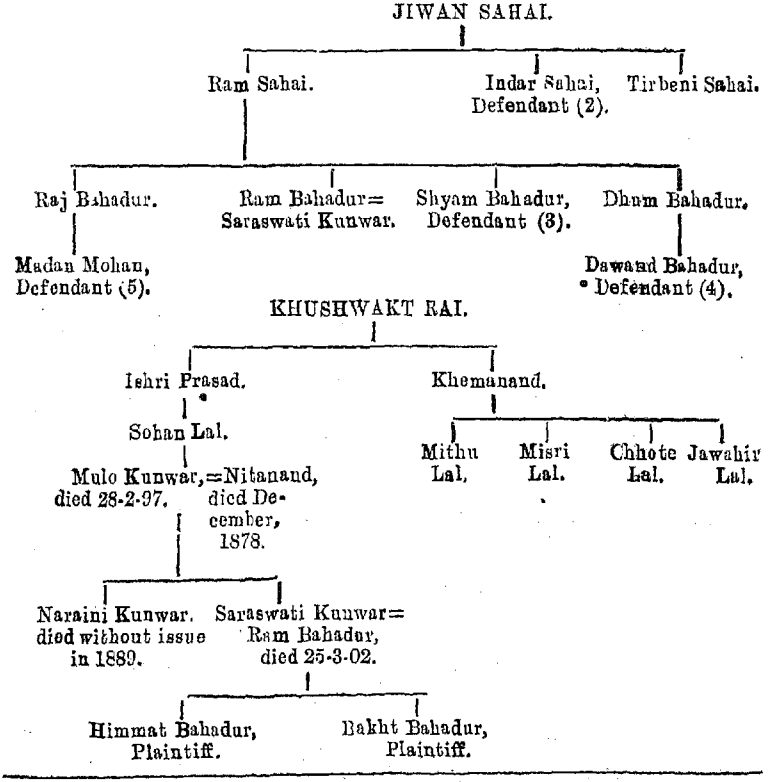
on partition. *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), *Appovier* v. *Rama Subba Aiyan* (2) and *Hasmat Rai* v. *Sunder Das*, (3) referred to.

THE facts of this case are fully stated in the judgment of Karamat Husein, J.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru*, the Hon'ble Pandit *Sundar Lal*, Mr. *G. W. Dillon* and Dr. *Satish Chandra Banerji*, for the appellants.

Sir *Walter Colvin*, and Messrs. *Abdul Majid* and *B. E. O'Conor*, for the respondents.

KARAMAT HUSAIN, J.—Before stating the facts of the case I set forth the following pedigree. It will show the relation of the parties to the suit, with the exception of Musammat Bhawani Kunwar who is a transferee of Jiwan Sahai under the sale-deed of the 9th February 1892. The suit was instituted on the 14th December 1904.



(1) (1901) I. L. R., 25 Mad., 149. (2) (1866) 11 Moo., I. A., 75.
(3) (1885) I. L. R., 11 Calc., 396.

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The facts which have led up to this appeal are as follows :—

One Malik Muhammad Ali Khan obtained two decrees against Ishri Prasad and his brother Khemanand. One was dated the 17th August, 1822, for Rs. 23,348-3-0 and the other was dated the 20th August, 1822, for Rs. 17,800. These decrees were put in execution from time to time, and a sum larger than that which was actually due was realized under them. A suit then was instituted for the ascertainment of the excess, and the High Court in 1869 fixed it at Rs. 41,600. Soon after the amount of the excess had been fixed, the heirs of Ishri Prasad and Khemanand started proceedings to recover it from the property of Husaini Begam, a daughter of Malik Muhammad Ali Khan. The village Parewa belonging to her was attached and sold on the 20th September 1877. One Nur Ahmad purchased it for Rs. 52,000. Babu Ram Sarup, who had purchased the rights and interests of two of the four sons of Khemanand, realized on the 27th and 28th November, 1877, Rs. 49,107 out of the sale-proceeds of Parewa, and deposited the same with Jadon Rai and Baldeo Prasad. Out of the sum so deposited Musammat Mulo Kunwar withdrew sums amounting to Rs. 21,475 by instalments. Out of the money so received she applied Rs. 17,612 to the payment of the debts due by her husband Nitanand in his life-time.

The sale of Parewa in a suit brought by one Altaf Ali Khan was set aside on the 30th of January 1878, and on the sale being set aside Nur Ahmad on the 12th December 1878 applied for the return of his purchase money and his application was granted on the 20th December 1878. He proceeded against the property which Musammat Mulo had inherited from her father and her husband. She sued Nur Ahmad for a declaration that she was not liable to refund the entire sum realized by Ram Sarup. The High Court on the 25th November 1878 held that she as an heir of Ishri Prasad was liable to pay the entire amount. Nur Ahmad realised portions of his claim and a balance of Rs. 21,815-6-6 remained due to him. This is the balance for which, according to the allegations in paragraph 15 of the plaint, the heirs of Khemanand alone were liable. Jiwan Sahai paid this balance, at the instance of Musammat Mulo Kunwar, to Aziz Ahmad and Zamir Ahmad, sons of Nur Ahmad, for the discharge of the money due

to their father. The money was paid out of the proceeds of the sale of the property which was sold by Jiwan Sahai to the sons of Nur Ahmad on the 4th of May 1885.

In order to pay the debt due to Jiwan Sahai Musammat Mulo Kunwar sold to him on the 30th September 1890 for Rs. 17,665 the property in suit which she had inherited from her husband. As Musammat Saraswati, mother of the plaintiffs, was recorded in the revenue papers as owner of the property in dispute, she also joined her mother in selling the property to Jiwan Sahai. On the 9th February 1892 Jiwan Sahai and Banke Bihari Lal, a co-sharer in the village, sold the entire 20 biswas of the village Yusufpur and 13 biswas 6 biswansis 6 kachwansis and 15 nanwansis in the villlage of Deora Shaikhpur to Bhawani Kunwar for Rs. 30,000. The property sold included the property in dispute and the share of Jiwan Sahai in the sale proceeds was Rs. 17,400. Besides selling the property in dispute to Bhawani Kunwar, Jiwan Sahai executed an agreement on the 9th February 1892, in which he covenanted that in the event of the plaintiffs recovering the property from her she would be entitled to recover the price paid by her from certain immovable property of his which was specified in the agreement.

As Bhawani Kunwar could not pay the whole price of the property so purchased by her she hypothecated it in favour of Jiwan Sahai by way of security under a deed of the 11th February 1892. She from time to time paid portions of the mortgage debt with interest. After the death of Jiwan Sahai she deposited the balance of the mortgage debt, *i. e.*, a sum of Rs. 5,456-10-3, in Court for payment to the representatives of Jiwan Sahai.

Indar Sahai and others applied on the 27th July 1899 for payment to them of the money so deposited, but their application was refused. On the 19th March 1902 another application for payment was made by them, but it was also unsuccessful. The case of the plaintiffs with reference to the facts stated above is that they are the heirs of their maternal grandfather Nitanand; that the sale of the property left by Nitanand was made by Mulo Kunwar without legal necessity and was therefore void as against them, and that they are entitled to a decree for proprietary possession hereof. They also allege that for the payment of Rs. 21,815-6-6

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the heirs of Khemanand alone were liable. Bhawani Kunwar in her defence pleaded that the heir of Jiwan Sahai were necessary parties to the suit; that the suit was barred by limitation; that the plaintiffs were estopped from questioning the sale carried out by Jiwan Sahai; that the debts due by Nitanand were paid out of the sale proceeds of Parewa, and that it was the duty of Mulo Kunwar and Saraswati to sell the property of Nitanand to discharge his debts; that the sale of the 30th September 1890 is binding upon the plaintiffs; that the plaintiffs and Jiwan Sahai were members of a joint Hindu family and as such were benefited to the extent of the funds realised by the sale effected by Jiwan Sahai, and that the plaintiffs are bound by that sale.

The learned Subordinate Judge framed the following issues:—

1. Is the plaintiffs' suit barred by limitation?

2. Is the suit barred by section 115 of the Indian Evidence Act?

3. Was the estate of Khemanand alone liable for the sum of Rs. 21,815-6-6 paid by Musammat Mulo Kunwar through Jiwan Sahai for the discharge of Nur Ahmad's decree, or was Ishri Prasad's estate also liable for it?

4. Were any debts of Nitanand, and if any, of what amount, repaid out of the money forming the consideration for the sale-deed of 30th September 1890 executed by Mulo Kunwar in favour of Jiwan Sahai, and what effect has this fact on the alienation of Nitanand's property which is the subject matter of the suit? What are the plaintiffs' liabilities under the deed?

5. Are the plaintiffs bound by the transfer made by Jiwan Sahai to Bhawani Kunwar because he was their (great) grandfather?

6. Were Jiwan Sahai and the plaintiffs members of an undivided Hindu family, and what effect has this fact in the suit?

7. Is Indar Sahai a necessary party to the suit? Did Jiwan Sahai transfer the property to Bhawani Kunwar in good faith?

Regarding the 7th issue the learned Subordinate Judge says:—"Indar Sahai has subsequently been made a party to the suit. He denies his connection with the suit and the correctness of the plaintiffs' claim." His finding on the first issue was that the suit was not barred by limitation, inasmuch as the alienation sought to be

set aside had been made during the minority of the plaintiffs and as the suit was instituted within three years of their attaining majority. On the second issue he found that the plaintiffs were not estopped, as they were not parties to the applications of the 27th July 1899 and the 19th March 1902 relied on by the defendants. On the 3rd issue he found that under the decree of the High Court dated the 25th November 1884 the estate of Ishri Prasad was liable for Rs. 21,815-6-6. On the 4th issue he came to the conclusion that, although the debts due by Nitanand were paid off by Mulo Kunwar from her share in the sale proceeds of Parewa yet the plaintiffs were bound by the sale. The learned Subordinate Judge, on the findings already stated, dismissed the plaintiffs' claim without trying issues 5 and 6. The plaintiffs then preferred this appeal to this Court. The grounds urged in appeal are to the effect that the voluntary payments made by Mulo Kunwar in the life-time of her husband towards the discharge of debts due by him did not entitle her after his death to transfer his property and that the plaintiffs are not bound by the sale effected by her. It was also urged on the plaintiffs' behalf that they were entitled in any event to a decree for the recovery of the property in suit on payment of such sum of money as the Court should consider them liable to pay.

The appeal came on for hearing on the 11th December 1907, and the following three issues were referred by this Court under section 566 of the Code of Civil Procedure for trial to the Court below:—

"1. At the date of the sale to Musammat Bhawani Kunwar and the receipt of the purchase money were the plaintiffs and Jiwan Sahai *members of a joint Hindu family?*"

"2. If the family was not joint at that time, or had ceased to be joint since that time, to what share of the joint estate did the plaintiffs become entitled on separation?"

"3. Did the plaintiffs receive any, and, if so, what benefit from the purchase made by Musammat Bhawani Kunwar from Jiwan Sahai?"

On the first issue the learned Subordinate Judge found that the plaintiffs and Jiwan Sahai were joint on the date of the sale to Bhawani Kunwar and the receipt of the purchase money.

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No objection has been taken to this finding. His finding on the second issue was that, according to the plaintiffs, separation took place in 1894 among all the members of the family, while according to the defendant Indar Sahai alone separated in 1897, and that plaintiffs became entitled to a one-eighth share in the joint estate on separation. On the third issue the learned Subordinate Judge found that the plaintiffs were to be presumed to be benefited to the extent of one-eighth of the sale consideration of Rs. 17,400, *i.e.* Rs. 2,175. Objections were taken to the above findings to the effect that as the price was received while the family was joint it was not correct to say that the plaintiffs were benefited to the extent of one-eighth of the price only.

At the hearing of the appeal on the return of the findings two points were urged on behalf of the appellants. First, it was urged that as the payments which were made by Mulo Kunwar were made in the life-time of her husband they could not come within the meaning of the term "debt" for the discharge of which his widow could lawfully sell the property she had inherited from him. Secondly, it was contended that as the plaintiffs on separation were benefited to the extent of one-eighth of the price, they were entitled to recover the property in dispute on the payment of Rs. 2,175. The first contention, in my opinion, is well founded. The obligation to pay the debt of a person whose estate is taken by another person rests as Mr. Mayne puts it, "upon the broad equity that he who takes the benefit should take the burden also." (Mayne on Hindu Law, § 327, p. 423, 7th edition.) The existence of debts due by the ancestor at the time of his death is therefore a condition precedent to the liability of the heir to pay them. If there are no debts due by the deceased his heir has no burden to take. In the case before us certain debts incurred by Nitanand were no doubt paid off by his wife, but they were paid in his life-time. In the absence of any evidence to prove the contrary, those payments must be presumed to have been voluntary payments and the presumption gains much strength from the relationship of husband and wife in which the parties stood to each other. Such being the case, the property which Mulo Kunwar inherited from her husband Nitanand could not be made liable

for the debts which had no existence at his death and the transfer of such property by her could not be deemed to be a transfer made for the payment of his debts. The plaintiffs therefore could not be bound by the sale deed executed by Mulo Kunwar on the 30th September 1890.

For the decision of the second point, *i.e.*, the right of the plaintiffs to recover the property in dispute on payment of Rs. 2,175, it is to be borne in mind that Bhawani Kunwar is in possession of that property; that Jiwan, who presumably was the manager of the joint Hindu family, sold it for the benefit of the family with an undertaking to make good any loss which Bhawani Kunwar might sustain if she were dispossessed of it in a suit by the plaintiffs; that the plaintiffs were joint with Jiwan Sahai at the time of the sale and receipt of the purchase money, and that this purchase money was brought into the common purse of the joint Hindu family for the benefit of the family.

In addition to the above facts two traits of a joint Hindu family governed by the Mitakshara are also to be borne in mind. They are the *unity of juristic existence* in dealings with third persons and the *unity of ownership* of the joint property by the members of the joint family. That these traits are to be found in such a joint family will appear from the following remarks:—"The term 'joint' in the expression 'joint Hindu family' has been borrowed from the language of English Property Law." (K. K. Bhattacharyya, Joint Hindu Family, page 51, edn. of 1885.) It is not only the term 'joint' which has been borrowed from the English law: several incidents of joint tenancy have also been imported into the law governing a joint Hindu family. "As soon as it was observed that there was a very tangible analogy between Hindu coparceners and English joint tenants, it was inevitable that incidents of English joint tenancy should have been extended to the legal position of the Hindu coparceners, at least in cases where such extension did not run counter to anything to be found in the original texts. We must remember that the Judges who did this had no other course left open to them; for they were familar with the law of English joint tenancy; they saw nothing in the original texts,

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or in the translations, to guide them in the particular instances; certainly the most reasonable course for them was, avowedly or not, to take advantage of that other law they were familiar with, supported as this course was with the analogy already adverted to." (K. K. Bhattacharyya, Joint Hindu Family, p. 54, 55, edn. of 1885.) Out of the incidents of the joint tenancy which have been introduced into the law of the joint Hindu family I am here concerned with two. The first is that all the joint tenants as regards strangers are deemed for juristic purposes as *one single individual*. "A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves the properties of one single owner" (Williams on Real Property, page 133, 18th edn.). "Joint tenancy, as its name bespeaks, is essentially a joint interest: whatever may be their rights as between themselves, as regards strangers all the holders of an estate in joint tenancy are regarded but as a single individual. It results from this principle, that, so long as there remains any participant of the joint ownership, so long does the estate continue, and therefore, in case of the death of one or more it will survive to the remainder." (Goodeve, Real Property, p. 239, 2nd edn.). "The joint tenants are as regards third persons considered to be one single owner" (Shephard and Browne on the Transfer of Property Act, p. 145, 6th edn. This *unity of juristic existence* finds its place in the law of the joint Hindu family, as appears from the following passages:— "This old law laid down by the original texts prohibiting the members from reciprocally bearing testimony, or becoming sureties or giving or accepting presents seems to be founded upon the principle that all the members together constitute a single entity in the eye of law" (K. K. Bhattacharyya, Joint Hindu Family, p. 203, edn. of 1885.) Sir W. Bhashyam Ayyangar in *Sudarasanam* v. *Narasimhulu* (1) remarks:—"But so long as a family remains an undivided unit, two or more members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit, but if they comprise all the members of a branch they can form a distinct and separate corporate unit within the larger

(1) (1901) I. L. R., 25 Mad., 149, at p. 155.

corporate unit and hold property as such." The second trait, *i.e.*, the *unity of the ownership* of the joint property by the members of a joint Hindu family under the Mitakshara has been explained by their Lordships of the Privy Council in *Appovier* v. *Rama Subba Aiyan* (1) as follows:—"According to the true notion of an undivided family in Hindu law no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rents, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of the undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of an undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has henceforth a definite and certain share which he may claim a right to receive and enjoy in severalty, although the property itself has not been actually severed and divided."

Now I have to consider certain consequences of the two unities already mentioned. A corollary of the unity of ownership is that the plaintiffs cannot be deemed to have been benefited to the extent of one-eighth of the sale consideration. The fact that at a subsequent separation they got one-eighth of the joint property cannot be a measure of the benefit received by them at a former time when they were joint. The above corollary settles the question of the *quantum* of the liability of the plaintiffs, for if their benefit in the sale consideration is not a determinate share, their liability cannot be for a proportionate share of it. This leads me to consider whether they are or are not liable to refund the sale consideration at all. Having regard to a corollary of the unity of the juristic existence in dealings with third persons all

(1) (1866) 11 Moo., I. A., 75.

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the members who formed this joint Hindu family at the receipt of the price of the property sold to Bhawani Kunwar are jointly liable for the whole of it. If the sale in her favour is set aside, she is entitled to a refund of the whole price paid by her, and she can recover it from one of the members who constituted the joint Hindu family at the time of its receipt as well as from the entire group. The plaintiffs as heirs of Nitanand are entitled to have the sale of his property to Jiwan Sahai set aside, but as members of a joint Hindu family for the common benefit of which the whole consideration of the sale by Jiwan Sahai was brought into the common purse of the family are liable to refund the whole of it to Bhawani Kunwar. They cannot say that on a subsequent partition they got one-eighth of the family property only and therefore have a right to recover the property on payment of the one-eighth of the purchase money. That share was their right on partition with reference to the other members of the joint family, but the liability as regards Bhawani Kunwar is a single liability to return the whole of the purchase money paid by her. The case of *Hasmat Rai* v. *Sunder Das*, (1) though not on all fours with the present case, favours the view taken by me. According to that case, if the sale to Bhawani Kunwar were set aside, the whole of the purchase money would be a debt of Jiwan Sahai, and unless his son showed that it had been contracted for immoral purposes mentioned in the Hindu Shastras, the whole of the joint family property would be liable for it, and the sons could not recover the whole or any portion of the property sold without refunding the whole of the purchase money. For the above reasons I hold that the plaintiffs are entitled to recover the property in dispute from Bhawani Kunwar on the payment of Rs. 17,400. I would therefore allow the appeal, set aside the decree of the Court below and give the plaintiffs a decree for possession of the property in suit provided that they deposit into Court for payment to Musammat Bhawani Kunwar defendant No. 1 a sum of Rs. 17,400 (seventeen thousand four hundred) on or before the 1st November, 1908. If they fail to deposit the said sum of Rs. 17,400 their suit shall stand dismissed with costs in both Courts. The plaintiffs will be entitled to mesne profits from the date of deposit

(1) (1885) I. L. R., 11 Calc., 396.

into Court to the date of delivery of actual possession to them of the property in suit.

STANLEY, C. J.:—I agree with my learned colleague in the conclusion at which he has arrived. The questions involved in the appeal present some difficulty, particularly the question whether the plaintiffs appellants could be put under terms to pay the amount of the purchase money paid by Musammat Bhawani Kunwar to Jiwan Sahai, or any part of that sum, as a condition precedent to the recovery of the property claimed. It appears to me, however, in agreement with my learned brother, that we cannot say that the benefit of the payment made to Jiwan Sahai, who was the head of the joint family of which the plaintiffs were members at the time can be now sub-divided so as to enable us to say that the plaintiffs only partially enjoyed the benefit. Under all the circumstances, I think that if the plaintiffs are to recover the property they are in equity bound to pay the amount of the moneys received by the head of the family when it was joint, that is, the sum of Rs. 17,400. It may be that the plaintiffs, if they pay this amount, will be entitled to recover contribution from the other members of the family. This question, however, is not before us. I concur in the order proposed.

BY THE COURT:—The appeal is allowed, the decree of the Court below is set aside, and a decree for possession of the property in dispute given to the plaintiffs, provided that they deposit in Court for payment to Musammat Bhawani Kunwar the defendant No. 1 a sum of Rs. 17,400 on or before the 1st of November 1908. On payment by the plaintiffs of the aforesaid sum, they will be entitled to the costs of this appeal and also the costs in the Court below, also to mesne profits from the date of the deposit up to the date of delivery of actual possession. If they fail to make the deposit their suit shall stand dismissed with costs in both Courts.

Appeal decreed.