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an inquiry under section 202 of the Code or after issue of summons to the accused person. My attention has been called to certain rulings of this Court, e.g. *Queen Empress* v. *Ajudhia* (1), but an examination of these rulings shows that they were all cases in which the accused was tried and discharged and a further inquiry was ordered behind his back and without notice issued to him. The present is not a case in which it was necessary to issue notice to the accused persons before ordering further inquiry. I therefore reject the application. The proceedings which have been stayed will be continued.

Application rejected.

PRIVY COUNCIL.

*P. C. 1912, November, 7, 8. December, 10.

SURAJ NARAIN AND ANOTHER (PLAINTIFFS) v. IQBAL NARAIN AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Hindu law—Joint family—Allegation of separation in suit by some members for separate share—Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family, allegation of—Non-receipt of share of profits of joint property—Voluntary residence not with joint family—Refusal of allowance as being inadequate.

The appellant, a member of a joint undivided Hindu family, brought a suit in 1905 against the respondents, the other members of the family, alleging a separation by him in 1901, when he had expressed his intention to hold his share separately, and claiming possession of his share, with mesne profits.

Held that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation: but to have that effect the intention must be unequivocal and clearly expressed. Separation from commensality does not as a necessary consequence effect a division [*Rewun Persad* v. *Radha Beeby* (2)]. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate.

In this appeal it was held (affirming the decision of the court of the Judicial Commissioner) that on the evidence in, and under the circumstances of, the case and the conduct of the party alleging division of the family there had been no separation in 1901, and the appellant was consequently not entitled to mesne profits on that ground.

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* *Present*:—Lord MACNAGHTEN, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1898) I.L.R., 20 All., 339. (2) (1846) 4 Moo. I. A., 137.

He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *Held* that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion.

APPEAL from a decree (30th October, 1909) of the Court of the Judicial Commissioner of Oudh which varied a decree (27th August, 1908) of the Additional Judge of Hardoi.

The only question for determination on this appeal was whether the appellants were entitled to a decree for mesne profits against the respondents, in addition to the decree for partition of their joint properties.

The facts are for the purpose of this report sufficiently stated in the judgement of their Lordships of the Judicial Committee.

The appellant Suraj Narain, with his two sons as co-plaintiffs, instituted the suit which gave rise to this appeal, against Bakht Narain and his family (defendants nos. 1 to 6) and also against Ratan Lal, Madan Mohan Lal, and Kishan Lal (defendants nos. 7 to 9). He claimed that the properties in the names of the defendants nos. 7 to 9 belonged to the joint family, alleging that they had wrongly taken possession of them in collusion with Bakht Narain. He alleged that he had totally separated himself from Bakht Narain at the end of October, 1901, and that there had been a "legal partition" of the properties, first made in November, 1900, and completed in October, 1901, and he prayed for possession of his half share of the joint family properties, for mesne profits, and other relief.

The defence was a denial of the separation and partition alleged, and also of the right of the plaintiffs to mesne profits.

The only issue now material was the 16th, which was as follows :—Can the plaintiffs claim accounts and mesne profits from the defendants nos. 1 to 5, and what is the amount of the latter ?

The Additional Judge of Hardoi held that Suraj Narain had separated from the family as alleged by him ; that since his separation he had been excluded from the joint family property, and that he was consequently entitled to the mesne profits of his half share. He accordingly made a decree for possession of one-half share in the joint property with mesne profits.

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On appeal the court of the Judicial Commissioner, Mr. L. G. EVANS, Judicial Commissioner, and Mr. T. C. PIGGOTT, 2nd Additional Judicial Commissioner, after discussing the evidence at considerable length, came to the conclusion that neither separation nor exclusion had been proved, and that the claim for mesne profits was consequently not sustainable. In the result a decree for an account was made.

On the main point in the case, the proof of separation, the judgement of the Judicial Commissioner's court (which was delivered by Mr. PIGGOTT and concurred in by Mr. EVANS, after referring to the cases which had been cited in argument, continued :—

"Mr. Justice Markby was decidedly of opinion that it followed from the principles laid down by their Lordships of the Privy Council in *Appovier's case* that one member of a joint family might turn his joint ownership of the family property into a tenancy in common within the meaning of that ruling by merely signifying to the other members of the family an intention to that effect. We have not been referred to any Privy Council case which goes so far as this; and it seems to me that the principle thus broadly stated cannot be affirmed without serious qualification. It would surely not be contended that, if one of two brothers who had up to that moment lived together as members of joint family were to say to another, at the end of some quarrel over family matters, 'Very well then, if you insist on treating me so badly, I intend to separate from you from this moment. You do not deny that my share in the family property is equal to yours, and I intend from henceforth to regard myself as the separate owner of my own half share,' such words would in themselves, and apart from any evidence of the subsequent conduct of the two brothers, have the effect of producing separation between them in law. The court would require at the very least to be satisfied that the subsequent conduct of the brother who had thus spoken was such as to put it beyond question that his words were not merely spoken in the heat of the moment, or intended as a threat to put pressure upon his brother and compel the latter to show more respect to his wishes, but embodied his deliberate purpose, consistently adhered to and evidenced by his subsequent actions. Moreover, there would have to be no room for doubt in the mind of the court that the parties concerned were entirely agreed as to the share in the family property each of them would have to take in the event of a separation. Personally I am not sure that even these qualifications are sufficient; or perhaps I might express my point more correctly by saying that I should require clear evidence of subsequent action on the part of the brother who had expressed his intention to separate with a view to acqui ng, with as little delay as was reasonably possible under the circumstances, the separate control and enjoyment of the share claimed by him in the family property after separation. In the absence of such action on his part, I hold that a strong presumption would arise in favour of his having reconsidered the intention expressed by him in the heat of the moment and acquiesced in the continuance of the family in a

state of jointness. Applying these principles to the facts of the present case, it does not seem to me that anything like a sufficient case is made out in favour of the proposition that Pandit Suraj Narain on behalf of himself and his minor sons separated from Pandit Bakht Narain and his branch of the family, either in the month of March, 1901, or at any subsequent date prior to the institution of Pandit Suraj Narain's suit on June 20th, 1905."

On the other branch of the plaintiff's case, namely, that Suraj Narain was in any event entitled to mesne profits as a member of a joint family who had been for years before the institution of the suit excluded from all participation in the joint family property, the appellate court said:—

"It must be remembered that we are dealing in this case with the members of a joint family who were often widely separated in residence, and who exercised their respective professions, or carried on various branches of business, without reference to any joint family account . . . . . Under these circumstances the mere fact of non-participation by Suraj Narain in the profits of the joint family between the years 1901 and 1905 supposing such non-participation to be fully established, could scarcely be regarded as such evidence of exclusion as would justify a subsequent claim for mesne profits . . . . . When Suraj Narain went away and took up employment in the Amethi estate without taking any further action, he seems to me, as I have already remarked, to have acquiesced in the existing state of affairs under which Bakht Narain remained in possession of the joint family property as manager, pending the settlement of outstanding accounts and disputes. Under these circumstances, I am of opinion that the claim for mesne profits cannot be brought and that the lower court was in error in passing a decree for the same."

The account directed was "an account of the income enjoyed by the defendants (and by Pandit Bakht Narain before his death) from the date of the institution of the plaintiffs' suit on June 20th, 1905, to the date on which possession was given to the plaintiffs under the decree now appealed against, from the immovable property of the joint family in respect of which the plaintiffs have been found to be entitled to a half share. The defendants will be entitled to set off against such income, not only the expenses of management, but all expenditure which the court may find to have been properly incurred on objects to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the divisible assets of the joint family, under the head of movable property, in the hands of the defendants, and the plaintiffs will be awarded one half of the same."

On this appeal—

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De Gruyther, K. C., and *B. Dube* for the appellants contended that the family ceased to be a joint undivided Hindu family, so far as Suraj Narain and his sons were concerned, at latest in October, 1901. At that time the evidence established that Suraj Narain expressed his intention of holding his share (which was one half) separately. His claim was not denied, but Bakht Narain declined to partition until the debts on the estate had been discharged. One member, it was submitted, could separate himself against the wishes of all the other members of the family; and an oral expression of his intention to do so was sufficient, no writing being necessary. Reference was made to *Rewun Persad* v. *Radha Beeby* (1); *Appovier* v. *Rama Subba Aiyan* (2); *Bulakee Lall* v. *Indurputtee Kowar* (3); *Vato Koer* v. *Rowshun Singh* (4); *Raghubanund Doss* v. *Sidhu Churn Doss* (5); *Suarsanam Maistri* v. *Narasimhulu Maistri* (6); *Radha Churn Dass* v. *Kripa Sindhu Dass* (7); *Joy Narain Giri* v. *Grish Chunder Myti* (8); *Ram Pershad Singh* v. *Lukhpati Koer* (9) and *Balkishen Das* v. *Ram Narain Sahu* (10). After the date abovementioned the appellants had been excluded from participation in the profits of the joint family property to which they were admittedly entitled. The decree of the court below was erroneous in not giving the appellants a decree for mesne profits as claimed; and also as to the mode in which it directed the accounts to be taken.

A. M. Dunne for the respondents contended that the evidence clearly established that there had been no separation or partition as alleged by the appellants. There was an application on the record by Suraj Narain to have his name put on the Register as being the head of the joint family, but he did not ask for separation. And there had been no exclusion of the appellants from participation in the joint family profits. On the contrary, Suraj Narain had been offered a share of the profits and had declined to to take it. In this view there were no circumstances which

(1) (1846) 4 Moo. I. A., 137 (168).
(2) (1856) 11 Moo. I. A., 75 (89).
(3) (1865) 3 W. R., 41.
(4) (1867) 8 W. R., 82 (83).
(5) (1878) I. L. R., 4 Calc., 425 (430).
(6) (1901) I. L. R., 25 Mad., 149 (156).
(7) (1879) I. L. R., 5 Calc., 474 (476).
(8) (1878) I. L. R., 4 Calc., 434; L. R., 5 I. A., 228.
(9) (1902) I. L. R., 30 Calc., 231 (235); L. R., 30 I.A., 1 (11).
(10) (1903) I. L. R., 30 Calc., 738; L. R., 30 I. A., 139.

justified a decree for mesne profits. The decree of the court below was right and should be affirmed.

De Gruyther, K. C., replied.

1912, *December 10th*:—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

The point for determination involved in this appeal turns on the question whether the plaintiffs, who were admittedly members of a joint Hindu family governed by the Mitakshara law, separated, as they allege, in October, 1901, or whether they continued joint in property, if not in food and worship, as the defendants contend, up to the institution of the suit in 1905.

The parties are Kashmiri Brahmins settled in Oudh, and, with the exception of the defendant Ratan Lal, are descended from one Pandit Bishan Narain who died over 40 years ago. He left four sons, of whom Pandit Suraj Narain the first plaintiff is the only one now surviving. On Bishan Narain's death his eldest son Raj Narain became the *karta* of the joint family. On his death in 1890, Ram Narain, the next in order of seniority, assumed charge of the family estate. He died in October, 1900, leaving a daughter who is married to the defendant Ratan Lal. Her son Raj Indar Narain appears to have been adopted by Ram Narain, and although his name frequently appears in the course of the present litigation he is no party to the action. On the death of Ram Narain, the defendant Bakht Narain, who has died since the institution of this suit, applied in November, 1900, for mutation of names in the Collector's register in respect of the joint family property. On the 8th of December, 1900, Suraj Narain filed a petition objecting to the mutation being effected in Bakht Narain's name alone, and praying that his name along with the plaintiffs' and Raj Indar Narain's might be entered in equal shares

Some action appears to have been taken by the revenue authorities on the application of Bakht Narain, but before any definite order was made, the parties came to a settlement which was embodied in a deed of compromise. This document bears date the 27th February, 1901, and after reciting the facts connected with Suraj Narain's application, proceeds to state as follows:—

"Hence, in submitting this application we pray that mutation of names be effected in favour of Pandit Bakht Narain alone as the head of a joint family

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and the status of the family has continued joint from the death of Pandit Ram Narain up to this day and shall remain so as long as any dispute does not arise among the heirs."

Bakht Narain's name was accordingly entered with regard to the entire joint estate, and matters apparently remained *in statu quo* for the next two years. In consequence of some quarrel with his elder brother, Suraj Narain, on the 5th of May, 1903, applied to the revenue authorities to have his and Raj Indar Narain's names entered jointly in respect of two-thirds of the family properties.

The differences between the brothers seem to have been mainly connected with the question of the shares the two branches of the family would take upon a partition. As Bakht Narain had three sons and Suraj Narain had only two, the latter evidently apprehended that if the division were to be made *per capita* his branch would obtain a smaller share. The compromise of February, 1901, which provided for a reference to the Advocate-General was really intended to remove this fear on the part of Suraj Narain.

On the 31st August, 1903, the Assistant Collector made an order in favour of Suraj Narain. This order was reversed on appeal by the Deputy Commissioner on the 30th of October, 1903. The Deputy Commissioner embodies in his judgement the actual contentions advanced before him by the parties, which afford a strong indication of the views they then took of the position of the family. Their Lordships will refer to this document when dealing with the arguments at the Bar on this appeal.

After the Deputy Commissioner's order, Suraj Narain returned to the service of the Amethi Estate and remained there up to the end of 1904. In June, 1905 he, in conjunction with his surviving son, brought the present suit against Bakht Narain and his sons for a partition of the family properties. The various proceedings in the suit of Bakht Narain against Ratan Lal, in which Suraj Narain attempted to be joined as a plaintiff, have no direct bearing on the question their Lordships have to consider.

In the present action, the plaintiffs, Suraj Narain and his son, claimed to recover mesne profits from Bakht Narain and his branch of the family, on the ground that they had separated from the joint family in October, 1901. Their contention was accepted by the Subordinate Judge, who made a decree in their favour on

that basis. The Judicial Commissioners have on appeal reversed his decision; and the present appeal to his Majesty in Council is from their judgement. The learned Judges have carefully and elaborately examined the evidence on the question of the alleged separation in October, 1901; and as their Lordships agree with the main conclusions of the court below, they do not consider it necessary to deal with the matter in detail.

The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad* v. *Radha Beeby* (1) and the well-known case of *Appovier* v. *Rama Subba Aiyan* (2). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting. By the compromise of February the parties had agreed to retain the status of jointness which had existed till then "until any dispute arose among the heirs." Suraj Narain alleges that he separated a few months later; there is, however, no writing in support of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family. The oral evidence on which the allegation has mainly rested, as the learned Judges in the court below point out, is either inconclusive or unreliable. On the other hand, his conduct, borne out by documents, is clearly against his contention. After the compromise of February, 1901, the mutation proceedings instituted by Bakht Narain in November, 1900, were continued, and on the 2nd of January, 1902, the revenue officer directed that the statements of the two brothers should be recorded "to ascertain in whose name the entry should be made." And on the 8th of February the officer in question made the following order:—

"As the statements of Pandit Bakht Narain and Suraj Narain have been received and they unanimously show their willingness for the entry of the name

(1) (1846) 4 Moo. I. A., 137. (2) (1866) 11 Moo. I. A., 75.

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of Bakht Narain and declare his possession also, and as no one has filed any objection, it is therefore ordered that, after expunging the name of Ram Narain, deceased, the name of Bakht Narain be entered and the file be submitted to the officer in charge of pargana for sanction."

The conduct of Suraj Narain on this occasion was certainly not consistent with his allegation that he had severed his connection with the joint family, of which Bakht Narain was the acknowledged "head," in October, 1901.

In his application of the 5th May, 1903, among other matters, he speaks of a separation in "mess and worship," but there is no mention of a division of rights in property. Had his present statement been true, some reference would unquestionably have been made to it in this document. Separation from commensality, as was observed in the case of *Rewun Persad* v. *Radha Beeby* (1) does not as a necessary consequence effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In the present case there is evidence to show it arose from a difference in the religious opinions of the two brothers.

But the conduct of Suraj Narain after the order of the Deputy Commissioner on the 30th October, 1903, and the statements of his pleader before that officer, leave no doubt in their Lordships' mind that his present allegation is unfounded. The passage in the Deputy Commissioner's judgement which gives the substance of these statements is important. After reciting some of the facts connected with the dispute before him, the judgement proceeds thus:

"Ultimately on the 29th February, 1901, [*sic*], by virtue of a compromise, the name of Bakht Narain was entered as *manager* and *head* of a joint Hindu family. By a clause at the end of this agreement Bakht Narain was to remain so recorded so long as there should be no dispute among the *warisan*. There is now a discussion as to the meaning of the word *warisan*.

"Mr. Jackson for appellant argues that it clearly refers to the *heirs* of the executant of the compromise. Mr. Champat Rai for the respondent maintains that it refers to the executants themselves; and as they are now in disagreement he wishes to have his client's name recorded in the Government registers.

"Here it is necessary to say that there is a third party, Raj Indar Narain, said to be the adopted son of Ram Narain.

"Bakht Narain now denies the validity of the adoption."

And the order is, "I think that Suraj Narain and Raj Indar Narain" (the applicants in that case) "should go to the Civil Court and get their shares clearly defined."

(1) (1846) 4 Moo. I. A., 137.

The statement of Mr. Champat Rai appears to their Lordships to involve a clear admission that the joint status had continued till then; and that as the parties were, to use his words as recorded by the Deputy Commissioner, "now in disagreement," he wished to have his client's name recorded in the Government registers.

After the dismissal of his application, as already observed, Suraj Narain went away to Amethi without making an attempt to go to the Civil Court. Although Suraj Narain made various attempts to come in as a plaintiff in the suit Bakht Narain had brought against Ratan Lal, it may be taken as well established that after the Deputy Commissioner's order matters remained *in statu quo* until the present action was instituted. Their Lordships are of opinion that the allegation regarding a separation in October, 1901, of rights in property fails, and that the view of the learned Judges in the court below is well founded, that the plaintiffs are not entitled to claim mesne profits on that basis.

But it is urged that as the plaintiffs did not, after the disputes arose between the two brothers, receive any profits from the joint estate, they are entitled to mesne profits on the ground of exclusion. The evidence is clear and distinct on this point, and shows that Bakht Narain was all along offering Suraj Narain an allowance of Rs. 200 a month, which he refused to accept as being inadequate. This certainly does not, in their Lordships' judgement, amount to exclusion from the joint estate.

On the whole their Lordships are of opinion that this appeal fails and ought to be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

Solicitors for the respondents :—*Pemberton, Cope, Gray & Co.*

J. V. W.