nature of Musammat Rajpali's possession as tenant of the land in suit, namely, whether the possession was adverse to the plaintiff or permissive on his part. These questions have not been considered at all by the lower appellate court in consequence of what was in our opinion an erroneous view taken by court as to the effect of the will. Our order, therefore, is that we set aside the order of remand passed by the learned Additional Judge and remand the case to that court to be re-admitted to his file of pending appeals and disposed of according to law, subject to the observations made by us in this judgment. Costs here and hitherto shall abide the event of the suit.

Appeal decreed and cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919 *January*, 9.

PARSOTAM DAS AND ANOTHER (PLAINTIFFS) *v.* JAGAN NATH AND OTHERS (DEFENDANTS.) *

Hindu law—Mitakshara—*Joint Hindu family*—*Separation of one member, the rest of the family remaining joint*—*Re-union.*

The filing of a suit by a member of a joint Hindu family in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where, without any suit, one member of a family separates himself from the others and relinquishes his rights in the family estate, taking either no share in the family estate or perhaps a less share or a greater share, the surviving members cannot remain united.

Where such a separation of one member of a joint family takes place, it is not the necessary result in law that the other members must be taken to have separated *inter se* and then to have reunited. *Balabux* v. *Rukhmabai* (1) and *Kawal Nain* v. *Prabhu Lal* (2) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Baldeo Ram Dave* (with him the Hon'ble Pandit *Moti Lal Nehru* and Munshi *Panna Lal*), for the appellants.

Mr. *B. E. O'Conor* (with the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents.

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* First Appeal No. 248 of 1916, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 25th of August, 1916.

(1) (1903) I. L. R., 30 Calc., 725. (2) (1917) L.R. 44 I. A., 159; I. L. R., 39 All., 496.

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RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit for partition. A pedigree will be found at page 12 of the paper book, from which it appears that Bhojraj had four sons, namely, Gopal Das, Chimman Lal, Phul Chand and Nathu Ram. Gopal Das was a son by the first wife of Bhojraj ; the other three were the sons by a second wife, and they were all younger than Gopal Das. Chimman Lal appears to have died so far back as the year 1898 or 1899. Phul Chand died in October, 1904. Nathu Ram died in January, 1905, and Bhojraj himself died a few days afterwards. Gopal Das died on the 9th of December, 1914, and thus survived his father and his half brothers by several years. Parsotam Das (the plaintiff) is one of the two sons of Gopal Das. His brother Chiranji Lal is alive, but would not, or at any rate did not, join in the suit. The plaintiff's allegation was that Bhojraj and his sons by both wives remained joint until the death of Bhojraj, that upon the death of Bhojraj the brothers separated, that is, ceased to be members of the same undivided Hindu family, that they divided up between them the movable property but left undivided the immovable property including a certain business which goes under the name of Bansidhar Bhojraj. The defendants, who are the sons and grandsons of Chimman Lal and Phul Chand, pleaded that, in the life-time of Bhojraj, Gopal Das (the son of the elder wife) separated, whilst the father and the other surviving sons and grandsons remained joint ; that upon the occasion of the separation a sum of Rs. 500 in cash, some ornaments and two houses were given to Gopal Das and taken by him in order to enable him to separate from the family and that Gopal Das became separate. There was some very strong evidence in support of the story told on behalf of the defendants, and it seems to us that in the main the learned Subordinate Judge has accepted the defendant's contention. The learned Subordinate Judge believes that Gopal Das separated from his father and half-brothers. He believes that Gopal Das from thence forward carried on a business on his own account, with which his father and his half-brothers had no concern. He believes that on the other hand Bhojraj and his other sons carried on a separate business in this very house called Bansidhar Bhojraj and that Gopal Das had no concern with it. As the result, the

learned Subordinate Judge dismissed the plaintiff's suit in so far as he claimed a share in the business house, but he granted him a decree for the partition of certain shops and houses. The learned Subordinate Judge did this because he thought that, while Gopal Das had taken some money and established himself in a separate business, he had not given up his right to the houses and shops. He thought also that it was necessary in law that a deed should be executed if rights in the houses and shops were to be transferred or relinquished. This latter finding of the court below is to some extent inconsistent with the earlier part of his finding. The learned Judge, we think, for the moment, failed to appreciate the difference between "partition" and "separation." No doubt members of a Hindu family can be "separate" and still hold property in ascertained shares but which is undivided. But the separation of Gopal Das, from his father and half-brothers proved by the evidence meant that he ceased to be a member of a joint and undivided family consisting of himself and them, and it necessarily followed that he had no longer any right in the property that was the joint undivided property of the joint family which he had separated himself from. We think furthermore that the finding of the learned Judge about the houses and shops was not correct. He relies upon the fact that certain leases were made by tenants in the name of Gopal Das after the death of Bhojraj. The view of the learned Judge was that if Gopal Das had no interest in them the leases would not have been given in the name of Gopal Das. So far as Gopal Das is shown to have been concerned with the houses during the life-time of Bhojraj and before the separation the leases are of no weight whatever. Some of the leases are in respect of the very houses which the defendants pleaded had been given to Gopal Das when he separated. One lease was made in February, 1905. Gopal Das takes the lease as managing member of a joint Hindu family, what family is not specified. At this time all his half-brothers had died and his father also. Further, it was not altogether impossible that Gopal Das might have made the lettings on behalf of the descendants of his half-brothers without any fraudulent intention of laying claim to the property, and in this connection we may repeat that, although the right to share in the business and in the houses

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and shops arose upon the death of Bhojraj in the year 1905, and Gopal Das did not die until the year 1914, Gopal Das never thought it right to make any claim, nor even in the present suit does one of his sons Chiranji Lal. Having said so much, we think it right to state what our views of the facts are before proceeding to deal with the question of law which has been argued before us. We believe on the evidence that there was a separation during the life-time of Bhojraj between Gopal Das on the one side and Bhojraj and his other sons on the other. We believe that Gopal Das was given and was ready to take certain property on the occasion of his separation. We believe that at that time there was no necessity to ascertain shares and in fact there was no specification of shares. We believe that there never was any actual separation between Bhojraj and his other sons and that they in point of fact remained members of a joint undivided Hindu family right up to the time of the death of Bhojraj afterwards. The contention on behalf of the appellant was that, even assuming this conclusion of facts to be correct, it must be held that the separation of Gopal Das under the circumstances which we have stated necessarily carried with it a separation between all the other members of the family and that therefore, even on the assumption that at the date of the death of Bhojraj he and the descendants of his other sons were still joint, they must be considered as a joint family which had separated and re-united, and that accordingly the share which Bhojraj would have had in the business if there had been a partition at that moment between him and his grandsons, devolves as if it was his separate property and does not devolve on the surviving members of the undivided family consisting of Bhojraj and the descendants of his younger sons. It is true, no doubt, that there is an exception to the devolution of property in the case of a member of an undivided family who has separated and then re-united. This matter is discussed by Mr. Mayne in his work on Hindu Law. The question which we have to decide now is whether it can be said that this exception to the ordinary rule of devolution of joint undivided property belonging to a joint and undivided Hindu family applies in a case like the present. In the absence of authority we should certainly say no, because in

our opinion there never was separation between Bhojraj and his younger sons or between Bhojraj and the descendants of his younger sons and therefore no re-unity. Great reliance has been placed on certain remarks of their Lordships of the Privy Council in the case of *Balabux* v. *Rukhmabai* (1). There their Lordships, dealing with the facts of that particular case, made the following remarks :—" It appears to their Lordships that there is no presumption when one co-parcener separates from the other that the latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member to fix the shares, which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all." We think that these remarks of their Lordships do not apply to the present case. They say that in many cases it must be necessary to ascertain the share of the outgoing members, and to fix the shares of the other co-parceners and in this sense the separation of one is a virtual separation of all. We need hardly say that it was absolutely unnecessary for their Lordships to hold that, merely because in some cases the separation of one " might in a sense be said to be the separation of all," it would alter the ordinary devolution of joint undivided Hindu property, notwithstanding that there had never been any break in the jointness between the surviving members at all. A decision of their Lordships of the Privy Council in *Kawal Nain* v. *Prabhu Lal* (2) has been cited to us. In it their Lordships held that the filing of a suit by a member of a joint Hindu family for partition and claiming his share operated as a separation. Again we do not think that the decision in this case helps the appellant No doubt, their Lordships have held that the filing of a suit in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where, without any suit, one member of a family separates himself from the others and relinquishes his rights in the family estate, taking either no share in the family estate or perhaps a less share or a greater share, the surviving members cannot remain united. The defendants respondents have submitted to the decree of the court below

(1) (1903) I. L. R., 30 Calc., 725. (2) (1917) L. R., 44 I. A., 159; I.L.R., 39 All., 496.

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directing partition of the houses and shops. Possibly this may not make much difference to them, because the plaintiff was obliged from the very nature of this suit to bring in the houses which the defendants say had been given to him upon his separation. Possibly as the result of our decision in the present case the parties may think that, notwithstanding the decree passed by the court below, it is more desirable that each party should retain the houses which they had before the institution of the suit. Objections have been filed on behalf of the defendants that the court below ought to have awarded them costs. We think that the probabilities are that the suit was really instituted for the purpose of getting a share in the business and would not have been instituted merely for partition of the houses and shops. As, however, the respondents have submitted to the decree in this respect, we think that we cannot now award to the defendants their costs in the court below, but we leave those costs to be dealt with as the court below shall deem just and equitable. The order of the Court is that we dismiss the appeal with costs. We allow the objection of the respondents to this extent that we direct that the costs in the court below, including the costs of the first hearing, shall be in the discretion of the court making the final decree for partition. When awarding costs the court may take into consideration whether or not it should allow the defendants the costs of the fee of Maulvi Shafi-ul-lah, pleader, provided that the fee was taxable according to the rules in force at the time of the decision of the case.

Appeal dismissed.

REVISIONAL CRIMINAL.

1919
January, 11.

Before Mr. Justice Lindsay.

EMPEROR *v.* TULLA AND OTHERS*

Act No. III of 1867 *(Public Gambling Act), sections* 3, 4*—Common gaming house—Order for confiscation of money found on the persons of accused.*

In the case of men convicted under section 3 or 4 of the Public Gambling Act, 1867, the law does not contemplate the confiscation of money found on the persons of the accused: *Emperor* v. *Maturwa* (1) referred to.

* Criminal Reference No. 14 of 1919.

(1) (1918) I. L. R., 40 All., 517.