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testamentary disposition to take effect after her death, to continue this right of management in favour of relatives of her own. For these reasons I concur in the decree and order proposed.

Decree modified.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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April, 27.

SABAL SINGH (DEFENDANT) *v.* SALIK RAM SINGH (PLAINTIFF).*

Second appeal—Hindu family—Question of jointness or separation—Finding of fact or law.

The question whether a Hindu family is joint or separate is not necessarily a question of fact merely, but in certain circumstances may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal.

THE facts of this case, so far as they are necessary for the purpose of this report, appear sufficiently from the judgments.

Pandit *Uma Shankar Bajpai* (for Pandit *Krishna Narain Laghate*), for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent.

PIGGOTT, J.:—The question in issue in this suit was whether two brothers, Sarju Singh and Salik Ram Singh, were or were not members of a joint undivided Hindu family at the time of Sarju Singh's death. The trial court found that there had been separation and had given very strong reasons for that opinion. The learned District Judge has, on appeal, recorded a contrary finding and it has been pressed upon us that we ought to accept that as a finding of fact. He has undoubtedly endeavoured to record it as a finding of fact; but in arriving at his conclusion, he has misrepresented the law on the point and he has used expressions in his judgment inconsistent with his own finding. The principal point against Salik Ram Singh, who was the plaintiff in the suit, was that he had made statements while under examination which virtually amounted to admitting that there had been separation. We know that there had been separation in residence and in mess, for Salik Ram Singh had gone to Calcutta and taken up service there, while Sarju Singh was living at home and looking after his cultivation. Sarju Singh sold a specified half share in the ancestral property, describing the same as his own share; and later on Salik Ram Singh himself sold the remainder and described it as his own share.

* First Appeal No. 177 of 1921, from an order of Jogindro Nath Chaudhri, District Judge of Azamgarh, dated the 25th of August, 1921.

The learned District Judge himself, in discussing the plaintiff's deposition, says that what the plaintiff deposed was that in the joint property in suit he and his brother, Sarju Singh, each had a half share. If each of them was the owner of a defined half share, then there had been a specification of shares sufficient, under the circumstances of the present case, to complete the break-up of the joint family and to constitute each of the brothers a separated Hindu. It has been contended before us that the lower appellate court has acted upon the evidence as a whole, and there is, no doubt, some force in this argument. What the learned District Judge, however, says regarding the rest of the oral evidence is that the Munsif "*admits*" *that the defendant's witnesses also say that* Sarju Singh was joint with the plaintiff. Now the trial court had noted that certain witnesses for the defendant had made statements against the defendant and in favour of the plaintiff's contention. He went on to say that those witnesses had, in his opinion, been won over by the other side and were deposing falsely. The lower appellate court has not said that it believes those witnesses, and it is certainly unsatisfactory in a high degree to see a carefully reasoned judgment dealt with on appeal as that of the trial court has been in this instance. It is sufficient, however, for us to say that, in our opinion, the finding of the lower appellate court proceeds upon an erroneous view of the law and that it is not a consistent finding, inasmuch as in his review of the evidence, and more particularly of the plaintiff's own deposition, the learned District Judge has recited, and apparently accepted as established, facts which would be sufficient to support the conclusion arrived at by the first court and which are inconsistent with the finding of jointness recorded by the lower appellate court. Under the circumstances we think we are warranted in setting aside what we consider a clearly erroneous finding and restoring the decision of the trial court. We do accordingly set aside the order and decree of the lower appellate court and restore that of the court of first instance, with costs throughout.

WALSH, J.—I agree. I think the case* relied upon by Mr. *Uma Shankar Bajpai*, although not an authority for anything but itself, as it does not purport to lay down any principle, and indeed the Judicial Commissioner from whom the

* *Amrit Rao and others* v. *Mukund Rao and others*, (1919) 53 Indian Cases, 866.

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appeal was brought had overruled the District Judge on a question of fact, so that their Lordships were free to take their own view of the matter, does, on the other hand, justify the view that where fundamental facts are admitted by a party inconsistent with his case and with his testimony, it does become a question of law whether, for example, jointness or separation can legitimately be found on such evidence, or to put it as their Lordships put it in the case in question :

" The conclusion in this case before us that the plaintiff was a member of a joint family is not a sound or a legitimate conclusion on the facts proved and it, therefore, may be interfered with as an erroneous legal conclusion."

The learned Judge himself has done his best to support this view of the matter inasmuch as a sentence in the basic reasoning of his judgment contains a complete misstatement of the law, namely, the reference to the separate dealing of the half share in the joint property. I should not have thought it necessary to add anything to what my brother has said had it not been for the singular features of this judgment which may be due, it is true, to carelessness, but for which at present I am unable to suggest any reasonable explanation. The learned Judge uses this expression, which in itself is a misuse of language, in reference to a Judge whose judgment he is reviewing in appeal :—

" The learned Munsif admits that the defendant's witnesses say that Sarju Singh was joint with the plaintiff."

A learned Judge or Munsif does not " admit," and the use of such language is totally misconceived and out of place in an appellate court's judgment. But the fact is that the learned Munsif was careful to state what was the sworn testimony of the defendant's witnesses to whom the District Judge refers and to add that in his opinion they were unworthy of belief because they had been got at by the other side. If that is so, it would appear that in the opinion of the Munsif there has been a certain amount of activity on the plaintiff's side independently of the proceedings in court, and it would be well, in my opinion, if the learned Judge, to whom a copy of this judgment should be sent, would send an explanation, at any rate, to me, of the passages to which I have referred in his judgment.

Appeal allowed.