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for the mother, although we do not direct it, we give the mother or any brother of hers, Basdeo for example, whom she may appoint, liberty to appear before us in person on the date fixed to give evidence, if he sees fit or is so advised by Mr. *Agarwala*, on the final disposal of this matter when the affidavit of Chotey Lal is filed.

* * * *

In particular and without prejudice to the generality of the foregoing observations, we direct that an order be issued forthwith and communicated to the District Judge at Agra, that Musammat Khundi Devi either produce or make arrangements for producing her infant son before the District Judge next Saturday at 10.30 a.m. for the purpose of handing the boy over to the father, and that Chotey Lal do file an affidavit in this Court in accordance with our directions.

* * * *

After hearing the father cross-examined on the additional affidavit which he has filed in accordance with our order, we have no hesitation in confirming the order of the court below and dismissing the appeal.

Appeal dismissed.

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April, 26.

Before Mr. Justice Piggott and Mr. Justice Walsh.

GOSWAMI PURAN LALJI (PLAINTIFF) *v.* RAS BIHARI LAL AND ANOTHER (DEFENDANTS).*

Hindu law—Endowment —Failure of nominated manager to act—Settlor's widow competent to assume the management of the endowed property, but not to appoint a new manager by will.

A Hindu, by deed dated the 15th of May, 1871, created an endowment of certain property in favour of an idol, and named a certain person as manager of the endowed property. The manager so nominated never in fact took charge of the property; but after the death of the settlor his widow took possession and managed the property in accordance with the intentions of her husband. The widow, however, proceeded to make a will appointing a new manager in succession to herself, and upon her death, the heir of the settlor sued to have this appointment set aside.

Held that the suit would lie. Although the widow was justified as her husband's representative in assuming charge of the endowed property, and might in her life-time have nominated a manager whose appointment would have enured after her death, she had no power to dispose of the managership by will in the presence of an heir of the settlor.

Gossami Sri Gridhariji v. *Romanlalji Gossami* (1), *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (2), *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3), *Sheoratan Kunwari* v. *Ram Pargash* (4), and *Sheo Prasad* v. *Aya Ram* (5), referred to.

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* First Appeal No. 44 of 1920, from a decree of Peare Lal Katara, Subordinate Judge of Muttra, dated the 16th of January, 1920.

(1) (1889) I. L. R., 17 Calc., 3.
(2) (1906) I. L. R., 28 All., 689.
(3) (1907) I. L. R., 35 Calc., 226.
(4) (1896) I. L. R., 18 All., 227.
(5) (1907) I. L. R., 29 All., 662.

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

Munshi *Durga Prasad* and Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondents.

WALSH, J.—This is an appeal from a judgment dismissing the plaintiff's suit. The suit was decided by the Subordinate Judge of Muttra. As regards the Cawnpore property the appeal fails. As regards the Bindraban property I have come to the conclusion that the appellant is right and the plaintiff is entitled to succeed for the following reasons :—(I will for the moment disregard the reasons given by the lower court for thinking otherwise.)

The property was dealt with by a deceased virtuous man who wanted to dedicate it to a certain idol. The deed of dedication is contained in the document dated the 15th of May, 1871. So far as the property goes with which this judgment is concerned, and in regard to which in my opinion the plaintiff is entitled to succeed, the general intention of the donor, to be gathered from the language of the deed which is extremely difficult to follow because it appears to contain provisions inconsistent with one another, was, that one Sangam Lal, who was called the second donee, should make arrangements for the worship and service in a temple, collect the rent of the property and spend it on food, offering and entertainment and in no other way. His representative was to act in a similar manner, such provision seeming to imply a power to appoint a representative if he saw fit, but no one was to have the power to transfer the endowed property. Should anybody attempt to transfer the endowed property or to misappropriate the funds, a right was given to the *panches* and managers of the temple of Banke Bihariji Maharaj to take steps to prevent it. As I understand this provision, the latter persons were intended to be a kind of *cestui que* trust, or guardians of the corpus, who would be sufficiently interested to be recognized by law as persons entitled to interfere in the case of a breach of trust.

The first donee, the widow, to whom the deceased gave the remaining property, survived him for many years. The second donee, Sangam Lal, for some reason or another, which does not appear on the record of either this suit or of

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the previous suit to which I am about to refer, never took upon himself the office of manager and it is undisputed that the widow got into possession and retained possession, and if the recitals in the will, the validity of which is raised in this suit, are to be accepted as true, enjoyed and executed in every way the office of manager or *mutawalli* in place of Sangam Lal.

In the year 1893 the father of the present plaintiff, one Goshain Makhan Lal, brought what appears to have been a foolish suit, and if he knew of the deed of endowment to which I have just referred, must have been a fraudulent suit, against the widow. He launched it in the guise of an innocent, plausible and natural claim by an ordinary reversionary heir against a widow who had acquired a life-interest in her deceased Hindu husband's property and was, therefore, prohibited by Hindu law from dealing with the corpus, alleging that she had executed a will in respect of this property in 1893 in favour of her relation Ram Lal, to whom reference will be made in a moment, and sought to have the deed cancelled and declared void. That suit was decreed in favour of the then plaintiff, though on what ground does not appear from the only judgment which we have on the record. The decree was set aside on the 23rd of January, 1897, by a Bench of this Court upon the ground that every allegation which had been alleged by the plaintiff in his plaint had failed and that he had no cause of action for asking for the will to be set aside as a reversionary heir. It was at that date either common ground or pleaded against the then plaintiff that the property had been assigned by the deceased husband to the *panches* of Thakur Banke Bihariji Maharaj and that the widow was given no interest or right of any kind in the property but that she was for the moment in possession in some way or another of the endowed property because the appointed manager Sangam Lal had not taken up his office and that the whole foundation, presumably fraudulent, on which the plaintiff had litigated did not exist in fact. The learned Judges threw out a suggestion that this lady in acting as manager might be only a trespasser and that if she was, there might be a right in the heirs of Sangam Lal, who may be presumed by this time to have been dead, or the *panches*, to put an end to her trespass,—questions which must depend upon the interpretation of the deed of endowment and the

rights of the managers as they are provided, but questions, which in my opinion, did not and could not lawfully arise for decision in the plaintiff's suit and which this Court did not purport to determine. They pointed out to the plaintiff that so far as the management of the endowed property was concerned, he, at any rate, had no right to interfere, which was no doubt a correct but superfluous statement, it being sufficient for the decision of the appeal that he had no shadow of a claim as reversionary heir to set aside the will of 1893. So far as I can gather from the evidence in the suit and from anything which has been suggested on behalf of the respondents before us, that is a correct and comprehensive statement of what happened in the prior litigation. In course of time the former plaintiff having died, and finally the widow herself, this suit has been brought by the present plaintiff who is admittedly the heir of the deceased donor. In order to make the matter clear, which, I regret to say, the judgment of the court below fails to do, I do not think I can do better than quote from a statement which was made by the plaintiff's pleader in the court below setting out correctly as a matter of form, if reference is made to the plaint, and also I think correctly in substance, the nature of the claim. Having referred to the waqf and the appointment of Sangam Lal and the widow as *mutawalli*, the pleader goes on as follows:—"My claim is that Sangam Lal has never got possession over the property as *mutawalli* and Musammat Achamb Kuar remained in possession as *mutawalli*. She had under the deed of endowment of 1871 no power to appoint a *mutawalli* in her place. The plaintiff as heir brings this claim under the Hindu law."

The claim was to have it declared or decided that an alleged power of appointment which the deceased widow had made during her life-time under a will dated 1909 in favour of certain persons to whom I will refer in a moment had no legal authority, was not justified by the deed of endowment and, in the absence of some legal authority, custom or usage, was not justified by the general rule of Hindu law. I think it is clear that the plaintiff has successfully established the broad principle involved in that statement in this case. The authorities cited are not on all fours with the present case. Few cases are on all fours with one another. But it appears to have been laid down per-

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fectly clearly by the Privy Council as long ago as 1889, in *Gossami Sri Gidhariji* v. *Romanlalji Gossami* (1) that "the office of a shebait is vested in the heir or heirs of the founder provided that there is no usage, course of dealing or circumstance showing a different mode of devolution". A different mode of devolution must of course mean some mode warranted by law. Obviously a mode contained in an express condition of the endowment would be a mode warranted by law, because every man has a right to do what he pleases with his own property and to indicate the limits within which the succession to the management or control or ownership of his property shall be continued after his death when he is no longer here to direct operations. The authority in question undoubtedly covers the position of the office of the shebait. The point specifically raised in this suit is the power of appointment to such office as is shown by the statement of the pleader which I have quoted. The plaintiff distinctly put in issue the power of appointment which the lady had endeavoured to exercise by her will of 1909, and did not specifically raise the question of the succession to the office itself. That case has been followed by two or three Benches of this Court, particularly by a two-Judge Bench in *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (2), a case which would otherwise be on all fours but apparently is not on all fours with this suit inasmuch as the lady who had been appointed *pujari* under the will of the original donor and who had made the will seeking to appoint the next manager which the heirs of the founder challenged by the suit was not, or at any rate is not shown by the report to have been, the widow or heir of the deceased donor. If she had been, there would have been no distinction between this case and that. There is a further relevant decision in 1907 by the High Court of Calcutta, *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3), which lays down another cognate but somewhat narrower rule, namely, that a shebait cannot as such, by will, alienate the office of shebait. The decision of the Privy Council has also been followed by this Court in *Sheoratan Kunwari* v. *Ram Pargash* (4) and *Sheo Prasad* v. *Aya Ram* (5), and, as I gather from the learned Subordinate

(1) (1889) I. L. R., 17 Calc., 3.
(2) (1906) I. L. R., 28 All., 689.
(3) (1917) I. L. R., 35 Calc., 226.
(4) (1896) I. L. R., 18 All., 227.
(5) (1907) I. L. R., 29 All., 663.

Judge's judgment, was accepted by him in deciding the first issue in the suit, he basing himself in his judgment upon I. L. R., 28 All., 689, to which I have already referred. So far as I was able to understand the observations addressed to us yesterday on behalf of the respondent, this legal position was accepted as correct by the respondent. That being so, it seems to me quite clear that the plaintiff at that stage had *primâ facie* established a right to succeed in the suit, a state of affairs expressed by the learned Judge of the court below that the plaintiff could maintain the suit if it did not " fail on the merits ". Inasmuch as he dismissed the suit, it must be assumed that he came to the conclusion that it did fail on the merits. What were the merits which he intended to decide to be sufficient to justify its failure, is the problem which I am, on a perusal of his judgment, unable to solve. He finds that the widow was appointed to supervise over the management of Sangam Lal. I do not know where he gets that from, but it is not of very great importance because as Sangam Lal did not manage there was nothing to supervise, and he goes on to find that she remained in possession only as a trespasser. He had already found that the suit was not barred by the Statute of Limitation. It seems to me, therefore, that having accepted the principle upon which the plaintiff based his claim, and having found that the position of the widow who made the will was merely that of a trespasser, the logical consequence of these two propositions would be that her right to appoint a successor failed and that she had not discharged the onus cast upon her by the plaintiff's *primâ facie* right. His final conclusion on issue No. 7 is absolutely unintelligible. It looks to me as though he had been frightened by a dictum of this Court in the previous decision which had really no bearing on this suit, and while expressly holding that the previous judgment of the High Court did not operate as *res judicata*, it was sufficient to justify him in saying that the plaintiff had absolutely no right to maintain the suit. The view pressed upon this Court on behalf of the respondent has been substantially this:—It may be put in more than one way:—First, it was said that the widow being the heir during her life-time, she might reasonably be held to have the power of appointing a successor to Sangam Lal. Presumably she could, for what such an appointment would be worth, to the extent of her

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life until, as the High Court said in its previous judgment, Sangam Lal or the *panches* attempted to interfere with her right, but whether she could do so by will so as to bind the present plaintiff after her death, which is really the question in this suit, must, I think, depend upon the terms of the deed of endowment. If the right to do so cannot be found there, in my opinion it cannot exist in law. To hold that she could do so on some general principle of law analogous to the right of the beneficial owner, would seem to me to give a higher right to a Hindu widow as heir of her deceased husband than has ever been recognized by Hindu law or custom; that is to say, although she is not in fact a beneficial owner, and the person deriving such benefit as would accrue from the appointment would not be beneficial owner of the corpus, nonetheless it would seem to me to recognize the right of a Hindu widow, who as heir has no more than a life interest, to do more with endowed property than she can admittedly do with unendowed property. So far as I can speak with any confidence of the terms of the deed of endowment, I am satisfied that no power of appointment was ever contemplated by the deceased donor or intended to be conferred upon his widow.

The respondents' case was also put, as I understand it, in this way:—That if anybody had a power of appointment under the deed of endowment, it was the *panches* or manager referred to in the latter part of the deed. I do not think the deed is capable of that interpretation. I think the real meaning of the provision with regard to them is that they are persons who are given the right to interfere with the *de jure* manager and to correct and prevent any defalcations or other mismanagement by him while he is in office. But assuming that that right is conferred upon the *panches* and managers of the temple above referred to, I have been unable to see how that point can avail the defendants in this case. It is not universally true, but I think it is true in this class of cases that a person claiming to be either in office, or in possession, or to resist a declaration or assertion of right by a person *primâ facie* entitled, must stand upon his own right or on that of the persons through whom he claims. He cannot set up what is called a *jus tertii*. It does not seem to me that the defendant, even if he had relied upon that point, would have been entitled to succeed upon it, but I think for

the purposes of this case it is sufficient to hold that it was never pleaded. It was not the ground on which the respondent succeeded in the court below and, so far as I was able to understand the argument addressed to the Court on behalf of the respondents, was not relied upon by him before us.

It, therefore, comes back, as Mr. *Durga Prasad* rightly said, to a very simple question: Is the widow of the deceased donor justified by the power given by the deed of endowment of 1871 to make the will of 1909? My answer to that question is, no. In conclusion, I may refer to certain passages in the will itself which, although this cannot really be used as decisive against the present defendants, go very far to confirm me in the strong view I take of this defence. I think the person who was responsible for drafting or settling this will on behalf of the deceased lady discreetly avoided referring to the power under which she was purporting to appoint. I am satisfied that the appointment was made by her, *qua* manager and not as heir. If it had been made as heir there was no reason why she should not have said so, but in the somewhat portentous recital she distinctly alleges that she has been in exclusive possession merely as manager, and in the first operative clause appointing her minor relative she directs that "he shall like myself be the *mutawalli* and manager of every kind of movable and immovable property and shall as such have all sorts of powers". She discreetly said in the recital "I have power to make a fresh arrangement". So far as a document can assert its own legal authority, I think this document was intended to assert that the power so conferred upon her was inherent in her as *de facto* manager and that it was as such that she sought to exercise it. In my opinion that is sufficient to dispose of the defence. I cannot part with the case without expressing, although it is really not necessary for the decision which I think we ought to arrive at, the very strong view which I take that this appointment in the will was purely illusory, and if a general power in her favour were to be collected from the deed of endowment or could be, without doing violence to the principles of Hindu law, attributed to her as heir, I think there would be strong ground for holding that the appointment contained in clause 2 of the will is what is known in English law as "a fraud upon the power". The appointment of Ras Bihari, her daughter's son, who she says has been

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brought up as a begotten son and lives with her, is a mere sham. She appoints two persons, his mother Musammat Ram Dei, and Ram Lal, to be guardians of the said minor. So far so good. But she goes on to provide that when the minor attains majority, the two persons she has appointed as guardians during his minority shall continue to look after the property, and during their life-time, the executor, in other words, the so-called manager of the endowment now being of full age whom she has appointed, is to perform all works in conformity with the opinions of the said two persons. To my mind that provision left these two persons masters of the situation. It made the appointment by the deceased man, of the *panches* and the representative of Sangam Lal as a sort of watch-dog over the corpus with a view to preventing breaches of trust, practically a dead letter. Under such a provision the so-called manager, Ras Bihari, could never be touched for any breach which he might commit, because he would have an absolute answer under his own appointment, namely, that he was bound to comply with the directions of two other persons, and as far as I can see, it would be extremely difficult for anybody in a court of law to reach these two other persons, and it is not difficult to see how the whole of the endowment could be squandered and misappropriated, with very great difficulty in preventing and almost insuperable obstacles in the way of punishing such misfeasance. I take a very strong view, apart from any other question in this suit, that the alleged appointment made by the widow under this will was as far from and as hostile to the intentions of the original donor as anything could be, and I am satisfied that our decision is in accordance with the merits as well as in accordance with the law. To that extent the plaintiff's appeal must be allowed. It must be declared that the appointment is vested in him and that the will so far as it purports to deal with the trusteeship or managership of the Bindraban property is void and of no effect and that the plaintiff is entitled to take possession. The parties will pay and receive costs in proportion to their failure and success in both courts.

PIGGOTT, J.—We are dealing in this case with property held under a trust created by a deed of endowment, and the terms of that deed are necessarily the most important matter for consideration. This deed of the 15th of May, 1871, is

a singularly ill-drafted document and it would be quite easy to take particular portions of it and show that their apparent meaning is contradicted by certain other portions. The most glaring example of this is to be found in the fact that what may be called the operative portion of the deed, where the donor, Sri Goshain Narsinghji, purports to make a gift of property in favour of his wife, Musammat Achamb Kunwar, and of Sangam Lal, contains an exception excluding from the operation of the gift the immovable property specified at the foot of the deed which is the principal subject-matter of the present appeal. It is only inferentially, by means of words used in a later portion of the document, that one can understand that the executant intended to make a gift of this immovable property in favour of an idol. We must, however, take it as an admitted fact on the pleadings that a trust was created in favour of an idol. The questions remaining to be considered are what this idol was and what directions the founder of the trust left regarding the management of the same. It is quite clear that the trust was to be mainly in favour of an idol described by the name and title of Sri Thakur Radha Bihariji Maharaj whose image, if it was in existence at all at the date of the deed, had not yet been installed anywhere. It was left to the widow, Achamb Kunwar, to instal this idol in a particular shrine, described as amongst certain buildings which "have been built and are still under construction" in an earlier part of the deed. When this idol was so installed he, considered as a juristic personality, was to have the enjoyment of the income from the immovable property specified at the foot of the deed and the management of this property, with directions for the proper application of the income, was conferred upon Sangam Lal. It may fairly be inferred from an expression used in the deed that this office of manager was intended to be hereditary in the family of Sangam Lal. It is by no means clear, however, whether the actual gift of the corpus of the property was in favour of the idol already mentioned from the date of its installation by the widow. The temple which Sri Goshain Narsinghji had built, or had begun to build, for the reception of this idol was evidently situated in close proximity to a larger temple dedicated to an idol described as Thakur Banke Bihariji Maharaj, which temple was in charge of a managing committee of some sort referred

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to in this deed. According to the terms of the deed it was this idol installed in the larger temple, in the charge of this managing committee, which was " ultimately " to be the owner of the immovable property. The real and principal difficulty about the interpretation of the entire document is this word " ultimately ". On the face of it, the document is a deed of gift to take effect immediately from the date of its execution and, in so far as certain property movable and immovable was to be placed in the possession of Achamb Kunwar and of Sangam Lal, respectively, the deed evidently did operate from the date of its execution. Those portions of the deed which relate to the application of the income could not come into force until the idol of Sri Thakur Radha Bihariji Maharaj was installed in the small temple constructed by the executant, or commenced by the executant and finished by his widow after his death. There is nothing in the terms of the will to suggest that the word " ultimately " which qualifies the gift in favour of the idol of Banke Bihariji Maharaj, in the larger shrine, refers to any date subsequent to the installation of the less important idol in the small shrine. I think it must have been for some such reason as this that in the former litigation it was considered that the ultimate right to the management of the immovable property specified at the foot of this deed of the 15th of May, 1871, vested in the committee of management in charge of the larger shrine of Thakur Banke Bihariji Maharaj. I agree, however, that these considerations cannot determine the result of the present suit. I do think that a defendant in possession of immovable property is entitled to resist a plaintiff claiming possession of the same by setting up a *jus tertii*, and that there is nothing in the circumstances of the present suit to qualify that right. If, however, a defendant wishes to set up such a defence, he should certainly take the responsibility and submit to the possible consequences of doing so in plain language. After carefully studying the written statement filed by the defendant in the present suit it does seem to me that the rights of the temple of Thakur Banke Bihariji Maharaj, or of the idol therein installed, or of the committee of management in charge of that temple, were not expressly pleaded or put in issue.

With regard to the other questions raised before us, the position I would take up is a simple one. We must assume,

as between the parties to this litigation, that Sangam Lal, the manager appointed under the deed of endowment, either refused to act, or in some other manner clearly indicated that he did not intend to take up the trusteeship offered him under the terms of this deed. There was then beyond all question a right to appoint a new trustee vested in some one or other. The widow, Musammat Achamb Kunwar, seems to me to have acted in good faith and to have done her best to carry out the wishes of her late husband. The first thing she had to do was to instal the idol in the small shrine referred to in the deed of endowment, and it is not denied that she did this. In the absence of another manager it seems to me that she was perfectly entitled, after her husband's death, to take up the management of the trust property herself. The only persons who could question her right to do so would be the committee in charge of the larger temple of Thakur Banke Bihariji Maharaj, if they held that under the terms of the deed of gift Sri Goshain Narsinghji had so divested himself of this property as to deprive his heirs after him of any right of appointment, the ultimate management of the trust resting entirely in the said committee. Assuming, however, that this committee did not concern itself in the matter, the widow would be carrying out the intentions of her late husband in installing the idol and making arrangements for its due worship. As a matter of fact she has gone a great deal further, because in the will which was made the subject-matter of the present suit she has dedicated the entire balance of her property for the benefit of another idol to be installed somewhere at Cawnpore. Now my own view regarding the question of law which has been principally adopted before us is this, that under the circumstances assumed by the parties to this litigation, and putting aside altogether the question of the *jus tertii* to which allusion has been made, if Musammat Achamb Kunwar had seen fit, upon the failure of Sangam Lal to take up the office conferred upon him by this deed, to make another appointment to take effect immediately, she had a right to do so as representing the estate of her deceased husband, and she had a right to make an appointment which would enure beyond her own life-time. I think, however, on the authorities it cannot be held that she had a right virtually to appoint herself as manager and then to endeavour, by means of a

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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.