Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

BANKE BIHARI (PLAINTIFF) *v.* BRIJ BIHARI AND OTHERS (DEFENDANTS).* 1928 *December,* 17.

Hindu law—Partition—Notice by one member demanding partition—Revocation—Intention of partition dropped, by subsequent agreement of parties—Whether notice per se *effects partition.*

Where a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but the intention to separate was given up a day or two later as the result of a subsequent agreement of the members at a family meeting and there was no disruption of the family in fact: *Held* that the notice in these circumstances did not, by itself, operate to effect a separation in law. An unequivocal demand for partition, which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, can not be treated as nevertheless effecting a separation. *Ram Kali* v. *Khamman Lal* (1), *Jai Narain Rai* v. *Baijnath Rai* (2), *Kedar Nath* v. *Ratan Singh* (3) and *Palani Ammal* v. *Muthuvenkatachala Moniagar* (4), referred to.

THE facts of the case are fully stated in the judgement of the Court.

Pandit *Uma Shankar Bajpai* and Dr. *Kailas Nath Katju*, for the appellant.

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the respondnts.

MEARS, C. J. and MUKERJI, J. :—This appeal arises out of a suit for partition of joint family property, in which the appellant was the plaintiff. The relationship of the parties is shown by the following pedigree.

[The pedigree is omitted, as not being material to this report.]

*First Appeal No. 131 of 1925, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 28th of January, 1925.

(1) (1928) I. L. R., 51 All., 1. (2) (1928) I.L.R., 50 All., 615.
(3) (1910) I.L.R., 32 All., 415. (4) (1924) I.L.R., 48 Mad., 254.

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The plaintiff's case was that on the death of Bhagwan Das on the 1st of May, 1922, the family estate belonged by right of survivorship to the rest of the family, consisting of the parties to the suit, and that in the case of partition the plaintiff's share was one-half. The plaintiff accordingly claimed separation by metes and bounds of his one-half share.

The defence was that the plaintiff had separated himself from the rest of the family during the lifetime of Bhagwan Das and that he was allotted a quarter share only, to which alone he was entitled.

The learned Subordinate Judge has held that the defendants' case was partially true, that although no partition by metes and bounds took place, as alleged by the defendants, there was nevertheless enough evidence to show that the status of the family had been split up and that the plaintiff had come to be regarded as the owner of a quarter share. The learned Judge accordingly decreed the suit by directing partition of a quarter share to the plaintiff.

The main question for determination in this appeal is whether or not there was an actual disruption of the family by the separation of the plaintiff before the death of Bhagwan Das, or whether at the date of the suit the family still continued to be joint, in which event the plaintiff's share would be one-half.

[A portion of the judgement is here omitted.]

It appears that on the 2nd of February, 1922, the plaintiff sent a registered notice to Bhagwan Das and Ram Bilas demanding partition. The defendants did not rely on it as a document creating, as a matter of law, a separation in the status of the family. The reason was that according to their case the partition had already taken place in July, 1920. The defendants accordingly stated in paragraph 5 of the written statement

that by means of this notice the plaintiff declared the separateness of his status, and the defendants added that it was agreed, as the result of the notice, that a deed of partition would be registered as soon as Bhagwan Das recovered from his illness. It was the defendants' case that on the 2nd of February, 1922, Bhagwan Das was really ill, but we may state at once that there is no reliable evidence to prove this and the court below has not found that such was the case.

In view of the pleadings stated above the only question for decision was whether the plaintiff had separated in July, 1920. No question arose as to whether, if the family was joint even at the date of the registered notice, namely, the 2nd of February, 1922, the delivery of the notice created a disruption in the family.

The case, however, has been considered from both the aspects and the following issue was framed by the court below:—"Whether the plaintiff separated from the joint family about July, 1920? If the answer to the above be in the negative, is the plaintiff to be looked upon as separated in interest after his notice or registered letter of the 2nd of February, 1922?"

The learned Subordinate Judge held that the plaintiff had severed his interest during the lifetime of Lala Bhagwan Das, but did not say when the disruption took place. As we have already stated, the learned Judge was not satisfied that a partition took place in July, 1920.

Before examining the evidence the learned Judge adopted a method of trying the case of which we do not approve. Instead of arriving at findings of fact first and applying the law then, he proceeded to find out what the law was and then to find his facts. This procedure is calculated to mislead a judge and to tempt him to arrive at findings which are likely to fit in with his view of the

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law. In our opinion this is what has actually happened in this particular case. The learned Judge found as a matter of law that a definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. It is not the case that the learned Judge applied this rule of law to the notice dated the 2nd of February, 1922, specifically, but he applied it to the entire case.

The first thing that we have to see is whether the learned Judge erred in his finding of fact, namely, that the plaintiff had separated his status from the joint family and had become a separated member. The learned Judge, as already stated, has discarded the oral evidence adduced on behalf of the defendants. He based his opinion on the account-books said to belong to the family and the account-book of a certain legal practitioner, Lala Tribhuban Lal. He relied also on certain minor pieces of evidence, which will all be noticed in due course.

[The judgement then proceeded to discuss the evidence in detail, and continued.]

The separate and cumulative effect of all these documents undoubtedly is that, at the date of the death of Lala Bhagwan Das, the defendants and Bhagwan Das were living jointly and there was no separation at all.

Now we come to a consideration of the effect of the registered notice which was given, evidently in a fit of petulance, by the plaintiff to Bhagwan Das and Ram Bilas. As we have already said, it is not a part of the defendants' case, as put forward in the written-statement of Ram Bilas, that from the date of the delivery of this notice to the addressees of it, the families became separate, to all intents and purposes. The defendants' case on the other hand was that there already existed a separation which had taken place some 20 months

previously and the result of this notice, dated the 2nd of February, 1922, was only a declaration of the factum of separation. Before we consider the legal effect of this notice, we may at once point out that the very fact that such a notice was given tends to destroy the defendants' case that there had already existed a separation between the parties. By this notice, Bankey Bihari asked for a partition. The reference to "settlement of account" has no reference to any previous partition alleged by the defendants in the written statement, and for two reasons. The notice does not imply any previous partition. Further, the court below has found that there was no partition by metes and bounds and we have found that there was no partition at all.

There can be no doubt that a member of a joint Hindu family, if he chooses, may separate himself and to effect a separation in status it is not necessary that the other members should be consenting parties. But even where an unequivocal wish to separate is once declared, any separation will not be effected in law if it be found as a fact that the intention was given up as the result of a subsequent agreement of the parties, by which the notice was expressly or impliedly withdrawn. Before we proceed to consider the case-law, let us examine the facts of the case. The plaintiff's case is that after he had given this notice, he was called upon to explain his conduct towards an elder member of the family like Bhagwan Das. One Lal Bahadur, undoubtedly a relation of the parties, and whose brother comes as a witness for the defendants, swears that he was present at the interview. The result of the interview was that the plaintiff was promised some money for his expenses and he admitted his error in asking for partition. There can be no doubt that the plaintiff himself and his witness, Lal Bahadur, have in occasional passages of the evidence

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made statements which cannot be accepted. But it is perfectly clear to us that the notice was not followed by anything serious in the nature of a disruption of the family. The defendants' case is that when the notice was received the plaintiff was told, evidently by Ram Bilas, that Bhagwan Das was ill and the plaintiff must not hurry and when Bhagwan Das got well an account would be taken of what further profits were due to the plaintiff and a deed of partition would be registered. We can take it, therefore, that it is common ground that no actual partition followed the giving of the notice. Again, it is common ground that, as the result of the notice, a meeting among the members of the family took place, in which distant relations may or may not have been present, and nothing came out of the storm which the notice aroused. We may, therefore, safely take it, in view of the subsequent conduct and statements of the parties, enumerated above, and as the evidence adduced by the plaintiff shows, that the plaintiff dropped his idea of separation, at the instance of the other members of the family and possibly of relations like Lal Bahadur. The plaintiff, having no son and only a daughter, his separation meant the loss of a quarter share to the family. Thus every inducement was likely to have been put forward to make the plaintiff abandon his idea of separation. Our finding of fact, therefore, is that the plaintiff did conceive an idea of separation but gave up that idea a day or two later as the result of a family meeting.

Now we come to the question of law which is involved in the second part of the issue framed by the court below and is reproduced here: "Has the plaintiff to be looked upon as separate in interest after his notice or registered letter of the 2nd of February, 1922?"

On behalf of the respondents reliance has been placed on a statement of law contained in the case of

Ram Kali v. *Khamman Lal* (1) by two learned Judges of this Court, the judgement being delivered by SEN, J. The learned Judges professed to lay down the result of certain decisions of Hindu law relating to joint families and partition. The proposition relied on by the respondents in support of their case is clause (*e*) at page 28 of the report. To understand this clause (*e*) we have to read it with the preceding clause (*d*). They are as follows:—

"(*d*) It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

(*e*) Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by subsequent conduct of the parties."

With the proposition in clause (*d*) we have no quarrel. As regards clause (*e*) too, we should have no quarrel with it, if the third word "is" may be read as "has been."

We have not the least doubt that the learned Judges did use the word "is" in the sense of "has been". The proposition that is laid down in clause (*e*) is really a proposition that was laid down by this very Bench of the Court, in *Jai Narain Rai* v. *Baijnath Rai* (2), quoted by the learned Judges themselves with approval at page 27. This proposition lays down that where there has been completed separation, there can be no joint family afterwards except by way of re-union.

The case before us is whether the evidence before us points to a completed separation or only to an attempted separation. We have found as a fact that there was no completed separation, that a separation was demanded but the demand was given up at the instance of the other members of the family. The question, therefore, is

(1) (1928) I.L.R., 51 All., 1. (2) (1928) I.L.R., 50 All., 615.

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whether an unequivocal demand which has not been persisted in and has, no doubt, been given up with the consent of the other members of the family, must nevertheless be treated as effecting a separation? The answer to this question is not furnished by the case of *Ram Kali* v. *Khamman Lal* (1), relied on by the respondents. Indeed their Lordships do concede at page 25 of the report that on the authority of the Privy Council, "it must be held to be settled law that the intention to separate can very well be abandoned." The cases quoted by their Lordships, viz. *Kedar Nath* v. *Ratan Singh* (2), and *Palani Ammal* v. *Muthuvenkatachala Moniagar* (3), afford illustrations of a demand for separation subsequently abandoned, with the result that the jointness of the family remained undisturbed. In the case of *Kedar Nath* v. *Ratan Singh* (2), there were three brothers; one separated outright, the second brought a suit for partition but withdrew his claim and remained joint with the third brother against whom he had brought the suit. Their Lordships held that as between the second and third brothers there was no disruption of jointness. Similarly, in the Madras case there was a demand for separation. A partition suit was filed, but ultimately the matter was compromised. It was held that the family did continue to be joint. In all these cases the demand was abandoned with the consent of the other members of the family. It is not necessary for us to say, definitely, in this case, whether the person making the demand for partition may abandon it without the consent of the other members of the family, so as to enable him to continue to be a member of the joint family. But it is clear to us that, where all the parties are agreed, including the member demanding a separation, that the demand should be withdrawn there is no disruption in the status of the family.

(1) (1928) I.L.R., 51 All., 1. (2) (1910) I.L.R., 32 All., 415.
(3) (1924) I.L.R., 48 Mad., 254.

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Such being our view of the law, we hold that the mere notice of the 2nd of February, 1922, which was never persisted in and which was ultimately given up, did not create a disruption of the joint family.

The result is that the family was joint when Bhagwan Das died on the 1st of May, 1922. It follows that the plaintiff is entitled to a half share in the entire joint family property.

We allow the appeal, modify the decree of the court below and decree the plaintiff's suit for partition, in its entirety. This will be the preliminary decree in the suit and the partition will be carried out in accordance with law. The plaintiff will have his costs of the suit and of the appeal.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

KUNJ BIHARI AND OTHERS (PLAINTIFFS) *v.* BINDESHRI PRASAD AND OTHERS (DEFENDANTS).*

1928 *December*, 20.

Instalment decree—Instalments not directed to be payable only in court—Date for payment expiring on court holiday —Deposit on re-opening of court—Validity of payment.

An instalment decree made the first instalment payable on a certain date, but it did not direct that the amount was to be deposited in court. The date specified expired during the vacation of the court, and the amount was tendered in court on the re-opening day. *Held* that as the judgment-debtors had the power to make the payment direct to the decree-holders, and depositing it in court was not the only course open to them, they could not take advantage of the fact that the court was closed on the specified date, and the payment made by them was not made in time. *Muhammad Jan* v. *Shiam Lal* (1), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Mr. *B. Malik*, for the appellants.

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*First Appeal No. 398 of 1925, from a decree of Raja Ram, Subordinate Judge of Jaunpur, dated the 20th of May, 1925.

(1) (1923) I.L.R., 46 All., 328.