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the argument that there is only the testimony of one man against another and that this is not a proper basis for a conviction for perjury. The result is that the application is dismissed. The applicant has been released and must surrender to his bail.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

SWARATH DHOBI (PLAINTIFF) *v.* GHURKI AND OTHERS (DEFENDANTS).* 1931 *January*, 26

Hindu law—Joint Hindu family—Acquisition of one member —Whether joint family property—Nucleus not proved—Separate property.

Where there is no nucleus of ancestral property or where there is no nucleus of joint property possessed by the members of the family, any acquisition of a particular member cannot be treated as joint family property in which other members of the family have a right to share.

Mr. *Harnandan Prasad*, for the appellant.

Mr. *Haribans Sahai*, for the respondents.

MUKERJI and BENNET, JJ. :—This second appeal has been referred to a Bench of two Judges because the learned Judge before whom it came thought that there was some conflict between two cases decided by this Court, namely, *Ram Kishan Das* v. *Tunda Mal* (1), and *Kundan Lal* v. *Shankar Lal* (2).

The facts of the case as found by the court below are these. One Ghura@ was a tenant holding the fixed-rate tenancy, one half of which is in dispute in this suit. On the 26th of July, 1913, he made a gift of one half of it to the plaintiff appellant Swarath, who was a son of his wife's brother. The other half he gave

*Second Appeal No. 680 of 1928, from a decree of Sarup Narain, Second Additional Subordinate Judge of Jaunpur, dated the 4th of February, 1928, reversing a decree of Riyazul Hasan, First Additional Munsif of Jaunpur, dated the 4th of February, 1927.

(1) (1911) I.L.R., 33 All., 677. (2) (1913) I.L.R., 35 All., 564.

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to his daughter Mst. Lotania. The daughter's half share went by inheritance to her son, and on the death of the son the property was inherited by the father, the husband of Mst. Lotania, Jhinguri. On the 13th of June, 1919, Jhinguri sold this half share in the tenancy to the plaintiff's brother, Gobardhan, the late husband of the respondent No. 1, Mst. Ghurki. The other defendants in the suit are transferees from Mst. Ghurki. The plaintiff appellant claimed the half share in dispute on the ground that his brother Gobardhan died joint with him and that by right of survivorship he is entitled to the property in question. The defence was that Gobardhan died separate and the property in suit was his self-acquisition.

The court of first instance decreed the suit. On appeal the learned Subordinate Judge dismissed it. The learned Subordinate Judge found that although the two brothers Swarath and Gobardhan lived together, there was no nucleus either of ancestral or of joint family property and that, therefore, there was no presumption that the property acquired by Gobardhan was joint family property in his hand. The learned Judge also found that Gobardhan used to go out to Calcutta to earn a living and it was possible that with the savings he was able to purchase the property in question.

In this Court it has been contended that the learned Subordinate Judge has overlooked the presumption of Hindu law that the property held by a member of a joint Hindu family is joint property and that if this presumption be given its proper effect to, the suit should be decreed.

The learned counsel for the appellant has further contended that there is a real conflict between the two cases quoted at an earlier part of this judgment and he has asked that if we are also of the same opinion we should refer the case to a larger Bench.

We are of opinion that there is no conflict at all between the two cases *Ram Kishan Das* v. *Tunda Mal* (1), and *Kundan Lal* v. *Shankar Lal* (2). Indeed the learned Judges who decided the later case expressed the opinion that they were not in any way differing from the earlier case. At page 568 of the report in I. L. R., 35 Allahabad, RICHARDS, C.J., is reported to have said: "It seems to me, however, that it is unnecessary in the present case to express any view on the correctness of the decision in *Ram Kishan Das* v. *Tunda Mal* (1), because I think that in the present case it is necessary for the plaintiff etc." We are also of the same opinion. Mayne in his Hindu Law, 9th edition, in the footnote at page 377 says: "The decision in *Kundan Lal* v. *Shankar Lal* (2) is not really in conflict with the proposition in the text; for in that case it was assumed that the property, though acquired in the name of a particular member, was in the possession of the joint family".

The case before us is apparently governed by the decision in *Ram Kishan Das* v. *Tunda Mal* (1), which lays down a law which has never been dissented from in this Court. It will be interesting to look at the original texts in order to find out whether the rule that has been laid down in that case is in any way in conflict with them. Vijnaneshwara in his commentary on the Mitakshara, in chapter I, section 4, placitum 118 (Colebrook's Translation) says: "The author explains what may not be divided. 'Whatever else is acquired by the coparcener himself without detriment to the father's estate as a present from a friend or a gift at nuptials does not appertain to the co-heirs.' " Then he explains: "That which has been acquired by the coparcener himself without any detriment to the goods of his father or mother or which has been received by him from a friend . . . shall not

(1) (1911) I.L.R., 33 All., 677. (2) (1913) I.L.R., 35 All., 564.

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be given up to the brethren or other co-heirs; the person recovering it shall take such property". (Ibid)

The opinion recorded by the author of Mitakshara is really based on a text of Manu which may be translated as follows:—"Whatever one has earned by his own labour without impairing the paternal estate, one may not give a share of that self-acquired property to another if he so desires it." (Translated by M. N. Dutt Shastri, M.A., and published by Elysium Press, Calcutta. See Manusamhita, chapter IX, sloka 208.)

A similar idea is expressed by the next sloka in which it is laid down by Manu as follows: "A son who has managed to recover an ancestral property which his father had failed to do in his lifetime must not divide the same among his own brothers if he does not so desire."

It appears to us that the use of the word "joint" family has been to some extent responsible for the conception that there can be no joint family without joint property. The word that has been actually used in the Sanskrit texts, especially by the author of Mitakshara, is "*Abibhakta*" which means "undivided". A family in which the members are living together may be called an undivided family, for the simple reason that they have not separated. Where the idea of mere living together has to be expressed, the expression that has been used by Manu is "*Sahajiwantah*". In chapter IX, sloka 210, Manu lays down that when divided members of a family "live together" and they decide to separate again, the eldest member of the family cannot claim the eldest member's share. The word "joint" implies, though not necessarily, possession of some property which may be regarded as owned by all the members of the family. The word "undivided" need not necessarily carry any such idea. Dr. Gour in his Hindu Code, Third edition, at page 590, in article 1174 says: "The strength

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of the joint family lies in the joint family property. Without such property a joint family is conceivable, but then its jointness would have no meaning, since such family may possess certain family rights in common, but they are comparatively of little account. The importance of the joint family, therefore, lies in the fact that it possesses all its property in common, as such members have mutual rights and obligations with reference to it. But while Hindu law postulates and presumes the existence of a joint family, it does not either postulate or presume the existence of joint family property . . ." Indeed the law is now too well established to be disturbed at this late hour and it is to this effect that where there is no nucleus of ancestral property or where there is no nucleus of joint property possessed by the members of the family, any acquisition of a particular member cannot be treated as joint family property in which other members of the family have a right to share.

The result is that the appeal cannot succeed and it is hereby dismissed with costs.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

RAM DHANI RAM (PLAINTIFF) *v.* RAM RIKH SINGH AND OTHERS (DEFENDANTS).*

1931 *January*, 27.

Agra Pre-emption Act (Local Act XI of 1922), section 4(1)—Co-sharer—Mortgagee in possession—Not entit'ed to pre-empt.

The expression "as proprietor" in section 4(1) of the Agra Pre-emption Act means by virtue of proprietary right and would not apply to a case where a person is in possession of the property but his title falls short of the proprietary interest. So, a mortgagee in possession, and in receipt of a share of the profits as such, does not come within the definition of a co-sharer in that section and is not entitled to pre-empt.

*Second Appeal No. 603 of 1929, from a decree of Kameshwar Nath, District Judge of Ghazipur, dated the 16th of January, 1929, confirming a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 27th of February, 1928.