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is disproved. Until the claimant establishes his acknowledgment, the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact."

Hasan and Misra, JJ.

We dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

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MUSAMMAT MENDA KUAR (PLAINTIFF-APPELLANT) *v.* MIRTUNJAI BAKHSH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Hindu law—Joint Hindu family consisting of three brothers, one being a minor—Partition among brothers—Ascertainment and allotment of shares of the three brothers—Share of minor given to his elder brother with whom he continued to live—Death of minor brother—Minor brother, whether a separated Hindu at his death—Reunion—Minor, whether can enter into an agreement to reunite.

Where a coparcener separates from others, the presumption of Hindu law as to jointness ceases to apply to the remaining coparceners. The ascertainment and the fixing of the share of every coparcener gives rise to the inference that all the coparceners have separated.

An agreement amongst the members, other than the outgoing members, to continue as between themselves the status of coparceners or to form a new joint family must be proved. Either for the purposes of maintaining the previously existing status of coparcenary or for the formation of a new

*First Civil Appeal No. 127 of 1926, against the decree, dated the 31st of May, 1926, of Bhagwat Prasad, Additional Subordinate Judge of Bara Banki, dismissing the plaintiff's claim.

joint family, there must be an agreement to that effect amongst the remaining members of the family. A member who is a minor is incompetent to enter into such an agreement. The agreement to remain united or to reunite need not be express but may be inferred from the conduct of the parties and the surrounding circumstances.

The fact of a separation having been effected between two brothers who constitute a joint Hindu family governed by the Mitakshara law raises no presumption that there was a separation of a joint family constituted of one of the brothers and his descendants. *Girja Bai* v. *Sadashiv Dhundiraj* (1), *Balkishen Das* v. *Ram Narain Sahu* (2), *Approvier* v. *Rama Subba Aiyan* (3). *Balabux Ladhuram* v. *Rukhmabai* (4), *Jatti* v. *Banwari Lal* (5), *Hari Bakhsh* v. *Babu Lal* (6) and *Palani Ammal* v. *Muthuvenkatacharia Moniagar* (7), referred to.

Messrs. *Ali Zaheer* and *Salig Ram*, for the appellant.

Messrs. *A. P. Sen* and *Bishambhar Nath Srivastava*, for the respondents.

HASAN and MISRA, JJ. :—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Bara Banki, dated the 31st of May, 1926. The plaintiff, Musammat Menda Kuar, widow of Sheo Partap Singh, claims in the suit, out of which this appeal arises, possession of a one-third share in the immoveable property entered in list A., and of moveable properties mentioned in lists C and D attached to the plaint. The claim is founded on the title of inheritance to the estate of her husband, Sheo Partap Singh. The defendants Nos. 1 and 2, Mirtunjai Bakhsh Singh and Chandar Sekhar Singh, respectively, are brothers of Sheo Partap Singh and Musammat Chhbraj Kuar, defendant No. 3, is the mother of Mirtunjai Bakhsh Singh. Chandar Sekhar Singh and Sheo Partap Singh, the

(1) (1916) L.R., 43 I.A., 151.
(2) (1906) L.R., 33 I.A., 139.
(3) (1868) 11 M.I.A., 75.
(4) (1903) L.R., 30 I.A., 130.
(5) (1923) L.R., 50 I.A., 192; 4 Lah., 350.
(6) (1924) L.R., 51 I.A., 163; I.O.W.N., 536.
(7) (1925) L.R., 52 I.A., 83.

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deceased husband of the plaintiff, were born of one mother who died some years ago. Mirtunjai Bakhsh Singh, the first defendant, was born of Chhbraj Kuar, defendant No. 3. Sheo Partap Singh, Mirtunjai Bakhsh Singh and Chandar Sekhar Singh are sons of Sant Bakhsh Singh, resident and zamindar of Sonepur, in the district of Bara Banki. Sant Bakhsh Singh died on the 31st of July, 1920, and the plaintiff's husband, Sheo Partap Singh, died on the 11th of June, 1922. His age at the time of his death is said to be sixteen or seventeen years.

The defence raised by Mirtunjai Bakhsh Singh is that Sheo Partap Singh died in a state of union with his brothers. The defence put forward by Chandra Sekhar Singh is that he and Sheo Partap Singh lived as members of a joint Hindu family governed by the Mitakshara school and that Sheo Partap Singh died while living in that state of jointness (*vide* paragraph 15 of his written statement) and further that in the event of a separation of Mirtunjai Bakhsh Singh being proved, Chandar Sekhar Singh and Sheo Partap Singh did not separate but continued to live joint. The effect of these defences clearly was the denial of the plaintiff's right to inherit the estate of her deceased husband. On these pleadings the broad issue which arose for decision was as to whether or not Sheo Partap Singh died as a separated member of the family.

The plaintiff produced evidence, oral and documentary, to establish the case that on the morning of the *daswan* ceremony of Sant Bakhsh Singh partition of the family estate was effected into three shares. One of such shares was allotted to her deceased husband, Sheo Partap Singh, and the remaining two shares were allotted to the other two brothers,

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one share each. The work of partition occupied three or four days. Mirtunjai Bakhsh Singh, defendant No. 1, produced witnesses to support the defence that there was no partition, and that there has never been one of any nature at any time. Chandar Sekhar Singh, defendant No. 2, produced no evidence whatsoever, oral or documentary, and thus the case that there was a partition on the eleventh day after the death of Sant Bakhsh Singh, as between Mirtunjai Bakhsh Singh on one side and Chandar Sekhar Singh and Sheo Partap Singh on the other, remained unsupported by any evidence on behalf of the defendant, who had set up this case in defence as laid out in the written statement.

Hasan and Misra, JJ.

The Additional Subordinate Judge, mainly on the evidence produced by the plaintiff, has found, however, that the partition effected after the death of Sant Bakhsh Singh was merely a separation of Mirtunjai Bakhsh Singh and not of Sheo Partap Singh from Chandar Sekhar Singh. This is a finding which has been challenged in appeal before us.

In support of the decree under appeal, the respondents' learned Counsel has advanced arguments (1) that there was no intention of breaking up the joint family in spite of the division of moveables into three lots at the partition, (2) that the division of moveables between Chandar Sekhar Singh and Sheo Partap Singh was not intended to effect a separation between them as to immoveable property, and (3) that Chandar Sekhar Singh and Sheo Partap Singh reunited after the said partition, besides the argument in support of the defence raised by Mirtunjai Bakhsh Singh that there has been no partition of any kind at all.

It appears to us that the first three arguments raise a new case altogether and must not be entertained at this stage. These arguments evidently involve important

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questions of facts which were not put forward before the trial court even for decision, much less for trial. The plaintiff on the pleadings as a whole was called upon to establish the broad case that her husband had separated before his death from his two brothers, and not the case either that the division of the moveables into three shares was intended as a matter of fact to break up the status of jointness or that the division between Chandar Sekhar Singh and Sheo Partap Singh was not intended as a matter of fact to effect a separation between them as regards immoveable property or that there was no reunion.

We are are of opinion that it would be highly unjust to the plaintiff to permit these new cases to be raised in appeal. The main and the only question, therefore, for decision is as to whether there was a partition amongst the three brothers on or about the 11th of August, 1920. As already stated, the decision would almost exclusively rest on the evidence produced by the plaintiff and on that evidence alone the learned Additional Subordinate Judge has found "that there was a partition among the sons of Sant Bakhsh Singh in August, 1920, in which the entire moveable property of the family was divided into three shares, one share being separated and given to defendant No. 1, and the remaining two given jointly to the defendant No. 2 and their shares were defined in the immoveable property also." With a part of this finding we generally agree, but we do not agree with the further finding that this partition was not intended to or had not the effect of separating Sheo Partap Singh from his other two brothers, but was only limited to the separation of Mirtunjai Bakhsh Singh. We are of opinion that the proved partition establishes the breaking up of the joint family and the separation of the three brothers *inter se*. We may mention that the finding of the court below that there was a partition was not seriously contested on behalf of Mirtunjai Bakhsh Singh before us. Hav-

ing regard, therefore, to our agreement with the learned Additional Subordinate Judge on this part of the case we do not feel that we should detain ourselves any longer on this point.

[Their Lordships then discuss the evidence and find that the cumulative effect of the evidence was that there was a separation, full and complete, amongst all the three brothers and their separate shares in all the joint property were ascertained and defined and so far as the tangible moveable property was concerned it was physically handed over to every one of the three brothers in equal portions. Sheo Partap Singh being at the time of the partition a mere boy lived with and under the protection of his own brother, Chandar Sekhar, and the moveable property which fell to the share of Sheo Partap Singh was also retained by Chandar Sekhar in the capacity of a guardian. They, therefore, held that the plaintiff had succeeded in establishing her case that her husband, Sheo Partap Singh, was a separated Hindu at the time of his death governed by the law of Mitakshara and that she was entitled to succeed to his estate.] Their Lordships then continue as follow:—

Hasan and Misra, JJ.

Having regard to the finding of fact just now recorded little room is left for any legal discussion as to what 'partition' means, and as to the effect of the separation of one member of a joint family on the status of the other members of the same family. In the arguments before us the law on the subject was much pressed on us from both sides. We think that in its legal aspect also the plaintiff's claim stands again on a firm ground.

In the first place, what is the true conception of the Hindu law on the subject of partition? Yajnyawalcya in the Mitakshara defines partition as follows:—

> "Partition (*vibhaga*) is the adjustment of divers rights regarding the whole, by distribut-

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ing them on particular portions of the aggregate.''—Colebrooke's Mitakshara, chapter I, section 1, verse 4.

Hasan and Misra, JJ.

In the annotations the words '' partition is the adjustment of divers rights '' are thus explained and in support of the explanation Sabodhini and Balam-bhatta are referred to :—'' The adjustment, or special allotment severally, of two or more rights, vested in sons or others, relative to the whole undivided estate, by referring or applying those rights to parcels or particular portions of the aggregate, is what the word ' partition ' signifies.'' In discussing the text of Gautama, namely, '' An owner is by inheritance, purchase, partition, seizure or finding : acceptance is an additional mode for a Brahmana; conquest for a Kshatriya; gain for a Vaisya and a Sudra. ''Mitra Misra says in Viramitrodaya as follows :—

'' The meaning of the above text is as follows :—' Inheritance ' is heritage; ' purchase ' is well-known; ' partition ' is the division of heritage whereby the right to specific portions is indicated . . . . . ''—Golapchandra Sarkar Sastri's translation of the Virmitrodaya, chapter I, section 13.

Again in section 36 '' partition '' is explained :—'' Indeed what is effected by partition is only the adjustment (of the proprietary right) into specific portions.'' Section 23, of chapter II of part I of the same book is as follows :—

'' 23. Here again, partition at the desire of the sons, whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction. Hence what, after premising partition, is said by Katyayana, in the

text :—' The wealth of those who have not attained to maturity and likewise of those who are absent in a distant place, shall be deposited, free from disbursement, with relatives and friends,' is also in support of this view. Otherwise if partition could not take place without their consent, the declaration of the deposit of their wealth with relatives and friends would be unreasonable. So also Vishnu says :—' Likewise the wealth of a minor shall be preserved till he attains to majority.' ''

The last two mentioned texts and the text in the Mitakshara are referred to in the judgment of their Lordships of the Judicial Committee in the case of *Girja Bai* v. *Sadashiv Dhundiraj* (1) and the following observation is made :—

> '' In fact later writers leave no room for doubt that ' separation ,' which means the severance of the status of jointness, is a matter of individual volition.''

According to these texts, therefore, the allotment of a one-third share to Sheo Partap Singh and similarly to his two brothers in household articles, cash, houses and lands which constituted the undivided estate was a partition amongst all the three brothers in this particular case. On the evidence already discussed it is clear that the aggregates of cash and corn in the house were physically divided into three equal portions, one portion being actually given to each brother. Most of the other articles were similarly dealt with. Some of the articles were in their entirety given to Chandar Sekhar and Sheo Partap Singh jointly, that is to say, as representing two shares, one share belonging to each in the aggregate. This, as we have said more than once, was natural in the circumstances of the case, but it does not alter the nature of the

(1) (1916) L.R., 43 I.A., 151.

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partition affected by the adjustment of the rights of all the three coparceners, nor was the minority of Sheo Partap Singh a bar to a complete and effective partition amongst the three brothers. The fact that Sheo Partap Singh and Chandar Sekhar lived together and enjoyed their property in common makes no difference in the status of each as separated members. This state of facts is entirely covered by the judgment of their Lordships of the Judicial Committee in *Balkishen Das* v. *Ram Narain Sahu* (1). In delivering the judgment of the Judicial Committee Lord DAVEY said :—

Hasan and Misra, JJ.

> " They might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. Consistently with the broad principle laid down in the case of *Approvier* v. *Rama Subha Aiyan* (2) this was determined by the allotment to them of defined shares which, to use Lord WESTBURY'S illustration, converted them from joint holders into tenants in common."

It makes no difference in principle that the partition in the present case is not evidenced by any written agreement as it was in the case before their Lordships of the Judicial Committee. The Case of *Approvier* v. *Rama Subha Aiyan* (2) is the leading case as to what constitutes a partition in Hindu law. In delivering judgment of their Lordships of the Judicial Committee in that case Lord WESTBURY said :—

> " But when the members of an undivided family agree among themselves with regard to

(1) (1906) L.R., 33 I.A., 139. (2) (1868) 11 M.I.A., 75.

particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, although the property itself has not been actually severed and divided."

Hasan and Misra, JJ.

The view that Lord WESTBURY'S expression implies that the severance of status can take place only by agreement was clearly negatived in the case of *Girja Bai* v. *Sadashiv Dhundiraj* (1), above referred to. The facts of this case fulfill the test laid down by Lord WESTBURY.

Now we come to the question of the legal effect of the separation of Mirtunjai Bakhsh Singh on the status of the other two brothers, Chandar Sekhar and Sheo Partap Singh. In this connection, the first case to which reference may be made is *Balabux Ladhuram* v. *Rukhmabai* (2). The facts necessary for our purposes are that three brothers, Girdhari Lal, Kunyaram and Ladhuram, lived together as an undivided family possessed of an estate at Ellichpur. At some time in 1869 or 1870, Kanyaram separated from his other two brothers, took away his share amounting to about Rs. 11,000 and started a shop of his own. There was no evidence that Ladhuram drew out his share of the family property or any part of it, and the inference drawn from the evidence was that he left it in the family shop which continued to be carried on by Girdhari Lal under the name of Amarchand Girdhari Lal. Ladhuram had a son Balabux, the plaintiff-appellant before their Lordships of the Judicial Committee. About the time of the partition, Ladhuram sent his wife and the son, who was an infant then, to reside in a different place, and a few

(1) (1916) L.R., 43 I.A., 151. (2) (1903) L.R., 30 I.A., 130.

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months afterwards he joined them there and then they all went together on a pilgrimage to Prayag where Ladhuram died in the year 1873. Thereupon, Girdhari Lal brought the appellant's mother and the appellant, then thirteen or fourteen years old, to his residence at Ellichpur where they all lived together until Girdhari Lal's death in 1882. Girdhari Lal left no male issue, but he left a daughter and a widow Rakhmabai, who was the defendant-respondent in that case.

Hasan and Misra, JJ.

The plaintiff, Balabux, claimed title to the family shop and business as the survivor of a joint family consisting of his uncle, Girdhari Lal and himself. The defence was that there was a complete partition between the brothers in 1869. As to the transaction of the year 1869 the trial court found that there was a partition between Girdhari Lal and his two brothers, but that there was reunion between the plaintiff, Balabux, and his mother and Girdhari Lal some years before the latter died, so the effect of this reunion must be taken as cancelling the partition of 1869. The trial court made a decree in the appellant's favour. The Judicial Commissioner on appeal affirmed the finding of the trial court that Girdhari Lal and Ladhuram had separated in 1869. The opinion of the Judicial Commissioner was based on the legal inference drawn from the evidence, and their Lordships of the Judicial Committee dealt with that inference. The direct evidence was too slight either way to form a satisfactory basis for decision. This being so, their Lordships put before themselves the question: "What, then, is the result?", for decision, and the decision is given in the following words:—

> "It appears to their Lordships that there is no presumption, when one coparcener separates from the others, 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 coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

Hasan and Misra, JJ.

This statement of law seems to us, if we may respectfully say so, absolutely clear. According to it in a case where only one coparcener separates from the other (1) the presumption of Hindu law as to jointness ceases to apply to the remaining coparceners; (2) the ascertainment and the fixing of the share of every coparcener may amount to a separation of all, and (3) an agreement amongst the members other than the outgoing member to continue as between themselves the status of coparceners or to form a new joint family consisting of themselves must be proved. As regards the reunion of a minor member of the family, their Lordships say :—

> "A reunion in estate properly so called can only take place between persons who were parties to the original partition. This appears to be the meaning placed on the well-known text of Vrihaspati (Mitakshara, chapter 2, section 9); he who being once separated dwells again through affection with his father, brother or paternal uncle is termed reunited? It is difficult, also, to see how an agreement for that purpose could have been made by or on behalf of the appellant during his minority."

It seems to us to follow that either for the purpose of maintaining the previously existing status of co-

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parcenary or the reformation of a new joint family there must be an agreement to that effect amongst the remaining members of the family. It further follows that a member, who is a minor, is incompetent to enter into such an agreement. We think that the ground of the decision of their Lordships of the Judicial Committee in this case has not in any manner been shaken or modified by any other subsequent decision of the same tribunal as it was contended at the Bar. Indeed, it was affirmed and applied in the case of *Jatti* v. *Banwari Lal* (1). This was a case of separation of four brothers. The widow of one of the brothers claimed title by inheritance to the estate of her deceased husband. The defence was that only one of the brothers, Ishar Das, who was not the husband of the plaintiff, had separated. The finding of the trial court was " that on the separation of Ishar Das, the family of the parties ceased to be a joint Hindu family in the strictest sense of the term, or in other words, its members ceased to be coparceners." Their Lordships of the Judicial Committee held that this view of law was well settled by *Balabux Ladhuram* v. *Rukhmabai* (2) and *Balkishen Das* v. *Ram Narain Sahu* (3).

The other decisions, to which we shall presently refer, only establish the two following propositions: (1) that the agreement to remain united or to reunite need not be express and special, but may be inferred from the conduct of the parties and the surrounding circumstances, and (2) that the fact of a separation having been effected between brothers who constituted a joint Hindu family governed by the Mitakshara raises no presumption that there was a separation of the joint family constituted of one of the brothers and his descendants.

The second proposition is laid down in the case of *Hari Bakhsh* v. *Babu Lal* (4). In this case, noticing

(1) (1923) L.R., 50 I.A., 192.
(2) (1903) L.R., 30 I.A., 130.
(3) (1903) L.R., 30 I.A., 139.
(4) (1924) L.R., 51 I.A., 163.

the decision in *Jatti* v. *Banwari Lal* (1), Sir JOHN EDGE quoted the finding of the trial court which was approved of and adopted in that case by their Lordships of the Judicial Committee and said: "The members ceased to be coparceners of each other, but it is not suggested that if one of those members happened to have had sons who were coparceners when Ishar Das separated from his brothers, such sons and their father would cease to be coparceners, constituting together a joint and undivided family."

It appears to us that this was a reaffirmation of the view that on a separation of one coparcener there was a virtual separation of all and the further proposition laid down was that that view was not applicable to a case where the question was of separation between one member and his descendants.

The first proposition rests on the case of *Palani Ammal* v. *Muthuvenkatacharia Moniagar* (2) and this case was put forward at the Bar as having modified the view expressed in the case of *Balabux Ladhuram* v. *Rukhmabai* (3). We do not think that that is the effect of this case. On the contrary Balabux' case is described in the judgment as the leading authority for the proposition relating to reunion. We think that it is necessary to quote from the judgment of their Lordships at some length. Sir JOHN EDGE in delivering the judgment said:—

> "In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the

(1) (1923) L.R., 50 I.A., 192. (2) (1925) L.R., 52 I.A., 83.
(3) (1903) L.R., 30 I.A., 130.

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members have separated. That the coparceners in a joint family can, by agreement amongst themselves, separate and cease to be a joint family, and on separation are entitled to partition the joint property amongst themselves, is now well-established law. An authority for that proposition is the judgment of the Board in *Approvier* v. *Rama Subba Aiyan* (1), which applies to joint families such as the joint family which descended from the propositus. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of coparceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is, on separation, entitled to have his share in the property of the joint family ascertained and partitioned off by him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from

(1) (1866) 11 M.I.A., 75

them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other fact is proved. The leading authority for that last proposition is *Balabux Ladhuram* v. *Rukhmabai* (1)."

Hasan and Misra, JJ.

In the present case, our conclusion as to the separation of all the three brothers is not founded on the mere fact that the shares of the coparceners were ascertained and defined. There are many other facts on the cumulative effect of which our conclusion rests. In these series of facts the most striking fact is that there was a physical division and allotment into three shares of most of the household articles, the cash, the corn, the houses and the lands appertaining to the houses. Other facts are stated in sufficient details in our judgment, and it will serve no useful purpose to repeat them again. As to the agreement between Chandar Sekhar and Sheo Partap Singh to continue to be coparceners or to reunite as a joint Hindu family we have sufficiently well realized in the preceding portion of this judgment that the agreement need not be express or special and that it may be inferred from the conduct of the parties. In the case before us no agreement to reunite was pleaded, and then we have the further difficulty that Sheo Partap Singh was a minor. As to the agreement to continue as coparceners the facts from which such an agreement could be inferred are in the light of the entire evidence and the circumstances of the case more consistent with the theory that Chandar Sekhar and Sheo Partap Singh

(1) (1903) L.R., 30 I.A., 130.

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became tenants in common, each possessed of a defined and ascertained share in such of the properties as were not actually divided at the separation in question.

Hasan and Misra, JJ.

At the outset of this judgment we have noticed certain arguments advanced on behalf of the respondents in support of the decree under appeal, and we have held that the arguments raise a new case which should not be permitted at this stage, but it will be seen that the merits of the points involved in these arguments have also been considered by us and decided against the respondents.

Under issue 2, the trial court has found that the sum of Rs. 8,000 and three silver articles fell to Sheo Partap Singh's share at the partition, and they were in the possession of Chandar Sekhar. Under issue 3(*a*) the trial court has further found that the plaintiff is entitled to certain articles of jewellery as her *stridhan*. A decree in favour of the plaintiff in respect of some of these articles and for Rs. 302 as the money equivalent of other articles has been made by the trial court against Chandar Sekhar. The court has also granted a decree for maintenance at the rate of Rs. 600 a year in favour of the plaintiff. A sum of Rs. 1,400 has also been decreed to her as arrears of maintenance. The plaintiff's suit as to the one-third share in the immoveable property set out in list A, attached to the plaint, corresponding with list A, attached to the decree of the court below, has been dismissed.

In accordance with our finding that Sheo Partap Singh, the plaintiff's husband, died as a separated Hindu the plaintiff is entitled to a decree for a one-third share in the immoveable property entered in list A also, and she is entitled to mesne profits in respect of the one-third share for the three years preceding the date of the institution of the suit and since then till the recovery of

possession. The amount of the mesne profits will be ascertained hereafter. The decree of the trial court as to maintenance must, in the circumstances, be discharged.

We accordingly allow this appeal, set aside the decree of the court below and decree the plaintiff's suit for possession of a one-third share in the immoveable property mentioned in list A attached to the plaint and also for the articles which the lower court has held under issue 2 to have belonged to Sheo Partap Singh, and also for the articles for which that court has granted a decree to the plaintiff and for Rs. 302 in lieu of certain other articles. The plaintiff will be entitled to recover her costs in both the courts from the defendants-respondents, who will bear their own costs in the same courts. The plaintiff will be entitled to mesne profits as directed above.

Hasan and Misra, JJ.

Appeal allowed.

MISCELLANEOUS CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

GOBIND SARAN AND ANOTHER (APPELLANTS) *v.* COMMISSIONER OF INCOME-TAX, UNITED PROVINCES (RESPONDENT).*

1927 *September,* 16.

Income-tax Act (XI of 1922) sections 31, 32 and 66(2)—Jurisdiction—Appeal against assessment and refusal by Commissioner—High Court's power to order Commissioner to state the case and to interfere—"Assessee", whether includes his representative in interest.

Where there has been no appeal under section 31 or section 32 against the assessment and there is no refusal by the Commissioner of Income-tax under section 66, clause (2),

*Civil Miscellaneous Application No. 433 of 1927, against the order of W. Gaskell, Commissioner of Income-tax, United Provinces, Ghazipur, dated the 2nd of April, 1927, refusing to state and refer the case to the Chief Court of Oudh at Lucknow.