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the facts the decision was based on the facts of the particular case which they themselves have stated to be different from those of many other cases.

Hamilton, J.

In the present case it is impossible for me to say from the judgment of the learned Sessions Judge whether there was common intention to cause the death of Chandrika Prasad Singh or whether the person who inflicted the fatal blow committed murder because of his intention or of his knowledge. As it is not known who inflicted the fatal blow and it is not shown that there was a common intent, it is impossible for me to hold that the convictions under section 325 are incorrect. No question, therefore, of issuing notice for enhancement arises. As regards the facts, undoubtedly there was at least a common intent of causing grievous hurt and the convictions under section 325 were justified and the sentences of five years' rigorous imprisonment are not excessive.

The appeal is, therefore, dismissed.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice A. H. de. B. Hamilton, and Mr. Justice J. R. W. Bennett

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July, 14

ALI RAZA KHAN, SARDAR (PLAINTIFF-APPLICANT) *v.* NEWAZISH ALI KHAN, SARDAR (DEFENDANT-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), Order 40, rule 1—Receiver—Appointment of Receiver during pendency of appeal.

Where a suit for possession referred to two estates and the plaintiff's claim was decreed only for a 2/15th share of the smaller estate and the plaintiff appealed against that order and also applied for the appointment of a Receiver during the pendency of the appeal on the ground that the defendant was committing act of waste, *held*, that it is exceedingly unlikely that the defendant should injure the estate in which he holds a large share to wrong the applicant who is only entitled to a much

*Civil Miscellaneous Application No. 828 of 1939, filed in First Civil Appeal No. 39 of 1938.

smaller share and so there is no reason to grant the prayer for the appointment of a Receiver.

When there has been a decision on the merits deciding the right of the parties in the respective properties concerned, the property cannot be said to be any longer "*in medio*", and a receivership which has come to an end by the decision of the case cannot be continued until the final decision of the appeal. Where the application for the appointment of a Receiver is rejected by the trial court and the suit is also decided against the applicant there is no ground at all for the appointment of a Receiver in appeal. *Bisheshwar Singh* v. *Jadunath Singh* (1), referred to.

Messrs. *M. Wasim* and *M. H. Qidwai*, for Applicant.

Messrs. *Niamatullah* and *Mohammad Husain Usmani*, for opposite party.

HAMILTON and BENNETT, JJ.:—This is an application for the appointment of a Receiver or in the alternative for an order for security for mesne profits and an order to the defendant not to sell or cut any more jungle or trees or grant or create any further subordinate rights in any of the property in suit.

The application is by Sardar Ali Raza Khan Qizilbash who was plaintiff in the suit, which was decided by a learned Judge of this Court in the exercise of the original jurisdiction. The defendant was Sardar Newazish Ali Khan.

The plaintiff dissatisfied with the decision of the learned single Judge of this Court has filed an appeal and the original defendant has, therefore, become a respondent.

The suit, in so far as we are at present concerned, referred to property in Oudh which may be referred to as the "Oudh Estate" and to property in the Punjab which may be referred to as the "Rakh Juliana Estate", and the value of these properties as given to us is 18 lakhs for the Oudh Estate and 3 lakhs for the Rakh Juliana Estate.

The plaintiff claimed both estates in their entirety and, therefore, among his reliefs he asked for a decree for possession of the property.

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The learned Judge of this Court found that the plaintiff had no right at all to the Oudh Estate, but as regards the Rakh Juliana Estate the defendant had a right to one-third and the plaintiff and his four brothers had equal rights to the remaining two-thirds so that the right of the plaintiff was two-fifteenths, but no possession was given because the plaintiff claimed exclusive possession to the whole and, therefore, the learned Judge remarked that the plaintiff would have to apply for partition in order to get his two-fifteenths share.

This application is based on the allegation that the defendant has committed acts of waste including the following:

(*a*) sale of large and valuable jungle in the Oudh estate;

(*b*) sale of timber trees and fruit bearing trees in both the Oudh and Rakh Juliana Estate;

(*c*) the grant of leases unfavourable to the estate and the creation of other subordinate rights in favour of his own creatures and his wife; and

(*d*) the investment of all income derived from the estate in favour of his wife so as to put it beyond the reach of the applicant should the appeal succeed.

The application must be considered in two aspects: according to the rights of the applicant as found by the single Judge of this Court and the rights claimed by the applicant which he thinks will be recognized by the appellate Court after the decision of the appeal.

The applicant alleges that he has good hopes of succeeding in the appeal and if he succeeds he will be found entitled to both the Oudh and the Rakh Juliana Estates and he will be given a decree for possession of both the estates. We propose to consider the two aspects of the case separately.

If his appeal fails he has established title to two-fifteenths of the Rakh Juliana Estate, that is, to a part of the estate worth Rs.40,000. The defendant, on the

other hand, will have established his title to one-third of this estate, therefore, to property of the value of one lakh and the whole of the Oudh Estate of which the value is 18 lakhs. The acts of waste committed in the Rakh Juliana Estate are only, as alleged in the application, the sale of timber trees and fruit bearing trees and the investment of the income of that estate in the name of wife of the defendant-respondent. There will be plenty of property left with the defendant-respondent from which the appellant can obtain compensation for any loss due to acts of waste committed as regards his two-fifteenths share. We may further say here that these allegations as to acts of waste are not proved, and naturally it appears to us exceedingly unlikely that the defendant-respondent should injure the value of the Rakh Juliana Estate where he holds one-third to wrong the applicant who is only entitled to two-fifteenths. In this aspect of the case we see no reason to grant the prayer for the appointment of a Receiver.

Taking the other aspect, we are asked to presume that the applicant is likely to succeed in appeal. In *Bisheshwar Singh* v. *Jadunath Singh* (1) an application for the appointment of a Receiver was made to a Bench of this Court during the pendency of an appeal against the decision of a single Judge of this Court in the exercise of original jurisdiction. It was there held that when there has been a decision on the merits deciding the right of the parties in the respective properties concerned, the property cannot be said to be any longer "*in medio*", and a receivership which has come to an end by the decision of the case cannot be continued until the final decision of the appeal.

In the present case the property as to which this application is made has been throughout in the possession of the defendant-respondent, and though an application for the appointment of a Receiver was made in the original suit, it was rejected so that this is not a case

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of continuing a receivership because one was in existence during the trial of the original suit, but prayer is made for the appointment of a Receiver, though a similar application had been made in the original court and had been rejected, and though there has been a finding of a competent court against the applicant, except as regards a two-fifteenths share in the Rakh Juliana property which property is only worth one-sixth of the Oudh estate. Unless the decision of the single Judge of this Court is entirely upset, there will certainly be sufficient property in the hands of the defendant-respondent to satisfy any legal claim of the appellant-applicant and we see no reason to presume that such will be the result of the appeal.

We may again repeat that the allegations of waste are vague and that it is difficult to believe that as the defendant-respondent has been successful in the original court there is any likelihood of his being under such apprehension of the result of the appeal that he has proceeded already to seriously damage the estate or that he will in future seriously damage the estate.

We see no reason, therefore, to grant the application for the appointment of a receiver which would have the result of depriving of possession the defendant who had possession up to the decision of the suit by the lower court and who has continued to hold possession since, after a recognition of his title by a Judge of this Court which cannot be said to have weakened his position except as regards the Rakh Juliana Estate which is of far lesser value than the Oudh estate.

As regards the other prayer of the applicant should his prayer for the appointment of a Receiver be not granted, the learned counsel for the applicant has not been able to show under what provisions of the Code of Civil Procedure we could grant this prayer and he has to rely on the inherent powers of the court. Presuming even that our inherent powers allowed us to grant this prayer (and we do not say that we have these

powers) we should see no reason to exercise them because of the reasons we have given in rejecting the prayer for the appointment of a Receiver.

We, therefore, dismiss this application with costs.

Application dismissed.

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ALI RAZA KHAN, SARDAR v. NEWAZISH ALI KHAN, SARDAR

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan, Acting Chief Judge

RAM LAKHAN (PLAINTIFF-APPELLANT) *v.* SURAJ PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS)*

1939 *July*, 17

Hindu Law—Joint family property—Agricultural holding treated by members of family as joint family property but no proof that it was acquired with the help of joint family property—Holding, if joint family property.

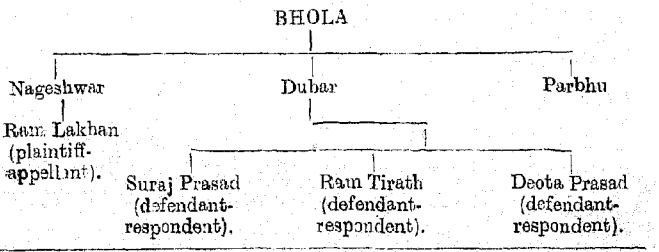
Whilst it cannot be said that in every case an agricultural holding acquired by a member of a joint Hindu family becomes joint family property, it is equally wrong to say that in no case can a holding acquired by a member of a joint family be joint family property. Where there is no evidence to show that a holding was acquired "with the help of the ancestral or joint family property" but there is evidence that the holding was treated by members of the family as joint family property, the holding is joint family property. *Acharji Ahir* v. *Harai Ahir* (1), referred to.

Messrs. *M. Wasim* and *Ali Hasan*, for the Appellant

Mr. *S. N. Roy*, for the respondents.

ZIAUL HASAN, A.C.J.:—This is a plaintiff's second appeal against a decree of the learned Civil Judge of Gonda confirming a decree of the Munsif of that place.

The relationship existing between the parties will appear from the following pedigree:



*Second Civil Appeal No. 97 of 1936, against the order of Mr. Gauri Shankar Varma, Sub-Judge of Gonda, dated the 23rd December, 1935.

(1) (1930) I.L.R., 52 All., 961