1869
May 14.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

RADHIKA PRASAD DEY (DEFENDANT) *v.* MUSSAMUT DHARMA DASI DEBI AND OTHERS (PLAINTIFFS.)*

Hindu Family—Commensality—Presumption.

The mere fact of a Hindu family living in commensality is not sufficient to raise a presumption of their property being joint. The existence of joint funds, out of which the property might have been purchased, must also be proved to raise the presumption of the property being joint.

IN execution of a decree against one Dwarkanath Gupta, the defendant Radhikaprasad Dey succeeded in obtaining possession of the property in dispute. The plaintiffs, Dharmadasi Debi and Nistarini Debi, filed a petition under section 230 of Act VIII. of 1859, stating that they were owners of a moiety of the property; that Dwarkanath had only a two anna share thereof; that Kasinath and Madhu who were brothers, and their sons after their death lived in commensality, and were joint in estate; and that the plaintiffs being widows of their sons were entitled to a moiety. Two other claimants preferred their petitions of claim. The defence set up was that there had been a partition, and that the property in dispute had been obtained by Dwarkanath's father, partly under partition and partly by purchase; that there was another partition between the judgment-debtor and his brothers, and the property in dispute solely belonged to the plaintiff.

The Principal Sudder Ameen dismissed the suit.

On appeal, the Additional Judge found from the evidence that the family still lived in commensality, and that there had been no separation; and held that as the parties formed a joint Hindu family, that the presumption according to Hindu law, that the property was joint had not been rebutted, and that therefore the plaintiffs were entitled to the property claimed. He accordingly passed a decree in favor of the plaintiffs.

* Special Appeal, No. 2044 of 1868, from a decree of the Additional Judge of Hooghly, dated the 22nd April 1868, reversing a decree of the Subordinate Judge of that district, dated the 28th November 1867.

1869

BADHIKA PRASAD DEY v. MUSSAMUT DHARMA DASI DEBI.

The defendant appealed to the High Court.

Baboos *Srinath Das* and *Taraknath Dutt* for appellant.

Baboo *Mahes Chandra Chowdry* for respondents.

JACKSON, J.—The special respondents' pleader does not contend that the decision of the Judge can be supported. It is manifest that the case must go back for a new trial to the lower Appellate Court. The plaintiffs who commenced their suit by the procedure indicated in section 230 of the Code of Civil Procedure, alleged that the property which the defendant had purchased, and either had dispossessed or was about to dispossess them of in execution of the decree, was the joint property of the family of which their deceased husbands had been members; and that they were entitled to shares in that property, the interest of that party whose rights had been purchased by the defendant being only a fractional share. They consequently made application to the Court, and the Court proceeded as directed in that section. The suit was dismissed by the Second Principal Sudder Ameen; but on appeal, the Additional Judge gave judgment for the plaintiff. The ground of his decision is this. After observing that the family was originally a joint Hindu family, and that the evidence given by the defendant in his opinion failed to show a separation; he says: "I hold it "proved that the plaintiffs, the widows of the sons of Kasinath "and the son of Madhu, have been living as a joint Hindu "family; that the presumption of Hindu law that the property "is joint has not been rebutted, and that the plaintiffs are there-"fore entitled to half of the joint property." The Judge therefore considered that when the plaintiffs showed that the family was up to that time living in commensality, without any other circumstance whatever, it became incumbent on the defendant to show that the property had been purchased with the funds and for the sole benefit of the party whose rights he had purchased, and on his failure to prove that circumstance he considered the plaintiffs were entitled to judgment.

That is not the law. In such cases, it is not sufficient for the plaintiffs to show the fact of commensality, but there must be

1869

RAMNIKA PRASAD DEY v. MUSSAMUT DHARMA DASI DEBI.

in addition to that fact, the existence of joint funds out of which the property might have been purchased. Where that is the case, there is no doubt a presumption, but not a very strong presumption in favor of the joint family.

The decision of the Judge, therefore cannot be supported and the proceedings must go back in order that he may determine whether, in addition to the fact of commensality, there was a joint fund out of which the purchase might have been effected; and after considering the evidence upon that point, as well as any evidence which the defendant may have given to show a separate purchase, he will determine on which side the balance of evidence lies, and will decide accordingly.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

1869 May 21.

MARK RIDDED CURRIE AND ANOTHER (DEFENDANT) v. S. V. MUTU RAMEN CHETTY AND ANOTHER (PLAINTIFFS,)*

Registration of Document—Act XX. of 1866—Specific Performance of Agreement.

The plaintiff lent defendant 20,000 rupees, and received a document in the following terms:—

"On demand we promise to pay S. V. Mutu Ramen Chetty and C. T. Chinniah Chetty, the sum of rupees twenty thousand, value received."

MEMO.

7 B. L. R. 204.

"For the above promissory note, the grant of the dockyard and offices to be deposited in three days, and proper agreement drawn out.

"The time of credit to be one year or eighteen months, the interest at Rs. 1-10 per cent. per mensem."

In a suit to compel specific performance, and for damages on breach of the agreement contained in the above Memo, *held*, that the Memo, contained an agreement of which a Court of Equity would grant specific performance, had not defendant rendered specific performance impossible.

Held also, that the document did not contain an agreement creating an interest in land, and registration was not, therefore, necessary to render it receivable in evidence under the Registration Act XX of 1866.

The fact that the document was received in evidence without a stamp, was no reason for reversing the decision in appeal.

* Regular Appeal, No. 1 of 1869, from a decree of the Recorder of Moulmein, dated the 21st October 1868.