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on the record, instead of the Official Assignee. It does not appear that the defendants have as yet filed their written statement, or have been misled as to the nature of the plaintiff's suit. I think it right then that these amendments should be made, of course, at the cost of the plaintiffs; and the defendant must be allowed the same time to file his written statement, as he would have had if the plaint had been originally filed in its amended form

Application Granted.

Attorneys for the plaintiff in both cases: Messrs. *Dhur* and *Mitter*.

Attorney for the defendant in both cases: Mr. *Dover*

[APPELLATE CIVIL.]

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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RAMHARI SARMA (PLAINTIFF) *v.* TRIHIRAM SARMA AND OTHERS (DEFENDANTS).*

Hindu Law—Succession to Inheritance—Separated and Re-united Brothers—Widow.

A Hindu died, leaving a widow, a brother, and two nephews, the plaintiff and the defendant. The brother was the defendant's father; he and the brother were since dead, the brother having died in the widow's life-time. The plaintiff claimed to be entitled to a moiety of the estate of the deceased by inheritance. The defendant claimed the whole on the ground that the deceased lived as a re-united or associated brother with his (the defendant's) father, whereas the plaintiff was the son of a separated brother of the deceased. *Held*, that the material issue to be tried in the case was whether the widow lived in a state of re-union with the defendant, as her husband had done with the defendant's father, or whether she, at the time of her death, lived separate from him; though in the same family house.

* Special Appeal, No. 2100 of 1870, from a decree of the Officiating Judge of Chittagong, dated the 28th June 1870, affirming a decree of the Moonsiff of that district, dated the 19th February 1870.

Baboo *Krishna Shakha Mookerjee* for the appellant.

Baboo *Akhil Chandra Sein* for the respondents.

THE facts of this case and the arguments of the pleaders are fully noticed in the judgment of the Court, which was delivered by

MOOKERJEE, J.—This case must be remanded to the Court of first instance for re-trial. The dispute appears to be about the estate of one Rammaniko, the paternal uncle of the plaintiff and of defendant No. 1. The defendant No. 2, being the grandson of another brother of Rammaniko, is excluded from inheritance by the plaintiff and defendant No. 1, who are nearer sapindas to the deceased. It appears that Rammaniko left a widow, Sharoda, who died on the 5th Assin 1231 (26th September 1824). The plaintiff claims a moiety of the estate of Rammaniko as his brother's son. Defendant No. 1 denied that the property ever belonged to the deceased, and took an alternate plea to the effect that the deceased Rammaniko, having lived as a re-united or associated brother with the defendant's father Ramballab, he, the defendant, is entitled under the Hindu law to the whole of the inheritance, to the exclusion of the plaintiff, who is the son of a separated brother of the deceased.

The Court of first instance dismissed the plaintiff's suit, on the ground that "it was fairly proved by the evidence of the witnesses of both the parties that Ramballab and Rammaniko were two uterine brothers; that they jointly held their shares; and that no division took place between them." The Court held, therefore, "that defendat's rights of heirship to the disputed property are preferable to those of plaintiff."

On appeal the Judge confirmed this decision, holding that the evidence in the case proved "that Rammaniko and Ramballab lived in commensality up to the date of the former's death, and that Rammaniko's widow lived in commensality with the surviving brother Ramballab."

It is contended before us that the findings of the Courts below are insufficient under the Hindu law to establish an exclusive right in the defendant to the property left by Ramma-

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niko. It is said that it may be that Rammaniko and Ramballab lived together in commensality; but as it is an admitted fact that Rammaniko left a widow as his heir, it should have been seen whether at the time of her death she was or was not living as a re-united co-parcener with the defendant No. 1, the nephew of the deceased Rammaniko. It appears that at the time when Sharoda, the widow of Rammaniko, died, all the brothers of that individual were dead. It does not appear either in the pleadings or in the evidence when Ramballab, the father of the defendant, died; nor does it appear that the defendant as a re-united co-sharer continued to live with the widow in a state of re-union down to the period of her death.

The authorities on the Hindu law are not very clear on the subject of the right of an associated brother in preference to that of an unassociated one. The only clear distinction they make is between separated and re-united parceners, and the definition given by Vrihaspati of the term re-union is,—"He "who being once separated dwells again through affection with "his father, brother, or paternal uncle is termed re-united." This text of Vrihaspati is explained and interpreted by the author of the Dayabhaga in paragraph 30, section 1, chapter XI, in the following manner:—"Those persons who by birth have com- "mon rights in the wealth acquired by the father and grand- "father, as father (and son), brothers, uncle (and nephew), are "re-united, when after having made a partition, they live together "through mutual affection as inhabitants of the same house, "annulling the previous partition and stipulating that 'the "'property which is mine is thine.'"

Thus it appears that a special rule is laid down by the Hindu law for cases in which a separation once takes place and then afterwards the co-parceners re-unite through affection, and not only dwell together in the same house, but there takes place an entire community of interest among them, on an understanding that "whatever is thine is mine and whatever is mine is thine." In such a case only the law says that a "re-united parcener shall take the heritage" in preference to, and in utter exclusion of a separated claimant, but of an equal degree, whether brothers of the whole or half blood, or sons of such brothers or uncles.

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The parties in this case are nephews of the late proprietor Rammaniko; they are therefore claimants in an equal degree of affinity to him. Now, before one of them can be preferred to the other and adjudged the whole estate of Rammaniko, it should be inquired into and found whether the one was a re united parcener, according to the meaning of that term given in the Hindu law, and whether the re-union, if there was any, subsisted down to the time of the death of the widow.

Now it is an undoubted principle of Hindu law, that in order to determine who is the heir to a deceased Hindu who left a widow as his heir at the time of his death, the *status* of the family at the time of the death of that widow is to be looked at, and not the *status* at the time of the death of the proprietor. If A, a proprietor of an estate, died, leaving two uterine brothers and no widow, the brothers would undoubtedly be entitled to succeed to his estate; but if A also leaves a widow, the widow would take the estate as the surviving half of her deceased husband, and enjoy it as his representative. Now, if one of these brothers die in the life-time of this widow, leaving a son, that son would not inherit the estate, but the surviving brother would get the entire estate after the death of the widow. It is therefore clear that in order to find the true heir to a Hindu proprietor on the death of his widow, it is not sufficient to see who was his nearest sapinda at the time of his death, but it must be seen who was the nearest sapinda alive at the time of the death of his widow.

In this case the lower Courts have only found that "Ram-"maniko lived with his brother Ramballab in commensality up "to the date of the former's (Rammaniko's) death, and that "Rammaniko's widow lived on in commensality with the sur-"viving brother Ramballab." If the widow had died during the life-time of Ramballab, this finding might have been sufficient to entitle Rammaniko as a re-united parcener to obtain the property of his brother; but it is an admitted fact that Ramballab died before the widow, and the defendant in this case is his son. It does not appear at all whether the family continued to live in the same state in which it was at the time of Ramballab's death. The contention in this case is between two

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nephews, or brother's sons, of Rammaniko, who are sapindas of an equal affinity: under the ordinary Hindu law both of them would have been equally entitled to the estate if there had been no question of re-union. In order to defeat the claims of the plaintiff, the defendant must prove clearly that the widow continued to live with him in the same state of re-union in which her husband lived with defendant's father. It is therefore incumbent on the defendant to show that not only was there a re-union between the husband of the widow and the defendant's father, but that the widow lived in that state of re-union with him down to the time of her death.

It may be that the widow, though she lived as a member of a re-united family with Ramballab, did not so live with the defendant. She had an undoubted right to a partition, and a separate enjoyment of the share of her husband, and it may also be the case that at the period of her demise she was actually living separate from both the nephews of her husband. I do not think that, in that case, the defendant could have claimed the property of her husband to the exclusion of the plaintiff, who would ordinarily be entitled to share with him the heritage of their common uncle.

I would, therefore, remand the case to the Court of first instance, to lay down an issue as to whether the widow of Rammaniko lived in a state of re-union with defendant as did her husband with Ramballab his brother, or whether she at the time of her death lived separate from him, though living in the same family house. The Moonsiff should, after framing this issue, give full opportunity to the parties to adduce evidence on this issue, and then decide the case according to the result of that inquiry, and with advertence to the remarks made above. It has been stated in the course of the argument that the evidence adduced in this case merely goes to show that Rammaniko and his widow lived in the same house with Ramballab; that there is no evidence to show that they lived as members of an united or joint Hindu family. The Moonsiff should bear in mind that the mere fact of brothers living in the same dwelling-house is not conclusive proof of their living as a re-united or joint family. It must be shown that their was an actual re-union, and that

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the husband, and after his death the widow, lived with the defendant as members of a joint family, and that there was a community of interest between them. Even if there had been no actual partition by metes and bounds, but if the two co-parceners had enjoyed the rents and profits of their respective shares, and did not throw them into a common fund or box, as is the case in all joint families, it must be held that there was a partition between them, and that they cannot be said to be members of a joint undivided Hindu family.

The costs of this appeal will be costs in the cause, and will abide the final result.

Case remanded.

[FULL BENCH.

Before Mr. Justice. Norman, Offg. Chief Justice, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Macpherson, and Mr. Justice Mittor.

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RAM CHANDRA TANTRA DAS (PLAINTIFF) *v.* DHARMO NARAYAN CHUCKERBUTTY (ONE OF THE DEFENDANTS).*

Sale in Execution—Act VIII of 1859, s, 205—Property—Right of a Hindu Heir expectant on the Death of a Widow.

The interest of an heir, according to the Hindu law, expectant on the death of a widow in possession, is not property, and therefore not liable to attachment and sale in execution of a decree under section 205 of Act VIII of 1859.

ONE Jagatdulal died, possessed of a 1 anna, 6 gandas, 2 cowries, and 2 krants share out of an 8-anna share in a certain talook call Radhaballab Rutnessur, leaving him surviving three sons and a widow. These three sons succeeded equally to the share of the property left by their father. Two of the brothers died unmarried and without issue between the years 1247—49 B. S. (1840—1843), and their shares were inherited by their mother. The plaintiff, the other surviving son, and the mother, lived jointly and in commensality. The mother died in the year 1270 B. S. (1863). Before the death of the mother, in 1266

Special Appeal, No. 407, of 1870 from a decree of the Subordinate Judge of Mymensingh, dated the 7th December 1869, reversing a decree of the Moonsiff of that district, dated the 12th April 1869.