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TARUCK CHUNDER PODDAR v. JODESHUR CHUNDER KOONDOO.

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

The 8th July 1868.

DHUNOOKDHAREE LAL (PLAINTIFF) *v.* GUNPUT LALL (DEFENDANT).

Hindu Law—Joint Family Property—Presumption—Burden of Proof.

Baboo *Debendro Narain Bose* for the appellant.

Mr. *R. E. Twidale* for the respondent.

THE following judgments were delivered:—

JACKSON, J.—It is satisfactory to find that in this case our order of remand has produced from the Additional Judge a judgment infinitely more satisfactory and convincing than the judgment which came before the Court when the case was last heard.

It now appears that he has found as a fact, and it is not alleged that the evidence is not sufficient to warrant that finding, that the joint family property to which the plaintiff and defendant were entitled was not sufficiently large after supporting the members of the family to leave any surplus funds from which the property in suit could have been acquired, and it appears that the two brothers Gunput and Onpooch were at that time pursuing lucrative employments, the plaintiff himself being a minor.

In this state of facts, affording no ground for the usual presumption as to joint family estate, the plaintiff could not succeed. I entertain no doubt speaking for myself that our judgment remanding the case was perfectly just and right, and I have the satisfaction of seeing that it has borne fruit in the shape of a judgment which we are able to affirm.

As to the case of *Dhunookdharee Lall* v. *Gunput Lall* (1), it may be said that facts were found there which rebutted the presumption. The special appeal therefore will be dismissed with costs.

MITTER, J.—I am of the same opinion. It is admitted that the property in dispute was purchased by the defendant (respondent.) The plaintiff's case, however was that the purchase was made with joint funds belonging to himself and the respondent.

It is true that, in a case of this nature where the defendant pleads self-acquisition, the *onus* of proving such acquisition lies on the defendant. But all that the Hindu law requirs the defendant to prove in such a case is that the property which he claims as his own was acquired "without detriment to the paternal estate," or in other words, without using the paternal estate, or the proceeds thereof. The defendant having shown that, in acquiring the property in suit, he did not use any property which belonged to the joint family, the presumption of joint ownership is at once rebutted, and it is for the plaintiff to show that the property was acquired in the manner alleged by him.

His case in the Court below was that the defendant received his education from the joint estat, and that he is consequently entitled to particspate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it.

It is a mistake to say that, in every case in which a Hindu pleads separate acquisition, it is incumbent on him to show the source from which the money came. No doubt, as remarked by their Lordships of the Privy Council, in the case of *Dhurm Das Pandey* v. *Mussamut Shama Soondari*

* Special Appeal, No. 3462 of 1867, from a decree of the Additional Judge of Tirhoot, dated the 23rd September 1867, reversing a decree of the Sudder Ameen of that district, dated the 22nd June 1865.

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tion, and so it cannot be considered as laying down any rule as to the *onus* of proof. So the case of *Mussamut Soobheddur Dossee* v. *Boloram Dewan* (1) is also contrary to the decisions of the Privy Council. I must adopt the judgment of the Court of Appeal rather than the law laid down in that case. The case of *Koonjbeharee Dutt* v. *Khetturnath Dutt* (2) is consistent with the decisions of the Privy Council. It was argued before us, and reference was made to the case of *Banee Madhub Mookerjee* v. *Bhugobutty Churn Banerjee* (3), that it was not shown here that there was any nucleus of property by means of which this acquisition by Isserchunder might have been made, and that at least the plaintiff ought to have given some evidence of that. I must observe that what is said in that case about there being a nucleus of property is only a *dictum*; no doubt, it would be very useful for the plaintiffs to show that, but I cannot agree that they are bound to do it. That *dictum* seems to me to be inconsistent with the doctrine laid down by the Judicial Committee. There is one more case which I must notice that is directly opposed to the decisions of the Privy Council—*Shiu Golam Sing* v. *Baran Sing* (4). With every respect for the learned Judges who pronounced that decision, I feel obliged by the superior authority of the Privy Council to differ from it. The law laid down by the Judicial Committee in 12 Moore's I. A., (5) does not appear to have been presented to the learned Judges. Probably, if it had been, they would, whatever their own opinion might be on the subject, have considered that they were bound to follow it.

Dibiah (*a*), the source from which the money comes is the "chief criterion" for determining as to whether a particular property is joint or separate, but their Lordships never said that it is the only criterion so as to render it obligatory on the party who pleads self-acquisition to give evidence of the particular source from which the money was derived.

The appeal ought therefore be dismissed with costs.

(1) W. R., Sp. No., 57.

(2) 8 W. R., 270.

(3) *Ib.*

(4) 1 B. L. R., A. C., 164.

(5) 3 B. L. R., P. C., 13. There is a note by the Chief Justice to this passage in the margin of the original judgment to the effect that the words "12 Moore's I. A." should be "3 Moore's I. A."

(*a*) 3 Moore's I. A., 229.

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The result of a consideration of the authorities appears to me to be that the Subordinate Judge was wrong in what he laid down as to the *onus* of proof. He improperly put upon the plaintiffs the *onus* of proving that (to use his own words) "the property was acquired with the aid of joint funds, and at a time when the brothers were living in a state of family partnership." That is opposed to the authorities which this Court is bound to follow, and on that account his decision must be reversed, and the case must be sent back to him for retrial.

The costs of this appeal will follow the result of this suit.

Appeal allowed.

PRIVY COUNCIL.

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(1) SADUT ALI KHAN (DEFENDANT) *v.* KHAJEH ABDOOL GUNNEY (PLAINTIFF);

AND

(2) KHAJEH ABDOOL GUNNEY (PLAINTIFF) *v.* MUSSAMUT ZAMOORUDOONISSA KHANUM (DEFENDANT).

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[On appeal from the High Court of Judicature at Fort William in Bengal.]

See also
15 B.L.R. 78
15 B.L.R. 82

Act VIII of 1859, *s.* 15—*Declaratory Decree—Limitation—Payment—Act X of* 1859—*Enhancement.*

A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus, a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X of 1859 to enhance the rent, is one in which a declaratory decree may be made.

The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree the suit being one in which a declaratory decree may be made.

THE first appeal was from a judgment of a Division Bench of the Calcutta High Court (Loch and Hobhouse, JJ.), dated the 4th February 1868, by which a decree of the Principal Sudder

* *Present* :—THE RIGHT HON'BLE SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.