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case. Every Hindu family is presumed to be joint in food, in worship, and in estate until it is separated. The separation must be proved by the party who asserts it—*Dhurm Das Pandey* v. *Mussamut Shama Soondri Dibiah* (1), *Koonjbeharee Dutt* v. *Khetturnath Dutt* (2), and *Nilkristo Deb Barmano* v. *Bir Chandra Thakur* (3).

Baboo *Chunder Madhub Ghose* for the respondent. The *onus* of proving that the acquisition was made with joint funds and for the joint family, and that the property was held as joint family property, was upon the plaintiffs, and this *onus* they have not discharged, and their case has been rightly dismissed. This is not a case where a family is shown to have possessed any ancestral property, or any joint property or funds which might have served as a nucleus for the acquisition of the property in suit—*Mussamut Soobheddur Dossee* v. *Boloram Dewan* (4), *Khilut Chunder Ghose* v. *Koonj Lall Dhur* (5), *Dhunookdharee*

(1) 3 Moor's I. A., 229.
(2) 8 W. R., 270.
(3) 3 B. L. R., P. C., 13; S. C., 12 Moor's I. A., 523.
(4) W. R., Sp. No., 57.
(5) *Before Mr. Justice Loch and Mr. Justice Mitter.*

KHILUTCHUNDER GHOSE (DEFENDANT) *v.* KOONJ LALL DHUR (PLAINTIFF).*

The 2nd September 1868.

Hindu Law—Joint family property—Presumption—Burden of Proof.

Baboo *Mutty Lall Mookerjee* for the appellant.

Baboo *Girish Chunder Ghose* for the respondent.

THE following judgments were delivered.—

LOUCH, J.—It appears that the Judge has thrown the *onus* of proof on the wrong party. He required the defendant to prove that the property in dispute was purchase by Bholanath out of his own means. It appears that one Bholanath purchased the property connected with this case in execution of a decree. His rights and interests were subsequently sold and purchased by one Unooda, who sold it to the defendant. The plaintiff in this case has purchased the rights and interests of Bhoyrubnath, a brother of Bholanath, in this property, and sued to recover possession of his share. The first point before the lower Court was whether the property was the sole property of Bholanath, or the joint property of Bholanath, Bhoyrubnath, and Brojonath. It appears to have been admitted that the three brothers, Bholanath, Bhoyrubnath and Brojonath, lived in commensality; and the lower Appellate Court has considered this fact sufficient to warrant the presumption of Hindu law that a property purchased by one member of a family was purchased for the benefit of all the members, without ascertaining whether

* Special Appeal, No. 1335 of 1868, from a decree of the Judge of Sylhet, dated the 28th February 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 17th May 1867.

Lall v. *Gunput Lall* (1), *Shiu Golam Sing* v. *Baran Sing* (2), and *Banee Madhub Mookerjee* v. *Bhugobutty Churn Banerjee* (3). Had it been shown that there was a nucleus of joint family property with which this property might have been acquired, the presumption relied upon by the other side might have arisen, but no joint property is at all shown to have existed. In *Nilkristo Deb Barmano* v. *Bir Chandra Thakur* (4), the remark that the normal estate of a Hindu family is joint, was applicable to the particular case set up by the plaintiff, *viz.*, that the property being an ancestral impartible raj descending to a sole heir, it was an undivided joint property to which the plaintiff being the eldest male member was entitled to succeed. Their Lordships of the Judicial Committee did not intend to lay down any rule with reference to the question now before, the Court, and to a case were there is no joint estate out of which an acquisition might have been made. The remarks do not touch the present question: and even if they did, they would be merely *obiter dicta*. These remarks do not in reality go further than what was laid down in the case of *Naragunty Luchmeedavamah* v. *Vengama*

there was any ancestral property from which funds were derived for the purchase of this property; and he has required the defendant, who is the representative of the auction-purchaser of Bholanath's share, to prove that Bholanath purchased from his separate funds. The plaintiff, respondent in this case, alleges that the property was purchased by Bholanath and Bhoyrubnath from joint funds. We do not, however, find that any evidence has been given on the part of the plaintiff to show that there were other properties from which the funds for the purchase of this property could have been derived, and before calling on the defendant, as the Judge has done to prove that this property solely belonged to Bholanath, and was purchased by him, the plaintiff should have started his case and shown that there was a joint source from which funds were available for the purchase of this property for the family. The Judge appears to have thrown the *onus* on the defendant, special appellant in this case, and has given a decree to the plaintiff, because the defendant has failed to prove his case. We think that the case should be remanded to the Judge to come to a finding on the plaintiff's evidence, and to determine whether there was any joint fund, from which means could be derived for the purchase of the property. Should the plaintiff make out his case, he will then look to the evidence of the defendant. Costs of this appeal will follow the ultimate result.

MITTER, J.—I concur. Under the circumstances stated by my learned colleague, the plaintiff is bound to start his case. There can be no presumption of joint ownership from the mere fact of commensality.

(1) *Post*, p. 201.

(2) 1 B. L. R., A. C., 164.

(3) W. R., 270.

(4) 3. B. L, R., P. C., 13; S, C., 12 Moore's I. A., 523.

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Naidoo (1), *viz.*, that the family is to be presumed to be joint until division is proved. The case of *Dhurm Das Pandey* v. *Mussamut Shama SoondriDibiah* (2) is not an authority in support of the general proposition contended for by the appellants. It rather supports the view uniformly taken by this Court, and the late Sudder Court, of the question at issue; for there, admittedly, the family had some joint property, and upon that footing the presumption of law in favor of joint property was raised. In the case of *Naragunty Luchmeedavamah* v. *Vengama Naidoo* (1), already alluded to, the contest was between a male member of the family of the deceased *poligar* and the widow of the deceased in respect of an ancestral estate, and the question was whether the plaintiff, a male surviving member, was a member of an "undivided family," or otherwise whether there had been a separation, in which latter case the widow might claim in preference to the plaintiff; and the *onus* of proving separation was cast upon the widow.

The judgment of the Court was delivered by

COUCH, C.J.—This suit was brought by the plaintiffs to have their rights under a *miras* (hereditory) lease obtained by their ancestors of a certain share of a tenure known by the name of Baran Moollah confirmed and declared; and their case was that Isserchunder, the father of the second defendant, an infant, Brijokishur, the father of the first set of plaintiffs, and Hurishchunder, the father of the second plaintiff, being three uterine brothers while living jointly and in commensality, acquired with the aid of their joint funds, a mokurari maurasi lease on the 15th of Chaitra 1264 (21th March 1858).

The defence set up was that the lease was in fact granted by the lessors to Isserchunder after the dissolution of the commensality between the co-parceners, and that at the time of the granting of the lease, there was a verbal stipulation to the effect that, upon the payment of the bonus-money, the lease would be returned to the lessor, and that the defendant received back the bonus-money.

(1) 9 Moore's I. A., 66. (2) 3 Moore's I. A., 229.

It seems that the issues had been framed by the predecessor of the Munsif who tried the case, and that the latter modified them and framed amongst others this, "whether the *miras* lease in respect of the share of the mouza in dispute had been acquired by Brijokishur, the father of the first plaintiffs, Hurishchunder, the father of the second plaintiff, and by Isserchurder, father of defendant No. 2, while they were living jointly and in commensality, and had been held by them in joint tenancy; and whether, after their decease, the second defendant and the plaintiffs had been jointly in possession of the propeaty, or whether the plaintiffs had been dispossessed of the property in suit by the first defendants:" and, secondly, "whether Isserchunder, the father of the second defendant, had acquired a *miras* leave in respect of the property in suit after severance of the commensality with the fathers of the plaintiffs," which was really involved in the first issue.

The Munsif then tried the case, and he said in his judgment:—"It has been satisfactorily proved that the said Isserchunder and his brothers, Brijo and Aurishchunder, held the property in dispute jointly both while they were living in a state of commensality, and also after a severance of the commensality, and that, after their death, the present plaintiffs and the defendant have also held the said property jointly," and then noticing what is laid down in Mr. Norton's work on evidence (1), and stating that it appeared that the three brothers were living in a state of family partnership, he said "a heavy burden lies on defendant No. 1 to prove the fact of the separate acquisition of the property in suit, and the defendant No. 1 has totally failed to discharge the said *onus*." He then decreed in favor of the plaintiffs, ordering that they should recover possession of the share which they claimed.

The case cameon appeal before the Subordinate Judge, and he, after noticing the decree the Munsif had made, said:—"With reference to the second issue, I find that it is admitted on all hands that the *miras* lease, in respect of the property in suit, was obtained in the name of Isserchunder. Therefore, under the

(1) Sec s. 590, 2nd edition.

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precedents quoted in the margin (1), the *onus* of proving the fact of the acquisition of the leasehold property by the three brothers, namely, Isserchunder, Brijokishur, and Hurishchunder, the ancestors of the plaintiffs, with the aid of the joint ancestral funds, and at a time when the three brothers were living in a state of family partnership, was upon the plaintiffs. I am of opinion that the plaintiffs have failed to discharge the said *onus* satisfactorily." And he decreed the appeal, setting aside the Munsif's decision, and ordering the suit to be dismissed.

In his judgment he also said that it had been proved that the *miras* lease was acquired by Isserchunder, who had paid the bonus necessary for obtaining it; and as there was no evidence to show that the fathers of the plaintiffs, or the plaintiffs themselves, had any interest in the said leasehold estate, "it is not at all necessary to put the defendant to strict proof of his title. He therefore threw upon the plaintiffs the burden of proving that the property had been acquired by the family jointly, instead of putting the burden of proof upon the defendant as the Munsif had, and the question raised in this special appeal, and upon which, seeing the small amount of evidence there is in the case, the decision of the suit really depends, is, upon which party ought the burden of proof to have been laid.

Now the Judicial Committee of the Privy Council, in *Nilkristo Deb Barmano* v. *Bir Chandra Thakur* (2), have laid down the rule by which this Court must be guided. At page 540, their Lordships say:—"The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all, or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing, the family may have property distinct from that to which a sole heirship belongs, and may continue joint." These observations have

(1) *Mussamut Soobheddur Dossee* v. *Boloram Dewan* W. R., S. No., 57; and *Khilut Chunder Ghose* v. *Koonj Lall Dhur*, *ante*, p. 194.

(2) 3 B. L. R., P. C., 13, sec 17; S. C, 12 Moore's I. A., 523, sec 540.

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reference to the particular case before their Lordships, but here they lay it down in most distinct terms that every Hindu family is presumably joint in food, worship, and estate; and the same law had been laid down, in a previous case of *Naragunty Luchmeedavamah* v. *Vengama Naidoo* (1), where it is said that the presumption with regard to a Hindu family is that it remains undivided. In another case before the Judicial Committee, *Dhurm Das Pandey* v. *Mussamut Shama Soondri Dibiah* (2), we find the law laid down which is applicable to the case before us. Their Lordships say:—"It is allowed that this was a family who lived in commensality eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumtion of law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case, with regard to any part of the property. Now what has been relied upon, with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it, but all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan whose most valuable assistance we have in this case (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore I think that, so far on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property." Now, with regard to what their

(1) 9 Moore's I. A., 66; see 92. (2) 3 Moore's I. A., 229; see 240.

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Lordships say as to the family being possessed of property, and that the presupmtion of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. It being so, until in this case it is shown that Isserchunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person who set up a different state of things from what is to be presumed to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family, and the possession by one of them of the property. That appears to me to be the result of the judgments of the Privy Council which I have referred to.

There is no doubt a conflict of decisions in this Court upon this subject. I can see no way of reconciling them. We must follow what has been laid down by the Court of Appeal from this Court; and I may observe that, in decisions of this Court which are in conflict, the judgments of the Privy Council do not appear to have been noticed; in some they have not been noticed at all, in others I do think they have not been noticed in the manner they would have been if the attention of the Judges had been directed to them. I have no doubt it frequently happens in this Court that all the authorities bearing on the subject are not presented to the Court in the argument, and this sometimes leads to a conflict of decisions.

I have said there are various decisions in this Court which cannot be reconciled with the law, which I feel bound by the judgments in the Privy Council to lay down. The case of *Khilut Chunder Ghose* v. *Koonj Lall Dhur* (1) which was quoted to us, is certainly contrary to the decision of the Privy Council

(1) *Ante*, p. 194.

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(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.