1868

KAL KRISHNA CHANDRA v. HARIHAR CHUCKERBUTTY.

bring a fresh suit; but it does not, in my judgment, comprehend jurisdiction. I hold, then, upon the reading of section 7 and section 37 of Act XXIII. of 1861 together, that we have no jurisdiction to entertain this appeal, and I agree in dismissing it with costs.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

1863
July 24.

SHIU GOLAM SING *v* BARAN SING.*

Joint-family Property—Onus probandi—Legal Presumption.

See also 12 B.L.R. 340.

The normal condition of a Hindu family being joint, it must be presumed to remain joint, unless some proof of a subsequent separation is given, and where property is shown to have been once joint-family property, it is presumed to remain joint, until the contrary is shown; but the mere fact of a family being joint is not enough to raise a presumption in law, that property acquired by one member of that family is joint property.

Where A. as purchaser claimed a share in property as being joint-family property, *Held*, A. was not only bound to show that the family was joint, but that the property in question became joint-property when acquired, or that at some period since its acquisition, it had been enjoyed jointly by the family.

THIS was a suit instituted in the Court of the Sudder Ameen of Sarun, to recover possession, with mesne profits, of a certain share of Mouza Pananpur, which the plaintiff alleged that he had purchased at an auction-sale in 1861. The plaintiff further alleged that the land, which was the subject of the suit, was the joint-family property of three brothers, and that, by purchase, he was entitled to the undivided share of one of the three brothers. The defendants denied that the land belonged to the brothers jointly; and, on the contrary, alleged that it was the self-acquired property of the elder brother, who was not the vendor of the plaintiff.

The Sudder Ameen decreed the claim of the plaintiff, but on appeal, the Principal Sudder Ameen reversed the decision of the lower Court, on the ground that the plaintiff had failed to make out that the property in dispute was the joint family property of the three brothers.

The plaintiff now appealed to the High Court on the ground, that the lower appellate Court had wrongly thrown on the

* Special Appeal, No. 769 from a decreee of the Principal Sudder Ameen of Sarun, reversing a decree of the Sudder Ameen ofthat district.

plaintiff the *onus* of proving that the brothers lived jointly, and that the property was joint-family property.

Baboo *Ramesh Chandra Mitter* for appellant.

Baboo *Abinash Chandra Banerjee* for respondent.

The judgment of the Court was delivered by

PHEAR, J.—The first objection of the special appellant to the judgment of the lower appellate Court is this: "that the lower appellate Court has thrown the burden of proof with regard to the question of separation on the wrong party, that is, your petitioner. It was for the defendants to prove their plea." This objection really goes to the root of the whole contest, for if it cannot be maintained, the decision of the Principal Sudder Ameen must remain good against the plaintiff. It amounts to this, that whereas the Principal Sudder Ameen has come to the conclusion that the plaintiff has not proved his case, this objection urges that it was not for the plaintiff to prove his case, but for the defendant to establish his defence. And the reason why the burden of proof is not to rest upon the defendant, who is resisting, rather than upon the plaintiff, who is making the claim, is remarkable. The plaintiff says, that he is entitled, by purchase, to the property of one of three brothers, and alleging that the land which is the subject of suit, is the joint-family property of the three brothers, he seeks to recover his vendor's undivided share in it. The defendants entirely deny that the lands belong to the brothers jointly; and, on the contrary, aver, that it was the self-acquired property of the elder brother, who was not the vendor of the plaintiff. Upon this statement, the plaintiff's pleader argues, that the plaintiff's case is made out, for he maintains that the brothers must be presumed to be living jointly until the contrary is proved; and, further, that all property acquired by one member of a joint-family must be presumed to be acquired for the benefit of the whole, until it is shown to be otherwise.

We have looked as carefully as we can through the later decisions of the Sudder Court and of this Court, but we can find

1868

SHIU GOLAM SING v. BARAN SING.

nothing which goes any way towards supporting this position. It is no doubt laid down in many cases that the normal condition of a Hindu family is joint, therefore starting with the fact of a family being joint, it must be presumed to afterwards remain joint, unless some proof of a subsequent separation is given. Also that where property is shown to have been once joint-family property, it is presumed to remain the joint property of all the members of the joint-family, until something to the contrary is shown. But, on the other hand, there is more than one case which lays down, that the single fact of a family living joint or in commensality, is not enough to raise a presumption in law, that property acquired by one individual member of that family is joint property. To render it joint property, the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of the joint property, or by joint labour. But neither of these alternatives is matter of legal presumption. It can only be brought to the cognizance of a Court of Justice in the same way as any other fact, namely by evidence—consequently whosoever's interest it is to establish it, he must produce the evidence. In *Subhadra Dasi* v. *Balaram Dewan* (1), the Chief Justice, in delivering judgment, remarks, "it was contended that as the two brothers lived in commensality, the presumption was that their property was joint." On this point he goes on to say the rule is correctly laid down in certain cases, which he mentions, and among these is the decision in *Kishori Lal* v. *Chaman Lal* (2) and on turning to the report of the judgment there given, we find the Court saying, "the *onus probandi* in this case appears to us to be clearly on the plaintiff. By his own admission the properties in dispute were not acquired by the use of the patrimonial funds, nor have the defendants ever acknowledged that they were acquired by the joint exertions and aid of the plaintiff, and his father. It was, therefore, for the plaintiff to prove his own allegations as to the original joint interest in the purchase of the properties. The mere circumstance of the parties having been united in food raises no such sufficient presumption of a joint interest, as to relieve the plaintiff from the onus of proof." It

(1) Special No. W. R., 57. (2) S. D. R. 1852, 111.

1868

SHIU GOLAM SING v. BARAN SING

seems to me upon those authorities, and certainly upon the reason of the thing, that the plaintiff coming into Court to claim a share in property as being joint-family property, must lay some foundation before he can succeed in his suit. He must, at least, show that the defendants whom he sues constitute a joint family, and that the property in question became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family. It will be sufficient for this purpose for him to show that the family, of which the defendants came, was at some antecedent period, not unreasonably great, living joint in estate; and that the property in question was either a portion of the patrimonial estate so enjoyed by the family, or that it has been since acquired by joint funds. In this case, the Principal Sudder Ameen has found that the plaintiff has given no proof of the family being joint, beyond the admitted fact of the three persons being brothers, and the plaintiff has also given no sort of proof that these brothers ever were living in the joint enjoyment of any property, still less that this property was acquired by the use and employment of any joint funds. It seems to us that he was entirely right, on the finding, to dismiss the plaintiff's suit, without looking further into the case.

The appeal will be dismissed with costs.

Before Mr. Justice Loch and Mr. Justice Glover.

SHIB KUMAR JOTI *v.* KALI PRASAD SEN.*

1868 *July* 25.

Upanchowki Tenure—Mesne Profits—Rent—Act X of 1859.

A. sued B. for possession, with mesne profits, of a share in certain talooks, alleging that he purchased it in execution of a decree. B. proved that he held the lands under an Upanchowki title. The lower Court, however, awarded to A. mesne profits for six years.

Held, that B. having proved his Upanchowki title, A. could only be entitled to a share of the Upanchowki jumma, which was not of the nature of mesne profits, but of rent; and, therefore, a suit to recover that could not be brought in the Civil Court.

THE suit was for recovery of possession of certain shares in talooks, with mesne profits from the date of purchase, the 29th

* Special Appeal, No. 1787 of 1867, from a decree of the Judge of Rungpore, modifying a decree of the Principal Sudder Ameen of that district.