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(1869) 05 CAL CK 0016

Calcutta High Court

Case No: Special Appeal No. 2044 of 1868

Mussamut Dharma  
Dasi Debi and Others

APPELLANT

Vs

Radhika Prasad Dey

RESPONDENT

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**Date of Decision:** May 14, 1869

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### Judgement

L.S. 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 therefore 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 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.

2. 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.