(1868) 07 CAL CK 0022

Calcutta High Court

Case No: Special Appeal No. 769

Shiu Golam Sing		APPELLANT
	Vs	
Baran Sing		RESPONDENT

Date of Decision: July 24, 1868

Final Decision: Dismissed

Judgement

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 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 whosever''s interest it is to establish it, he must produce the evidence. In Subhadra Dasi v. Balaram Dewan, (Special No. W. R., 57), 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 (S.D.B., 1852, 111) 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 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 ease, 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 farther into the case.

2. The appeal will be dismissed with costs.