Mst. Reoti Devi vs Pt. Bhagwan Dayal on 7 May, 1954

Equivalent citations: AIR1954ALL801, AIR 1954 ALLAHABAD 801

JUDGMENT

Gurtu, J.

1. This is a defendant's appeal. It is necessary to set out the pedigree printed at page 2 of the paperbook, as it will help in the appreciation of the case of the parties-

PANDIT LACHHMAN PRASAD

Pandit Kashi Ram (Died on 12th Oct.1924, leaving no male issues). | Pandit Jwala

Mst Batashi (Daughter) (died about 192)

BalakRam | Sia Ram

| | | | Raghubar Dayal (died on 26th Feb, Banwari Lal (died in 1914, Bhagwan Dayal Ram Lal 933, leaving no mail issues). leaving no male issues). Plaintiff (died in 1914) | | (1) By first wife Ajudhia Prasad | Mst. Saraswati (daughter) | | Lala Ram (died in 1942)(2) By Mst. Revti Devi Babu Ram second wife,defendant (died in 1942) | Mst. Daya Vati (minor).

2. The plaintiff's case has been stated as follows;

3. Lachhman Prasad and his sons held properties detailed in Schedule "A" which are still in the joint undivided possession of the male descendants and are held by them in coparcenary as joint Hindu family properties, and there never was a separation between Lachhman Prasad's issues after his death. One of the wives of Kashi Ram, uncle of the plaintiff Bhagwan Dayal, used to reside in the ancestral house in village Naugaien, district Farrukhabad, where the other brother Jwala Prasacl lived with his own wife. Kashi Rarn was in service for about thirteen years at Lucknow and at Agra, hut he gave up service about the year 1885 A. D. and then he, along with the plaintiff and the plaintiff's brother Raghubar Dayal, started a business in Agra which was carried on with the joint labour, skill and efforts of the three of them. The properties detailed in Schedule "B" were purchased out of the funds acquired in this way, and were never made part of the ancestral property belonging to the coparcenary.

4. Kashi Ram, Raghubar Dayal and Bhagwan Dayal constituted a joint family of their own within the larger joint family. After the death of Kashi Rarn, the plaintiff and Raghubar Dayal, as survivors of this smaller joint family, carried on as before, and properties entered in Schedule "C" were jointly acquired. After the death of Raghubar Dayal, the plaintiff became the sole survivor and owner of the entire assets of this smaller joint family entered in Schedule "B" and "C", and thereafter the plaintiff acquired by himself, the properties entered in Schedule "D" as the sole surviving coparcener. The ancestral assets and the assets of this smaller joint family were kept separate at all times.

5. The plaintiff's alternative case is that if separation between Lachhman Prasad's issues be proved to have taken place after Lachhman Prasad's death, then Kashi Ram, Raghubar Dayal and the plaintiff constituted a re-united joint Hindu family. Further, the plaintiff's case is that in a suit (No. 15 of 1939) of the revenue Court, a decree had been passed which cast a cloud, and tended to affect the rights of the plaintiff adversely.

6. The said decree was passed in a suit for profits brought by the defendant, Suit. Revti Devi, in respect of her share of the profits of village Chaoli entered in the present suit in Schedule "B". She claimed the profits in respect of a half share in the said village as the widow of a separated Hindu. In that suit, the issue sent down by the revenue Court under the provisions of Section 271, Agra Tenancy Act, 1926, "whether the defendant was proprietor of a half share in Chaoli" was answered in Smt. Revti's favour by the learned Munsif, a decree had been passed by the revenue Court on that basis in Smt. Revti's favour.

7. The plaintiff claimed a declaration that the properties detailed in Schedules "B", "C" and "D" of the plaint are the sole and absolute properties of the plaintiff, and that the decree in revenue Court suit No. 15 of 1939 of the Court of the Sub-Divisional Officer, Agra, dated 3-2-1941, is null and void. An injunction was also prayed for against the defendant restraining her from executing the said decree.

8. The defendant Revti Devi, wife of Raghubar Dayal, filed a written statement in which she stated that the sons of Lachhman Prasad lived separately and carried on cultivation separately. It was also stated that the descendants of Jwala Prasad also separated and carried on their cultivation separately. The existence of any joint property belonging to Lachhman Prasad's family or the accruing of any income therefrom was denied. It was pleaded that Kashi Ram was the sole owner of the business started by him and of the property purchased out of that business. It was pleaded that Kaghubar Dayal and Bhagwan Dayal had no share in the business during the life-time of Kashi Rain.

It was further pleaded that after the death of Kashi Ram, Raghubar Dayal and Bhagwan Dayal became the owners of a moiety share each in the properties purchased and acquired by Kashi Ram, under his will dated 13-9-1919. It was pleaded that the entire property which was purchased after the death of Kashi Ram was owned half and half by Raghubar Dayal and Bhagwan Dayal plaintiff, and that after the death of Raghubar Dayal, the defendant was the owner of Raghubar Dayal's share and also had a half share in everything purchased subsequently because it was purchased out of the assets in which she had a half share. The case of re-union set out in paragraph 9 of the plaint was not admitted. There was also a plea that the judgment in revenue suit No. 15 of 1939 was final and

binding on the parties.

9. The learned Civil Judge was of the view that since Kashi Ram belonged to a separate branch and out of the four sons of Jwala Prasad only two joined with Kashi Ram, a joint family within a joint family was not created, and that Kashi Ram, Raghubar Dayal and Bhagwan Dayal in themselves, could not form such a smaller joint family under the Hindu Law. The learned Civil Judge came to the conclusion that Raghubar Dayal and Bhagwan Dayal had separated from their brothers, Bauwari Lal and Ramlal, that there had been a separation also, so far as Kashi Ram was concerned, in the family of Lachhman Prasad, but that Kashi Ram, Haghubar Dayal and Bhagwan Dayal plaintiff had reunited in fact, though the plaintiff could not be said to have legally reunited with Kashi Ram as it was not shown that the plaintiff was in existence when Kashi Ram separated.

The view of the learned Civil Judge seems to be that qua the share of Kashi Ram, the position was that it was Kashi Ram's self-acquired property, but since Kashi Ram had willed the property to both Raghubar Dayal and Bhagwan Dayal, and they had re-united amongst themselves also when they re-united with Kashi Ram, therefore, the property which came to them by will had, by the fact of their living jointly, messing jointly and managing jointly, been given the impress of joint family property.

The learned Civil Judge was clearly of the view that Kashi Ham could not be said to be joint with his nephews, Raghubar Dayal and Bhagwan Dayal, and that his share of the property must be deemed to have belonged to him in severally. So far as the issue of 'res judicata' was concerned, the view of the learned Civil Judge was that so far as village Chauli was concerned, the question of title could not be gone into and the claim about half of Chauli village was barred by the rule of 'res judicata'.

10. The controversy in this appeal has centred round several points and it is desirable to deal with each point under a separate sub-head.

A.--Was there a separation, or did Lachhman Prasad's male descendants continue to live jointly?

11. The plaintiff's case, as set out in the plaint as regards this point, was perfectly clear that there never had been a separation. On the other hand, the defendant's case was that the sons of Lachhman Prasad lived separately and that the descendants of Jwala Prasad had also separated.

12. Learned counsel for the plaintiff-respondent contended in arguments that there had, in fact, been no separation at all. He argued that if there was once a joint Hindu family and if it possessed some property, the presumption was that the entire family continued joint and that the burden of proving separation was on the person asserting it, namely, here on the defendant. Learned counsel invited attention to the following pieces of evidence and argued that the continued existence of a joint family and property is proved.

(i) Statement of Puttu Lal, page 391, at pages 392-393 which runs as follows-

> "I am the brother and the General Attorney of the plaintiff (Mst. Revti Devi). I cannot say the numbers of the occupancy holdings at Naugaien, nor can I state the Mahals. The occupancy holdings have been in existence from the time of the father of Kashi Ram and Jwala Prasad. The houses and groves had been in existence from the time of the father of Jwala Prasad..... Kashi Ram, Raghubar Dayal and Bhagwan Dayal used to live at Agra in one and the same house, and they were joint in mess. Kashi Ram was the head."

But this witness also said that-

> "Jwala Prasad and Kashi Ram partitioned the fields privately..... The houses and groves too were partitioned..... After the death of Kashi Ram, Bhagwan Dayal and Raghubar Dayal became separate, but the business remained joint. Both of them used to live separately in one Haveli..... In the life-time of Raghubar Dayal, the goods of Bhagwan Dayal and Raghubar Dayal vised to be kept separate."

(ii) Revti Devi's evidence, page 397, at page 399 bottom, which runs as under--

> "Those fields were of the time of Kashi Ram's father."

But she also says that-

> "A partition in respect of these fields might have taken place beforehand."

In her examination-in-chief, she has clearly stated that Bhagwan Dayal, Banwari Lal, Raghubar Dayal and Ram Lal lived separately, and that Kashi Ram and Jwala Prasad also lived separately. Therefore, although the evidence suggests that there was once joint status and joint property, it also tends to show that there was subsequent separation, and at least an informal partition of joint property. The learned Civil Judge has relied upon the statement of Smt. Revti Devi which suggests partition, and has pointed out that even the plaintiff has asserted that the two other brothers of Raghubar Dayal and Bhagwan Dayal were separate.

This cannot be denied. The fact that Kashi Ram had separated also seems clearly evident from the evidence and the circumstances of the case. Once separation has been proved in the case of these individual members, there is no presumption left of jointness, and keeping in view the fact that the plaintiff himself has submitted an alternative case of re-union and denies that the two other brothers had any rights in the suit property, there can be little doubt that the finding arrived at by the learned Civil Judge in regard to the family having ceased to be joint is a correct one.

The evidence regarding joint living, messing and worship is substantially with reference to three persons Kashi Ram, Raghubar Dayal and Bhagwan Dayal, and its real bearing is on the question of re-union; there is little evidence of a satisfactory character with reference to family members as a whole. No accounts have been filed to show that the entire family funds and dealings were treated as joint amongst all the descendants of Lachhman Prasad. The evidence in the case does not satisfy me

that up to the date of the suit Lachhman Prasad's family continued joint in status and property.

B.--'Could Kashi Ram, Raghubar Dayal and Bhagwan Dayal be regarded in Hindu Law as forming, in themselves, an undivided family owning joint family property as a corporate body within a larger joint family'?

13. It has been clearly laid down in -- 'Sudar-sanam Maistri v. Narsimhulu Maistri', 25 Mad 149 (A), that:

> "So long as the family remains an undivided unit, two or more members thereof, whether they be members of different branches or of one and the same branch of the family..... can have no legal existence as a separate independent unit; but if they comprise all the members of a branch or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such."

Two brothers out of four and an uncle do not satisfy this test.

14. The view taken in this Madras case -- 25 Mad 149 (A)' has been followed in the case of --'Himmat Bahadur v. Bhawani Kunwar', 30 All 352 (B), and has quite recently been approved of by their Lordships of the Supreme Court in --'Sidheshwar Mukherjee v. Bhubeneshwar Prasad', AIR 1953 SC 487 (C). At p. 491 it has been observed as follows:

> "It has been observed in a Madras case -- 25 Mad 149 at p. 155 (A)', and we think rightly, that so long as the family remains joint, all the members of a branch or a sub-branch of the family can form a distinct and separate corporate unit within the larger unit. Of such a smaller unit consisting of the father and his sons, the father would undoubtedly be the head and legal representative, although he is not the head of the larger unit."

15. The question formulated under sub-head B must, therefore, be answered in the negative. This discussion presupposes that there was no partition, which is contrary to the facts of the case.

C.--"Was there a re-union between Kashi Ram, Raghubar Dayal and Bhagwan Dayal?"

16. Once there has been a separation, there is a heavy onus on the party asserting a re-union. To constitute a "re-union", there must be an intention of the parties to re-unite in estate and interest. The mere fact that the parties who have separated live together or trade together after partition, by itself, would not amount to a "re-union". 'Reunion' implies an agreement between the parties to re-unite in estate with the intention to remit themselves to the former status as a member of a joint family.

17. A re-union in estate also must take place between the very persons who are parties to the original partition. (His Lordship discussed the evidence on the question of re-union and concluded:) 18-29. In view of the entire circumstances I am of the view that it has not been established that there 'was any re-union between Kashi Ram, Raghubar Dayal or Bhagwan Dayal, or any two of them.

30. I might add that the plaintiff's case is not that there was a re-union between Raghubar Dayal and the plaintiff for the first time after Kashi Ram's death. The re-union set up was re-union with each other during the life-time of Kashi Ram, which case I have found to be not made out.

D.--"What is the effect of the decision of the judgment and decree in suit No. 197 of 1933?"

31. It has already been stated that this was a suit brought by Smt. Hevti Devi for her share of the profits of village Chanli. The suit was under the Agra Tenancy Act (3 of 1926). Under Section 271 of the said Act, if a revenue court is of the view that a question of proprietary title has arisen in the case before it, it has to frame an issue in this regard and send the record for a finding by the particular civil Court which would have jurisdiction to decide the question of title were the suit originally filed in the civil Court.

The finding of the civil Court, when it is returned, has to be accepted by the revenue court, and the decree has to follow upon the finding so accepted and the other findings recorded by the revenue court itself. The provisions of Act 3 of 1926 differ in this respect from the provisions of the previous Act 2 of 1901. Under that Act, the revenue court itself could, if it so chose, decide the question of proprietary title, or it could stay the suit and relegate the parties to a suit in a competent civil Court on the question of proprietary rights.

32. In cases where the revenue court itself had decided the question of proprietary rights, the decision on the issue of proprietary rights has been considered by our High Court to be 'res judicata' in subsequent proceedings in the civil Court. (See -- 'Ubaid Ullah Khan v. Abdul Jalil Khan', AIR 1937 All 481 (D)). In that case the suit was filed in 1932 for mesne profits for years from 1916 to 1929 under the Agra Tenancy Act 3 of 1926.

In that case it was indicated that it was then too late, in view of the state of authorities of this Court, to contend that the decision of a revenue court upon a question of title could not operate as 'res judicata' in a suit in a civil Court between the parties, but, as in that case the revenue court had not, as it should have done, sent an issue on title to the appropriate civil Court for a finding, the decree of the revenue court was treated as a nullity.

33. It has been contended that, in view of the changed position under the Agra Tenancy Act, the previous rulings are not applicable. The argument is that under the old Act, the revenue court was itself entitled to give a finding on the question of title, but now the revenue court, which even though it may be a court of exclusive jurisdiction is not entitled to give a finding of its own on the question of title. This finding has to be given by an appropriate civil Court.

Therefore, it is argued that so far as the question of title is concerned, it cannot be said that the revenue court, the court of exclusive jurisdiction, gives any finding on the question of title. In this way, it is suggested that in the case of a judgment and decree of the revenue court under the Agra Tenancy Act, 1926, the principles enunciated by their Lordships of the Supreme Court in -- 'Raj Lakshmi Dasi v. Banamali Sen', AIR 1953 SC 33 (E), will not be applicable.

34. There can be no denying the fact that the revenue court is still a court of exclusive jurisdiction. Moreover, a civil Court, when it is dealing with an issue sent by the revenue court to it under Section 271, Agra Tenancy Act 3 of 1926, does not really function as a normal original civil Court. The issue is decided by it not as a result of any plaint being presented to it in the first instance. It also cannot give any sort of a decree embodying its finding on the issue of title. Further, at no point of time does a revenue court lose seisin of the case. The case at no time 'pends' in the civil Court and is" not there registered as a fresh suit.

35. In these circumstances a civil Court, when dealing with the issue of title, appears to me to be itself exercising a sort of special and exclusive Jurisdiction. The position is possibly analogous to the case when the High Court is answering a reference under the Income-tax Act. It has been held that when the High Court does so, it really acts in a special jurisdiction. (See -- 'Commr. of Income Tax, Bengal v. Hungerford Investment Trust Ltd.', 62 Cal 671 (F)).

36. Moreover, it could not be said that the issue as to title is a separate matter distinct from the main revenue suit. I am inclined to agree with the contention of Mr. Pathak that the sending of an issue to the so-called civil Court is merely a procedural matter, and that when the revenue court accepts the finding, as it must, and acts upon the finding, it really adopts that finding and the finding in effect, becomes the revenue court finding. If an analogy may be brought to aid, the position is somewhat like the one when a decree is passed upon an award, or a civil court records a finding according to the statement given on special oath by a particular person in a pending case, parties having agreed to abide by that statement.

Therefore, in my view, there is really no substantial difference between the position under the 1926 Act, and the position under the previous Act of 1901 in this regard, and since the revenue court is undoubtedly a court of exclusive jurisdiction, Section 11, Civil P. C., would not apply in terms, but the principles thereof would apply, and should be applied in order to prevent inconsistent decisions.

37. Having disposed of the question "whether a decision of the revenue court under the Agra Tenancy Act, 1926 could operate as 'res judicata' in subsequent civil proceedings" the next question which arises is-

E.--"Does the judgment and decree of the revenue court, based on the finding recorded by the Munsif in suit No. 15 of 1939, operate as res judicata in this case?"

38. There have been two controversies under this sub-head. Firstly, it is said that the only question that was decided in suit No. 15 of 1939 was, whether Smt. Revti Devi was the proprietor of the specific property in suit, namely a half share in village Chauli, Khewat No. 1, and that the question

whether she was proprietor of the entire estate of Raghubar Dayal, was not directly or substantially in issue. Secondly, it is contended that if the Court found that Raghubar Dayal was owner of a half share, and on his death his wife became owner of his share as life owner and Raghubar Dayal's share does not devolve on Bhagwan Dayal, then the Court was only giving its reason for coming to the conclusion that she was the proprietor of the property in suit. It was argued that only findings operate as 'res judicata' and not reasonings for the finding.

39. No doubt, the issue on which the civil Court recorded the finding is framed as follows:

> "Is defendant proprietor of the property in suit?"

There is, however, no doubt that the whole question of whether Raghubar Dayal and Bhagwan Dayal were joint tenants or tenants in common, was gone into with specific reference not only to village Chauli, Khewat No. 1, but generally with reference to the entire estate held by Raghubar Dayal and Bhagwan Dayal. No special features relating to village Chauli, Khewat No. 1, which would put it on a footing different from other items of property comprising the estate of Raghubar Dayal and Bhagwan Dayal, was brought out by the civil Court in the course of its finding on the issue sent to it. In my view one has got to look at the substance of the issue and not at the mere wording of it, and one has to consider the respective cases of the parties put before the Court, and the judgment and decree as a whole.

40. The answer to the issue "is the defendant proprietor of the property in suit" necessarily involved a consideration of what was the nature of Raghubar Dayal's estate. This question has clearly been decided in the former suit. The conclusion regarding the ownership of the estate of Raghubar Dayal, to my mind, does not constitute the reason for finding on the issue "is the defendant proprietor of the property in suit". That conclusion itself disposes of the issue, for the estate of Raghubar Dayal admittedly also comprised the village Chauli, Khewat No. 1.

41. In my view the main issue in this case is the same as the main issue in the revenue suit, namely, what was the nature of Raghubar Dayal's estate.

42. It is significant that the plaintiff should have felt that the decree in the revenue suit affects his right in regard to the entire assets of Rahgubar Dayal, and that parties should have asked that the very evidence filed in the revenue court should be treated as evidence in this case. I, therefore, find in favour of the defendant's contention that the question of the right of Smt. Revti to the estate of Raghubar Dayal cannot be re-raised.

43. The net position, therefore, is that the plaintiff has failed to prove that Lachhman Prasad's family continued to be joint up to the date of the suit, and also failed to prove re-union between Kashi Ram, Raghubar Dayal and the plaintiff. The plaintiff has also failed to establish that there could be a joint family within a joint family under Hindu Law comprising of himself, Raghubar Dayal and Kashi Ram. The only other position possible is that Kashi Ram, Raghubai Dayal and the plaintiff have carried on their affairs together as co-partners, and that after the death of Kashi Ram the plaintiff and Raghubar Dayal have continued as co-partners.

There is no rule of survivorship to the estate of a co-partner. It is not proved in this case either that there was any term of partnership which provided for the application of the rule of survivorship, The Courts do not lean towards the creation of joint tenancies, and so far as Hindu Law is concerned, except in the case of coparcenery between the members of an undivided family, the principle of joint tenancy is unknown to Hindu Law (See -- 'Gopi v. Mt. Jaldhara', 33 All 41 (G)). It is not really necessary to examine the case further from the angle of a partnership, because that was not the case which was really submitted to us in the course of argument.

44. Therefore, despite the careful advocacy of Mr. Gopal Behari, the plaintiff's case, in my view, fails. He is not entitled to the relief sought by him.

45. This appeal must, therefore, be allowed with costs, and the plaintiff's suit must be dis-ftriisscd with costs. I order accordingly.

46. The cross-objection is dismissed with costs.

Agarwala, J.

47. I agree in the conclusion arrived at by my learned brother that this appeal should be allowed but for different reasons.

48. The facts of the case are narrated in the judgment of my learned brother and it is not necessary to repeat them.

49. The following points arise for decision in this appeal:

> (1) Was there a separation among the descendants of Lachman Prasad or did they continue to live jointly?
>
> (2) If there was a separation, did Kashi Ram, Raghuhar Dayal and Bhagwan Dayal reunite?
>
> (3) If the descendants of Lachhman Prasad were joint could Kashi Ram, Bhagwan Dayal and Raghubar Dayal form a smaller joint family within the larger joint family for the purpose of starting a business and acquiring joint family property separate from the property of the larger joint family?
>
> (4) What was the nature of the property acquired by Kashi Ram, Raghubar Dayal and Bhagwan Dayal? Was it joint family property of these three persons or, at any rate, of Raghubar Dayal and Bhagwan Dayal or did they have separate interests in the same?
>
> (5) What is the effect of the decision of the judgment and decree in suit No. 197 of 1933?

50. Point No. 1: Was there a separation among she descendants of Lachhman Prasad or did they continue to live jointly?

The ordinary presumption of Hindu law is that a Hindu family is joint and continues to be joint and the burden of proving separation is on the party alleging it. I do not think that the defendant-appellant, on whom the burden lay, has succeeded in establishing separation. In order to prove separation, it is not enough to show that different members of the family lived, i.e., resided and messed separately. It is necessary to establish that either there was a partition of the joint family property by metes and bounds or at 'least that the members of the family dealt with it as if they had separate defined shares therein. The joint family property in which all the descendants of Lachhman Prasad are interested is admittedly none other than the property mentioned in Schedule A of the plaint.

It is nobody's case that in the properties mentioned in the other schedules (with which we are really concerned in the present case and which are not ancestral properties), the descendants of Lachhman Prasad other than Kashi Ram, Raghubar Dayal and the plaintiff ever had any interest'. The evidence on the record only establishes separate living and messing and cultivation of fields separately. All these acts could have been done for the sake of convenience only. The statements of Puttu Lal and Reoti Devi quoted in the judgment of my learned brother do not show anything beyond this.

There is no reliable evidence on the record to prove that there was even a notional partition of the property mentioned in Schedule A or that its profits were enjoyed in defined shares by the different members of the family. No account books have been produced and we do not know how the profits of the ancestral property mentioned in Schedule A were dealt with. The fact that Kashi Ram, Raghubar Dayal and the plaintiff lived separately from other members of the family and carried on a business out of the income of which valuable properties mentioned in Schs. B and C were acquired has no bearing upon the jointness of the family, qua the ancestral property in Schedule A.

51. No. 2. 'If there was a separation, did Kashi Ram and Raghubar Dayal re-unite'?

Since a partition between Kashi Ram, Raghubar Dayal and Bhagwan Dayal has not been established there can be no question of a re-union between them.

52. No. 3. If the descendants of Lachhman Pro-sad were joint, could Kashi Ram, Bhagwan Dayal and Raghubar Dayal form a smaller joint family within the larger joint family for the purpose of starting a business and acquiring joint family property separate from the property of the larger joint family?

On behalf of the defendant-appellant it was urged that, even if Kashi Ram, Raghubar. Dayal and Bhagwan Dayal had not separated from the other descendants of Lachhman Prasad and still formed a joint Hindu family along with those descendants, it was not possible in Hindu law for these three persons to form a smaller joint family for the purpose of acquiring property separately from the bigger joint family. In support of this proposition reliance was placed upon the judgment of Sir Bhashyam Ayyangar J. in -- '25 Mad 149 (A)', which it was contended has been followed by this Court in -- '30 All 352 (B)' and by the Supreme Court in -- 'AIR 1953 SC 487 (C).

53. In -- '25 Mad 149 (A)', Sir V. Bhashyam Ayyangar J. pointed out that the Mitakshara doctrine of joint family property is founded upon the existence of an undivided family as a corporate body and the possession of property by such corporate body and that therefore the first requisite is the family unit and the possession by it of property is the second requisite. He observed that the ordinary conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz,, the undivided state -- it forms a corporate body; and that such corporate body, with its heritage is purely a creature of law and cannot be created by act of parties. As corollaries to these principles the learned Judge laid down the following two propositions:

> "(1) That there may be one or more families all with one common ancestor, with each of the branches of that family having a separate common ancestor. The unobstructed heritage devolving on such family, with its accretions, is owned by the family as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body may have separate unobstructed heritage which, with its accretions, may be exclusively owned by such branches as a corporate body, and the main family and its branches may possess joint property not only by operation of law but also by act of parties." And "(2) But so long as a family remains an undivided unit, two or more members thereof, whether they be members of different branches or of one and the same branch of the family, can have no legal existence as a separate independent unit."

54. The first proposition cannot be doubted but with all respect to the learned Judge I think the second proposition has been too widely stated. No case has been cited to us in which the second proposition was directly in issue and was approved. In -- '30 All 352 (B)', the question was whether all members who formed a joint Hindu family at the time of the receipt of the price of the property sold to a stranger were liable to return the whole of the price when the sale was subsequently set aside or the liability was limited to the share in the joint family property which they would obtain in partition.

The Court affirmed that every one of the members of the joint family was liable to refund the whole of the price, and in support of this view relied on the principle that a joint family has unity of juristic existence in its dealings with third persons and has unity of the ownership of the joint property. It was in this connection that the remarks of Sir Bhashyam Ayyangar cited above were quoted by this Court. The point that we have now to determine did not specifically arise for decision in that case. The Supreme Court in --'AIR 1953 SC 487 (C)', had occasion to refer to the first proposition enunciated by Sir Bhashyam Ayyangar and approved of it. The second proposition did not fall to be considered by their Lordships and they expressed no opinion about it.

55. The conception of a larger joint family holding joint property as a corporate body and at the same time two or more members whether forming a branch thereof or not, forming a separate joint family and holding joint property as a smaller corporate unit is not foreign to Hindu law. In order to understand this clearly, we shall have to bear in mind certain elementary principles pertaining to Hindu joint families. A joint family originates when a son is born to a person. The father and a son

form a joint family. The other descendants of one or both of them continually add to the number of members of the joint family. Thus, in its origin the constitution of the family consists of a common ancestor and his descendants.

Where the father inherited some property from his ancestor, his sons and other descendants up to three generations acquire, according to the doctrine of the Mitakshara, an interest in such property by birth. Their interest is called 'unobstructed heritage' because they acquire it by birth. Property acquired by inheritance upon the death of another is called 'obstructed heritage'. The former kind of property and not the latter is joint family property. Property subsequently acquired by the family or by individual members thereof with the aid of joint family property or if not so acquired, thrown in the common stock also becomes joint family property. A joint family owns the property as a corporate unit.

If in the family there are sons of the common ancestor, then the joint family is said to consist of branches each of which has a separate common ancestor. These branches may themselves acquire properties as separate corporate units. In course of time upon the death of the common ancestor, or upon the death of the common ancestor of a branch the constitution of a family changes. It now consists of collaterals instead of a common ancestor and his descendants. The above change may be brought about not only by deaths, but by partition in the family. Any member of a joint family whether he is the head of a branch or not may separate from the rest of the coparceners at his sweet will at any time he likes.

Likewise two or more members whether belonging to the same branch or not may separate from the rest of the members. In such an event, if the separating members intend that they should' remain joint 'inter se', there is nothing to prevent them from remaining joint. Likewise the other members of the family from whom two or more members have separated, may, if they so intend, continue to remain joint at the time of the separation of the former. The law is settled that the criterion is one of their intention and there is no presumption either in favour of separation or of jointness 'inter se' between the remaining members of a joint family when one or more members separate from them.

> "Just as there may be partial partition as to members of a joint family, so also there may be partial partition as to property. It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family." (Mulla's Hindu Law, llth Edn., Section 328, page 433).
>
> No doubt in the case of a division of interests in respect of a part of the joint estate, the presumption is that the separation is complete and that the members of the family hold the rest of the property not as coparceners but as tenants-in-common unless an agreement to hold this property as joint family property is proved. -- 'Ramalinga Annavi v. Narayana Annavi', AIR 1922 PC 201 (H). But the point is that by agreement, there can be separation in respect of one item of joint family property only, while the rest of the property is held as members of a joint family.

Suppose now that a joint family consists of A, B and C brothers and their sons D, E and F respectively, A and his son D demand a partition of a part of the joint property as against B and C and their sons E and F. They can by agreement between themselves separate A and D's share in the part of the joint estate from that of B, C, E & F. They may further agree that A and B will remain joint as to the share obtained by them while B, C, E and F will remain joint as to the share allotted to them.

In a case of this nature, the position is that there are now three joint families as separate corporate bodies instead of one. First, the larger joint family consisting of A, B, C, D, E and F and owning as a corporate body the undivided portion of the estate; second, a joint family consisting of A and D owning as a corporate unit their share out of the divided part of the estate and third, a joint family consisting of B, C, E and F owning as a corporate body their share of the divided part of the estate. Thus it is established that two or more members of a larger joint Hindu family may by agreement form a smaller joint family and own property as a corporate body separately from the property of the larger family.

55a. In my judgment there is no valid reason why two or more members of a larger joint family, whether belonging to one branch or not, may not form a separate joint family and acquire property by their joint labour and exertions as members of a smaller joint family--a corporate unit by itself. It is often said that a joint family cannot be created by agreement. By this is, however, meant that two strangers cannot join to form a joint Hindu family. A joint Hindu family comes into existence in the natural course, as indicated already, but once having come into existence, two or more members of such family may by agreement constitute of themselves a smaller joint family if they acquire property by partition or joint labour or otherwise as a corporate unit.

56. The question whether in a particular case some of the members of a larger joint Hindu family, who have jointly acquired property separately from the other members of the larger family, have acquired it as joint family property of their separate independent unit or they have acquired it as tenants-in-common in their individual right, is a matter of intention and proof. If the intention of the joint acquirers is that they should acquire the property in their capacity as members of a joint Hindu family in which their sons and descendants should also have shares, then the property will be impressed with the character of a joint family property of the joint acquirers and their descendants.

If, on the other hand, their intention be that they should be interested in the property in defined shares, they have acquired the property as tenants in common in their individual capacity. But one thing has to be noted in this connection. When the joint acquirers are brothers, they have an equal interest 'inter se' in the joint family property of the larger family, and when they combine for the purpose of acquiring separate property in their capacity as constituting a separate joint family unit their interest in the newly acquired property will also be equal.

But when the members of the independent unit are not brothers but are related between them selves as uncle and nephews, their interests 'inter se' in the joint property of the larger family are not equal and so their interests- in the newly acquired property if it is intended to be their joint family property cannot be equal, but must be of the same nature as their interest in the property of an original joint family of which they alone are the survivors.

One important test, therefore, in ascertaining the intention of joint acquirers--whether they intended that the joint acquisition should be impressed with the character of joint family property or not--is to find out whether they intended that their interest in the property so acquired will be of the same nature as they would have in the joint property of an original joint family of which they are the survivors. If that was not their intention they could not be said to have acquired the property as members of a joint Hindu family. So far as the point of law under discussion is concerned I would answer it in the affirmative.

57. Point No. 4. What was the nature of the property acquired by Kashi Ram, Raghubar Dayal and Bhagwan Dayal? Was it joint family property of these three persons or, at any rate, of Raghubar Dayal and Bhagwan Dayal or did they have separate interests in the same?

Kashi Ram, plaintiff's uncle, took up service in the army in the first instance. He was there for four or six years after the mutiny of 1857. Then he joined the police which service he left sometime between 1884 and 1885. Then he began money-lending business, out of the income of which all the properties were acquired. It was admitted by the plaintiff that Kashi Ram began money-lending business, that that business was carried on in the name of Kashi Ram Sarraf, that he and Raghubar Dayal were called by Kashi Ram to Agra where the business was carried on, that this happened after four years of starting the business and that the plaintiff was 10 or 11 years old, while Raghubar Dayal was 15 or 16 years old at that time, From the plaintiff's own admission it is clear that the business was started by Kashi Ram alone and that the plaintiff's case that it was started by Kashi Ram, Raghubar Dayal and himself was not correct. No doubt, after the plaintiff and Raghubar Dayal had been called to Agra they used to sit at the shop but they were minors at that time and there could be no question of their having contributed any assets in the business.

The plaintiff and Raghubar Dayal were maintained by Kashi Ram and the mere fact that they used to sit at the shop which belonged to Kashi Ram exclusively would not make them partners or co-sharers or coparceners in the business. It was an act of generosity on the part of Kashi Ram to have called his nephews to Agra to maintain them and educate them and such an act could not, without other evidence, be construed as entitling them to a share in the business.

58. It no doubt appears that Kashi Ram intended that Raghubar Dayal and the plaintiff should have a share in the properties acquired by him from out of the income of the business. For, we find that from November 1890 onwards Kashi Ram began to associate the name at first of Raghubar Dayal, the elder brother, and later both of Raghubar Dayal and the plaintiff along with him in all the - transactions of loan, purchases, sales, hypothecation etc. Thus we find that in the bond dated 27-11-1890, executed by one Kammo, Kashi Ham and Raghubar Dayal are stated to be the cocreditors. In the mortgage deed dated 21-12-1892, Kashi Ram and Raghubar Dayal are the

co-mortgagees.

In the hypothecation bond of 6-8-1893, Kashi Ram and Raghubar Dayal are again the co-mortgagees. In the sale-deed dated 15-3-1899, the property -is acquired in the name of Kashi Ram alone but the hypothecation bond of 6-8-1893, which stood in the name of Kashi Ram and Raghu-bar Dayal is set off towards the sale price. From 3903 onwards the names of Kashi Ram, Raghubar Dayal and Bhagwan Dayal appear in all the documents executed by way of hypothecation bonds, sale-deeds, mortgage-deed, etc., in their favour. Suits are instituted by all the three persons together and decrees obtained by them in their joint names.

This state of affairs continued up to the death of Kashi Ram in 1924. Numerous documents were executed during this period. All of them were by, or in favour of, all the three. The most important document, however, to be considered in this connection is the will of Kashi Ram dated 13-9-1919.

In this will Kashi Ram declares that he has got moveable and immoveable property, cash, ornaments, utensils of every sort and documents under which money was due to him by debtors which properties are self-acquired, that he has also got zamindari in mauza Chawali, purchased from his own money that he has a share in occupancy holding in mauza Naugaon, that Raghubar Dayal and Bhagwan Dayal, sons of Pandit Jawala Prasad, his nephews, have been living with him for a very long time', that he has brought them up like his own sons, that he has performed all the rites relating to marriage and sacred thread and that both of them are partners in the money-lending business.

After stating all these facts he goes on to make a bequest of all the properties to both of them stating that Raghubar Dayal and Bhagwan Dayal shall be the owners in possession and appropriation in equal shares of his moveable and immoveable properties and assets. This document to my mind clearly negatives the theory that the properties were acquired by Kashi Ram and his two nephews as members of a joint Hindu family; for in the first place Kashi Ram considered that the properties were his own self-acquired estate and secondly, as such he makes a bequest of it to his two nephews in equal shares.

Having regard to the context, the mention of the nephews as partners in the money-lending business is a statement more of his desire than that of a legally binding relationship. Even if the nephews were 'partners', they were not coparceners so far as the business or the property were concerned. In the case of properties acquired by Raghubar Dayal and the plaintiff jointly with Kashi Ham, the presumption is that all the three had an equal share therein.

This is an additional proof of the fact that they were not acquired with the intention of being the properties of a joint family unit because as stated in connection with point No. 3, in order that the separate property acquired by two or more members of a joint family be impressed with the character of joint family property, the interest of the acquirers must be of the same nature as their interest in the joint family properties of an original joint family of which they alone are the survivors. If Raghubar Dayal and the plaintiff were co-tenants in the properties acquired by them along with Kashi Ham, their status with respect to the properties bequeathed to them by Kashi Ram

could not be different specially when by the will a defined moiety share was given to each brother.

59. The same observations will apply to the properties acquired after the death of Kashi Ram as there is no evidence of blending of the self-acquired property with the joint family property mentioned in Schedule A.

60. The mere fact that the three persons lived together and messed together would not be enough to raise the presumption that the property acquired by them was their joint family property; for one member of a joint Hindu family may acquire separate property for himself even though he is living and messing jointly with the other members of the family. The admissions of the defendant-appellant to the effect that her husband was joint with the plaintiff are not very material because even if they were members of a joint Hindu family (which they were qua the properties in Schedule A) they need not necessarily have acquired the properties in Schedules B and C as such members.

Whenever she was asked whether she had a share in the properties in dispute mentioned in Schedules B and C she always said that she had such interest which could only be possible if her husband and the plaintiff had defined shares in those properties. Further, these admissions were made for the purposes of suits as against third parties when the interests of both the plaintiff and the defendant-respondent required that the admissions be made in order to save the suits as they had been filed by the plaintiff alone. For these reasons, the admissions cannot be construed against the contention of the defendant-respondent.

61. Any acquisition by Bhagwan Dayal after the death of Raghubar Dayal out of the income of the business which was owned by himself and the defendant would belong to both of them, even though it was acquired in the name of Bhagwan Dayal himself, as Bhagwan Dayal would be deemed to hold the property as trustee for the defendant.

62. This leads us to the last point urged before us, namely, whether the suit as a whole or in part is barred by the principle of res judicata. The earlier suit (No. 197 of 1933) was one for profits of the share of the defendant-respondent in village - Chawli. The value of the property then in dispute was admittedly less than Rs. 5,000/-. A suit for profits of a mahal was cognizable exclusively by a revenue court as provided by Section 230, Agra Tenancy Act, 1926, which was then in force. But Section 230 expressly made the exclusive jurisdiction of the revenue court to try such suits subject to the provisions of Section 271. Section 271 provided that "where the question of proprietary right is in dispute in a case, the revenue court shall submit an issue on that question and submit the record to the competent civil Court for the decision of that issue only. The. civil Court, after refraining the issue, if necessary, shall decide that issue only and return the record together with its findings on that issue to the revenue court, which submitted it. The revenue court shall then proceed to decide the suit accepting the finding of the civil Court on the issue referred to it."

Section 271 further went on to provide that "every decree of a revenue court passed in a suit in which an issue involving a question of proprietary right has been decided by a civil Court shall if the question of proprietary right is in issue also in appeal, be appealable to the civil Court which has

jurisdiction to hear appeals from the court to which the issue of proprietary right has been referred; and if the question of proprietary right is not in issue in appeal, be appealable to the revenue court."

Three things are clear; first, that the revenue court has no jurisdiction to try an issue of proprietary right and a civil Court alone has jurisdiction to try it; second, that the revenue court is bound to accept the decision of the civil Court and, thirdly, that an appeal against the decision of the revenue court lies to the civil Court and not to the revenue court if in the appeal also the question of proprietary title is in dispute. It has been consistently held that by the expression 'competent civil I court' to which the issue of proprietary title has to be referred by the revenue court, is meant the civil Court which has jurisdiction to try a suit in respect of the title to the property in question.

Thus, if the value of the property is less than Rs. 5,000/- the issue of proprietary title is to be sent to the Munsif; if it is over Rs. 5,000/- the issue is to be sent to the Civil Judge. If an issue is sent to the Munsif when the property is of the value of over Rs. 5,000/-, his decision is without jurisdiction and is not binding -- ('Mt. Dan Kuer v. Ewaj Singh', AIR 1931 All 28 (2) (I). The mere fact that the decision of the Civil Court is incorporated in the decree of the revenue court does not mean that the decision on the issue of proprietary title is of the revenue court, and further, it does not mean that the revenue court had exclusive or even concurrent jurisdiction to try that issue. Indeed if it attempted to decide the issue itself, its decision will be a nullity, AIR 1937 All 481 (D)).

63. The principles of "res judicata' so far as suits are concerned are embodied in Section 11, Civil P. C. Under that section certain limitations are imposed upon the application of the doctrine of 'res judicata', One of these limitations is that the Court which decided the previous suit must be a Court competent to decide the subsequent suit. It is true that those limitations apply only to suits and that the wider principles of the doctrine of 'res judicata' do not admit of the application of these limitations (AIR 1953 SC 33 (E)). Mahajan J., as he then was, in delivering the judgment of the Supreme Court after quoting from Sir Lawrence Jankins' judgment in -- 'Sheoparsan Singh v. Ramanandan Prasad', AIR 1916 PC 78 (J), observed that-

> "When a plea of 'res judicata' is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of 'res judicata' on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction, like revenue courts, land acquisition courts, administration courts etc."

Reliance was placed upon the first sentence quoted above namely, "the court that heard and decided the former case was a court of competent jurisdiction" and it was urged that the revemie court which tried the former suit was competent to try that suit, and that therefore its decision is binding on the question of proprietary title. The sentence quoted above read in the context means that the court that heard and decided the former case must be a court of competent jurisdiction to try the issue which has been raised in the subsequent case.

The next sentence clearly points out that the decision of courts of exclusive jurisdiction could be held to be binding on general principles only when such courts had jurisdiction to decide the issue which is in dispute in the subsequent case and not otherwise. A reading of Sections 230, 271 and 272 shows that the revenue courts are debarred from trying the issue of proprietary title which is now in dispute between the parties. The judgment and decree of the revenue court therefore, could not be said to operate as 'res judicata' on the question of proprietary title on any general principles of law.

64. The decision of the civil Court on the issue of proprietary title, though given on an issue, will however, be binding as if it were given in a suit between the parties on the same principles as are laid down in Section 11, Civil P. C. For the purposes of Section 11 the decision of the civil Court on the issue of proprietary, title in the former revenue suit will be treated on the same footing as if it was given by the civil Court in a suit respecting the title to the property in dispute in that case, and upon that footing it will have to be seen whether that decision is binding between the parties in the subsequent civil suit.

The limitations imposed by Section 11 will govern the matter and the decision of the civil Court in the former suit will only be binding in the subsequent suit, if the former civil Court which decided the issue of proprietary title was competent to try the subsequent suit. It is admitted that the civil Court which tried the issue of proprietary title was not competent to try the present suit. No case has been cite'd before us in which a contrary view has. been taken. The position under the U. P. Tenancy Act of 1939 is the same as it was under the Agra Tenancy Act of 1926. But the procedure provided in the Agra Tenancy Act of 1901 was somewhat different.

Section 199 of the latter Act authorised the revenue Court before which a question of proprietary title was raised, either to require the defendant to institute in the civil Court a suit for the determination of the question within three months, or to determine the question itself. It was provided that if the Revenue Court elected to decide the question itself, it was to follow the procedure laid down in the Code of Civil Procedure and its decision in that case would be binding as the decision of the civil Court itself. Perhaps in such a case the wider principles of the doctrine of 'res judicata' might be applied and it might be held that the revenue Court decision is binding on the parties in the subsequent civil Court. But the same cannot be maintained of a decision given under the Acts of 1926 and 1939. The present suit, therefore, could not be barred by the decision in the former revenue suit.

65. Nor is it possible to hold that the present suit is barred qua the Chawali property which was the subject-matter of the dispute in the previous revenue suit. Section 11, Civil P. C., applies the bar of 'res judicata' only if the Court which tried the former suit or issue was competent to try the subsequent 'suit', i.e., the whole of the subsequent suit and on this principle even the relief as regards village Chawli cannot be said to be barred by 'res judicata'. But if the subsequent suit is based on two distinct causes of action, or if two separate suits could have lain for the relief regarding village Chawali and for the relief regarding the other property, then one could possibly say the relief regarding village Chawali is barred by 'res judicata'.

For, a party cannot be allowed to get round the bar created by Section 11, Civil P. C., by the mere device of adding some more property to the property in dispute in the previous suit and by raising the valuation of the subject-matter of the subsequent suit thus making it non-cognizable by the Court which decided the former suit. But where, as here, the subsequent suit is based on one cause of nature, which covers not only the property in dispute in the previous suit but the rest of the properties, Section 11 can have no application.

66. Having regard to my finding on point No. 4 the appeal must succeed and the plaintiff's suit must be dismissed with costs in both the Courts. The cross object must be dismissed with costs.

BY THE COURT

67. We allow the appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit with costs throughout. The cross-objection is dismissed with costs.